The Contribution of Constitutional Courts to the Democratic Quality of Elections in Sub-Saharan Africa: A Comparative Case Study of Madagascar and Senegal

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Abbreviations

ACCPUF	Association des Cours Constitutionnelles ayant en Partage l'Usage du Français
AEVD	African Electoral Violence Database
AFP	Alliance des forces du Progrès
AJ/PADS	And-Jëf/Parti africain pour la démocratie et le socialisme
ANP	Assemblée Nationale Populaire
ARB	Africa Research Bulletin
AREMA	Avant-Garde de la Révolution Malgache
AU	African Union
AVI	Asa Vita no Ifampitsarana
Bdv	Bureau de vote
CA 2000	Coalition alternance 2000
CC	Conseil Constitutionnel
CCAF	Cour constitutionnelle, administrative et financière
CdA	Cour d'appel
CDRV	Commission départementale de la recenssement des votes
CENA	Commission électorale nationale autonome
CENI	Commission électorale nationale indépendante
CMD	Comité militaire pour le développement
CMRV	Commission matériel de recenssement des votes
CNE	Conseil national électoral
CNRV	Commission nationale de la recenssement des votes
CRES	Comité pour le redressement économique et social
CS	Cour suprême
DGE	Direction générale des elections
DQE	Democratic Quality of Elections
EEM	Anglican Church
EISA	Electoral Institute for Sustainable Democracy in Africa
EIU	The Economist Intelligence UNit
EMB	Electoral Management Body
EU	European Union
EUEOM	European Union Election Observation Mission
FFKM	Fiombonan'ny Fiangonana Kristianina eto Madagasikara

FJKM	Reformed Protestant Church
FLM	Lutheran Church
FNDR	Front National pour la Défense de la Révolution
GRAD Iloafa	Groupe de réflexion et d'action pour le développement
HAE	Haute autorité de l'état
HCA	Haut conseil d'audiovisuel
HCC	Haute Cour Constitutionnelle
IFES	International Foundation for Electoral Systems
KMF-CNOE	Consortium national d'observation des élections
LE	Legislative elections
LO	Loi organique
MAP	Madagascar Action Plan
MBS	Malagasy Broadcasting System
MDG	Madagascar
MDSD	Most Different System Design
MI	Ministère de l'interieur
MMDM	Mouvement Militant pour le Développement Malagasy
MMSM	Mouvement Militant pour le Socialisme Malgache
MP	Member of Parliamemt
MSSD	Most Similar System Design
NA	National Assembly
NDI	National Democratic Institute
ODEL	Observatoire Départementale des Elections
OIF	Organisation internationale de la Francophonie
ONEL	Observatoire Nationale des Elections
PAI	Parti africain de l'indépendance
PE	Presidential Elections
PDS	Parti Democratique du Sénégal
PR	President of the Republic
PS	Parti Socialiste
PV	Procès-verbal
RADDHO	Rencontre Africaine pour la Défense des Droits de l'Homme
RES	Rassemblement des écologistes du Sénégal
RPSD	Rénaissance du Parti Social-Démocratique

SCAD	Social Conflict Analysis Database
SEN	Sénégal
SG	Sécretaire Général
TIM	Tiako i Madagasikara
UPRS	Union pour la République du Sénégal
US	United States
VAP	Voting Age Population
V-DEM	Varieties of Democracy

1 Introduction

This thesis is the first comparative study to be done on the role of African[1] constitutional courts in elections. It analyses the contribution of constitutional courts to the democratic quality of elections specifically in Madagascar and Senegal. The thesis is situated in the wider research on democratisation. My study addresses research gaps on the democratic repercussions of constitutional courts and on electoral dispute resolution in general, as well as specifically on the democratic contribution of African constitutional courts. In this introduction, I first explain the general relevance of the research strands in which my work is located and the specific research gaps that my thesis addresses. I start with the broad field of democratisation, before subsequently narrowing my scope to constitutional courts, elections and sub-Saharan Africa. Thereafter, I introduce my core research question and the key concepts that guide my analysis. Finally, I outline the structure of my thesis.

1.1 Why Democratisation?

In the 1980s, democratisation started to emerge as a vibrant field of study in Political Science. Alongside the publication of numerous monographs, this emergence was also reflected in the establishment of journals like *Democratization* in 1994 and the *Journal of Democracy* in 1990. The strong research interest in this topic was stimulated by the so-called "third wave of democratization" (Huntington 1991). Since the 1970s, democratic regimes have proliferated in such diverse locations as Latin America, Asia, Eastern Europe and Africa. In 1972, the US organisation Freedom House classified 46 per cent of the world's regimes as "not free", in contrast to 29 per cent of "free" ones. By 1991, the proportion had been inverted: 42 per cent of the world's regimes were "free" while now only 23 per cent were considered "not free" (Freedom House 2017). This drastic increase in the number of democratic regimes triggered enthusiasm among practitioners and scholars who proclaimed in 1992 the "end of history", as democracy seemed to be possible everywhere (Fukuyama 1992).

This enthusiasm turned soon into disenchantment, however, when it became apparent that the new regimes were not developing into stable, full-fledged democracies. Instead, a large number of the third wave's transitional regimes stagnated in a "gray zone" where they were "neither dictatorial nor clearly headed toward democracy" (Carothers 2002). Moreover, a debate emerged about whether a "democratic rollback" (Diamond 2008) and a crisis of democracy were under way (Diamond 2015; Levitsky and Way 2015; Merkel 2014). Yet, democracy is still the most widespread regime type in the world. In 2016, Freedom House classified 45 per cent of the world's regimes as "free" and 25 per cent as "not free".

Haggard and Kaufman rightly stress, in a recent article appearing in the *Annual Review of Political Science*, that democratisation still requires close scholarly attention. In particular, the question of "whether the new regimes really cross a democratic threshold and prove durable" (Haggard and Kaufman 2016, 126) deserves further scrutiny. For this purpose, they suggest an approach that focuses on how democratic institutions that were introduced during the third wave of democratisation perform in practice. Specifically, institutions that are meant to constrain executive power like constitutional courts necessitate additional research (Haggard and Kaufman 2016, 132–134). In this study, I thus follow Haggard and Kaufman's invitation

[1] In this thesis, I use the terms "sub-Saharan Africa" and "Africa" as well as other corresponding adjectives interchangeably. Both refer, consequently, to the 49 states located on the African continent south of the Sahara Desert.

and examine the contribution of constitutional courts to the democratic quality of elections in two African electoral democracies, Madagascar and Senegal.

1.2 Why Constitutional Courts?

Constitutional courts are a highly relevant – though often overlooked – subject of study for students of democratisation. Constitutional courts are relevant because they are meant to be beneficial institutions for democracy. The special position of constitutional courts in the institutional architecture of a political system should in principle allow them to control and limit political power (Kelsen 1928, 1930), as well as to protect human rights and political liberties too (Ginsburg 2003, 10; Stone Sweet 2008, 818). Furthermore, the special status of constitutional courts in theory insulates them from partisan politics. Constitutional judges are believed to be more independent, legally better qualified and more assertive than judges in the ordinary judiciary are (Garlicki 2007; Hirschl 2013, 159; Mazmanyan 2017, 4; Scheppele 2002).

Constitutional courts protect the constitution, equality and human rights by reviewing laws. Through these review activities, they exercise horizontal accountability. They are thus particularly important for upholding constitutionalism and the rule of law, which many consider to be the Achilles' heel of third-wave democracies (Diamond 2015; O'Donnell 1998; Zakaria 1997). Constitutionalism and the rule of law are contested concepts, ones that refer to ideas such as the supremacy of constitutional rules, equality before the law, the protection of human rights and the separation of powers – all of which I discuss more extensively in Chapter 2 (Alberts 2009; Hirschl 2004a; Maravall and Przeworski 2003; Møller and Skaaning 2012; Morlino 2010; O'Donnell 2004; Stone Sweet 2008). An important prerequisite for constitutionalism and the rule of law is judicial independence, including independent constitutional courts (Hilbink 2008; Morlino 2010; Nohlen 2009; O'Donnell 2004; Zakaria 1997).

The observation that third-wave democracies frequently suffer from the insufficient presence of the rule of law in their milieus contrasts with the empirical proliferation of constitutional courts worldwide and the "global expansion of judicial power" more generally (Tate and Vallinder 1997). Courts worldwide influence public policies through their rulings. There is an "ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008, 94). This trend has been termed the "judicialisation" of politics. The growing importance of courts has been observed in the US (Shapiro 1997), Europe (Stone Sweet 2000), Asia (Dressel 2012), Latin America (Helmke and Rios-Figueroa 2011; Sieder, Schjolden, and Angell 2008) and Africa (Gloppen, Wilson, Gargarella, Skaar, et al. 2010; Gloppen, Gargarella, and Skaar 2004). Courts with review powers take centre stage in this debate.

The number of constitutional and of other courts entitled to perform constitutional reviews has grown massively since 1945, and even more so since the late 1980s (Stone Sweet 2008, 234). After World War II, Austria (1945), Italy (1948), the Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978) and Belgium (1985) each established a constitutional court (Stone Sweet 2008:234). The trend of constitutional courts emerging quickly accelerated in the 1990s, when new constitutions were drafted in during the course of democratic transitions. Of the 72 countries that were "free" or "partly free" in 2000 (but not in 1986) according to Freedom House, 43 had introduced a constitutional court (Ginsburg

2003, 6–9).[2] These courts were established across most world regions, namely in Asia, Latin America, post-Soviet Europe and in sub-Saharan Africa. In the latter, 20 polities had a constitutional court in 2006 according to the dataset of the Comparative Constitutions Project (Elkins, Ginsburg, and Melton 2010). Most constitutional courts in sub-Saharan Africa can be found in countries that were formerly colonised by France, while almost no constitutional courts are located in former British colonies.[3] Interestingly, the first post-independence constitutions of the 1960s in francophone Africa did not provide for constitutional courts – even though France itself had introduced a Constitutional Council in 1958.[4] However, in the early 1990s most francophone countries incorporated constitutional courts into their constitutions – and ones that were heavily inspired by the French model.[5]

Constitutional courts matter for democracy in theory, and they are by now a widespread empirical phenomenon too. Yet, only a few studies have analysed the real-world democratic influences of constitutional courts so far. As Kneip points out, much attention has been devoted to issues like judicial appointments, institutional constraints on judicial power and the interplay of courts and legislators. However, whether constitutional courts' decisions have a negative or a positive influence on the quality of democracy has hardly been addressed to date (Kneip 2009, 31). Dressel shares the observation that far less attention is given to judicial performance and its wider effects (Dressel 2012, 5). Dressel's and Kneip's desideratum is, in accordance with Haggard and Kaufman's invitation, that scholars scrutinise more closely how institutions like constitutional courts perform empirically. To this end, I focus on one specific field in examining constitutional courts' performance: electoral matters. Finkel suggests that electoral rulings are a concrete and efficient yardstick by which to evaluate judicial power vis-à-vis the other branches of government, because they are about "how political power is awarded" (Finkel 2003, 781) – and consequently of the utmost importance.

1.3 Why Elections?

Electoral matters are particularly suitable for examining constitutional courts' repercussions on democracy because they are a core constitutive element of democracy. Elections are at the heart of all concepts of democracy, no matter whether the latter are thick or thin (e.g. Beetham 1994; Collier and Levitsky 1997; Coppedge and Gerring 2011; Dahl 1971; Merkel 2004; Schumpeter 1974). Furthermore, the transition to democracy being made is commonly associated with the holding of free and fair elections (Møller and Skaaning 2013, 152). Today, in almost 90 per cent of all political regimes elections are held periodically (Van Ham and Lindberg 2015, 521). However, the mere holding of elections does not make a regime

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[2] Ginsburg's inventory includes 34 polities with a constitutional court exclusively competent for constitutional review, and ten polities that possess a constitutional court but nevertheless also have judicial review mechanisms incorporated into their standard judicial system.

[3] Among the former French colonies, only Cameroon does not have a constitutional court. Those countries not colonised by France that do have a constitutional court are: Angola, Burundi, the Democratic Republic of Congo, Equatorial Guinea, Mozambique, South Africa, Tanzania and, since 2016, Zambia (ACCPUF 2005; Elkins, Ginsburg, and Melton 2010; Kabanda 2017).

[4] At the time it was argued that the young states would not need such a specialized judiciary, and supreme courts with chambers specialized in performing constitutional reviews were designed (Bourgi 2002, 735–736).

[5] Stroh and Heyl show that for countries formerly belonging to French West Africa, between 57 to 89 per cent of the provisions related to their constitutional court were similar to those of the French Constitutional Council. This does not imply that the designs of the new African constitutional courts were blind copies, however. The authors reveal that domestic political dynamics, and in particular the level of political competition, led to important variations on the French model (Stroh and Heyl 2015).

democratic. There is now a growing body of research on competitive or electoral authoritarian regimes (Levitsky and Way 2010; Schedler 2013). In such regimes electoral competition is a regular and important part of political life, but these elections are so flawed that they do not actually meet democratic standards. Research on electoral manipulations and electoral integrity is also at the centre of strong scholarly interest (Birch 2011; Norris 2014; Simpser 2013).

In this thesis, I offer an innovative perspective on this phenomenon by combining and integrating the research strands of electoral integrity and judicial politics systematically. In both research branches, the study of courts' involvement in electoral disputes is considered to be an important contemporary research gap. A number of authors have by now recognised the importance of courts for democratic elections (Birch 2011, 20; Diamond 2002, 29; Elklit 1999, 46; Helle 2016, 8; Masclet 1998, 33; Mozaffar and Schedler 2002, 12; Norris 2017; Van Aaken 2009, 306, 309; Van Ham 2012, 126; Van Ham and Lindberg 2015, 527). They assert the importance of courts or judicial independence in a general manner, but it remains unclear what kind of court should intervene at what stage of the electoral cycle exactly, and in which ways to best improve the democratic quality of elections. Neither do these studies theorise what kind of barriers courts can face, nor do they spell out which factors can support courts in the adjudication of elections. Consequently, I fill these theoretical research gaps by discussing in Chapter 2 extensively how constitutional courts can contribute to the democratic quality of elections.

The literature on constitutional courts suggests that closer scrutiny of their role in elections is necessary. Apart from their "defining function" (Ginsburg and Elkins 2009, 1432) of constitutional review, many constitutional courts are also equipped with ancillary powers, such as the review of international treaties or state emergencies. Among these ancillary powers the power to adjudicate on and supervise elections is the most prevalent one. Fifty-five per cent of the 77 constitutional courts existing in 2006 had the competence to adjudicate on or supervise elections (Ginsburg and Elkins 2009, 1443). Tom Ginsburg and Zachary Elkins argue that constitutional courts cannot be fully understood without a closer examination of the effects of their ancillary powers, which have not been sufficiently analysed yet (Ginsburg and Elkins 2009, 1431–1432). A further look at the empirical world of constitutional courts underscores Ginsburg and Elkins' claim. Dressel and Mietzner, for instance, argue that the difference in reputation that Indonesia's and Thailand's constitutional courts enjoy stems from their different attitudes to electoral processes (Dressel and Mietzner 2012, 392). Brouard notes, meanwhile, that the French Constitutional Council is in the first place an electoral court, because in the period of 1959–2006 more than two-thirds of the total number of its decisions concerned electoral issues (Brouard 2009, 106). Electoral decisions also play an important role in the work of West African constitutional courts. The Malian Constitutional Court mainly rendered electoral decisions (Heemann 2014, 12–13),[6] while for the Nigerien Constitutional Court electoral decisions account for over one-third of its total decisions (Dagra 2014, 8).[7]

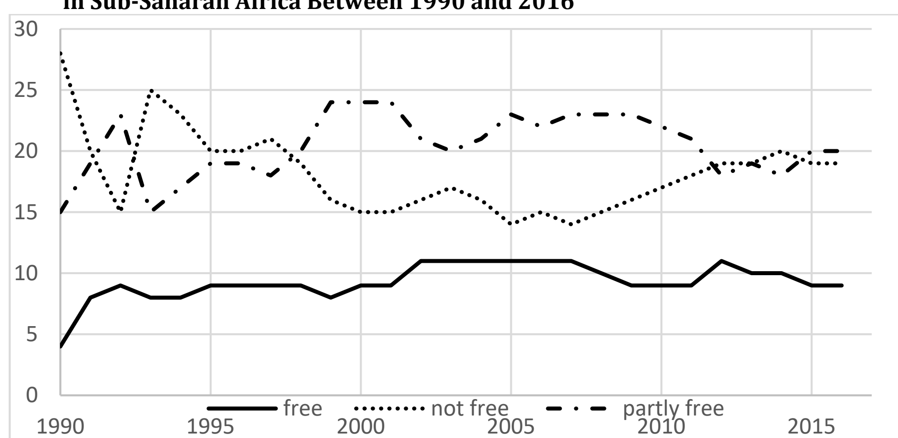
[6] In the period between 1994 and 2011, the Malian Constitutional Court took approximately 198 decisions. Of these, 141 were electoral decisions.
[7] Since 2001 the Nigerien Constitutional Court has taken 436 decisions, of which 162 were electoral ones.

1.4 Why Africa?

In this thesis I focus on sub-Saharan Africa, which offers rich ground for the study of democratisation and courts. Compared to other world regions, the African judiciary and in particular constitutional courts have been under researched so far. Furthermore, the successful quest for generalisable theories of democratisation, judicial politics and electoral integrity in the field of Comparative Politics requires the study of all world regions.

Africa was part of the third wave of democratisation. Similar to other world regions, most of the third-wave regimes did not subsequently develop into full-fledged democracies. Today, Freedom House classifies more African countries as "not free" than it does as "free". Still, Africa is now more democratic than in 1990 – because the number of free regimes is higher and the number of not free regimes lower, as Figure 1 illustrates.[8] The bulk of regimes are "partly free", hence in the grey zone between democracy and autocracy.

Figure 1. The Development of Free, Partly Free and Not Free Regimes in Sub-Saharan Africa Between 1990 and 2016



Source: Author's own graph, based on data taken from Freedom House (2017).

Africa's post-colonial regimes after the 1960s were characterised by "big man rule", meaning the personalised rule of strong presidents who stayed indefinitely in office (Bratton and Van de Walle 1997; Jackson and Rosberg 1982; Lynch and Crawford 2011, 282; Prempeh 2008). The new constitutions of the 1990s, however, enshrined in them institutional checks and balances such as presidential term limits or courts with judicial review powers so as to constrain such presidential power. In this context, Posner and Young observe the growing importance of formal institutions in Africa (Gyimah-Boadi 2015, 102; Young and Posner 2007). Many authors find that these democratic institutions frequently fail to limit the abuse of presidential power (Diamond 2015, 148–149; Gyimah-Boadi 2015, 105–106; Lynch and Crawford 2011, 283–285; Prempeh 2008). However, statements made about weak horizontal accountability and the weak rule of law are only general observations. We lack concrete empirical ground and specific knowledge on how African courts perform vis-à-vis the executive.

Studies by political scientists on courts in Africa are rare. Existing studies on courts in Malawi, Namibia, Tanzania, Uganda and Zambia show that on the one hand these high courts are indeed subject to executive pressure, but on the other they all have nevertheless a record of

[8] In 1990, Freedom House classified four African regimes as "free", 15 as "partial free" and 28 as "not free". In 2016, nine regimes were "free", 20 were "partially free", and 19 were "not free" (Freedom House 2017).

assertive judicial decision making not in favour of the president (Ellett 2013; Gloppen, Wilson, Gargarella, Skaar, and Kinander 2010; Gloppen, Gargarella, and Skaar 2004; VonDoepp 2009). These findings indicate that the dynamics of African judicial politics are by no means straightforward. As such, more expansive studies on African courts are called for. In particular, African constitutional courts deserve much greater attention. The existing academic works on African constitutional courts either focus on the South African Constitutional Court (e.g. Gibson and Caldeira 2003; Klug 2000; Roux 2016) or alternatively apply only legal perspectives (e.g. Böckenförde, Kanté, Ngenge, and Prempeh 2016; Diop 2013a; Heemann 2014; Kanté 2005, 2008; Narey 2016; Schoepffer 2014; Sindjoun 2009; Winter 2014).

Only recently, constitutional courts in francophone Africa have gained some interest by political scientists. These studies examine constitutional courts as the dependent variable, and do not scrutinise the repercussions of their decisions on democracy however. For instance, in a co-authored paper, I have previously explained the similarities and variances in West African constitutional courts' design (Stroh and Heyl 2015). Mariana Llanos and her co-authors (2016) compare informal interferences targeted at three African constitutional courts with those directed towards three Latin American courts; while Stroh (2016) analyses how the increasing politicisation of appointments to the constitutional bench in Benin has damaged the Constitutional Court's reputation there. In contrast, this thesis changes perspectives and instead analyses constitutional courts as an independent variable – so as to closely investigate the quality of democratisation in Africa.

1.5 Research Question and Key Concepts

Despite growing research on constitutional courts and electoral integrity, we still lack a detailed empirical understanding of – and theoretical concepts to analyse the democratic repercussions of – constitutional courts in general, as well as more specifically of electoral dispute resolution and African constitutional courts. Hence, this dissertation addresses the following core research question:

How do constitutional courts contribute to the democratic quality of elections in African electoral democracies?

My research systematically compares the politics of constitutional courts in Africa. This systematic comparison is combined with an exploratory approach that examines the practices of constitutional courts in depth. I have opted for this exploratory approach because of the still missing empirical data on constitutional review processes, and due to hard to come by access to data on constitutional courts – and even electoral integrity. This combined methodological approach is guided by a theoretical framework that will be elaborated in due course.

For answering the guiding research question, I apply a structured, focused comparison of Madagascar and Senegal respectively. The timespan of my analysis is the period between 1990 and 2012, hence the approximate two decades after the third wave of democratisation had first swept across Africa. I chose two cases for this, ones that were classified for several years as electoral democracies by Freedom House within this time period. I focus on constitutional court interventions in presidential and legislative elections respectively. My research design is an x-centred one. This means that I focus on the effects of constitutional courts on the democratic quality of elections. I do not scrutinise what factors can explain the democratic quality of elections. Nor do I analyse which kind of courts have the most

beneficial effect on the democratic quality of elections. In the following, I briefly introduce the key concepts of my thesis – these will be more extensively developed in Chapter 2.

Constitutional Courts

Constitutional courts are the subject of my thesis. Constitutional courts are separate courts that hold the exclusive power for the constitutional review of laws and government acts. They can likewise invalidate laws by rendering them unconstitutional. Being separate courts means that constitutional ones are distinct bodies detached from other courts on the highest judicial level. Having the exclusive power of constitutional review means that only the constitutional court is vested with that power. In contrast, some countries have decentralised systems of judicial review in which lower courts may also engage in judicial review. In these systems, the highest court of appeal is also the court of last resort for constitutional questions. While constitutional review is the core function of constitutional courts, they are frequently vested with ancillary powers – such as the adjudication of elections (Ginsburg and Elkins 2009). Constitutional courts are particularly pertinent phenomena to the study of the repercussions of courts for the democratic quality of elections, because many scholars assume that their separate institutional construction makes them especially suitable for the protection of democracy (Garlicki 2007; Ginsburg 2003; Hirschl 2013, 159; Mazmanyan 2017, 4; Scheppele 2002; Stone Sweet 2008).

Constitutional Court Behaviour

Constitutional court behaviour is my independent variable. I assume that constitutional courts have a discretionary capacity in their behaviour. Hence, they can choose between a range of different options when interpreting the constitution and the law. The formal expressions of constitutional court behaviour are court rulings. I focus, then, on these formal expressions of court behaviour. Due to the discretionary power of constitutional courts, not only the outcomes of these court rulings but also their justifications require analysis. In the analysis of constitutional court behaviour, I distinguish between *functional, ambiguous and dysfunctional interventions* on the one hand and direct and indirect interventions on the other. This distinction between functional and dysfunctional interventions is inspired by Kneip's own work on the German *Bundesverfassungsgericht* (Kneip 2009). I add, however, the category of ambiguous interventions. Functional interventions are beneficial for the democratic quality of elections. Dysfunctional interventions impede the democratic quality of elections. In the case of ambiguous interventions, the influence on the dependent variable is not straightforward because functional aspects co-exist with dysfunctional ones.

For capturing the influence of constitutional courts on the democratic quality of elections, a further distinction is necessary. Constitutional courts can influence elections in both *direct and indirect* ways. Court decisions have, first of all, an immediate consequence for the adjudicated on affair. Additionally, a court decision has also an effect beyond the affair at hand. Constitutional courts signal in their decisions to political actors how they evaluate cases. In other words, courts provide in their rulings information about their stance on certain issues. This information is relevant for political actors beyond the specific case, because they learn through them if they have to fear the court or not.

Democratic Quality of Elections

The democratic quality of elections is my dependent variable. The concept was first developed by Lindberg (2006) in his seminal book on democracy and elections in Africa. The concept accounts for the necessity to define more precisely what makes elections specifically

democratic, since they increasingly occur also in authoritarian regimes. The democratic quality of elections comprises three elements – participation, competition and legitimacy. Lindberg's concept is inspired by Dahl's (1971) own idea that competition and participation are constitutive elements of democracy. Lindberg further adds in the element of legitimacy, because legitimate elections ensure that the holding of elections persists into the future (Lindberg 2006, 36). I complement Lindberg's concept with the one of the electoral cycle, so as to cater for the complexity of the electoral process and the exploratory goal of this dissertation. This combined model can be applied beyond the study of constitutional courts. It is also pertinent for the analysis of other institutions involved in elections, such as election management bodies.

Electoral Cycle

Elections occur as the result of a complex legal and organisational process, one that starts well before votes are actually cast on election day. Practitioners and scholars thus developed the concept of the electoral cycle to disaggregate the different steps of an election, and to underscore that the process both before and after vote casting requires attention (ACE The Electoral Knowledge Network 1998; Elklit and Reynolds 2005; Elklit and Svensson 1997; Mozaffar and Schedler 2002; Norris 2013b; Van Ham 2015). According to my understanding, the electoral cycle consists of six stages: the electoral legal framework, the electoral register, the registration of candidates, the electoral campaign, voting and the processing of votes. I use the electoral cycle as an analytical tool to specify theoretically how exactly the democratic quality of elections is at stake in these different stages of the electoral cycle.

1.6 Outline of the Thesis

Following this introduction, the dissertation is organised into six further chapters. In **Chapter 2**, I develop the concepts and the analytical framework of my thesis against the backdrop of relevant conceptual and theoretical debates in the fields of democratisation, judicial politics and elections. To address the identified research gap regarding constitutional courts' repercussions on democracy, I contribute by designing the concept of "constitutional court behaviour". I further introduce the analytical categories of functional, ambiguous and dysfunctional interventions, as well as of direct and indirect interventions – through these constitutional courts influence the dependent variable of my dissertation, namely the democratic quality of elections. As a theoretical innovation, I combine the concept of the democratic quality of elections with the concept of the electoral cycle. For this purpose, I specify how the three democratic qualities of elections – participation, competition and legitimacy – are at stake throughout the six steps of the electoral cycle. I further derive from the empirical literature that competition and legitimacy as well as the pre-voting stages of the electoral cycle are particularly vulnerable in the context of African elections. Based on a comprehensive literature review, I argue that a transparent and consistent jurisprudence that is driven by democratic principles and that responds to electoral irregularities in close proximity to their occurrence is beneficial to the democratic quality of elections. To prepare for the later theory-driven discussion of my results, I introduce three major theories for the explanation of court behaviour: formal insulation, public support as a defence shield and the insurance theory. Further to this, the debate on the sequencing of elections and the rule of law is elaborated.

In **Chapter 3**, I introduce my research strategy. I define the boundaries of my universe of cases – constitutional courts with electoral review powers in African electoral democracies in the period between 1990 and 2012 – and justify the selection of Madagascar and Senegal as

the cases of my dissertation. Moreover, I explain why the method of a structured, focused comparison serves well the exploratory goal of my thesis. Subsequently, I present how I tackled the challenge of scarce data on African constitutional courts through two separate field research stays in Madagascar and Senegal. During these stays, I carried out 78 interviews with constitutional court judges, legal experts and politicians. Additionally, I collected in archives data on constitutional court decisions as well as from legal documents. The archival work allowed me to compile an original dataset of 274 constitutional court interventions. For the assessment of these interventions, I develop a novel scheme that combines internal and external assessment strategies. The internal assessment is based on the analysis of the constitutional court decisions, while the external one draws on secondary sources such as academic literature, legal comments, newspaper articles and election observation reports. Moreover I outline the operationalisation of the democratic quality of elections, which is based on secondary sources.

In **Chapters 4 and 5**, I carry out the empirical analysis of the constitutional courts' contribution to the democratic quality of elections in Madagascar and Senegal respectively. I briefly introduce the evolution of democracy and elections, so as to familiarise the reader with the political contexts in which the constitutional courts operate. Subsequently, the analysis follows three steps. First, I examine the three democratic qualities of elections – participation, competition and legitimacy – in the period between 1992 and 2009 for Madagascar and in the period between 1992 and 2012 for Senegal. Second, I introduce the history and legal framework of the Madagascan Haute Cour Constitutionnelle and the Senegalese Conseil Constitutionnel. Moreover, I examine the formal and informal relationships of the courts with the political branches as well as with the wider public too. Third, I examine the constitutional courts' behaviour during elections. I organise this examination across the six steps of the electoral cycle. I scrutinise for each step how exactly the constitutional courts intervened, and explain the assessments given of the interventions' functionality for the democratic quality of elections.

Chapter 6 is devoted to the structured, focused comparison of constitutional court behaviour in Madagascan and Senegalese elections. My analysis reveals that in both countries all three qualities of democratic elections were subject to constraints during the periods of observation. Focusing on the courts' major decisions, I observe that both courts responded to the existing constraints on competition and legitimacy with predominantly dysfunctional interventions. The interventions of the Madagascan HCC had, however, more serious repercussions on the democratic quality of elections, which was reflected in the 2009 breakdown of the democratic regime. My discussion of the results against the backdrop of three prominent theories of court behaviour shows that the appointment rules and practices in place hampered in both countries the emergence of independent constitutional courts. Furthermore, both courts lacked public support and did not strategically build up a support base – which made them more vulnerable to political pressure. Yet, the level of political competitiveness cannot satisfactorily explain the behaviour of the Madagascan and the Senegalese constitutional courts when compared to what the insurance theory posits will happen. Eventually, I show that the relationship between the rule of law and elections is indeed inextricable intertwined, as Carothers (2007) argues. However, this inextricability rather leads to a stagnating process in which courts impede electoral integrity; contentious elections undermine assertive judicial decision making.

In **Chapter 7**, the dissertation concludes with a summary of its key findings. Overall, I observe that the two constitutional courts' positive influence on the democratic quality of elections was ultimately limited in the periods of observation. I therefore focus the concluding analysis on identifying the core factors that impeded a positive contribution being made to the democratic quality of elections by the two constitutional courts. Among these factors are institutional ones, such as formal powers that prioritise indirect interventions in the electoral process. Others are enrooted in the behaviour of political actors, as well as of the two constitutional courts themselves. A rather legalistic jurisprudence and low responsiveness to electoral petitions by the courts are examples for the latter. Moreover, factors inherent to elections – like the high political salience of them – hamper more positive contributions being made. Lastly, I propose in this final chapter ideal avenues for future research so as to improve our understanding of how courts can foster the deepening of democracy in third-wave regimes.

2 Theory

This chapter is organised into four main parts. First, I present the setting of my research: democracy and democratisation. I introduce major conceptual questions, as well as the debate about the proper sequencing of the rule of law and elections. In the second part, I turn to constitutional courts. I discuss what perspectives the theoretical literature offers on the relationship between constitutional courts and democracy, develop my concept of "constitutional court behaviour" and explain what characterises democratic jurisprudence. Moreover, I present three major theories of judicial behaviour: formal insulation, public support and insurance. Third, I elaborate on the relationship between elections and democracy and introduce the concept of the "democratic quality of elections". Subsequently, I introduce the concept of the "electoral cycle". The latter is a useful tool to disentangle how the three qualities of democratic elections – participation, competition and legitimacy – are at stake throughout the electoral process. Furthermore, I evaluate whether certain democratic qualities of elections and certain stages of the electoral cycle are more vulnerable than others in the context of African elections. In the fourth and final part, I present the major findings of the literature on the relationship between courts and democratic elections. I argue that the literature offers only rather general premises. Consequently, I specify in detail how courts can enhance the democratic quality of elections. Finally, I summarise the theoretical framework of my thesis.

2.1 The Setting: Democracy and Democratisation

My research question is positioned under the broader umbrella of the study of democracy and democratisation. My dependent variable, the democratic quality of elections, is derived from the idea of democracy. The two institutions – constitutional courts and elections – on which my research focuses are widely associated with democracy, as this chapter will demonstrate. The motivation behind my research is to better understand how processes of democratisation unfold, by focusing on specific aspects of those processes. Therefore, I introduce the main conceptual debates on democracy and democratisation and offer a brief overview of how the study of democratisation has developed in recent decades.

2.1.1 What is Democracy?

Democracy is a historical concept that dates all the way back to ancient Greece. Democracy is furthermore a core concept in the discipline of Political Science, wherein it is studied from different angles and for different purposes. Consequently, a plethora of conceptualisations were developed in the last centuries and throughout the different fields of Political Science. I will focus in the following on the main conceptual debates in the field of Comparative Politics among scholars that study democratisation. In this context, scholars frequently distinguish between "minimalist" or "thin" conceptualisations on the one hand and "maximalist" or "thick" ones on the other.

Minimalist conceptions of democracy emphasise procedural elements, most importantly elections. Joseph Schumpeter is a prominent proponent of a minimalist understanding of democracy. Accordingly, the constitutive characteristic of democracy is competition for political office via free elections (Schumpeter 1974). If this competition is open enough to be won theoretically by any candidate and if the election result is respected, the election constitutes a democracy (Møller and Skaaning 2013, 145). Robert Dahl is another representative of a rather minimalist democracy concept, but he moves beyond Schumpeter's focus on competition. Dahl considers "the continuing responsiveness of the government to the preferences of its citizens, considered as political equals" (1971, 1) a key characteristic of

democracy. He argues that for this purpose competition for political office and the inclusiveness of a regime are necessary conditions. Thus, the share of the population that can participate in contesting the government is also decisive for a regime qualifying as democratic or not. Furthermore, Dahl specified several civil and political rights that he deemed necessary for the realisation of competition and participation. Among these rights are the freedom of expression and the availability of alternative sources of information.[9] Hence elections cannot take place in a vacuum, but need to be accompanied by a set of basic rights.

Thicker conceptions of democracy move beyond the focus on just elections. In such concepts more emphasis is put on the question of whether political rights and civil liberties are also respected in the period between elections (Elklit 1999, 29). Gerardo Munck identifies two directions that such broader concepts can pursue. Scholars can either, first, accentuate whether the citizens' control over political decisions and the equality of citizens is valued throughout the political decision-making process (2016, 12). This is the majoritarian approach, which considers the preservation of the majority's will a democratic necessity. In contrast, the juridical-constitutional school deems, second, institutions that limit the exercise of power and the will of the majority an important feature of democracy. Such counter-majoritarian institutions are for instance the rule of law or civil rights (Munck 2016, 12–15). The concept of "liberal democracy" may be the most famous example of a juridical-constitutional understanding of democracy. Guillermo O'Donnell as well as Merkel and his co-authors developed concepts in the tradition of the juridical-constitutional school. O'Donnell emphasises in his concept the importance of "horizontal accountability" for democracy (O'Donnell 1998). The group around Merkel developed a concept of "embedded democracy" that comprises five partial regimes (Merkel, Puhle, Croissant, Eicher, et al. 2003). These are: a democratic electoral regime, political rights of participation, civil rights, horizontal accountability and the effective power to govern for elected officeholders. These five partial regimes are embedded in social and economic conditions that protect democracy "from outer as well as inner shocks and destabilizing tendencies" (Merkel 2004, 36).

Scholars of Comparative Politics who seek to study democracy beyond the Organisation for Economic Co-operation and Development (OECD) world face a trade-off. On the one hand, they need a concept that captures democracy well and, on the other, they require one that can also be applied to countries outside the specific conditions of the OECD world (Collier and Levitsky 1997; Collier and Mahon 1993; Sartori 1970). For this reason, many scholars examining political regimes across the world adopt a thin concept of democracy such as that of "electoral democracy" (Møller and Skaaning 2010; Munck and Verkuilen 2002, 9).

My research here is located at the intersection between minimalist and maximalist conceptions of democracy. I analyse electoral democracies, meaning regimes that meet minimal standards of procedural democracy. Yet, my research question is inspired by liberal conceptions of democracy that stress the importance of horizontal accountability as well as of civil and political liberties. Constitutional courts are counter-majoritarian institutions that shall protect the constitution and uphold human rights, as will be further explained below (Munck 2016, 14).

[9] Dahl identified eight institutional prerequisites for democracy: 1. freedom to form and join organisations; 2. freedom of expression; 3. right to vote; 4. eligibility for public office; 5. right of political leader to compete for support; 6. alternative sources of information; 7. free and fair elections; and, 8. institutions for making government policies dependent on votes and other expressions of preference (Dahl 1971, 3).

2.1.2 What is Democratisation?

The scholarship on democratisation was initially informed by the transitions occurring in Southern Europe and Latin America in the 1970s and 1980s. These transitions stimulated heuristic models like the three phases of democratisation: democratic opening, democratic transition and democratic consolidation (O'Donnell, Schmitter, and Whitehead 1986). In the 1990s, the attention shifted instead to the process that occurs after the designing of democratic institutions and the holding of elections. This process can be conceptualised either negatively or positively (Schedler 1998, 91–93). The negative variant fears the death of democracy. Democracy can die rapidly through a coup d'état, or alternatively it can die only slowly (O'Donnell 1992, 19, 33). Schedler calls a sudden death "democratic breakdown" and a slow one "democratic erosion" (1998, 93). The latter implies that the principles of democracy are incrementally eroded through, for instance, the abuse of electoral institutions, rise of a hegemonic party or the excessive use of incumbency advantages. The term "democratic consolidation" adopts a negative conceptualisation, and means avoiding the breakdown or erosion of democracy. A positive notion of democratisation hopes for a further improvement of democracy. Such an improvement can be the completion of democracy when an electoral democracy becomes a liberal one, or the deepening of democracy when democratic procedures become increasingly stable and democratic rights are extended (Schedler 1998, 94–100).

When scholars eventually recognised that the new political regimes of the third wave of democracy experienced neither democratic deepening nor democratic consolidation, they reacted with a proliferation of democracy concepts to capture the characteristics of the regimes existing in the grey zone. Collier and Levitsky called these endeavours "democracy with adjectives" (Collier and Levitsky 1997). Furthermore, the idea that "any country moving *away* from dictatorial rule can be considered a country in transition *toward* democracy" (Carothers 2002, 6, emphasis added by the author himself) was questioned. Instead, Carothers suggested that democratic consolidation should be understood as "chaotic processes of change that go backwards and sideways as much as forward, and do not do so in any regular manner" (Carothers 2002, 15).

The bulk of African regimes are located in the grey zone between democracy and autocracy, as has been shown in the introduction to this thesis. I acknowledge that these regimes may not be on their way toward democratic deepening. Yet, I assume that all political regimes are in a constant process of regime development. Even so-called "stable democracies" are not impervious to democratic erosion. My research is led by an interest in democratisation; the countries that I study in this thesis, Madagascar and Senegal, both had democratic aspirations at the beginning of the 1990s. Therefore I use the term "democratisation" when referring to their processes of regime development. Furthermore, I deploy the term "third-wave regimes" or "third-wave democracies" to cover the specific context of the grey zone in which they lie.

2.1.3 Sequencing Elections and the Rule of Law

The reader of works on liberal democracy or courts encounters frequently the terms "rule of law" and "constitutionalism". In all likeliness, the reader soon understands that the phenomena that these terms describe are meant to be beneficial for democracy. However, it may be more difficult to grasp what these terms exactly mean and how the concepts of the rule of law and constitutionalism specifically relate to each other. Do they describe different phenomena? Do these phenomena closely relate to each other or even overlap?

Several authors state that the rule of law as well as constitutionalism are contested concepts (Møller and Skaaning 2012; Morlino 2010, 40; Stone Sweet 2008, 219). In a narrow understanding, constitutionalism means the respect of (constitutional) rules. Alberts defines constitutionalism as "the widespread adherence to the democratic rules and norms contained in the constitution and other basic laws governing political life" (Alberts 2009, 127). Stone Sweet offers a similar definition: "The word refers to the commitment, on the part of any given political community, to accept the legitimacy of, and to be governed by, constitutional rules and principles" (Stone Sweet 2008, 219). Narrow concepts of the rule of law also focus on the primacy of the law, but they comprise additionally the notion of "equality" (Finnis 1980; Maravall and Przeworski 2003; Møller and Skaaning 2013, 143).[10, 11] O'Donnell puts forward a broader concept that also entails certain rights and the checking of executive power. Accordingly, the rule of law "ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of state power" (O'Donnell 2004, 32). This concept resembles the definition of constitutionalism articulated by Hirschl. He understands constitutionalism as the constitutional enshrinement of a bill of rights and the establishment of judicial review (Hirschl 2004a, 71). Moreover, he posits that constitutionalism is commonly associated with liberal or egalitarian values (Hirschl 2004a, 72). Stone Sweet (2008, 219) concludes that constitutionalism means to some limited government that operates under the rule of law. Thus, broader conceptions of constitutionalism as well as of the rule of law embrace ideas like the protection of political and civil rights, the separation of powers and the equality of all citizens.

The concepts of the rule of law and constitutionalism matter for my thesis because they are closely related to constitutional courts and judicial independence, which will be discussed more extensively later in this chapter. Hirschl implicitly includes courts in his understanding of constitutionalism, as he refers to the judicial review that is usually exercised by courts. Hilbink (2008, 227) associates the rise of constitutionalism with the increased number of constitutional courts emerging around the world. Nohlen stresses that constitutional jurisdictions require a setting "with constitutional guarantees of human and political rights, with a separation of powers and under the rule of law" (2009, 13). Morlino (2010, 48) considers judicial independence an empirical dimension of the rule of law. Ríos-Figueroa and Staton (2009, 4–5) also suggest to empirically measure the rule of law through its institutional component of judicial independence.

In the debate on sequences in the process of democratisation, it is contested whether the features of constitutionalism and the rule of law are actually necessary for democratisation. Zakaria argues that regimes that meet the standards of procedural democracy but do not embrace what he calls "constitutional liberalism" are dangerous for the future of democracy (Zakaria 1997). Constitutional liberalism means to Zakaria aspects like "the rule of law,

[10] Møller and Skaaning define the rule of law as follows: "That effective equality before the law is in place and subjects all public and private agents to appropriate, legally established controls over the lawfulness of their acts. Crucially, the rule of law implies that laws—besides being general, public, prospective (that is, non-ex post facto), and certain—are equally applied regardless of a citizen's political allegiance, socioeconomic status, ethnic or religious affiliation, and so on" (Møller and Skaaning 2013).

[11] According to José María Maravall and Adam Przeworski: "Law rules if 'those people who have the authority to make, administer, and apply the rules in an official capacity […] do actually administer the law consistently and in accordance with its tenor'" (Maravall and Przeworski 2003, 1, citing; Finnis 1980).

private property rights, and increasingly, separated powers and free speech and assembly" (Zakaria 1997, 26). According to Zakaria, democracies without constitutional liberalism are illiberal ones. Such regimes discredit the very idea of democracy. He believes that illiberal democracy brings the "erosion of liberty, the abuse of power, ethnic divisions, and even war" (Zakaria 1997, 42–43). His argument is inspired by the historical developments in Western European countries, as well as in the settler colonies. In these countries the rule of law and civil liberties evolved prior to the introduction of inclusive and competitive elections.

Authors like Carothers or Møller and Skanning oppose Zakaria's argument. Møller and Skanning argue that the sequence of the early Western democracies was a result of unique historical factors that could not be reproduced in other contexts. They continue that today political opening is associated with the introduction of elections, and that it makes no sense to postpone the holding of elections artificially (Møller and Skaaning 2013, 152). Carothers further contends that it is not realistic to assume that the rule of law could be established more easily under authoritarian rule, because such leaders have few incentives to introduce the rule of law. If such leaders do introduce the rule of law for the sake of economic development, it would probably be a truncated version that does not actually serve democratic purposes. Moreover, Carothers asserts that the logics of authoritarianism and the rule of law contradict each other (Carothers 2007, 14–16). In contrast, democracy and the rule of law are "inextricably intertwined" and "many elements of democratization bring progress toward the rule of law and vice-versa" (Carothers 2007, 18). Møller and Skaaning furthermore find in an empirical analysis that democratic competition can occur even if civil liberties and the rule of law are currently deficient (Møller and Skaaning 2013, 146).

The debate is relevant for this thesis because the issue of courts and democratic elections can be considered a disaggregation of the argument that the rule of law is beneficial or even necessary for democracy. In the empirical reality of the third wave of democracy, elections were introduced before the rule of law has been achieved. However, many of these regimes set at the moment of transition a fundament for the rule of law by introducing constitutional courts, judicial independence and/or presidential term limits in their constitutions. Hence, the two principles need to develop at the same time. Yet, it remains an open question how the rule of law and democratic action influence each other in practice.

2.2 Constitutional Courts

We learned so far that CC are considered beneficial for democracy, and that this idea stems from concepts of liberal democracy. Before I discuss the relationship between constitutional courts and democracy more extensively, I will first have a closer look at what CC actually do and at their history. The core function of constitutional courts is the judicial review of laws. Constitutional review jurisdictions judge whether laws and executive acts comply with the constitution; or, in other words, whether laws contain certain provisions that contradict the legal principles of the constitution. If laws are not in accordance with the constitution, the constitutional review jurisdiction can render them unconstitutional – and consequently void. Constitutional review jurisdictions thus guarantee the hierarchy of legal texts, and as such serve as a guardian of the constitution.

The idea of constitutional review was born in 1803 in the United States of America.[12] At this time, constitutional review aimed at protecting the separation of powers between the three branches of government and enforcing the division of power between the central government and the federal states (Horowitz 2006, 127). Thus, it was a device to keep in check central executive power. It was only in the 20th century that constitutional review increasingly entailed the idea of human rights protection (Stone Sweet 2012, 816). Many countries incorporated human rights charters into their constitutions, which provided constitutional courts with the opportunity to now protect these rights by constitutional review. With these powers constitutional courts can contribute to establish a *Rechtsstaat*, “a state governed by law and respectful of its citizens” (Horowitz 2006, 126).

The US roots of constitutional review already reveal that it is not a task exclusively exercised by constitutional courts, because in the US no such constitutional court exists. Hence, judicial review can also be assigned to other judicial bodies. Two main systems of constitutional review can be distinguished. They are frequently denominated the American one and the European one, or more precisely for the latter the Austrian model (Horowitz 2006, 127; Stone Sweet 2008, 231). In the American model, constitutional review is assigned to the ordinary judiciary. The task is decentralised, and every court can invalidate laws for constitutional reasons. At the apex of such a system a single court, the supreme court, is the last resort in constitutional questions. The Austrian model meanwhile was invented by legal and political philosopher Hans Kelsen. In this model constitutional review is exercised by a separate constitutional court. Separate means that the court is detached from the ordinary judicial system and that it is the only court competent for constitutional review. Thus, it is a centralised system of constitutional review (Horowitz 2006, 127; Stone Sweet 2008, 231).

What is the merit of having a separate constitutional court? Kelsen argued that a court with review powers requires its own “constitutional space” (Stone Sweet 2012, 818). The court has to be detached from the other branches of government, because its power to invalidate legal and executive acts requires a special status. The ordinary judiciary is subordinated to the parliament, and applies the legal norms adopted by the latter. Thus, it implements the policies of the political branches. In contrast, judicial review implies the keeping in check of the political branches. Kelsen was convinced that the special status of the constitutional courts would prepare them better to fulfil the function of restraining political power (Ginsburg 2003, 9).

2.2.1 Constitutional Courts and Democracy

Ideas of liberal democracy and the rule of law suggest a positive influence of constitutional courts on democracy. In this section, I spell out the arguments for constitutional courts’ democratic benefits – ones that motivated the global proliferation of constitutional courts during the third wave of democracy. Before doing this, I first introduce the longstanding debate on the democratic compatibility of constitutional review – due to the positive normative relation between constitutional courts and democracy not being as clear as is sometimes suggested in the literature on democratisation.

Critics of constitutional reviews see two main problems. First, judges and courts make law. According to this view it is not possible for courts to simply apply a legal norm. Every interpretation of the constitution or of a law reflects additional factors, like the judges’

[12] In 1803 the Supreme Court of the United States of America decided in the case Marbury v. Madison that a law adopted by a democratically elected parliament can be scrutinised and invalidated by the Supreme Court (Kneip 2009, 13; Stone Sweet 2008, 223).

preferences or the political context, and hence not only the core intention of the article or law in question (Shapiro 1981, 29). Second, judges are usually not directly elected and thus lack democratic legitimacy. In the strict understanding of the separation of power idea, they are not meant to make law because law-making is the privilege of the legislative branch (Dahl 1957, 1989, 188). Shapiro argues that the law-making activities of courts as such are not problematic as long as they can be overturned by the legislative branch through new laws. However, amending constitutions is a difficult endeavour in most polities as it may require a referendum (Shapiro 2013, 386). Thus, constitutional review is problematic for democracy as it constrains the power of the legislative branch. Or to use Shapiro's words:

> *"Courts make law. Constitutional courts often make big law, and the law they make is not easily invalidated by others. In a democracy, the people or its elected representatives are supposed to make law. If courts are truly independent, then they are lawmakers who are not politically accountable to the demos" (2013, 388).*

Proponents of constitutional review argue that democratic constitutions are comprised of essential principles that may be in conflict with the short-term interests of democratically elected politicians. Alexander Bickel coined the idea of constitutional review as a counter-majoritarian institution that protects the core principles of democracy and human rights against the will of the majority. This protection would let democracy survive in the long run (Bickel 1986). Ronald Dworkin argued in a similar vein when he stated that "mature democracy" needs a defence against the tyranny of the majority through judicial rights protection (1990).

The debate offers more nuances of the main arguments in both directions (see Kneip 2009), which will not be addressed here in further detail since the focus is on constitutional courts in relation to electoral matters. However, the debate on constitutional review and democracy does give some insight into the topic of constitutional review and elections. John Ely argues that constitutional review is necessary for democracy, but only in clearly defined issue areas. He proposes that constitutional review should seek to protect democratic procedures, and thus guarantee that all citizens can participate in the process of representation and that their preferences are equally weighted. He asserts that in these procedures minorities need to be protected from the majority. Safeguarding democratic procedures ensures, accordingly, that democracy can persist. Ely limits, however, the safeguarding role of constitutional review jurisdictions to the procedure of democracy and excludes the protection or extended interpretation of substantive rights, like for instance religious freedom (Ely 1980).

The idea of the importance of constitutional review and constitutional courts spread across the world despite the controversy about the democratic compatibility of constitutional review, however. The idea gained popularity in the second half of the 20th century and during the third wave of democratisation (Ginsburg and Versteeg 2014, 590). The protection of the constitution and of human rights were considered the proper answer to totalitarian regimes like the Third Reich and the authoritarian regimes of the second half of the twentieth century (Ginsburg 2003; Hirschl 2013, 159; Horowitz 2006). Many regimes that democratised during the third wave of democracy were characterised by excessive power abuses by long-term rulers and by the violation of human rights. Therefore, the protection of human rights as well as of civil and political liberties is considered an important core function of the political system. Constitutional courts have often been considered particularly suitable for this endeavour (Ginsburg 2003, 10; Stone Sweet 2012, 818).

Several reasons for the suitability of constitutional courts are given. First of all, the creation of a new separated court is a strong symbol for breaking with the authoritarian past. While the ordinary judiciary failed to develop the rule of law under authoritarianism, and is thus confronted with popular distrust, a new court can symbolise a new beginning (Ginsburg 2003, 9–10; Horowitz 2006, 126). The special status of a constitutional court is said to insulate it from partisan politics (Hirschl 2013, 159). Theoretically, such a new court can be filled with judges having a record of integrity (Ginsburg 2003, 9–10; Horowitz 2006, 126). Constitutional judges are, according to these ideas, believed to be more independent, legally better qualified and more assertive too (Garlicki 2007; Hirschl 2013, 159; Mazmanyan 2017, 4; Scheppele 2002). Furthermore, it is argued that such new separated courts can initiate a new kind of jurisprudence that is less formalistic and that advocates the primacy of the constitution over the state (Mazmanyan 2017, 6–8; Prempeh 1999, 145). Finally, constitutional courts appear to many constitution makers as an easy institutional complement to existing constitutional orders, because they can be added without requiring a restructuring of the whole judicial system (Stone Sweet 2012, 818).

2.2.2 Conceptualising Constitutional Courts

In this section, I introduce the concept of my independent variable – constitutional court behaviour. Before I develop the concept I outline a prominent concept in the study of judicial politics – judicial independence. I argue that the concept is not pertinent for this thesis because it cannot capture well the repercussions of constitutional courts.

Judicial Independence

What does "judicial independence" mean? Scholars often attest that judicial independence is a concept that lacks clear definition (e.g. Brinks 2011, 130; Herron and Randazzo 2003, 423; Larkins 1996, 607; Ríos-Figueroa and Staton 2014, 106; Russell 2001, 3; VonDoepp 2009, 18). Furthermore, authors highlight that the concept of judicial independence contains different notions. Russell terms them the "autonomy" and the "behaviour" dimensions (2001). Autonomy is a relational term that describes the individual and collective autonomy of judges from other individuals and institutions. The behaviour dimension meanwhile refers to "judicial behaviour that is considered indicative of judges enjoying a high measure of autonomy" (Russell 2001, 6). Russell's dimensions are similar to what Larkins calls the ideas of "impartiality" and "political insularity" (1996). Accordingly, impartiality is the "idea that judges will base their decisions on the law and facts, and not on any predilection toward one of the litigants" and political insularity is "the notion that judges should not be used as tools to further political aims nor punishment for preventing their realization" (Larkins 1996, 609). While impartiality refers to the character of courts' output, the decisions, political insularity refers to the relations that judges have with political actors. Russell stresses that such a distinction is important because judges may issue independent decisions even though they face pressure from political actors, and vice versa (Russell 2001, 6). While Larkins and Russell sought to entangle the different dimensions of judicial independence, Ríos-Figueroa and Staton (2014) stress that judicial independence alone cannot explain the influence of courts on politics. Accordingly, "it makes little sense to call a judge independent if her decisions are routinely ignored or poorly implemented" (Ríos-Figueroa and Staton 2014, 107). Therefore, they conceptualise judicial independence with two dimensions: the autonomy of judges and the influence of courts.

Ríos-Figueroa and Staton's emphasis on the influence of courts triggers the question of whether judicial independence is really an adequate concept to analyse the influence of

courts on politics. Judicial power is an alternative for conceptualising the phenomenon. Tate and Vallinder already informed the debate in their seminal contribution, when arguing that the "global expansion of judicial power" makes the difference (Tate and Vallinder 1997). Consequently, authors like Brinks or Helmke and Ríos-Figueroa turned away from the judicial independence concept and focused their research on judicial power instead (Brinks 2011; Helmke and Ríos-Figueroa 2011).[13] VonDoepp meanwhile uses the concept of "judicial autonomy", after discerning that the one of judicial independence is on the one hand intuitively useful and necessary but that on the other it remains blurred in spite of the conceptualisation efforts made by several scholars. For VonDoepp, judicial autonomy "refers to a situation where judges can exercise meaningful authority without fear of or manipulation by other powerholders" (VonDoepp 2009, 18). These concepts that include power and authority point to a crucial aspect of the matter; it is not only important how free courts are in their decisions, but also if those decisions make a difference. Kapiszewski and her co-authors apply a similar emphasis in their conceptualisation of courts. Observing that the political power of courts is subject to ebbs and flows (Kapiszewski, Silverstein, and Kagan 2013, 2) and that courts can take different roles in the political process, they are interested in the question of how consequential courts are. In other words, they ask if courts "have some actual effect on the governance of the surrounding society" (Kapiszewski, Silverstein, and Kagan 2013, 7).

The Influence of Courts

The question of the de facto influence of constitutional courts on democracy has not been much analysed, yet. Kneip (2009, 31) states that while much work has been done on questions like judicial appointments, institutional constraints on judicial power and the interplay of courts and legislators, it has rarely been analysed whether constitutional courts' decisions have a negative or a positive influence on the quality of democracy. Dressel shares this observation:

> *"So far the growing body of scholarship has principally been concerned with exploring the origins of judicial empowerment; it has given far less attention to actual judicial performance in terms of either variations in judicial behavior or their effects on governance" (2012, 5).*

Since the influence of courts on democracy has been rarely examined, the literature also offers only few examples of how such a democratic contribution of courts can even be conceptualised. Siri Gloppen and her co-authors, as well as Kneip, argue that such a conceptualisation requires a specification of democracy (Gloppen, Wilson, Gargarella, Skaar, and Kinander 2010; Kneip 2009). Thus, the behaviour of courts needs to be analysed in relation to a concept of democracy or a proxy of democracy. Gloppen and her co-authors develop a concept that is called the "accountability function" of courts in order to analyse the effect of judicial behaviour on democracy. Accordingly:

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[13] Interestingly, Brinks' concept of judicial power consists of two dimensions: autonomy and authority. Autonomy is defined as the capability of courts to develop and pursue their own will and their own policy goals (Brinks 2011, 129). Thus, the definition resembles those of judicial independence. In Helmke and Ríos-Figueroa's concept of judicial power, however, judicial autonomy does not play a prominent role. According to them, judicial power is the degree of horizontal and vertical control. Judges "exercise horizontal control when (1) they are able and willing to get involved in intergovernmental dispute cases and (2) they are able and willing to decide cases against the more powerful party" (Helmke and Ríos-Figueroa 2011, 9), while vertical control "entails the adjudication of various constitutional rights" (Helmke and Ríos-Figueroa 2011, 9).

"Democratic judiciaries must strive to uphold or contribute toward: genuine competition for positions of political power; equal opportunities for political participation; political space for deliberation and contestation of political decisions; and protection of basic rights" (2010, 18).

While this is in principle an inspiring suggestion, it has the disadvantage that in practice it merges together into one concept the behaviour of courts and the target of their behaviour (accountability). It provides a benchmark for classifying the behaviour of courts, but it does not allow for a specification of what kind of court behaviour will have a positive effect on accountability.

Kneip chooses the concept of "embedded democracy" to examine the influence of the German *Bundesverfassungsgericht* on the quality of democracy (Kneip 2009; Merkel, Puhle, Croissant, Eicher, and Thiery 2003). The five core regimes of that embedded democracy serve as benchmarks, or in Kneip's words as "demarcation criteria" (2011, 137) for the assessment of the court's decisions. According to his analytical framework, CC decisions can either be functional or dysfunctional for democracy. Court rulings are functional to democracy if they concern one of the embedded democracy's core regimes. In contrast, dysfunctional decisions pertain to matters outside these core regimes. These decisions are dysfunctional because they limit the parliament's legislative power too greatly, even though core principles of democracy were not called into question by the respective law. Kneip further stresses that not only the actions of a constitutional court can be functional or dysfunctional for democracy but that a non-action may have a similar effect too, if democracy is threatened in one of the core regimes – and a constitutional court does not protect it (Kneip 2009, 85). The value of Kneip's contribution is that he analytically distinguishes between court behaviour and democracy. Moreover, he introduces the categories of functional and dysfunctional court rulings. However, the main criterion for the functionality of a decision is the topic of the respective decision. If a ruling concerns a core regime of democracy then it is functional to democracy. Thus, he does not account for the possibility that the court handled a case in a way that was dysfunctional to democracy – even though a core regime of democracy was pertained to.[14] I argue that what courts decide and the ways in which they justify their rulings deserve more attention, so as to understand the contribution of constitutional courts to the democratic quality of elections.

Court Decisions

Analysing court decisions more closely necessitates taking an analytical approach to them. Political scientists usually limit their analysis of court decisions to the outcomes of them. Thus, they examine for instance whether a law was either upheld or invalidated in the review process. In the study of judicial independence, it is a common approach to scrutinise to what extent court rulings favour the government (e.g. González Casanova 1970; Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Schwarz 1977). The outcome of a decision does indeed have the most tangible influence on the political context. However, I agree with Larkins who claims that the analysis of judicial decisions needs to go even deeper:

[14] In fact, the criteria for Kneip's assessment of court decisions are not perfectly clear. He stresses that he does not assess the content of the ruling, thus if they are legally right or wrong (Kneip 2009, 309). However, in the discussion of his results, he adds that it also matters for the assessment whether or not the *Bundesverfassungsgericht* referred in its rulings to a clear constitutional norm (Kneip 2009, 311–312).

> *"Examining outcome alone is insufficient: exactly* ***what*** *a court decides,* ***the way*** *it reaches its decisions and* ***the words*** *it uses can speak volumes more about the position of the judiciary in a given country" (1996, 618–619, emphasis added by the author himself).*

Bolle argues in a similar vein, by saying that the wording and tone of a decision can give a good impression of the court's impartiality (Bolle 2009, 96). While these authors underscore the importance of analysing the motivations and justifications behind court decisions, they do not offer an analytical approach or analytical categories for the actual examination of those court decisions. Consequently, I develop my own analytical approach in Chapter 3.

Prerequisites of Court Decisions

Court decisions do not just happen out of the blue. Factors that are exogenous to courts determine whether a court can render a judgement on a specific issue. Two prerequisites determine whether a constitutional court can render election-related decisions, and hence generate influence on the democratic quality of elections. First, the legal framework defines the respective constitutional court's formal electoral powers and prescribes in which issue area the constitutional court may render decisions. This is what some scholars call the "supply side" of judicial power (Woods 2009; cited by Moraski 2009, 274). For instance, a constitutional court can only protect competition during the electoral campaign when it is formally entitled to rule in this issue area.

Second, the potential plaintiffs decide whether they lodge petitions and thus activate the constitutional court. This has been labelled the "demand side" of judicial power (Woods 2009; cited by Moraski 2009, 274). For instance, the constitutional court cannot control how far the constitutional principles of participation and competition are respected in the electoral law if it is not referred to the court by the eligible actors in the first place. Only if a constitutional court has the mandatory power to overview and certify elections is such an activation unnecessary, and the CC thus able to exercise influence on its own behalf.

These two prerequisites are exogenous to the constitutional court. In other words, the CC itself has no immediate influence on its formal powers and on whether or not electoral challenges are addressed to it.[15] For a comprehensive analysis of court behaviour the examination of the supply and demand prerequisites is necessary.

Direct and Indirect Influences

For capturing the influence of constitutional courts on the democratic quality of elections a further distinction is necessary. Constitutional courts can influence elections in both direct and indirect ways. Court decisions have, first of all, an immediate consequence for the adjudicated affair. Additionally, a court decision has also an effect beyond the affair at hand. Constitutional courts signal in their decisions to political actors how they evaluate cases. In other words, courts provide in their rulings information about their stance on certain issues. This information is relevant for political actors beyond the specific case, because they learn through them if they have to fear the court. Stone (1992) distinguishes between the direct

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[15] Certainly, it is conceivable that the court itself also has an influence on the number and kind of complaints that are addressed to it. If potential plaintiffs do not expect a court to respond to their grievances, they may be frustrated and will cease to file further complaints – as will be argued also in this work with respect to indirect influences (Smith 1988, 98). It is sometimes also argued that courts may have influence through their behaviour depending on which powers it is vested with or which powers are curbed (Bánkuti, Halmai, and Scheppele 2012). However it is necessary to draw a line at some point, and so to concentrate on certain parts of a process in order to be able to systematically analyse it.

and indirect influences of the French Constitutional Council. The CC influences directly the policy-making process when it rules on the constitutionality of legislative provisions. When it renders a law unconstitutional and it can consequently not be adopted, the influence of the CC is obvious.

However, "the pedagogical authority of its past jurisprudence, and the threat of future censure" (Stone 1992, 9) also has an influence on the legislative process. It transforms "the customs, habits and conduct of ministries and parliament" (Stone 1992, 4), for instance when parliamentarians try to draft their bills in a way that will not provoke changes through constitutional review. Stone's notion of indirect influences resembles Gloppen et al.'s idea of courts' latent constraints. Courts exercise latent constraint on power "when other institutions and actors refrain from actions that they assume the court will sanction" (Gloppen, Wilson, Gargarella, Skaar, and Kinander 2010, 22). They add, however, that such latent constraints are difficult to measure. Kapiszewski et al. also stress that judicial decisions have short- and long-term consequences, and shape the subsequent course of events (Kapiszewski, Silverstein, and Kagan 2013, 7). Indirect or long-term influences of judicial decisions were also acknowledged by Smith, who noted that past decisions may determine later the type of litigants that appeal to the court at all – because potential litigants will stay away from a court that is not likely to entertain their claims (Smith 1988, 98).

Constitutional Court Behaviour

The concept for the independent variable of my thesis is "constitutional court behaviour". I limit constitutional court behaviour to the formal expressions of constitutional courts. Formal expressions of constitutional courts are the official decisions that these courts render. This implies that informal expressions of court behaviour, such as alliance seeking with the legal community, are not included into this concept. For my concept, the outcomes of court decisions as well as the justification of those decisions are both relevant.

I follow Kneip's suggestion that court rulings can either be functional or dysfunctional (2009). Yet, I adjust Kneip's analytical categories in two ways. First, I assess the functionality of court decisions based on the content of them – while Kneip determines functionality merely based on the subject matter of the respective decision. Second, I amend Kneip's analytical categories by adding in the one of ambiguous court rulings. These rulings are situated in the grey zone between functional and dysfunctional decisions. Ambiguous rulings may comprise functional and dysfunctional aspects, which makes their influence ambiguous. Rulings may also be ambiguous due to the flawed nature of the legal framework. For instance, if the constitution or electoral laws are designed in a way that impedes constitutional courts in rendering decisions that are functional to the democratic quality of elections. In such cases, the decision of the constitutional court may comply with the legal text but at the same time serious violations of electoral rules have been tolerated. This explanation of the three analytical categories reveals already that the functionality of court behaviour can only be assessed in relation to another concept, the "democratic quality of elections". In this thesis, the latter concept serves as a benchmark for the examination of court behaviour. The concept of the democratic quality of elections will be introduced more extensively in Section 2.3.1.

2.2.3 Democratic Jurisprudence

The idea of functional and dysfunctional court behaviour triggers the question of what kind of jurisprudence exactly is functional to democracy. In this section, I explain which interpretative approaches judges can adopt and which ones are most conducive to democracy. The very discussion of different interpretative approaches reveals an underlying assumption

about the nature of judicial decision making. Accordingly, judges have a discretionary power when interpreting legal rules. Therefore, I first position this assumption within the academic debate and subsequently proceed to the different interpretative approaches.

I introduced already the idea that judges do not only apply law but that they also make it through their various interpretations. This idea points to the question of what exactly guides judges in their decision making, and if and by what they are constrained in their decisions. The legalistic and the realistic schools in the study of courts offer different answers to these questions. The legalistic school posits that judicial decisions are in the first place guided by legal doctrines that judges apply in an objective, impersonal and politically neutral manner (Epstein and Jacobi 2010, 343). Accordingly, judges interpret and apply existing legal norms defined by the constitution and the law. This does not necessarily imply that the legal framework provides clear answers for all cases. Many cases are indeterminate, and consequently different judges can consider different judgments appropriate for a particular case. Nevertheless, judges seek to give priority to the law when they render their decisions (Bailey and Maltzman 2011, 7).

Representatives of the realistic school, meanwhile, do not believe that any interpretation of the law can be achieved in an objective and impersonal manner. Interpreting law involves inevitably law making (Shapiro 1981, 29), and judges are influenced by many factors that are unrelated to the law as such. Scholars differ, however, in their assumptions about what kind of influences shape judges' decisions if the law is indeed not the determining factor. Attitudinalist scholars assume that judges are unconstrained actors that in the first place follow their own ideology and their own policy preferences (Segal and Spaeth 1993). They may nevertheless refer to the law in their decisions, but they use it as a "smoke screen to cover their pursuit of policy" (Bailey and Maltzman 2011, 5). Neo-institutionalist scholars consider judges and courts as actors that are constrained by legal and political institutions, as well as by the political context (Smith 1988). According to neo-institutionalist scholars who apply rational choice logic, judges are constrained by their strategic interaction with endogenous as well as exogenous institutions and actors. Endogenous actors are, for instance, their peer judges, while the most important exogenous ones are the legislative and executive branches of government (Maltzman, Spriggs, and Wahlbeck 1999, 48–54).

I adopt here a realistic approach, and assume that constitutional courts have a discretionary power in the interpretation and application of the law (Vanberg 2015, 180). I agree also with the neo-institutionalist approach that sees constitutional courts as institutions constrained by the institutional and political context in which they operate. The constraints imposed by the institutional and political context nevertheless leave a discretionary space in which courts subsequently position themselves.

The assumption that courts have a discretionary power in their decision making matches the observation that they can apply different interpretation techniques. Several authors observed that judicial interpretation can be split into a legalistic or formalistic interpretation technique on the one side and a principled or purposive one on the other (e.g. Harrington and Manji 2015; Mazmanyan 2012; Prempeh 1999; Sánchez, Magaloni, and Magar 2011). A legalistic interpretation technique gives "literal effect to the plain meaning of legal texts" and tends to be "narrow, rule-driven, and text-bound" (Prempeh 1999, 140). Simeon Djankov and his co-authors found in a study of 109 countries that legal formalism is more prevalent in civil law countries in continental Europe, Asia, Africa and Latin America than in common law countries (Djankov, La Porta, Lopez-de-Silanes, and Shleifer 2003). Mazmanyan explains that a

legalistic vision of the law is strongly present in post-communist countries. In these countries the law "never performed as an integral part of a concept, constitution, or any supra-statutory authority but only as a procedure" (Mazmanyan 2012, 319). This narrow understanding of the law leads to the phenomenon that "the higher principles of democracy, expressed in modern written constitutions, are given a solely procedural extension through the laws" (Mazmanyan 2012, 319). As a consequence courts interpret the law and the constitution with reference to the letter of the law. With this interpretation technique they can easily serve the preferences of the ruling party following the principle of "for my friends, anything – for my enemies, the law"[16] (Mazmanyan 2012, 322).

In contrast, a court can also use a more purposive and principled mode of interpretation. This means that the interpretation of a constitutional text does "not only consult the spirit of the law but also endeavor[s] to harmonise the letter with the spirit" (Prempeh 1999, 140). A constitutional court applying such an interpretation technique can include additional principles, like the constitution's preamble or international charters ratified by the country in question into its judgment (Brouard 2009, 110–111; Scheppele 2002, 248; Widner 2001, 399). A principle-oriented interpretation can also imply the less restrictive interpretation of standing rules (Mazmanyan 2017, 8; Scheppele 2002, 259). Scheppele illustrates this with an example from India. In 1982, the Indian Supreme Court accepted petitions by lawyers who claimed that the judicial independence of several of the country's high courts had been comprised. The lawyers did not have the standing right to lodge such petitions, but the Supreme Court considered the issue of the utmost importance and therefore decided to rule on it anyway (Scheppele 2002, 259).

Barak, the former president of the Israeli Supreme Court and a law professor, developed a theory of "purposive interpretation". For Barak the aim of interpretation "is to realize the purpose for which the text was designed" (2005a, 93). He claims that the purpose of legal texts is the realisation of a social goal, such as human rights, equality or justice. He further argues that the interpretation of the constitution and the law is the judges' most important tool to safeguard democracy (Barak 2005a, 92). According to his view, the technique of purposive interpretation is the best means of interpretation in a democracy (Barak 2005b, 9).[17] Scholars working on Africa also consider a principled or purposive interpretation technique necessary for courts to enhance democracy (Harrington and Manji 2015, 176; Prempeh 1999). Therefore, I consider such constitutional court behaviour as functional for democratic elections if it adopts a principled and purposive interpretation technique. In contrast, constitutional court decisions that apply legalistic interpretation techniques are seen as being dysfunctional for democratic elections.

2.2.4 Theories of Court Behaviour

In this thesis, I seek to explore the repercussions of constitutional courts on the democratic quality of elections. In contrast to the bulk of studies in the field of Judicial Politics, I analyse constitutional court behaviour as an independent variable. Yet, I expect that my findings will provoke questions on why the constitutional courts behaved the way they did. A comprehensive answer to this question is beyond the scope of this thesis. Nevertheless, it can

[16] This quote is sometimes attributed to the former Brazilian authoritarian leader Getulio Vargas (Plummer 2005) and sometimes to the former Peruvian authoritarian president Óscar Benavides (The Economist 2012).

[17] He cautions, however, that purposive interpretation is not a suitable technique in totalitarian regimes, as this would imply the interpretation of the legal text in accordance with the will only of the totalitarian leader (Barak 2005b, 11).

be enlightening to discuss my findings against the backdrop of prominent theories of judicial politics. Therefore, I introduce three of them in this section to inform the discussion of my results in Chapter 6.

2.2.4.1 Formal Insulation

There are still ongoing debates about what role formal rules play for the independence of courts and their judges. Can rules be designed in a way that protect judges from undue political influence, and that empower them to perform as counterweights to the political branches of government? Rules for the appointment and removal of judges as well as for the configuration of their terms of office figure prominently among those considered paramount for the structural insulation of judges (Melton and Ginsburg 2014, 196; Popova 2012, 14; Ríos-Figueroa 2011, 29). Appointment rules stipulate who exactly has the power to select the judges that will sit on the bench. Term-length rules define how long judges will serve on the bench and whether they can be reappointed if they have not already been awarded life tenure. Removal rules prescribe if there is any legal leverage to get rid of judges before the official end of their term. Among these rules, appointment ones are particularly important as they offer a direct entry point for influencing the court – while term and removal rules present more indirect channels thereof. In Fombad's words: "The process of selecting judges, generally, is probably one of the most powerful and effective means that could be used by the other two branches of government to interfere with and influence the judiciary" (2014, 2).

Different mechanisms exist for the appointment of constitutional judges. Ginsburg distinguishes for instance between single-body, professional, cooperative and representative appointments (Ginsburg 2003, 43). The first mechanism vests one actor, for instance the president, with the power to appoint all constitutional judges. The second mechanism attributes the power to select judges to other judges. The third mechanism, of cooperative appointments, divides the appointment prerogative between two bodies. For instance, the president nominates judges that then require the approval of a super majority in parliament. The final mechanism, of representative appointments, distributes the appointments between a number of different bodies. Each of these can select a share of the constitutional judges independently. Thus each respective body does not require its appointment decision to be approved by another involved body.

The literature has so far not singled out one appointment mechanism as being the best one. There is, however, agreement that executive dominance of the appointment process or an overtly partisan appointment mechanism are detrimental to the independence of judges (Feld and Voigt 2003, 502; Ginsburg 2003, 42). Ginsburg considers appointments by a single body as inadequate for democracies because "if the president can appoint all judges, the presumption of effective constitutional constraint disappears" (2003, 44). Fombad sharpens this point even further, by stating that appointment only by the president "practically means that those who are most responsible for the abuse of powers have been given the decisive role in determining who will adjudicate over these abuses of powers" (2014, 18). As such, many authors consider appointment mechanisms that involve at least two appointment bodies to be more beneficial to judicial independence (Feld and Voigt 2003, 502; Herron and Randazzo 2003, 426; Horowitz 2006, 130, 132; Melton and Ginsburg 2014, 196; Ríos-Figueroa 2011, 29). Furthermore, these authors also deem the participation of the judiciary in the appointment process as being conducive to the independence of courts.

Empirical studies have generated scepticism about the influence of formal rules on the de facto level of judicial independence, however. Herron and Randazzo (2003) found that formal

rules of judicial independence are not related to the assertiveness of the courts' judicial review. Their sample comprised seven post-communist courts with constitutional review powers. Larger empirical samples confirmed a low correlation between de jure and de facto independence (Feld and Voigt 2003, 505; Ríos-Figueroa and Staton 2014, 2). Nevertheless, not all authors find that formal rules are completely meaningless for judicial independence. Hayo and Voigt present results indicating that de jure and de facto judicial independence may only weakly correlate, but that de jure judicial independence still has an important influence on the behaviour of courts (Hayo and Voigt 2007). Melton and Ginsburg discovered that in authoritarian regimes independence-enhancing formal rules on the appointment and removal of judges wield a positive influence on the de facto independence of courts. Turning to the African context, Fombad argues that appointment prerogatives for constitutional judges are of high relevance for African politicians because many African courts with constitutional review powers also adjudicate presidential elections and constitutional revisions (Fombad 2014, 3). Stroh argues, meanwhile, that the appointment of judges shapes the public perception of the respective court (Stroh 2016, 10).

2.2.4.2 Public Support as a Defence Shield

One approach to the study of judicial politics stresses the importance of public support for judicial independence and judicial power. This research is guided by the question of why courts sometimes dare to strike down executive preferences even though they are the weakest branch of government. Courts possess neither the purse nor the sword, thus they are dependent on the budget and the coercive implementation capacities of the executive and the legislative branches respectively. Theories of public support posit that courts can render bolder decisions if the level of public confidence in courts is high. In such a situation, the public protects the courts from non-compliance with their decisions or from other forms of interference (Staton 2006, 98–99; Vanberg 2001). This theory was developed and tested in reference to established democracies, however (Gibson and Caldeira 2003, 2). In the context of established democracies, the support for courts increases with the level of education about and awareness of the judiciary's specific principles and work (Benesh 2006; Gibson, Caldeira, and Baird 1998). Tests of the theory in less stable democracies have shown that the mechanism of judicial education works differently there. In unconsolidated democracies, more knowledge about the courts' work in fact leads to less confidence in the judiciary (Aydın and Şekercioğlu 2016; Salzman and Ramsey 2013).

Gibson and Caldeira observed in South Africa that courts need to actively build up their support base in new democracies, and that this endeavour may take some time (2003, 24). What strategies can courts opt for in order to build up their legitimacy? There are two options: confidence building through the court's decision making, and activities that Ellett and Trochev term "off-bench resistance" (2014). The first option draws on the idea that institutions enjoy higher levels of public confidence if they perform well (Aydın and Şekercioğlu 2016, 636). Performing well means the rendering of independent decisions and the enforcement of them. Epstein, Knight and Shvetsova (2001) posit that courts can increase their legitimacy and power if they choose cases strategically. They need to select cases in which they can demonstrate their independence without simultaneously alienating powerholders and the public. In the beginning, this is more viable with politically less salient cases. In these cases the courts do not risk a backlash through non-compliance with their decisions, because the cases are simply not important enough. Over time they can earn public confidence and dare to render assertive verdicts in more sensitive and important cases (Epstein, Knight, and Shvetsova 2001).

Thus, courts can stretch their discretion in decision making, or the "tolerance interval" as these scholars term it, over time through being strategic. The second option comprises a host of different strategies by which to reach out in order to increase public support. Widner described how Tanzanian Chief Justice Francis Nyalali built a support base for the country's judiciary. Nyalali was convinced that institutions were "made, not born" (Widner 2001, 392). Thus, the crafting of judicial independence would require bargaining with audiences outside the court. Nyalali reached out to courts abroad as well as to international donor organisations in order to acquire knowledge and financial support for administrative reforms in the judiciary, alongside legal training. He also initiated the establishment of regional networks of judges and lawyers. Furthermore, he sought to build domestic networks of legally well-trained, high-ranking officials in ministries and other government agencies in order to spread the idea of the rule of law throughout the policy process (Widner 2001, 393–395). Staton observed that judges of the Mexican Supreme Court pursue public relations strategies to raise the awareness of their work, and consequently support for it (Staton 2006). Ellett and Trochev meanwhile identified such strategies as making attacks against the judiciary public, organising public protests and building alliances with the bar association or transnational legal networks, in order to defend against any interference with the judiciary (2014). The authors illustrate these possible strategies with examples from across the globe.

2.2.4.3 Political Competition and Court Behaviour

Perhaps the most prominent theoretical strand for explaining judicial independence is that of strategic action, which focuses on competition being the explanatory factor for both the establishment and subsequent behaviour of courts. According to the classic theories of this approach, high levels of political competition enhance judicial independence because the fear of losing office creates incentives for incumbents to allow for an independent judiciary. An early version of the argument posits that independent courts protect the policies of politicians even after they have handed over power to the opposition (Landes and Posner 1975). Later versions advance the notion that independent courts protect incumbents against opposition attacks after their loss of power (Finkel 2008; Ginsburg 2003; Helmke and Rosenbluth 2009; Stephenson 2003). Therefore, the risk of losing office motivates incumbents to grant judicial independence – because courts serve as a form of insurance for politicians. From a different perspective, courts have more incentives to pursue independent decision making if electoral turnover is likely because they can likewise demonstrate their independence to the opposition – which in turn may prevent retaliatory measures once the latter ascends to power. In other words, courts strategically defect so as to appease future powerholders (Helmke 2002).

This theory has been tested in different world regions. Ramseyer shows in a comparison of Japan and the USA that the prospect of power alteration and the expectation that elections will continue does positively influence judicial independence (Ramseyer 1994, 722). Other scholars observe that increasing competition during democratisation fostered judicial independence in Argentina and Mexico (Chavez 2004; Helmke 2005; Magaloni 2008; Ríos-Figueroa 2007). Ginsburg adapts the insurance theory to the period of constitutional design in Asia, and finds that under conditions of high electoral competition more independent constitutional courts were adopted (Ginsburg 2003). In francophone West Africa meanwhile, more competition during the design stage led to stronger deviations from the French blueprint – and consequently to the emergence of more independent constitutional courts (Stroh and Heyl 2015).

At the same time, scepticism about the explanatory power of the insurance theory has grown. One critique of the strategic action theory is that it theorises the relationship between powerholders and courts too thinly (Hirschl 2004b; Staton 2004; Vanberg 2000; VonDoepp 2009; VonDoepp and Ellett 2011; Whittington 2003). Accordingly, the classic accounts conceptualise the incentive structure for political leaders in an overly simplistic manner, leave out important explanatory factors like public support for the judiciary and misconceive courts as passive bodies that do not act strategically themselves. Another critique questions the scope conditions of the insurance theory. Such authors assume that political competition either cannot fully explain court behaviour, or it at least has a different effect in third-wave regimes (Larkins 1998; Popova 2010; Tate 1993; VonDoepp 2009). VonDoepp argues that the incentive structure for African leaders depends on their personal insecurities, in other words on what incumbents have to lose in terms of wealth and personal security if they lose office, as well as on how judicialised politics are and how assertively courts make judgements (2009). Popova (2012) posits that in hybrid regimes political competition has the opposite effect to the one asserted by the insurance theory. This means that high political competition reduces judicial independence in hybrid regimes because powerholders face lower costs and higher benefits of pressuring courts in these settings.[18] The costs of pressurising courts are lower because informal mechanisms for that inherited from the former authoritarian regime may still exist. Furthermore, a weakly organised civil society and media sector have low capacities to organise public blaming for such pressure. Under conditions of high electoral competition, courts can be a useful instrument to un-level the playing field and increase the chance of staying in power (Popova 2012, 35–38).

While the insurance theory has been developed and tested predominantly in small- or medium-N studies, more recent ones tested the theory with large-N designs. The results of these differ. Randazzo, Gibler and Reid (2016) find that competition has a positive effect on judicial independence. This effect is stronger in full democracies than it is in partial democracies. There is, however, no negative relationship between political competition and judicial independence in authoritarian regimes. These results resemble those of Epperly (2017) too, which show that competition enhances judicial independence in authoritarian regimes. Their findings contradict, however, Aydin's (2013) that competition in full democracies fosters independent courts whereas it hampers judicial independence in developing democracies. In Chapter 6, I will discuss how helpful these theories are to explain constitutional court behaviour in the cases of Madagascar and Senegal and what my cases teach us about these theories.

2.3 Elections

Electoral matters serve as an example for the study of constitutional courts' democratic repercussions in African electoral democracies. Elections are a suitable field for this endeavour because they form a core element of democracy concepts (e.g. Beetham 1994; Collier and Levitsky 1997; Coppedge and Gerring 2011; Dahl 1971; Merkel, Puhle, Croissant, Eicher, and Thiery 2003; Schumpeter 1974). Moreover, elections have high political relevance because they (should) decide on the distribution of political power (Finkel 2003, 780–781). The holding of elections is not a privilege of democratic regimes; they also occur regularly in competitive or electoral authoritarian regimes too (Levitsky and Way 2002, 2010; Schedler 2013). There are many ways in which elections can fall short of democratic

[18] Popova developed her theory for regimes that are neither consolidated democracies nor consolidated authoritarian regimes (Popova 2012, 26).

standards. In this section, I develop a conceptual framework for determining the democratic quality of elections. Before I turn to that framework, I first define what elections are and on what kind of them I will focus.

Lindberg defines elections narrowly as "one of many ways of choosing leadership and disposing of old governments in a political system" (2006, 22). This definition can be specified as follows: elections are one of many ways to assign executive and legislative offices, as well as to distribute power. Other ways of determining or acquiring leadership are for instance coup d'états, hereditary monarchies, appointment by superior authorities, rotation or lottery systems. Elections imply that a certain number of people are involved in the mechanism of choosing leadership. Elections can take place on different state levels, such as the national, the regional and the local. I focus here on national executive and legislative elections.

2.3.1 The Democratic Quality of Elections

This work is led by an interest in democratisation. However, if elections take place in a wide array of regimes it is necessary to first define what makes an election "democratic". One way to define the democratic character of elections is to view them as "instruments of democracy" (Powell 2000). Instruments serve a certain purpose; instruments of democracy serve the purpose of democracy, then. Van Ham, as well as Lindberg, specifies what qualities elections need to fulfil, or what purposes elections need to serve, in order to qualify as democratic ones. According to Van Ham, elections need to "generate accountability and responsiveness" to serve as an instrument of democracy (2012, 24). Elections need to link citizens to their representatives in government, transmit the citizens' preferences to those representatives and to motivate them to implement the citizens' preferences. Furthermore, citizens need a mechanism to sanction politicians for non-compliance with their preferences, thus to hold them accountable (Van Ham 2012, 23–24). Lindberg also considers the realisation of self-government as the main function of democratic elections. Elections are "an institutionalized attempt to actualize the essence of democracy: rule of the people by the people" (Lindberg 2006, 1). Three qualities are necessary for elections to achieve this goal of self-government: participation, competition and legitimacy. Lindberg derived these qualities from Dahl's (Dahl 1971) concept of democracy, while adding the further dimension of legitimacy.

I apply Lindberg's approach here because it has several advantages for this project. First, Dahl's concept of democracy is one of the most widely used ones in empirical research on democracy. Its attractiveness stems from its applicability to a variety of contexts; in other words, it is a concept that travels well across world regions. Second, this work is concerned with if and how constitutional courts make elections more democratic – and not with the influence of the electoral regime on the whole democratic one. Lindberg's concept of the democratic quality of elections allows such a focus, while van Ham developed her concept specifically to measure the influence of the electoral regime on the democratic one.[19] In the following, I introduce the three qualities of democratic elections more extensively.

2.3.1.1 Participation

When democracy means the right to self-government, modern democracies in territorial states face severe problems. Democracy was invented in the small city-state of Athens, in which all citizens could indeed participate in self-government. In contrast, modern states are

[19] It should be noted that Lindberg also analyses the influence of elections on other democratic qualities in a second step, more precisely on civil liberties (Lindberg 2006).

huge with millions of citizens. These dimensions make the direct contribution of all citizens to self-government simply unfeasible. This dilemma is solved by the idea of representative democracy (Powell 2000, 1). Consequently, the right to self-government is delegated to a given government. This government needs to be responsive to the preferences of its citizens in order to be part of a democratic polity. Responsive government is only possible if citizens express preferences, and that expression can only be achieved through participation. Dahl stresses that this responsiveness of governments requires the equal weighting of preferences, thus a government should not only respond to the preferences of selected groups or sectors society but also to a broad array of preferences (Dahl 1971, 2).

Participation can theoretically be expressed through different channels. However, the classic mechanisms of participation and the core feature of representative democracy are elections for executive office and parliamentary seats. It is for this reason that this thesis focuses specifically on the participatory channel of national elections.

Dahl argues that participation in a democracy needs to be as inclusive as possible. Hence, democratic elections require universal suffrage. Further, participation not only has an active side in the form of casting votes but also a passive one too – namely the candidacy for democratically elected offices (Dahl 1971, 3). However, in this study I subsume under participation only its active variety because the idea of passive participation is closely related to that of competition. For analytical clarity, I analyse matters of candidacy within the category of competition then.

Participation rights can be legally provided for in the constitution. In this analysis, I only include those countries that have legal provisions of universal suffrage in force. There are, however, variations regarding to what extent these legal rights become effective. From a theoretical point of view, it is important to look also at the implementation of participation rights – because a lack of participation in elections results in unequal representation, and thus in a low quality of democratic government (Lijphart 1997, 1). I will explain in Section 2.3.2 more extensively how participation can be hampered in elections, but for now to the second quality of democratic elections.

2.3.1.2 Competition

Competition or contestation is the second dimension of Dahl's democracy concept (1971). Dahl posits that regimes differ in the "extent of permissible opposition, public contestation, or political competition" (1971, 4). Competition is weakened when Dahl's eight institutional guarantees are not granted to politicians that want to "contest the conduct of government" (Dahl 1971, 4). While participation is about expressing preferences so as to make government responsive, competition is about providing alternatives between which citizens can choose in order to better express their preferences within a representative democracy (Lindberg 2006, 31). In most representative democracies, political parties and their candidates compete for political offices and public policies. Competition is necessary and good for democracy (Altman and Pérez-Liñán 2002, 89), but there can also be too much of it. It is one of the three paradoxes of democracy that too much competition, and thus conflict, threats the stability and governability of the political system. Thus, competition and conflict need to be mitigated through political institutions and a culture of consensus (Diamond 1990).

In many new democracies, there is less concern about too much political competition but rather about too little. Important channels for competition are elections for executive and legislative offices. However, competition should continue after elections within the elected

bodies, like the parliament, so as to provide genuine choice vis-à-vis policies (Altman and Pérez-Liñán 2002, 89). As this work is concerned with elections, it consequently focuses on how competition evolves in elections. When talking about electoral competition, clarification about the difference between competition and competitiveness is necessary. Sartori stresses that competition and competitiveness need to be distinguished from each other. He defines competition as "*a structure*, or a rule of the game" and competitiveness as "*a particular state of the game*" (Sartori 1976, 194, emphasis added by the author himself). While competition implies that a multitude of parties may exist and may contest the incumbent government in free and fair elections, competitiveness refers to the outcome of elections – it is present when "two or more parties obtain close returns and win on thin margins" (Sartori 1976, 194). This distinction highlights that a party may win repeatedly by high margins, even though fair competition was indeed possible. This is the case in dominant party systems. In such systems, the high winning margins reflect the will of the voter and are not due to the manipulation of competition. Dahl does not, however, split competition and competitiveness. He uses instead the terms "liberalization, political competition, competitive politics, public contestation, and public opposition" interchangeably (Dahl 1971, 4). Like Lindberg, I use the term "competition" – and a high level of competition means that free and fair competition for executive and legislative offices is possible. The relationship of competition to competitiveness will be further discussed in Chapter 3.

2.3.1.3 Legitimacy

Dahl (1971) posited that participation and competition are the core dimensions of democracy. While participation and competition make a regime democratic according to Dahl's definition, they do not make democracy last. Democracy also requires legitimacy: "To be stable, democracy must be deemed legitimate by the people; they must view it as the best, the most appropriate form of government for their society" (Diamond 1990, 49). Self-government becomes meaningless when the people do not consent to the idea of it (Lindberg 2006, 33). Since elections are a core mechanism of democracy, they also need to be considered as legitimate by the people.

There is an ongoing controversy in the scholarship regarding whether legitimacy (of power or democracy) should be conceptualised as simply being reflected in the people's views (empirical legitimacy) or if legitimacy requires instead the satisfaction of objective criteria, like compliance with rules (normative legitimacy) for example. Max Weber defined legitimacy "as the belief in legitimacy on the part of the relevant social agents" (Beetham 1991, 6).[20] Lindberg takes a similar approach: "As an attribute of democracy, legitimacy is in the eyes of the beholders dependent on the views of that country's people, political parties, and power elites" (2006, 33). Beetham states that legitimacy has three dimensions, including a normative one. It requires first, conformity to rules, second, justifiability of those rules through shared beliefs and, third, consent (Beetham 1991).[21]

I follow an empirical definition of legitimacy, like Weber and Lindberg, and consider elections as legitimate when the people and the political actors of the country in question consider elections to be the appropriate channel through which to choose political offices and to

[20] Weber also defined three types of legitimacy: charismatic, traditional and rational-legal (Weber 1921). This conceptualisation refers, however, to the sources of legitimacy or legitimate authority and not to the core meaning of legitimacy itself (Lindberg 2006, 32).

[21] Beetham criticises Weber's conceptualisation of legitimacy, and argues for the need to include independent and objective criteria for defining it (Beetham 1991, 4–15).

delegate self-rule. Legitimacy of elections requires consent on a general level and a specific one. Thus, people and political actors need to believe both that elections as such are the right channel and that a particular election was legitimate. At this point, I also refer to Beetham (1991) – because it is my assumption that the people and political actors involved will consider an election legitimate when the legal rules have been respected.

2.3.1.4 Evaluating the Three Qualities of Democracy

Having introduced the three dimensions of democratic elections separately, the question remains of how the three relate to each other. In fact, the answer to this has both theoretical and empirical aspects to it. To answer from a theoretical perspective, I turn to those scholars that developed the concept of the democratic quality of elections. Dahl clearly posits that competition and participation are both necessary conditions for democracy (Dahl 1971, 6, 8). This is what distinguishes his concept from Schumpeter's (1974) own minimalist one of democracy, in which competition is the most important feature. Dahl offers a typology of regimes according to the presence of the two dimensions competition and participation.[22] However, Dahl considers any move in a regime towards more competition and more participation to be a process of democratisation (Dahl 1971, 8). Lindberg does not offer an explicit discussion on how the three dimensions aggregate, and keeps them distinct. He notes nevertheless that participation, competition and legitimacy are necessary "for the realization of self-government" (Lindberg 2006, 34).

Hence, Dahl and Lindberg agree that the two or three dimensions respectively are necessary conditions for democracy. The theoretical question remains of whether during processes of democratisation any of the dimensions are more important than the others. In other words, if there is any sequence of the dimensions that is more beneficial to the enhancement of further processes of democratisation than others are. The literature currently does not offer answers to this question.

The question of how the three dimensions relate to each other and if there is a sequence among them is also, as noted, an empirical one. Bratton and van de Walle found in their analysis of African founding elections in the 1990s that official turnout rates varied strongly across countries, as did the level of competitiveness. Burundi achieved in its 1993 election an official turnout rate of 97.3 per cent, whereas in Burkina Faso in 1991 only 21.7 per cent of the official electorate cast their vote (Bratton and Van de Walle 1997, 208).[23] They further found that turnout rates were positively, strongly and significantly correlated to the level of electoral competitiveness (Bratton and Van de Walle 1997, 210). Thus, turnout was stronger when citizens had viable options between which they could choose and when the race was not dominated by only one candidate or party. After his examination of African second elections, Bratton concluded that "the biggest challenge in getting to democracy [...] is not so much the expansion of political participation as the introduction of genuine political competition" because leaders had curbed less participation than competition in the run-up to the elections (Bratton 1998, 63). Lindberg's analysis of elections between 1989 and 2003 confirmed these observations.[24] He assessed participation as comparatively high, when

[22] Accordingly, regimes in which neither participation nor competition are present are closed hegemonies, regimes that offer participation but no competition are inclusive hegemonies while regimes that have competition but no participation are competitive oligarchies (Dahl 1971, 7).
[23] The lowest turnout listed by Bratton and van de Walle occurred in Mali (16 per cent). This number is, however, difficult to compare because it was the participation rate of the eligible voters, while most other rates were the share of registered voters.
[24] Lindberg includes furthermore selected elections from the period 1969–1988.

taking the difficult socio-economic conditions for participation in most African countries into account (Lindberg 2006, 57). Furthermore, he observed that voter turnout increased the more elections that were held (Lindberg 2006, 90).

Lindberg considered the development of competition to be less impressive. In particular, in legislative elections ruling parties could secure a large share of seats due to electoral systems that inflate majorities (Lindberg 2006, 57). In his panel analysis of elections, he found that the level of competitiveness in presidential elections increased in third elections (Lindberg 2006, 90). Legitimacy was also gauged as deficient by Lindberg. The situation would be "far from a general acceptance of results" (Lindberg 2006, 69). The panel analysis did not show improvements to the extent of the acceptance of results, only the level of electoral violence decreased the more elections that were held (Lindberg 2006, 90).

To sum up, we have learned that all three dimensions are constitutive to the concept of the democratic quality of elections – but that they also each vary independently in the empirical reality of sub-Saharan Africa. On an aggregated level, there have been more constraints to competition and to legitimacy than to participation. Moreover, Bratton and van de Walle (1998; 1997) observed that the extent of participation was influenced by the extent of competition. This is an observation that confirms findings in the general literature on electoral participation (Blais and Lago 2009, 94). What do the theoretical considerations and the empirical findings imply for my own study of constitutional courts' contributions to the democratic quality of elections? The empirical findings suggest that constitutional courts have a stronger leverage on the democratic quality of elections if they enhance competition and legitimacy.

2.3.2 The Electoral Cycle

An important prerequisite for the democratic quality of elections is that the rules of the game allow for participation, competition and legitimacy. The constitution should, among other things, stipulate universal franchise, permit a plurality of parties and provide for the enforcement of these rights. However, contemporary political regimes do not differ that much in their formal rules for elections but rather in the implementation of these rights (Lindberg 2006, 7; Van Ham 2012, 21). Electoral rights of participation, competition and legitimacy may be incompletely implemented, erroneously implemented or outright deliberately manipulated. Organising elections requires enormous logistical effort and inaccuracies in this process are hardly evitable. Elections may, however, also be intentionally manipulated. The potential perpetrator has a whole "menu of manipulation" at his disposal for rigging elections (Schedler 2002a). Electoral irregularities are the entry point for courts. The latter are meant to arbitrate when political actors or citizens contest electoral irregularities.

In this thesis, I explore and analyse how constitutional courts perform when adjudicating on elections. To obtain a comprehensive picture of the courts' performance, an analytical framework that disaggregates elections and the potential entry points for courts is needed. The concept of the democratic quality of elections defines benchmarks for democratic elections, but it also does not provide an appropriate disaggregation of what enables or hinders an election to qualify as a democratic one. I turn to the literature on electoral integrity for advice on the conceptualisation of elections.

Van Ham distinguishes three aspects in which conceptualisations of electoral integrity differ. Scholars can conceptualise electoral integrity, first, either positively or negatively, second, by applying particular or universal criteria, and, third, by using a process- or concept-based approach (Van Ham 2015, 716). The concept of the democratic quality of elections is,

according to Van Ham's distinction, a positive, a universal and a concept-based one. It is a positive concept because it defines the positive norms that elections in a democratic regime shall fulfil. These norms are not case-specific, but are rather applicable to all elections in the world – which makes them universal. While concept-based conceptualisations of electoral integrity provide clear standards for the assessment of elections, process-based ones offer a more comprehensive and precise picture thereof (Van Ham 2015, 719). In modern political regimes, large parts of the adult population are usually called on to cast their vote in elections. Consequently the conduct of elections is a huge organisational and logistical challenge that requires a number of steps being taken, ones by no means confined to election day. Process-based conceptualisations of elections were developed to account for the complexity of electoral organisation. Some of these conceptualisations are more fine-grained than others. Mozaffar and Schedler distinguish, for instance, three levels of the electoral process: rule making, rule application and rule adjudication (Mozaffar and Schedler 2002, 8). Another comparatively approximate approach is to simply distinguish between the time before polling day, the polling day itself and the time after polling day (Elklit and Svensson 1997, 37). More fine-grained approaches define the various steps that are part of an electoral cycle that repeats itself in the case of every election (ACE The Electoral Knowledge Network 1998; Elklit and Reynolds 2005; Norris 2013b). For my exploratory goal, taking such a fine-grained approach is suitable.

Table 1. Electoral Cycle Conceptualisations

ACE	Elklit/Reynolds	Norris
1. Legal Framework	1. Legal Framework	1. Election Laws
2. Planning and Implementation	2. Electoral Management	2. Electoral Procedures
3. Training and Education	3. Constituency and Polling District Demarcation	3. Boundaries
4. Voter Registration	4. Voter Education	4. Voter Registration
5. Electoral Campaign	5. Voter Registration	5. Party and Candidate Registration
6. Voting Operations and Election Day	6. Access to and Design of Ballot Paper, Party and Candidate Nomination and Registration	6. Campaign Media
7. Verification of Results	7. Campaign Regulation	7. Campaign Finance
8. Post-Election	8. Polling	8. Voting Process
	9. Counting and Tabulating the Vote	9. Vote Count
	10. Resolving Election-Related Complaints, Verification of Final Results and Certification	10. Results
	11. Post-election Procedures	11. EMBs

Source: Author's own compilation (ACE The Electoral Knowledge Network 1998; Elklit and Reynolds 2005; Norris 2013b).

The electoral cycle consists of either eight or eleven steps depending on the authors, as I show in Table 1. The respective conceptualisations of the electoral cycle cover similar issues, but differ in the segmentation of the various steps. While Elklit and Reynolds, as well as Norris and her co-authors, defined a distinct segment for constituency boundaries, the electoral network ACE includes this task in the step of the legal framework. Norris and her co-authors divide electoral campaign issues into two segments, campaign media and campaign finance, whereas the other authors merged these aspects together into only one category. Obviously, the authors adjusted the electoral cycle to the necessities of their analysis. I defined in an iterative process an electoral cycle for my own analysis (Yom 2015). This means that I had the categories defined by the cited authors in mind when I looked through the constitutional courts' decisions. Aspects like voter education do not appear in these decisions, and it is therefore not meaningful for my analysis to design a distinct category for it. Neither is it useful to include a category on electoral disputes, since I use the electoral cycle to analyse these throughout the course of the whole electoral process. The electoral cycle for my analysis consist of six steps, as I display in Table 2.

Table 2. The Electoral Cycle

1. Electoral Legal Framework
2. Electoral Register
3. Registration of Candidates
4. Electoral Campaign
5. Voting
6. Processing of Votes

Source: Author's own composition.

While process-based conceptualisations capture well the complexity of the electoral process, they hardly spell out the democratic standards that will lead the assessment (Van Ham 2015, 719–720). I account for this shortcoming by combining the concept of the democratic quality of elections with the one of the electoral cycle. By bringing the democratic quality of elections and the electoral cycle together, I follow Van Ham's advice to combine process-based and concept-based conceptions of electoral integrity. I specify in the following section which of and how the democratic qualities of elections are at stake during each stage of the electoral cycle. Furthermore, I illustrate how participation, competition and legitimacy can be manipulated throughout the electoral cycle.

2.3.2.1 Electoral Legal Framework

At this stage, the rules of the electoral game are designed. These rules cover a large range of issues like franchise, electoral system, assembly size, district boundaries, electoral management bodies, procedures for voter and candidate registration, or procedures in the polling station. The electoral legal framework comprises different texts: the constitution, the general electoral law, electoral laws regulating concrete elections as well as decrees and orders that specify the regulations of the constitution and the electoral code. Furthermore, I subsume laws regulating electoral institutions like the electoral management body (EMB) – as well as the implementation and operation of EMBs – also as part of this segment.

The electoral legal framework serves as the baseline for participation, competition and legitimacy. These rules define to what extent participation and competition are formally possible in the electoral game, and thus whether elections have a chance at all to qualify as democratic. Furthermore, the legitimacy of elections is higher when the opposition accepts and trusts in electoral rules. Mistrust in the rules may prevent the opposition from participating in the electoral contest, or from accepting the results (Mozaffar and Schedler 2002, 11). The electoral framework is a convenient entry point for incumbents to tilt the playing field.[25] When incumbents have a strong legislative majority then they can easily amend electoral laws. Depending on a constitution's amendment rules, incumbents may also adjust those rules to their benefit. Consequently the electoral legal framework is often contested in new democracies and in sub-Saharan Africa, while opposition parties often push to reform the electoral legal framework and to adopt detailed rules regulating the electoral process (Hartmann 2007, 146).

In the following, I will give specific examples for rules that are crucial for participation, competition or legitimacy. First, the most important rule for participation is universal suffrage. In modern democracies it is common that adult citizens are entitled to vote. Attempts to narrow the electorate down can be considered manipulation of the legal framework. For instance, increasing the minimum age for voting can have a huge effect in societies with a high share of young people. Furthermore, excluding diaspora voters may also curb the influence of opposition voters (Hartmann 2015, 915). One way to legally manipulate active participation is to include "custom-made 'nationality clauses'" (Schedler 2002a, 42). These are rules introducing strict standards for the nationality of candidates, usually targeting the strongest potential challengers.[26] Moreover, rules that help to enable the people to vote on a more practical level are also crucial for participation. Provisions for the density of polling stations on election day or voter sensibilisation are two examples of such rules. Thus, their design can be also used to indirectly disenfranchise citizens.

Second, regarding competition, Mozaffar and Schedler consider rules about the electoral system, a district's magnitude and its boundaries, the assembly size as well as the electoral timetable to be ones of electoral competition (Mozaffar and Schedler 2002, 8). Moreover, rules concerning the registration of candidates or equal access to the media regulate the fairness of competition (Bland, Green, and Moore 2013, 365). For instance, the electoral legal

[25] Manipulating the electoral framework is considered an attractive instrument by incumbents because it does not involve high financial and logistical costs, and is also less easy to detect (Van Ham and Lindberg 2015, 526).

[26] For example in 1996 the Beninese National Assembly tried to introduce a constitutional clause that prohibited presidential candidates with dual citizenship from running; this clause was tailored specifically to then-incumbent Nicéphore Soglo, who also held French citizenship (Bolle 2009, 85).

framework can regulate how much time is allocated to each party for electoral advertising in the state media.

Competition can be manipulated through the design of the electoral system for legislative elections. Not only does the type of electoral system (majoritarian, proportional representation or combined systems) matter for its effect, but also so do which specific technical rules are designed for the implementation of it. The size of the constituency, the form of candidacy as well as the formula for converting votes into seats are important elements of these rules (Hartmann 2007, 147). For instance in the 1997 Kenyan legislative elections, district boundaries were drawn in such an unequal manner that the incumbent party won the majority of the seats even though it won only 40 per cent of the vote (Schedler 2002b, 107).

Third, the foundation of a legitimate electoral process is the overall legal framework in place. The electoral framework may comprise rules that additionally foster the legitimacy of the electoral process by creating institutions that oversee the fairness of the electoral process. Such institutions can be media commissions or electoral courts. Furthermore the legitimacy of elections can be influenced by the administration or management of them, because this work influences how citizens and political actors experience the electoral process (Elklit and Reynolds 2002, 88). Electoral management involves various steps like administering the registration of candidates, printing ballot papers, educating voters, overseeing the electoral campaign, staffing and equipping polling stations, admitting electoral observation, transporting the votes cast and the like. These tasks can be assigned to either a single unit or can be distributed to several different organisations. Furthermore, the unit that is in charge of the majority of electoral management tasks can be located either within formal government institutions or outside of these.

Mozaffar (2002) identifies three institutional locations of electoral management: 1) within the formal government bureaucracy, for instance within the Ministry of the Interior; 2) within the formal government bureaucracy, but its work is overseen by an external body; and, 3) outside of the formal government bureaucracy completely. In such cases usually a specific body, an independent electoral commission, is created specifically for this purpose. The last institutional configuration, outside of formal government, is considered to be the most autonomous one (Mozaffar 2002, 90–91). In the literature it is widely assumed that independent electoral commissions in particular increase the legitimacy of the electoral process (Birch 2008, 308; Lehoucq 2002, 31; Van Aaken 2009, 299; Rosas 2010, 77).[27] Apart from the institutional location, factors like the appointment and tenure of commission members, as well as the budget process, are considered to influence the level of trust in the electoral process (Van Aaken 2009, 299; Birch 2008, 308; López-Pintor 2000; Rosas 2010, 78).

The autonomy of the EMB can not only be influenced at the rule-making stage, but also the de facto operation of the EMB can be influenced in a variety of other ways too. Political actors can use two strategies to influence the work of an EMB. They can try to influence the members of an EMB to the extent that they take decisions in the management process that favour the respective political actor. This can be done through influencing the appointment

[27] Birch found that elections are perceived as less free and fair in countries with autonomous EMBs. However, it is not clear whether autonomous EMBs are particularly present in countries with low levels of trust in the electoral process (Birch 2008, 313).

process in favour of loyal members, or by pressuring the EMB members.[28] Another option is to impede the work of an EMB by altering the allocation of the resources like financial budget or practical materials necessary for the management or supervision of elections. Furthermore, the executive can block the access to important sources for electoral supervision. For instance the access to the electoral register can be denied. The electoral register is also the next part of the process, discussed below.

2.3.2.2 Electoral Register

The process of establishing and maintaining the electoral register, as well as the distribution of electoral cards or similar documents, is captured in this step. For the conduct of elections the identification first of eligible voters is necessary. For this purpose the civil registry can be used, or a separate electoral register can be established. Most countries in sub-Saharan Africa do not have efficient systems of civil registration in place. In the countries of my universe of cases, the civil registers cover between 31 per cent of the population in Mozambique and 89 per cent in Djibouti according to the estimations of the United Nations (Piccolino 2016, 4–5). Consequently, separate electoral registers are established and in most sub-Saharan African countries this involves an active registration of the voters in the electoral roll – this means that citizens need to appear in person at a registration centre (Evrensel 2010, 22). For the identification of the voters on election day citizens receive voter cards, which carry information on the voter and their polling station (Evrensel 2010, 32).

The democratic dimension of participation implies that all eligible citizens should be able to vote, and that the right to vote is equally exercised – and, as such, that every vote carries the same weight (Elklit 1999, 44; Schedler 2002a, 39). Electoral registers and electoral identification cards are specific instruments to implement the right to equal participation. The electoral list allows control over who is eligible for voting on election day, and helps to avoid multiple votes being cast by a single voter. While the constitution and the electoral law provide the legal provisions about who has the right to vote, the electoral register guarantees on a technical level that all eligible citizens are actually able to vote in practice. A reliable electoral register needs to fulfil three criteria: comprehensiveness, currency and accuracy (Piccolino 2016, 3). Comprehensiveness means that all eligible voters are registered on the voters' roll. Currency implies that the register is regularly updated, thus excluding citizens that are no longer eligible because of death, criminal punishment or moving away while including those citizens that have now reached the legal age to vote. Accuracy refers to the correctness of information on the voters, and the absence of multiple entries for each (Evrensel 2010, 10–12; Piccolino 2016, 3). It should be noted that a trade-off exists between the principles of accuracy and comprehensiveness, because the more procedures that are invented to ensure the accuracy of the register then the more complicated the registration process becomes. That may require further centralisation of the process, and creates greater obstacles to voter registration (Piccolino 2016, 6). A reliable electoral register enhances the distribution of electoral identification cards. Similar to with the registration process, these cards should be as accessible as possible so as to enable citizens to vote.

[28] The extent to which this can be done depends on the formal appointment rules in place. Influence on incumbents is high when the executive is able to appoint a high share of EMB members. In cases where consultation processes for the appointment are stipulated, these can be bypassed. The possibility of influencing EMB members is similar to those of influencing judges. It entails direct (e.g. threats of violence) and subtle (e.g. unofficial communication) types of interference (Llanos, Tibi Weber, Heyl, and Stroh 2016, 5).

The electoral register and the distribution of electoral identification cards provide opportunities for electoral manipulation too, however. The comprehensiveness of the electoral register can be manipulated by installing less accessible registration centres in opposition strongholds, or by opening such centres only unreliably. The current-ness of the electoral register can be constrained by not conducting regularly the update procedures, or by not supplying sufficient staff and material for this task. Finally, accuracy can also be intentionally undermined by inserting double entries or phantom voters. Such inaccuracies allow for the distribution of several electoral identification cards to a single voter, which in turn makes multiple votes possible of course.

2.3.2.3 Registration of Candidates

The electoral legal framework defines the criteria for eligibility in legislative and presidential elections. A prerequisite for competition is that a number of candidates vie for office. For this purpose, candidates need to register and their candidacy needs to be verified. This step focuses on the implementation of the registration procedures, and on the application of the eligibility rules.

Electoral candidates need to file their registration with an administrative body. This may be the Ministry of the Interior, the electoral commission or a judicial body. Apart from fulfilling the eligibility criteria of age, citizenship or residency status, paying deposits and providing lists with supporters' signatures may additionally be required for successful registration as a candidate. The responsible administrative body then needs to verify if the candidate in question satisfied all legal and procedural requirements. In sub-Saharan Africa, the verification and publication of the list of candidates may also involve the attribution of symbols and colours to each. These can then be used for the electoral campaign itself, and are printed on the ballot paper. Due to high illiteracy rates, this aspect bears high importance (Meledje 2009, 146).

The registration of candidates is crucial for ensuring competition. Free competition requires the accessibility of the relevant administrative body, and the transparent communication of deadlines and requirements. Moreover, free competition necessitates that the rules are equally interpreted and applied for all candidates across the board (Bland, Green, and Moore 2013, 367; Bolle 2009, 88).

Manipulation at this stage of the electoral cycle needs to be channelled through the administrative body that receives and verifies the prospective candidacies. The staff of these bodies need to be persuaded to apply the rules unfairly, for instance by counting and verifying the signatures of opposition candidates more rigorously or by assigning popular colours and symbols to the incumbent official. Techniques and instruments for influencing administrative staff can be similar to those potentially applicable vis-à-vis EMBs.

2.3.2.4 Electoral Campaign

The electoral campaign is the phase in which the candidates and their parties publicly compete for votes. There is a wide repertoire of electoral campaigning; it can be done for example through public rallies, personal meetings, the distribution of campaign materials or through advertisements in the street – and more importantly in the media. An effective campaign requires having a substantial financial budget.

In the stage of the electoral campaign the democratic quality of competition is at stake. Fair competition requires that parties and candidates can openly compete for votes, as well as a level playing field. This means for example that all competing parties should have equal

access to the media for their advertisements and the coverage of their programmes and activities (Elklit 1999, 45). This equality vis-à-vis competition should be regulated by a public institution (Elklit and Reynolds 2002, 142).

Fair competition during the electoral campaign can be undermined by a number of measures. It is a universal phenomenon that incumbents enjoy certain advantages during the electoral campaign. They are usually better known to the public, have previously been able to demonstrate their policies in action and can attract financial resources for campaigning more easily (Maltz 2007, 132–133). This advantage is hard to overcome, also in consolidated democracies (Ansolabehere, Snyder, and Stewart 2000; Weisberg 2002). However, fair competition is seriously threatened when incumbents use public resources (e.g. transportation, offices and employees) for campaign purposes (Elklit 1999, 45; Helle 2016, 10). Furthermore the state media can be used for biased reporting, for instance by extensively covering the incumbent's political activities. The media can also be used for negative campaigning, thus for communicating information on other candidates that damages their reputation and that may even have been entirely made up (Schedler 2002b, 108–109).

2.3.2.5 Voting

The act of casting votes in presidential and legislative elections usually takes place on a distinct day. The common means of voting is through casting votes at polling stations. Thus, on election day polling stations have to be created across the country. This is a logistical challenge, as all polling stations need to be equipped with electoral materials like ballot papers, attendance sheets, voting booths and ballot boxes. In addition, polling stations need to be staffed with electoral workers. In the polling station several steps of the voting process have to be undertaken, like voter identification, ballot paper distribution, voting and the casting of the votes for a large number of people. The majority of sub-Saharan African countries allow their emigrant citizens to cast their votes (Hartmann 2015). In these cases, voting has to be additionally organised in foreign countries.

While in the previous stages of the electoral cycle the conditions for participation were organised, participation itself is exercised on election day. Competition is also at stake on election day, because any undue influence exerted on the voter disturbs their exercising of free choice between competing parties and the fair conditions for this contestation. Therefore, the secrecy of the ballot safeguards both participation and competition simultaneously (Elklit and Svensson 1997, 37).

Equal participation can be manipulated through blatant measures like voter intimidation, which prevents particular voters from casting their votes or alternatively pressurises citizens into voting for a certain candidate. More subtle measures, meanwhile, are the incorrect keeping of the polling station's attendance sheet, the use of removable ink or the non-control of electoral cards. Such practices allow for multiple votes being cast, which in turn violates the principles of equal participation and fair competition.

2.3.2.6 Processing of Votes

The last stage of the electoral cycle is about maintaining the quality of participation and competition that has been attained in the previous stages. Votes are counted, transported as well as tabulated and the results of the elections are announced in this part of the electoral process. After the closure of the polling stations, the election results have to be ascertained and announced. This is usually done in several steps. In the first, votes are counted at the respective polling station. Before this can happen, invalid ballot papers have to be identified.

Then, the results of the polling stations are tabulated, thus counted together at several administrative levels. The number of administrative levels at which the results are tabulated depends on the particular country. In order to be tabulated, the results must be transmitted from the polling station via the next administrative levels to the national level. This transmission not only includes the result sheet as such but also the ballots themselves for the potential verification of the results. For legislative elections, the number of votes for a party needs to be transformed into the number of assembly seats that have been won by the respective party. The votes are transformed according to the electoral formula in force. At the national level first provisional results are announced, and later, after verification, the final results follow.

It is obvious that all these steps provide entry points for last-minute electoral manipulations. Inconvenient votes may be hidden or destroyed, votes may be counted twice or misinterpreted and ballot boxes may be stuffed with manipulated ballot papers. During the transportation stage, ballot boxes may be stolen or replaced – while the tabulation of votes allows also for intentional miscalculations. Therefore, vote processing is also crucial for the legitimacy of the electoral process – in particular among political actors. Legitimacy can be enhanced through monitoring of the counting, transport and tabulation stages by party agents and electoral observers (Elklit 1999, 46).

Table 3. The Democratic Qualities of Elections Along the Electoral Cycle

Stage of Electoral Cycle	Democratic Quality at Stake
Electoral Legal Framework	***Participation:*** Design of rules permitting equal participation (e.g. universal franchise, regulations on voter sensibilisation, density of polling stations). ***Competition:*** Design of rules permitting fair competition (e.g. electoral system, electoral campaign rules, rules for candidate registration). ***Legitimacy:*** Legal framework serves as baseline for legitimacy, design as well as the implementation of watchdog institutions enhance legitimacy.
Electoral Register	***Participation:*** Comprehensive and accurate electoral register enables citizens to participate and to have their votes equally weighted.
Registration of Candidates	***Competition:*** Uniformly implemented rules and transparent procedures enable fair competition between potential candidates.
Electoral Campaign	***Competition:*** Equal access to the media, equal conditions for campaign events and containment of the incumbency advantage enable fair competition.
Voting	***Participation:*** Accessible polling stations, implementation of secret and equal ballots permit equal participation. ***Competition:*** Policing of electoral campaign stop and non-intimidation of voters as well implementation of secret and equal ballots are crucial for ensuring fair competition.
Processing of Votes	***Participation:*** A transparent and accurate counting and tabulation process maintains equal participation. ***Competition:*** A transparent and accurate counting and tabulation process maintains equal competition. ***Legitimacy:*** A transparent and accurate counting and tabulation process supervised by party agents and election observers increases legitimacy.

Source: Author's own composition.

2.3.2.7 Evaluating the Electoral Cycle

So far, I have elaborated the different stages of the electoral cycle and explained how the democratic quality of elections is affected throughout the electoral process. I have not discussed whether any stage of the electoral cycle is more important or more prone to manipulation than the other ones. The very purpose of the concept of the electoral cycle was to sensitise election observers to how not only the polling and the processing of votes as such is important for the quality of elections but that the various necessary steps before election day also need to be taken into account for a proper assessment. Elklit stresses that "election quality is not achieved by concentrating on election day activities only" but that "what goes on before polling day is the main key to both success and failure" (1999, 35).

Whereas this position was derived from vast experience of election observation, several scholars have conducted systematic studies of the prevalence of manipulation at different stages of the electoral process (Birch 2011; Grömping and Coma 2015; Simpser 2013; Van Ham and Lindberg 2015). The results of these studies differ regarding how strongly the pre-electoral period, and in particular the registration of voters, was manipulated in sub-Saharan Africa. However, these studies also differed in their variables, sample size, period of coverage, data sources and measurement units. Simpser found that pre-electoral manipulation occurred more often in sub-Saharan Africa than election day manipulation did (Simpser 2013, 51). This finding confirms the observations by Elklit. Birch found, however, that in sub-Saharan Africa manipulation efforts where more often targeted at vote choice rather than at the legal framework. Manipulations to the legal framework take place before the poll, while the manipulation of vote choices also occurs on election day itself (Birch 2011, 69). However, Birch's data does not carry much validity for sub-Saharan Africa since only 19 elections were included in her cross-regional dataset (Birch 2011, 48). In contrast, Simpser's sample comprises 218 African elections in the period between 1990 and 2007.

Nevertheless, Simpser's, Birch's as well as the Electoral Integrity Project's (EIP) findings all agree that irregularities in the electoral register were widespread. According to Simpser, obstacles to voter registration occurred in 61 per cent of African elections and belong together with voter intimidation before and during the poll as the two biggest problems faced (Simpser 2013, 51). Birch also found that manipulations of the electoral register score high on her index, as do the abuse of state resources and uneven media coverage (Birch 2011, 48). Grömping and Martínez I Coma, relying on the Perceptions of Electoral Integrity Index, gauged that problems with voter registration, with financing and with media coverage of the campaign are the three most serious problems in sub-Saharan Africa (2015, 23). Their sample comprises, however, only expert perceptions on elections held in 2012, 2013 and 2014, those in 28 African countries (Grömping and Coma 2015, 37). In contrast, experts of the VDem dataset assessed that in only 38 per cent of the 284 coded African elections (1986–2012) did problems with the electoral register occur. Vote buying and constraints to the independence as well as the capacity of electoral management bodies were the most prevalent manipulation strategies (Van Ham and Lindberg 2015, 532). Thus their findings also point to a vulnerability of the pre-electoral phase, as their three main problems – the independence and capacity of EMBs, as well as vote buying – are mainly relevant prior to the actual election day.[29]

The empirical research thus suggests that the pre-voting stages are important for electoral integrity, even if there is no clear-cut evidence available in answer to the question of which

[29] Only vote buying is also a problem of the poll itself.

stages of the electoral cycle are the most manipulated ones. However, I have also discussed in Section 2.3.1.4 if certain qualities of democratic elections are particularly vulnerable in sub-Saharan African elections. According to these studies, the democratic qualities of competition and legitimacy are particularly at risk. Therefore I assume that the stage of the electoral legal framework, the registration of candidates and the electoral campaign require particular protection, because in these pre-voting stages competition and legitimacy are at stake. However, the empirical evidence on the electoral cycle indicates also that the electoral register is a frequent site of irregularities. Therefore, I consider this stage also as important – but less so than the previously mentioned ones.

2.4 Constitutional Courts and Elections

In the previous section, I explained what qualities are necessary to make elections democratic and demonstrated how these are continuously at stake along the electoral cycle. If irregularities and manipulations can occur at every stage of that cycle, it means also that contestations of these deviations can materialise throughout the process too (Masclet 1998, 37; Orozco-Henríquez 2010, 19). Therefore, the adjudication of electoral disputes can be an important contribution to safeguarding democratic elections. This is an assumption that has been put forward by a number of authors already (Birch 2011, 20; Diamond 2002, 29; Elklit 1999, 46; Helle 2016, 8; Masclet 1998, 33; Mozaffar and Schedler 2002, 12; Norris 2017; Van Aaken 2009, 306, 309; Van Ham 2012, 126; Van Ham and Lindberg 2015, 527). The authors differ in how precisely they theorise the positive relationship between electoral dispute resolution and electoral integrity. Some simply state that an independent judiciary or the impartial settlement of electoral disputes is necessary for elections to be free and fair (Birch 2011, 20; Diamond 2002, 29; Elklit 1999, 46; Helle 2016, 18; Masclet 1998, 33).

Van Ham describes the effect of courts more precisely: an independent adjudication of electoral disputes increases the costs of electoral fraud, and consequently influences whether actors decide to manipulate elections at all or in what kind of fraud they choose to engage (Van Ham 2012, 126). Lindberg suggested a different direction for the relationship between courts and elections. Accordingly, the introduction of multi-party elections offers courts (and the security sector) opportunities to distinguish themselves by undertaking pro-democratic actions. Thus multi-party elections change the pay-off structure so that anti-democratic behaviour is no longer rewarded, and contribute through such mechanisms – like the one described between elections and courts – to the democratisation of the overall political regime (Lindberg 2006, 114). Other scholars position the role of courts within a system of electoral governance. Mozaffar and Schedler identify electoral adjudication in their conceptualisation of electoral governance as being the last important trigger for electoral integrity:

> *"The resolution of electoral disputes represents the concluding act of electoral contests. Failure at this final stage may ruin any advances made at prior stages. Controlling the judges can be the easiest way of controlling electoral outcomes. But the reverse is true as well. When the election management founders, electoral conflict adjudication may still provide an institutional safety-valve. Organizational failures may be "redeemed" by judicial actions that resolve complaints fairly and expediently" (Mozaffar and Schedler 2002, 12).*

Van Aaken, states similar to Mozaffar and Schedler, that dependent courts can threaten the achievements of de facto independent EMBs (Van Aaken 2009, 306). Norris, meanwhile, considers a three-step sequence of transparency, accountability and compliance as important

for electoral integrity. Accordingly, courts are an element of horizontal accountability within the state that can improve electoral integrity. This check is particularly necessary if the EMB is influenced by the executive (Norris 2017, 5, 10, 18). In a similar vein, Birch and Van Ham assume that independent courts as well as the media or civil society organisations influence electoral integrity. Furthermore, courts as well as the other mentioned factors can outweigh any failures of electoral management (Birch and Van Ham 2017, 488). Birch and Van Ham test their assumptions also empirically. Van Ham found in 2012 that judicial independence has a positive influence on electoral integrity (2012, 147, 156–159). These findings were confirmed in the aforementioned study by Birch and Van Ham, in which they gauged in an extended sample that an independent judiciary contributes positively and significantly to electoral integrity (Birch and Van Ham 2017, 495, 497).

Even though the above-cited authors differ in the precision of their theoretical assumptions, they have in common that they adopt a rather general view on the role of courts in elections. Their theoretical assumptions are underspecified in several ways, however. They do not differentiate which kinds of court should engage in electoral dispute resolution, and they do not spell out at what stage of the electoral cycle courts shall intervene – nor, indeed, in which ways, so as to enhance the democratic quality of elections. In the following, I will thus concentrate on addressing these unanswered key questions.

2.4.1 Which Courts for Democratic Elections?

Polities provide different institutional architectures to regulate electoral disputes. International IDEA identifies four institutional areas to which electoral dispute resolution can be attributed. Electoral disputes can be resolved by legislative, judicial, electoral management or ad hoc bodies. Within the judicial branch, regular, administrative, specialised electoral or constitutional courts can be responsible for handling electoral disputes. In most polities electoral dispute resolution is attributed to several different institutions (Orozco-Henríquez 2010, 60). International IDEA also provides an analysis of the advantages and disadvantages of the different institutional arrangements. Accordingly, the systems potentially differ in how close the referees are to the political sphere, how much the rule of law is integrated, how timely a manner they can react to the challenges and in their reputation. From this perspective, CCs can contribute to the legitimacy of electoral dispute resolution "given the high rank, usual prestige and professional capacity of its members" (Orozco-Henríquez 2010, 133). Furthermore, CCs can guarantee the recognition and respect of constitutional principles in the electoral dispute resolution. The potential disadvantages of the involvement of CCs are time constraints when they serve as appeal courts and their possible politicisation in emerging democracies. International IDEA states that it depends on the specific context of each country how the potential advantages and disadvantages develop and influence the quality of electoral dispute resolution (Orozco-Henríquez 2010, 133–134).

Mazmanyan theorises that CCs are better suited for the upholding of electoral integrity, because they have the tendencies to render less formalistic rulings, to refer more often to international standards in their rulings and to integrate constitutional norms in the electoral jurisprudence (Mazmanyan 2017, 2). The reference to international standards is important, because electoral integrity is defined in international treaties and declarations such as the Universal Declaration of Human Rights or the UN International Covenant for Civil and Political Rights (Norris 2013a, 2014, 23; United Nations 1966). A less formalistic jurisprudence rather respects universal values and fundamental principles than a technical

interpretation of the letter of the law (Mazmanyan 2017, 7). Mazmanyan finds support for his theory in an analysis of court rulings in electoral matters in Armenia, Azerbaijan and Moldova.

Broader empirical examinations of the effects of the different institutional arrangements are pending. Thus we do not know if, for instance, ordinary courts or constitutional courts adjudicate electoral disputes in a more democratic manner. Moreover, Masclet pointed to the question of whether the concentration of electoral adjudication competences in one court or the spreading of those competences across several courts is more beneficial for upholding democratic elections (1998).

In this thesis, I focus on the influences of constitutional courts on elections and I am therefore not concerned with the question of the best institutional arrangement. The above discussion had the purpose to illustrate that theories about the positive effect of courts on elections have been rather general in nature so far. Furthermore, I have shown that some authors regard constitutional courts as having certain advantages in the adjudication of electoral disputes.

2.4.2 Timing of Electoral Adjudication

Another open questions remains: When shall courts intervene into the electoral process? I mentioned above that disputes can occur at every stage of the electoral cycle (Norris 2014, 33; Schedler 2002b, 122; Van Ham and Lindberg 2015, 525). Studies on the prevalence of manipulation strategies have shown that the stages of the electoral cycle before voting day are crucial for electoral integrity. Therefore, an electoral jurisdiction should also be entitled to punish irregularities at these stage. There is, however, a difference whether irregularities are contested immediately or after the conclusion of the respective stage of the electoral cycle. For instance, any shortcomings in the electoral register may be challenged before the votes are cast. In such a situation, the challenge can lead to the correction of these shortcomings. In contrast, problems with the electoral register may also be contested after the poll, once the credibility of the result has been certified. Then, the electoral register cannot be redressed anymore for the concerned election and so the irregularities need to be sanctioned by other means.

International IDEA states that an effective electoral justice system needs to respond immediately to irregularities. Alleged manipulations should be challenged during the electoral cycle in which they occur and not afterwards, because otherwise the electoral process can be destabilised and the results may require cancellation (International IDEA 2010, 9). Masclet similarly argues that irregularities in the pre-voting stage should be adjudicated before the voting as such, in order to ensure the regularity of the poll and so as to prevent the annulment of results (Masclet 1998, 38).

2.4.3 Responding to Electoral Irregularities

The question of when courts shall judge electoral irregularities is intertwined with the further one of how courts shall best respond to electoral irregularities. The political science literature on electoral integrity does not offer any specific answers to this two-part question. International IDEA provides an overview of different responses to electoral irregularities, meanwhile (Orozco-Henríquez 2010). I first summarise this overview below, before presenting the two key challenges that courts confront when they adjudicate on elections.

At the operational stage, electoral dispute resolution can have a corrective or a punitive effect. Corrective measures seek to remedy the effects of an electoral law violation. This can be done through annulling, redressing or acknowledging the irregularity. For instance, in the pre-electoral period the biased rejection of an eligible candidate can be reversed. After polling

day single votes, the results of polling stations or a whole election can be annulled. The result can also be redressed after total or partial recounts, or irregularities can be acknowledged as violations of the electoral law – but without a decisive effect on the election result being discovered (Orozco-Henríquez 2010, 38–39, 170, 174). For example, the court can acknowledge that too short opening hours of a polling station are a violation of the electoral law but that the effect on the result cannot be precisely determined. Punitive actions seek to punish the perpetrator of the electoral law's violation. Such punishments can include financial sanctions, imprisonment or the cutting of election-related rights – like the right to candidacy, or access to the state media for electoral advertising (Orozco-Henríquez 2010, 38, 41).

International IDEA stresses that an effective electoral justice system requires a response to irregularities; courts need to react by "annulling, revoking, modifying or even just acknowledging" the irregularity (2010, 19). This demand is plausible, and matches van Ham's theoretical assumption that the independent adjudication of electoral disputes increases the costs of electoral fraud. These costs, even if it is only the loss of reputation, only increase if perpetrators have to fear sanctions or are unlikely to achieve their goal of biasing the election result. In other words, only a judicial response to electoral irregularities can induce a change of behaviour (Van Ham 2012, 126).

Reacting to irregularities poses, however, two key challenges to courts. The first is the political salience of adjudicating on elections. Elections decide the distribution of power, as does the adjudication of electoral disputes. Ratsirahonana, a former Madagascan constitutional judge and politician, considered electoral disputes to be the most sensitive issue treated by judges because they touch upon the ambitions and honour of politicians (Ratsirahonana 1998, 153).[30] Furthermore, in third-wave democracies "elections represent a form of crisis, testing the strength of the institutions established to secure fair and peaceful political succession and representation" (Gloppen and Kanyongolo 2012, 43). If electoral adjudication fails to deliver a legitimate decision, alternative channels may be sought through which to contest the election. Such alternatives can be popular uprisings potentially leading to electoral violence, an opposition boycott of the elected institutions and/or negotiations behind closed doors (Chernykh 2013, 4; Eisenstadt 2002, 51; Franck 2010, 425; Meledje 2009, 153). All these options have in common that they are extra-legal means for achieving an election result – and not a democratic way of distributing power.[31] This implies that courts face enormous pressure when they adjudicate on contested elections. There have been critical voices about the capacity of courts to resolve severe electoral disputes. Bois de Gaudusson argues that the adjudication of contested elections is an overtaxing of constitutional courts in the context of fragile democracies, because they neither have the means nor the standing for solving conflicts that the political actors were not able or not willing to solve themselves (Bois de Gaudusson 2003, 1).

Courts face a second key challenge when candidates contest the results of an election. If irregularities cannot be corrected through the recounting of votes, the nullifying of those votes is another possible sanction. But under what conditions shall courts annul votes? This

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[30] The full quote reads as follows: "De mon point de vue, cette extrême sensibilité s'explique par le fait qu'en matière de contentieux électoral la décision de justice touche tout particulièrement l'honneur, l'orgueil, l'ambition politique, sinon la vanité personelle d'un candidat, qui, ne l'oublions pas, est un homme politique" (Ratsirahonana 1998, 153).

[31] Peaceful popular protests are of course legitimate ways of expressing preferences in a democratic polity; they are, however, not a democratic channel for distributing power.

course of action confronts courts with a dilemma, because it implies that voters are constrained in exercising their right to participation and in expressing their will. If votes are nullified to a limited extent, the virtue of punishing irregularities may outweigh the damage done to respecting the voters' will. However if a large number of votes are annulled, it is questionable whether the end game of an election – the expression of the voters' preferences – is still achieved. Bolle pointed this out after observing high levels of annulment in elections in Benin and Mali (2009, 101). The constraining of the will of the voters can be mitigated by repeating the election. This compensation is, however, more feasible in legislative elections, because by-elections can be held for some constituencies without the necessity to repeat the whole overall election. Such a mitigation is more difficult in presidential elections, when it necessitates the repetition of the whole election. The holding of elections is, however, expensive, and most developing countries rely upon external financial aid for the organisation of them.

Other scholars argue that irregularities only damage the integrity of the election if they have a decisive influence on the result (Elklit and Svensson 1997, 38; Meledje 2009, 148; Mozaffar and Schedler 2002, 5–6). This approach is reflected in the electoral jurisprudence of the aforementioned French Constitutional Council. The French court applies the legal principle of interpretation "*de minimis non curat praetor*". This means that irregularities are considered irrelevant unless they change the outcome of the election. Consequently, the Constitutional Council only examines irregularities more closely in a tight race between front-running candidates (Bois de Gaudusson 2003, 159; Franck 2010, 429). Constitutional courts in francophone Africa also apply this principle of interpretation, and thus only annul votes when an irregularity had an *influence déterminante*. Such a decisive influence is attested to when a severe violation of the electoral law has taken place and when the winner's margin is small (Bolle 2009, 93). Thus, the approach of the *influence déterminante* implies that irregularities are tolerated as long as they do not affect the overall result. This approach contradicts the assumption that manipulative behaviour is more likely to change if it is sanctioned and the recommendation to respond to irregularities. Bois de Gaudusson puts forward the question of whether such a reluctance to annul votes perpetuates the immorality of a fraudulent system (Bois de Gaudusson 2003, 159).

What do I take from this discussion for my own study? I acknowledge that courts are constrained by formal limits vis-à-vis electoral competences and rules of appropriate evidence, high costs of election cancellation and enormous political pressure. Moreover, their sanctions potentially constrain participation. Nevertheless, I posit that for the purpose of democratic elections it is still better if courts acknowledge and sanction irregularities wherever possible. The toleration of irregularities does not alter the costs of cheating, and upholds a culture of manipulation. For the end of reacting to irregularities, courts should examine allegations even if the provided evidence does not meet the required standard; they should also refer to constitutional principles as well as to international standards of electoral integrity. Courts can furthermore demonstrate, through the sanctioning of irregularities, that they are fundamentally inclined to defend democracy wherever possible.

2.4.4 Justifying Judicial Sanctions

Not only how courts respond to electoral irregularities but also how they justify their response matters for the democratic quality of elections. Constitutional courts convey through the justifications of their rulings messages about their core stance in electoral matters. Furthermore, the way in which they examine allegations of election fraud is crucial

for the perception of the election. Court rulings differ in their level of transparency and consistency with the previous jurisprudence.

Transparency is considered an important principle of good governance and is enshrined in international conventions such as the International Covenant on Civil and Political Rights or the African Charter on Democracy, Elections and Governance (African Union 2007; Heald 2006; Norris 2017; United Nations 1966). Recently, practitioners have also stressed the importance of transparency for electoral processes (Catt, Ellis, Maley, Wall, et al. 2014, 23) – while the National Democracy Institute launched an Open Election Data Initiative (NDI 2015). There is mixed evidence about whether transparency has indeed a positive effect on governance in general (Fung, Graham, and Weil 2007; Gaventa and McGee 2013; Joshi 2013; Kosack and Fung 2014). Yet, there is evidence that perceptions of electoral fraud have a negative influence on the participation in and the legitimacy of elections (Bauhr and Grimes 2014; Norris 2014). Transparency of the electoral process that is combined with accountability for electoral irregularities can improve the public confidence in elections (Hood 2010; Norris 2017).

Constitutional courts adjudicating on electoral matters can contribute to transparency and accountability. The latter is created when courts respond to electoral irregularities. Transparency, meanwhile, is created through the examination of electoral irregularities and the justifications given for rulings. Court rulings differ in this regard. A court can extensively explain how a certain aspect of the electoral law has been violated and how this is affecting democratic principles, or it can refer only briefly to the article in question. When judging the effect of an irregularity, a court can engage in extensive examinations of the issue or it can refrain from making the judgment because the plaintiffs have not provided sufficient evidence. The court can provide extensive calculations of the possible effect or it can simply state that the act does not have an effect on the sincerity of the votes. Moreover, court decisions differ in the information they provide. Courts can specify where and to what extent they have corrected results or they can merely provide a total number of annulled votes.

Scholars who analysed electoral disputes in Africa find that opaque decisions that do not outline possible conflicts of democratic principles, only poorly or in piecemeal fashion justify the judgment and that do not specify the (geographic) effects seed mistrust (Bolle 2009, 94; Harrington and Manji 2015, 185). In such cases, it is not clear for either political actors or citizens alike whether the CC has protected or harmed the democratic quality of elections. Apart from potential harm being done to participation and competition, this may additionally lead to the decreased legitimacy of an election.

The consistency of rulings is essential for the perception of a court's credibility, and consequently for an election's credibility (Orozco-Henríquez 2010, 131). Consistency of rulings means that similar irregularities are answered with similar responses and sanctions. Are similar acts considered to violate the same norms, and to lead to the same decisions? Does the court interpret its competences in every election in the same way, or in some elections is it responsible for the electoral campaign and in others not? Regarding the electoral operations, does, for instance, an insufficient number of ballot papers in a polling station always lead to the annulment of the polling station's votes? Courts seed mistrust if they change their jurisprudence arbitrarily. The principle of *stare decisis* traditionally does not hold for civil law countries because the primary authority is assigned there to the law. However, also in civil law countries extensive justification for a change of interpretation can be expected, in order to prevent mistrust arising (Orozco-Henríquez 2010, 131). Yet, a change

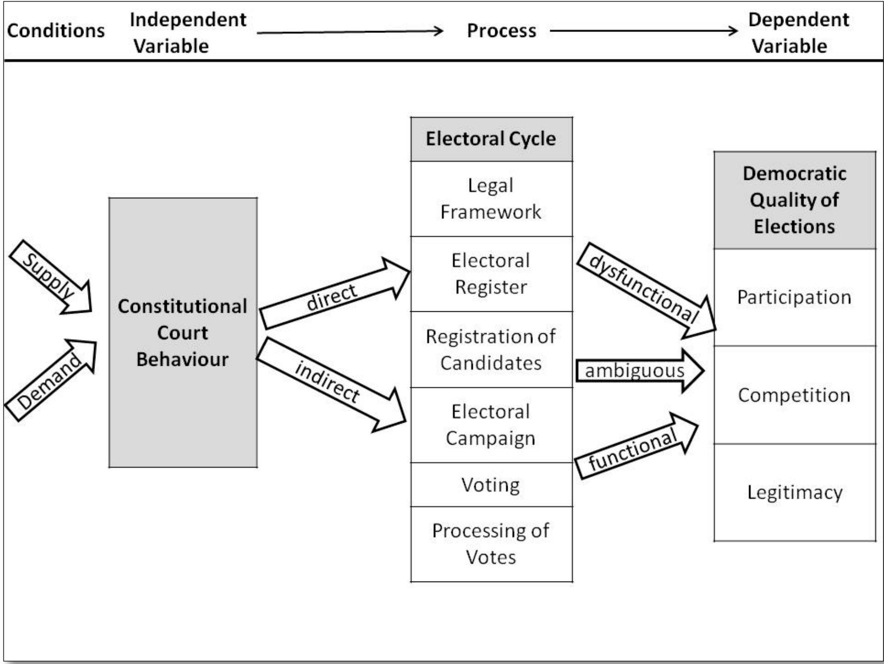
of jurisprudence is not necessarily dysfunctional for the democratic quality of elections. It depends on whether the new approach is more or is less conducive to democratic principles being upheld.

2.5 Summary

In this chapter, I have developed my theoretical framework. The main concepts introduced have been constitutional court behaviour and the democratic quality of elections. The electoral cycle and the categories of functional, ambiguous and dysfunctional as well as direct and indirect influences serve as analytical instruments to capture the relationship between the two concepts. In the following, I summarise my analytical framework.

The contribution of constitutional courts to the democratic quality of elections depends on two conditions being met. The legal framework needs to empower constitutional courts to adjudicate on electoral matters (supply), and potential litigants need to activate constitutional courts by filing complaints (demand). If constitutional courts are empowered and activitated then they have discretion on how to exercise their power and how to interpret the rules. Therefore, their judgments can be functional, ambiguous or dysfunctional for the democratic quality of elections. Functional judgments are beneficial, while dysfunctional ones are detrimental to democratic elections. In contrast, the repercussions of ambiguous rulings are not straightforward. Constitutional courts influence the democratic quality of elections by intervening with their judgments in electoral matters. Constitutional courts render direct and indirect influences on the democratic quality of elections. Direct influences have an immediate effect on the election in question, while indirect ones reverberate beyond individual elections. The three democratic qualities of elections – participation, competition and legitimacy – are at stake throughout the six stages of the electoral cycle. It is in the course of the electoral cycle that constitutional courts can influence the democratic quality of elections. Figure 2 visualises my theoretical framework.

Figure 2. Theoretical Framework: How Constitutional Courts Influence the Democratic Quality of Elections



Source: Author's own design.

Apart from the grounds for the development of the theoretical framework, I also extracted from the theoretical and empirical literature on judicial politics as well as on elections several assumptions about how constitutional courts can influence the democratic quality of elections in beneficial ways. The first set of assumptions concerns the target of court interventions. According to empirical studies, competition and legitimacy are particularly vulnerable in African elections and consequently require protection by courts (Coppedge, Gerring, Lindberg, and Skaaning 2016; Lindberg 2013). Therefore, constitutional courts have stronger leverage over the democratic quality of elections if they enhance competition and legitimacy. Moreover, the four pre-voting stages of the electoral cycle – the electoral legal framework, electoral register, registration of candidates and electoral campaign – are crucial for upholding democratic elections (Elklit 1999; Grömping and Coma 2015; Van Ham and Lindberg 2015). These different stages offer plenty of entry points for the manipulation of elections. Hence, constitutional courts need to adjudicate on the pre-voting stages in order to establish a positive influence on the democratic quality of elections. At the same time, the period before the casting of votes still allows for the mitigation of electoral irregularities. This is why adjudication on pre-electoral irregularities should take place before voting itself does.

The second set of assumptions deals with the nature of constitutional court behaviour. The functionality of constitutional courts' influence on the democratic quality of elections depends on the ways in which they justify their rulings. Purposive and principle-driven judicial interpretation techniques are more conducive to ensuring democratic elections than narrow and legalistic ones are. A purposive interpretation technique seeks to harmonise the letter of the law with its spirit, integrates constitutional principles and international norms and is less restrictive in the interpretation of the courts' competences, standing rules or requirements for evidence submission. Transparent rulings that specify the reasoning behind a judicial decision and the (geographical) scope of sanctions, as well as a consistent jurisprudence, are also crucuial for a positive contribution being made to democratic elections. Moreover, fostering the democratic quality of elections necessitates that constitutional courts actually respond to irregularities. Judicial responses like vote

annulments, result modifications or acknowledgments of irregularities mitigate the damage of electoral manipulations. Furthermore these responses change the incentive structures for the agents of electoral manipulations, which in turn may reduce even the occurrence of the phenomenon in the long run.

3 Research Strategy

In this chapter, I explain my research strategy. I introduce my comparative design, define my universe of cases, and motivate my case selection. Subsequently, I explain how I organised my data collection, operationalise the dependent variable of my study, and develop a unique strategy for the assessment and aggregation of constitutional court decisions.

I compare the two cases of Madagascar and Senegal through a structured, focused comparative design that is appropriate for the exploratory nature of my research. Madagascar and Senegal qualify for my universe of cases because they were classified as Electoral Democracies for several years between 1990 and 2012 and have constitutional courts that adjudicate on national elections. The main data for measuring the independent variable of this study – constitutional court behaviour – were collected during two main field research stays. I collected data in archives and conducted expert interviews. For the assessment of constitutional court decisions, I developed a new approach that combines content analysis of the constitutional court decisions with observations from the secondary literature. The dependent variable – the democratic quality of eletions – is measured by secondary sources.

3.1 Comparative Design

In this study, I choose a comparative approach for scrutinising the constitutional courts of Madagascar and Senegal. What is the purpose of comparison in the political science subdiscipline Comparative Politics? Comparing is a "method of discovering empirical relationships among variables" (Lijphart 1971, 683) explains Lijphart, a veteran of the subdiscipline. Another veteran, Sartori, spells out: "Comparisons *control* – they control (verify or falsify) whether generalization hold across the cases to which they apply" (Sartori 1991, 244, emphasis added by the author himself). In other words, the comparative method seeks to explain relationships between variables in a specific case and beyond the single case.

The classic methods for the comparisons of a small number of cases are inspired by Mill's distinction of the method of difference, the method of agreement and the method of concomitant variation (George and Bennett 2005, 153; Lijphart 1971; Mill 1843; Slater and Ziblatt 2013, 1302). Przeworski and Teune take up Mill's approach in their development of the most similar system design (MSSD) and the most different system design (MDSD) (1970). In a MSSD, the cases share similar characteristics but vary in the outcome of the analysed relationship between variables. In a MDSD, cases differ in many factors but share a similar outcome. These designs are also called controlled comparisons (e.g. Slater and Ziblatt 2013). Controlled comparisons have the advantage that they allow for a certain level of external validity. Therewith, the findings of a controlled comparative study permit generalisations beyond the cases under study (Slater and Ziblatt 2013, 1311). According to Slater and Ziblatt, external validation can be reached through a research design that uses abstract variables, a case selection that reflects representative variation and a theoretical engagement aimed at controlling for rival hypotheses (Slater and Ziblatt 2013, 1311–1313).

Despite the merit of external validity, a controlled comparison is not the appropriate design for my study for two reasons. Firstly, controlled comparisons have a strong focus on outcomes. According to Slater and Ziblatt the guiding goal of comparative work is "capturing variation in outcomes" (Slater and Ziblatt 2013, 1313). The focus on outcomes is a causal perspective that is also called "causes of effects" or y-centred (Rohlfing 2012, 40–41). Applying "a causes of effects" perspective implies that the researcher seeks to discover the decisive causes of the outcome in focus. In contrast, x-centred research designs adopt an

“effects of causes” perspective in which the effects of a specific cause on an outcome are analysed (Rohlfing 2012, 40–41). In my research I am not aiming at explaining which factors enhance or impede the democratic quality of elections. Instead, I seek to analyse the effect of constitutional courts on the democratic quality of elections. Thus, I adopt a x-centred research design. I argue that controlled comparisons are less suited to account for a x-centred causal perspective.

Secondly, controlled comparisons are not appropriate for research in unexplored research fields. A critique of the MSSD is the difficulty to meet the requirements of case selection; or put differently, to find cases that are homogenous but differ in one respect (George and Bennett 2005, 152). In contrast, Slater and Ziblatt argue that Mill’s requirements should not be overly literally interpreted and that cases do not need to be either perfectly different of perfectly similar to qualify for a controlled comparison (Slater and Ziblatt 2013, 1313). I agree with Slater and Ziblatt but one open question remains: How to choose cases according to their variation on the operating variables if the researcher does not know the variation of the independent variables, yet? Slater and Ziblatt acknowledge that different case selection strategies are necessary, depending on how well the respective field of research was already explored in prior research (Slater and Ziblatt 2013, 1312). For less explored research areas they suggest a case selection strategy as put forward by Evan Lieberman. Accordingly, cases shall be selected through running a regression analysis of a larger number of cases. This technique allows for the location of all cases in relation to the regression line (Lieberman 2005, 443–446). But how to conduct a statistical analysis if the researcher lacks the data for it? In research fields that are not well researched, yet it is not possible to control the variables in advance. Thus, it is a matter of chance if the cases that were selected based on patchy information do indeed qualify for a controlled comparison.

Fortunately, there are alternatives to compare a small number of cases, for instance structured, focused comparisons (George and Bennett 2005). Such a comparison is structured by research questions or analytical categories that are applied to the cases. Thus, every case is compared with the same analytical structure. In my thesis, the electoral cycle is a tool for structuring the comparison. Furthermore, the comparison focuses on specific aspects of the cases and the researcher does not deal arbitrarily with whatever aspect appears interesting in the respective case. The focus of my study is clearly defined: it is the influence of constitutional courts on the democratic quality of elections. George and Bennett stress that a meaningful structured focused comparison requires the identification of the universe of cases in which the cases are located, theory guided development of the structure and the focus as well as a positioning of the respective study in the research field (George and Bennett 2005, 69–71). The previous chapters demonstrated how theory and prior research guided my research question as well as the development of my concepts. Moreover, I relate the discussion of my comparison to theory and prior research in the fields of democratisation, judicial politics and electoral integrity in Chapter 6.

3.2 Universe of Cases and Case Selection

In the following, I summarise four criteria that mark the empirical boundaries of my universe of cases. The universe of cases is confined by the subject of my research, a type of regime, a geographical scope and a timewise focus. The four criteria are also encapsulated in Table 4.

Table 4. Four Boundaries of the Universe of Cases

1. Thematic boundary: Constitutional courts with electoral jurisdiction
2. Regime boundary: Electoral democracies
3. Geographic boundary: sub-Saharan Africa
4. Time boundary: 1990-2012

Source: Author's own composition.

The first boundary is set by my focus on constitutional courts and their influence on the democratic quality of elections. Therefore, only those constitutional courts that are entitled to adjudicate electoral matters qualify for the universe of cases. The second boundary is the type of regime in which the constitutional courts operate. I focus on regimes that meet minimal standards of democracy. I do so because I assume that the conditions for courts in authoritarian regimes differ from those in democratic regimes. I want to analyse those constitutional courts that have at least a minimal chance for democratic behaviour. Yet, I do not want to use a too demanding democratic standard and therefore apply a concept of democracy that is able to travel across contexts (Sartori 1970, 1033–1034). For measuring the minimum standard of democracy, I refer to electoral democracies as classified by Freedom House.[32] This measure has the advantage that it is available for the period of my analysis. The third boundary is a regional one. I focus on the region of sub-Saharan Africa. Two reasons justify this decision. A large number of third-wave transitions occurred in Africa. Therefore, Africa offers a rich laboratory for the study of third-wave trajectories. Furthermore, empirical research on African constitutional courts is scarce and therefore a desiderata. The fourth boundary is a timewise restriction. Since I focus on electoral democracies and am interested in the trajectories of third wave transitions the time period between 1990 and 2012 is appropriate. The starting point is defined by the beginning of the third wave transitions in Africa. The ending point of the period is determined by the start of this study in 2012; only elections that took place before 2012 could be taken into account. To sum up, African countries that had a constitutional court with electoral jurisdictions in place and were classified as electoral democracies by Freedom House in the period between 1990 and 2012 are part of my universe of cases.

Twelve countries belong to my universe of cases. These are Benin, Burundi, the Central African Republic, Comoros, Djibouti, Madagascar, Mali, Mauritania, Mozambique, Niger, the Republic of Congo and Senegal. Table 5 shows in which years these countries experienced constitutional events since 1990. The term constitutional event is borrowed from the terminology of the Comparative Constitutions Project and comprises the promulgation of a completely new constitution as well as constitutional amendments (CCP). Furthermore, the dates of the de facto implementation of the constitutional courts are provided. The website of the *Association des Cours Constitutionnelles ayant en Partage l'Usage du Français* (ACCPUF) - the Francophone organisation of constitutional courts – served as source for this information

[32] Freedom House classifies polities as electoral democracies if they have a competitive, multiparty political system, universal adult suffrage, regularly contested elections and significant public access of major political parties to the electorate. Furthermore, the polity has to receive 7 out of 12 possible scores in the subcategory on the electoral process of the political rights dimensions and an overall political rights score of 20 out of 40 possible scores. National presidential and legislative elections serve as fundament of the classification (Freedom House 2011).

(ACCPUF 2005). I complemented the data with online research of the constitutional courts' websites if available. The last column specifies the years or periods in which the respective country was classified as Electoral Democracy by Freedom House.

Table 5. Universe of Cases (1990-2012)

Country	Constitutional Event since 1990	Creation of Constitutional Court	Electoral Democracy
Benin	1990	1993	1992-2012
Burundi	2004	n.a.	2006-2010
Central African Republic	1994, 2004	n.a., 2005	1994-2001 2006-2008
Comoros	2001	n.a.	2005-2012
Djibouti	1992	n.a.	2000-2002
Madagascar	1992, 1998	1977	1994-2008
Mali	1992	1994	1993-2011
Mauritania	1991, 2006	1991	2008
Mozambique	1990, 2004	2004	1994-2009
Niger	1992, 1996, 1999, 2009, 2010	1996, 1999, 2009, 2010	1993, 1996, 1999, 2005, 2011-2012
Republic of Congo	1992	2003	1993-1997
Senegal	1992, 2001	1992	2001-2012

Source: Author's own compilation based on data from the Comparative Constitution Project, ACCPUF and Freedom House.

I am not only interested in the influence of constitutional courts on the democratic quality of elections in one particular moment in time but also in how this influence evolved over time. Consequently, I seek cases that experienced a comparatively high number of national elections because I examine the influence of constitutional courts in presidential and legislative elections. Increasing the number of elections leads furthermore to an increase of the number of observations. This in turn increases the comparative leverage (Lijphart 1971, 686). A look at the table above already suggests that the countries in the universe of cases differ in terms of numbers of national elections that they held while being classified as electoral democracy and having a constitutional court in place. Table 6 displays more precisely how many national elections were adjudicated on by constitutional courts in the periods in which the respective country was classified as electoral democracy. Accordingly, four countries experienced a comparatively high number of national elections as electoral democracy and with constitutional courts adjudicating on the polls. These are Benin, Madagascar, Mali and Senegal. Senegal was since 2000 and hence during six elections classified as electoral democracy by Freedom House. The quality of elections improved however significantly since the introduction of the new electoral law in 1991 (see Chapter 5). Therefore, the national elections since 1993 can also be considered. This increases the number of relevant elections in Senegal to nine.

Table 6. Number of National Elections as Electoral Democracy and with Constitutional Courts Adjudicating on the Poll

Number of National Elections	Case
1	Djibouti
2	Burundi, CAR, Mauritania
3	-
4	Mozambique, Niger
5	Comoros
6	Mali, Senegal
7	-
8	Madagascar
9	Benin, (Senegal, including the elections of the 1990s)

Source: Author's own composition.

I selected two cases for my comparative case study. This number of cases allows for sufficient in-depth engagement with the context of the cases and at the same time still offers comparative leverage. A structured, focused comparison does not necessitate such a rigorous case selection as a controlled comparison as I argued already above. Nevertheless, I sought to obtain a variation of the cases in my comparative design. Since data for my independent variable were scarce at the beginning of my research process, I chose a proxy for the independent variable. The appointment rules for constitutional judges served as proxy for the institutional independence of the relevant constitutional courts. As I discussed extensively in Chapter 2, the more bodies are involved in the appointment process of constitutional judges and the more non-political bodies participate in the appointment, the better the institutional independence of constitutional courts. Table 7 shows how many and which bodies are involved in the appointment of constitutional judges in Benin, Madagascar, Mali and Senegal. Accordingly, the appointment of Madagascan constitutional judges requires the involvement of the highest number of bodies in the sample. Additionally, a non-political appointer – the high judicial council – participates in the process. In contrast, Senegal's President of the Republic had until 2016 the exclusive right to nominate all constitutional judges. Madagascar and Senegal are suitable cases for my structured, focused comparison because they both had high numbers of elections for examination and they vary with respect to the appointment rules.

Table 7. Rules for Appointment of Constitutional Judges

Indicator / Case	Benin	Madagascar	Mali	Senegal
Number of Appointment Bodies	2	4	3	1
Bodies Involved in Appointment	President, board of National Assembly.	President, National Assembly, Senate, high judicial council.	President, National Assembly's president, high judicial council.	President.

Source: Author's own composition based on constitutions that were in force in the period of observation.

3.3 Data Collection

This thesis is the first comparative study on the role of African constitutional courts in elections. Therefore, a major contribution of this thesis is the collection of original data. For the measurement of my dependent variable – the democratic quality of elections – I can draw from existing data sets and secondary literature as I explain more extensively in the next section. In contrast, data and literature on my independent variable – constitutional court behaviour – is scarce and access to it is difficult.

The most important data for the analysis of constitutional court behaviour were court decisions on electoral matters. Furthermore, I required texts on the legal framework, such as

electoral laws or *lois organiques* concerning the constitutional courts, as well as additional sources that can nurture my assessments of the functionality of constitutional court decisions. Legal comments, academic literature and newspaper articles are useful sources for this endeavour.

There are differences between my two cases in terms of existing secondary literature. Almost no academic literature deals specifically with the Madagascan HCC. An exception is an article by Roger (2002) who focuses, however, on the election crisis of 2001. Other works cover the HCC in the course of their analysis of broader political developments in Madagascar (see for e.g. Cadoux 1998; Marcus 2016; Ralambomahay 2011). In comparison to the Madagascan HCC, the Senegalese CC is analysed more extensively in the academic literature as a number of articles and even a seminal monography demonstrate (Diagne 1996; Diop 2013a; Kanté 2005; Ndiaye 2014; Schoepffer 2014).

To collect original data, I carried out two months of field research in Madagascar and Senegal. The field research in Senegal took place in the period between 11 September and 9 November 2012. In Madagascar, I spent the time between 4 April and 31 May 2013. The goal of these field research stays was the collection of constitutional court decisions, legal texts, secondary literature, local election observation reports and newspaper articles. Furthermore, I conducted interviews with experts to gain a comprehensive picture of the constitutional courts and their political contexts.

The collection of constitutional court decisions was easier in Senegal than in Madagascar because Law Professor Fall edited a collection and commentary of the CC's decisions (Fall 2008a). This collection includes, however, only the decisions up to 2008 and thus does not cover the whole period of examination. The decisions for the period between 2008 and 2012 had to be collected at the archive of the constitutional council. Access to these decisions was difficult and it required several visits at the CC to obtain the authorisation of the CC president. A Senegalese law professor also reported that access to the decisions is difficult and illustrated this with an anecdote. He sent some of his students to the CC for collecting CC decisions. His students spent the whole day in the lobby of the CC without obtaining the decisions (SEN-4).[33] However, access to constitutional court decisions was even more difficult in Madagascar. For the Madagascan HCC no collection and/or commentary of HCC decisions is available. Law professors stated that it is hard to get access to the HCC decisions (MDG-3). Furthermore, there would be an unwritten law that the HCC may not be touched by scholars. Therefore, a commentary on the HCC decisions would be too risky (MDG-15). During my research stay the political situation in Madagascar was tense due to the pending elections that were meant to end the transitional period. Therefore, the access to the HCC's archive was denied for several weeks. Eventually, I was granted access and could take photos on the HCC decisions on the list of candidates and elections' final results. These decisions were complemented with HCC decisions from the private archive of a Madagascan politician.

I conducted interviews with two different semi-structured interview guidelines. One guideline addressed the work of the constitutional courts and their relations with other branches of government more comprehensively. The guideline covered issues like the assessment of the constitutional courts' independence, their relations with the public and the political branches of government and procedures of decision making at the courts (see Appendix C for further details). The second guideline specifically focussed on elections and

[33] The codes "MDG-x" or "SEN-x" refer to interview transcripts that are stored in the electronic appendix.

the constitutional courts' role in the electoral processes (see Appendix D). Depending on the course of the conversation and the expertise of the individual interviewee the guidelines were also merged.

For the selection of interview partners, I combined the technique of targeted and snowball sampling (Tansey 2007; de Volo and Schatz 2004). I identified relevant groups for interviewing. These included present and former constitutional judges, election officials, civil society representatives, party representatives, judges and lawyers of the ordinary judiciary and law professors. In addition to this targeted approach I asked in the interviews for further potential interview partners. I conducted in Madagascar 42 and in Senegal 36 interviews. The interviews were recorded when the interlocutors permitted it. For the further analysis, I transcribed and/or paraphrased the relevant parts of the interviews since expert interviews do not require a comprehensive transcription (Meuser and Nagel 1991). In cases in which recording was not authorised, I took notes and wrote protocols after the interviews. I examined the content of the interviews by ordering them according to thematic categories such as "appointment of judges" or "assessment of constitutional court's independence". Since I waranted my interview partners anonymity, I cite the interviews with codes (e.g. MDG-1 or SEN-1). The transcribts of the interviews can be accessed in the electronic appendix where they are identified through the codes. In addition, I provide a list of my interview partners in the appendix of this thesis. My interview partners approved the mention of their names.

3.4 Operationalising the Democratic Quality of Elections

In this section, I operationalise the dependent variable of my study – the democratic quality of elections. The countries of my universe of cases satisfy the minimum requirements for formal participation, competition and legitimacy. As was stated already above the formal rules for free and equal participation and competition as well as for legitimacy are adopted in many countries but there are huge differences in the implementation of these rules. This is why the following operationalisation will focus on indicators that seek to measure the extent of implementation of the three qualities. Lindberg's (2006) operationalisation of the democratic quality of elections served as a starting point for this work. Some of his indicators are however eliminated while others are added. Moreover, the indicators are adjusted for the requirements of a qualitative study.

Participation

The classical indicator for participation in elections is voter-turnout. There are two main techniques to measure voter-turnout and each of them bears certain difficulties. The first technique is to calculate the voter-turnout in accordance with the official numbers of all registered voters and the number of casted votes. The electoral register can however lack comprehensiveness and accuracy and thus may not provide a correct baseline for the calculation of the turnout. Some legally eligible voters may have opted for non-registration or may have encountered difficulties when they wanted to register (Hill 1994, 136). Furthermore, logistical challenges or manipulations of the electoral register may distort the total number of voters. The second technique seeks to balance the shortages of the first technique (Altman and Pérez-Liñán 2002, 88). For this purpose, the size of the population at voting age is estimated and serves as baseline for the calculation of the voting age population turnout (VAP). Elklit recommends the VAP turnout as indicator to measure participation (Elklit 2006, 300). Yet, the estimation may be inaccurate as well because there are groups of the population at the voting age that are not eligible for voting. These may be prisoners,

mentally ill people, foreigners or members of the army (Hill 1994, 136). Furthermore, the population data used for this estimation may be as erroneous as the electoral register, in particular in sub-Saharan Africa where in many countries no reliable civil registers exist (Kuenzi and Lambright 2007, 673; Lindberg 2006, 36). I will use both voter turnout indicators and will complement them wherever possible with additional data on the registration process, for instance with the estimated share of registered voters or qualitative data on the registration process for the respective elections.

Competition

The competition dimension covers whether political actors and parties can compete freely for executive and legislative offices. Formal rules allowing for free competition are a prerequisite for de facto competition. However, de jure free competition does not result automatically in de facto free competition. This is why the extent of de facto competition needs to be measured. Many authors develop indicators for competition that include election results (Bogaards 2007). An example is the winner's margin that measures the distance between the winner of an election and the candidate or party that won the second largest share of the votes. A small winner's margin is then used as an indicator for high competitiveness of elections whereas a large winner margin reveals a low level of competitiveness (see e.g. Ginsburg 2003). The problem with such indicators is that they cannot distinguish whether the large winner margin reflects the true will of the voters or whether it is the effect of manipulations. This is why Bogaards suggests that electoral competition should be assessed through the analysis of the electoral process (Bogaards 2007, 1232–1233).

In Section 2.3.2 it was already illustrated how competition is at stake in the different steps of the electoral process. The analysis of the court actions along the electoral cycle will also entail in how far competition has been actually threatened in the respective election. To avoid overlaps with the analysis of the electoral process, competition in the dependent variable will be measured using electoral outcomes despite the above mentioned shortcomings.

I follow Lindberg and will start with the analysis of vote shares. For presidential elections the share of votes won by the winner and his strongest challenger are taken into account. Many African polities apply a two-round electoral system for presidential elections in which the two most successful candidates participate in a run-off election (Lindberg 2006, 40). I will collect data for both rounds of the presidential elections but the results of the first round of presidential elections will be more decisive for my assessment of the level of competitiveness. I think that these results provide more accurate information because they are not inflated by electoral alliances that are forged after the first round (Lindberg 2006, 40). For legislative elections, I examine the share of seats won by the strongest and the second strongest party. The analysis of the seat shares does not give a precise picture of the level of competitiveness because electoral systems have a distorting effect. The extent of the distortion depends on several technical decisions and cannot be easily compared across countries (Hartmann 2007, 147). However, official election results often do not provide information on the vote shares won by the different parties but only on the number of seats (Kuenzi and Lambright 2007, 674; Lindberg 2006, 41).[34] Thus, I also use for pragmatic reasons the seat shares. The data on the results will also be used for the calculation of the winner's margin. The winner's margin only tells the difference between the two leading candidates but not how strong each of the

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[34] My own research on African election usessources like African Elections Database and IPU-Parline as well as of official documents by ministries of the interior and constitutional courts confirmed this observation.

party is. Thus, an election with a landslide victory of 70 per cent and a challenger still winning 30 per cent of the votes will result in the same winner's margin like a strongest candidate winning 45 per cent and a second candidate winning 5 per cent of the votes. This is why the pure numbers of the vote- or seatshares need to complement the interpretation of the winner's margin.

Another popular indicator for measuring competition is the occurrence of electoral turnover. An electoral turnover proofs that parties truly can compete for political offices and that this competition is not distorted by manipulation of the playing field (Lindberg 2006, 42). Przeworski, Alvarez, Cheibub and Limongi introduced the turnover test. They classify all political regimes in which the incumbent is not subject to an electoral turnover after two terms in office as a dictatorship (Przeworski, Alvarez, Limongi, and Cheibub 1996, 52). The problem of this classification is that polities with a dominant party systems like for instance Botswana are classified as dictatorships whereas authoritarian polities with presidential non-reelections rules are classified as democracies (Bogaards 2007, 1217; Schedler 2001, 73). However, this effect can be avoided when other indicators for measuring competition are also used (Lindberg 2006, 42). Therefore, I include the occurrence of electoral turnovers into my measurement.

Legitimacy

Elections are legitimate when the people and the political actors of the respective country consider elections as the appropriate channel to choose political offices and to delegate self-rule. Furthermore, the people and the political actors need to consider the particular election as legitimate. Thus, they need to be convinced that legal rules have been respected in the electoral game and they need to comply with the election result.

I use two indicators to measure whether the political elite and the people consider the particular election as legitimate. First, the compliance with the election result serves as indicator for legitimacy. For this purpose, the reactions of the main political parties will be scrutinized. Political actors may immediately accept the results, for instance when a presidential candidate expresses his congratulations to the winner of the election directly after the announcement of the official election results. However, political actors may also refuse to accept the result. They may challenge the results in different ways as has been illustrated in Section 2.4 or they may harshly criticise the electoral process. When they challenge election results through the constitutional court they may react in various ways to the decision of the constitutional court. I acknowledge that political actors may contest the election result for strategic reasons although they consider the electoral process to be clean (see e.g. Beaulieu 2014). Nevertheless, heatedly contested elections in spite of free and fair elections show that important actors do not sufficiently support the general idea of elections what is in turn a sign for the low legitimacy of elections. I will analyse qualitatively how key political actors reacted to the election results. The less political actors comply immediately with the results and the longer it takes until they accept the results, the lower is the level of the election's legitimacy.

Second, the occurrence of electoral violence serves as an indicator for legitimacy. Whereas the previous indicator measures whether election results were accepted, this indicator measures a specific expression of non-acceptance. Violent protest is a severe expression of non-acceptance and can have a devastating effect on the overall political regime. Lindberg measures in his work the electoral violence during the electoral campaign and on election day (Lindberg 2006, 44). Electoral violence can be distinguished in pre-electoral and post-

electoral violence. Pre-electoral violence follows a different logic than post-electoral violence. Pre-electoral violence is a result of uncertainty over the outcome and seeks to „shape who votes, where they vote and how they vote" (Straus and Taylor 2012, 20) whereas post-electoral violence is a reaction to the outcome of the election and aims at changing this outcome. Challengers are more likely to be involved in post-electoral violence because the risk of repression by the state through e.g. exclusion from the contest is higher and more costly in the pre-electoral phase (Straus and Taylor 2012, 21, 33). Both logics of electoral violence reveal a low trust in elections as a legitimate mean to distribute power. I will observe both kinds of violence.

In addition to the three indicators that focus on the legitimacy of a particular election I will examine an indicator that captures the legitimacy of elections in a more general sense. For this purpose, I will analyze whether the electoral regime survives. The periodic conduct of elections can be interrupted through coups, civil wars or other changes to the electoral calendar (Lindberg 2006, 45). In any case such a breakdown proves that political actors doubt the legitimacy of the electoral process. In the case of a coup d'état some political actors obviously prefer other means for determining political leadership. Minor interruptions of the electoral regime, like postponement of elections also harm legitimacy because political actors as well as citizens cannot trust anymore that they can express their preferences, hold their government accountable and can contest government through democratic channels periodically.

The indicators for legitimacy presented so far are elite-centered. However, for the persistence of democracy not only the support by the elites is necessary but also the support by the citizens. To measure if citizens perceive elections as legitimate, voter surveys are necessary (Lindberg 2006, 43). The most comprehensive survey data on political attitudes in sub-Saharan Africa is offered by Afrobarometer. Afrobarometer started its surveys in 1999 and currently conducts the sixth round of surveys. It began with surveying 12 countries and subsequently extended its scope of countries in every round (Afrobarometer 2015). Consequently, Afrobarometer does not provide data for the whole period of analysis. In particular, the case of Madagascar in which the period of analysis ends in 2009 is not covered well. In Senegal, five rounds of surveys were conducted since 2002 while in Madagascar four rounds were conducted since 2005. For systematic reasons, I do not include Afrobarometer data in my analysis. In Table 8, I provide an overview of my indicators for measuring the democratic quality of elections.

Table 8. Operationalisation of the Democratic Quality of Elections

Indicator	Sources
PARTICIPATION	
Official voter turnout: What share of the eligible citizens participated in the elections?	Official documents like constitutional court decisions wherever possible, African Elections Database and IPU-Parline.
VAP-turnout: What share of the eligible citizens participated in the elections?	International IDEA.
Qualitative data on registration process: Were there major obstacles in the registration process? What share of the eligible population registered for elections?	Secondary literature, election observation reports.
COMPETITION	
Share of votes / seats won by the strongest and second strongest candidate/party: How high is the vote-/seatshare of the strongest candidate/party?	Official documents like constitutional court decisions wherever possible, African Elections Database and IPU-Parline.
Winner's margin: How close is the race between the strongest and second strongest candidate/party?	Own calculation.
Electoral turnover: Did electoral turnover take place?	Official documents like constitutional court decisions wherever possible, African Elections Database and IPU-Parline.
LEGITIMACY	
Acceptance of election results: Did the major political actors accept the election results? After how much time did they accept?	Secondary literature, newspaper reports
Electoral violence: Did any violence related to the electoral process take place before, during or after the election?	Secondary literature, election observation reports, African Election Violence Database (AEVD) (Straus and Taylor 2012), Social Conflict and Africa Database (SCAD) (Salehyan et al. 2012) and V-Dem (Coppedge, Gerring, Lindberg, and Skaaning 2016).
Electoral regime survival: Did the electoral regime survive until the next election?	Secondary literature, newspaper reports.

Source: Author's own compilation.

3.5 Constitutional Court Behaviour: Processing Court Interventions

Court behaviour is expressed through the rulings that courts issue. To measure court behaviour constitutional court decisions need to be scrutinised. For this purpose the relevant court rulings have to be identified. In this thesis, national elections were defined as an example to study the democratic influences of constitutional courts. Therefore, decisions that concern legislative and presidential elections are relevant for this thesis. The concept of the electoral cycle serves as a tool for identifying the relevant decisions.

After I identify the relevant decisions, I analyse them. I stated in the theory chapter that I follow Larkins' approach and consequently analyse not only the outcome of the courts' decisions but also their motivation. Yet, the literature does not offer much guidance on how to assess court decisions systematically, in particular when it comes to a larger number of rulings. One approach is to analyse whether a court ruled in favour of the incumbent (e.g. González Casanova 1970; Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Popova 2012; Schwarz 1977). This approach focuses, however, on the outcome of decisions. In quantitative empirical legal studies, the counting of citations is a prevalent method to measure court behaviour (Posner 1999). This method scrutinises how often courts refer in their rulings to certain aspects, for instance to verdicts of other courts, to international norms or democratic principles like freedom or equality. Mazmanyan applied this method to analyse electoral decisions of courts in post-soviet countries (Mazmanyan 2017). The method of citation counting is not suitable for my research question since I am interested in how the

courts influence the democratic quality of elections. Furthermore, tentative explorations of the court decisions showed that the courts rarely cite other decisions or international norms. Kneip, from whom I borrowed the distinction of functional and dysfunctional influences, does not analyse the motivation of the court decisions extensively. Instead, he uses the categories of the embedded democracy concept for assorting the decisions. Decisions that can be attributed to one of the categories are functional and those that cannot be attributed to a category are dysfunctional. Furthermore, he assesses the clarity of the constitutional principles that are applied in the respective decision (Kneip 2009, 310–312).

Kneip's approach is neither sufficient for my research question and the empirical reality of my cases. This is why I developed a unique scheme for assessing constitutional court decisions. I propose a procedure that follows four steps. In a first step, I take stock of the interventions in the constitutional court decisions that are relevant for elections. Constitutional courts may deal in one ruling with several issues. For instance, they may judge on irregularities during the electoral campaign and manipulations on voting day in the same decision. I seek to explore how constitutional courts contribute to the democratic quality of elections along the electoral cycle. Therefore, a disaggregation of the many issues covered in constitutional court decisions is useful for my research goal. This is why I distinguish constitutional court decisions and constitutional court interventions. An intervention is a sub-unit of a court decision. Table 9 illustrates how the number of constitutional court decisions and interventions on electoral matters differed in Madagascar and Senegal. The table further indicates the number of assessed interventions. In some instances, interventions could be identified but an assessment was not possible due to lack of data.

Table 9. Number of Analysed Decisions and (Assessed) Interventions

	Madagascar	**Senegal**
Number of Analysed Decisions	54	52
Number of Interventions	165	109
Number of Assessed Interventions	152	107

Source: Author's own composition.

In a second step, I attribute these interventions to the different stages of the electoral cycle and determine for which democratic quality of elections they are relevant. While the attribution of an intervention to a stage of the electoral cycle is straightforward, interventions are not necessarily relevant for only one democratic quality of elections. In such cases I do not choose one democratic quality of elections but instead include all relevant ones for the respective intervention.

In a third step, I assess the functionality of the court interventions. This is the most complex endeavour that necessitates a combination of internal and external assessment strategies. An internal assessment is based upon the observations derived from the content of the interventions. Thus, the exclusive sources of internal assessments are the court decisions. In contrast, in an external assessment the analysis of the political context in which the intervention was rendered is taken into account. For this purpose, further sources are assessed. Such sources are secondary literature on elections, if available legal comments on the decisions, news paper articles and election observation reports.

The internal assessment draws on guidelines that are deductively derived. In the theory chapter, I discussed already several aspects that make court decisions more conducive to democracy and electoral integrity. Table 10 encapsulates these deductively derived guidelines from the literature.

Table 10. Deductive Guidelines for the Assessment of Constitutional Court Interventions

– Purposive interpretation techniques are more conducive to democracy (Barak 2005b; Harrington and Manji 2015; Mazmanyan 2017; Prempeh 2008; Scheppele 2002) → harmonisation of the law's letter with its spirit → reference to constitutional principles and preamble, international norms → less restrictive interpretation of standing rules or evidence requirements – Response to irregularities (annulments, modifications, or acknowledgments) is necessary to improve electoral integrity (International IDEA 2010, 19; Van Ham 2012, 126). – More transparent rulings increase electoral integrity (Bolle 2009, 94; Harrington and Manji 2015, 185; Norris 2017). – Consistent rulings increase electoral integrity (Orozco-Henríquez 2010, 131).

Source: Author's own composition.

These deductive guidelines require translation to the specific configurations of the empirical setting because general rules cannot account for all the specificities of the empirical reality. Andreas Schedler argues that sound research in political science requires judgments and that no measurement is possible without judgments (Schedler 2012). These judgments need to be as transparent and as consistent as possible according to Schedler (Schedler 2012, 28, 32). Therefore, I discuss the assessments for the specific interventions in detail in the country chapters. To account for consistency, I examine the case specific judgments within and across my case studies after the completion of my assessments and adjust my coding where necessary. In Table 11, I summarise my general coding rules for the internal assessment that served as a starting point. One criterion, the one of consistent rule application, requires a broader assessment of the direction of the change. Did the change of jurisprudence lead to a more purposive jurisprudence or to a more legalistic ruling? In the table below I assume a purposive jurisprudence as baseline but the assessment follows the case specific constellation.

Table 11. General Rules for Internal Assessment

Functionality	Assessment criteria
Functional	– Acknowledgment of irregularities – Sanctioning of irregularities – Rule clarification – Extensive examination of alleged irregularities – Consistent rule application – Reference to democratic principles in ruling – Consultation of further evidence (e.g. from electoral commission)
Ambiguous	Combination of functional and dysfunctional elements in the same intervention
Dysfunctional	– Opaque decision – Inconsistent rule application – Narrow interpretation of constitutional court's jurisdiction – No acknowledgment of potentially serious rule violations – No examination of alleged serious rule violations – Flawed justifications

Source: Author's own composition.

An internal assessment, which is based solely on the text of the court decision has several limits. First of all, I need to rely on the information that the constitutional court provides while I do not have access to the text of the complaint and the supporting evidence. Thus, I cannot check whether the court cited the motivation of the complaint correctly and comprehensively. Neither can I know the quality of the evidence for the irregularities. Moreover, a skilled constitutional judge may be able to hide biased decisions behind sound legal arguments. Consequently, the bias is difficult to detect. I account for these limitations by including information and assessments from secondary sources wherever possible. I refer to legal literature to validate my interpretation of the rulings. More importantly, I consult secondary literature on the political context of the rulings. In the secondary literature, I seek information about the preferences of the powerholders or other political actors in the specific

case. If an obvious interest of a powerholder is observable and the constitutional court rules are in accordance with it, the intervention is assessed as being dysfunctional. In Chapters 4 and 5, I report the secondary sources and how I based my assessments upon them. While the usefulness of the combination of internal and external assessments is evident, not all interventions are dealt with in the secondary literature. In these instances, I have to rely on my internal assessments.

The fourth and final step of the courts' interventions' processing is the aggregation of the data. The aim of this study is to identify patterns of court behaviour. The 152 constitutional court interventions coded for Madagascar and the 107 constitutional court interventions coded for Senegal need condensation to allow for the identification of such patterns. For this aggregation I have two samples. The first sample is a comprehensive one that includes all coded interventions. The comprehensive sample serves the explorative purpose of this thesis. The coded interventions are presented in tables in the country chapters and in the comparative chapter. These tables have different configurations. Depending on the focus of the respective section they are arranged according to one of the three dimensions of comparison: time, electoral cycle and democratic quality of elections. The tables display the number of interventions in the respective field and the functionality of the interventions. The functionality of the interventions is identified through different colours: green marks functional interventions, orange designates ambiguous interventions and red indicates dysfunctional interventions. Table 12 shows an example of such a table.

Table 12. Example of Aggregated Intervention Table

Election	Participation	Competition	Legitimacy
Election xy	# of interventions	# of interventions	# of interventions

Source: Author's own composition.

The tables derived from the comprehensive sample have the advantage that they provide a broad picture of the courts' behaviour in elections. The interventions are aggregated for the tables by simply adding up all coded interventions. However, this technique also has some limitations. The aggregation does not make a difference between the importance of the interventions. Thus, interventions that were targeted at a single polling station bear the same weight as interventions that concerned the whole country or all candidates. Moreover, information provided in the court decisions have different level of abstractness. This means that sometimes a verdict offers information on a specific intervention that is attributed for instance to a specific polling station. In other instances, the court reports on a more general level that it punished specific irregularities but it remains unclear how often the irregularity occurred. These different levels of abstractness notwithstanding I code all these reports as interventions to acquire a picture of court behaviour even though it is not as precise as the numbers suggest.

In order to address this limitation and to account for the different importance of the interventions, I create a second sample. The second sample comprises major interventions. Through the analysis of the comprehensive sample that drew from sources internal and external to the court interventions as well as my field research I obtained a solid expertise on the interventions and their repercussions. I referred to this expertise when selecting the major decisions. The major interventions may deviate from the overall pattern of electoral decisions, thus they adapt a different jurisprudence than in previous similar instances or deal with peculiar matters. They may have a bigger impact as they concern the whole country or all candidates or they simply had a bigger political impact. Such an impact becomes virulent through reactions by political actors or the public. Furthermore these cases were more often

discussed or mentioned in the interviews that I have conducted and in the secondary literature. In contrast, the vast majority of court interventions in the two countries were not mentioned in the secondary literature.

4 Madagascar

In this chapter, I explore how Madagascar's constitutional court - the Haute Cour Constitutionnelle (HCC) – contributed to the democratic quality of elections in the period between 1992 and 2009. I organised the chapter in four main parts. In the first part, I briefly introduce the democratic history of Madagascar. In the second part, I examine how the three democratic qualities of elections – participation, competition and legitimacy – developed during the period of analysis. Subsequently, I introduce the HCC familiarising the reader with the court's history and legal framework. Furthermore, I analyse how the court is perceived by the public and how the political branches interact with the HCC. In the fourth part, I turn to the systematic analysis of the HCC interventions on the democratic quality of elections. For this purpose, I examine the court's decisions in all steps of the electoral cycle and assess their influence on the democratic quality of elections.

4.1 The Evolution of Democracy in Madagascar

4.1.1 The Political Regime Before 1990

Madagascar experienced two republics in the period between independence in the late 1950s and the democratic transition that commenced at the beginning of the 1990s. The first republic was ruled by President Philibert Tsiranana and his *Parti Social-Démocrate* (PSD). After the independence referendum in 1958, a constituent national assembly adopted on 28 April 1959 the constitution of the first republic and the same assembly elected, on 1 May 1959, Tsiranana president (Randrianja and Ellis 2009, 180). The economy and the politics of Tsiranana's first republic were still closely linked to those of the former colonial power, France (Marcus 2016, 42; Randrianja and Ellis 2009, 180; Raveloson 2000, 16). The new constitution did formally allow for political competition. Several parties existed during this time, the most prominent of which was the AKFM. Legislative elections were held in 1960, 1965 and 1970. In all of these elections, however, the PSD won a clear majority of seats.[35] The electoral law and the administration were biased towards the PSD, which allowed the party to reach an enormous level of influence not only to dictate policies but also to repress people. In the 1960s, PSD party members were even authorised to arrest other people and to hand them over to the police (Randrianja and Ellis 2009, 182–183).

Tsiranana was popularly reelected in 1965 and again in 1972. The demise of this regime began, however, in 1971. A serious illness suffered by Tsiranana weakened his grip on power, and tense power struggles behind the facade of a stable regime now became visible to the public. A peasant rebellion in the south further destabilised the regime. In the election of 1972 Tsiranana was the only candidate. According to official results, he won 99 per cent of the votes (Randrianja and Ellis 2009, 184). This result could not, however, impede the massive protests that would evolve only a few months after the election. What started as a student strike in Antananarivo spread to other cities after the death of a student protestor. The situation escalated when the military opened fire on demonstrators on 13 May 1972. A few days later, Tsrianana handed over power to General Ramanantsoa. A revolutionary period inspired by Soviet communism thereafter started, but political frictions also continued. In February 1975 Ramanantsoa was forced to transfer power to Colonel Richard Ratsimandrava, who sought to create a radically decentralised government. He was, however, assassinated after only one week in power. Afterwards the country was ruled by a junta for a

[35] In 1960 the PSD won 75 out of 107 seats, while in both 1965 and 1970 it won 104 out of 107 seats (African Elections Database, Madagascar).

number of months. This junta eventually appointed, in June 1975, the naval officer Didier Ratsiraka as head of state (Randrianja and Ellis 2009, 189–192).

In December 1975 a referendum was held in which Madagascan citizens had one vote to decide on the constitution, on the Charter of the Socialist Revolution, and on Ratsiraka as president (Randrianja and Ellis 2009, 193). The Charter, or *Boky Mena* (red book), had a supra-constitutional character and outlined Marxist-Leninist principles for Madagascar (Cadoux 1993, 60). It spelled out how society and the state could be transformed to democratic socialism by creating a system of local *fokonolona* governance and by the socialisation of the economy (Raveloson 2000, 42–44). The Democratic Republic of Madagascar was governed by the president of the republic, the *Conseil Suprême de la Révolution* (CSR), the Government, the *Comité Militaire pour le Développement* (CMD) and the *Assemblée Nationale Populaire* (ANP). These institutions were, however, dominated by Ratsiraka, who could be reelected in perpetuity (Raveloson 2000, 46).

Party politics were constrained during the second republic. Only socialist parties, united under the banner of the *Front National pour la Défense de la Révolution* (FNDR), were allowed to participate in the country's political life. The FNDR was comprised in 1976 of five parties, with two further ones joining in the following year.[36] Ratsiraka headed AREMA, which became the strongest party within the FNDR. AREMA dominated the government, the CSR, the ANP and the administration (Marcus 2016, 116). Elections for the ANP were held in 1977, 1983 and 1989. In all elections AREMA won the majority of seats.[37] Ratsiraka was reelected in the presidential elections of 1982 and 1989 meanwhile.

4.1.2 The Transition to Democracy

Massive economic difficulties forced Ratsiraka to relax the socialist agenda and to seek already in 1980 a structural adjustment agreement with the International Monetary Fund and the World Bank. Politically, the Ratsiraka regime faced internal criticism and an evolving opposition from the churches and from society in general. These cracks in the regime became evident in the presidential elections of March 1989. In this election, four candidates were vying for the presidential office. Ratsiraka had, however, a clear advantage over his rivals due to his superior financial means and his control of the administration.[38] These advantages and manipulation attempts were not sufficient to secure a clear victory, though. Candidate Manandafy would win, according to official results, 20 per cent of the vote (African Elections Database). The freshly created Madagascan election observatory association KMF-CNOE[39] reconstructed how Ratsiraka did not actually win the majority of votes.[40] Although Ratsiraka managed to be the official winner of the elections, he nevertheless was politically weakened by them and thus had to consider concessions. In August 1989 Ratsiraka invited the FNDR

[36] The FNDR parties were: Avant-Garde de la Révolution Malgache (AREMA), AKFM/KDRSM, VITM/KITM, UDECMA/KMTP (since 1976) and MFM/MFT and VSM (since 1977) (Marcus 2016, 115).

[37] 1977: AREMA 112/137; 1983: AREMA 117/137; 1989: AREMA 120/137.

[38] He was said to have had a sum of several billion Malagasy francs (FMG) at his disposal for campaigning purposes. In comparison, his strongest contender, Manandafy, had only a campaigning budget of 100 million FMG. Furthermore, officials in the administration were asked to donate to Ratsiraka's campaign (Raveloson 2000, 121).

[39] The *Comité National d'observation des Elections et d'Education des Citoyens* was established in February 1989. This organization, which had been initiated by the FFKM, had as its goal the observation of the electoral process and the promotion of democratic values (Rajaona 1995, 36).

[40] KMF-CNOE had conducted a statistical projection with a sample of 60 out of 110 constituencies' results. According to this calculation, Ratsiraka had won only 48.83 per cent of the vote (Raveloson 2000, 123).

members to submit their reform proposals, and on 29 December 1989 the ANP adopted a constitutional amendment that abrogated the political monopoly of the FNDR and thus introduced multi-partyism. During a visit of then French President Mitterand to Antananarivo in June 1990, Ratsiraka announced an even more far reaching constitutional revision. This revision was not adopted until late May 1991; it had already come too late however (Rajaona 1995, 25–26).

In the meantime, the protest movement had gained further momentum. An important player in the regime-critical movement was the association formed of four Christian churches, *Fiombonan'ny Fiangonana Kristianina eto Madagasikara* (FFKM).[41] The FFKM had organised in August and December 1990 national concertations to foster dialogue between regime-critical voices and the regime itself (Ravaloson 1994, 46–48; Raveloson 2000, 101). Representatives of the regime did not attend the dialogue, however. Instead an alliance of the regime-critical voices – the *forces vives* – was created and plans for the democratisation of the regime were developed (Raveloson 2000, 101). The *forces vives* comprised political parties that used to be close to the Ratsiraka regime as a result of having been members of the FNDR, and of new political parties that had just been created after the lifting of the FNDR monopoly. On 1 May 1991 the *forces vives* launched a series of demonstrations calling for a transitional government and a new democratic constitution (Raveloson 2000, 135). The demonstrations developed into a general strike, and in July the more radical faction of the *forces vives* declared a shadow government under the leadership of Albert Zafy and Rakotoarison. On 10 August, a protest march headed to the presidential palace Iavoloha outside of Antananarivo to compel President Ratsiraka to agree to a meeting with the protestors. It was on this occasion that the presidential guard opened fire on the demonstrators, leaving 30 dead and 200 injured (Delval 1994, 98–99).[42]

Behind closed doors negotiations with the Ratsiraka regime were already underway. These negotiations were protracted for several months, however, due to divisions on both sides of the negotiation table.[43] It was only on 31 October that the FFKM finally achieved a breakthrough by reaching a formal agreement – the *Convention du Panorama du 31 octobre 1991* – between the Ratsiraka government and the *forces vives*.[44] The Panorama Convention prescribed a transitional period of 18 months. During this period Ratsiraka remained president of the republic but his competences were substantially curtailed. The ANP was dissolved, and transitional institutions were created instead. These were the *Haute Autorité de l'État* (HAE), the Office of Prime Minister, the *Comité pour le redressement économique et social* (CRES) (with 130 members) and the *Comité militaire pour le développement* (CMD) (Delval 1994, 100). The Panorama Convention guided the time period for transition, even though the former was not immediately fully implemented itself.[45]

An important element of the transitional period was the National Forum that was supposed to draft a new constitution. The pro-Ratsiraka forces of the MMDM insisted that this meeting

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[41] The FFKM had been created in 1979, and united the Catholic church and three Protestant ones – more precisely, the reformed protestant church (FJKM), the Anglican church (EEM) and the Lutheran church (FLM) (Rajaona 1995, 34; Ravaloson 1994, 166).

[42] Other sources state that the exact number of victims was never established (Allen 1995, 106; Randrianja and Ellis 2009, 202).

[43] The *forces vives* were divided into a more radical (Ramsala, centred around Zafy) and a more moderate faction (FFM, former FNDR parties). It was the latter who propagated a negotiated transition.

[44] The agreement had been signed in a hotel in Antananarivo called 'Panorama'.

[45] The ANP had not been dissolved immediately, as prescribed by the convention. The ANP continued to operate until 21 November in fact, and even adopted two laws in this period (Rajaona 1995, 29).

should not be called a national conference. They feared that such a nomenclature would give the assembly too much authority, due to the wave of national conferences spreading across the African continent.[46] Furthermore, the MMSM was in favour of the two constitutional proposals being presented in the form of a referendum because they assumed that the popular will would demonstrate that the *forces vives* did not have a broad majority across the country (Rajaona 1995, 31, 41).

The National Forum was divided into two phases. First, regional conferences were held in February 1992 that appointed delegates and, second, the National Forum itself met in the period between 22 March and 1 April 1992. About 1400 delegates participated therein, among them the regional delegates and representatives of numerous political, social and religious groups (Raveloson 2000, 209). The National Forum was made up of five commissions, of which the constitutional commission was the most frequented one.[47]

The tensions between the two different camps continued during the course of the National Forum. Between the Ratsiraka camp and that of the *forces vives* two points were particularly contested. First, the Ratsiraka camp advocated for a federal state structure and, second, they fought against an implicit ban on reelection for Ratsiraka.[48] While the federal idea did not succeed, a reelection ban for Ratsiraka was not included either in the constitutional draft or in the electoral law. The conflicts in the National Forum were also expressed violently. Among other incidents, the house of Albert Zafy was attacked on one occasion and on the last day of the National Forum armed Ratsiraka supporters crashed the meeting. Five people died and 37 were injured during this incident (Delval 1994, 102). The National Forum's constitutional draft was revised by an ad hoc committee, before being finally approved by a national referendum on 19 August 1992.[49]

4.1.3 Elections in Madagascar (1992–2009)

The new constitution set up a new electoral regime. The president of the republic was to be elected for a five-year term and a National Assembly for a four-year term.[50] In the period between 1992 and 2009, four presidential and four legislative elections were held in Madagascar. The first presidential election was held in November 1992, approximately three months after the constitutional referendum of 1992. In this election the strongest candidates were the incumbent Didier Ratsiraka and the leader of the Forces vives, Albert Zafy. The latter won the election in the run-off. Zafy's term was characterised by power struggles between the president, the prime minister and the National Assembly. The constitution of 1992 provided for a strong National Assembly, which subsequently elected the prime

[46] This wave had been initiated by the National Conference in Benin, and had been praised at the time as an African way of constitution making and democratization.

[47] The five commissions concerned the constitution, the electoral law, social affairs as well as education and culture. A total of 600 delegates chose to participate in the constitutional commission (Rajaona 1995, 49).

[48] It had been proposed that Article 137 of the new constitution should include a presidential re-election ban for persons who had already served two terms in the period since independence. As Ratsiraka was the only person still living to whom this provision would apply, it was perceived as being a personalized legal provision (Rajaona 1995, 49–50).

[49] The ad hoc committee comprised Albert Zafy, as HAE President, Prime Minister Razanamasy, CRES Presidents Manandafy and Andriamanjato as well as the leaders of the four FFKM churches (Raveloson 2000, 207).

[50] The constitution of 1992 prescribed a term of four years for the National Assembly. The term's length was altered to five years in the constitutional revision of 1998 (C 1992, Art. 66, C 1998, Art. 66).

minister and a weak president. This system is sometimes described as a parliamentary one, although in reality it was actually a semi-presidential system (Elgie 2011, 122).

The power struggles came to an end after the second parliamentary impeachment motion that was upheld by the HCC in September 1996. Consequently, the Madagascan people cast their votes for the second presidential election of the Madagascan Third Republic in November 1996. Ironically, Ratsiraka and Zafy were again the two strongest candidates – this time Ratsiraka won the run-off by a small margin. The third presidential election followed the official schedule, and was thus held in December 2001. This time a new contender had entered onto the stage. The successful yoghurt entrepreneur and mayor of Antananarivo, Marc Ravalomanana, declared he would compete for election in August 2001 (Randrianja 2003, 314). His candidacy was a surprise for Ratsiraka and other observers besides. By June no viable contender had been detected, and the Economic Intelligence Unit mentioned Ravalomanana as a presidential candidate for the first time only in its December 2001 issue (EIU 2001; Marcus and Razafindrakoto 2003, 32).

Although Ratsiraka had pulled a number of strings to tilt the playing field, specifically by extending his control over the territorial administration, by amending electoral laws and by appointing new constitutional judges, Ravalomanana still won more votes in the first round of the election (Randrianja 2003, 312; Razafindrakoto and Roubaud 2002, 21; Marcus and Razafindrakoto 2003, 36). Ravalomanana even claimed to have won the poll in the first round. The HCC proclaimed in January 2002, however, that Ravolomana was in the lead but that a run-off with Ratsiraka would be necessary. After this decision, protests escalated throughout the country. In April, an internationally mediated agreement would be signed in Dakar and domestic judicial manoeuvres led to the dismissal of all constitutional judges. The previous constitutional judges returned to HCC and rendered a second decision on the presidential election's results. This time Ravalomanana was proclaimed to have won the poll in the first round. The electoral crisis de facto ceased when Ratsiraka left Madagascar for his French exile, in June 2002. The next presidential elections were less crises ridden meanwhile, as no serious contender ran for presidency. Consequently, Ravalomanana could win the poll in the first round. However, he would not complete his second term because the military forced him to step down in March 2009. The military immediately transferred power to Andry Rajoelina, who had led protests against the Ravalomanana government in the previous months. The next election did not take place before October 2013. The following table recaps the presidential elections and their main contenders.

Table 13. Presidential Elections and Their Main Contenders (1992–2007)

Election Date	Main Contenders
25.11.1992 (1st round) 10.02.1993 (2nd round)	Albert Zafy (winner) Didier Ratsiraka
03.11.1996 (1st round) 29.12.1996 (2nd round)	Didier Ratsiraka (winner) Albert Zafy
16.12.2001	Marc Ravalomanana (winner) Didier Ratsiraka
03.12.2006	Marc Ravalomanana (winner) Jean Lahiniriko

Source: African Elections Database.

Legislative elections eventually succeeded presidential ones. The first legislative election of the Third Republic was due at the latest two months after the proclamation of the presidential election's results (C 1992, Art. 145), and thus at the beginning of May – but it was in fact postponed until to June 1993, among other reasons due to several amendments to the electoral law and ones particularly targeted at the electoral system itself (Delval 1994, 106). In these elections, a coalition of *forces vives* parties won the majority of the parliamentary seats. The subsequent legislative elections were also rescheduled, and the legislative terms were either extended or reduced – this will be explained in detail in due course. The legislative election of 1997 was won by Ratsiraka's party AREMA, while the elections of 2002 and 2007 awarded Ravalomanana's party TIM with a legislative majority. The table below gives an overview of the legislative elections' dates and the strongest parties therein.

Table 14. Legislative Elections and Their Strongest Parties (1992–2007)

Election Date	Strongest Party
16.06.1993	Comité des Forces Vives
17.05.1998	AREMA
15.12.2002	TIM
23.09.2007	TIM

Source: African Elections Database.

4.2 The Democratic Quality of Elections in Madagascar

In this section, the development of the democratic quality of elections in the period between 1992 and 2009 will be scrutinised by using the indicators that have been introduced in Chapter 3. I start the analysis with participation and proceed with the analysis of competition and legitimacy.

4.2.1 Participation

Participation comprises two aspects: passive participation by the voters and active participation by those who present themselves as candidates for election. I start the analysis by considering passive participation, before then turning to its active form. Passive participation is commonly measured by the voter turnout rate. However, a look at the registration of the electorate and the inclusiveness of the electoral roll is also worthwhile.

The electoral register in Madagascar is maintained by the local administration. Thus, the voters do not have to register themselves prior to each election. For the updating of the electoral roll, a committee for the census of the voters is created before elections and the final electoral list is subsequently fixed by an administrative commission (Ord. 92-041, Art. 6-10, LO 00-14, Art. 6-10). The number of registered voters is nevertheless a fluid matter. A certain degree of fluctuation should not be surprising or even be taken as an indicator of quality, as the Madagascan population has grown substantially in the last three decades. The electoral register offers up, however, inconsistencies that stretch beyond the explanation of mere population growth. The following table shows the number of registered voters that the HCC reported in its decisions on presidential elections.[51] The last column reports the difference between the number of registered voters in the first and second rounds.

[51] In the decisions on the legislative elections, the numbers of registered voters were not reported.

Table 15. Number of Registered Voters as Given by the Haute Cour Constitutionnelle

	First Round	Second Round	Difference
PE 1992	6,130,016	6,282,564	+ 152,548 (2.4 %)
PE 1996	6,453,612	6,667,102	+ 213,490 (3.2 %)
PE 2001[52]	6,376,360	6,720,218 (second decision)	+ 343,858 (5.1 %)
PE 2006	7,317,790		

Note: Author's own composition based on HCC decisions.

In all elections there were more registered voters in the second round than there were in the first. The differences in 1993 and 1998 may be explainable by the use of ordonnances. In each election the electoral register had shortcomings, as election observers repeatedly reported on. Common problems were the omission of voters from the register, inconsistencies between the entries on the electoral card and the register, and the registration more than once of certain voters. For the ad hoc rectification of such errors, judicial authorities at the local level were allowed to issue ordonnances that entitled the citizens in question to vote in a certain polling station. These additional votes by ordonannce may have been added in the register for the second round.[53]

More bemusing, however, is the difference between the number of registered voters that is reported in the HCC's first and second decision on the 2001 presidential election. Where were the more than 340,000 voters in the first decision, and how did they come to appear in the second one? The number of the first decision is even more suspicious when it is compared to that of registered voters in the second round of the 1996 election: the electorate of 2001 contained about 300,000 less voters than in 1996. This divergence corresponds to a more blatant irregularity in 1998. The number of registered voters for the constitutional referendum in 1998 was announced as 4,552,758. Thus, roughly two-thirds of the electorate mysteriously shrank away after 1996 but reappeared again two years later for the legislative elections (CNOE-KMF 1999, 250; Razafindrakoto and Roubaud 2002, 29). Razafindrakoto and Roubaud explain that in 1993 the number of registered voters was roughly in accordance with the numbers of the population census.[54] Until 1996 the rate of non-registration was below 5 per cent. In 2001 this rate had however increased to 20 per cent. The authors analyse that Ratsiraka's winning margin had been particularly high in those *fivondronanas* in which the rate of non-registration was comparatively high. Moreover, the non-registration rate was high in those *fivondronanas* where AREMA and/or Ratsiraka had won high vote shares in previous elections (Razafindrakoto and Roubaud 2002, 30–31). This raises the suspicion that citizens not inclined to vote for Ratsiraka and AREMA had been omitted deliberately from the electoral register. In other elections, the fluidity in and inconsistencies of the number of registered may not only have been due to administrative challenges and the development of the voting age population but may have also been caused by deliberate manipulation.

[52] In 2001 only one round of the presidential elections took place, but two decisions on the final results were rendered.

[53] This is only an assumption, however. Other authors report different number of registered voters for the two electoral rounds, but do so without further discussing the discrepancies therein (Razafindrakoto and Roubaud 2002, 30–31).

[54] They point out that a certain degree of under registration is also common in consolidated democracies. In the 1990s, the non-registration rate in France was estimated at 10 per cent for example (Razafindrakoto and Roubaud 2002, 29).

The number of registered voters indicates the size of the electorate, and the development of these numbers hints to their accuracy and consistency. The number tells us how many people are officially entitled to vote, but it does not tell us how many citizens eventually chose to participate. For this reason the turnout rates also need to be analysed. The official turnout rate is calculated according to the official number of registered voters. The following table presents the turnout in presidential and legislative elections. It includes the official turnout data as well as the turnout calculated in relation to the estimated overall size of the voting age population.

Table 16. Turnout Rates in Presidential and Legislative Elections

Presidential Elections			**Legislative Elections**		
Election Year	**Turnout (Registered Voters)**	**Turnout (VAP)**	**Election Year**	**Turnout (Registered Voters)**	**Turnout (VAP)**
PE 1992	74	67	LE 1993	55	54
PE, 2 1993	68				
PE, 1 1996	58	30			
PE, 2 1996	50		LE 1998	60	41
PE 2001 (D 1)	67	56			
PE 2001 (D 2)	68	56	LE 2002	67	51
PE 2006	62	51	LE 2007	46	.

Note: Turnout rates were calculated in relation to the official number of registered voters and to the estimated voting age population. The calculation of the presidential elections' turnout was based on the data from the HCC decisions. The legislative elections' turnout was taken from Lindberg's dataset. VAP turnout data is from IDEA. This data were not available for both rounds of the elections.

A comparison of the voter turnout in presidential and legislative elections shows that the participation in the latter was generally lower except for the legislative election of 1998. The highest turnout in legislative elections was achieved in the one of 2002. Participation in the presidential elections increased and decreased in two waves, of which the first had a particularly high peak and a very low trough.

A look at the political context is useful for the interpretation of the turnout rates. The presidential elections of 1992/1993 were the founding elections of the Third Republic. A high number of people were engaged in the general strikes that led to the demise of the Ratsiraka regime, and these individuals were eager to elect a new president. The lower turnout in the legislative elections may be explainable by the greater abstractness of legislative elections in comparison with presidential ones – in which a single person is elected. Analysts of the legislative elections furthermore stressed that ad hoc changes to the electoral system as well as the high number of candidates may have created confusion among the electorate (Cadoux 1993, 64; Delval 1994, 107).[55] The difference between the two turnout rates is nevertheless striking to the extent that the constitution of 1992 had vested parliament with significant powers in comparison to the presidency. Consequently a lot of power was distributed via the legislative elections, while the president held much less power. This created a paradox in which the office with less formal power enjoyed more popular support. This paradox may have induced Zafy's belief that he as the president deserved more power.

[55] In total, 4000 candidates on 121 lists vied for the legislative election of 1993. In Antananarivo alone 37 lists of candidates competed for 8 parliamentary seats (Cadoux 1993: 64; Delval: 107).

Turnout in the presidential elections of 1996 was much lower than in 1992/1993. Many authors explained this by the electorate's frustration about the choices that they had available to them (Allen 2003, 91; Cadoux 1998, 599; Marcus and Razafindrakoto 2003, 29). This appears to be a plausible explanation in particular for the second round of the presidential race. While for the first round three candidates were deemed viable (Ratsiraka, Ratsirahonana and Zafy), the Madagascan had to choose in the second round between two former presidents who had been ousted from office before the official end of their term. Ratsiraka had to step down due to popular protests, while Zafy had been impeached by the National Assembly. This election was often described as a choice between a rock and a hard place. Taking this frustration into account, it makes sense that the turnout in the legislative elections of 1998 was higher than it was in the presidential elections of 1996 – as the former at least offered more choice to voters.

The higher turnout rate in the presidential elections of 2001 can be explained in a similar vein. Surveys had shown that the Madagascans were longing for a new leader. Being a new candidate was apparently a persuasive factor for voters (Marcus and Razafindrakoto 2003, 35). The legislative elections of 2002, meanwhile, experienced the highest legislative turnout ever. This may be surprising because, on the one hand, the contestations and chaos in the aftermath of the presidential elections could have shaken the voters' confidence in elections per se and consequently have lowered their motivation to participate. On the other hand, the voters may have expressed their willingness to put an end to the electoral crisis and to confirm the power of the new president by vesting him with a majority in the National Assembly. The decrease in the turnout in the presidential and legislative elections of 2007 may have been due to similar logics as in previous elections. Choices were constrained in both elections, as AREMA's promising presidential candidate Rajaonarivelo was not allowed to run and his party had subsequently decided to boycott the legislative elections.

Active participation in Madagascan elections was intense within the period of analysis. In legislative elections, between 1,318 and 4,000 candidates vied for the 127 to 160 seats of the National Assembly.[56] There were less legislative candidates in the 2000s, which corresponds with the election boycotts in 2002 and 2007 as well as with the dominance of Ravalomanana's TIM party. In presidential elections, between six and 15 candidates stood for election each time – as Table 5 below illustrates. There are two sides to such high levels of active participation. On the one hand, a high number of candidates standing indicates a genuine interest in the electoral game and also a certain level of trust in its institutions. On the other, intense active participation points to a certain type of political entrepreneurship. In particular, the two-ballot system of presidential elections creates an incentive structure in which participation in the first round provides bargaining power with the candidates still remaining in the second round.

[56] The National Assembly's size changed for each election. It comprised 138 seats in 1993, 150 seats in 1998, 160 seats in 2002 and 127 seats in 2007.

Table 17. Number of Candidates Standing for Election

Election Years	Presidential Elections	Legislative Elections
1992/1993	8	4,000
1996/1998	15	3,500
2001/2002	6	1,318
2007	14	1,542

Source: Presidential candidates - HCC decisions. Legislative elections - 1993 – Cadoux 1993, 64, 1998-EIU 1998, 21, 2002- EP 2002, 5, 2007-Midi Madagasikara, 24.08.2007.

In two elections, boycotts by opposition parties took place. In 2002 Zafy's party, CRN, decided to boycott the legislative elections in order to express their strong opposition to Ravalomanana. There were also internal discussions within AREMA about whether to boycott the elections due to the party's bad prospects. Furthermore, Norbert Ratsirahonana and Leader Fanilo's candidate Razafimalaheo did not contest the legislative elections (EIU 2002, 32, 2003, 30–31). The legislative elections of 2007, meanwhile, were boycotted by AREMA as a protest against the rejection of Rajaonarivelo's candidacy therein.

To sum up, active electoral participation went through a number of ups and downs between 1992 and 2009. The electoral register had its shortcomings, and covered the real number of people making up the electorate only to varying degrees. This is why the official turnout rates can only give a rough picture of the Madagascan citizens' participation. Nevertheless, the official turnout rates reveal that participation in Madagascar apparently decreased when the people's frustration about their available political choices was high. In 2006 and 2007 the electoral turnout trend pointed downwards. This is a parallel to the development in the level of active participation. The only elections that were boycotted were those held in 2002 and 2007, with the latter boycott being politically more serious. Thus, considering both indicators, participation can be said to have declined by the late 2000s.

4.2.2 Competition

In this section, the de facto level of electoral competition in Madagascar will be analysed. Data related to the election results – like the electoral turnover, the results as such and the winning margins – serve as indicators for this endeavour.

Electoral turnover is considered by authors like Adam Przeworski as the most important indicator for competition and democracy (Przeworski, Alvarez, Limongi and Cheibub 1996, 52). On first sight, Madagascar experienced three electoral turnovers between 1992 and 2008. A closer look at these events reveals, however, that these turnovers were not that straightforward and not that clearly attributable to elections. Instead, they were each accompanied by a severe institutional crisis. The turnover of 1992 took place after several months of popular protests and a transition period. The second turnover was preceded by an interim presidency, due to the impeachment of Zafy. The third turnover occurred after a full-fledged electoral crisis, and the legality of the turnover remains contested until today (Ralambomahay 2011; Razafindrakoto and Roubaud 2002, 24).

Another measure for electoral competitiveness is the comparative strength of candidates and parties in terms of the election results, and the number of rounds required for winning the presidency. The Madagascan constitution prescribes a two-ballot system for presidential elections. Thus, a run-off is required when none of the candidates were able to win the absolute majority of votes in the first round. In the four presidential elections held within the period of analysis, between six and 15 candidates vied for office. The relatively high number of candidates suggests that the Madagascans had a genuine choice, and that several

candidates were competing for their vote. It only happened in 2006 that a candidate, the incumbent Ravalomanana, won the clear absolute majority in the first round. In both elections of the 1990s, a second round had to be held because none of the candidates were able to win the absolute majority in the first round. In the election of 2001, the necessity of a second round had been strongly contested and it was eventually not even held.

The following table presents the results and winning margins of the two strongest candidates in the country's presidential elections. The election of 2006 was definitely the election with the lowest level of competition. Ravalomanana was not only able to win the absolute majority in the first round but also none of his rivals were able to collect more than 11 per cent of the votes.[57] Consequently, Ravalomanana was able to obtain 1.9 million more votes than Jean Lahiniriko, the second-strongest candidate. The level of competitiveness was also rather low in the Third Republic's founding elections. Although a second round was necessary, Albert Zafy acquired already in the first one a significant winning margin of 0.16 percentage points. This is historically not surprising as many Madagascans had protested and gone on strike for months so as to topple the Ratsiraka regime; indeed, the whole election pointed to a change occurring after the long protests against that regime.

Table 6: Results and winner margins of presidential and legislative elections (1992–2007)

Election	Candidate I		Candidate II		Winner Margin	
	Votes	Percentage	Votes	Percentage	Votes	Percentage Points
1992, 1	Zafy 1,846,842	45.14	Ratsiraka 1,195,026	29.22	651,816	0.16
1993, 2	Zafy 2,766,704	66.74	Ratsiraka 1,378,640	33.26	1,388,064	0.33
1996, 1	Ratsiraka 1,321,388	36.61	Zafy 844,459	23.39	476,929	0.13
1996, 2	Ratsiraka 1,608,321	50.71	Zafy 1,563,137	49.29	45,184	0.01
2001 (1)	Ravalomanana 1,895,228	46.21	Ratsiraka 1,677,008	40.89	218,220	0.05
2001 (2)	Ravalomanana 2,306,617	51.46	Ratsiraka 1,609,103	35.9	697,514	0.16
2006	Ravalomanana 2,435,199	54.79	Lahiniriko 517,994	11.65	191,7205	0.43

Source: Author's own composition of HCC's results and own calculations.

Madagascar experienced the fiercest presidential competition in 2001 – that despite several attempts by incumbent Ratsiraka to unbalance the playing field. In that election the competition focused on two candidates, Didier Ratsiraka and Marc Ravalomanana, who together won 87 per cent of all votes. This share of votes was stable across the two issued results of the election. The winner margin ranged, however, between 0.05 in the first HCC decision and 0.16 in the second. The result of 2001 was, however, not the closest-ever presidential race when the results of the second rounds are also taken into account. In 1996 Ratsiraka could only gain 45,184 more votes than Zafy. This is in sharp contrast to the second round in 1993, when Zafy acquired an advantage of almost 1.4 million votes. However I do not assess the 1996 election as a highly competitive one, because the whole episode was rather characterised by the citizens' disappointment about the poor choices that the political class offered them than by a heated contest between two promising candidates.

[57] Jean Lahiniriko acquired 11.65 per cent, Roland Ratsiraka 10.14 per cent and Herizo Razafimahaleo 9.03 per cent of the vote.

All of Madagascar's legislative elections were held within a year after presidential elections, except for the legislative ones of 1998. The latter took place 18 months after the presidential elections on this occasion. Legislative elections that follow presidential elections within a certain period of time tend to produce honeymoon effects. Thus, they award the new president with a parliamentary majority (Shugart 1995).[58] This applies for Madagascar too, where the electoral turnovers in the National Assembly succeed the electoral turnovers within the presidency. Hence, in 1993, 1998 and 2002 new parliamentary majorities took over. The strength and composition of these parliamentary majorities varied, however, across the elections. While in the 1990s no single party could obtain the majority, Marc Ravalomanana's TIM has tightened its grip on the National Assembly since 2002. In 1993 the strongest party, Comité des Forces Vives, won 47 out of 138 seats. Others parties gained between one and 15 seats in the Assembly and an alliance of several groups was built to gather a parliamentary majority of 75 seats.[59]

All in all, the 1993 election was characterised by a multitude of new parties that competed for the available parliamentary seats. Meanwhile, 1998 marked the return of Ratsiraka's AREMA – which had not participated in the 1993 elections.[60] AREMA won 63 out of 150 seats. With the support of Leader Fanilo's 16 seats and 32 independent candidates that were mostly close to AREMA, Ratsiraka could count on a two-third majority (Marcus and Razafindrakoto 2003, 30). In 1998 two other parties won more than ten seats. These were Norbert Ratsirahonana's AVI (14 seats) and the RPSD (11 seats). Zafy's AFFA won only six seats. In 2002, the TIM party was freshly created by Marc Ravalomana. In its first contested elections it won already 103 out of 160 seats and thus a clear parliamentary majority. Only one other party acquired more than ten seats in this election, with the FP gaining 22. In the subsequent elections the strengths of TIM even increased. The number of seats available was only 105, but as the size of the National Assembly had been substantially decreased then the TIM held a majority of 82.7 %. All other parties in the National Assembly won only one or two seats each. Thus, similar to the presidential elections, competition in the legislative elections had decreased by 2007.

Table 18. Results of Strongest Parties and Alliances in Legislative Elections

Elections		**Strongest Party**		**Majority Alliance**	
	Total Number of NA-Seats	**Seats**	**Share**	**Seats**	**Share**
1993	138	Comité des Forces Vives 47	34.1	75	54.3
1998	150	AREMA 63	42	111	74
2002	160	TIM 103	64.4	n/a	n/a
2007	127	TIM 105	82.7	n/a	n/a

Source: Author's compilation of data from the African Elections Database, secondary literature. Author's own calculations.

[58] Legislative elections that are held concurrently with presidential ones tend to produce the largest presidential majorities in parliament.

[59] Sources differ on the size of the majority group and the participating parties. This may be due to shifting alliances and subsequent fragmentation processes within the majority. I refer here specifically to the data of the African Elections Database.

[60] FAMIMA, a group close to AREMA, had instead vied for seats.

Although competition for political office is indeed present in Madagascar, power holders seek to control that competition to their own advantage. Competition was more vivid in the 1990s, particularly in parliamentary elections, and in the presidential election of 2001 – but it had declined by 2006/2007. In these elections, Ravalomanana won the presidency in the first round and his party gained a massive majority in the National Assembly.

4.2.3 Legitimacy

The legitimacy dimension is about the acceptance of elections as the appropriate channel for leader selection by political actors and by citizens as a whole. This dimension seeks to capture to what extent elections are the "only game in town" (Linz and Stepan 1996). I will start the analysis with the most blatant indicator for the acceptance of elections, namely the survival of the electoral regime. I will then proceed with scrutiny of the candidates' acceptance of election results and the occurrence of electoral-related violence.

Between 1992 and 2009 elections were the only way to achieve political office in Madagascar, but not the only way to lose it. In 1995, for example, then President Zafy was impeached. However, at least theoretically, the impeachment procedure is an institutional instrument of liberal democracy – although the legality of the procedure's application in 1995 is still contested even now (Allen 2003). Thus, from an institutional point of view the impeachment of Zafy cannot be considered as a non-acceptance of elections. In 2002 the result of the presidential elections of the previous year was heavily contested, but the electoral mechanism per se was not officially called into question by the relevant actors and the conflict did not lead to a disturbance of the presidential elections' periodical rhythm. In contrast, the electoral regime clearly broke down in 2009 when Marc Ravalomanana was ousted from office. The subsequent rule of Andry Rajoelina was not legitimised by elections, and the first subsequent ones were only held in October 2013.

The parliamentary electoral regime was not interrupted between 1993 and 2009, but the regularity of legislative elections was repeatedly subject to political manoeuvring. In 1998, 2002 and 2007 the legislative elections were not held in due time. In 1997 the parliamentary mandate was extended, while in 2002 and 2007 it was reduced.

Since 1992 election results have been mostly accepted, except for that of the presidential election of 2001. When the HCC proclaimed in 1993 the final results of the presidential election, Ratsiraka read out a letter in which he wished Zafy success for the heavy responsibilities that would lie ahead of him (Delval 1994, 104). With this statement he implicitly also accepted his defeat. In 1997 Zafy claimed after the run-off that the vote counting was rigged and thus demanded that it was redone. His demand was, however, dismissed and Ratsiraka was declared the winner by a small margin (ARB 1997, 12,533). A few months later, the supporters of Zafy renewed their criticism of Zafy's impeachment and the subsequent elections when the legislative elections were postponed (EIU 1997, 26). The non-acceptance of the election results by Zafy and his supporters was, however, of rather a rhetorical nature and did not disturb the continuation of the electoral regime. In contrast, Ravalomanana's rejection of the official results in 2002 turned into a full-fledged electoral crisis. Ravalomanana did not accept the ruling of the HCC that a presidential run-off should be held. He had demanded the comparison of the polling stations' electoral records, which had been collected by different bodies, and claimed victory in the first round already. He initiated popular protests and declared himself president in a pseudo-official ceremony that was attended by former HCC judges. Afterwards, the situation further escalated. In March, Ravalomanana's supporters stormed the ministerial buildings to allow Ravalomanana's

cabinet to take their seats. Ratsiraka responded with the declaration of martial law and the setting up of his government in Toamasina. The roads to the capital, Antananarivo, had been blocked and small clashes between the two camps occurred. The electoral crisis was eventually resolved by international negotiations and domestic judicial manoeuvres. In April 2002, Ravalomanana was officially declared president of Madagascar. This time Ratsiraka did not accept the decision, and continued to organise resistance against Ravalomanana. He finally surrendered in June 2002, then flying to France.

The use of electoral violence shows to what extent elections as an institution are accepted, and whether political actors seek to influence the outcome of them by violent means – be it either before or after the elections. In the secondary literature on politics and elections in Madagascar, for the period between 1992 and 2009 electoral violence did not play a prominent role except for in the post-electoral crisis of 2002. Several databases exist that cover election-related violence. For the purpose of this analysis, the data of the Lindberg dataset, the African Electoral Violence Database (AEVD) and the Social Conflict Analysis Database (SCAD) were taken into account. These databases do not, however, agree fully in their respective assessments of the Madagascan elections. Lindberg (2006) deems the elections in 1996, 1998, 2001 and 2002 as ones with isolated incidents of electoral violence, and the elections of 1992 and 1993 as not at all peaceful.[61] Straus and Taylor code in the AEVD the elections of 1997,[62] 1998, 2002 and 2007 as free of violence, the elections of 1993 and 2006 as ridden by violent harassment[63] and the election of 2001 as characterised by large-scale violence.

The different assessments of the 2001 elections may be due to different specific periods of observations. Straus and Taylor include the pre- and post-electoral period in their overall assessment, while Lindberg focuses only on the pre-electoral period.[64] This corresponds to the observations of the SCAD data, which reports a large degree of electoral violence in the post-electoral period.[65] In fact, violent actions did not escalate immediately after the elections but rather from February 2002. AEVD's classification of the 2002 legislative elections as "large-scale violence" is not plausible, however. The post-electoral violence related to the presidential elections prevailed until June 2002 (SCAD), but there were no reports on violence related to the legislative election in the same year. SCAD confirms the AEVD coding, and does not offer any entries on election-related violence in 1996. For 1998, two election-related events were coded within the six months before the legislative elections. However, at least one of these events was clearly related to the referendum that took place two months prior to the legislative elections. SCAD covers two events for the elections of 1992 and 1993, a

[61] Lindberg's dataset does not cover the elections of 2006 and 2007.
[62] This refers apparently to the election of 1996. The second round was held on 29 December, and thus may be (mistakenly) counted as 1997.
[63] The authors consider the following actions as violent harassment: "Police or security forces breaking up rallies, party supporters brawling in the streets, confiscation of opposition newspapers, candidate disqualifications, limited short-term arrests of political opponents", while large-scale violence is "repeated widespread physical attacks leading to a substantial number of deaths over time (20 deaths or more)" (Straus and Taylor 2012, 23–24). The dataset offers an additional medium category of "political repression", but it is not present in the Madagascan context according to the coding.
[64] In fact, it is not fully evident which period Lindberg bases his observations on. The relevant section in his book includes contradictory remarks about whether the observations concern the period "during [the] election campaign and on election day" or also the "immediate aftermath" (Lindberg 2006, 44–45).
[65] SCAD only reports one pre-electoral event that caused two deaths, but that had been covered only by one media source.

rather amateurish coup attempt in July 1992 and the occupation of administrative buildings by protesters demanding a federal system of government in June 1993. The subsequent storming of the building caused two deaths (SCAD). The secondary literature further accounts for the assassination of a local politician and a billposter in the electoral period 1992/1993 (Delval 1994, 107). The higher death toll may have induced Lindberg as well as AEVD to rate the 1992/1993 elections as more violent than the subsequent ones, although they still differ in their assessment of the degree of violence therein.

In brief, the presidential election of 2001 stands out in the history of electoral violence. The violence was mainly prevalent in the post-electoral phase. Other elections also experienced violent incidents that occasionally also involved deaths, as in 1993, but these incidents did not escalate to the extent that the legitimacy of elections per se was ever seriously called into question.

Generally, elections as a mode for leader selection were accepted in Madagascar between 1992 and 2009 – but the legitimacy of elections was also contested. The electoral schedule was repeatedly circumvented, in particular when it came to legislative elections. This lax handling of the elections' periodical rhythm weakened their legitimacy. Furthermore, the legitimacy of each election process varied, and in 2002 the legitimacy of the presidential election of the previous year was seriously contested. This was also the election that experienced the highest degree of electoral violence. Although the legitimacy of the 2006 and 2007 elections was not called into question in terms of the (non-)acceptance of results or of electoral violence, the electoral regime did not survive until the next election. Thus, it could be argued that Madagascar did not fully recover from the crisis of electoral legitimacy that occurred in 2002.

To recapitulate, all three dimensions of the democratic quality of elections varied between 1992 and 2009. The dimension of legitimacy displayed the heaviest slumps over time, as the presidential elections of 2001 produced a crisis of legitimacy and in 2009 the electoral regime even broke down. The presidential election of 2001 is an example of how the three dimensions of the elections' democratic quality can diverge. While legitimacy was in crisis, comparatively high levels of competition and participation were also simultaneously present. The dimensions of participation and competition have in common that they declined in the second half of the 2000s. While competition was intense in the 1990s and experienced an upward trend after the legislative elections of 2002, passive participation after 1992 went through ups and downs. In the elections of 2006 and 2007, meanwhile, the levels of active and passive participation decreased.

4.3 The Context of the Haute Cour Constitutionnelle

In this section I examine the various interventions of the Madagascan High Constitutional Court. The first part gives an introduction to the history of the HCC, analyses the court's formal powers and presents the varying perceptions of the HCC. The second part of the section then turns to the interventions of the HCC as such. I start with an overview of the court's chosen practice to deal with elections, before I then examine in detail how the court intervened at each step of the electoral cycle – and whether its interventions were functional or dysfunctional to the democratic quality of elections.

4.3.1 A Brief History of the Haute Cour Constitutionnelle

The HCC was already a part of the constitutional institutions of Ratsiraka's second republic that had been adopted in December 1975. In 1978 the HCC was implemented, and constitutional judges were appointed. The constitution of 1975 prescribed seven constitutional judges and a president, but according to a publication of the HCC the bench in fact comprised ten judges in the period between 1978 and 1985 (HCC 2006, 6,15).

The transitional agreement "Convention du 31 Octobre 1991" ("Convention de Panorama") included the HCC as one of the transitional institutions. Eleven new judges were appointed to this transitional HCC. These judges were appointed by President of the Republic Ratsiraka, by the transitional authority Haute Autorité de l'État led by Zafy and two by Prime Minister Guy Willy Razanamasy (Convention du 31 Octobre, Art. 9). One of the last actions of the Second Republic's Popular National Assembly (see Section 5.1.2) was the adoption of a law that extended standing rights to the HCC. According to that law, all institutions – also including the decentralised ones – could refer laws and executive decisions to the HCC – and the HCC was even vested with the right of proprio motu, thus the court could access itself. This was an attempt to maintain some sort of leverage over the transition process. The HCC also applied these new prerogatives in 1992 as well (Rajaona 1995, 30–31).

The constitution of 1992 devised a structure of the judiciary that was meant to break with the past. The state structure was defined so as to consist of the executive power, the legislative power and the judicial power. The latter comprised the Cour constitutionnelle, administrative et financière (CCAF), the Supreme Court, the Cour d'appel, the tribunals and the High Court of Justice (C 1992, Art. 41). Article 98 of the constitution stipulates the independence of the judicial branch from the executive and legislative ones, and further that this independence is protected by the CCAF and the Supreme Court.

The constitution of 1992 had prescribed the replacement of the HCC by the new CCAF. This body was meant to comprise three courts: the constitutional court, the Conseil d'état and the Cour de comptes. These courts were to be presided over by the constitutional court's president (C 1992, Art. 105). The CCAF was, however, never actually realised. The HCC instead continued to operate, and the constitutional judges who had been appointed as per the transitional agreement continued to sit on the bench. The Convention du 31 octobre had stipulated that the transitional institutions should stay in force until the implementation of the Third Republic's own institutions, and that the time period for this should not exceed 18 months (Arts 1 and 13). The transitional provisions of the 1992 constitution prescribed that the HCC and the Supreme Court should continue to exercise their functions according to the law until the implementation of the respective new institutions (C 1992, Art. 146). The constitutional referendum of 1995, which had been initiated by Zafy, neither amended the provisions on the CCAF nor the transitional Article 146. Only the constitutional referendum of 1998, triggered by Ratsiraka, abrogated the provisions on the CCAF and formally reintroduced the HCC. The constitutional rules governing the HCC since 1998 resemble to a large extent those for the CCAF.

Why, then, was the CCAF never implemented? First of all, the non-implementation needs to be taken in the context of the Zafy years. The first years of the Third Republic were characterised by conflicts between the president, the National Assembly and the prime minister. In this time six governments had been formed (Randrianja 1997, 29). Furthermore, the CCAF was not the only institution that would not be implemented. The Senate, the High Court of Justice and plans for decentralisation reform all went unrealised too (Randrianja

1997, 30). Authors like Cadoux and Randrianja interpreted the instabilities of this period as a sign that the old equilibrium of power and clientelistic networks had been disturbed by the new institutions, and that the elites were now searching for a new equilibrium (Cadoux 1998, 594; Randrianja 1997, 31).

The non-implementation of the CCAF was, however, also due to a mistrust of judges and a reluctance to vest them with too much power. Interviewees in Antananarivo reported that politicians paint a picture of corrupt judges (MDG-2; MDG-1; MDG-7) and the dangers posed by a government of judges (MDG-1; MDG-7). Interviewees agreed, however, that the non-implementation of the CCAF was due to a lack of political will (MDG-9; MDG-1; MDG-11; MDG-10; MDG-8; MDG-7; MDG-15). A former constitutional judge and an activist judge reported that Zafy held a conference with judges to explain his plans for constitutional amendments and to question the idea of judicial power (*pouvoir judiciaire*) (MDG-15; MDG-7). This conference is mentioned in the secondary literature as well (Cadoux 1998: 597). Some judges apparently reacted by going on strike, so as to pressurise the government into implement the new judicial institutions – as a former minister of justice and a former judge explained (MDG-1, MDG-7). A journalist, meanwhile, alleged that the implementation has been systematically blocked by the Ministry of Justice, and that under the presidencies of both Zafy and of Ratsiraka (MDG-8). The non-implementation of the CCAF had repercussions on the composition of the HCC, because a regular schedule of judicial appointments was never established in the years after the adoption of the 1992 constitution. This negligence also had an influence on the electoral crisis of 2002 since reshuffles of the bench were initiated before the poll and during the election crisis. I will explain these developments more extensively below.

4.3.2 The Formal Powers of the Haute Cour Constitutionnelle

4.3.2.1 General Provisions

This section introduces the provisions of the legal framework governing the HCC, focusing on the court's competences, standing, appointment and tenure rules. While in this section the general framework is explained, the subsequent one will concentrate on the specific provisions for the court's role in elections.

The two key documents for the HCC are the constitution and the organic law governing the HCC. Both documents – and in particular the constitution – were amended several times after the democratic transition at the beginning of the 1990s. The constitution of 1992 was amended in 1995, 1998 and 2007.[66] The constitutional amendment of 1995 did not concern the HCC, but the one of 1998 introduced some major changes to it – while in 2007 only minor related issues were adjusted. The provisions of the constitution were elaborated in the organic law *Ordonnance 92-018 du 8 juillet 1992 relative à la Haute Cour Constitutionnelle*. This law was updated by *Ordonnance 2001-003 du 18 novembre 2001 portant loi organique relative à la Haute Cour Constitutionnelle*.

Competences

According to Article 106 of the 1992 constitution, the HCC is charged with reviewing the constitutionality of treaties, laws, ordonnances and autonomous regulations, adjudicating

[66] In November 2010, a new constitution of the fourth republic was adopted in a constitutional referendum. This thesis analyses the period before 2009; closer scrutiny of the 2010 constitution is thus not undertaken due to space constraints.

conflicts between different state institutions and state levels, as well as mediating in electoral disputes. The HCC further decides on the definitive and temporal impediment of the president of the republic,[67] who swears the oath of office before the HCC, the National Assembly and the Senate.[68] Moreover, the president of the republic needs the approval of the HCC's president before he declares a state of emergency or martial law.[69]

The HCC's power to review laws and ordonnances is restricted to the period between the adoption of a law by parliament and its official promulgation (C 1992, Art. 110-111). The HCC thus has the power for an abstract a priori review. A concrete a posteriori review is only possible via the channel of the *exception d'inconstitutionnalité*. This exception allows judicial parties involved in a court procedure to apply for a constitutional review. The respective court then rules on this demand, and can after transfer the matter within one month to the HCC (C 1992, Art. 113). The constitutional amendments of 1998 and 2007, meanwhile, did not introduce any major changes to the HCC's power.[70]

Standing

The constitution of 1992 stipulated that all laws, ordonnances and parliaments' standing rules were to be transferred to the HCC by the president of the republic (C 1992, Art. 110-111). Since all laws required the HCC's review, the president of the republic could not take a decision about which laws would be referred – and thus held in this respect a mere procedural competence. This provision was changed in 1998. The mandatory review of laws was restricted to organic laws and ordonnances. Ordinary laws were only to be reviewed by the HCC if one-quarter of the National Assembly's or the Senate's members or a head of the state institutions had referred the law to the HCC (C 1998, Art. 121). The constitution of 1992 further allowed all public authorities to seek advice from the HCC on any draft bills (C 1992, Art. 112). This provision was not changed in the constitutional amendments. The standing rule for the *exception d'inconstitutionnalité* did not change either in the amendments.

Appointment

The appointment rules in Madagascar prescribe since 1992 a diversified mechanism. The constitution of 1992 provided for nine constitutional judges. Of these, three were to be appointed by the president of the republic, two by the National Assembly, one by the Senate and three by the High Judicial Council (C 1992, Art. 107). The appointment procedure remained largely stable, only the shares of the Senate and the High Judicial Council were amended in 1998. Thereafter the Senate and the High Judicial Council appointed two judges each respectively (C 1998, Art. 119). In 1998, another more substantial amendment was introduced. While the constitution of 1992 stipulated the election of the HCC president from among and by the HCC members, after 1998 this individual was appointed rather by the president of the republic (C 1992, Art. 107, C 1998, Art. 119).

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[67] Both situations require the referral from the National Assembly after a two-thirds majority vote (C 1992, Art. 50, 51).

[68] C 1992, Art. 48.

[69] Furthermore, the presidents of the National Assembly and the Senate need to agree on the nature of the special situation at hand (C 1992, Art. 59).

[70] In fact, only the constitutional amendment of 1998 introduced the HCC's competence to review whether the laws adopted by the newly created autonomous provinces were in accordance with the constitution and the organic laws (C 1998, Art. 118). This provision was abrogated jointly with the doing away with the autonomous provinces themselves in the 2007 amendment.

Tenure

The constitutional amendment of 1998, moreover, changed the judges' tenure of rule. The constitution of 1992 had granted the constitutional judges a term of six years that was not renewable (C 1992, Art. 107). In 1998, the length of term was increased to seven years. The article did not, however, specify any limitation to the number of terms that a judge may serve (C 1998, Art. 119).

4.3.2.2 Electoral Provisions

Three types of legal text define the HCC's competences and the procedures in the electoral process more closely. Those are the constitution, the organic law on the HCC and the electoral laws. Among those documents, the constitution gave only a vague idea of the HCC's role while the organic law and the electoral law provide more details on different aspects of the process. The Madagascan electoral legal framework is split into several laws and the provisions on the HCC are dispersed across these documents. While the electoral law regulates general points that are relevant for all elections, like the maintaining of the electoral list, the electoral campaign or the composition of the polling stations, the special laws on presidential and legislative elections focus on regulations relevant specifically for these.

Competences

The constitutional texts give a broad description of the HCC's role in the electoral process. The constitution of 1992 stipulated that the HCC was to be the judge of electoral disputes (C 1992, Art. 106), and to control the frequency of referenda, presidential elections and legislative ones too (C 1992, Art. 109). The constitutional texts of 1998 and 2007 narrowed down this description, doing so simply by stating that the HCC was to rule on disputes related to referenda, presidential elections and legislative elections (C 1998, Art. 118, C 2007, Art. 112).

The organic laws on the HCC are in line with the latter constitutions. They also stipulate that the HCC judges on complaints related to referenda, presidential elections and legislative elections (Ord. 92-08, Art. 27, Ord. 2001-003, Art. 27). The other provisions in the law focus on details in the submission procedure for complaints, and the treatment of those.

The electoral laws define three main functions of the HCC in the electoral process. First, it receives and controls the registration documents of electoral candidates and announces the list of them; second, it judges on complaints related to electoral operations; and, third, it announces the final electoral results. For the registration of candidates, the process, the involved institutions and the HCC's role all differ between legislative and presidential elections. Candidates for legislative elections need to register at an administrative commission established especially for this purpose at the *Fivondronampokontany* level. This commission certifies the registration documents and fixes the list of parties and candidates in the *Fivondronampokontany*. When the administrative commission dismisses someone's candidacy it informs the HCC, who has to approve the commission's decision. The candidate is also informed, so as to give them an opportunity to defend their prospective candidacy at the HCC (Ord. 93-007, Art. 53, 54; Ord. 98-001-Art. 11, 12; 02-004- Art. 49, 53). The administrative commissions further submit their list of candidates, which require the confirmation of the HCC. The court then issues a comprehensive list of candidates and parties for the whole country. Candidates for presidential elections directly register at the HCC. This body controls the documents and the eligibility of the candidates, announces the final list of

them for presidential elections and also identifies each individual's symbols as well as colours (Ord. 92-042-Art. 18, 19; Ord. 01-002-Art. 14).

The electoral laws on the presidential and legislative elections specify that the HCC is in charge of complaints that concern the preparations of the poll and the electoral operations as such (Ord. 93-007- Art. 77; Ord. 02-004- Art. 75; Ord. 92-042-Art. 44, Ord. 01-002-Art. 32). Electoral disputes do not automatically lead to the suspension of operations or the result.

The general electoral law defines the standing rules for electoral disputes. Accordingly, all voters can file complaints that concern the polling station for which they are registered on the electoral roll. In the complaint, they can contest the regularity of the electoral campaign and the electoral operations, the result of their polling station or can denounce any other violations of the electoral code. The candidates and their parties have the same rights of contestation (Ord. 92-041-Art. 107). These access rules remained mainly stable. The electoral law of the year 2000 only specified the timeframe for the complaints (within 20 days after the closure of polling stations) and added another group of plaintiffs.[71] National election observers were after 2000 also entitled to make electoral complaints in the polling stations for which they are certified. Furthermore, the delegates of candidates and parties have also been permitted to file complaints ever since (Ord. 00-14-Art. 117). The plaintiffs need to support their complaint with evidence. This can be official documents or the declaration of witnesses (Ord. 92-041, Art. 114; Ord. 00-14-Art. 119).[72] If the complaint concerns particular persons, they can submit a statement of defence (Ord. 92-041, Art. 115; Ord. 00-14-Art. 120). The *procès-verbal* (PV) from the polling stations is an important piece for the HCC's examination of the cases. On the basis of these PVs, observations and complaints can be noted.[73] The HCC has, however, also the power to commission further investigation of the cases (Ord. 92-018, Art. 34; Ord. 2001-003).

The task of announcing the final results of the legislative and presidential elections includes several preparatory steps. The HCC itself is not involved in the counting and tabulation of votes. The counting starts rather at the polling stations, and commissions for the counting of votes (Commission de recensement matériel des votes, CRMV) are established on several administrative levels to tabulate the results coming from the polling stations. Once the results from all polling stations have arrived at the CRMV, the commission is obliged to announce within 24 hours the provisional results (Ord. 92-042, Art. 37; Ord. 93-007, Art. 69; 01-002, Art. 26; 02-004, Art. 71). The CRMV does not have the power to annul any votes, but is required to report all irregularities and errors that it detected during its work (Ord. 92-042-Art. 38). The HCC examines these reports as well as the complaints that were noted in the PVs, and then judges if the results are valid or if certain votes require annulment (Ord. 92-042-Art. 39). The HCC also has, however, the power to examine the electoral documents on its own behalf. If it detects violations of the electoral laws and other regulatory provisions or problems of public order it may annul votes without any prior complaint having been made

[71] Previously, the time period had been defined in another section of the electoral law and was limited to 15 days after election day (Ord. 92-041-Art. 113).

[72] The electoral code of 1992 required the written, autonomous and signed declaration of five witnesses. The number of necessary witnesses was reduced to three in the electoral code of 2000.

[73] In all polling stations a PV, an electoral report, is written. Candidates, their delegates and accredited election observers may demand irregularities or violations of the electoral law are noted in the PV (Ord. 92-041, Art. 94; Ord. 00-014-Art. 96). Furthermore, the polling station staff are obliged to report any untoward incidents occurring at the polling station in the PV (Ord. 92-041, Art. 102; Ord. 00-014-Art. 104).

by the CRMV, voters, candidates or election observers (Ord. 92-42-Art. 44, Ord. 93-007-Art. 77; Ord. 2001-002-Art. 32; Ord. 2002-004-Art.75). After all these verification checks, the HCC announces the final results of the election. The electoral law on the presidential elections initially prescribed a timeframe of ten days between the arrival of all electoral documents from the CRMV for the verification process and the proclamation of the final results (Ord. 92-042-Art. 39). This timeframe was extended to 20 days by Ord. 93-004 of 15 January 1993, thus before the second round of the presidential elections had begun. For the legislative elections, the timeframe was fixed at 20 days right from the beginning (Ord. 93-007, Art. 71; 02-004, Art. 73).

Let us summarise the HCC's competences in the electoral process using the framework of the electoral cycle. The HCC's power of constitutional review comprises the authority to review electoral laws. Until 1998 it mandatorily reviewed all laws, but since then the HCC has had to appeal in order to be able to review electoral laws. The HCC does not hold specific competences to judge on the electoral roll. For this issue, special commissions on the local level can be addressed in case of denied or multiple registrations. The Tribunal de premier instance serves as court of appeal for the decisions of the special commissions.[74]

Furthermore, the electoral law comprises a chapter on penal provisions. This chapter covers infringements related to the electoral register, such as deliberate multiple registrations on the electoral roll. The HCC can transfer such cases to the public prosecution (1992-041, Art. 131 ter; Ord. 00-014-Art. 140). The HCC is charged with the certification of presidential candidates and the proclamation of the list of candidates for the presidential and legislative elections. The court's decision on the list of candidates is of last resort and no other venue for the dispute of these lists exists. During the electoral campaign, the HCC has held since 2000 the power to disqualify candidates who abuse public authority's prerogatives (00-014, Art. 128). The electoral law furthermore devotes a whole section in the penal provisions' chapter to infringements committed during the electoral campaign. The HCC holds major adjudication competences related to the voting procedure and the processing of votes. After the announcement of the provisional results by the national counting commission, the HCC receives all electoral documents. The HCC is the sole institution authorised to annul votes and to amend the election results. The procedures for the validation of the results were already explained above. The following table summarises the HCC's competences along the electoral cycle, which it does not, however, hold at all stages thereof. While the constitution of 1992 provided the HCC with vague but broad competences by stipulating that the HCC was to be the judge of electoral disputes (C-1992-Art. 106) and to control the regularity of referenda, presidential elections and legislative elections (C-1992-Art. 109), the electoral laws define the main areas of the HCC's competences.

[74] Until 2000 the Supreme Court was the court of last resort for registration disputes (Ord. 92-041-Art. 12-17, Ord. 00-014-Art. 12-20).

Table 19. HCC's Competences Along the Electoral Cycle

Electoral Cycle	HCC Competence	Alternative Mechanism
Legal framework	Constitutional review	No alternative
Electoral register	No specific competence	Special commission: adjudication of registration conflicts *Tribunal de premier instance*: court of appeal (and since 2000 of last resort) Supreme Court: court of last resort until 2000 Public prosecution
Registration of candidates	LE: Examination of rejected candidacies, proclamation of list of parties and candidates PE: certification of candidates, proclamation of list of candidates	LE: administrative commissions certify the list of candidates
Electoral campaign	Since 2000: disqualification of candidates abusing public authorities' prerogatives during the campaign	*Conseil d'État, Tribunal Administratif* Public prosecution
Voting	Adjudication of electoral disputes	Public prosecution
Processing of votes	Certification of results (including annulments), adjudication of electoral disputes, proclamation of final results	No alternative

Source: Author's own composition.

4.3.3 Perceptions of the Haute Cour Constitutionnelle

The section on the court's formal competences has demonstrated that the HCC has the power to render decisions on politically salient issues. Thus, the independence of the HCC – or the extent to which it is influenced by political actors – is of major importance for the Madagascan political system. Section 5.4.1 explained how politicians painted a picture of corrupt judges scheming in the 1990s to avoid the implementation of the CCAF. Semi-structured interviews that were conducted by the author herself in April and May 2013 in Antananarivo with judges, lawyers, law professors, politicians and civil society activists show that the perception of a dependent court still prevails. A prosecutor, a former minister of justice, law professors and a judge all agreed that they did not consider the constitutional court to be independent (MDG-9; MDG-1; MDG-3; MDG-6; MDG-7; MDG-15).

A former minister of justice stated that it would not be possible to analyse the HCC without knowing the political interferences with it (MDG-01). A judge considered the HCC to be the protector of powerholders (MDG-7), while a former HCC member asserted that in every political crisis the judiciary had played a leading role and that the HCC existed so as to approve anti-democratic political changes (MDG-16). A law professor assessed that the HCC was independent in the years between 1992 and 1998. Cadoux (1998) shares a similar view when he writes that the HCC did a good job in guarding the constitution, that despite its transitional nature and the high political pressure existing in the first years after the transition (Cadoux 1998, 597).

Another law professor observed a certain loyalty and servility by the HCC towards powerholders, and that it protects the interest of the president of the republic (MDG-15). This perception was shared by his colleague, who stated that HCC decisions would be influenced by political factors and that the constitutional judges would not dare to displease the president (MDG-6). Powerholders would also exercise pressure, but the constitutional

judges would rather practice a voluntary alignment with the respective powerholder – because they could benefit from this directly, for instance by getting a new car (MDG-1). One former HCC judge stated that it would be a question of personality and conviction. Some constitutional judges would even have no respect for the oath that they had sworn (MDG-16).

4.3.4 The Haute Cour Constitutionnelle and the Political Branches

4.3.4.1 Appointment and Judges

The Madagascan constitution prescribed appointment rules that involve several institutions into the appointment process. Not only the President of the Republic but also the National Assembly, the Senate and the High Judicial Council hold the prerogative to appoint judges. The literature on judicial politics deems a more diversified appointment system as more beneficial for independent courts (Feld and Voigt 2003, 502; Herron and Randazzo 2003, 426; Horowitz 2006, 130, 132; Melton and Ginsburg 2014, 196; Ríos-Figueroa 2011, 29). My interview partners nevertheless found that the appointment rules are important for explaining the dependence of the court (MDG-9; MDG-1; MDG-6; MDG-7). A law professor assessed that the appointment rules forge bonds between the judge and the appointer (MDG-3). A former minister of justice explained that political actors would appoint loyal judges (MDG-1). A journalist described how tactical considerations necessitate the appointment of judges that are close to power. This proximity would be reflected in the partisan bias of the HCC's rulings (MDG-8). A judge pointed out that especially the appointment of the HCC's president by the president of the republic in the period between 1998 and 2010 created obligations. The HCC president was obliged to validate illegal actions, like rendering laws constitutional, although they willingly violated the constitution out of fear of powerholders (MDG-7).

The real problem of the appointments was not the rule but the application of it and more precisely the arbitrary timing of appointments. In fact, the appointment rules of the 1992 constitution were not applied until 2001. The judges sitting on the constitutional bench throughout the 1990s were appointed according to the transitional agreement Convention de Panorama. Their remaining was due to the non-implementation of the CCAF that was formally introduced by the 1992 constitution. Political reservations had impeded the set-up of the court and in 1998 the idea of the CCAF was abandoned. Instead, the HCC was officially reintroduced but this did not lead to new appointments. It was only in the run up to the presidential elections of 2001 that the constitutional judges were reshuffled. On 22 November 2001, roughly three weeks before election day, new constitutional judges were appointed. The nine new judges rendered in January 2002 the first decision on the presidential election's final results. This verdict was fiercely contested in the electoral crisis. Eventually, the administrative chamber of the Supreme Court nullified on 16 April 2002 the appointment decree 2001-1080 and all decisions that had been taken by these constitutional judges (2002-03-CS-CA). It was also decided that the judges who had sat on the constitutional bench previous to the November 2001 appointment should return. The new (old) six constitutional judges rendered a second decision on the election result thereafter. In August 2002, after the official end of the electoral crisis, new constitutional judges were appointed to the bench. The term of these judges was due to have been officially over in 2009. However, as Madagascar entered in March 2009 a new regime crisis, in fact these judges remained on the bench. It was only in 2014 that new constitutional judges were eventually appointed. Thus, the appointments in 1992, 2001 and 2002 were intertwined with political crises.

How partisan were the appointments within the period of observation? According to the Convention du 31 Octobre four constitutional judges were to be appointed by President of the Republic Ratsiraka, five by the Haute Autorité de l'État led by Zafy and two by Prime Minister Guy Willy Razanamasy (Convention du 31 Octobre, Art. 9). Prime Minister Razanamasy was an AREMA member and thus part of the Ratsiraka camp. The representatives of the old regime could hence appoint six out of eleven transitional judges. Therefore, they held a slight majority in the transitional HCC. Ratsiraka appointed three judges who had served already at the HCC since 1978.[75] His fourth judge, Thomas Indrianjafy, had served as his minister of justice between 1976 and 1982 and used to be a member of the High Revolutionary Council. Thus, all these judges had close ties to the Ratsiraka regime and the legacy of the second's republic HCC was transferred to the new court through these judges. Despite the slight majority of the old regime's representatives Ratsirahonana was elected HCC president (MDG-6).[76] Ratsirahonana was appointed by the HAE. The initial 11 judges decreased to nine over the course of the 1990s. In 1995 Honoré Rakotomanana was appointed to the International Criminal Tribunal for Rwanda in Arusha, and in 1996 HCC President Norbert Ratsirahonana became prime minister. Nine judges remained on the bench, which coincided with the number of constitutional judges prescribed by the 1992 constitution. In theory, the balance between the Forces vives appointments and the AREMA appointments remained stable since Rakotomanana was appointed by Ratsiraka and Ratsirahonana by Zafy. However, in 1996 the Forces vives alliance was already deeply divided what led to the impeachment of Zafy. Therefore, the loyalties of the judges appointed by the HAE probably also faded.

The appointments initiated by Ratsiraka in 2001 also displayed some obvious partisan loyalties. Ratsiraka reappointed two of the three judges he had appointed in 1992: Indrianjafy and Berthe Rabemahefa. The tenure rules for the judges appointed according to the transitional agreement were unclear. Their term was meant for a short transitional period and not for nine years. The constitution of 1992 stipulated a six-year term for constitutional judges that was not renewable (C 1992, Art 107). This article was diluted in the constitutional revision of 1998. Accordingly, a term at the constitutional bench lasted seven years and the restriction to the number of terms was deleted (C 1998, Art 119). Thus, the reappointment of Indrianjafy and Rabemahefa was legal. I described Indrianjafy's party links as former minister and AREMA member already above. Rabemahefa had served on the constitutional bench already since 1978. The third judge appointed by Ratsiraka was Benjamin Rakotomandimby. Rakotomandimby was also an AREMA member and had been elected to the Senate in March 2001 (ION 943, 6). Two judges respectively were appointed by the National Assembly and the Senate. In both parliaments Ratsiraka controlled a majority. In the Senate 49 of the 60 seats that were to be elected by an electoral college were won by AREMA candidates. Additionally, Ratsiraka could appoint another 30 senators. In the National Assembly AREMA had also forged a coalition that held 74 per cent of the seats. Not many biographical details about the other constitutional judges are known. However, Germaine Bakoly Razanoarisoa who was appointed by the National Assembly told the author that her husband used to be a high-ranking AREMA official (MDG-16). This information in combination with the information about the parliamentary majorities let us suspect that there may have been further linkages to the AREMA party. Eventually, the appointments of

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[75] These were Honoré Rakotomanana, Berthe Rabemahefa and Victor Boto. Rakotomanana had been appointed President of the HCC in 1985.

[76] According to the Convention du 31 Octobre the HCC president was to be elected among his peers (Convention du 31 Octobre, Art. 9).

2001 were nullified by the Supreme Court. Marc Ravalomanana and Jean-Michel Rasolonjatovo, then a member of the High Judicial Council and candidate for the position of a constitutional judge, lodged petitions. The court judged that the appointment procedures in the High Judicial Council, the National Assembly and the Senate were illegal. The appointments by the High Judicial Council were annulled, because the minutes of the appointment session had not been signed by all attendants and thus violated the organic law on the High Judicial Council. The presidents of the National Assembly and the Senate had appointed their share of constitutional judges unilaterally. The Supreme Court decided that these procedures had also violated the standing orders of parliament (2002-03-CS-CA). After the nullification of the 2001 appointments the previous judges, thus those that were appointed in 1992, were supposed to return to the constitutional bench. Six of these individuals returned. The HCC president Victor Boto resigned officially due to health reasons (ION 994). However, loyalties to Ratsiraka who had appointed Boto in 1992 may have also played a role in this polarised situation of the electoral crisis. The two judges who had been reappointed in November 2001 also refused to rejoin the old team.

In August 2002 new judges were appointed to the HCC. Ravalomanana rewarded judges that supported him during the electoral crisis. Jean-Michel Rajaonarivony and Dieudonné Rakotondrabao had inaugurated him during his self-proclamation ceremony in May 2002 (Ralambomahay 2011: 30). However, Ravalomanana's power was in August 2002 not fully established yet. AREMA held in the National Assembly still a majority of seats and Ravolamanana could initiate new elections only for December 2002. A dissolution of the Senate was not possible. Therefore, Ravalomanana could only change the 30 Senators that were presidential appointees but 49 of the 90 seats were still held by AREMA senators (Marcus 2004: 12). The non-implementation of a regular appointment schedule and the recurrence of political crises led to some almost eternal judges. Three of them – Jean Michel Rajaonarivony, Dieudonné Rakotodranbao and Raymond Imboty – served over 20 years (between 1992 and 2014) each as constitutional judges. Table 20 provides an overview of the appointments to the HCC.

Table 20. Appointments to the HCC

Nomination 1 1992	**Nomination 2** 22.11.2001 Décret 2001-1080	**Interim-Team** 04/2002 – 08/2002	**Nomination 3** 14. and 16.08.2002 Décret 2002-826 Décret 2002-855 Décret 2002-856
RATSIRAHONANA Norbert Lala (HCC-President: 1992-1996)	**INDRIANJAFY Georges Thomas** (HCC-President)	**MANANJARA** (HCC-President)	**RAJAONARIVONY Jean Michel** (HCC-President)
BOTO Victor (HCC-President: 1996-2001)	RABEMAHEFA Berthe	RAKOTONDRABAO Andriantsihafa Dieudonné	RAKOTONDRABAO Andriantsihafa Dieudonné
RAKOTOMANANA Honoré (until 1995)	RAKOTOMANDIMBY Benjamin Alexis	RAKIVOLAHARIVONY Jeannine Hortense	IMBOTY Raymond
RAKOTONDRABAO Andriantsihafa Dieudonné	RAMELSON Frédéric	IMBOTY Raymond	RABEHAJA Fils Edmond
RAKIVOLAHARIVONY Jeannine Hortense	RASOAMANAVA Alphonsine Mahefamana	RAKOTOARISOA Florent	RASOAZANAMANGA Raheltine
IMBOTY Raymond	RAZANOARISOA Germaine Bakoly	RAJAONARIVONY Jean Michel	RABENDRAINY Ramanoelson
RAKOTOARISOA Florent	ANDRIAMIRAVO André	-	RANAMPY Marie Gisèle
RABEMAHEFA Berthe	RAKOTONIRINA Aimée	-	RAZOARIVELO Rachel Bakoly
RAJAONARIVONY Jean Michel	TSIAHOUA Philippe Marcellin	-	ANDRIAMANANDRAIBE Rakotoharilala Auguste
MANANJARA	-	-	-
INDRIANJAFY Georges Thomas	-	-	-

Note: The different colours indicate the body or actor which appointed the respective judge. Yellow indicates the HAE, red the Prime Minister, blue the National Assembly, green the Senate, orange the President of the Republic and purple the High Judicial Council.
Source: Author's own analysis based on data from field research.

4.3.4.2 Informal Interferences

Informal interferences are a way of *ex post* pressurising a court in order to influence its rulings. Informal interference may take different forms. Powerholders may interfere directly or subtly with the court. Direct interferences are more open and usually visible to the public, they often imply violation of formal rules. Public rhetorical attacks against a court, threats of violence against the judges or physical assaults are modes of direct informal interference. Subtle interferences are less visible to the public because they often take place behind closed doors. Unofficial communications like phone calls, personal obligations due to family ties or a shared educational history and bribes are modes of subtle informal interference (Llanos et al 2016: 1239).

In 20 interviews the author asked about the presence of informal interferences.[77] All interview partners agreed that the HCC is subject to some sort of informal interference. The views differed however with respect to the prevalent types of interference. Informal communication, bribes, personal threats and physical attacks were most frequently assessed as present by the interview partners. A total of 17 interview partners considered informal

[77] This data was analysed in comparison to five other countries in Latin America and sub-Saharan Africa in Llanos et al 2016.

communication with the HCC as a common mode of informal interference. The paying of bribes was asserted as prevalent by 15 interview partners. Personal threats were perceived as present by 13 interview partners and rhetorical attacks by 12 interviewees.

A constitutional judge confirmed that they meet regularly with politicians to coordinate the law making process but that this would not be an interference with the court's independence (MDG-4). A constitutional judge who was appointed in November 2001 described how the then-HCC president Indrianjahafy mentioned that he received phone calls from Ratsiraka's team. However, according to the interviewee, Indrianjahafy did not give the impression of being a victim of threats (MDG-5). Two other former constitutional judges asserted that Ravalomanana influenced the constitutional judges through phone calls, for instance to pressurise them to announce his victory in the first round (MDG-11; MDG-14).

The interviewees did not offer anecdotes on how bribes were used to influence the constitutional judges. In the secondary literature it was however mentioned that the constitutional judges had received new cars before their judgment on the close race between Ratsiraka and Zafy in 1996 (Randrianja 2003: 311). The accounts on physical attacks and personal threats of violence against judges concentrated on two periods. Firstly, an attack against the house of HCC president Boto was remembered by many interview partners (MDG-1; MDG-11; MDG-10; MDG-3; MDG-8; MDG-12). While the remembered that such an attack had happened, they did not remember the specific context of the attack but that it was related to politics and Zafy supporters. In the secondary literature the incident was more specifically reported. Accordingly, a bomb exploded at Boto's house during a demonstration organised by Zafy and his supporters. EIU argued that these protests and the attack expressed the discontent about the legislative election's postponement (EIU 1997Q3: 25). A former minister of justice asserted however that the attack was not a serious incident: it was "not about attacking the person, it is rather for publicity…These are small bombs that are breaking a little bit the windows" (MDG-12).

Secondly, the interview partners referred to threats and attacks against judges during the electoral crisis of 2002. The constitutional judges that served in the period between November 2001 and April 2002 talked about their experience during the crisis. One judge narrated how the newspapers had published pictures of the constitutional judges and encouraged the readers to watch out for the judges (MDG-13). Another judge stated "I was threaten outside of my house but luckily someone who knew me passed by" (MDG-5). Still another justice reported: "during the electoral crisis thousands of people came to attack me but they did not know where I live". Once a small group from the neighbourhood came to her house with machetes and other weapons. She decided to face the group and they eventually refrained from attacking her physically (MDG-14). A last judge reported that she had received many threats during her time at the HCC. Furthermore, her house was attacked after she had left the bench and she claimed that this incident was related to the electoral crisis (MDG-16).

The more specific accounts of informal interferences have one thing in common: the incidents related to electoral matters. This matches the assertion of several constitutional judges that they are particularly pressurised during election periods (MDG-10; MDG-5; MDG-14). One former constitutional judge explained it like this: "we are always afraid of people's revenge because the HCC members decide on the destiny of the country. This is why we fear for our life" (MDG-14).

To sum up, I observed that constitutional judges and experts agreed that the HCC suffered from political pressure. This pressure was expressed through different modes of informal

interferences. Pressure was particularly high during election periods and political crises. In terms of violent threats the experiences during the 2002 election crisis stood out.

4.4 The Haute Cour Constitutionnelle's Behaviour in Elections

4.4.1 Practices of Election Validation

In the previous section, the HCC's electoral competences were highlighted. Accordingly, the court mainly issues decisions at three stages of the electoral process: when the electoral laws are reviewed, when electoral candidates register and when the final results of elections are proclaimed. The results of the decisions differ across the three stages. The HCC can render electoral laws unconstitutional, it can dismiss candidates and it can nullify votes or disqualify candidates when it certifies election results.

The decisions on the constitutionality of electoral laws and on the list of candidates can be clearly attributed to distinct stages of the electoral cycle: those of the legal framework and the registration of candidates. The decisions on the final results of elections, however, usually include issues from several stages of the electoral process. Obviously, issues related to the voting and processing of votes are adjudicated in these judgments. Moreover, matters concerning the electoral register or the electoral campaign also appear in the decisions. Consequently, extracts from decisions on the final results are analysed in the following according to which stage of the electoral cycle the matter belongs to. As the decisions on the final results of an election cover different aspects of the electoral cycle, they are of central importance for this analysis. Therefore, I will give in the following a brief introduction to the structuring of these decisions and to the annulment practices of the court.

The HCC applied in most of its decisions two verification procedures. The first is denoted as *contrôle materiel*, and comprises the verification of the electoral documents' consistency. Thus, the HCC checks whether all necessary electoral documents were submitted and whether the numbers on, for instance, the counting sheets and the PV are in accordance. The second is labelled *contrôle de legalité*, and concerns the lawfulness of the electoral operations. According to the electoral law, the HCC at this step is to verify the PVs of the polling stations and the counting commissions. This legal control is noteworthy because the HCC itself has the power to appeal when it detects electoral law violations. Thus, the court is here not dependent on the referral of complaints but can become active by itself (92-042, Art. 44, 2001-002-Art. 32).

The HCC underscored this competence in its decisions taken up until 2002. It was only in the second decision on the presidential elections of 2001 that it took a different stance. It stated that the electoral law aims at fighting electoral fraud and that the duty of the electoral judge is to protect the sincerity of the polls. It further argued that it is not the court's mission to punish voters and candidates for mistakes that were committed by officials in the processing of votes.[78] The HCC invoked this argument to justify why it revalidated the votes of 242 polling stations that had been annulled in the first decision on the 2001 presidential election. From this decision onwards the previously clear structure of the decisions changed. In the

[78] "Considerant que le but recherché du Code électoral est de lutter contre la fraude; que le juge électoral se doit de rétablir la verité des urnes en sanctionnant toute pratique tendant à porter atteinte à la sincerité du scrutin et susceptible de modifier à tort le sens du vote. […] Considérant en effet qu'il ne pas conforme à la mission du juge électoral de sanctionner des électeurs de bonne foi et les candidats pour des carences commises volontairement ou non par le responsables officiellement chargés de réaliser la formalisation des résultats du scrutin, de la collecte et la centralisation des documents électoraux" (2002-05-HCC/AR : 6–7).

legislative election of 2002, the HCC exercised the *contrôle de légalité* and cited the electoral law – as in the decisions up to 2001. In the decision on the 2006 presidential elections, the court did not even refer to the two verification procedures. Instead it clarified that the court's checks would include judgments on contested ballot papers, rectifications of the PVs when necessary (but without the modification of the will of the voters) and the examination of the observations noted in the PVs. The court did not follow these procedures extensively, but rather turned to the examination of the petitions (2006-05-HCC/AR). In the decision on the 2007 legislative elections, the court applied a similar approach again; it first conducted a *contrôle matériel* and then judged the petitions (2007-18-HCC/AR).

The clarification of these procedures was necessary because the HCC actively used its power to nullify votes, and thus it is important to understand on which basis the HCC took these decisions. Up to 2001, the annulment decisions were based on the two aforementioned verification procedures and were not as a consequence of complaints registered. The court conducted its own verification procedures before examining these complaints. This becomes apparent also in the large number of rejected complaints. I will start the analysis with an overview of the annulled votes, before presenting the reasons for those annulments.

Table 21. Number and Share of Annulled Votes by the HCC

	Number of Cast Votes	Number of Annulled Votes	Percentage of Annulled Votes
MDG-PE, 1-1992	4 089 227	267 009	6.53
MDG-PE, 2-1993		85 783	
MDG-LE, 1993		109 011	
MDG-PE, 1-1996	3 769 623	565 82	1.5
MDG-PE, 2-1996	3 310 891	49 873	1.51
MDG-LE, 1998		18 732	
MDG-PE, 1,1-2001	4 250 275	82 387	1.94
MDG-PE, 1,2-2001	4 565 708	16 307	0.36
MDG-LE, 2002		1 377	
MDG-PE, 2006	4 531 946	261	0.01
MDG-LE, 2007		66 385	

Source: Author's compilation and calculation based on HCC's decision. In the legislative elections of 1993, 2002 and 2007, respectively two, four and two constituencies were nullified in addition to the above-cited numbers. For the legislative elections, the HCC did not provide the total number of votes cast.

The HCC exercised its authority most extensively in the 1992 presidential and the 1993 legislative elections, as well in the first decision on the 2001 presidential elections. However, between 16,000 and 66,000 votes were also nullified in other elections. Only in the 2002 legislative elections and the 2006 presidential elections did the HCC practise abstention from making massive annulments. In the first round of the 1992 presidential elections, the court nullified 267,009 votes – and thus the highest number of votes ever in its existence. These votes made up a share of 40 % of this election's winner margin between Zafy and Ratsiraka.[79] This shows that annulments can come close to influencing the outcome of an election. A comparison of the provisional results and the final results of the election reveals that the HCC did annul votes for all major candidates, and did not change the order of their victory. However Zafy had the highest number of votes cancelled by the HCC, as Table 9 below illustrates. The HCC nullified 170,555 votes for Zafy, which made up a share of 8.5 per cent of

[79] The winner margin was 651,816 votes, in favour of Zafy.

all votes for him. It should be noted that the provisional results include only those of 14,055 polling stations out of 14,134 in total, or 99 % thereof. Consequently, the numbers presented as different between the provisional and the final results are only approximate measures.

Table 22. Difference Between Provisional and Final Results of the 1996 Presidential Election

	Provisional Result	Final Result	Difference	Difference in Percentage Points
Zafy	2 017 397	1 846 842	170 555	8.5
Ratsiraka	1 258 787	1 195 925	62 862	5.0
Manadafy	443 485	417 504	25 981	5.9
Rabetsitonta	96 236	89 715	6 521	6.8
Marson	203 445	188 235	15 210	7.5
Rabemanjara	124 533	117 273	7 260	5.8
Andriamanalina	98 218	92 061	6 157	6.3
Tsiranana	152 331	142 571	9 760	6.4

Source: Author's compilation and calculation. The source for the provisional result was Midi Madagasikari (7.12.1992, 2), and for the final result 1992-38-HCC/AR.

In the second round of the 1996 presidential election, the HCC's intervention was even more far reaching. In this election the court annulled far less votes, only 49,873, but the number of annulled votes exceeded the winner margin. According to the final result, Ratsiraka had won 45,184 more votes than Zafy. The provisional result of this election is, however, not available.[80] Thus, it cannot be analysed whether the annulment of votes was biased towards one candidate or the other.

In the legislative elections of 1993, 2002 and 2007 the votes of whole constituencies were cancelled; more precisely the voting of two, four and two constituencies were nullified respectively. While the annulment of an entire constituency implies a high percentage of votes being involved, such annulments are actually less influential because the affected votes in these constitutencies are only the repeat ones. The will of the voter consequently does not get lost, as is the case of annulments occurring without by-elections.

Most decisions of the HCC on the final results of elections are divided into a corpus part and an annex. In the corpus part, the final results are proclaimed and the decision is justified. In the annex, different tables are presented. The content of the annex differs across the decisions. An example of such tables is a list of annulled polling stations, including the reasons for annulment and the number of annulled votes. I will analyse in the following the annexes of the various decisions.

The HCC provided more detailed information on annulled polling stations in its decisions on the 1993 legislative election, the run-off of the 1996 presidential election, the 1998 legislative election, the 2007 legislative election as well as in the first decision on the 2001 presidential election. It listed in the annex, in keywords, the reasons for the annulment of the respective polling stations. All reasons stipulated concerned the voting and the processing of votes stages of the electoral cycle. The reasons identified within these two stages of the electoral cycle can be divided into five groups. First, issues concerning the equipment, staff and general operation of the polling station. Examples are the lack of sufficient ballot papers for all candidates, analphabet polling station staff or simply the lack of any electoral operations in a polling station. Second, matters relating to the procedures of the voting process. For instance,

[80] Sources like EIU, African Research Bulletin, Madagascan newspapers (*La Tribune*, *Midi Madagasikari*), election reports and secondary literature were researched for this purpose.

the attendance sheet needs to be signed by the voters and countersigned by polling station staff. Analphabet voters can sign with their fingerprints, but they are required to give the prints of both thumbs. Third, problems in the counting process. The electoral law stipulates that the ballots shall be counted by citizens and not by the polling station staff. Fourth, discrepancies with the electoral documents to be submitted to the CMRV and the HCC. This includes, for example, counting sheets or PVs that are incomplete or not signed, and unreadable or missing documents. Finally, the fifth category covers instances of probable fraud – meaning when the numbers on the different electoral documents are in discordance with each other, or what the HCC labels as a "strong presumption of fraud" without further explanations given. The following table presents how many polling stations were annulled in each election and category.

Table 23. Why Were the Results of Polling Stations Cancelled?

Category	**LE 1993**	**PE 1996,2**	**LE 1998**	**PE 2001 (1)**	**LE 2007**
Polling station	11.2% (38)	0% (0)	1% (1)	1.2% (4)	0% (0)
Voting procedures	33.1% (112)	21.9% (25)	51.5% (52)	9.6% (33)	0.2% (2)
Counting	32.2% (109)	20.2% (23)	4% (4)	8.4% (29)	0%
Deficient electoral documents	9.2% (31)	32.5% (37)	35.6% (36)	76.5% (264)	1% (4)
Fraud	14.2% (48)	25.4% (29)	7.9% (8)	3.8% (13)	98.8 % (398)
Total	**100% (338)**	**100% (114)**	**100% (101)**	**99.4% (343 out of 345)**	**100% (403)**

Source: Author's compilation and calculation based on HCC decisions.

The focus of the cancellations varied across the elections. The comparison shows that problems with the equipment of the polling station constituted only in 1993 a problem. In the subsequent elections, votes were rarely cancelled for this reason. In the 1993 legislative election, results were mainly nullified due to shortcomings in the voting and counting procedures. In 1996, the HCC annulled roughly equal shares in all categories – except for the equipment of the polling station. In 1998, the HCC put a focus on shortcomings in the voting procedures in its reasons for cancellation. In the presidential election of 2001 and the legislative election of 2007, the cancellations were strongly biased towards one category. In the 2001 election, 76.5 per cent of the annulments were due to deficient electoral documents. In 2007, the court presumed fraud in 98.8 per cent of its cancellation cases. However 396 out of the 403 cancelled polling stations were in the constituencies of Bealanana and Mananara Avaratra alone, which were completely annulled – and in which, consequently, by-elections were later held.

4.4.2 The Haute Cour Constitutionnelle's Interventions Along the Electoral Cycle

In the following, I analyse the content of and justifications for the HCC's decisions more extensively. I will return for that purpose to the electoral cycle, as introduced in Chapter 2. The electoral cycle allows for the tracing of the HCC's influences on the democratic quality of elections.

4.4.2.1 Electoral Legal Framework

The electoral legal framework comprises constitutional provisions, electoral laws and regulatory texts. In these provisions, the conditions for participation and competition are laid out – which are in turn a prerequisite for legitimacy, which the compliance with rules enhances. While the HCC cannot review constitutional provisions but rather only interpret them, it does have the power to review laws and regulations. The HCC can thus render laws

unconstitutional. Between 1992 and 1998, all laws and ordonnances had to be referred mandatorily to the HCC. Since 1998, only organic laws and ordonnances have required a mandatory review by the HCC. Furthermore, all public authorities were entitled to demand the opinions of the HCC. It should be mentioned here that I do not hold a comprehensive collection of all HCC decisions regarding the electoral legal framework, but unfortunately only a limited one.[81]

My collection includes two groups of decisions. The first consists of decisions and opinions that review electoral laws. The second group comprises nine decisions and opinions about changes made to election dates. I start my analysis with the electoral laws reviewed by the HCC and then turn to the decisions on the electoral calendar. Consequently, no in-depth analysis was possible.

My sample of electoral laws reviewed by the HCC comprises 11 decisions and opinions, of which six upheld the respective law and five dismissed the law in question at least in part. The upheld laws were the electoral law of 1992 (Ordonnance 92-041), the electoral law of 2001 (2000-014), an organic law of 1998 stipulating the modalities of the legislative elections (Ordonnance 1998-001), an organic law on the presidential elections (2001-002), an amendment law to the electoral law of 1992 (law 97-011) and to the one of 2001 (Ordonnance 2002-001). These decisions were comparatively short, and did not provide a detailed discussion of each respective law. Dismissed laws concerned the resignation of incumbents who had run for presidency, ID cards for voter identification, the period for candidate registration and the competences for determining constituency boundaries.

Presidential Election of 1992: Incumbent Candidacies

In October 1992, Prime Minister Razanamasy had referred an ordonnance related to the presidential election to the HCC for constitutional review. The law contained provisions stipulating that presidential candidates that hold office in the transitional institutions would be obliged to resign. It referred to Article 46 of the constitution, which also provided for the resignation of the presidential incumbent when vying for office. The HCC judged that these provisions in the electoral law and Article 46 of the constitution were not valid during the transition period, because the constitution would also include provisions for that time period. Among those provisions, article 143 stipulates that the institutions prescribed by the convention of 31 October 1991 would continue to operate until the implementation of the institutions introduced by the constitution of 1992. The court referred to the principle of *specialia derogant generalibus*, or that special law breaks general law, when justifying its decisions (1992-12-HCC/D3).

The contradictions within the constitution, as well as between the constitution and the electoral law, stemmed from a controversy in the transition period. A first draft of the constitutional article 137 prohibited the presidential candidacy of persons that had served two presidential terms since independence. This provision was one of the most contested issues in the forum because it was tailored specifically to Ratsiraka. It was eventually left out of the constitutional draft (Rajaona 1995, 49–50). Furthermore, the resignation of

[81] Access to the decisions of the HCC is difficult. There is no online archive or printed collection of the court's decisions. Therefore, the decisions can be only accessed through the HCC's chief clerk. The chief clerk granted access to the decisions on the registration of candidates and the final results of elections. This access did not cover the decisions on the electoral laws. The author was, however, granted access to the private archive of a former high-ranking politician and lawyer. This archive was not comprehensive, though.

incumbents is a recurring topic in the Madagascan political discourse. It is considered as a means by which to enhance competition, because it deprives the incumbent candidates of their access to state resources and their subsequent advantage in the electoral campaign. In 1996 the HCC rendered an extra decision on the list of presidential candidates, in which it examined more closely this issue – as will be outlined in Section 5.4.5.4. The access to state resources played a role in electoral contestations, as the section on the HCC's interventions in the electoral campaign will demonstrate. The constitution of 2010 included the provision that the incumbent president would need to resign 60 days prior to the presidential election being held (C 2010-Art 46); in 2013, before the first presidential elections of the fourth Republic, this provision was again contested.

On the one hand, the HCC decision of 1992 could be assessed as non-functional to competition – as it did not cater to the demand to eliminate the incumbent's advantage by forcing them to resign. On the other, it should be stressed that the HCC's decision was not in discordance with the constitution. The initial constitutional draft to exclude candidates is questionable in terms of the principles of the rule of law, because it was targeted at only one specific person. The decision further protected the transitional institutions. Moreover, the decision was not only unfavourable to Ratsiraka; according to the electoral law, Albert Zafy – as the head of the *Haute Autorité de l'État* – would have been obliged to resign as well. I consequently assess the decision as neutral to competition.

Presidential Elections of 1996: Voter Identification

Another topic that appeared repeatedly in the decisions and opinions is voter identification by ID card. The initial version of the electoral law stipulated an electoral card and an identity provision, without specifically mentioning an ID card, for voters on election day (92-041, art. 89). The transitional article 133 of the same law further provided that the non-possession of an ID card was not an obstacle to voting. In August 1995, President Zafy asked the HCC for an opinion on whether art. 9 and 89 of electoral law 92-041 could be amended on the regulatory track – thus, without the involvement of the National Assembly. The HCC affirmed that these provisions could be indeed amended on the regulatory track. It argued that the possession of a national ID card could not be considered as a determinant element of a voter's quality, because it would be only one modality of many to verify identity and to exercise the right to vote. Consequently, it would be a regulatory issue (1995-05-HCC/AV). Roughly a year later, the prime minister appealed to the HCC to demand an opinion on the same issue. The HCC repeated its previous argumentation (1996-06-HCC/AV). In October 1996, the PM referred amendment law 96-028 to the HCC. This law sought to amend article 133 of electoral law 92-041, and to define the holding of an ID card as a prerequisite for voting. The article further prescribed the postponement of the presidential elections so as to be able to implement the new provision on ID cards. The HCC ruled that the question of ID cards for voter identification would be a legislative matter, one for which the National Assembly was competent. This marked a break with the two previous opinions that had defined the issue as a regulatory matter. The court nevertheless dismissed the amendment law, because a postponement of the presidential election would violate article 47 of the constitution that prescribes the deadlines for election dates (1996-24-HCC/D3).

For the analysis of the three opinions and decisions, it is important to note which actor appealed to the court at what point in time. The first opinion had been demanded by then President Albert Zafy in August 1995, one month before the constitutional referendum that he had initiated. The second opinion was sought by Prime Minister Norbert Ratsirahonana in

September 1996. Ratsirahonana used to be the HCC's president, until he was appointed prime minister by Albert Zafy in May 1996. At the end of July 1996, an impeachment motion against Zafy was voted in the National Assembly. On 4 September 1996, the HCC upheld this impeachment motion and decided that Prime Minister Ratsirahonana should serve as acting president. The previous day, Zafy had declared that he would leave office on 10 October 1996.

As such, the second opinion was rendered after the validation of the impeachment motion. The amendment law had also been referred by Prime Minister Ratsirahonana, who was about to serve as both prime minister and acting president simultaneously. The dismissal of the electoral law in order to avoid the postponement of the elections was consistent with later decisions on the election date of the 1996 presidential elections, as will be discussed below. It was, however, not consistent with decisions on subsequent elections, as will be also explored below. The use of ID cards for voter identification is considered by some experts as a measure to improve voter registration and to prevent irregularities in the electoral list. IFES, for instance, recommended in its report on the 1996 election to link in a long-term perspective on the electoral and civil registers and to use the national ID card for voter identification (IFES 1996, 26).

All in all, the HCC did not hold a distinct opinion on the use of ID cards for voter identification and it judged the upholding of the election date as more important. The influence of the HCC's decision on participation is dysfunctional because the use of ID cards can improve the reliability of the electoral register and voter identification on election day and thus enhance the equal weighting of votes. However, the HCC neither referred to the principle of participation in its rulings nor did it discuss the implications of the law for participation. The upholding of the election date was, in principle, functional to legitimacy, because elections need to be held periodically to constitute a reliable institution. The strict stance of the HCC in 1996 was nevertheless questionable as will be discussed more extensively below.

Legislative Elections of 2002: National Assembly's Seats and District Boundaries

In October 2002, the HCC dismissed certain provisions of the organic law 2002-004 that regulated the legislative election. The court rendered those provisions unconstitutional that concerned the number of parliamentary seats and the definition of the constituencies, because article 68 of the constitution stipulated that these questions were to be regulated by governmental decree (2002-17-HCC/D3). The HCC decided in accordance with the constitution. Constitutional article 68 was amended in the referendum of 1998. Before, the number of seats and the definition of constituencies were a legislative duty. While the initial version of the article can be considered more democratic, as manipulating the constituency boundaries are an entry point for the distortion of competition, the HCC was not entitled to review the constitutional article but only to interpret it. I assess the court's intervention, consequently, as neutral to competition.

Election Dates

In the second part of this section, I analyse the changes to election dates. The Madagascan government repeatedly sought to circumvent the legal deadlines for election dates. The constitution defines the legal duration of presidential and legislative terms, as well as the period in which the elections for the new office holders shall take place. For both the presidential office and the National Assembly elections shall be held between 60 to 30 days prior to the expiration of the incumbents' term (C 92, 98-Art. 47). These provisions are thus part of the electoral legal framework. For elections to be democratic, it is crucial that they are

held regularly. Citizens need to know when they can express again their preferences, and competitors when they can contest office once more. Thus, the rules for the election date touch upon the conditions for participation and competition. They are, however, also crucial for the legitimacy of elections, because the electoral rhythm should rely on legal rules and not on the arbitrary decisions of powerholders. I collected documents related to the presidential elections of 1996, 2001 and 2006, as well as on the legislative elections in 1998 and 2003. Furthermore, the dates of the legislative elections in both 1993 and 2007 were shifted. It was only in 1996 that the HCC upheld the legal election date, although the government sought to postpone both the first as well as the second round of the presidential elections. In all other cases, the court validated changes to the legal terms.

Presidential Election of 1996

In 1996 the presidential election had to be held earlier than expected due to the impeachment of Zafy. The government asked for an opinion on its demand to postpone the first round of the presidential elections. The official letter cited budgetary reasons, specifically due to the high number of candidates and several problems with the electoral list – which would impede the election's organisation in due time (letter 29.9.1996). The HCC dismissed this demand.[82] The government nevertheless launched another attempted postponement for the second round, which was due before 1 January 1997. The government argued that an election date during the festivity period could provoke high abstention rates and turmoil. It moreover referred again to problems with electoral cards, and to the budgetary problems stemming from the high number of candidates in the first round (letter 29.11.1996). The HCC again dismissed this demand, judging that the risk of abstention and turmoil would be inherent to the holding of elections while the organisation of financial means would be an ordinary duty of the government. These factors would not be unforeseeable and insurmountable, and consequently did not constitute a *force majeure*.

Legislative Election of 1998

In 1997, a series of decisions were rendered related to the date of the legislative elections. In April 1997, the HCC rendered an opinion on the expiration date of the legislative term. The National Assembly's president had demanded this. The question arose because of contradictions between the constitution and the electoral law on legislative elections. The constitution prescribed a period of four years, and accordingly the legislative term would have expired in August 1997 (C 1992-Art. 66). Law 93-007, however, stipulated that the National Assembly's term expired at the latest on the first Tuesday of May in the fourth year after its election (93-007, Art. 3). The HCC ruled that the inconsistency between the two legal texts arose due to the postponement of the legislative election in 1993, and that the constitution was in breach of the law (1997-01-HCC/AV). Accordingly, the legislative term would expire on 3 August 1997. In the subsequent month Prime Minister Rakotomavo sent a letter to the HCC demanding an opinion on a *force majeure*, to postpone the elections. The National Assembly had adopted on 12 May a law that required voters to hold an ID card, to be checked at the polling stations. This would pose a serious problem to the organisation of the elections because not all citizens would hold an ID card, the electoral roll would require a revision and parts of the civil register with data until 1987 had been lost in a major fire. Furthermore, natural catastrophes like two cyclones and a locust plague were also cited (letter 21.5.1997).

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[82] The decision is missing, but the elections were indeed held on 3 November 1996 as prescribed by the law.

The HCC confirmed the request in its ruling. It judged that the law was unforeseeable and invoked huge organisational challenges. The natural catastrophes would, moreover, impede the participation of the people and cause insurmountable challenges. Consequently, the court attested to the existence of a *force majeure* and validated the postponement of the legislative elections for ten months, starting on 3 August 1997 (1997-03-HCC/AV). In another decision taken in July 1997, the HCC further ruled that current MPs would continue to hold office until the election of the new National Assembly (1997-13-HCC/D3). To assess the decision to postpone the legislative elections, factors inherent to the decision and also ones concerning the context in which the decision was rendered should be taken into account. There are two surprising factors inherent to this decision. First, it does not make sense why the HCC scheduled the beginning of the *force majeure* for 3 August 1997 – because, strictly speaking, the election would have been already due by this date. Second, it is noteworthy that MPs were able to adopt a law on national ID cards for voter registration that invoked the postponement of elections and that this law has not be rendered unconstitutional for this very reason – as had happened in 1996. In 1997 the HCC still held the power to mandatorily review all laws and ordonnances. This provision was, as noted, only changed in the constitutional referendum of 1998. Thus, the court obviously changed its jurisprudence in this matter.

Turning to the context, it should be noted that the postponement of the legislative election was decided within the first months of Ratsiraka's presidency. At this time, many Madagascan politicians feared that Ratsiraka would seek to restore his previous authoritarian regime. Consequently, the HCC's decision was perceived very critically. During this time the house of HCC president Victor Boto was attacked. Opposition parties close to Zafy denounced that the cited *force majeure* would serve as a pretext for the postponement, and linked this criticism to a call to annul the impeachment of Zafy and the presidential election outcome of 1996. The more moderate opposition group Panorama, led by former Prime Minister Jacques Ravony and former HCC President Norbert Ratsirahonana, declared that Madagascar "was spiraling into lawlessness, and that the future of democracy on the island was in jeopardy" (EIU 1997, 26). Ratsiraka could not count on a majority in the National Assembly that had been elected in 1993. The year 1997 was hence marked by struggles between the president and the National Assembly (Gräbener 1998, 273). Consequently, the law on ID cards cannot be read as an attempt to support Ratsiraka's desire to postpone the election. Ratsiraka had, however, incentives for that postponement. He was planning a constitutional referendum to weaken the position of the National Assembly and to strengthen that of the presidency within the constitution. He consequently preferred to have a National Assembly that was elected under new constitutional rules.

Presidential Run-off in 2002

The electoral crisis in 2002 provoked two decisions to postpone the second round of the presidential elections. The run-off was initially scheduled for 24 February 2002. On 20 February, the HCC confirmed the existence of a *force majeure* and agreed to a postponement of one month. The protests after the first round had worried the international community, who wanted to deploy international election observers. The organisation of these observation missions would require more time on the international and national levels. The course of events was deemed unforeseeable, unsurmountable and compelling (2002-04-HCC/D3). One month later the HCC validated another postponement of one month. This time the *force majeure* was constituted by the state of emergency existing in the whole country and by the proclaimed martial law in Antananarivo; the holding of elections would require serenity and

social peace (2002-05-HCC/D3). Eventually, the run-off was not held at all due to the political developments that will be outlined more extensively in Section 5.4.5.7.

Presidential Election of 2006

In 2006, the government of Ravalomanana sought to prepone the presidential elections to 3 December of that year. The government argued that this preponement would allow them to hold the elections before the season of cyclones and strong rain started. The HCC confirmed the demand, judging that the earlier election date would facilitate participation and enhance equality between the candidates. Furthermore, it would neither extend the presidential term nor reduce it excessively. Moreover, the HCC defined as constant jurisprudence that climatic reasons legitimise changes to the election date. The more interesting thing about this decision is that it did not discuss the expiration date of Ravalomanana's term. Due to the electoral contestations of 2002, the actual start of Ravalomanana's term was debatable. The court cited article 47 of the constitution, which stipulated that elections should take place between 60 to 30 days before the expiration of the presidential term. It inferred that, accordingly, the polls were to take place between 22 December 2006 and 22 January 2007. This meant, however, that both the government as well as the HCC took 22 February 2002 to be the official beginning of Ravalomanana's term. This was also the date proclaimed by Ravalomanana's himself. This ceremony was attended by several judges who still sat in 2006 on the court's bench. However, at this point in time the presidency of Ravalomanana was still being contested nationally and internationally. No HCC decision had validated his victory in February. It was only on 29 April 2002 that the HCC proclaimed that Ravalomanana had won the presidency in the first round. This proclamation was followed by an official inauguration on 6 May 2002. Defining 22 February 2002 as the official beginning of Ravalomanana's presidential term was thus a political statement, one in which the court as an institution undermined its own status and supported the incumbent's own reading of history.

All in all, the HCC decisions on the shifting of election dates were dysfunctional for the legitimacy of elections. Elections should be scheduled as prescribed by the law and not as required by political circumstances. All legislative elections were either postponed or preponed. This is additionally dysfunctional for the principle of the separation of powers, because it conveys the impression that powerholders can decide on the holding of legislative elections according to their own political necessities. This weakened the standing of the National Assembly vis-à-vis the executive. Moreover the HCC was not consistent in its rulings, in particular with regards to the legislation on national ID cards being a legitimate reason for the postponement of elections. In 1996 it had even rendered a law unconstitutional because it would have led to the postponement of the presidential elections, while in 1997 it judged the law as an unforeseeable and unsurmountable factor that necessitated the postponement of the legislative elections. This judgment served Ratsiraka's preference to hold the legislative elections after the constitutional referendum that would cut the National Assembly's power. Similarly, the preponement of the legislative elections in 2002 allowed the new president, Ravalomanana, to win a parliamentary majority.

The decisions on the scheduling of presidential elections were neither consistent with nor functional to the legitimacy of elections. While the postponement of the second round of the 2001 presidential elections may have been inevitable due to the contemporary political turmoil, it is, however, not plausible that the HCC upheld the electoral calendar in 1996 but then blatantly served Ravalomanana's interests and interpretation of history in 2006. The election of 1996 was the only one where the date was unforeseeable and that had to be

organised on short notice due to the impeachment of Zafy. If laws on voter identification were considered a *force majeure* in 1997, then an impeachment could also qualify as one too.

Table 24 summarises the HCC interventions on the electoral legal framework. The interventions into the electoral legal framework were predominantly ambiguous and dysfunctional. The bulk of interventions concerned legitimacy. The presidential election of 1996, when the HCC upheld the electoral calendar, was a rare occasion in which the HCC influenced legitimacy in a beneficial way. In later elections, the influence on legitimacy deteriorated. This was due to the approved changes to election dates.

Table 24. Assessment of HCC Interventions Related to the Electoral Legal Framework

Election Year	Number of Interventions	Participation	Competition	Legitimacy
PE 1992/93	1 (2)		1	
LE 1993	no data			
PE 1996	6	3		3
LE 1998	3 (4)			1 2
PE 2001	2 (5)			2
LE 2002	1		1	
PE 2006	2			1 1
LE 2007	no data			

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.4.2.2 Electoral Register

The electoral register is crucial for participation. A comprehensive and accurate electoral register is a precondition for voters to be able to cast their votes and to have them equally weighted. The correct use of the electoral register should enable those that are entitled to vote to do so and restrict non-eligible persons from participation.

The HCC is not the competent jurisdiction for the contestation of the electoral register according to the electoral law. The electoral list is nevertheless repeatedly considered in HCC decisions on the final results of elections. Multiple entries and omissions, the inclusion of minors and non-authorised ad hoc additions to the electoral list as well as electoral lists that are established in a fanciful manner[83] – and are thus generally erroneous – are typical issues mentioned in the decisions made.

The HCC's intervention in matters related to the electoral register changed, however, within the period of observation. In the 1990s the HCC considered the electoral register, or consequences arising from an incorrect electoral register, in its verification of the election results' legality. As a consequence of this control, the court nullified votes partially or even completely in certain polling stations. For instance, the HCC sanctioned voting by minors – with it deciding to annul those votes (1992-38-HCC/AR, 1996-226-HCC/AR, 1997-04-

[83] "de manière fantaisiste (1996-226/HCC/AR).

HCC/AR). After 2003 the court treated matters related to the electoral register with more caution. It did not perform anymore the control of the results' legality and judged that it was not competent to handle the electoral register (2003-01-HCC/AR). In 2006, it mentioned the electoral register as a response to petitions submitted – but it eventually rejected all complaints and refrained from nullifying any votes.

I will illustrate with the example of multiple entries in the electoral register how the HCC changed its practice of annulment, and the reasoning behind that. Multiple entries mean that a single person is registered several times in the electoral register of one or several communities. This allows the concerned person, in theory, to cast multiple votes. This violates the principle of equal voting rights, and thus the participation dimension of the democratic quality of elections. In its decision on the 1992 presidential election's results, the HCC stated that the electoral register would contain some "imperfections" like multiple registries and omissions despite efforts to improve it. This would have led to multiple votes by some, even though the use of indelible ink had limited the phenomenon. The HCC judged that these votes need to be annulled according to the electoral law (1992-38/HCC/AR). The HCC continued this jurisprudence in the decision on the 1993 legislative elections. In this decision, the HCC defined the issues that would lead to partial annulments in its control of the results' legality (1993-456-HCC/AR).[84] Multiple votes were one of the issues listed in the judgment. In the decision on the presidential elections of 1996, the HCC literally repeated the phrases from its 1992 decision (1996-226-HCC/AR). However, already in the subsequent decision the issue disappeared. Neither in the decision on the run-off nor on the 1998 legislative elections was the issue of multiple votes ever mentioned. The issue of multiple registrations and votes did not reappear in the judgements until the presidential election of 2006. In this election, several plaintiffs complained about irregularities in the electoral list. A certain number of voters were erased from the register or appeared twice despite the suggested corrections. The HCC responded differently to this complaint compared to its jurisprudence of the 1990s, however. It stated that civil society and political organisations would have participated in the commission that was charged with the electoral list's revision. Consequently, irregularities in the electoral list would also be their responsibility. Furthermore, the HCC clarified that it was not competent to handle the electoral list's verification. Consequently, the complaints by the plaintiff could not lead to the annulment of votes (2006-05-HCC/AR). The HCC repeated this argumentation in the decision on the 2007 legislative elections too (2007-18-HCC/AR).

The example of multiple entries and votes shows that the HCC changed the interpretation of its own competences. While it considered in the 1990s multiple entries and consequent multiple votes as a reason for partial annulments, it denied in 2006 and 2007 having any authority to verify or sanction irregularities related to the electoral register. It thus narrowed down its competences in its own interpretation. To assess the functionality of the court's intervention, an analysis of these two different stances is required. In the 1990s, the HCC stretched its competences as the electoral law did not clearly state that multiple votes should lead to their annulment.[85] Furthermore, the partial annulment of votes appears to be an

[84] In the 1990s the HCC divides its judgments on election results into two parts. The first was *contrôle materiel*, and comprised the verification of the electoral documents' consistency. The second part was *contrôle de legalité*, and concerns the lawfulness of the electoral operations themselves.

[85] The HCC cited this in the decision on Art. 117 of the electoral law. This article defines those deeds that deserve punishment by a criminal court, but does not mention the annulment of votes as a form of sanction.

ambiguous practice – since it remains unclear how the court can identify in an anonymous election which were the result of repeat voting. In an anonymous poll, votes can only be randomly annulled. This would however harm the principle of participation, as an innocent vote could become a victim of nullification.

The technique of randomness is also prone to manipulation. The constitutional judges could deliberately annul those votes that jeopardised the victory of their preferred candidate. Thus, the reluctance to do so in the 2000s could have been an acknowledgment of this ambiguity. Did this change lead, however, to interventions that were more functional to democracy? The justification for the decisions in 2006 and 2007 also appears to be flawed. While it is true that the role of civil society and political groups in the electoral registration process changed after 2000, it is not plausible that this prohibited them from complaining about irregularities in the process.[86] Such an argumentation opens the door for using the participation of non-governmental organisations (NGOs) and opposition parties as an excuse for the administration's mistakes or manipulations. Furthermore, the HCC ignored the plaintiff's complaint that declared irregularities in the electoral register had not been rectified by the responsible authorities.

Petitions, meanwhile, articulate more substantial critiques of the electoral register. Presidential candidate Tsiranana complained that the Ministry of the Interior had announced 7.3 million registered voters before the elections, but in the provisional results only 6.9 million registered voters were noted. A representative of candidate Lahiniriko claimed that voter cards had not been distributed to the electorate in the region of Menabe. Candidate Razafimahaleo complained that 4.3 million voters were deprived of their voting rights, and that the company that was charged with the computerisation of the electoral register would have been closely connected to Ravalomanana's campaign director. The HCC dismissed these petitions because they lacked sufficient evidence to back them up (Tsiranana), or because the claimant did not have the authorisation to represent Lahiniriko. Razafimahaleo's petition, meanwhile, was dismissed because it could not prove that the proximity of Ravalomanana's campaign director may have affected the sincerity of the vote or disturbed the will of the voter.

The available data does not allow us to assess the evidence provided by the plaintiffs. It is well possible that they were lacking evidence. However, secondary sources also reported large-scale difficulties with the electoral register in this election year. CNOE, a Madagascan civil society organisation specialised in election observation, criticised the shortcomings of the electoral register both before and after the poll (CNOE-KMF 2007, 80,84). EISA criticised in its report that the electoral register had not been displayed systematically across the country, and that the political parties had not received copies of the electoral list for verification (EISA 2007, 10). OIF also acknowledged problems with the electoral register, and in particular with a high number of undistributed cards – which had led to the disenfranchisement of voters (OIF 2007, 20). In some areas up to 35 per cent of citizens were said to have experienced problems in the registration process (Marcus 2016, 64). Thus, there were hints that there were serious shortcomings in the electoral register – but the HCC refrained from addressing this issue by interpreting its competences narrowly and defining high thresholds for evidence. In this way, it kept silent about possible violations of the

[86] The electoral code of 1992 prescribed an observatory function for civil society and political groups, while the electoral code of 2000 declared them ex officio members of the relevant local electoral register commission (CE 1992, Art. 7, CE 2000, Art. 7).

electoral law and the democratic quality of elections. I code the HCC interventions into the electoral register since 2006 as dysfunctional for participation because the HCC applied a narrow interpretation of its competences, ignored widely reported shortcomings of the electoral register and took a flawed stance when denying parties and civil society organisations to complain against the register.

Table 25 encapsulates the assessments of the HCC interventions into the electoral register. The interventions mainly concerned participation. Those interventions in 2006 concerning the transparency of the electoral register and the company that handled the register had a negative influence on the legitimacy of the poll. Ambiguous interventions turned since 2006 into dysfunctional ones.

Table 25. Assessment of HCC interventions Related to the Electoral Register

Election Year	Number of Interventions	Participation	Competition	Legitimacy
PE 1992/93	3	3		
LE 1993	2*	2		
PE 1996	5	5		
LE 1998	1*	1		
PE 2001	0			
LE 2002	2*	2		
PE 2006	7	5		3
LE 2007	1	1		

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.4.2.3 Registration of Candidates

At the stage of candidate registration, competition is at stake. Aspiring candidates need to register their candidacy for presidential or legislative elections. To be admitted to the elections they need to meet eligibility criteria and provide all necessary documents. Their application then needs to be verified by an administrative body or court. Competition is constrained if rules are applied unevenly to different candidates and consequently the participation in the elections is denied despite the fulfilment of eligibility and registration criteria.

The HCC has different roles in the registration process for legislative and presidential candidates. While potential presidential candidates need to register directly at the HCC, parties for legislative elections register their list of candidates at administrative commissions at the local level. For both kinds of election it is the HCC that fixes the final list of candidates. I start the analysis by looking at the decisions on the presidential candidates, and then turn to those on the legislatives candidates.

Presidential Candidates

In this analysis the decisions on the presidential elections in 1996, 2001 and 2006 are included. The decision for the presidential elections of 1992 was unfortunately not available in the HCC's archives. Table 11 below shows the number of registrations and the final number of presidential candidates in these three elections. In all three elections certain registrations were dismissed. In 2006 the HCC dismissed the highest number of registrations: four out of 18. The court was concerned by two issues: the necessary documents for registration and the candidacies of individuals who hold a high-level public office.

Table 26. Overview of Registrations and Dismissals of Presidential Candidacies

Election	Number of Registrations	Number of Presidential Candidates	Number of Dismissed Registrations	Reasons for Dismissal
1996	17	15	2	Necessary documents were not submitted or were incomplete
2001	7	6	1	Necessary documents were incomplete
2006	18	14	4	Incomplete documents Declaration of candidacy not signed by competent authority

Source: Author's own compilation based upon HCC decisions.

The aspirants to the presidential office need to meet certain eligibility criteria[87] and to support their declaration of candidacy with a number of official documents. In all cases of dismissed registration the HCC cited problems with these supporting documents. For instance, in 1996 Max Fabien Andrianirina is reported to have sent a telegram from Rouen to declare his candidacy – but did so without providing any supporting documents. Aspirant Randriamandroso failed according to the HCC in both 2001 and 2006 to submit the majority of the required documents. All dismissed candidacies in 1996, 2001 and 2006 failed to submit the receipt of deposit.

In these cases the court's justification is convincing, and it seems plausible that the aspirants were responsible for not fulfilling the legal requirements. The case of Pierrot Rajaonarivelo's dismissed candidacy is, however, different. The HCC testified to one shortcoming in Rajaonarivelo's dossier. He had indeed submitted all necessary documents, but his signature on his declaration of candidacy had not been certified by the competent authority. While ordonnance 2001-001, Art. 8 stipulated that the signature needed to be certified by the prefect or sub-prefect, a newly issued decree of 2006 stated that the signature needed to be certified by the *Chef de district*.[88] This decree had been issued roughly one month before the deadline for the registration of candidates.[89] The HCC explained in its decision that the declaration would remain a private one, without the approval by the competent authority. While the HCC made obscure in its decision whether and if so by which authority the declaration had been certified, it later clarified that its examinations had revealed that the

[87] The eligibility criteria are defined in Art. 46 of the constitution, and amplified in ordonnances and decrees. According to the constitution, eligibility requires Malagasy nationality, the entitlement to civil and political rights and being of a minimum age of 40 at the time of registration (C-Art. 46). Further criteria stipulated in ordonnances were effective registration on the electoral list, the settling of all fiscal obligations and the payment of a deposit. There were two important changes to these criteria in later years. In 2001, the amount for the deposit was increased from 25 million FMG to 125 million FMG. After 2006, the aspirant now needed to be a resident of Madagascar at the time of registration.

[88] Décret 2006-673 of 12 September 2006.

[89] The deadline for registration was 14 October 2006, with the decree being issued on 12 September 2006.

competent authority, the district administration, had not registered such a certification. Apparently, the *Chef de district* had written "*vu*" ("seen") on the declaration – but the HCC ruled that this did not qualify as a certification.

The HCC further emphasised that it would be constrained by the law and regulations, and would not be entitled to substitute for the legislator or the competent authority. According to this logic the HCC had no other choice but to dismiss the candidacy. The ruling of the HCC was, however, only the final legal step to exclude Rajaonarivelo from the election. Rajaonarivelo, a former deputy prime minister, had lived in exile in France after the electoral crisis of 2002. He was planning his candidacy from Paris. In August 2005 he was sentenced in absentia to 15 years hard labour for the misuse of funds.[90] When he tried to return to Madagascar so as to register for the presidential election, the government closed the airport and the police dispersed a demonstration of his supporters with tear gas (ARB 2006, 16832). These measures had already impeded Rajaonarivelo's registration for presidency and the HCC only had to detect shortcomings in his registration. The HCC's decision was not fully transparent, the rule was strictly interpreted and it was not taken into consideration that the rule had been amended only at very short notice. Taking the other efforts of the government to impede Rajaonarivelo's candidacy into account, the decision appears to have been politically motivated. The Madagascan public was reported to have considered these actions as an unfair deprivation of Rajaonarivelo's political rights (EIU 2006, 13). Thus, the decision was dysfunctional to competition.

In 1996, the HCC was concerned with the question of whether holders of high-ranking public offices may vie for elections without resigning from their current position. For the examination of this question, the court split the decision on the list of candidates into two. The first decision, 1996-22-HCC/D3, was rendered on 8 October 1996 and the second, 1996-23-HCC/D3, on the following day. Five aspirants held high-ranking public offices: Ratsirahonana Norbert, Andriamanjato Richard Mahitsison, Voninahitsy Jean Eugène, Razanabahiny Marojama Jérôme and Ramarason Alain Patrick. The HCC judged in its decision whether the candidacy of these individuals while already holding office would violate article 40 of the Constitution, article 36 of the electoral law 92-041 and article 7 of Ordonnance 92-042. These articles demand the political neutrality of the administration and the public sector. The articles of the electoral law specify this duty of neutrality during election time. Accordingly, presidential candidates holding public offices may not use the prerogatives of public authority, public properties and administrative means to influence the voters. Furthermore, it is prohibited to conduct official openings during the electoral campaign or to use administrative vehicles for campaign purposes. While the HCC simply quoted the respective articles of the legal texts, it did also interpret article 40 of the constitution. It stated that the principle of the administration's neutrality would imply that local administrative authorities like the police, the military or school teachers were exempted from protocolary duties vis-à-vis institutional superiors during the electoral campaign. The HCC finally ruled in favour of allowing the five office holders to stand as presidential candidates, but reminded them of the above-explained legal constraints and specified what the implications of administrative neutrality were. It is noteworthy that the HCC did not refer to a complaint when clarifying the rules, and thus did not react – apparently elaborating on these implications of its own accord. Consequently, I assess this court intervention as functional to

[90] EIU had reported that Rajaonarivelo's candidacy was dismissed due to his conviction, but the HCC decision made no mention of it (EIU 2006, 13).

democracy because it contributed to transparency, referred to democratic principle and clarified the rules so as to protect fair competition in the election.

Legislative Candidates

In the remaining part of this section I will examine the HCC's decisions on the list of candidates for legislative elections. I will outline how the HCC defined its role in the registration process, the outcome of its decisions and will analyse a series of complaints made in 2007. The HCC rendered in 1993, 1998, 2002 and 2007 decisions on the list of party candidates for the legislative elections. In these decisions, the HCC defined its role in the registration process for legislative candidates. The HCC was consistent in the interpretation of its role. Accordingly, the HCC was responsible for ruling on candidacies that were refused by the competent local commissions. It needed to verify the alleged legal and regulatory shortcomings of their applications. If these shortcomings were confirmed or other irregularities detected, the registration had to be denied. When the alleged irregularity was the mistake of the administration or did not constitute a legal or regulatory violation, the application would be accepted. The HCC, moreover, stated that it was its obligation to fix the definitive list of candidates for the whole territory. In 2002 and 2007, the HCC pointed out that its duties had been extended and that it was now entitled to examine also the cases of lists that had been accepted by the territorial commission. It did not, however, further specify what this examination implied.

When it comes to the decisions that the HCC rendered, the court was less transparent. It did not specify what kind of shortcomings were alleged by the territorial commissions, and did not go into detail about what constituted an administrative mistake or what irregularities it had detected in its own examinations. Most decisions did not specify to what extent candidates were dismissed. Only the decision of 1993 (1993-455-HCC/AR) listed the candidates and the lists that were not admitted to the legislative elections. There were 17 dismissed registrations. In three cases, the whole list of parties for a constituency was dismissed. In the other ones, only certain persons from the party lists were rejected. The decisions of 1998, 2002 and 2007 do not provide information on the number of dismissed candidates or lists of candidates. They only give in the annex the admitted lists and candidates.

In November 2002 Prime Minster Jacques Sylla sought an opinion by the HCC. He requested whether the period for the registration of legislative candidates could be extended by four days. The HCC assessed that the extension of the period of registration would not constitute a constraint to democratic principles, but rather would seek to guarantee the exercise of a fundamental freedom – namely to vie for election. It further argued that the extension would not have an effect on the period of electoral campaigning and the date of the poll. The HCC was flexible in the interpretation of the rule, and cited democratic principles to legitimise a relaxation of it. Such a flexible interpretation is not common in the HCC's decisions. I consider the intervention as ambiguous to competition. It had functional aspects because the HCC referred to democratic principles and the spirit of the law. The ad hoc amendment of the rule was, however, dysfunctional.

In 2007, ten petitions were lodged after the admission of the official list of candidates. These petitions focused on three issues: the withdrawal of candidacies, the delivery of ballot papers and the eligibility of candidates. Four plaintiffs demanded the withdrawal of their candidacy. Several explanations were given for this wish. One candidate cited purely professional reasons (2007-13-HCC/AR), while another stated that he had never been a supporter of the

party on whose list he was running (2007-03-HCC/AR). An additional candidate announced that it had been a monumental error to present a candidacy for an opposition party (2007-15-HCC/AR), and in a similar vein the final individual expressed his preference to support the candidates of the state (2007-04-HCC/AR).[91] The HCC ruled in all cases that the withdrawal of a candidacy after the registration was not possible, citing decree 2007-724, Art. 4. The HCC was apparently determined to apply this rule consistently, even though this created some problems when it came to the delivery of ballot papers.

Up until 2013, multiple ballot papers were used in Madagascar. Thus not all candidates and parties were listed on one single ballot paper, but rather each candidate or party had a separate one. The electoral candidates were obliged to provide their ballot papers by themselves. They had to deliver a sufficient number of ballot papers to the administration by a certain deadline. This regulation could create problems. In 2007, candidate Andrianarisoa sought authorisation to deliver his ballot papers to the competent authority. The *Chef de district* had refused to take the ballot papers because they had not been submitted in time. The HCC judged that the organisation of the ballot papers' distribution is a matter for the local authorities, and that it cannot substitute for them when these papers are not submitted on time (2007-06-HCC/AR). Candidate Belalahy filed a demand to withdraw his candidacy because he had not met the deadline for submitting his ballot papers. In this case, the HCC stuck to its ruling that a candidacy cannot be withdrawn after registration (2007-12-HCC/AR). Consequently, Belalahy remained a candidate in the elections but the citizens of his constituency were not even able to vote for him due to the lack of ballot papers. Not submitting ballot papers on time became, like this, a way for a de facto withdrawal of candidacy.

The HCC did not, however, highlight this point of incoherence in electoral rules. This incoherence also fuelled intra-party fighting. AREMA's Direction Collégiale Nationale had sent on 2 February 2007 a letter to the HCC in which they opposed the use of AREMA's ballot papers, as the party had already decided to boycott the elections. On the same day, AREMA's ballot papers had been submitted by the national secretary and by the administrative national secretary. The HCC argued in its decision that there were contradictory choices being made within AREMA and that it would not be the HCC's responsibility to settle such intra-party conflicts. The complaint was consequently dismissed. Interestingly, the HCC did not refer to the rule that the withdrawal of candidacy is impossible after registration. Instead, it stressed that active participation in an election was a fundamental right and one valid independent from a party (2007-14-HCC/AR). Thus, it should be the individual candidate and not the party who decided on their participation therein.

The final topic of the candidate-related complaints in 2007 was the conviction of several nominees. Three complaints concerned condemned aspirants. In one case, the aspirant, Victor Wing Hong, demanded his admission to the legislative elections because a decision by the Supreme Court's to reject his appeal would have been illegal. In two other cases the plaintiffs demanded that candidacies be annulled due to candidates' conviction. In the Hong case, the HCC ruled that his conviction was definitive and thus he was ineligible (2007-05-HCC/AR). In the latter two cases, the HCC judged that the convictions were still open to

[91] The last plaintiff reveals an interesting understanding of the political system, because officially it is not the state that presents candidates for election but rather political parties. This plaintiff apparently conceived of the TIM as a state party.

appeal and thus the affected persons would still be eligible (2007-11-HCC/AR, 2007-16-HCC/AR).

All in all, the court's decisions on legislative candidates were less transparent – and thus more difficult to assess. The court faces, however, in legislative elections a practical challenge, because the number of aspirants is much higher than in presidential elections. Thus, thorough verification and justification is much more difficult for a court with only nine members. The decisions of 2007 appear, on the one hand, functional to competition, because the court sought to apply the rules consistently. However, the strict application of the rules seems absurd given the de facto linkage with the delivery of ballot papers. The latter rule was highly criticised by the opposition, because it provided an additional challenge to opposition parties and thus threatened active participation and competition (Marcus 2016, 63). The court did not, however, address the inconsistency of the rules. Therefore, I assessed the interventions as ambiguous.

In Table 27, I present an overview of the HCC interventions on the registration of candidates. The interventions were relevant for competition. In the presidential elections of 1996 and 2001, the HCC did not impede competition by constraining access to the presidential candidacies. In 2006, the HCC served as an instrument to prevent the participation of Rajaonarivelo in the presidential race. In the legislative elections of 2002 and 2006, the HCC wielded ambiguous influences. In 2002, the influence was ambiguous in 2002 because the rules were interpreted liberally and in 2007 because the court adopted an overtly strict interpretation of rules.

Table 27. Assessment of HCC Interventions Related to the Registration of Candidates

Election Year	Number of Interventions	Participation	Competition		Legitimacy
PE 1992/93	No data				
LE 1993	3		1 (green)	2 (red)	
PE 1996	2		2 (green)		
LE 1998	No data				
PE 2001	1		1 (green)		
LE 2002	1		1 (orange)		
PE 2006	1 (2)		1 (red)		
LE 2007	4		1 (green)	3 (orange)	

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.4.2.4 Electoral Campaign

During the electoral campaign fair competition is at stake. The HCC did not hold any specific competences related to the electoral campaign until the year 2000. In this year a new provision was introduced into the electoral law that candidates holding public offices could be disqualified if they abused public resources and authority for campaign purposes (2000-

014, Art. 128). Such disqualification can be decided on by the HCC, the *Conseil d'État* or the *Tribunal administratif*.

Presidential Election of 2001

In the 1990s, issues related to the electoral campaign did not appear in HCC decisions. It is only in the first decision on the 2001 presidential election's results that the electoral campaign is addressed. Marc Ravalomanana had lodged a petition to disqualify Didier Ratsiraka. He accused Ratsiraka of using illegal advertising spaces, the opening of the aerodrome in Morondova and the service of state officers and administrative cars for his electoral campaign. Furthermore, he denounced Ratsiraka for, as part of his electoral campaign, holding a press conference at the presidential palace two days before the election – and for the fact that this press conference had been broadcast by *Télévision Malagasy* and *Radio Nationale Malagasy*. In this way, the incumbent would have received more broadcasting time than the other candidates. Additionally, Ratsiraka threatened the voters after the official end of the electoral campaign that trouble and instability would occur if they did not vote for him. This speech was broadcast on public channels.

The HCC invited Ratsiraka to submit a response to the accusations. This he did, putting forward the following arguments: he was not yet a presidential candidate when he opened the aerodrome, and it had not been him who had used administrative cars. Consequently he was not responsible. The broadcast press conference did not violate the rule on equal public broadcasting time because this would only count for such time that is free of charge; Ratsiraka had, in fact, paid for this extra time. Furthermore, the presidential palace would be Ratsiraka's home and the HCC had accepted this address as his residency when he had registered for elections. Thus, he could not be disqualified for holding a press conference at his home. The response further underscored that the Constitution would allow the incumbent to vie for another term without resigning from office. Ratsiraka's lawyers admitted that he gave an interview after he had already cast his vote, but he neither called for the people to vote for him nor did he threaten voters.

The HCC argued that it could only rule on the disqualification of the candidate, and that for this issue only Articles 128 and 131 of the electoral code would be relevant (2000-014). Interestingly, the HCC referred to both Article 128 and Article 131 but only cited Article 131 – the latter defines a higher threshold for the disqualification of a candidate. While article 128 defines the abuse of public resources as a reason for disqualification, article 131 sets the disturbance of public peace as its threshold.[92] The articles of the electoral code that regulate the electoral campaign would not be relevant for the question of disqualification. Like this, the HCC reduced the number of points to be submitted to further examination because the opening of the aerodrome and the advertisements were not relevant regarding disqualification according to the HCC. These dismissals were ambiguous for competition. On the one hand, the HCC was indeed not competent to adjudicate on these issues. On the other hand, these were serious problems in the electoral campaign and the HCC did not even

[92] Article 128 « Tout chef et tout membre d'Institution en exercice ou sortant, tout fonctionnaire d'autorité, civile ou militaire, candidats à une élection, ayant usé des prérogatives de puissance publique dont ils disposent pour influencer le choix des électeurs seront disqualifiés. », Article 131 « Quiconque, pendant la campagne électorale, aura troublé la paix publique par voie de rixes, bagarres ou autres voies de fait, par des coups et blessures, d'homicides, de destructions ou dommages aux biens, directement ou indirectement par personnes interposées ou groupe de personnes, sera puni par les peines prévues par le Code pénal suivant chaque cas considéré. Tout candidat qui tombe sous le coup de l'alinéa précédent encourt en outre la disqualification.»

acknowledge the problems. Furthermore, the dismissal of the petitions obviously served the incumbent's interests. Two points from the accusations remained: the use of administrative resources and the press conference at the presidential palace. The use of public resources was sanctioned by the annulment of votes in the location where the infringements had been committed, in accordance with article 127 of the electoral code. This was the only functional intervention on competition.

In the examination of the press conference and its broadcast, meanwhile, the HCC followed the arguments that had been put forward by Ratsiraka's lawyers. The director of the broadcasting station had sent a receipt to confirm the payment made for the extra broadcasting time. The CNE confirmed that the press conference had been broadcast after first televising other candidates' solemn appeals. The electoral law only regulated the fair distribution of the free broadcasting time, but did not set any rules for the paid broadcasting time. The presidential palace would be the official domicile of Ratsiraka and the holding of a press conference at one's residence could not be considered as the use of the public authority's prerogative. The press conference had been rebroadcast on 15 December 2001, one day before the poll – but there was no evidence that it was Ratsiraka who had commanded this rebroadcasting. The court eventually judged that there was no evidence that the reported events had any influence on the choices of the voters and the results of the poll. Consequently, Ratsiraka was not disqualified (2002-01-HCC/AR).

The HCC decision was not functional to ensuring fair competition. The disqualification of a main contender at that stage of the electoral process would have been a drastic and contentious measure. However, as the issues that were raised can be considered as genuine threats to competition then the HCC could have acknowledged the problems and addressed the limitations of the electoral code. Instead, the HCC reduced the number of issues upon which it deliberated, took up arguments by Ratsiraka's lawyers, referred to legalistic interpretation and offered flawed justifications for its decisions. It seems that the court backed the exploitation of legal loopholes. While it may be true that the electoral law provides stipulations only for the distribution of the free broadcasting time, the HCC could have acknowledged that paying for broadcasting slots on public television nevertheless introduces bias – as the citizens may not be able to distinguish free broadcasting time from paid time. It is also arguable whether the presidency should have been considered as Ratsiraka's private residency and an appropriate location for press conferences during the electoral campaign. Putting this into the context of electoral contestation and the refusal of the court to confront the different electoral records, the court appears to have been even less eager to protect fair competition.

Legislative Election of 2002

Following the legislative election of 2002, complaints were also filed at the HCC concerning the related electoral campaign. The HCC did not examine them in detail but rather only clarified that it was not the competent jurisdiction to rule on the use of public resources, corruption and the traffic of influence. It furthermore provided a list of activities related to the electoral campaign that would not influence the regularity of the poll and that would be judged by the criminal courts. Among these were campaign activities outside the official period of campaigning, belligerent and irreverent speeches, official openings undertaken during the campaign period, vote buying and the use of public means and administrative cars for campaign purposes. Consequently, all complaints related to these different points were outright dismissed. In particular, the last point on the list was in discordance with the

jurisprudence of the previous year – when the HCC referred to article 127 of the electoral code that provides for the annulment of votes in the localities where public resources had been abused. This article should be also valid for legislative elections too, as it is included in the general electoral law. All in all, the HCC interpreted its competences in this realm as narrowly as possible and did not acknowledge the potentially serious violations of the electoral law. Consequently, the decisions were dysfunctional for competition.

Presidential Election of 2006

The electoral campaign was among the issues that were addressed in the HCC's decision on the 2006 presidential election's results. Issues related to the electoral campaign were raised in a number of different complaints. Some of these demanded the annulment of votes, some the disqualification of a candidate. All these complaints were targeted at incumbent candidate Marc Ravalomanana. The complaints have also in common that they were all either dismissed or the HCC declared itself incompetent to handle the issue in question. They were dismissed because the HCC judged that they did not provide sufficient evidence for wrongdoing, that they could not prove that the incidence had an influence on the sincerity of the vote and the will of the voters or that the deeds could not be attributed directly to Ravalomanana himself. For instance, a petition by candidate Razafimahaleo complained that two MPs had used the University of Fianarantsoa for campaigning, the distribution of donations and money and for the management of the support team of Ravalomanana. The petition was dismissed because the HCC judged that it did not provide sufficient evidence for its claims. Another petition by the same plaintiff denounced that the Ravolomanana-owned television programme of MBS had been broadcast at a quasi-national scale, which violated the idea of the equal partition of broadcasting time between the candidates. In this case, the HCC judged that there was no evidence that this would have affected the sincerity of the vote and the will of the voter. Candidate Ferdinand Razakarimanana complained about a campaign speech by Marc Ravalomanana given in Antsonjombe, in which he spoke in a defamatory and aggressive way about other candidates; Razakarimanana also cited that Ravalomanana had insulted and offended security forces in Antsirabe. For these issues the HCC declared itself incompetent, because the criminal courts were responsible for handling such accusations.

Candidate Jean Lahiniriko demanded in his petition the annulment of votes won by Ravalomanana and the latter's disqualification. The points that Lahiniriko raised appear in both claims but the HCC ruled on them separately. Lahiniriko accused Ravalomanana of using public goods for propaganda purposes, the presentation of the development plan Madagascar Action Plan one day before the beginning of the campaign period, the closure of schools in Mahamasina to achieve a high attendance rate at his campaign event and the broadcasting of praise for Ravalomanana's achievements on national radio one day prior to the poll. He further accused Ravalomanana of creating organisations close to TIM, and of forcing teachers and medical doctors to join these in order to campaign for him.

Candidate Monja lodged a petition to disqualify Ravalomanana that raised similar issues. The HCC dismissed the demand to annul Ravalomanana's votes because there was no evidence that he had ordered the closure of the schools and the broadcasting of the aforementioned praise. Furthermore, there was no legal provision prohibiting the president from presenting a development plan outside of the campaign period. When judging the disqualification, the HCC added that the date for the presentation of the development plan had been determined by the examination period for the budget bill and that it had been scheduled for the day before the beginning of the electoral campaign to avoid any potential confusion. The two TIM

associations would be private ones that everybody could join and that would be protected by article 14 of the constitution on the freedom of association. Moreover, the associations were created several months before the campaign and thus not for campaign purposes. The HCC clarified that the application of article 128 to disqualify a candidate would require the violation to have been committed by the candidate himself and proof that the act in question had had repercussions on the will of the voter. It would be the responsibility of the plaintiffs to provide the evidence. The plaintiffs did not, however, provide sufficient evidence to back the claims and consequently the petitions were dismissed.

The interventions on the presidential election of 2006 resemble in their general tone those ones on the 2001 presidential election. The interventions were dysfunctional to competition except for two ambiguous ones. Ravalomanana apparently learned from his predecessor Ratsiraka, for instance when an appraisal of his achievements was broadcast on national radio one day before the poll. The HCC did not address these apparent attempts to distort competition. Instead, it defined its high thresholds for the disqualification of a candidate. While the disqualification of a candidate is a far-reaching measure that should be handled with care, the court could have nevertheless still pointed to threats to free competition. Instead, it introduced a legal loophole by demanding proof of the direct order being given by the candidate themself – for instance for the closure of schools. Such orders are, however, difficult to prove and responsibility can be easily disguised within a large campaign machine. When the HCC judged in 1996 on the presidential candidacies of public office holders, it stressed the necessity of the administration's neutrality and explained that officials were exempt from protocolar duties during the electoral campaign. The closure of schools or the creation of special organisations for teachers appear to have been attempts to influence the administration.

In Table 28, I summarised my assessments of the HCC's interventions on the electoral campaign. The presidential elections of 2001 and 2006 as well as the legislative election of 2002 attracted the highest number of interventions in the electoral campaign. In the elections of 2002 and 2006 the bulk of interventions were dysfunctional for competition.

Table 28. Assessment of HCC Interventions Related to the Electoral Campaign

Election Year	Number of Interventions	Participation	Competition	Legitimacy
PE 1992/93	0			
LE 1993	0			
PE 1996	0			
LE 1998	0			
PE 2001	6		1 (green) 3 (orange) 2 (red)	
LE 2002	9*		9 (red)	
PE 2006	9 (10)		2 (orange) 7 (red)	
LE 2007	1		1 (green)	

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.4.2.5 Voting

The review of the voting process is a core competence of the HCC in the electoral process, even so when a narrow interpretation of its prerogatives is adopted. On election day, participation and competition are at stake. Voters need to be enabled to cast their vote and need to be protected from any undue influence on their free will. For instance, electoral campaign activities cannot proceed on election day itself or voters cannot be intimidated before, during or after casting their votes. Furthermore, it has to be guaranteed that every vote has the same weight – or in other words that every voter is entitled to the same number of votes. Thus, certain voters casting multiple votes or ineligible persons casting votes have to be prevented.

The change of direction in the HCC's approach to verifying elections and to justifying its judgments after 2002 is also visible in the issue area of the voting process. While the justifications given in the decision on the 2002 legislative election resembles those of the previous such elections, the impact of this decision was slighter – as the court annulled votes in a different way. It annulled four whole constituencies, in which by-elections took place but it annulled less votes without the possibility to recast the votes. In the following I will present the issues that the HCC raised in its decisions and how its stance has varied over the years.

The issues covered in the main body of the decisions can be clustered into five thematic groups: the identification of voters, the maintenance of the attendance sheet, the authorisation of the electoral list, the equipment of the polling station and general disturbances.

The Identification of Voters

The identification of voters was a major concern of the HCC. It is important for participation as it supposedly prevents an abuse of the voting right. Voters need to identify themselves and prove their eligibility at the polling station itself. Important conditions are their registration on the electoral roll and the holding of an electoral card. As has been pointed out in previous sections, electoral rolls may, however, be erroneous. Consequently, voters may turn up at the polling station without being registered on the electoral roll and without an electoral card. The electoral law provided procedures in case of a voter being accidentally omitted from the electoral register. In such a case, the voter can apply for ordonnances issued by judges at the local level to be a substitute for the electoral card and entry in the electoral register. However, the HCC attested to several instances in which citizens could cast their votes without being registered on the electoral roll and without holding a piece of proof like the electoral card or an ordonnance (1992-38-HCC/AR, 1996-226-HCC/AR, 1997-04-HCC/AR). In these instances the HCC ruled that such circumstances necessitate the annulment of those votes. These interventions were functional for participation because they acknowledged irregularities and consequently punished them.

Two further issues adjudicated on by the HCC were the delivery of electoral cards on election day and proxy votes. In 2007 a complaint was filed that denounced the delivery of electoral cards on election day. The HCC judged that this could not be automatically considered as an attempt at electoral fraud because Article 56 of the electoral law allowed for the distribution of uncollected cards on election day (2007-18-HCC/AR). The proxy votes were, however, judged to be a valid reason for the annulment of the concerned polling station's results (2003-01-HCC/AR). While the HCC refrained in 2007 from a closer examination of the circumstances under which electoral cards were distributed, it applied in 2003 strict sanctions for proxy votes – the annulment of the results of a whole polling station. The

decision in 2003 was functional for participation whereas the one in 2007 was dysfunctional for participation because the problem was not sufficiently examined and jurisprudence was changed.

Maintenance of the Attendance Sheet

The second cluster pertains to the procedures related to the attendance sheet. Voters need to sign an attendance sheet when they cast their vote. This is necessary to prevent multiple votes by the same person and to ascertain the total number of votes cast. It is thus also a measure to guarantee the equal weight of votes. Madagascan electoral law requires that the signatures of the voters are countersigned by a staff member of the polling station (92-041, art. 91). The HCC attests in several decisions to deviations from this procedure (1992-38-HCC/AR, 1996-226-HCC/AR, 1997-04-HCC/AR, 2002-01-HCC/AR, 2003-01-HCC/AR). In all cases the HCC sanctioned the deviation with the annulment of votes, and in serious cases the results of the whole polling station. The HCC apparently pursued an educational goal with this practice. It explained the procedure in several decisions, extensively pointing out that illiterate voters need to sign the attendance sheet with the print of both thumbs, that the countersigning has to be done by staff members of the polling station and not any other person, and that a cross is not sufficient to confirm the voter's signature. The HCC commented further on these deviations: In decision 1992-38-HCC/AR, the court expressed its regret that it had to nullify again votes due to this deviation – even though it had already nullified many votes of the constitutional referendum for this reason (1992-38-HCC/AR: 5). This comment reveals an expectation that annulments and clarifications could potentially induce a learning process and thus lead to the better implementation of the rule. In the same decision, it further expressed astonishment about those polling stations' staff members who must be literate as they were able to sign the PV and counting sheet but who could only put fingerprints on the attendance sheet.[93] In later decisions the court clarified that it cannot validate the regularity of the elections if the attendance sheet is only signed by fingerprints (1997-04-HCC/AR) and that this would constitute a strong presumption of fraud (2002-01-HCC/AR). It is noteworthy that the issue still appears in the legislative election of 2003, but not in the presidential and legislative elections of 2006 and 2007. The interventions related to the maintenance of the attendance sheet were functional for participation because they acknowledged irregularities and consequently punished them.

Authorisation of the Electoral List

The third cluster is about the authorisation of the electoral list. This list is essential for the regulation of participation. The electoral list of the respective polling station requires the signature of the Président de la Délégation spéciale of the *Fivondronampokontany* or *Firaisampokontany*. The HCC ruled consistently in 1992, 1997 and 2002 that the votes of a polling station need to be annulled if the electoral list is not correctly authorised (1992-38-HCC/AR, 1997-04-HCC/AR, 2002-01-HCC/AR). These interventions were functional for participation because they acknowledged irregularities and consequently punished them. The issue does not appear again in decisions after 2002.

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[93] "il est pour les moins curieux de constater que les members de bureau et les scrutateurs, sachant tous lire et écrire, qui ont bien signé les procès-verbaux et les feuilles de dépouillement, se sont trouvés paradoxalement acculés à l'opposition d'empreintes digitales après avoir introduit l'enveloppe dans l'urne »

Equipment of the Polling Stations

The issues in the other clusters were less recurring ones. Only in the cluster of the equipment of polling stations is the topic of insufficient ballot papers addressed in three separate decisions. The availability of sufficient ballot papers is an element of fair competition. The candidates only have an equal chance to be elected if sufficient ballot papers for all candidates are available. The HCC annulled in 1992 the results of some polling stations that had failed to provide sufficient ballot papers for all candidates (1992-38-HCC/AR). This intervention was functional for competition. In the first decision on the 2001 presidential elections, the court clarified that insufficient ballot papers would only be a reason for annulments if it could be proved that it was the fault of the administration and not the candidate themself (2002-01-HCC/AR). In the meanwhile the electoral law had changed and assigned the responsibility of the ballot papers' supply and distribution to the candidates themselves. This new provision favoured the incumbent candidates because they enjoyed easier access to the distribution channels of the state. In the decision on the 2007 legislative election the court reiterated and extended this argumentation. In particular, it reaffirmed that it is not possible to withdraw candidacy and also that there being insufficient ballot papers due to their non-deliverance by a candidate may not inevitably lead to vote annulments. This argumentation is consistent with the judgements on the list of candidates, as discussed above. However, the decisions of 2002 and 2007 were ambiguous for competition because the HCC on the one hand clarified the rules and on the other hand did not address the structural bias of the rule.

The other incidents are rather unique in comparison to the clusters analysed above. They concern, for instance, the operation of polling stations beyond official opening hours (2003-01-HCC/AR), the employment of security staff as polling station staff (1992-38-HCC/AR) or the abduction of a ballot box (2007-18-HCC/AR). These were all incidents that provoked the annulment of votes by the HCC.

On first sight, it seems in the 1990s that the HCC was willing to protect voter participation and their correct identification when it annulled votes due to missing or flawed means of identification. A caveat is, however, required because it is not evident how the court identified those votes that had been cast without correct prior identification. When it comes to the examination of attendance sheets it could be argued that in the 1990s the HCC also overplayed sanctions. The HCC pursued an educational goal that was in principle functional to participation, because the clarification of rules can theoretically lead to an improvement of electoral operations – and consequently to the protection of equal participation. However, the sanctions imposed appear to have been overly strict – namely when the court annulled votes because analphabets had signed the attendance sheet with only one thumbprint instead of both. Even the signing of the attendance sheet with signs like a cross could be due to high turnout at the polling station and not necessarily inherently an attempt to manipulate the vote. In such cases, it could be argued that the preservation of a vote should be more important than the strict application of the rules. The HCC, however, never discusses this conflict of principles.

Table 29 summarises the functionality of the HCC's interventions on the voting operations. These interventions were predominantly functional for participation and competition as has been discussed above. Dysfunctional interventions occurred in the presidential elections of 1996 and 2006 as well in the legislative elections of 2007.

Table 29. Assessment of HCC Interventions Related to the Voting Operations

<table>
<tr><th>Election Year</th><th>Number of Interventions</th><th colspan="2">Participation</th><th>Competition</th><th>Legitimacy</th></tr>
<tr><td>PE 1992/93</td><td>7</td><td colspan="2">5</td><td>1</td><td>1</td></tr>
<tr><td>LE 1993</td><td>8</td><td colspan="2">6</td><td>1</td><td>1</td></tr>
<tr><td>PE 1996</td><td>14</td><td>13</td><td>1</td><td></td><td>1</td></tr>
<tr><td>LE 1998</td><td>5</td><td colspan="2">5</td><td>1</td><td></td></tr>
<tr><td>PE 2001</td><td>6</td><td colspan="2">5</td><td>1</td><td></td></tr>
<tr><td>LE 2002</td><td>6*</td><td colspan="2">6</td><td>2</td><td></td></tr>
<tr><td>PE 2006</td><td>1</td><td colspan="2"></td><td>1</td><td>1</td></tr>
<tr><td>LE 2007</td><td>3 (4)</td><td>1</td><td>1</td><td>1</td><td></td></tr>
</table>

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.4.2.6 Processing of Votes

The verification of and adjudication on the processing of votes is a core competence of the HCC in the electoral process. Between the closure of the polling stations and the arrival of the electoral documents at the HCC many intermediary steps are undertaken. The votes are counted and the results are transported to different levels of the administration, where they are then centralised. The CMRV tabulates the results at the national level, and announces the provisional outcomes. This process is prone to mistakes and manipulations. For the voters it is a black box because they have no opportunity to observe it. They need to trust that their vote will be factored in correctly in the national result. Thus, the accurate processing of votes is important for the overall legitimacy of the poll. This point was particularly evident in the electoral crisis of 2002. That crisis marked a break in the issues that the HCC adjudicated on related to the processing of votes. While the HCC had focused up until that year rather on procedural shortcomings, the comparison of PVs stemming from different sources would become a prominent issue after 2002.

In its first years the HCC judged personnel problems vis-à-vis the counting process as a reason for annulments. The electoral law stipulated that the votes should not be counted by the staff of the polling station but by voters present there (Ordonnance 92-041, Art. 95, Organic Law 2000-014, Art. 97). The HCC cited this issue in 1992, 1996 and 1997 (1992-38-HCC/AR, 1996-226-HCC/AR, 1997-04-HCC/AR). Another issue was the correct signing of the counting sheets. The scrutineers are required to sign the counting sheet (Ordonnance 92-041, Art. 96, Organic law 2000-014, Art. 98). The court judged that the signing of the counting sheet by staff of the polling station or other officials constituted a reason for the annulment of votes in the respective polling station, as the electoral law requires the vote to be counted, as noted, by voters (1997-04-HCC/AR, 2002-01-HCC/AR). Furthermore, the scrutineers need to be literate – consequently a signature given by fingerprint was not accepted by the HCC (2002-01-HCC/AR). The analphabet scrutineers were only mentioned in the decision corpus of 2002. However, the HCC had cited this as a reason for cancellation in several other annexes (1993-456-HCC/AR, 1997-04-HCC/AR).

The HCC's interventions in the processing of votes range from functional to ambiguous vis-à-vis the legitimacy of elections. In many instances, the HCC responded to irregularities such as the counting by analphabet scrutineers by acknowledging these and annulling votes. These interventions were functional. However, there were also instances in which a strict technical interpretation of the electoral rules prevailed; this led to high levels of annulment. This was ambiguous for the legitimacy of elections. The international organisation IFES recommended in its election observation report of 1996 that the HCC should review the list of motives for the cancellation of results "in order to adjust such list to the realities of the Malagasy context and the national level of democratic development" (1996, 26). Some of the electoral rules that were strictly applied were very demanding for a developing country to adhere to. For instance, the rule that the votes must be counted by literate voters can be a significant challenge in a country where it can be difficult to find a sufficient number of literate delegates to staff the polling stations (MDG-17). The HCC is not the legislator and cannot alter rules, but it could still acknowledge the difficulties in implementing such rules and motivate political actors to consider more thoroughly how these may be appropriately enacted or adjusted.

In 1993, the HCC interpreted and underscored its power to annul votes. It clarified that it had the exclusive right of vote cancellations and that no other institution would be entitled to enforce this. The CMRV of Midongy-Sud had nullified the results of 12 polling stations in the legislative elections. The HCC cited Articles 68 and 69 of Electoral Law 93-007 that prescribes that the CMRV shall note detected inconsistencies and irregularities on the PV, although the latter body was not entitled to rectify the results. The court judged that the CMRV had overstepped its competences and had violated the electoral law. The HCC consequently reexamined these electoral documents and verified the validity of annulments (1993-456-HCC/AR). This intervention was functional for the legitimacy of elections because it clarified the rules. The clarification was apparently respected by the CMRV, as the issue does not appear again in later decisions.

Presidential Election of 2001: Denial of Juxtaposition

After the presidential election of 2001, attention turned to the comparison of electoral documents. The demand by Marc Ravalomanana's camp to contrast the results from different sources was at the heart of the electoral contestation in 2002. The electoral law allows accredited electoral observers and parties' representatives to receive copies of each respective polling station's electoral record (Ord. 92-041, Art. 104; Ord. 00-014-Art. 107). These signed documents comprised the tally of votes, alongside giving other information about the electoral operations in the polling station. Ravalomanana, with his great personal wealth, was the first candidate to systematically organise the collection of these electoral records with helicopters and four-wheel drive cars (Randrianja 2003, 315). This allowed him to personally have the votes counted simultaneously with the national counting commission doing so. Additionally, CNOE, a civil society organisation specialised in election observation, counted votes using the electoral records that their observers had collected across the country. All three counting processes produced different results, which provoked the candidate's questioning of the electoral records of these sources. Marc Ravalomanana declared already on 28 December 2002, before the announcement of the provisional results, that he would not accept a run-off unless a comparison of the electoral records was first undertaken (Midi Madagasikara 2001).

The HCC was the competent institution to verify the provisional results and to proclaim the final ones. This would have qualified it to undertake such a juxtaposition. Whether the HCC

was entitled to compare the electoral records from different sources became a heavily debated point, however (Rakotoarisoa 2002, 18). The HCC decided that it was not competent to compare the electoral records, and thus sent on 15 January 2002 a letter to the electoral council CNE. In this letter, the HCC invited the CNE to conduct a comparison of the electoral records under the direct observation of all presidential candidates and election observers. The HCC clarified, however, that the results of the CNE's work would only be informative in nature, and that the HCC would keep its power to judge sovereignly on the outcome of the election (La Tribune 2002; Midi Madagasikara 2002a). In other words, the HCC would retain the last word on the final result.

The HCC apparently tried to offer a concession through this verdict. In contrast, the Ratsiraka camp denied the legal possibility of a confrontation at the national level. The then President of the Senate, former President of the HCC and AREMA member Honoré Rakotomanana argued that the different electoral records should be compared onsite at the polling station, and that would be the only valid option for comparison provided by the electoral code (Midi Madagasikara 2002b). Ravalomanana refused a comparison by the CNE, as he considered the HCC as the only competent institution (Midi Madagasikara 2002e). The CNE replied on 16 January 2002, in a letter to the HCC, that it considered itself incompetent for the comparison of the electoral records, as no existing legal provision provided for such a procedure at the CNE (Midi Madagasikara 2002d). On 25 January, the HCC proclaimed the final results of the presidential elections. Ravalomanana had filed another demand for the challenging of the different sources' electoral records. He claimed that a comparison should take place under the observation of the HCC staff and the presidential candidates' own representatives. The HCC rejected this demand. In its justification given, the HCC asserted that the electoral law would confine the HCC's verification activities to the electoral records held by the national counting commission. A validation of electoral records owned by the candidates would violate the principle of the candidates' equality and the HCC's impartiality. The HCC further argued that it had requested the CNE to undertake a comparison but that the candidates had not cooperated therewith (2002-01-HCC/AR). Rejecting the comparison of electoral records, the HCC judged that Ravalomanana had won more votes than Ratsiraka – but nonetheless a run-off would still be necessary.

This decision was not accepted, and was eventually overturned by another HCC decision in April 2002. Prior to this protests had continued, international mediation efforts had begun, parallel governments had been set up and the country had been paralyzed for several months. The second decision was proceeded by a Supreme Court ruling that annulled the appointments of HCC judges (see Section 5.4.1). Then President Ratsiraka had initiated the appointment of new constitutional judges only three weeks prior to the presidential poll. These judges were dismissed, and replaced by their predecessors. The Supreme Court's decision was a highly controversial one, because the administrative jurisdiction normally cannot reverse the appointment of constitutional judges (Rakotoarisoa 2006, cited in Ralambomahay 2011, 31; Roger 2002, 39).[94]

The second decision on the presidential election's results was rendered on 29 April 2002. This time, the HCC argued that the electoral law entitled it to collect additional evidence for its examinations (2001-003, Art. 35). The HCC thus invited electoral observers and

[94] The decision had been rendered by the Supreme Court's administrative chamber.

candidates to submit their electoral records.[95] The HCC undertook a comparison of the submitted documents and asserted that it had been supported by advanced computer technology and highly qualified staff. A first comparison had shown that the results of 10,259 polling stations were consistent across all the PVs. The HCC simply stated that it had also compared the results for the remaining 6,234 polling stations. It is, however, unclear whether these results had been consistent across the PVs. For the results in Fianarantsoa, Ravalomanana's home province, the testimony of the Cour d'Appel's Avocat Général had also been taken into account. The HCC had annulled the results of 123 polling stations in Fianarantsoa in its first decision on the presidential elections. The Avocat Général testified that the governor of Fianarantsoa Province had given orders to the prefects and sub-prefects to delay the transmission of the PVs to the CRMV, and to modify the results in favour of Ratsiraka in several localities. The HCC judged that the PVs that it had received from the CRMV in these localities would not reflect the will of the voters, and that there were manifest discordances between the different PVs – thus it substituted the CRMV's PVs with those from the election observers (2002-05-HCC/AR). Eventually, the HCC declared in its second decision Ravalomanana the winner of the election – without a run-off being necessary.

In subsequent elections the comparison of PVs was also demanded. In the presidential elections of 2006, the candidates Ratsirahonana and Razafimahaleo demanded the comparison of PVs. Ratsirahonana had lodged a general complaint for the whole territory. It should be noted that Ratsirahonana had served as Ravalomanana's advisor in the electoral contestation of 2002. The HCC affirmed that the comparison of PVs contributes to the transparency of the results, and also its own willingness to exercise such a comparison. Comparisons would, however, only be admissible as a response to petitions specifying polling stations, communes, districts or regions. The plaintiffs would be required to enclose their PVs. The HCC would not follow up on demands for general comparisons. In those cases in which PVs had been submitted, the HCC compared them without finding any inconsistencies. Instead, it judged that Ratsirahonana had filed PVs of polling stations that did not actually exist (2006-05-HCC/AR).

In the aftermath of the 2001 presidential election the HCC did not contribute to the legitimacy thereof. Factors both internal and external to the court caused this failure. It was an interplay between what other actors had done to the HCC and what the HCC actually decided in its rulings that constituted the influence had on the democratic quality of elections. The HCC's decision in January 2002 to refuse the contestation of electoral records was perceived as a denial of justice (Midi Madagasikara 2002c). Jean-Eric Rakotoarisoa, a public law professor and today's president of the HCC, considered the search for the true result of an election as the essential duty of an electoral court and that the comparison of electoral records should be a normal measure to find the truth of the ballot boxes. He further asserted that no provision of the constitution or the electoral laws would prohibit a comparison (Rakotoarisoa 2002, 18). Roger, an official of the Ministry of Justice, was more cautious in his critique, underscoring that it had been almost impossible for the court to render an impartial decision. He nevertheless criticised the court for not listening to all parties before rendering its judgment, and for how it had applied a narrow and legalistic interpretation of its competences. This decision did not violate the law, but nor did it exhaust the court's legal scope either (Roger 2002, 37–39).

[95] The following actors had sent their PVs: the association TAFA of Toliara, the Consortium, CCO, CNE, the CRMV's presidents and the KMMR of Ravalomanana. Ratsiraka did not accept the invitation.

Moreover, the HCC had been considered as biased due to factors external to its own ruling. First of all, the appointment of the constitutional judges was considered as partial. The moment of appointment, as noted only three weeks prior to the elections, raised suspicions that Ratsiraka wanted to be sure that "his" judges would adjudicate on the presidential elections. This was particularly suspected as Ratsiraka had thought up until Summer 2001 that he would not have a serious rival, and thereafter he had sought several different means by which to tilt the playing field in his favour. Furthermore, several judges appointed by Ratsiraka were considered to be clearly affiliated to AREMA. Those judges did not swear their oath at the Ministry of Justice as was common for constitutional judges, but rather at the presidential palace Iavoloha; this only fuelled further mistrust of them (Rakotoarisoa 2002, 18). An additional factor that was heavily contested before the verdict of January 2001 was the location of the court. The HCC's headquarters are situated in Ambohidahy, the administrative district in the heart of Antananarivo. The presidential palace and the Place of the 13 Mai, famous for its history of popular protest, are close by the HCC's headquarters. The HCC moved during its deliberations on the election result to a hotel in Mantasoa, Antananarivo Province. The HCC worked there under the protection of the military. Some voices claimed that the fact that the HCC did not render its decisions at its headquarters would invalidate the judgments made. Roger (2002), for instance, cites the organic law on the HCC that defines Antananarivo (city) as the headquarter of the HCC. The location, the court room, the use of judicial robes and following other procedural rules would be essential for the accepted validity and respectability of a judicial decision.

To sum up, the HCC did not apply measures before its rulings to reduce mistrust about divergent election results and to mitigate electoral contestation. Nor did it contribute to the transparency of the results as it refused to contrast the electoral records, which would have been binding for the HCC's decision on the final result. This refusal was interpreted in light of the appointment of November 2001, the relocation of the court and a general mistrust of Ratsiraka's administration. Like this, the court's intervention in January 2002 was ultimately dysfunctional for electoral legitimacy.

For the second decision, the court undertook a contestation of the different electoral records that had been submitted to it. The court thus theoretically intervened to reduce mistrust in the electoral result. However the second decision was not more transparent in all regards, and again the composition of the court was criticised. The justifications in the decision corpus were also less elaborated on – while the first decision amounted to 23 pages in length, the second decision totalled only ten pages. The decision was furthermore rendered within only a short time span. On 10 April 2002, the administrative chamber of the Supreme Court had annulled the constitutional judges' appointment in November 2001 and furthermore all decisions that they had rendered (CS-CA-03). On 16 April, the same chamber had further judged that the constitutional judges that had served prior to the November appointment were to return to the constitutional bench and that a new decision on the final results of the presidential election was necessary (CS-CA-04, Roger 2002: 39). On 18 April, the agreement of Dakar was signed that confirmed the recounting of the votes.

Verdict 2002-05-HCC/AR that proclaimed the final results of the elections was rendered on 29 April 2002. Thus, it came only 13 days after the Supreme Court's decision that had recalled the old constitutional judges and 11 days after the agreement of Dakar that internationally legitimised the procedure. In the meantime the composition of the HCC was contested by AREMA's campaign director and several civil society organisations from Toamasina, the home province of Ratsiraka. They accused the HCC members of being partial, because four of

them had presided over the self-proclamation ceremony of Marc Ravalomanana on 22 February 2002.[96] The HCC, including the four accused members, adjudicated on this petition and unsurprisingly dismissed it on 26 April 2002. The court argued that the law would not provide for a challenge against HCC judges. It further referred to the agreement of Dakar, pointing out that it had been signed under the auspice of the UN and the OAU as a means to resolve the electoral crisis. The agreement confirmed the Supreme Court's decisions, and thus the work of the recalled HCC would be legitimised ultimately by the Supreme Court and the international community (2002-07-HCC/D3).

Another matter that had been debated in the prelude of the HCC decision on the election result was whether sufficient constitutional judges were involved in the decision. The HCC counts among its ranks, according to the constitution, nine members (C 1998-Art. 119). The Supreme Court decision had recalled the old nine judges, but not all of them actually returned. President Victor Boto resigned on 17 April 2002 (La Tribune 2002; 2002-05-HCC/AR) and two other judges, Thomas Indrianjafy and Berthe Rabemahefa, refused to appear at the HCC. Indrianjafy and Rabemahefa had been reappointed in November 2001 by Ratsiraka, and thus belonged to the constitutional judges that had proclaimed the final results of the election in January 2002. Thus, the HCC deliberated only with six judges. The HCC clarified in its decision on the final result that the organic law would require six judges to render decisions and that this quorum had been attained (2002-05-HCC/AR). Previously the court had announced that it would also undertake the contrasting recount if a minimum of two members were present, because the crisis would necessitate an urgent decision being made (La Tribune 2002). All in all, the circumstances of the decision, the quick timeframe and the short verdict made the second decision on the final results dysfunctional to legitimacy.

Table 30 summarises the functionality of the HCC interventions on the processing of votes. It shows that in the 1990s functional and ambiguous interventions prevailed. Since 2001 interventions that were dysfunctional for the legitimacy of elections occurred. These dysfunctional interventions were more important than the comprehensive assessment suggests as will be discussed in the next section.

[96] These individuals were Dieudonné Rakotondrabao, Jeanine Rakivolaharivony, Jean-Michel Rajaonarivony and Florent Rakotoarisoa.

Table 30. Assessment of HCC interventions Related to the Processing of Votes

Election Year	Number of Interventions	Participation	Competition	Legitimacy
PE 1992/93	3	1	1	1 1
LE 1993	5*			4 1
PE 1996	2			2
LE 1998	1*			1
PE 2001/D1	6			3 1 1
PE 2001/D2	2			1 2
LE 2002	3*	1	1	2
PE 2007	8			5 3
LE 2007	3			2 1

Note: "Number of Interventions" indicates the number of coded interventions. The number given in brackets designates the total observed interventions, if this number differs from that for coded interventions. In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred. The cross sum of the three entries related to the democratic quality of elections may deviate from the overall number of interventions indicated under "Number of Interventions", because certain interventions were relevant for two democratic qualities of elections (and thus appear twice).
Source: Author's own composition.

4.5 Patterns of Influences on the Democratic Quality of Elections

In the previous section, I provided a detailed and comprehensive assessment of the HCC interventions into the electoral cycle. In the following, I recapitulate the HCC's interventions on participation, competition and legitimacy. I present for each quality of democratic elections a brief summary of the comprehensive assessment. Moreover, I will compare these results with the ones of the analysis of major court interventions. I created the sample of major decisions based on my knowledge derived from the comprehensive assessment.

4.5.1 Participation

My comprehensive assessment of the HCC's interventions into the electoral cycle revealed that the HCC devoted the highest number of interventions – 66 – to participation. The bulk of these interventions were functional for participation. The electoral cycle's stages of the electoral register and the voting operations attracted the majority of interventions. In Table 31, I offer a summary of the HCC interventions.

Table 31. HCC Interventions on Participation

	Electoral Legal Framework	Electoral Register	Registration of Candidates	Electoral Campaign	Voting Operations	Processing of Votes
PE 1992/93		3			5	1
LE 1993		2			6	
PE 1996	3	5			13 1	
LE 1998		1			5	
PE 2001					5	
LE 2002		2			6	1
PE 2006		5				
LE 2007		1			1 1	

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

The HCC interventions into the electoral register were between 1992 and 2002 ambiguous and since 2006 dysfunctional for participation. In the first decade, the HCC acknowledged and punished after the poll repeatedly shortcomings of the electoral register, such as the multiple registrations of single voters. While the acknowledgment of these irregularities was functional for participation, the HCC overly stretched his competences for the punishment. Therefore, these interventions were dysfunctional. In 2006, the HCC, however changed its stance toward the electoral register and interpreted its competences more narrowly. As a consequence, the HCC ignored major irregularities of the electoral register. Furthermore, it denied in 2007 the civil society and the political parties to challenge the quality of the electoral register due to their involvement in the revision process.

The HCC's interventions on the voting operations were predominantly functional for participation. The HCC acknowledged and punished irregularities like the incorrect identification of voters or the wrong maintaining of the attendance sheet. These interventions require only one reservation. The sanctions led to high numbers of cancelled votes which can be a constraint to participation. Furthermore, the annulment of votes was in many instances opaque because the HCC annulled a certain part of votes without clarifying according to which logic it selected these votes.

The analysis of the major interventions draws a different picture of the HCC's influence on participation. Only two major interventions were relevant for participation. Both were dysfunctional and concerned the electoral register. These were the interventions of 2006 and 2007 in which the HCC ignored crucial problems of the electoral register.

4.5.2 Competition

In comparison to participation, fewer HCC interventions concerned competition. The bulk of the 50 interventions on competition were dysfunctional. These interventions mainly concerned the stages of the registration of candidates, the electoral campaign and the voting operations as Table 32 shows.

The stage of the electoral campaign attracted the highest number of interventions being dysfunctional for competition. These dysfunctional interventions clustered together in the legislative election of 2002 and in the presidential election of 2006, hence, in elections which

were held during the presidency of Ravalomanana. After the legislative election of 2002, the HCC denied any responsibility to adjudicate on potentially serious violations of the electoral law. It listed instances like the partisan use of public goods in the campaign, vote buying or propaganda outside the official campaign period. Yet, the HCC was entitled to adjudicate on the abuse of public goods in the campaign. After the presidential election of 2006, serious violations of the electoral campaign's fairness were challenged at the HCC such as the commission of civil servants to campaign for Ravalomanana or the closure of a school to increase the attendance rate at Ravalomanana's rally. In this election, the HCC did not outrightly deny its competences but rather blamed missing evidence for the dismissal of the petitions. The HCC did not acknowledge the potential serious rule violations and consequently tolerated the harms to competition.

Table 32. HCC Interventions on Competition

	Electoral Legal Framework	Electoral Register	Registration of Candidates	Electoral Campaign	Voting Operations	Processing of Votes
PE 1992/93	1				1	1
LE 1993			1 2		1	
PE 1996			2			
LE 1998					1	
PE 2001			1	1 3 2	1	
LE 2002	1		1	9	2	1
PE 2006			1	2 7	1	
LE 2007			1 3	1	1	

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

The analysis of the major interventions confirms the prevalence of dysfunctional interventions on competition as observed in the comprehensive assessment. Nevertheless, the HCC also rendered two major interventions that were functional for competition. Before the presidential election of 1996, the HCC clarified what the principle of the administration's neutrality would imply for the electoral campaign if incumbents run for presidency. This was one of the rare occasions in which the HCC engaged in more extensive rule interpretation and referred to democratic principles. After the legislative election of 2002, the HCC further annulled a whole constituency due to partiality of the administration. The major dysfunctional interventions on competition cluster together in the presidential elections of 2001 and 2006. I referred already above to those concerning the electoral campaign. In 2006, the HCC moreover dismissed the candidacy of AREMA candidate Pierrot Rajoanarivelo which seriously harmed competition.

4.5.3 Legitimacy

Legitimacy was subject to a similar amount of HCC interventions as competition. Half of the 48 interventions included in the comprehensive assessment were functional. The remaining interventions were divided in roughly equal shares of ambiguous and dysfunctional interventions. The large majority of interventions on legitimacy concerned the voting operations as Table 33 displays.

Table 33. HCC Interventions on Legitimacy

	Electoral Legal Framework	Electoral Register	Registration of Candidates	Electoral Campaign	Voting Operations	Processing of Votes
PE 1992/93					1	1 / 1
LE 1993					1	4 / 1
PE 1996	3				1	2
LE 1998	1 / 2					1
PE 2001/D1	2					3 / 1 / 1
PE 2001/D2						1 / 2
LE 2002						2
PE 2006	1 / 1	3			1	5 / 3
LE 2007						2 / 1

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

The HCC acknowledged and punished many irregularities in the processing of votes throughout my period of analysis. Such interventions were functional when they concerned issues like the counting of votes by illiterate persons or discordances between the numbers on the counting sheet and the PV. However, there were also instances in which the HCC applied the rules overly strictly, for example, when the court annulled results that had been tallied by polling station staff and not by citizens as prescribed by the law. In such instances, the preservation of the voters' will should have weighted heavier than the non-abidance of very demanding rules.

When I turn to my sample of major decisions, the rather positive impression from the comprehensive assessment does not persist. All major interventions on legitimacy were dysfunctional except for one. The single functional intervention on legitimacy occurred in the run-up of the 1996 presidential election. This election was the only instance in which the HCC resisted the attempts of political actors to shift the election date. The approval of shifts to election dates in 1997 and 2006 were in contrast dysfunctional for the legitimacy of elections. The HCC wielded the most serious negative influence on legitimacy after the presidential election of 2001 when it refused to compare the PV. In the presidential election of 2006 turned a blind eye on serious flaws in the processing of votes such as the family ties of the vote processing company's owner to the Minister of Education. In both samples - the comprehensive one and the selection of major interventions – disclose an accumulation of dysfunctional influences on the legitimacy of elections in 2006. This was the last presidential election before the regime breakdown in 2009.

The HCC influenced the democratic quality of elections during my period of observation. The court intervened into all stages of the electoral cycle. This activity of the HCC in electoral matters was reflected through high levels of electoral petitions and high levels of vote annulments. The functionality of the HCC's contribution to the democratic quality of elections was of mixed nature. While the analysis of my original comprehensive data set suggests that

the HCC influenced participation and legitimacy in predominantly beneficial ways, the examination of the sample of major interventions indicates that the HCC wielded most frequently dysfunctional influences on participation and legitimacy. Moreover, the HCC's interventions on competition had a clear dysfunctional character in both samples. Hence, the HCC did not serve as guardian of democratic elections. This was particularly true for the presidential elections of 2001 and 2006 in which the dysfunctional interventions clustered together. Let us see in the following chapter how Senegal's constitutional court contributed to the democratic quality of elections. Subsequently, I discuss extensively in Chapter 6 how the behaviour of the two constitutional courts in electoral matters resembled and diverged from each other and what can explain there constrained contribution to democratic elections.

5 Senegal

In this chapter, I explore how the Senegalese Conseil Constitutionnel (CC) operated in the period between 1993 and 2012 and how it interacted with the political context surrounding it. Against this backdrop, I analyse the development of the democratic quality of elections in Senegal and whether the council's interventions enhanced democratic elections or not.

In the first part of the chapter, I present Senegal's democratic history in a concise overview before I turn in the second part to the examination of the three democratic qualities of elections - participation, competition and legitimacy. In the third part, I introduce the history of the CC, the legal framework that governs its composition and work as well as public perceptions of the council. Moreover, I examine the council's relation with the political branches by focusing on the appointment practices and the informal interferences with the CC. In the fourth part, I turn to the systematic analysis of the CC interventions on the democratic quality of elections. For this purpose, I examine the council's decisions in all steps of the electoral cycle and assess their influence on the democratic quality of elections.

5.1 Democracy and Elections in Senegal

5.1.1 Evolution of Democracy

Senegal enjoys since the 1970s the reputation of being one of the few African democracies (see e.g. Fatton 1987). This positive image stems from three developments. First, Senegal can look back to a long history of elections. Since 1872, hence already under colonial rule the citizens of four municipalities – Dakar, Gorée, St Louis and Rufisque – were entitled to vote their municipal council (Fall 2011c, 97).[97]. Moreover, presidential and legislative elections were held regularly since 1963. Second, Senegal diverges from many of its neighbours through the absence of a coup d'état (Coulon 1988). Except from some turbulence in the first years following the independence from French colonial rule in 1960, executive power was never toppled by extra-constitutional means. Until 1962 Senegal's first president – Léopold Senghor – shared executive power with Prime Minister Mamadou Dia. Dia was arrested in 1962 for alleged coup d'état plans and subsequently a constitutional amendment established a semi-presidential system. Third, Senegal introduced comparatively early multi-party competition. In 1976, the establishment of three parties was permitted. Each of them was meant to represent an ideological strand – socialism (PS), liberalism (PDS) and Marxism-Leninism (Parti africain de l'indépendance, PAI). In 1978 the scope of parties was further expanded to four and in 1981 the ban on new parties was abolished (Kanté 1994, 98). This regulated introduction of multi-party competition fostered the development of strongly institutionalised party system. Institutionalised party systems are frequently considered as conducive for democratisation (see e.g. Wahman 2014). This party system was dominated by the ruling party Parti Socialiste (PS).[98] The PS ruled the country for forty years. The strongest opposition party was the Parti Democratique du Sénégal (PDS) led by Abdoulaye Wade. Wade vied for presidency since 1978 and finally won the presidential election of 2000. Despite the dominance of the PS, Senegal experienced nevertheless a turnover in presidential office prior to 2000. In 1980, Senghor passed power to Abdou Diouf. This was also considered an exceptional step in the African context.

Yet, all that glitters is not gold. Senegal's political regime was characterised by strong clientelistic networks within the PS and muslim brotherhoods exercised tremendous

[97] In fact, the citizens of Rufisque only obtained the right to vote in 1880.

[98] Until 1976 the PS was called Union Progressiste Sénégalaise (UPS) (Hartmann 2013, 171).

influences on politics, for instance through issuing election endorsements (Beck 2008). In the 1980s economic problems increased and the national elections of 1983 and 1988 were violently contested (Young and Kanté 1992, 64–69). After the 1988 Diouf had problems to appease the situation and therefore established a government of national unity in which he coopted opposition politicians like Wade. Eventually, Diouf agreed to launch an inter-party commission for drafting a new electoral law. The consensually adopted new electoral law was voted in 1991. The new electoral law was a major step towards genuinely free competition (Kanté 1994).

5.1.2 Elections in Senegal (1993-2012)

Even though the new electoral law had increased the transparency of the electoral process and fostered fair competition, the PS managed to preserve its dominant position throughout the 1990s. Diouf and the PS won the first presidential and legislative elections that were held under the new electoral law in 1993. The legislative election of 1998 was also still dominated by the PS. It was only in 2000 that Senegal experienced its first electoral turnover. In the fifth presidential election in which Wade vied for office, he was able to achieve a victory in the run-off. Table 34 provides an overview of the presidential elections during my period of analysis and its main contenders.

Table 34. Presidential Elections and Their Main Contenders (1993–2012)

Election Date	Main Contenders
21.02.1993	Abdou Diouf (winner) Abdoulaye Wade
27.02.2000 (1st round) 19.03.2000 (1st round)	Abdoulaye Wade (winner) Abdou Diouf
25.02.2007	Abdoulaye Wade (winner) Idrissa Seck
26.02.2012 25.03.2012	Macky Sall (winner) Abdoulaye Wade

Source: African Elections Database.

In 2001, Wade's Sopi Coalition won the majority of the National Assembly's seats. It was the first election in which an electoral alliance instead of a political party won the majority of seats. Since 2001 all legislative elections were won by an electoral alliance as can be seen in Table 35. Wade consolidated his power and was reelected in 2007. This election was criticised by the opposition for numerous irregularities. Due to the allegedly rigged presidential election of 2007, the major opposition parties boycotted the legislative election of the same year.

Table 35. Legislative Elections and Their Strongest Parties (1992–2007)

Election Date	Strongest Party
09.05.1993	PS
24.05.1998	PS
29.04.2001	Sopi Coalition
03.06.2007	Sopi Coalition
01.07.2012	Benno Bokk Yakaar

Source: African Elections Database.

The subsequent presidential election was also heavily contested by the opposition and the civil society because Wade sought a third presidential term despite a constitutional two-term limit. Yet, Senegal experienced eventually its second electoral turnover in 2012 when Wade's

former ally Macky Sall won the presidency. Sall's electoral alliance Benno Bokk Yakaar also secured the majority of seats in the legislative election of 2012.

5.2 The Democratic Quality of Elections in Senegal

In this section, the development of the DQE in the period between 1993 and 2012 will be scrutinised by using the indicators that have been introduced in Chapter 3. I start the analysis with participation and proceed with the analysis of competition and legitimacy.

5.2.1 Participation

In this section the active participation in Senegal's national elections will be analysed. Participation in Senegalese national elections was rather low as will be demonstrated by a comparison of official turnout rates and the estimated voting age population (VAP) turnout. These differences are caused by deficiencies of the electoral register as will be analysed as well in the following.

For gauging the accuracy of the electoral register the comparison of the estimated voting age population (VAP) and the official number of registered voters can give important hints. It should be noted however that the VAP size is a rough estimation based upon numbers of the UN Demographic Yearbook. It is an estimation and thus gives no precise information about the real number of the voting age population. Consequently, the numbers should be understood as hints to inaccuracies but not as hard evidence (International IDEA 2016a).

Table 36 shows how the official registration numbers and the estimated VAP developed between 1993 and 2012. Furthermore, it reports the difference between these two figures. The differences between these numbers scored in all elections above one million. The difference was particularly striking in 2000 as will be explained in more detail below. The number of officially registered voters increased in 1998 but decreased in 2000 to a level that was even lower than the one in 1993. In 2001, the number of registered voters increased slightly and then strongly in 2007. In the latter year the electoral register counted 2.1 million more voters than in 2001. Since then the size of the official electorate steadily increased. The estimated VAP increased in the five years between 1993 and 1998 per approximately 0.5 million voters and in the six years between 2001 and 2007 per almost 1.7 million voters. An increase of the electorate is in line with the demographic trend in Senegal. A certain divergence between the number of official registrations and the estimated VAP is not suspicious as such. The VAP is an estimation as stressed above and it does not take legal restrictions to eligibility into account. In Senegal for instance persons condemned for crime or sentenced to a certain period in prison are not entitled to vote (Loi 92-16, Art L 3; Loi 2012-01, Art L 30). Until 2007 members of the military or the police did not hold the right to vote (Loi 92-16, Art L 6). The inclusion of these forces had no big impact on the size of the electorate as the armed forces has a size of 15,000 soldiers and the national gendarmerie of 6,000 policemen (Cissé 2015, 122–123). However, even if such limitations are taken into account the differences between the two numbers are striking, in particular in the year 2000. For the first round of the presidential election the difference made-up approximately 2.2 million voters. In 2001 the difference was still high in comparison to the other election years.

Table 36. Size of Electorate in Terms of Official Registration Rates and Estimated VAP

Election	Official Number of Registered Voters	Estimated VAP	Difference Between Official Number and VAP
PE 1993	2,549,699	3,994,480	1,444,781
LE 1993	2,613,095	3,994,480	1,381,385
LE 1998	3,164,827	4,513,760	1,348,933
PE 2000, 1st round	2,275,987	4,539,960	2,263,973
PE 2000, 2nd round	2,745,230	4,539,960	1,794,730
LE 2001	2,804,352	4,607,716	1,803,364
PE 2007	4,917,157	6,301,663	1,384,506
LE 2007	5,004,096	6,301,663	1,297,567
PE 2012, 1st round	5,302,349	6,504,093	1,201,744
PE 2012, 2nd round	5,307,962	6,504,093	1,196,131
LE 2012	5,368,783	6,504,093	1,135,310

Source: Author's own compilation. Source for the official registration numbers are the CC judgments and for the VAP is International IDEA (2016b).

The divergence of the official registrations and the VAP estimation correspond to recurring critique of the electoral register. The electoral list is to be revised annually and additionally before each election (Loi 92-16, Art L 14; Loi 2012-01, Art L 39). Administrative commissions at the local level are charged with this task. They shall add those citizens to the list who reached the voting age or moved to the municipality and remove those that passed away or lost their right to vote due to condemnations. Citizens registered on the electoral roll receive a voter card with which they have to identify themselves on voting day in addition to an identity card (Loi 92-16, Art L 16, L 50; Loi 2012-01, Art L 41, L 78).

The maintenance of the electoral roll as well as the distribution of voter cards was repeatedly subject of critique by the opposition. In 1993 problems with the establishment of the electoral register and the distribution of voters cards was sought to be mitigated by the issue of certificates by local jurisdiction what created however further problems (EIU 1993a, 14; NDI 1993, 3; OIF 1993, 3). In 1998 the opposition claimed that in some districts their party supporters were removed from the roll during a computerised validation process of the electoral roll (EIU 1996, 7). In the run-up of the 2000 presidential election 1.5 million undistributed voter cards from the previous elections were publicly burned in response to opposition protests (EIU 1999, 15). Mistrust was again sparked by the opaque ordering of new voter cards in Israel what led to new demonstrations (EIU 2000, 11; Raddho 2000). In 2004 it was decided to create a completely new and digitalised electoral roll (EIU 2004, 15). Several delays in the process led however to problems in the distribution of electoral cards in 2007 (Raddho 2007, 13, 17). After new allegations on the inaccuracy of the electoral register during the local elections of 2009 an independent audit of the electoral roll was decided and supported by Germany, the EU and the US (Foucher 2011).

The picture of participation in Senegalese national elections becomes more nuanced if not only official turnout rates but also estimated VAP turnouts are taken into account as can be observed in Table 37. While the official turnout rates suggest that participation was in some elections comparatively high, namely in the presidential elections of 2000 and 2007 as well as in the legislative election of 2001, the estimated VAP turnout reveals low turnout rates throughout most elections. Electoral turnout rates were generally higher in presidential

elections than in legislative elections. The official turnout rates in presidential elections ranged between 51 and (1993) and 75 per cent (2000) and those of legislative elections between 35 and 41 per cent. The legislative election of 2001 was an exceptional election enjoying comparatively high turnout rates in terms of the official turnout rate (67 per cent) and the estimated VAP-turnout (41 per cent). However, it is also one of the elections that experienced the highest divergence between the official turnout and the estimated VAP turnout, 26 percentage points. Only the presidential election of 2000 offered a higher discrepancy of 38 percentage points between the official turnout and the estimated VAP turnout rate. These divergences correspond to the gaps between the officially registered electorate and the VAP as has been described above. The presidential elections with the highest electoral turnout in terms of official numbers were those of 2000 and 2007. The presidential elections of 2007 and 2012 displayed the highest participation in terms of the estimated VAP turnout.

Table 37. Turnout Rates in Presidential and Legislative Elections

Presidential Elections			**Legislative Elections**		
Election Year	**Turnout (Registered Voters)**	**Turnout (VAP)**	**Election Year**	**Turnout (Registered Voters)**	**Turnout (VAP)**
1993	51	33	**1993**	41	27
2000, 1st round	75	37	**1998**	39	28
2000, 2nd round	61	37	**2001**	67	41
2007	71	55	**2007**	35	28
2012, 1st round	52	42	**2012**	37	30
2012, 2nd round	55	45			

Note: Turnout rates were calculated in relation to the official number of registered voters and to the estimated voting age population. The calculation of the presidential elections' turnout was based on the data from the CC judgments. VAP turnout data is from International IDEA (International IDEA 2016b).

5.2.2 Competition

Electoral competition was in principle possible in Senegal but strongly dominated by the respective incumbents. Nevertheless, two electoral turnovers happened in incumbent elections. Those were the presidential elections with the highest level of competition. Legislative elections were also dominated by the respective ruling parties who used their parliamentary majorities to adjust the electoral system to their advantage. Therefore, across less votes were required to reach convenient majorities in the National Assembly. In the following I will assess the de facto level of competition by analysing the passive participation in elections and election related indicators like the occurrence of electoral turnovers, election results and winning margins.

The possibility of de facto electoral competition is decided in the preelectoral period. Only if citizens vie for political office, political competition can take place. In order to assess these prerequisites of electoral competition I analyse the number of candidacies in national elections and the occurrence of election boycotts. Table 38 indicates the number of candidates in presidential and legislative elections during my observation period. Accordingly, Senegalese citizens could chose between nine and 17 presidential candidates as well as between eight and 24 lists of candidates for legislative elections. For both elections

the number of options increased within the period of observation. There were few constraints to the admission of candidates as will be discussed in Section 5.4.5. In the presidential elections of 2007 and 2012 few candidates were not admitted to the race. The development of passive participation in legislative elections reflects the transformation of the Senegalese party system. The system developed from a dominant one-party system under the lead of the PS to a less institutionalised party system governed by electoral alliances (Hartmann 2013; Resnick 2013b). Wade as well as Sall won their legislative majorities with coalitions of several parties.

Table 38. Number of Candidates Standing for Election

Election Years	Presidential Elections	Legislative Elections
1993	9	8 parties / 1,222 candidates (ARB 1993: 10963)
1998	-	18 parties
2000/2001	9	18 lists of 25 parties
2007	16	17 parties
2012	17	24 lists

Note: Author's own compilation (CC judgments; Cour d'appel de Dakar 2012, 7; EIU 1993a, 14, 2007a, 15; Grimm n.d., 152; OIF 2001, 7).

Electoral choices can also be restricted by parties' decisions not to participate in the electoral contest. In Senegal one major electoral boycott took place; in 2007 the legislative elections were boycotted by a coalition of 17 parties (Galvan 2009, 495).[99] The boycott was a response to the alleged manipulations of the 2007 presidential election. Opposition parties had called for more transparency in the election management and in particular a revision of the electoral register and an independent structure for the organisation of the poll. Since Wade ignored their reform demands the parties opted for the boycott (EIU 2007b, 16; Hesseling 2008a). This was the only important election boycott during the period of observation. In 1993 a small party, the PLP, had campaigned for a boycott of the legislative election out of protest against the alleged rigging of the presidential election and the non-consensual amendment of the electoral code (Villalón 1994, 186–187). In 2012 some minor political parties called after the validation of Wade's candidacy for the boycott or postponement of the presidential election (Foucher 2013).

Senegal experienced two electoral turnovers in the presidency since 1992. In 2000 the victory of Senegal's veteran opposition politician Abdoulaye Wade ended the 40-year rule of the PS. Wade had fought for this victory since 1978 when he ran for the first time for presidential office. In 2012 Macky Sall won the presidency. Sall used to be a close collaborator and prime minister of Wade but he had defected from the PDS in 2008. Electoral turnovers are considered the litmus test for competition (Alvarez, Cheibub, Limongi, and Przeworski 1996). The Senegalese electoral turnovers were particularly unlikely because both elections were contended by incumbents. Incumbents have a strong likelihood to win reelection as Przeworski has shown for contested presidential elections between 1788 and 2008 and Cheeseman for sub-Saharan Africa (Cheeseman 2010; Przeworski 2015).[100] Before 2000 the PS-regime by Abdou Diouf worked hard to adjust electoral rules in a way that preserves the

[99] To the Front Siggil Senegal belonged among others the following parties: PS, AFP, PIT and LD-MPT (EIU 2007b, 16).

[100] Of the 2,230 elections studied by Przeworski 70 per cent were won by incumbents. Cheesman found that incumbents won 88 per cent of incumbent elections in African non-founding elections between 1990 and 2009 (Cheeseman 2010, 142; Przeworski 2015, 104).

PS' hold onto power (Creevey, Ngomo, and Vengroff 2005; Mozaffar and Vengroff 2002). For instance, by increasing the number of parliamentary seats and changing the balance of the segmented electoral system's seat allocation. In 2000 many commentators hoped that the victory of Wade would cause a deepening of democracy (Diop, Diouf, and Diaw 2000; Galvan 2001). These hopes were disappointed when Wade similar to Diouf sought to manipulate electoral competition (Levitsky and Way 2010, 276; Mbow 2008, 158–160; Thiam 2007, 149–150; Wahman 2014, 230). Moreover, he announced in 2010 that he seeks a third term despite a constitutional two-term limit. He pushed his third-term bid through despite public protests. Nevertheless, he eventually lost the election.

It were the turnover elections that experienced the highest level of competitiveness within the period of observation. The presidential elections of 1993 and 2007 were won by incumbent Diouf and incumbent Wade respectively in the first round with convenient winning margins of 26 percentage points in 1993 and 41 percentage points in 2007. While in 1993 two main contenders, Diouf and Wade, accumulated the largest bulk of votes, Wade was opposed in 2007 by several candidates who obtained rather small share of votes.[101] Wade won four times as many votes as his strongest contender Idrissa Seck.[102] The incumbents could also win the first round of the elections in 2000 and 2012. However, they did not obtain the required absolute majority and their winning margins were also comparatively low with 10 percentage points in 2000 and eight percentage points in 2012. The run-offs themselves were less competitive as the opposition candidates won clearly. In particular, Macky Sall acquired a comfortable advantage of 31 percentage points.

Table 39. Results and Winning Margins of Presidential Elections (1993–2012)

Election	**Candidate I**		**Candidate II**		**Winning Margin**	
	Votes	**Percentage**	**Votes**	**Percentage**	**Votes**	**Percentage points**
1993	757,311	58.4	415,295	32	342,016	26.4
2000, 1st round	690,917	41.3	518,740	31	172,177	10.3
2000, 2nd round	969,332	58.5	687,969	41.5	281,363	17
2007	1,914,403	55.9	510,922	14.9	1,403,481	41
2012, 1st round	942,327	34.8	719,367	26.6	222,960	8.2
2012, 2nd round	1,909,244	65.8	992,556	34.2	916,688	31.6

Note: Author's own compilation of CC's results and own calculations.

All presidents held stable majorities in the National Assembly as Table 40 shows. It was only Wade who had to rule for more than a year without a majority. He bridged this period by inciting floor crossing of PS MP to the PDS camp (Goeke 2015, 804). However, in the constitutional referendum of 2001 a new provision was introduced that entitled the president to dissolve the National Assembly. Wade did not wait long to use his new prerogative, dissolved the parliament and ruled by decree until the next election (Creevey,

[101] After Wade the strongest candidates in 1993 were Landing Savane winning 37,787 votes (2.91 per cent) and Abdoulaye Bathily winning 31,279 votes (2.41 per cent).

[102] The strongest contenders in 2007apart from Wade were Ousmane Tanor Dieng and Moustapha Niasse who won 464,287 votes (13.56 per cent) and 203,129 votes (5.93 per cent) respectively.

Ngomo, and Vengroff 2005, 479). Presidential parties or coalitions could win roughly 50 per cent of the votes in every election. Wade's Sopi coalition acquired the highest vote share, 69.2 per cent, in 2007. This high share was owed to the electoral boycott of the major opposition parties. The ruling parties or alliances also won comfortable winning margins. These margins ranged between 26.3 percentage points in 1993 and 37.8 percentage points in 2012 when the outlier of 64.2 percentage points in 2007 is not taken into consideration. The vote shares as such, however, do not tell the strength of the majority in the National Assembly. In order to assess this strength, the number and percentage of seats are relevant. The relation between the vote share and the seat share is distorted by the electoral system. The mixed electoral system in Senegal was designed in a way that it inflated the majority's size of the ruling party (Creevey, Ngomo, and Vengroff 2005; Mozaffar and Vengroff 2002). Therefore, a vote share of 49.6 per cent in 2001 produced a 74 percentage of seats. All in all, the level of competitiveness was low in legislative elections.

Table 40. Results of Strongest Parties and Alliances in Legislative Elections (1993-2012)

Elections		Strongest party / Majority alliance			
	Total number of NA-seats	Name	Number of seats	Percentage of votes	Percentage of seats
1993	120	PS	84	56.5	70
1998	140	PS	93	50.2	66.4
2001	120	Sopi coalition	89	49.6	74.2
2007	150	Sopi coalition	131	69.2	87.3
2012	150	Benno Bokk Yakaar coalition	119	53.1	79.3

Source: Author's own compilation of data from the African Elections Database, secondary literature. Author's own calculations.

5.2.3 Legitimacy

The legitimacy dimension is about the acceptance of elections as the appropriate channel for leader selection by political actors and by citizens as a whole. This dimension seeks to capture to what extent elections are the "only game in town" (Linz and Stepan 1996). I will start the analysis with the most blatant indicator for the acceptance of elections, namely the survival of the electoral regime. I will then proceed with scrutiny of the candidates' acceptance of election results and the occurrence of electoral-related violence. The results show that elections were accepted as the appropriate channel for leader selection throughout the period of observation. Even though elections were repeatedly questioned on a rhetorical level and through low-level electoral violence, election results were widely accepted.

Elections were the only mean to select political leaders on the national level in Senegal. The election regime was stable during the observation period 1993-2012. Thus, no crisis occurred that caused an interruption of the election regime. However, the electoral calendar of legislative elections was subject to two major shifts in 2001 and 2006. After the legislative election of 1998, the next election would have been due in 2003. However, Wade dissolved on 15 February 2001 Wade the National Assembly to gain a parliamentary majority and the legislative election was already held in April of that year (ARB 2001). The subsequent legislative election was pending in 2006 but was only held in 2007. Wade had announced already in 2005 after a flood that he wants to hold the legislative and presidential elections on the same day in 2007 in order to save money (Hesseling 2008b). Therefore he introduced

a constitutional bill into the National Assembly as will be examined more extensively in Section 5.4.3. This move was criticised by the opposition arguing that the flood would serve as a pretext to avoid elections due to intra-party fights in the PDS. The separate dates of the polls were furthermore considered as part of the 1991 consensus (EIU 2005, 17–18).

The results of all elections were accepted within three months after the official proclamation (Coppedge, Gerring, Lindberg, and Skaaning 2016). The result of the turnover elections in 2000 and 2012 were immediately accepted by the defeated candidates. In 1993 Wade gave, however, a press conference in which he alleged electoral fraud and called for the cancellation of the election or at least for a run-off (ARB 1993a, 10924). This announcement did not follow any actions apart from petitions to the CC. In 2007 some presidential candidates accepted immediately the victory of Wade while others issued a statement in which they criticised several points of the election process. Among these points were the bad quality of the electoral register, the partiality of the Ministry of the Interior, the incompetence of CENA or the restrained access to the media for opposition candidates (Raddho 2007, 30).[103] They made the improvement of these points a prerequisite for their active participation in the legislative election. Eventually, the legislative election of 2007 was boycotted as explained in the previous election. After the election, the opposition called for the cancellation of the poll because the low voter turnout would grant the National Assembly only a very low level of legitimacy (EIU 2007c, 13).

Electoral violence occurred in Senegal but on a comparatively low level. The elections of 1993 were the most violent ones while the legislative election of 2001 was the most peaceful election. In the following the level of violence across the elections will be analysed by using three databases: 1) the Lindberg database, 2) AEVD and 3) V-Dem (Version 6.2). Neither AEVD nor the Lindberg dataset cover the whole period of observation. The Lindberg dataset reaches until 2003 and AEVD until 2008. VDem includes the whole period except for the legislative election of 2012. Table 41 offers an overview of the different sources' assessments. Lindberg coded all elections between 1993 and 2001 as hit by isolated incidents of electoral violence (Lindberg 2006). According to AEVD among the elections between 1993 and 2007 only the legislative election of 2001 was free of violence. The legislative election of 1993 was classified as having experienced violent repression due to the assassination of CC Vice-president Sèye. All other elections were coded as ridden by violent harassment (Straus and Taylor 2012). Thus, Lindberg and AEVD mainly agree in their assessment of the level of violence. AEVD just considered the legislative election of 1993 as more violent than Lindberg and the 2001 election as less violent.

[103] Landing Savane, Talla Sylla, Robert Sagna, Mamadou Lamine Diallo, Cheikh Bamba Dieye, Doudou Ndoye and El Hadj Alioune Mbaye congratulated Wade the day after the announcement of the results. Ousmane Tanor Dieng, Idrissa Seck, Mamadou Seydi, Haidar El Ali, Abdoulaye Bathily, Souleymane Ndiaye, Amath Dansokho, Massène Niang, Kader Gueye, Moustapha Niasse, Madior Diouf and Mamadou Wague contested the results and issued claims for reforms (Raddho 2007, 30).

Table 41. Assessments of Electoral Violence in Senegal (1993-2012)

	AEVD	Lindberg	VDem Executive	VDem opposition	Analysis
PE 1993	violent harassment	isolated incidents	sporadic harassment and intimidation	not really peaceful	Sources roughly agree.
LE 1993	violent repression	isolated incidents	sporadic harassment and intimidation	widespread violence	AEVD and VDem assessed the election as more violent due to the assassination of the CC vice president.
LE 1998	violent harassment	isolated incidents	sporadic harassment and intimidation	somewhat peaceful	Sources roughly agree
PE 2000	violent harassment	isolated incidents	no harassment or intimidation	somewhat peaceful	Sources roughly agree but VDem assesses the level of executive violence as decreased.
LE 2001	free of violence	isolated incidents	no harassment or intimidation	almost peaceful	Lindberg assessed the election as slightly more violent. VDem observed violence by the opposition but on a decreasing level.
PE 2007	violent harassment	no assessment	no harassment or intimidation	almost peaceful	AEVD assessed the election as more violent than VDem.
LE 2007	violent harassment	no assessment	no harassment or intimidation	somewhat peaceful	Sources roughly agree. VDem attributes violence to the opposition.
PE 2012	no assessment	no assessment	no harassment or intimidation	somewhat peaceful	only one source
LE 2012	no assessment	no assessment	no harassment or intimidation	no assessment	only one source

Note: The **AEVD** team distinguished four levels of electoral violence. *Level 0* or "*no violence*" is defined as "no reported electoral violence before or after the poll", *level 1* or "*violent harassment*" is "indicated by police or security forces breaking up rallies, party supporters brawling in the streets, confiscation of opposition newspapers, candidate disqualifications, limited short-term arrests of political opponents", *level 2* or "*violent repression*" is "indicated by high-level assassinations and targeted murder combined with long-term high-level arrests of party leaders, the consistent use of violent intimidation and harassment (as in category 1) or the use of torture (coded as 2)" and *level 3* or "*large-scale violence*" is "a highly violent campaign with generalised violence – that is, repeated widespread physical attacks leading to a substantial number of deaths over time (20 deaths or more)" (Straus / Taylor 2012: 23-24). **Lindberg** distinguished the following three levels of electoral violence: "*not at all peaceful*", "*isolated incidents*" and "*peaceful*" (Lindberg 2006: 44-45). **VDem**'s variable on opposition intimidation by the **executive** or the ruling party comprises five levels. *Level 0* is defined as "the repression and intimidation by the government or its agents was so strong that the entire period was quiet." *Level 1* implies that there was *frequently* "systematic, frequent and violent harassment and intimidation of the opposition by the government or its agents during the election period." *Level 2* means that there was *some intimidation* that "was periodic, not systematic, but possibly centrally coordinated – harassment and intimidation of the opposition by the government or its agents." *Level 3* indicates that "there were *sporadic* instances of violent harassment and intimidation by the government or its agents, in at least one part of the country, and directed at only one or two local branches of opposition groups" and *level 4* implies that there "was *no harassment or intimidation* of opposition by the government or its agents, during the election campaign period and polling day". **VDem**'s variable on the violence perpetuated by the **opposition or citizens** also includes five levels. *Level 0* indicates that there "was *widespread violence* between civilians occurring throughout the election period, or in an intense period of more than a week and in large swaths of the country. It resulted in a large number of deaths or displaced refugees." *Level 1* means that the election was *not really peaceful* as " there were significant levels of violence but not throughout the election period or beyond limited parts of the country. A few people may have died as a result, and some people may have been forced to move temporarily." *Level 2* is defined as "*somewhat peaceful*. There were some outbursts of limited violence for a day or two, and only in a small part of the country. The number of injured and otherwise affected was relatively small." *Level 3* implies it was *almost peaceful* and that there "were only a few instances of isolated violent acts, involving only a few people; no one died and very few were injured." *Level 4* indicates that the election was *peaceful* and that "no election-related violence between civilians occurred."

The VDem project composed two variables relevant for electoral violence. It first coded whether the government engaged in harassment and intimidation of the opposition and second whether the opposition and the citizens perpetuated violent activities. Accordingly,

the Senegalese government harassed and intimidated the opposition at sporadic occasions in 1993 and 1998. Since 2000 the government refrained from such activities. VDem classifies the elections of 1993 as the most violent ones. The presidential election of 1993 is coded as experiencing significant levels of violence that was, however, not on a constant level and not concerned the whole country. The 1993 legislative election was coded as not at all peaceful and hidden by widespread violence between civilians. The elections of 1998, 2000, the 2007 legislative election as well as the presidential election of 2012 were coded as somewhat peaceful. Thus, some small outbursts occurred but they were temporarily and geographically limited. Only the legislative election of 2001 and the presidential election of 2007 were classified as almost peaceful with only few incidents of isolated violent acts (Coppedge, Gerring, Lindberg, and Skaaning 2016).

AEVD and VDem agree that the elections of 1993 were the most violent ones during the period of observation. There were fears of violent outbreaks before these elections because the elections of 1988 had been followed by violent protest. Violence in the 1993 elections, however, did not reach a similar scale as in 1988. There were protests in Dakar related to socioeconomic grievances (Kanté 1994, 107). For instance, a youth gang attacked a gendarmerie in Dakar one day after the proclamation of Diouf's victory (ARB 1993a, 10925). Furthermore, several violent attacks happened in Senegal's southern province Casamance (ARB 1993b, 10890; Villalón 1994, 181). The legislative election was furthermore overshadowed by the assassination of the CC vice-president. AEVD and VDem moreover concur that the legislative election of 2001 was the most peaceful one in the observation period. The secondary literature neither reports major violent incidents. VDem assessed the presidential election of 2007 as a similar peaceful election.

My analysis of the the three democratic qualities of elections' development throughout my observation period showed that participation, competition as well as legitimacy were subject to constraints. Participation was limited due to deficient electoral registers, which improved, however, over the course of time. Incumbents and their ruling parties sought to bias competition by adjusting for instance the electoral system to their needs. Nevertheless, two electoral turnovers happened in incumbent elections. Elections were accepted as a legitimate channel for leader selection. The conduct of elections was, however, repeatedly contested on the rhetorical level and through small-scale violence.

5.3 The Context of the Conseil Constitutionnel

In this chapter I aim to analyse the context of the CC. I do this by presenting a brief history of the council's creation as well as of the CC's precedent jurisdiction, the Supreme Court. Subsequently, I turn to the examination of the council's legal framework in general and specifically for elections. These rules define the legal supply of power for the CC and shape to a certain extent the council's options to intervene into the electoral process.

5.3.1 A Brief History of the Conseil Constitutionnel

The Conseil constitutionnel was adopted in 1992. The creation of the CC was however neither the beginning of constitutional jurisdiction nor of electoral adjudication in Senegal. After independence Senegal opted similar to the other former French colonies in West Africa for a Supreme Court at the apex of the judicial system instead of the French system that consisted of several specialised courts at the highest level of the judiciary. The Senegalese Cour suprême (CS) comprised three chambers: first, a chamber for civil, commercial and criminal

matters, second, a chamber for administrative matters and third, a chamber for budgetary review (Camara 1988, 307–311).[104] The court also held the power for constitutional and electoral review. These cases were not adjudicated in the chambers but all supreme court judges deliberated together on constitutional and electoral matters (SEN-2; Sylla and Diop 1988, 329). The supreme court's power to review laws and elections was however initially limited. At the beginning only the president of the republic was entitled to refer regular laws for constitutional review.[105] It was only in 1978 that the MPs were also granted the right to access the Supreme Court for constitutional review.[106] The court's electoral prerogatives were also expanded at the beginning of the 1980s. The CS was initially empowered to watch the credibility of presidential elections and to tabulate as well as proclaim their results. In 1982 and 1982 was authorised to review the regularity of legislative elections and to watch the equality of candidates during the electoral campaign for legislative and presidential elections (Sylla and Diop 1988, 331, 337). The opposition criticised the Supreme Court for predominantly deciding in favour of the PS-regime (Diagne 1996, 101; SEN-15) and perceived it as an ideological and repressive element of the state (Gounelle 1989, 142).

In 1992 the Senegalese judiciary was restructured. The Supreme Court was abolished and instead three new courts, a Conseil d'état, a Cour de cassation and a Constitutional Council, were introduced (Fall 2009, 75).[107] The literature and the interviewed experts offered several readings on the background of this reform. These readings range from technical explanations to political explanations related to the new electoral code, the fourth wave of democratisation and animosities between then-president Diouf and the then-president of the Supreme Court. The technical argument posits that a diversification of the highest judiciary was necessary to achieve more specialisation and to manage the workload. The reading related to the electoral reform interprets the creation of the CC as a response to the debates in the commission on the electoral law. Accordingly, the opposition had criticised that the Supreme Court did not fulfil its role as electoral judge effectively. The court's accumulation of electoral competences was considered as one reason for this failure. It was assumed that the court was not able to annul votes because this would have been a self-accusation as the court itself was responsible for the watching of the electoral process and the electoral campaign. Consequently, it was demanded to attribute different parts of the electoral competences to different jurisdictions (Diagne 1996, 114). A law professor explained that the CC was created as the hat ("chapeau") of the electoral law (SEN-7). Others explain the creation of the CC as an exercise of regional diffusion. At the beginning of the 1990s several West African countries like Benin or Mali held national conferences and constitutional referenda in which among other democratic innovations constitutional courts were introduced. Thus, Senegal only followed the trend of the time by adopting a constitutional council (Diop 2013a, 45; SEN-14).[108] Finally, several interviewees perceived the Supreme Court's abrogation as a consequence of conflicts between the then-president of the republic and the then-president of the supreme court. Accordingly, the supreme court had rendered a decision in disfavour of the government and

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[104] The third section was introduced in 1963 (Camara 1988, 307–311).

[105] Organic laws were mandatorily referred to the court for constitutional review.

[106] A quota of 15 MPs was required for the initiation of constitutional review. In 1981 this quota was reduced to ten per cent of the National Assembly's members what equalled 12 MPs at that time (Sylla and Diop 1988, 325).

[107] Loi 92-22du 30 mai 1992.

[108] Round table discussion in Dakar on 17 january 2012. Participants were the law professors Ismaïla Madior Fall and Alioune, the constitutional judge Isaac Yacoba Ndiaye and the CC public relation advisor Dominique Ndecky.

the court's president Assane Basile Diouf had called for more judicial independence and less interference by the ministry of justice (SEN-3; SEN-6; SEN-12; Schoepffer 2014, 7). One interviewee even asserted that the two Dioufs just strongly disliked each other what may go back to their simultaneous time at university (SEN-13).

I assume that all readings contain a grain of truth and that the restructuring of the judiciary was a perfect solution for Diouf because it allowed him to demonstrate his willingness for reform towards the opposition and the international community. The democratisation processes in the region threatened Senegal's reputation as a progressive democracy in West Africa. At the same time the restructuring allowed Diouf to get rid of the Supreme Court and its president while creating a CC that he could control more easily.

Abdou Diouf appointed the first constitutional judges on 17 June 1992 (Décret 92/79 du 17 juin 1992) and the newly launched CC rendered its first decision on 22 January 1993 when it issued the list of candidates for the upcoming presidential elections. In the same year the council experienced two major shocks. The first one was the resignation of its first president, Kéba Mbaye, after a stalemate at the national tabulation commission. The resignation of Mbaye after such a short time in office was a setback for the CC because Mbaye was one of the most famous judges in Senegal who enjoyed a reputation of proficiency and integrity. In Section 5.4.8 I will outline the backgrounds of this incident. The second shock was the assassination of the council's vice-president Babacar Sèye in May 1993. This assassination was one of the rare political murders in Senegalese history and was perpetuated while the council deliberated on the final results of the legislative election.

5.3.2 The Formal Powers of the Conseil Constitutionnel

In this section I introduce the legal framework that governs the work of the CC. Thus, I outline the supply of formal powers to the CC that define the council's scope of action. In the first part I will focus on the council's competences as well as on its standing, appointment and tenure rules. In the second part I zoom in the council's competences throughout the electoral process.

5.3.2.1 General Provisions

The legal framework of the CC is defined in the constitution, the organic law on the CC and the electoral law. For the general provisions the constitution and the organic law on the CC are relevant. During the period of observation the two constitutions were in force. In 2001 a new constitution was voted in a referendum. Before, the constitution of 1963 was still in place. Apart from the constitutional revision in 2001 several constitutional amendments were adopted between 1992 and 2012. These amendments however did not concern the CC. The organic law governing the CC was first adopted in 1992 (LO-92-23) and amended twice in 1999 (LO 99-71) and 2007 (LO 2007-03).

Competences

The constitution vested the CC with the power for constitutional review of laws and international treaties and the adjudication of conflicts between the executive and the legislative branch of government as well as between the Conseil d'état and the Cour de cassation (C-63/92-Art. 82, C-01-Art. 92). Until 2001 the CC was entitled to review organic laws mandatorily before their promulgation (C-63/92-Art. 67). Furthermore, the CC swears the President into office (C-63/92, Art. 31, C-01-Art. 37), advises the president on the holding of referenda (C-63/92-Art. 46, C-01-Art. 51), approves the newly elected president's assets

(C-01-Art. 37) and verifies a vacancy in the presidential office (C-01-Art. 35).[109] Moreover, the CC reviews since 2001 mandatorily the National Assembly's standing rules before its promulgation. The CC holds primarily powers for the abstract a priori review of laws. Thus, the council may review laws after the voting in parliament but before their official promulgation. A constitutional review of laws after their implementation is only possible through the channel of the *exception d'inconstitutionnalité* that will be explained below.

Standing

The President of the republic or ten per cent of the National Assembly's members can refer laws to the CC for constitutional review (C-63/92-Art. 63, C-01-Art. 74). Between 2008 and 2012 this right was extended the Senators who also had to gather ten per cent members for a referral. Citizens can appeal the CC only in exceptional circumstances. When a contending party in a trial at the Supreme Court alleges a violation of its constitutional rights, it can request an appeal for concrete constitutional review at the CC. The Supreme Court has to refer then the case immediately to the CC (C-63/92-Art. 82, C-01-Art. 92).[110]

Appointment

The appointment of constitutional judges was the exclusive right of the President of the republic in Senegal. The President appointed all five constitutional judges and determined the council's president and vice-president (C-63/92-Art. 80 bis, C-01-Art. 89). Only some professional requirements laid out in the organic law limited the choice of the president. Accordingly, the majority of the council's members is supposed to have served previously as high ranking judges in the Supreme Court, the Conseil d'état, the Cour de cassation or the Cour d'appel.[111] Two constitutional judges may have a background as full law professors, lawyers or high ranking officials in the state administration but they are required to have a professional experience of at least 25 years (LO 92-23-Art. 4). These provisions have not been altered through the amendments in 1999 and 2007.

Tenure

The constitutional judges were appointed for a six-year term and the number of terms was restricted to one. Thus, constitutional judges could not be reappointed. There was only one exception to this rule. If a judge left office earlier than prescribed and another judge stepped in, the acting judge could be awarded an own term after expiration of the left judge's term (LO 92-23-Art. 5). The constitution furthermore prescribed that every two years a maximum of two judges was to be appointed (C-63/92-Art. 80 bis, C-01-Art. 89). As five constitutional judges were appointed in 1992 when the CC was launched a transitional provision was necessary in order to allow for the renewal of judges in a two-year rhythm. This transitional provision shortened the term of four judges to two and four years but allowed for their reappointment after the expiration of their first reduced term. The length of the initial term was determined by a lottery among the constitutional judges (LC 92-22, Art. 6).

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[109] Until 2001 the CC verified also a vacancy in the office of the National Assembly's presidency (C-63/92-Art 35).

[110] The right was initially valid for trials at the Conseil d'état and the Cour de cassation. After the supremation of these courts and the re-introduction of the Supreme Court in 2008, the right was also transferred to the SC.

[111] Present or former presidents of the cited courts or their chambers as well as the public prosecutors of the courts are qualified for the position.

5.3.2.2 Electoral Provisions

The Senegalese constitution prescribes that the courts and tribunals watch the regularity of the legislative and presidential polls (C 1992-art. 29, 49; C 2001-art. 35, 60). Thus, the Constitutional Council is not explicitly vested with this power. The constitution however stipulates that the CC adjudicates disputes related to the presidential election after the announcement of the provisional results (C 1992-art. 29; C 2001-art. 35). The legal framework also entitles the CC to adjudicate disputes on the legislative elections but this competence is only defined in the electoral law and not in the constitution.

The main competences of the CC in the electoral process are the review of electoral laws, the registration of candidates, the adjudication of electoral disputes and the proclamation of the final results of legislative and presidential elections. The CC can review electoral laws as part of its general competence to review laws. Until 2001 amendments to certain parts of the electoral law were mandatorily reviewed by the CC. Those were the parts of the law that hold the status of an organic law (C 1992-Art. 67). The mandatory review of organic laws was abolished in the constitutional reform of 2001. Amendments to other parts of the electoral law can be requested by ten per cent of the MPs and the president of the republic in the six days after the voting in the National Assembly.

The CC holds more competences in the registration process of presidential candidates than in the one of legislative candidates. Presidential candidates register at the CC, the CC verifies the registration documents as well as the eligibility of candidates and publishes the list of candidates (C 1992-Art. 24, C 2001-Art. 29, CE-92-15-Art. LO 91, CE 06-Art. LO 116). Presidential aspirants can challenge the list of candidates at the CC (CE-92-15-Art. LO 93, CE 06-Art. LO 118). Aspirants for legislative elections have to register at the Ministry of the Interior. The Ministry of the Interior verifies the registration and proclaims the list of candidates (CE-92-15-Art. LO 145). If the Ministry plans to deny a registration it has to refer the case to the CC for confirmation (CE 92-15-Art. LO 149, CE 06-Art. LO 172). Furthermore, candidates can challenge the decisions of the Ministry within 24 hours at the CC (CE 92-15-Art. LO 151, CE 06-Art. LO 174).

Presidential candidates are entitled to challenge the regularity of the presidential poll at the CC within 72 hours after the proclamation of the election's provisional results. Candidates for legislative elections may also file complaints against the regularity of the poll at the CC within five days after the announcement of the provisional results. In contrast to presidential candidates, the legislative candidates' right to contest has only a legal status and not a constitutional one.

The provisional results of legislative and presidential elections are announced by the national counting commission CNRV that is headed by the President of the Cour d'appel. The CNRV consists moreover of two judges and a representative of each candidate or party. These representatives attend the meetings, have access to all electoral documents and can note their comments on the CNRV's PV (CE 92-15-Art. LO 111, LO 160). The CNRV holds the power to annul votes and to rectify the results (CE 92-15-Art. LO 112, LO 160). After the announcement of the provisional results all electoral documents are transported to the CC. If no candidate or party challenges the result, the council proclaims the final results of the respective election (C 1992-Art. 29, CE 92-15-Art. LO 162). Thus, the CC does not hold the competence to certify the election results on its own behalf but is dependent on challenges to the electoral operations. The following table gives an overview of the CC's competences in the electoral process.

Table 42. CC's Competences Along the Electoral Cycle

Electoral Cycle	CC Competence	Alternative Mechanism
Legal framework	Constitutional review	No alternative
Implementation of EMB	No specific competence	No alternative
Electoral register	No specific competence	*Président du tribunal départemental*: adjudication of registration conflicts *Conseil d'état*: court of appeal Public prosecution
Registration of candidates	LE: Examination of rejected candidacies, adjudication of registration disputes PE: certification of candidates, proclamation of list of candidates	LE: Ministry of the Interior certifies and proclaims the list of parties and candidates
Electoral campaign	No specific competence	*Cour d'appel* Public prosecution
Voting	Adjudication of electoral disputes	Cour d'appel delegates observe the electoral operations Public prosecution
Processing of votes	Adjudication of electoral disputes, proclamation of final results	No alternative

Source: Author's own compilation.

5.3.3 Perceptions of the Conseil Constitutionnel

In this section I introduce how the CC is perceived by experts and shed light on a debate that surrounds the image of the council. For the first part I mainly draw on interview data while in the second part I nurture the analysis additionally with secondary literature. One assessment of the constitutional jurisdiction is that it is generally not well known in the public. A law professor polemically alleged that there even used to be constitutional judges that did not know the CC before their appointment to the institution (SEN-4).

Many experts stated that the CC has a predominantly negative image and assessed the council as a weak jurisdiction. The CC would be a jurisdiction that "judges nothing at all" (SEN-2) and that would not serve as a counter-power or that would not influence the functioning of the institutions (SEN-7; SEN-12; SEN-13; SEN-14). Moreover, the CC is perceived as a jurisdiction that judges in favour of powerholders and has mainly the purpose to rubber stamp and protect the executive's decisions (SEN-6; SEN-24; SEN-4, SEN-19). The CC judges would be driven by a strong desire to please the president in order to show him their respect (SEN-1).

The negative image of the CC is fed by the believe that it is under pressure from the executive branch and the observation that the council declares itself often incompetent to adjudicate matters that have been referred to him. While the relation of the CC to the executive in terms of appointment practices and pressure will be examined in Section 5.3.4, I will explain the background of the council's alleged incompetence in the following.

The CC often dismisses cases because it judges itself incompetent on the matter. These decisions have caused a bad reputation of the court among politicians and the population (SEN-5; SEN-7; SEN-13; SEN-3) and the media started to call the five constitutional judges "the five incompetent" instead to the "five wise men" what is a common denomination for constitutional judges in francophone Africa (e.g. in Nouvel Horizon 2009 cited by Diop 2013a, 289). The CC declared its incompetence for a wide array of matters. It is constant

jurisprudence of the CC to reject the review of constitutional laws, thus laws that amend the constitution. The CC judged for the first time in 1998 that it is not entitled to review constitutional law when Diouf's government sought to lift the presidential term limit and to abolish the 25 per cent rule (CC-44/98). The refusal to review constitutional laws was particularly criticised during the incumbency of Wade in which the constitution was frequently amended because it deprived the opposition from a venue to contest the constitutional amendments and no counter-majoritarian protection of the constitution was possible. The CC dismissed also other appeals like the one in 1996 to render the President's decision to start negotiations with the rebel group MFDC in Casamance unconstitutional (CC-22/96) or to invalidate the appointments to the electoral commission CENA (see Section 5.4.3). The CC justified these declarations of incompetence by arguing that the legal texts had not vested it with these powers. It explained that it has a power of attribution what means that the council can only adjudicate those matters that have been spelled out in the constitution or in the organic law (Diop 2013a, 201; Fall 2009, 77–78) (e.g. CC-66/99, Fall 2009: 77-78, Diop: 201).[112]

While the declaration of incompetence and its justification are a matter of fact on which experts in Senegal agree, there is a wide disagreement how to assess the council's stance. There are two camps. One camp argues that the CC interpreted its competences correctly and that it is a problem of the legal text that prescribed a weak constitutional jurisdiction. Accordingly, the constitution and the organic law would prescribe only narrow competences in a clear manner what would not allow for any interpretative effort. This view was held by a former high ranking judge, a former minister of justice, not surprisingly by a former constitutional judge and to some extent by an opposition lawyer (SEN-2; SEN-3; SEN-12; SEN-17). Serigne Diop, a former law professor and former minister of justice, defended the CC in an op-ed in 2009. He argued that under the rule of law no institution could act beyond their competences as defined by the law. The responsibility of the CC would be to control the constitutionality of laws but that it could not review constitutional laws because there would be no norm which the CC could consult for its review (Diop 2013a, 297). Madior Fall also defended the CC's declaration of incompetence in those cases in which the plaintiffs would raise absurd appeals referring to the example of the petition related to the peace talks with MFDC. These would demonstrate that the plaintiffs would not understand the legal texts (Fall 2009, 78).

The other camps criticises the council's lack of audacity and that it would not use its freedom to interpret the legal framework. This critical view was put forward in the interviews by a journalist and several law professors. The CC would have a power to interpret their competences but it would not dare to use it and would stick instead to a strict, literal and narrow interpretation of the constitution. This refusal of interpretation would be due to a lack of boldness (SEN-6; SEN-8; SEN-15; SEN-14; SEN-19; SEN-16).

Several authors also note that the CC applied a narrow, formalistic and literal interpretation of the legal framework that lacks creativity (Fall 2009, 78; Kanté 2005, 159). They acknowledge that the CC has to comply with its formal competences and that some of the critique against the CC is rather inspired by moral criteria and disappointment about the decisions (Diop 2013a, 297; Fall 2009, 79). However, the judges would have a power to

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[112] The CC writes: „Le Conseil constitutionnel est une juridiction d'attribution dont la compétences est strictement limitée par les textes qui les régissent et qu'il ne saurait se prononcer sur des cas expressément prévus par ces textes" (CC-66/99).

interpret the constitution and the law dynamically to adjust it to the necessities of society (Fall 2009, 79–80). While the French CC took a similar stance toward the interpretation of constitutional laws as the CC other constitutional courts for instance in Germany and Italy as well as in Benin, South Africa, Mali and Chad have demonstrated that a more bold interpretation is possible (Diop 2013a, 199–200). The approach of a minimalistic interpretation would sometimes appear as an avoidance of political conflicts (Kanté 2005, 162). Fall asserted that a constitutional jurisdiction has an implicit role as regulator of the functioning of the public powers and the rule of law. Consequently, it would need to step in in critical moments when the rule of law is at stake and no other jurisdiction is competent. Under the rule of law conflicts would require a resolution by courts what in turn could necessitate a plausible but bold stretching of competences (Fall 2009, 79–80). If a constitutional jurisdiction would refuse such an approach it would constitute a denial of justice as described by the French constitutionalist Louis Favoreu. Thus, a denial of justice is the failure to protect the right or the constitution or the credibility of an election. This would signal powerholders that they do not have to fear the court and can do what they want (Diop 2013a, 303–304). While proponents of the first camp often stated that an amendment of the constitutional council's power would change the situation Diop argues that a change of the rules would not change the approach because the underlying problem would be deeper and would be rooted in an unbounded respect for the powerholder (Diop 2013a, 304).

5.3.4 The Conseil Constitutionnel and the President

5.3.4.1 Appointment and Judges

As I have explained in Section 5.3.2.1 all five constitutional judges are appointed by the President of the republic. This fact was often raised and criticised in my interviews. They considered the appointment mode a problem because that would cause doubts in the public about the judges' independence (SEN-2; SEN-15). The appointment mode would lead to a bias of the CC towards the executive because the constitutional judges would not want to displease the president (SEN-14). A journalist referred to the saying of the former French minister of justice and president of the French CC Robert Badinter who explained that constitutional judges would have a duty of ingratitude (*devoir d'ingratitude*) towards their appointers what means that they shall not display any bias towards their appointers in the rulings. The Senegalese CC judges would however not demonstrate this ingratitude (SEN-6). While some interviewees nevertheless believed that the appointment mode would not influence the judges' work, that the judges were comparatively independent and that judicial independence would be eventually a decision of the individual (SEN-2; SEN-13; SEN-15), the explanations and suppositions about how the President choses his judges underscores the perception of judicial dependence.

Many interviewees assessed that close relations with the president matter for the appointment (SEN-01; SEN-4; SEN-5; SEN-6, SEN-9; SEN-13; SEN-15). This proximity could stem from the educational background, working relations, family or political ties (SEN-4; SEN-2; SEN-6; SEN-15). A former constitutional judge put it like this: "he choses his friends or those who could be his friend" (SEN-9). Another judge asserted that knowing high ranking persons or religious leaders would help to be appointed (SEN-13). Apart from the proximity to the president interviewees assumed that the President choses someone he can rely on (SEN-1; SEN-8; SEN-9; SEN-11; SEN-14; SEN-15). The president would appoint a "*homme de confiance*" (SEN-14), a person he can trust and whom he considers to do what he wants. A consultant explained that Wade sought to position in all crucial sectors of society people he

trusts in order to have a "*garantie de fiabilité*", a guarantee of reliability (SEN-8). However, no interview partner reported a change in the appointment policies between the different presidents during the period of observation. Several experts asserted that Abdou Diouf, Abdoulaye Wade and Macky Sall had followed a similar approach (SEN-4; SEN-8; SEN-9; SEN-13; SEN-14). The first appointment made by Macky Sall in 2012 was considered an evidence that things did not have changed in this respect (SEN-9; SEN-11; SEN-13; SEN-14).[113] A law professor considered the appointment of persons that are allegedly dependent from the executive a strategy to weaken the CC because it would create conditions under which people would doubt the credibility of the CC's decisions even if the council would work well (SEN-19).

What were the implications of the appointment rules for the two electoral turnovers in Senegal? The fact that the president may appoint all constitutional judges does not necessarily imply that every president has his own judges at the council. The terms of constitutional judges in Senegal last six years and are thus comparatively short. Moreover, they are limited to a single term. Nevertheless, a new president could theoretically spend several years with judges appointed by the previous president. In Table 43 the terms of the constitutional judges and their appointers are displayed. This overview reveals that Wade could appoint after only three months in office two constitutional judges. At the end of 2002, thus less than two years after his ascent to power, all judges were designated by him. Sall also appointed after approximately three months in power his first constitutional judge. In the same year he filled the second position. After three years and a few months the whole bench was appointed by him. However, in the case of Sall two judges passed away before their official end in office. Mohamed Sonko's term would have ended at the end of 2015 and Cheikh Tidiane Diakhaté's term would have lasted until July 2016. Thus, if he would not have passed away Sall would have faced over four years a president at the CC who was not handpicked by him. Therefore, if Sall's presidential term would have been shortened to five years instead of seven years he would have spent almost his whole term with a CC president appointed by his predecessor.

[113] Sall nominated in July 2012 Malick Diop. Malick Diop is a lawyer who worked as a judge before he served as cabinet director for Macky Sall during his time as minister and prime minister. From 2009 until his nomination to the CC he was a legal advisor to the President of the republic, thus for Wade as well as for Sall. Diop's career path demonstrates that he had a close working relationship to Sall and they know each other for a long time.

Table 43. Constitutional Judges in Senegal (1992-2017)

<table>
<tr><th></th><th>Member 1</th><th>Member 2</th><th>Member 3</th><th>Member 4</th><th>Member 5</th></tr>
<tr><td>1992</td><td>Kéba Mbaye (06/1992-03/93)</td><td>Babacar Sèye (06/92-05/93)</td><td rowspan="8">Marie-José Crespin (06/92-07/00)</td><td rowspan="10">Amadou So (06/92-09/02)</td><td rowspan="8">Ibou Diaité (06/92-07/00)</td></tr>
<tr><td>1993</td><td rowspan="10">Yousoupha Ndiaye (03/93-11/02)</td><td rowspan="3">Amadou Louis Guèye (09/93-6/96)</td></tr>
<tr><td>1994</td></tr>
<tr><td>1995</td></tr>
<tr><td>1996</td><td rowspan="6">Mamadou Lô (06/96-09/02)</td></tr>
<tr><td>1997</td></tr>
<tr><td>1998</td></tr>
<tr><td>1999</td></tr>
<tr><td>2000</td><td rowspan="2">Abdou Aziz Ba (07/00-02/02)</td><td rowspan="6">Abdoulaye Lath Diouf (07/00-10/06)</td></tr>
<tr><td>2001</td></tr>
<tr><td>2002</td><td rowspan="7">Babacar Kanté (12/02-01/09)</td><td rowspan="4">Mamadou Sy (02/02-07/06)</td><td rowspan="7">Mamadou Kikou Ndiaye (12/02-01/09)</td></tr>
<tr><td>2003</td><td rowspan="7">Mireille Ndiaye (12/02-08/10)</td></tr>
<tr><td>2004</td></tr>
<tr><td>2005</td></tr>
<tr><td>2006</td><td rowspan="6">Siricondy Diallo (07/06-07/12)</td><td rowspan="6">Chimère Malick Diouf (10/06-10/12)</td></tr>
<tr><td>2007</td></tr>
<tr><td>2008</td></tr>
<tr><td>2009</td><td rowspan="6">Isaac Yacouba Ndiaye (01/09-06/15)</td><td rowspan="4">Mohamed Sonko (01/09-05/13)</td></tr>
<tr><td>2010</td><td rowspan="5">Cheikh Tidiane Diakathé (08/10-01/15)</td></tr>
<tr><td>2011</td></tr>
<tr><td>2012</td><td rowspan="6">Malick Diop (07/12-today)
(since 06/15 CC-Vice President)</td><td rowspan="6">Mamadou Sy (10/12-today)</td></tr>
<tr><td>2013</td><td rowspan="5">Mandiougou Ndiaye (08/13-today)</td></tr>
<tr><td>2014</td></tr>
<tr><td>2015</td><td rowspan="3">Papa Oumar Sakho (06/15-today)</td><td rowspan="3">Ndiaw Diouf (06/15-today)</td></tr>
<tr><td>2016</td></tr>
<tr><td>2017</td></tr>
</table>

Note: Judges marked blue were appointed by Abdou Diouf, judges marked green were appointed by Abdoulaye Wade and judges marked yellow were appointed by Macky Sall.
Source: Author's own compilation based upon field research.

Interviewees assessed that proximity and responsiveness to the president are important criteria for the selection of constitutional judges. How well can this be observed through the judges that reached the constitutional bench? To inform the answer to this question I analyse the background of the persons that were appointed president of the CC. During the period of analysis four persons headed the CC: Kéba Mbaye, Youssoupha Ndiaye, Mireille Ndiaye and Cheikh Tidiane Diakhaté. The first two presidents were appointed by Diouf and the latter two were appointed by Wade. Kéba Mbaye presided the CC only for less than a year because of his resignation in 1993 and Youssoupha Ndiaye headed the council for almost ten years.

Kéba Mbaye was a high level career judge. He served as president of the Supreme Court from 1964 until 1982. In 1983 he was appointed judge at the International Court of Justice in The

Hague. Diouf asked Mbaye in 1990 to chair the commission on the elaboration of the new electoral law. Afterwards he was appointed president of the CC. Mbaye enjoyed a high reputation of competence, integrity, neutrality and authority (Diop 2013a, 113; SEN-1; SEN-6; SEN-9; SEN-10). Parts of his reputation stemmed from a speech he held at the inauguration of Abdou Diouf in 1981. In this ceremony he spoke out: "The Senegalese are tired" and claimed that Senegal's destiny would not only be the affair of single man or a single party but that democratic consolidation would require alternation in the executive (Mbaye 2005). Some observers believed that he could have built up a CC with real authority (Diop 2013a, 113) but he resigned after the presidential election of 1993 as will be explained in more detail in section 5.4.8.

Youssoupha Ndiaye was appointed substitute for Mbaye. He was also a career judge having served for several years as Supreme Court justice before he was appointed first president of the Cour d'appel of Dakar and subsequently president of the Cour de cassation at the beginning of the 1990s. Wade during his time as opposition politician criticised Ndiaye for being too close to power and not judging with equidistance towards the different political camps. However, the electoral turnover from Diouf to Wade took place during Ndiaye's time in office (SEN-11). After the electoral turnover, in the run-up of the 2001 legislative election the CC took two decisions that were in disfavour of the PDS. Wade responded with criticism to this decision as will be unfolded in section 5.4.5. At the end of 2002 Ndiaye was appointed Minister of sports and therefore resigned from his position at the CC. Without this promotion to the rank of a minister his term would have continued until May 2004 because he had completed the one of Mbaye and was in 1998 appointed an own six-year term. The media interpreted Ndiaye's change of position as agreement with Wade in order to allow the latter to appoint an ally to the CC (Guèye 2011, 48).

Mireille Ndiaye succeeded Youssoupha Ndiaye in office. Her appointment was contested because she had political ties with Wade through her family background (Guèye 2011, 48; SEN-6). Mireille Ndiaye was the widow of Fara Ndiaye, a founding member of the PDS and the party's vice-president in the 1980s. However, Ndiaye left the party and resigned from his parliamentary seat in 1986 to become a special advisor to President Diouf (Guèye 2014). Thus, it was obvious that Mireille Ndiaye and Abdoulaye Wade knew each other for a long time but at the same time her husband had also distanced himself from Wade. Nevertheless, Ndiaye was criticised for rendering decisions in favour of the PDS (Diop 2013a, 113).

The line of contested appointments to the CC presidency continued after Ndiaye's end in office. In 2010 Cheikh Tidiane Diakhaté was appointed CC president. Interestingly, Diakhaté was on the one hand known as an enemy of Wade (SEN-13; SEN-15) and on the other hand he had rendered judicial decisions in favour of Wade before his appointment to the CC (SEN-15; SEN-6). In fact, several judicial encounters between Wade and Diakhaté occurred across the decades. In 1993 Diakhaté was the responsible juge d'instruction when Wade was arrested in response to the assassination of a constitutional judge (Coulibaly 2005, 183). In 2005 Diakhaté was part of the High Court of Justice that was set-up to prosecute the former Prime Minister Idrissa Seck in an alleged embezzlement affair. After secret negotiations the case was eventually dismissed (Samb 2013, 365). As president of the Cour d'appel of Dakar Diakhaté chaired the CNRV in the contested presidential election of 2007 as well as in the local elections of 2009. Diakhaté was contested in 2009 when the Cour d'appel admitted the list of candidates by Wade's Sopi for local elections in the localities of Ndindi and Ndoulo. The CENA had previously dismissed these lists because it had been submitted too late. The decision of the Cour d'appel was eventually overruled by the Supreme Court (Diop 2013a,

114; EIU 2009, 9; Thiam 2015). After Diakhaté's appointment to the CC the journalist Diagne published an open letter in *Le Quotidien* in which he demanded the resignation of Diakhaté and stated that every CC decision in favour of Wade would be suspicious due to the presidency of Diakhaté (Diop 2013a, 114). The bureau politique de la ligue démocratique also criticised that Diakhaté could not be a neutral judge of elections after his role as CNRV-P in 2007 and 2009 as well as judge on Seck's embezzlement affaire (Diop 2013a, 115).

5.3.4.2 Informal Interferences

Informal interferences with a court are a way of *ex post* pressurising a court in order to influence its rulings. Informal interference may take different forms. Powerholders may interfere directly or subtly with the court. Direct interferences are more open and usually visible to the public, they often imply violation of formal rules. Public rhetorical attacks against a court, threats of violence against the judges or physical assaults are modes of direct informal interference. Subtle interferences are less visible to the public because they often take place behind closed doors. Unofficial communications like phone calls, personal obligations due to family ties or a shared educational history and bribes are modes of subtle informal interference (Llanos, Tibi Weber, Heyl, and Stroh 2016, 1239).

Informal interference and in particular subtle informal interference is difficult to observe. In interviews it is a delicate issue. Judges who accepted informal interference are unlikely to confess it and judges who may have not accepted informal interference cannot prove their credibility. Experts may have heard all kinds of stories and may have observed critically the scenery but usually lack supporting evidence. Nevertheless, the problem of informal interferences was discussed in sixteen interviews.[114] In these interviews judges and experts were asked for their perception about the occurrence of informal interference with the CC. They considered in particular informal communication, personal threats of violence, rhetorical attacks and physical attacks as have been perpetuated against the CC. Eleven interviewees believed that informal communication between the executive and the CC would take place and nine interview partners perceived personal threats of violence against constitutional judges as likely.[115] Eight respondents assessed rhetorical and physical attacks against the CC as present.

The perceptions of the interviewees give a general impression of the pressure that the CC is facing. In the following I illustrate with three episodes how the CC is put under pressure by politicians. The episodes differ in their degree of severity; they are all publicly known and took place in different moments of time. The first episode concerned the assassination of the council's vice-president Babacar Sèye in 1993, the second episode was an interference with the CC through a public letter by the President in 2001 and the third episode were the contestations of Wade's third-term bid in 2012 and the different kinds of pressures that evolved at that time.

On 15 May 1993 the vice-president of the CC, Babacar Sèye, was shot in his car on his way home from the CC. The day before the national tabulation commission CNRV had announced the provisional result of the legislative election and had passed the electoral documents to the CC for the validation of the results. The assassination of the constitutional judge was a shock for the country that had experienced electoral violence in particular in 1988 but a political motivated murder was without precedent (Villalón 1994, 189). The next day

[114] This data is comparatively analysed in Llanos et al 2016.
[115] Not all modes of interference were discussed with all respondents.

opposition politician Wade and some of his close collaborators were arrested (EIU 1993b, 12).[116] Two days later they were released from prison, allegedly after a phone call from the state house (Coulibaly 2005, 183). In the subsequent weeks three young men were arrested and prosecuted for the murderer of Babacar Sèye.[117] These men had worked as security staff for the PDS in the electoral campaigns of 1988 and 1993 (Coulibaly 2005, 11). In 1994 they were sentenced to prison terms of between 18 and 22 years. Wade and his fellows were charged for complicity but the case was dismissed for lack of evidence in May 1994 (EIU 1994, 12). The background of the perpetrators hinted to Wade and the PDS as commissioners of the murder. Since the PS victory in the presidential election of 1993 Wade had engaged in fierce criticism of the CC and in particular of the CC president Youssoupha Ndiaye and Sèye for being partial. He criticised the latter for being a PS supporter and official for many years (ARB 1993c, 11003; Coulibaly 2005, 77; EIU 1993b, 12; Villalón 1994, 190). However, soon after the assassination allegations occurred that the PS had complotted the assassination in order to discredit the PDS (Fall 1993, 18; Villalón 1994, 189). Villálon wrote already in 1994 that the murder of Sèye seemed to be "destined to become Senegal's version of the American Kennedy assassination" (Villalón 1994, 189). He turned out right as the killing inspired several books and even a movie (Coulibaly 2005; Dakar actu 2016; Kassé and Camara 1995; Niang 2002). Until today the Senegalese media commemorate the anniversary of Sèye's assassination ("Assassinat de Me Babacar Sèye : La part de vérité de Mody Sy dans 'Le prix de la conviction'" 2017; "Le 15 mai 1993, assassinat de Me Babacar Sèye" 2015) and different theories of the assassination's are circulated. While Pape Ibrahima Diakhaté, one of the assassinators, claims that the PDS commanded the killing, Clédor Sène, accuses the PS for initiating the murder (Coulibaly 2005; Fall 1993, 18; Fama 2015). Sène was also part of the three assassinators and he was considered the commander of the group. Other theories even assume that radical elements of the PS and PDS have organised the murder together to prevent a coalition between the two parties (Fall 1993, 19). Apart from these different conspiracy theories, the assassination had an echo in the political sphere after Wade's ascent to power. In February 2002 Wade pardoned and liberated the three assassinators (Coulibaly 2005, 173). Three years later the National Assembly adopted a law that granted amnesty to all offences committed in relation to general or local elections in the period between 1983 and 2004 whether prosecuted or not (Loi 2005-01 portant amnistie, voted 7.1.2005). The *Loi Ezzan* named after its author Ezzan furthermore included specifically all offences related to the killing of Babacar Sèye (Sy 2009, 309). The law was criticised by human rights organisations like FIDH and 29 MPs from the opposition referred the law to the CC because it would lead to impunity and injustice instead of pardon (FIDH 2005). The CC however upheld large parts of the law (CC-91/2005).

The second episode of interference happened before the legislative election of 2001. It was the first election that was held under the presidency of Wade. The CC rendered two verdicts that were in disfavour of the PDS and its coalition. The content of these cases will be explained in more detail in Section 5.4.5. Wade responded to these ruling that he considered provocations with a public letter. He criticised that his coalition had not been informed about the contestation although it concerned them and referred to the constitution and the standing rules of the CC. He furthermore demanded that the CC explains and comments its decision to

[116] The other arrested persons were Jean-Paul Diaz, Ousmane Ngom and Pape Samba Mboup (EIU 1993b, 12).
[117] The three confessing perpetrators were Assane Diop, Clédor Sène and Pape Ibrahima Diakhaté (Coulibaly 2005).

him.[118] The CC responded with a note that the procedures before the CC would not be contradictory and referred to several articles of the organic law on the CC. Wade again answered the note with a letter containing various legal arguments.[119] The behaviour of Wade was considered by many observers a scandal because it constituted an interference into the independent decision-making by a constitutional jurisdiction (Diop 2013a, 264; Fall 2009, 117; Samb 2013, 376).

The interaction between the president and the CC needs to be interpreted against the backdrop of historical events. Wade had fiercely criticised the CC since the presidential election of 1993 as has been described above. The assassination of Babacar Sèye and the conspiracy theories around this deed must have at least impressed if not traumatised the other constitutional judges. Immediately after the assassination Clèdor Sène had left an anonymous message at the responding machine of a major newspaper in which he stated that the assassination was a warning for the other constitutional judges not to harm the will of the voters (ARB 1993c, 11003). Thus, there was the intention to clarify that the assassination was not targeted at Sèye as an individual but that it shall concern the whole CC. Despite these assumed reservations of the constitutional judges against Wade, Wade was able to win the presidency in 2000 what was considered by several observers a sign of the council's independence.[120] When the decisions in 2001 were rendered two judges (Youssoupha Ndiaye and Amadou So) that served already at the moment of Sèye's assassination and another judge appointed by Diouf (Mamadou Lô) were still on the bench while two judges had been already appointed by Wade (Abdou Aziz Ba, Abdoulaye Lath Diouf). Those judges that had been appointed by Diouf except for Youssoupha Ndiaye approached the end of their term. Therefore, it can be assumed that the CC took at this time a more bold position towards the president due to the historical animosity and the approaching end of term. This bold position did not incite illegal judgements but a more assertive stance towards the executive. However, one of the CC decisions was eventually not fully implemented. Wade had thus defined the boundaries for the council's space through his public letter and the non-implementation of the council's decision.

In 2012 the CC was subject to pressure from the executive but also from the opposition and the public in general. Since Wade's announcement to vie for a third term public discussions about the constitutionality of his plans started as will be outlined in more detail in Section 5.4.5. It is the character of informal interferences that they are hard to observe. However, two executive decisions that concerned the CC received much public attention. The first decision was the increase of salary for the CC president to 5 Mio FCFA a few months before the decision on Wade's candidacy. It was not only the CC president who benefited from this elevation but the presidents of other institutions like the Inspection Général d'État, the Supreme Court and the Cour des comptes were also granted the higher salary. The second decision applied to all constitutional judges; they were granted cars (Sarr 2012). These executive decisions were perceived by the public as an attempt to bribe the council.

The CC was also subject to public pressure. In the demonstrations that were regularly held since the failed attempt to install the office of a vice-president in 2011 banners with threats

[118] Wade's letter was published in the newspaper Le Soleil that is owned by the state on 10 April 2010 and republished in the article by Diop and Milhat (2001).

[119] Wade announced in its second letter that it would publish the note of the CC and his response. The two pieces can be read in the article by Diop and Milhat (2001).

[120] A constitutional judge of the first generation at the CC told me that it was a great disappointment that Wade had won the election in 2000 (SEN-21).

against the CC were displayed and in Dakar's walls were painted with graffiti stating that the CC and Diakhaté's actions would be watched. The most serious attack was however perpetuated in October 2011 by a member of an organisation close to the PS: Malick Noël Seck. Seck expressed in the letter clearly that Wade would morally not be allowed to vie for another term and that it would be the responsibility of the CC to stop Wade. Otherwise the CC would be responsible for the suffering of the Senegalese people. Moreover, Seck announced that they would return the next day with more people to hold the CC accountable.[121] Seck was immediately arrested and condemned to two years in prison for issuing a death threat ("Affaire Malick Noël Seck: le chef de Convergence socialiste jugé pour menaces de mort et outrage à magistrat - RFI" n.d.; U.S. Department of State 2011).

I showed in this section that the CC is perceived to be under pressure what influences its independence. Several episodes of informal interference are known to the public. As I have illustrated that informal interference took various forms in the episodes. While the assassination of Sèye was the most severe attack on the CC, the pressure in 2012 had a broader scale as the CC was pressurised from different directions and more people engaged in the critique through the participation in demonstrations. Furthermore, the episodes showed that pressure on the CC was not a timely limited phenomenon but reoccurred throughout the period of observation.

5.4 The Conseil Constitutionnel's Behaviour in Elections

In this part of the chapter the CC interventions in the electoral process will be examined in-depth. I pursue two goals in this part. First, I seek to explore how the CC intervened in the different steps of the electoral cycle by analysing the outcome and the justifications of its interventions. Second, I assess how the council's interventions influenced the DQE. Therefore, I distinguish functional, ambiguous and dysfunctional interventions. In the different sections I justify for what reasons I coded the interventions as functional or dysfunctional. I start this part of the chapter with an overview of the council's annulment practices and the number of petitions that have been lodged at the CC.

5.4.1 Overview of Annulment Practices

As the analysis above has shown the legal framework restricted the role of the CC in the electoral process. Only a small circle of persons is entitled to lodge competitions and the council does not hold the competence to verify the electoral operations on its own behalf. The combination of these two rules leads to few opportunities to intervene in elections. Furthermore, the CC is not the only institution that may rectify the election result. When it comes to the application of the legal framework the CC adapted a restrained approach to the adjudication of elections. I call the approach restrained because it appears that the CC tried to intervene in the electoral process as little as possible. Thus, it remedied the election results in only few cases and dismissed most petitions that were filed at the council.

Table 44 shows to what extent the CC cancelled votes and rectified results. In most elections the CC neither cancelled the results of a polling station nor did it rectify the results by annulling some votes or assigning them to other candidates. Only in three polls the CC undertook such interventions: in the legislative elections of 1993 and 1998 as well as in the presidential election of 2000.

[121] The original reads as follows: "Demain, lorsque la parole sera à la rue, nous reviendrons plus nombreux afin que vous nous rendiez des comptes." (Seck 2011).

Table 44. Rectifications of Election Results by the CC in Presidential and Legislative Elections (1993-2012)

Election	Annulments	Rectification
PE 1993	No	No
LE 1993	2 polling stations	No
LE 1998	9 polling stations	No
PE 2000,1	3 polling stations	2 polling station
PE 2000,2	No	No
LE 2001	No	No
PE 2007	No	No
LE 2007	No	No
PE 2012,1	No	No
PE 2012,2	No	No
LE 2012	No	No

Source: Author's own compilation based upon CC judgments.

As the CC may only rectify results in response to complaints, a look at the number of complaints is worthwhile. Table 8 encapsulates the number of complaints. Petitions were lodged at all national elections except for the presidential run-offs in 2000 and 2012 as well as for the legislative election in 2007. The lack of complaints in 2007 was caused by the election boycott. In 1998 the highest number of petitions was lodged what corresponds to the comparatively high number of cancelled polling stations. There is, however, no correlation between the other numbers of complaints and annulment levels.

Table 45. Number of Complaints on the Provisional Results of Legislative and Presidential Elections (1993-2012)

Election	Complaints
PE 1993	6
LE 1993	5
LE 1998	15
PE 2000,1	7
PE 2000,2	0
LE 2001	7
PE 2007	2
LE 2007	0
PE 2012	2
PE 2012,2	0
LE 2012	6

Source: Author's own compilation based on CC decisions

5.4.2 The Conseil Constitutionnel's Interventions Along the Electoral Cycle

5.4.2.1 Electoral Legal Framework

The electoral legal framework is important for all three DQE. These rules define the conditions for participation and competition that serve as a fundament for the legitimacy of elections. Constitutional courts can intervene directly in the electoral legal framework through their power to review laws. They can also intervene indirectly by addressing shortcomings, inconsistencies or unintended effects of the electoral law in their other rulings.

Such a critique of the electoral law can inspire theoretically the political debate on the electoral legal framework. The design and operation of EMBs belongs also to the realm of the electoral legal framework. EMBs are particularly important for the legitimacy of elections because they are meant to exercise important oversight functions.

The Senegalese CC can review laws before their promulgation. Until 2001 it was entitled to review all organic laws mandatorily. As important parts of the electoral law belong to the organic domain of the law, this mandatory review power was relevant for the electoral process. For other laws the request by at least ten per cent of the members of parliament or by the president was necessary to initiate a constitutional review. Since 2001 the review of organic laws also requires the initiation by the president or ten per cent of the members of parliament. The CC does not hold specific powers related to the EMB.

The CC did not intervene in all elections into the electoral legal framework. The highest number of interventions occurred in 1998 and the election year 2007. Interventions into the electoral legal framework were predominantly dysfunctional for competition. The CC rendered only in 2007 a decision that was beneficial for competition. When the interventions concerned legitimacy, they were mainly characterised by ambiguity. Only in 1998 the CC reviewed two electoral laws in a way that was functional to the legitimacy of elections. Table 46 provides an overview of the topics, outcomes and assessments of the CC interventions. In the following I will first provide an overview of the number and outcome of complaints. Subsequently, I will analyse the CC decisions and their political context extensively and justify their assessments.

Table 46. Outcome and Assessment of CC Decisions Related to the Electoral Legal Framework (1993-2012)

Election	Topic	Initiator	Outcome	DQE	Assessment
LE 1993	rules governing the CNRV	PR	upheld	L	ambiguous
LE 1998	introduction of ONEL and HCA	PR	upheld	L	functional
LE 1998	number of seats in National Assembly	MP	dismissed	C	dysfunctional
LE 1998	improvement of electoral procedures	PR	partial dismissal	L	functional
LE 1998	number of seats in National Assembly	PR	upheld	C	dysfunctional
LE 1998	postponement of decision on number of seats in National Assembly	MP	dismissed	C	dysfunctional
PE 2000	abrogation of two-term limit and *quart bloquant*	MP	dismissed	C	dysfunctional
PE 2000	abrogation of two-term limit and *quart bloquant*	MP	not admitted	C	dysfunctional
PE 2007	CENA appointment	MP	dismissed	L	ambiguous
LE 2007	opinion on MP's term	PR	dismissed	C,L	neutral
LE 2007	extension of MP's term	MP	dismissed	C,L	dysfunctional
LE 2007	parity law	MP	dismissed	C	functional

Note: PR indicates President of the Republic and MP Member of Parliament.
Source: Author's own composition.

The CC rendered eleven decisions on electoral laws in the period between 1993 and 2012 and one decision related to the appointment of the electoral management body CENA. Most of these decisions, seven out of twelve, were initiated through challenges by MPs. Four decisions are however owed to the fact that until 2001 all organic laws required mandatory review. Furthermore, the President of the Republic demanded once an opinion from the CC. An analysis of the outcome of referred cases reveals that cases that had been referred to the CC

by the President were more often upheld than dismissed while all cases initiated by MP were dismissed.[122] Table 46 summarises this comparison. This observation confirms the assessment that CC interventions into the electoral legal framework were predominantly detrimental for competition.

Table 47. Outcome of Presidential vs Parliamentarian Referrals

Initiator	Number of Referrals	Dismissed / Not Admitted	Upheld
President	5	2	3
MP	7	7	0

Source: Author's own Compilation.

In April 1993 the CC upheld a law that amended rules how PVs were to be transmitted from the polling stations to the CDRV and CNRV as well as the decision-making processes in the latter commissions. This amendment was a reaction to the stalemate at the CNRV during the processing of the presidential election's results that will be explained more extensively in Section 5.4.8. According to the new law, the status of the political parties' representatives was redefined as observers. They were still part of the CDRV and the CNRV but they were not entitled anymore to vote on the rectifications of the result. At the departmental level of the counting commission annulments were prohibited and at the national level three judges of the *Cour d'appel* decided upon the rectifications (Villalón 1994, 187). The opposition criticised the amendment because it was unilaterally initiated by the PS and was voted in an extra-ordinary session of a National Assembly with an overwhelming PS majority.[123] Therefore, the opposition perceived it a setback for the consensual electoral law. This is why PDS deputies abstained from the voting (Coulibaly 2005, 74; Villalón 1994, 187). The law was forwarded by the President of the republic for the mandatory review. The CC certified that the law was voted with an absolute majority and that it would not violate the constitutional articles 29 and 49 stipulating that the election were to be overseen by the courts and tribunals (CC-9/93). The justification of the ruling is very concise and does not mention the difficulties of the previous election or the spirit of the consensual electoral code. The assessment of the judgment is difficult because the amendment reduced the power of the opposition representatives in the processing of votes. The curtailing of these prerogatives reduced on the one hand the level of legitimacy of the electoral process. On the other hand, legitimacy was also bolstered because the amendment sought to prevent future stalemates in the processing of votes and thus in the release of election results. Moreover, the amendment was legal from a legalistic point of view but the unilateral voting of the law in an extra-ordinary session contradicted the consensus that was sought in 1992. Taking all these considerations into account I assess the intervention as ambiguous for the legitimacy of elections.

In September 1997 the CC upheld another amendment of the electoral law. This time, the election supervision body ONEL, the audio-visual election supervision body HCA as well as a provision to prohibit that deputies can hold positions in the cabinet were introduced (CC-25/97). The introduction of ONEL was a reaction to opposition protests that demanded an independent electoral commission. An all-party commission had been launched to seek a consensus. However, the commission could not find a consensus because the opposition claimed an independent electoral commission that would also organise the election while

[122] In one case, the parity law in 2007, the dismissal of a law was the goal of the MP that had referred the law. Nevertheless, the majority of cases initiated by MP was dismissed.
[123] 103 out 120 National Assembly seats were held by the PS (African Elections Database 2012).

parts of the PS opposed any form of electoral commission. Eventually, Abdou Diouf presented a compromise, the *Observatoire Nationale des Elections* (ONEL), a commission that oversaw but did not organise the elections (Mozaffar and Vengroff 2002, 610). The amendment law was referred to the CC by the president of the republic for mandatory review. Similar, to the previous amendment the council certified that the law had been voted with an absolute majority and that it did not violate the constitution. The ruling was concise and did not discuss any principles extensively. I assess the judgment as beneficial to the legitimacy of elections because the amendment catered a demand by the opposition to a certain degree and improved the supervision of the electoral process.

In 1998 four decisions concerned the attempt to increase the number of seats in the National Assembly from 120 to 140. On 4 February the National Assembly had voted in an extra-ordinary session an organic law modifying several articles of the electoral law. The law was introduced without prior notice and included among others points the composition of the CDRV, the duty to submit a receipt of the public treasury when registering for presidential elections and the increase of parliamentary seats (EIU 1998, 12–13). 25 MP referred the law to the CC for constitutional review. Their major concern was the increase of parliamentary seats. The deputies criticised several issues like the violation of the National Assembly's *règlement intérieur*, procedural mistakes related to the agenda of extra-ordinary sessions and the modification of organic laws as well as the violation of the Constitution's article 71,2. This article stipulates that MP need to suggest compensatory measures if they vote laws that create new public duties and expenses. The CC rejected all concerns except for the concern relating to article 71,2. In particular, the CC ruled that it was not among its prerogatives to judge on violations of the National Assembly's *règlement intérieur*. However, the council stated that article 71,2 would need to be interpreted strictly. It analysed the reports of the parliamentary sessions and found that compensatory measures had not been sufficiently discussed and adopted.[124] Consequently, the CC rendered the law on the increase of parliamentary seats unconstitutional (CC-27/98). Thus, the law has not been dismissed because of its content but due to procedural irregularities in its adoption. In its mandatory review of the law the CC upheld the other articles of the amendment law (CC-28/98). The rejection due to procedural mistakes opened the door for a new law initiative. In an extra-ordinary session on 2 March 1998 the President of the Republic proposed a new organic law increasing the number of parliamentary seats. This time the CC upheld the law because laws initiated by the President would not require compensatory measures (CC-31/98). The CC further rejected the petition lodged by 22 deputies that requested the CC to postpone its decision until the *Conseil d'état* has decided on the legality of the extra-ordinary session. The *Conseil d'état* was the competent jurisdiction for judging the application of the National Assembly's *règlement intérieur*. The CC did not admit this complaint arguing that there were no provisions for demanding the postponement of a decision. The CC would be required to render its decisions within a defined period of time and its decision could not depend on other jurisdictions (CC-32/98). This is a case in which the CC did not exhaust its possibilities. It is true that the CC has to meet indeed deadlines in its decisions. The organic law on the CC stipulates 15 days for judging on the constitutionality of laws.[125] The law was adopted on 2 March, the President of the Republic submitted the law on 3 March to the CC and the CC rendered its decision on 10 March, thus only seven days after the submission. The council did

[124] The National Assembly only considered the re-organisation of its budget.
[125] LO-92-23-Art. 15

not exhaust the available time frame because according to the rule it would have had the time to wait another eight days for the decision of the Conseil d'état.

Before summarising and assessing the CC's approach to the amendment issue, I discuss the political background of the plan to increase the number of parliamentary seats. The extension of the National Assembly was a highly political issue that influenced the conditions for competition. The amendment did not only increase the number of parliamentary seats but also changed the balance in the segmented electoral system. In a segmented system one part of the parliamentarian seats are allocated according to a proportional representation system whereas another part of the seats is separately attributed according to a plurality system (Hartmann 2007, 150). The electoral code of 1992 had introduced a new balance in the allocation of seats. Accordingly, 50 seats were allocated using a plurality system with small constituencies and 70 seats were allocated applying a proportional representation (PR) system on the national level (Hartmann 2013, 181; Mozaffar and Vengroff 2002, 608). A larger share of seats distributed according to PR-rules was conducive for the opposition because it was more difficult for them to win seats on the constituency level. The amendment reset the balance of the segmented system to a 50/50 logic. Therefore, an equal share of 70 seats was allocated by each of the two systems. A further rule stipulated that the 20 additional seats were assigned to rural, less populated departments and not to urban departments like Dakar or Pikine where the opposition was strong (Mozaffar and Vengroff 2002, 610).

The CC had to deal with this politically salient issue. It adapted in the first judgment a restrained approach by clarifying that it was not competent to judge on the NA's *règlement interieur* and citing the violation of the compensatory provisions as justification for the dismissal. The council applied a strict interpretation of its competence that was not illegal but led to a weakness in the protection of parliamentary rights. The review as well as the overseeing of the *règlement intérieur* guarantees that the operations at the National Assembly are in accordance with the constitution. This is why many other African constitutional courts hold this power (Diop 2013a, 250). Through the legalistic interpretation of its competences, the council cemented this grey zone. Legal scholars like Diop criticise that the CC came through this interpretation close to a denial of justice (2013a, 250). This denial of justice became, however, more constituent when the CC refused to wait for the decision of the Conseil d'état whether the voting of the second attempt to introduce the increase of parliamentary seats in another extra-ordinary session had violated the *règlement intérieur*. It denied the deputies to contest the legality of the parliamentary operations in order to defend themselves against a disadvantage for the opposition in the legislative elections. I consequently assess the decisions of the CC in this matter as detrimental to competition.

After the legislative election another amendment to the electoral legal framework was introduced. The amendment concerned constitutional provisions for the presidential elections. On 27 August 1998 the new National Assembly adopted a constitutional law that abolished the presidential term-limit and the *quart bloquant* for presidential elections.[126] The *quart bloquant* required a candidate to win the absolute majority and additionally 25 per cent of all registered voters' votes to be elected in the first round. Two complaints were filed at the CC to challenge the constitutionality of this law. Both complaints had been filed by the same 23 MPs. In the first complaint the MPs argued that the parliamentary voting of the constitutional law had violated art. 69 of the constitution and the National Assembly's

[126] Art. 21 and 28 of the Constitution.

règlement intérieur. The CC dismissed the complaint by reiterating its previous judgment that it was not competent to adjudicate violations of the *règlement intérieur*. It further ruled that it was neither competent to review constitutional laws (CC-44/98). This was the first time that the CC judged that it is not competent for the revision of constitutional laws. The CC was harshly criticised for this repeated stance. The second complaint was not admitted because it did not meet the deadline. It had been filed on 4 September 1998, two days after the first complaint. The constitution only allows for the referral of laws to the CC within six days after the adoption of laws. As the law had been voted on 27 August this period had been over on 2 September. The strong respect of deadlines is also a constant jurisprudence of the CC. As the complaint has not been admitted the decision does not give further details on the case (CC-53/98).

The abrogation of the two-term limit and the *quart bloquant* was a clear preference of President Diouf and had disadvantages for the opposition. After a low voter turnout of officially 39 per cent in the 1998 legislative election, the removal of the 25 per cent provision, increased Diouf's prospects for the presidential election in 2000. At the same time, the amendment was yet another deviation from the electoral consensus of 1991. It was already discussed that the council's declarations of incompetence can be a mean to avoid political conflict. In this case the narrow interpretation of the council's competences paved Diouf the way for the next election. Therefore, I assess the two decisions as detrimental to competition.

Between 1998 and 2006 the CC did not review any law related to the electoral framework although seven amendments to the electoral law were voted in this period. This can be partly explained by the fact that since the constitutional revision of 2001 organic laws were no longer mandatorily reviewed. However, it also hints to a certain subservience by the MP that rarely used their right to refer laws to the CC (Thiam 2007, 151). Between 2001 and 2007 only two organic laws and five other laws were referred to the CC for review. However, when the legislative and presidential elections approached, a row of legal and judicial maneuvers was started of which the CC also became part.

One petition was lodged at the CC that concerned the implementation of the EMB. This petition was filed by 15 parties in July 2005 and challenged the appointment of CENA members.[127] CENA was introduced in 2005 after consultations between the opposition and the ruling party (Fall 2011c, 102). CENA replaced ONEL. In contrast to ONEL CENA is a permanent institution. CENA is meant to supervise the electoral management by institutions like the Direction générale des élections (DGE) throughout the electoral process (Fall 2011c, 106–107). The plaintiffs contested the appointment of the CENA president Moustapha Touré, his vice-president Papa Sambaré Diop and the CENA-member Issa Sall. Touré was challenged because his wife was an active PDS-member serving as elected member of the Conseil régional of Thiès and PDS-secretary in Thiès. The plaintiffs argued that the involvement of Touré's wife in active politics would not allow him to exercise the office of the CENA president impartially. The vice-president Diop and the member Sall would be subject of ongoing trials on forgery and abortion respectively what would put their integrity into

[127] These parties were Démocratie citoyenne (DC), Parti populaire sénégalaise (PPS), Bloc populaire sénégalaise (BPS), Front d'Action pour le renouveau (FAR/YONWI), Parti des travailleurs (PT), Parti socialiste (PS), Parti de l'indépendance et du Travail (PIT), Mouvement pour les Socialisme et l'Unité (MSU), Rassemblement national démocratique (RND), Alliance des forces du Progrès (AFP), Union des patriotes sénégalais (UPAS), Union démocratique des Travailleurs du Sénégal (UDTS), Ligue démocratique – Mouvement pour le travail (LD- MPT), Parti sénégalais du Progrès (PSP), Parti de la Réforme (PR) (CC-94/2005).

question. The plaintiffs further argued that their appointment decree had violated organic law 92-27 concerning the judiciary's statute and that the CC would be competent to adjudicate their petition as electoral judge (CC-94/2005). The CC dismissed the petition and cited two reasons for this decision. First, the CC's competences would be limited by the constitution and the organic laws. These legal texts would confine the CC's competence in the election process to the period of candidate registration and the period after the announcement of provisional results. Furthermore, the CC would not be competent to rule on the legal conformity of decrees. Second, the electoral law would entitle candidates and their representatives to lodge electoral petitions but not political parties as such (CC-94/2005).

The background of the petition was that the opposition was annoyed that the rules for the appointment procedures for CENA had been changed without their consent even though they had been part of a commission to design CENA and that they had not been heard on the appointment decisions (EIU 2005, 16). However, CENA president Touré and his colleagues remained at the electoral commission after the CC had dismissed the complaint on the appointment. This may have contributed to the mistrust towards CENA in the presidential election of 2007. Opposition candidates and observers alleged that CENA served as accomplice for fraud and would not do anything what could harm the party in power (Fall 2011c, 112). Madior Fall esteemed however that CENA has accomplished its mission quite well and that fraud became marginalised through its work (Fall 2011c, 112, 115). Ironically, CENA President Touré was in 2009 pressurised by Wade to resign because Wade perceived Touré as working against him in the local election (Fall 2011c, 111–112). The appointment of EMB members proved to be of utmost importance in Senegal and an intervention could have enhanced the legitimacy of the 2007 election. However, legal experts agree that the CC was indeed not competent to judge on this issue (Diop 2013a, 271; Fall 2009, 78; Guèye 2008, 505–507). The Conseil d'état would have been competent but was not accessed by the opposition (Guèye 2008, 505–507). Consequently, I assess the intervention as neutral because it did not contribute to legitimacy but the CC was legally constrained in its choices.

In September 2005 the President of the Republic demanded an opinion by the CC on the extension of the MPs' term. The legislative elections would have been due in 2006. After a heavy flood, Wade announced in August 2005 that he wants to postpone the legislative elections to 2007 and to combine the legislative elections with the presidential elections in order to save money. Wade's demand for an opinion by the CC had been rejected because the CC did not consider itself competent to give an opinion on such a issue (CC-93/05). On 16 December 2005 the National Assembly adopted a constitutional law that extended the MP's term. 15 MP challenged the constitutional law. They argued that the law would not qualify as a constitutional law since it regulated a punctual situation stemming from an extraordinary situation. The plaintiffs requested to define the law as an ordinary one. As a consequence the council would be entitled to review it. The law would further violated art. 103 of the constitution because it had been only voted once although two votes would have been necessary, one for the introduction and one for the adoption. The CC dismissed the petition. It considered the law as constitutional because the duration of the MP's term belongs to the constitutional corpus (*ordonnancement constitutionnel*) and is fixed in art. 60 of the constitution. It further denied that the procedure required by art. 103 would have been violated. The council underscored that it was not competent to review constitutional laws (CC-94/2006). This decision of the CC can be criticised from a juridical point of view. According to Fall the CC used the argumentation of a decision rendered by the French CC to rule that the law belongs despite its temporary character to the constitutional corpus. The

author questioned however in a comment if a law that does not change the constitution permanently can be considered a constitutional law (Fall 2008b, 494–495). He moreover argued that the CC contributed with this ruling to the banalisation of the procedure to revise the constitution (Fall 2008b, 499). The Senegalese constitution of 2001 had been amended 15 times under Wade and in the period between November 2006 and May 2007 alone five constitutional laws were adopted (Fall 2011a, 10; Thiam 2007, 146). Diop shares Fall's critique of the ruling and states that it appeared as blanc cheque for the executive. The ruling was harmful for the council's reputation as it had been criticised in several newspaper outlets like *Le Quotidien*, *Nouvel Horizon* and *Sud Quotidien* (Diop 2013a, 267–269). The judgment by the CC becomes however even more criticisable if the political context is taken into account. Wade asked the CC for an opinion just a few weeks after the arrestment of his former prime minister Idrissa Seck and the National Assembly's decision to refer Seck's case to the High Court of Justice.[128] Seck was one of Wade's closest collaborators since 1988. He supported Wade during his time in the opposition and helped Wade as his cabinet director to consolidate power during the first months of the president's rule. When he was appointed prime minister in 2002, his ambitions as Wade's successor became evident (Diop 2006, 118–120). However, Seck was fought by other Wade allies within the PDS and as he was disappointed when he realised that Wade sought to build his son Karim Wade as presidential successor, he was said to have leaked sensitive information about the Wade family to journalist Abdou Latif Coulibaly (Diop 2006, 118–120; Mbow 2008, 164). This is why it was widely assumed that Wade used the flood and the necessity to save money as a pretext for his political preference to postpone the legislative election. Wade did not want to prepare the legislative election while there were fights inside PDS about Seck (EIU 2005, 17–18; Thiam 2007, 147). Ironically, the legislative election was not held together with the presidential election but was postponed a second time in January 2007. This time the dismissal of a decree on the parliamentary seats' allocation by the Conseil d'état served as a pretext for the postponement. The political reasons were again internal fights in the PDS that Wade hoped to solve using his renewed legitimacy through a victory in the presidential poll (Thiam 2007, 147–148). Considering the juridical critique of the decision as well as the political background I assess the decision on the extension of the MP's term and the consequent postponement of the legislative election as detrimental to the legitimacy and competition of elections.

The CC was involved in another political maneuver before the legislative elections. On 27 March 2007 a law on gender parity was voted by the National Assembly. The law required that the list of candidates for legislative elections has a fifty-fifty balance between men and women. Two women organisations had suggested the law to the President of the Republic who supported their idea and proposed the law to the National Assembly.[129] The law had been adopted on 27 March 2007. 12 MP challenged the law arguing that it would violate the preamble of the constitution that states equal access to the exercise of power and art. 1 of the constitution that guarantees the equality of all Senegalese before the law regardless their race, sex and religion. The CC rendered the law unconstitutional confirming the plaintiff's argumentation and adding to its justification art. 3 of the constitution that defines the right to run for election as undividable and the equality of all candidates. It moreover referred to the *Déclaration des Droits de l'Homme et du Citoyen* that also states the equality of all citizens (CC-

[128] Seck was arrested on 15 July 2005 and the National Assembly referred the case to the High Court of Justice on 5 August 2005.
[129] These organization were COSEF and the association des femmes jurists (Fall 2008c, 524).

97/2007). The council's ruling was perceived controversially by legal scholars. Fatou Kiné Camara criticised that the *Convention sur l'Elimination de toutes les Formes des Discrimination à l'égard des Femmes* (CCEDEF) was ignored by the CC although it was also incorporated into the Senegalese constitution like the Universal Declaration of Human Rights. She argued that the parity law would be required to guarantee the equality of all citizens. According to Camara, the CC's ruling on the parity law was the drop that spilled the cup.[130] In contrast, Maurice Soudieck Dione defended the council's decision by asserting that Camara had misconceptualised discrimination. The CCEDEF would not legitimise affirmative actions and that the ruling had strengthened the rule of law and democracy (Diop 2013a, 293–294).[131] Madior Fall similarly gauged that such a positive discrimination of women would require further revisions of the Senegalese constitution (Fall 2008c, 527). Fall furthermore highlighted that the council's ruling was one of the rare occasions in which the council dismissed a law that had been proposed by the government (Fall 2008c, 526). This is even more noteworthy since there were political motives behind the law that were barely related to the fight for women rights. The law was adopted three days after an announcement by 15 opposition parties that they would boycott the upcoming legislative election if no improvements of the electoral list would be made and no independent electoral commission would be introduced (ARB 2007, 17043; Fall 2011c, 157). These parties mistrusted the result of the presidential election. Some authors alleged that the law was introduced to further weaken the opposition that could not cope with such an requirement on short notice (Fall 2011c, 117; Mbow 2008, 160). I assess the CC's dismissal of the law on gender parity as beneficial to competition despite its discussable justification. The dismissal prevented further hurdles for the opposition parties and did not serve presidential preferences.

Table 48 encapsulates the results of the assessments per election year. The peaks of intervention activity in 1998 and in the run-up of the election year 2007 can be observed. Competition was mainly influenced negatively through the rulings on the increase of the National Assembly's seats in 1998, the abrogation of the term limit and *quart bloquant* provisions in 1998 and the postponement of the legislative election in 2007. The only positive influence on competition was the dismissal of the parity law in 2007. The council's influences on legitimacy were mostly ambiguous or functional. The upholding of the amendments to the electoral law after the stalemate in 1993 and the declaration of incompetence in the case of the CENA appointments were ambiguous while the approval of the laws introducing ONEL and improving the electoral procedures were functional.

[130] Camara's comment was titled "La goûte d'eau de trop qui a fait déborder le vase : la décision du Conseil constitutionnel du 29 avril 2007" appeared in Wal Fadjri on 4 May 2007 and was summarised by Diop (Diop 2013a, 291–292).

[131] The original comment also appeared in Wal Fadjri on 18 May 2007.

Table 48. Assessment of CC Interventions Related to the Electoral Legal Framework

Election Year	Number of Interventions	Participation	Competition	Legitimacy
PE 1993	0			
LE 1993	1			1
LE 1998	5		3	2
PE 2000	2		2	
LE 2001	0			
PE 2007	1			1
LE 2007	3		1 1 1	1 1
PE 2012	0			
LE 2012	0			

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

5.4.2.2 *Electoral Register*

The electoral register is crucial for participation. A comprehensive and accurate electoral register is a precondition for voters to be able to cast their votes and to have their vote equally weighted. The correct use of the electoral register should enable those that are entitled to vote and restrict the votes of non-eligible persons.

The Senegalese CC is not specifically entitled for disputes related to the electoral register and cannot intervene directly in the revision process of the roll. During the revision process citizens can complain to the President of the Tribunal départemental if they had been omitted from the electoral register. Furthermore, all registered voters and the administrative authorities can challenge the irregular omission or inclusion of voters at the President of the Tribunal départemental as well (CE-92-15-Art. L 19, modified by Law 94-70, CE-06-Art. L 41). The decision of the President of the Tribunal départemental can be appealed at the Conseil d'État (CE-92-15-Art. L 21, CE-06-Art. L 44).

This provision makes it difficult to contest alleged irregularities at a larger scale because it requires that such actions are tracked down to individually affected voters and that these short comings are challenged at the local level. Concerns related to the electoral register can only be lodged at the CC after the conduct of the elections. Thus, the CC's interventions can only intervene indirectly into the electoral register after it has been activated by plaintiffs.

The CC intervened into the electoral register after the presidential election in 1993, the legislative election in 1998, the first round of the presidential election in 2000 and the presidential election in 2007. Furthermore, the CC ruled on a complaint related to the electoral register before the 1998 legislative election. The interventions into the electoral register were predominantly dysfunctional for participation. Only in 1998 two decisions were functional to participation. The petitions concerned two major themes: on the one hand, the accuracy of the electoral register and the distribution of electoral cards and on the other hand, alleged irregularities with register for external voters. The petition before the legislative election of 1998 dealt with the accessibility of the electoral register for ONEL. I will start my analysis with the ONEL decision because it stands out in different respects. Subsequently, I examine first the decisions related to the electoral register for domestic voters and then the cases dealing with the electoral register of external voters.

In 1998 a distinct petition was lodged roughly two weeks before the poll. In this petition a representative of the Alliance Jëf Jël/U.S.D. demanded whether the Ministry of the Interior is obliged to make the entire electoral register available to ONEL and all political parties. The CC considered this a demand for an opinion and clarified that it is a "*juge d'attribution*" and could therefore only rule on such questions that are explicitly prescribed by the constitution and the law (CC-41/98). Thus, the CC issued in this case one of its declarations of incompetence that have been already discussed in Section 5.3.3 and consequently dismissed the demand. The CC was criticised for its stance in this question. Alioune Sall commented that the CC could have interpreted its competences more expansively in this respect. Through the strict and narrow interpretation of its competences, the CC missed an opportunity to establish itself as a "*véritable gendarme de l'élection*" (Sall 2008a, 237). Consequently, I assess the refusal to judge on the access to the electoral register as dysfunctional. I consider it however as dysfunctional to the legitimacy of elections because the access to the electoral register would have increased the transparency and thus the legitimacy of the election.

Petitions dealing with the accuracy of the domestic electoral register and the distribution of voting cards were lodged after the presidential election of 1993, the legislative election of 1998 and the presidential election of 2007. The interventions were all dysfunctional for participation except for those in 1998. In 1993 and 2007 problems with the electoral register were widely reported. The registration process was one of the major concerns during the preparation of the poll in 1993 and was said to have eroded the public confidence in the integrity of the election (Villalón 1994, 179). The Ministry of the Interior admitted that many voting cards contained mistakes and that after the official end of the registration period ordonnances were issued by the presidents of the Tribunals départementals (Villalón 1994, 178). An official report quoted by the Economist's Intelligence Unit stated that 38,000 last minute voter authorisations were issued and that some of these documents were fraudulent (EIU 1993a, 14). The precise number was however not known as for instance the president of the department tribunal in St. Louis could not reconstruct to how many citizens he had issued the ordonnances (OIF 1993, 3). In 2007 CENA observed the non-distribution of voter cards. CENA reported that more than 300,000 voters were not able to vote because they did not obtain their voter cards (Raddho 2007, 17). Taking the official number of registered voters, 4,917,157 voters, as a basis the number of non-distributions mounted up to roughly 6 per cent. These reports notwithstanding the CC dismissed in both years the petitions without engaging in any examinations or justifications related to the alleged irregularities. In 1993 several plaintiffs complained that registrations on the electoral roll had been undertaken after the official deadline and that voter cards as well as IDs had been abusively withheld by the administration.[132] The CC judged that it would be incompetent for these matters and that only voters can complaint on irregularities related to the electoral register and the voter cards at the Tribunal départemental. Furthermore, it clarified that it would only be competent if the irregularities would affect the sincerity of the electoral operations (CC-6/93). Thus, the council applied despite the official reports and widespread critique a strict interpretation of its competences here and consequently refrained from examining this issue. It did not discuss if the irregularities had an influence on the vote and did not acknowledge that there were problems in the registration process. This is why I assessed the decision as detrimental to participation.

[132] Several petitions were filed at the CC. The CC responded jointly to them, thus it cannot be specified how many plaintiffs challenged the particular irregularities.

In 2007 Ousmane Tanor Dieng, the presidential candidate of the PS, denounced that the revision of the electoral register did not start at the same date across the country and that it was not done for the same period of time. This had violated the principle of equality as not all voters had the same opportunities to register. The CC replied that it had been due to technical reasons that the revision of the electoral roll could not start everywhere at the same time but that voters had not been discriminated because all registers had been accessible for the same period of time. The council therefore dismissed the complaint. Furthermore, Dieng alleged that not all electoral cards had been produced and distributed on time, that in some cases the administration had held electoral cards back and that this had been an attempt to hinder the citizens from voting. The CC dismissed this complaint because the fact of an incomplete distribution would not imply manipulation as it was not clear that the cards had been deliberately denied or that they had been used by others (CC-97/2007). Similar to 1993, the CC refrained from extensive justifications for its dismissal of the complaints even though irregularities were reported by CENA. While it did not deny that the incidents took place, the council did not acknowledge that these irregularities could have had a negative influence on the credibility of the vote. This restrained approach of the CC was taken in a situation in which the credibility of the presidential election was heavily contested and opposition parties threatened to boycott the upcoming legislative elections. One of their main points of critique was the deficiency of the electoral register. Thus, the reservation of the CC impeded a resolution of electoral contestations through the institutional channel of a court. Therefore, I assess the intervention as dysfunctional to participation.

Such a restrained approach is not the only option the CC used so far. In 1998 the CC also dismissed complaints related to the electoral register. However, in contrast to the other years the CC engaged in 1998 in extensive examinations. These examinations made the rulings more transparent and credible. I assessed the CC decisions for this reason as beneficial to participation. One complaint in 1998 aimed at a difference of registered voters announced by the Ministry of the Interior (3,070,517) and the CNRV (3,180,857) and that this difference would hint to manipulations. The CC noted that the inconsistency of registration numbers had been an issue of wide debate since the announcement of the provisional results and stressed that it took long time to analyse this discordance in depth. The CC then provided several factors that had affected this difference.[133] Another complaint alleged the illegal distribution of voter cards and demanded the annulment of the results of seven polling stations in Dakar because the sub-prefect sous-préfet had distributed 500 voter cards on election day. In this case the CC referred to a decree that permitted the distribution of voter cards and additionally examined the PV of the concerned polling stations (CC-42/98).

Plaintiffs filed complaints related to the electoral register of external voters after the legislative election of 1998, the presidential election of 2000 and those of 2007. All complaints were dismissed and they had in common that the CC refused any examination of the issues. In 1998 a plaintiff alleged that voter cards had been distributed to non-Senegalese citizens in Mali. This complaint was dismissed without further examinations due to a lack of

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[133] The council found that the initial number of the Ministry of the Interior did not take the numbers of belated registration of the tribunal départemental in Mbacké (8,684) and Kaolack (4,785) as well as the 80,844 external Sengalese voters into account. After these considerations a difference of 16,030 voters remained. The council suggested that this difference could have been due to the delegates of ONEL, the Cour d'appel and the staff of the polling stations that could not vote at their actual polling station. However, eventually the CC ruled that the number of registered voters is not relevant anyway because the casted votes (suffrage exprimés) serve as the baseline for the calculation of the majorities.

evidence (CC-42/98). In 2000 Abdoulaye Wade lodged a petition against the results of the external polling station in Kayes, Mali. Wade alleged that 4,000 Malian citizens working for the director general of Fer du Sénégal had been registered on an irregular basis. This irregularity had led to vote shares between 88 and 99 per cent for Abdou Diouf in Kayes. The high victory for Diouf would be suspicious because they would differ largely from those vote shares that Diouf had won in Bamako where representatives of Wade's CA 2000 alliance had observed the electoral operations. The CC dismissed this complaint due to lack of evidence. It further mentioned that the PVs of two polling stations had not been transferred and consequently would not contribute to the overall result (CC-71/2000). In 2007 Dieng complained that the electoral list for external voters had not been published and consequently no dispute of the list had been possible. The CC judged that even if this would have been true it would not have affected the sincerity of the vote (CC-97/2007). I coded all three rulings as detrimental to participation because the allegations were serious but the CC responded in a very brief and restrained manner.

Table 49 summarises the assessments of the council's interventions into the electoral register. All decisions, except for the 1998 decision on the accessibility of the electoral register, were rendered after the poll and could therefore influence participation only indirectly. The major part of the CC interventions had a detrimental influence on participation. The CC thus did not contribute to a better credibility of the electoral register although this was a strongly contested issue in Senegal's electoral history. In particular in 1993 and 2007 problems with the electoral register and the voting cards scored high on the agenda of electoral critique. In these years the CC however rather ignored the problems by taking a restrained approach. In 2007 the CC contributed through this reservation to the electoral boycott of the legislative election.

Table 49. Assessment of CC Interventions Related to the Electoral Register

Election year	Number of interventions	Participation	Competition	Legitimacy
PE 1993	1	1		
LE 1993	0			
LE 1998	4	2; 1		1
PE 2000	1	1		
LE 2001	0			
PE 2007	3	3		
LE 2007	0			
PE 2012	0			
LE 2012	0			

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

5.4.2.3 Registration of Candidates

The registration of candidates is important for the level of fair competition in an election. During the registration eligibility rules are applied what is an opportunity for unleveling the playing field. Eligibility rules may be interpreted inconsistently and favour the ruling party. Through such a bias competition is already distorted before the race has actually started.

The function of the CC in the process of candidate's registration differs in the presidential and legislative elections as already explained above. While the CC serves in presidential elections as responsible authority for the reception, verification and admission of candidacies, the council controls in legislative elections the ministry of the interior that operates the tasks of candidate registration.

Under PS rule the CC intervened predominantly in functional ways into the registration of candidates. Only in the legislative elections of 1993 and 1998 the council wielded some ambiguous interventions. In contrast, in the Wade years several dysfunctional and ambiguous interventions occurred while the functional interventions were in the minority. In the following I will first analyse how the CC handled the registration of presidential candidates before I turn to the council's behaviour in the registration process of legislative candidates.

The CC rendered in four presidential elections decisions on the list of candidates. Table 50 gives an overview of the number of candidates that registered and the number of candidates that were admitted or rejected by the CC. In the presidential elections of 1993 and 2000 all nine candidates were admitted while in the presidential elections of 2007 and 2012 one and three candidates respectively were rejected. While the rejection of candidates in 2007 and 2012 invoked electoral disputes, it was the admission of a candidate that triggered the highest level of contestation in the Senegalese public. I start with the examination of the rejections and proceed then with the analysis of Wade's candidacy for a third presidential term in 2012.

Table 50. Overview of Registrations and Rejections of Presidential Candidates

Election	Number of registrations	Number of rejected registrations	Number of presidential candidates	Reasons for rejection
1993	9	0	9	
2000	9	0	8[134]	
2007	16	1	15	Number of validated signatures was not sufficient
2012	17	3	14	Number of validated signatures were not sufficient

Source: Author's own compilation based on CC decisions.

In 2007 the CC dismissed the candidacy of Yoro Fall, a professor of history at the University of St Louis (CC-95/2007). In 2012 the CC rejected the dossiers of three candidates, those of Abdourahmane Sarr, of Kéba Keinde and of Youssou N'dour who enjoys worldwide fame as musician and owns Senegal's biggest private media company (CC-108/2012). In all cases the same reasons were given for the rejections: not enough supporting signatures. The CC verified the list of signatures necessary to support the candidatures and for the four candidates it could not identify and validate all necessary 10,000 signatures.[135] The electoral law only requires independent candidates to deliver 10,000 supporting signatures from six regions of which each region has to contribute at least 500 signatures (LO 92-15, Art. LO 88; 2012-01, Art. LO 116). Candidates stemming from political parties only require a certificate from their party that they are the official candidate of the respective party. This provision

[134] Mouhamadou Moustapha SY (PUR) withdrew his candidacy.

[135] For Yoro Fall, the rejected candidate in 2007, only 8,715 of the necessary 10,000 signatures were validated by the CC, in 2012 the CC validated for Abdourahmane Sarr only 8,100, for Kéba Keinde only 8,154 and for Youssou N'dour 8,911 signatures (CC-95/2007, CC-108/2012).

was introduced to promote the dominance of political parties in the electoral process (Diop 2013a, 217). In 2007 as well as in 2012 the decision of the CC was not transparent. In 2007 the CC requested a service provider to validate the supporting signatures. In 2012 the CC used the service of the Direction de l'Automatisation du Fichier Electoral (DAF). The DAF is a unit dependent on the Ministry of the Interior and was perceived as partial in 2012 (Diop 2013a, 217). The Election Observation Mission of the EU checked in a limited sample the existence of the supporting signatures. The mission found that at least 500 voters of those that had been declared as non-existent by the DAF did indeed existed and were registered on the electoral roll. The sample did however not allow verifying whether the dismissals of the three independent candidates were based on sufficient numbers. The mission moreover criticised that CENA was not involved in overseeing the validation of signatures (EUEOM 2012, 21–22).

In both years the CC refused the rejected candidates' demand to recount the signatures under observations. In 2007 Yoro Fall sued against the rejection of his candidacy. He stated that he had submitted more than 10,000 signatures and demanded a recount of the signatures observed by political parties. The council dismissed Fall's demand arguing that article 92 of the constitution would define the council's decision as of last resort and that the organic law on the CC would not prescribe any contradictory procedures (CC-98/2007). In this decision the CC ignored a contradiction in the legal framework. The electoral law entitles the candidates to contest the list of candidates (LO 92-15, Art. LO 93, LO 2012-13, Art. LO 122) while the constitution prohibits any appeal of CC decisions. This is legally a difficult situation because it is questionable from a normative point of view whether a court should judge on an appeal against its own decision. However, from a point of view that seeks to promote electoral integrity, it is highly desirable that aspirants can contest the decision on the list of candidates (Diop 2013a, 216–217). The CC did not address the legal contradiction although it could have kept its decision by judging that the constitution breaks the law. Therefore, the CC neither contributed directly to the transparency and legitimacy of the registration/validation process, nor did it contribute indirectly to an improvement of the legal framework by criticising the contradiction. Consequently, the decision was assessed as dysfunctional to competition. The CC decided in a similar vein in 2012 when it dismissed the challenges of Youssou N'Dour, Abdourahmane Sarr and Kéba Keinde against the CC's dismissal of their candidacies (CC-110/2012). In this judgment the CC explicitly referred to the 2007 decision on Yoro Fall but did not mention the provisions in the electoral law. However, the council admitted the petitions by Macky Sall, Ousmane Dieng and other candidates against its decision on the final list of candidates (CC-109/2012). What appears astonishing on the first sight maybe due to a strict interpretation of the electoral law. Article LO 122 stipulates that every candidate may challenge the list of candidates. Accordingly, aspirants that had not been admitted as presidential candidates would not have the right to contest that decision. However, the CC did not offer such an interpretation but simply cited the article in decision CC-109/2012 while it did not mention the article in decision CC-110/2012. Therefore, I also code the refusal in 2012 as dysfunctional to competition.

The most controversial decision of the CC was the admission of Wade's third term bid in 2012. This decision was already contested before it was actually rendered. The contestations had a political and a legal dimension. To understand the political dimension the background of the presidential term limit has to be explained. After the widely lauded electoral turnover in 2000 Wade announced that he plans to introduce a new, a more democratic constitution in Senegal. One of the claimed ambitions of this constitution was to prevent the rule of one party during

a long period of time as Senegal experienced with the PS. One feature of the new constitution was the shortening of the presidential term from seven to five years and the limitation of a president's possible reelections to one. The new constitution was voted in a referendum and Wade publicly declared that he would not serve more than two terms. However, as Wade broke many of his democratic promises he also changed his mind with regard to the length of his rule. In 2008 a constitutional law was voted in the National Assembly that extended the presidential term to seven years. The then-minister of justice Niang declared that the law would not apply retroactively. At the same time he stated that Wade would be eligible for a third term because his first term under the 2001 constitution would have started in 2012 (EIU 2008, 8). In June 2011 the executive proposed a constitutional bill that sought to introduce the office of a vice-president to be elected on the same ticket as the president and the possibility of a first round victory if the relative majority and at least 25 per cent of the casted votes were won (Demarest 2016, 64; Foucher 2011). This bill was perceived to facilitate Wade's hold on power and to install a quasi-monarchy as it was suspected that Wade would install his son Karim as his vice-president (Kelly 2012, 127). The bill was even criticised within the PDS but the public reacted more fiercely. In Dakar several protests by civil society groups took place and the law was eventually withdrawn (Demarest 2016, 64, 67). It was against this backdrop that Wade's plan to register for another candidacy was strongly contested. The protests against the 2011 constitutional amendments gave birth to new protest movements, the M23 and *Y'en a Marre* (Fed Up With It) that organised resistance against Wade's third-term bid (Demarest 2016; Kelly 2012, 127–128). Monthly demonstrations were held and major opposition politicians threatened that violence would break out if the CC would validate Wade's candidacy. Protest escalated when the CC eventually upheld Wade's candidacy on 27 January 2012 (Burchard 2015, 93–94).

Apart from these political protests a legal debate on the constitutionality of a third term for Wade unfolded in Senegalese academia and media. The interpretation of the constitution's article 27 and the transitional constitutional provisions in article 104 were essential for this debate. Article 27 limited the number of presidential terms a person may serve to two terms.[136] However, article 104 stated that the president in office would serve his term until its end but that all other constitutional provisions would apply to him.[137] The Wade camp insisted that according to the principle of non-retroactivity Wade was elected for his first term under the 2001 constitution in 2007. Wade even flew French professors of constitutional law into Senegal to support his interpretation publicly (Schoepffer 2014, 27). The opponents argued that the first sentence of article 104 would only refer to the length of the term and not to the counting of the terms. Fall stated that it would be due to the bad quality of the provisional article that such competing interpretations can evolve (Fall 2011c, 2). However, the council's decision of 27 January 2012 refrained from any interpretation exercise of the constitution but simply cited the two relevant articles before it listed the admitted candidates (CC-108/2012).

[136] The article read as follows: "La durée du mandat du Président de la République est de sept ans. Le mandat est renouvelable une seule fois. Cette disposition ne peut être révisée que par une loi référendaire."

[137] The article read in the original as follows: "Le Président de la République en fonction poursuit son mandat jusqu'à son terme. Toutes les autres dispositions de la présente Constitution lui sont applicable."

After this controversial decision several presidential candidates lodged a petition, among them Macky Sall, Moustapha Niasse, Ousmane Tanor Dieng and Idrissa Seck. [138] The complaint against Wade contained three arguments. First, Wade's candidacy had violated the letter and spirit of the constitution's article 27 and 104. A constitution would have an immediate effect and the principle of retroactivity would not count for the constitution because it is limited to criminal law. Second, Wade's candidature was presented under the banner of PDS and the Coalition Forces Alliées, this would violate the constitution (Art. 29) and the electoral law (Art. LO 116, LO 118). Third, Wade had claimed himself that he cannot seek a third term. This would need to be considered as a statement with a legal effect because the President of the Republic would be the authentic interpreter of the constitution. The CC replied that firstly, article 104 would stipulate that the President of the Republic in office finishes his term. This had implied that the length of the presidential term won in 2000 was not adjusted to five years after the constitutional reform. The length of term could however not be disassociated from the counting of the terms. Consequently, Wade's first term would not count under the constitution of 2001. Secondly, no text would prohibit presenting a candidacy simultaneously under the banner of a party and a coalition. Thirdly, presidential statements would not count as legal acts as long as they are not translated in a real legal act (CC-109/2012).

Both decisions, the one on 27 January and the response to the complaint by Macky Sall and others, were dysfunctional to competition. The first one avoided any justification of the council's interpretation and the second one did neither refer to the democratic ideas that had motivated the drafting of the constitution nor did it address the ambiguity of the provisional article. The reference to the founding history of a constitution is a legitimate interpretative technique if a purposive and principle-bound interpretation is sought (Barak 2005b). Furthermore, the CC did not interpret extensively the articles of the electoral law that were raised by the plaintiffs. The article leaves some room for interpretation but the CC simply presented its interpretation and ignored any possible ambiguity that would require a more extensive interpretation.[139]

Wade also filed a complaint against the candidacies of Idrissa Seck, Macky Sall and Cheikh Tidiane Gadio. Wade alleged that Idrissa Seck, Macky Sall and Cheikh Tidiane Gadio did not pay their guarantees and could thus not run for presidency. The CC dismissed this complaint due to a lack of proofs (CC-109/2012). This decision was assessed as functional because the CC had verified the payment of guarantees before and the CC at least resisted in this respect from further constraining competition in favour of the president.

In the remaining part of this section I will analyse the CC interventions related to the candidates of legislative elections. In legislative elections the CC does not take mandatory decisions on the list of parties running for elections but only renders decision if it is appealed by the Ministry of the Interior or the political parties. The Ministry of the Interior refers cases to the CC if it considers the aspirants ineligible. Candidates can lodge petitions against the decisions of the Ministry of the Interior. I will first present an overview of the cases referred to the CC and then examine three cases from 2001 and 2007 in-depth.

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[138] Ten presidential candidates filed the complaint against Wade, the others were: Ibrahima FALL, Cheikh Tidiane GADIO, Mamadou Abiboulaye DIEYE, Diouma DIAKHATE, Mor DIENG and Amsatou Sow SIDIBE.

[139] The articles in the constitution and the electoral law consistently to candidacies submitted by political parties OR coalition and do not consider the case that a candidacy was submitted under the banner of a party AND a coalition (C 2001-Art. 29, Law 2012-01-Arts LO 116 and LO 118).

Table 51. Outcome and Functionality of Complaints on the Registration of Candidates by Different Plaintiffs in Legislative Elections

Plaintiff	Number of Complaints	Number of Dismissed Complaints	Number of Upheld Complaints	Number of Functional CC Interventions	Number of Ambiguous CC Interventions	Number of Dysfunctional Interventions
Ministry of the Interior	6	4	2	4	2	0
Candidates	4	2	2	1	2	1

Source: Author's own compilation based on the analysis of CC decisions.

Table 51 indicates the number of complaints that have been referred to the CC by the Ministry of the Interior and candidates. The table encapsulates the outcome of the complaints and the assessments of the CC interventions. First of all, the data reveals that not many cases were referred to the CC. The CC took ten decisions related to the list of parties participating in the legislative elections. Six of them concerned the legislative elections of 1998. The majority of cases was referred by the Ministry of the Interior, in total six cases. A frequent objection against aspirants was the non-fulfilment of age requirements or in other words the registration of citizens that were younger than 25 years (CC-7/93, CC-35/98, CC-38/98). In another case the Ministry faulted that the aspirant were not registered on the electoral roll (CC-33/98). Four cases initiated by the Ministry were dismissed by the CC. For instance in the case of the non-registration on the electoral roll the CC judged that such a registration is not a prerequisite as long all eligibility criteria are met (CC-33/98). I assessed four of the CC responses as functional, for instance in the just mentioned case on the electoral roll or in the cases related to age requirements. Two interventions were coded as ambiguous. One example was a decision in which the CC did not upheld the dismissal of candidates due to non-fulfilment of age requirements because the Ministry had not met the deadline (CC-38/98). I considered the decision as ambiguous because the CC tolerated ineligible candidates because of slight violations of the deadlines. Therefore, deadlines were judged as more important than age requirements. Of the four petitions lodged by candidates two were dismissed and two were upheld. I assessed one CC response as functional, one as dysfunctional and two as ambiguous for competition. The ambiguous assessments were caused by overtly strict applications of deadlines. The functional and dysfunctional interventions will be discussed below in more detail.

Before the legislative election of 2001 the CC rendered two decisions that the new president Wade perceived as offense. The first decision concerned the candidacy of Aly Lô[140] and the phenomenon of pre-electoral floor crossing. Khalifa Sall as a representative of the PS challenged the Ministry of the Interior's decision to dismiss the PS list of candidates for the department of Tivaouane. The MI justified the dismissal of the PS list with the fact that Aly Lô would be part of the national list of the Wade coalition which had submitted the list before the PS. The PS argued that it had submitted its list earlier and that the list was complete at the moment of submission. The CC dismissed the PS demand to annul the list of the Wade coalition but judged that the PS had been complete and thus correct at the moment of submission. Consequently, the PS was allowed to nominate another candidate for the department of Tivaouane in order to recomplete its list (CC-80/2000). The incident happened during a period in which political reconfiguration in the aftermath of the *alternance* were underway. Wade had to rule the country for roughly a year without a majority in the National Assembly. During this time he sought to co-opt deputies of the PS (Diop 2013b, 428; Gellar

[140] The name of this politician is also sometimes written "Alé Lô".

2013, 125). This endeavours continued in the run-up of the legislative election. For this purpose Wade extended the period of registration for legislative candidates by decree. During this extension the PDS could poach Aly Lô. Lô justified his decision by announcing that he had not felt appreciated by the PS for his work in rural areas (Diop and Milhat 2001, 1). While the MI backed the poaching activities of the Wade coalition, the CC apparently sought to mitigate the damage to competition by accepting Lô as a candidate of the Wade coalition but giving the PS the opportunity to re-nominate a candidate for Tivaouane. The CC decision was thus beneficial for competition.

Three days later the CC rendered another decision against the President's preference. Three parties, the PS, AFP and Le Renouveau, challenged the decision by the MI to admit a list that carried the name "Coalition Wade" and had a ballot paper with the picture of Wade. The CC ruled that the coalition could not use the name and picture of Wade because Wade would not stand himself for election. The council referred to the principle of equality between the political parties that would imply equal treatment and judged that no party could use the picture and attributions of the president of the republic in a legislative election (CC-81/2001). Alioune Sall noted that this judgment was one of the rare occasions in which the CC referred to a principle in its justification, the principle of equality. In most cases the council would stick closely to the legal text without citing overarching democratic principles for the interpretation (Sall 2008b, 417–418). The intention of the CC decision was clearly to enhance competition in the electoral contestation and is consequently gauged as beneficial. The judgment of the CC was, however, not accepted by the executive. Wade reacted to the decision with a public letter in which he criticised the council's decision as has been already explained in Section 2.3.2.3. Wade's reaction to the CC went even further. While the name of the coalition was changed from "Coalition Wade" to "Coalition Sopi[141]", a shadow of Wade was printed on the ballot papers instead of his picture (Sarr 2013, 414). Thus, the CC decision was not fully implemented but partly circumvented.

In April 2007 the representative of the party Alliance Jëf-Jël filed a complaint because the party could not submit its list of candidates at the Ministry of the Interior. The submission was attempted on 30 March and 2 April 2007. The Jëf-Jël representative argued that the deadline for complaints against the decisions of the Ministry of the Interior was not over yet because the party had not received an official document that its list was dismissed. The party had however a bailiff's report that it was not able to submit its list of candidates to the Ministry of the Interior. The CC judged that the bailiff's report would count as a refusal of the Ministry and consequently the plaintiffs had missed the deadline of 24 h to complain against the decision of the Ministry (CC-100/2007).[142] The reading of the brief CC decision is puzzling. A comment by Madior Fall shed light on the context of the incident. The Jëf-Jël representatives tried to submit their documents earlier than expected at the Ministry of the Interior. Senegalese parties tend to submit their party list on the last day of the registration period. The Ministry of the Interior was according to Fall not prepared when Jëf-Jël knocked on its door but could not admit its failure (Fall 2008a, 536–537). Jëf-Jël and its then-party leader Talla Sylla belonged to the opposition against the PDS. Talla Sylla, who was a PDS-member until 1996, had been victim of an assassination attempt in 2003 after he had released a satirical song on Wade (Gueye 2013, 370; Kelly 2012, 123). The early submission of Jëf-Jël's list of candidates was a provocation against the Wade government. On 27 March

[141] "Sopi" is the Wolof expression for "change".
[142] The complaint by Jef-Jel had been filed on 12 April. As the attempts to submit the list of candidates had taken place on 30 March and 2 April the deadline was not met.

2007 the law on gender parity had been voted in the National Assembly. The law was however not promulgated yet when the registration period officially opened. In fact, some MPs had referred the law on 2 April to the CC for constitutional review. According to Fall the early submission was an attempt to circumvent the law on gender parity and to point to the legal contradiction (Fall 2008a, 538). The CC relied on its strict interpretation of deadlines when deliberating the petition. Through this interpretation strategy the CC could avoid to judge on the issue and to sanction the Ministry of the Interior. I assess this CC decision as detrimental to active participation because the CC neither directly enabled the participation of Jëf-Jël nor did it indirectly exhort the Ministry to abide by the electoral law by ensuring that parties can register their candidates within the prescribed period. Curiously, the party Alliance Jëf-Jël nevertheless participated in the legislative election of 2007 and Talla Sylla won a seat in the National Assembly (CC-101/2007). Neither the CC decisions nor the secondary literature provided an answer on this puzzle.

The following table summarises the number of CC interventions related to the registration of candidates across the elections and their influence on the DQE. The interventions were relevant for competition. The highest number of interventions occurred in the legislative election of 1998 and the presidential election of 2012. Until 2001 functional interventions prevailed and since the presidential election of 2007 dysfunctional interventions occurred. Thus, dysfunctional interventions into the registration of candidates started under the Wade regime. It was also under Wade that the more important cases were adjudicated. The most outstanding judgments were rendered in 2001, 2007 and 2007. Whereas the CC took in 2001 a widely respected functional decision, the council took one of its most contested decisions in 2012.

Table 52. Assessment of CC Interventions Related to the Registration of Candidates (1993-2012)

Election year	Number of interventions	Participation	Competition	Legitimacy
PE 1993	2		2	
LE 1993	2		1 / 1	
LE 1998	6		3 / 3	
PE 2000	1		1	
LE 2001	2		2	
PE 2007	2		1 / 1	
LE 2007	1		1	
PE 2012	5		1 / 1 / 3	
LE 2012				

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

5.4.2.4 Electoral Campaign

The electoral campaign is a crucial moment for competition. Opposition parties and candidates can be hindered in their campaign activities or incumbents may use systematically their advantages to appear more often in the media or to exploit public resources in their campaign. Such actions distort fair competition. The CC is not entitled to exercise a direct influence on the electoral campaign, thus to order corrections during the electoral campaign.

For such intervention the Cour d'appel and the Conseil national de régulation de l'audiovisuel (CNRA) are responsible.[143]

The CC rendered few interventions into the electoral campaign. This observation suits the council's limited competences in this realm. Most interventions into the electoral campaign influenced competition in ambiguous or dysfunctional ways. The CC undertook only one functional intervention; that happened in 1993. In the following I will give a brief overview of the council's decisions related to the electoral campaign. Subsequently, I will analyse some of those verdicts more extensively.

In five elections concerns related to the electoral campaign were included into complaints on the elections' results: after the 1993 presidential election, the 2000 presidential election, the 2001 legislative election, the 2007 presidential election and the 2012 legislative election. Furthermore, one petition was lodged before the presidential election of 2000. All these complaints were dismissed and in most cases the CC considered itself not entitled to judge on the issue. Only in 2007 and 2012 the council did not use that argument. The petitions complained about the use of state resources in the electoral campaign (CC-6/93, CC-71/2000, CC-83/2001), the inappropriate use of the state media for campaign purposes (CC-6/93), quasi-vote buying during the campaign (CC-96/2007) and the use of presidential pictures in the campaign for legislative elections (CC-83/2001, CC-114/2012). In the remaining part of this section I will first introduce the single functional intervention and then analyse the two decisions on the use of presidential pictures because they received much attention.

The only functional intervention into the electoral campaign occurred after the presidential election of 1993. A petition denounced the violation of the electoral law by a propaganda-broadcast for Abdou Diouf in the state owned radio and TV as well as in the state owned newspaper. The CC replied that a candidate had already accused these violations at the Cour d'appel and that the Cour d'appel had reacted to the concerned media (RTS and Le Soleil) to respect the equal treatment of all candidates (CC-6/93). I assessed this decision as functional because secondary sources reported that the conditions of the audiovisual campaign had improved in 1993 (NDI 1993, 2; OIF 1993, 5). In the same election another intervention related to the media was ambiguous. In this case a complaint concerned the broadcasting of a demonstration organised by a religious leader on the last day of the campaign in Tivaouane. The demonstration would have constituted a moral pressure on the voters. In this case the CC noted that the incident had neither been referred to the Cour d'appel nor to the Haut Conseil de la Radio Télévision (HCRT). The council further judged that it would not be proven that the broadcasting had an *influence déterminante* on the result but regretted that it had been broadcasted after the official closure of the electoral campaign. The demonstration in Tivaouane had a delicate background. For the presidential election of 1993 no endorsement by Islamic religious leaders was issued. However, Moustapha Sy, a junior Marabout, had recorded a tape in which he criticised Abdou Diouf and alleged a sex scandal. The tape was sold on a market in Dakar. To encounter the attack a Friday prayer at Tivaouane in which an important message would be issued was announced in Le Soleil. In this speech Moustapha Sy's uncle distanced his family from Sy's claims (Villalón 1994, 180). While the CC was right that the Cour d'appel or the HCTR were the responsible channels for such irregularities, it did

[143] The CNRA had two predecessor organisations during the period of analysis. The Haut Conseil de la Radio Télévision (HCRT) was created in 1991 and displaced by the Haut Conseil d'Audiovisuel (HCA) in 1998. The CNRA was created in 2006 (Fall 2011c, 108, 164).

not acknowledge that the incidents took place at the end of the campaign and that there was no time anymore to complain on the issue via the responsible institutions.

Political sensitive were two decisions related to the use of the president's picture in the legislative campaign. These decision were rendered in 2001 and 2012, thus after the electoral turnovers in power. Before the legislative elections of 2001 the CC had ruled that the picture of Wade may not appear on the ballot paper of the SOPI coalition. The UPR and RES complained after the election that Wade's picture had been shown on SOPI's campaign boards and that SOPI's campaign had centred around president Wade even though Wade had not vied himself for legislative elections. The CC dismissed this complaint arguing that it had only judged that the name Wade and Wade's picture may not appear on the ballot paper. As the CC's decision only concerned the ballot paper, the Cour d'appel would be the competent address for complaints referring to the electoral campaign (CC-83/2001). The council's jurisprudence did not deviate from previous elections and it was indeed not competent for this matter. However, the CC did not even acknowledge the contradiction with its previous ruling that was more assertive. The decision on the ballot paper had been answered by Wade with severe criticism. This harsh reaction may have daunted the council to keep a narrow interpretation for issues related to the electoral campaign. This is why I assessed the decision as ambiguous.

After the legislative elections of 2012 the coalition Bokk Gis Gis filed a complaint criticising that the picture of President Macky Sall had been used during the electoral campaign although the Cour d'appel had prohibited it. The court had however not done enough to assure the implementation of the decision and the equality of the candidates. The CC rejected the complaint arguing that even when the ineffectiveness of the decision had an influence on the voters, it was not reported that it had an "*influence déterminante*" (CC-114/2012). This is a case in which the council shied away from exercising more influence. The Cour d'appel had applied a broad interpretation of article LO 125 of the electoral code that stipulates the equality of candidates. The CC had applied a similar broad interpretation in its ruling on the prohibition of Wade's picture on the ballot paper in 2001 (EUEOM 2012, 29). However, as explained above the interpretation had not been extended to the electoral campaign because the Cour d'appel would be the competent jurisdiction. In 2012 the Cour d'appel had been appealed and it ruled accordingly. The plaintiffs pointed to a weakness of the institutions, namely the non-implementation of judicial decisions. It is essential for the protection of competition that the implementation of such decisions is monitored. Even if there is a void of the electoral framework, the CC could have tried to step in to fill it or at least acknowledged the problem. The CC adopted instead a narrow interpretation upholding the strict criterion of the *influence déterminante*. Such an approach was dysfunctional to the protection of competition. Furthermore, the EU election observation mission criticised that a new judge had been appointed to the CC while the council deliberated on the results of the election (EUEOM 2012, 36). This new juge, Malick Diop, used to be a close collaborator of the newly elected president Macky Sall.

The assessments of the CC interventions into the electoral campaign are displayed in Table 53. Interventions into the electoral campaign were few due to the council's limited prerogatives. The interventions were predominantly ambiguous or dysfunctional to competition. The most controversial interventions were those related to the use of the presidential picture.

Table 53. Assessment of CC Interventions Related to the Electoral Campaign

Election year	Number of interventions	Participation	Competition	Legitimacy
PE 1993	3		1 2	
LE 1993	0			
LE 1998	0			
PE 2000	2		2	
LE 2001	2		2	
PE 2007	1		1	
LE 2007	0			
PE 2012	0			
LE 2012	1		1	

Note: In the columns “Participation”, “Competition” and “Legitimacy”, the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author’s own composition.

5.4.2.5 Voting

On election day, in the first place participation and competition are at stake. Voters need to be enabled to cast their vote and need to be protected from any undue influence on their free will. For instance, electoral campaign activities may not proceed on election day itself or voters may not be intimidated before, during or after casting their votes. Polling stations need to be fully equipped for instance with polling booths to guarantee the secrecy of the vote or with sufficient ballot papers for all candidates to ensure fair competition. Furthermore, it has to be guaranteed that every vote has the same weight – or in other words that every voter is entitled to the same number of votes. For this purpose, procedures like the verification of voters, the signing of attendance sheets or the use of indelible ink are important in order to prevent the casting of multiple votes or of votes by ineligible persons. However, not only participation and competition are at stake but also legitimacy. Legitimacy is at stake when watch dog institutions like EMB delegates, party representatives or the composition of the polling station staff are concerned. These groups are all meant to watch the voting operations and to guarantee rule compliance.

The adjudication of complaints related to the voting operations is one of the council’s main competences in the electoral process. There is not ambiguity about the council’s prerogatives in this area. Presidential candidates may challenge the regularity of the poll within 72 hours after the provisional results’ proclamation and legislative candidates have a timespan of five days within the may lodge their petitions. The CC thus intervenes indirectly into the voting operations if it is activated by plaintiffs. It cannot correct the operations as such but only sanction the results of rule violations.

In the following, I will start with an overview of the council’s activities related to the voting operations before I proceed with an analysis of the CC’s justification patterns and the reasons for annulments.

The voting operations is the stage of the electoral cycle in which the Senegalese CC intervened most frequently. I coded 34 interventions for this part of the electoral process. The number of interventions ranged between zero after the legislative election of 2007 and ten after the legislative election of 1998. The CC did not only intervene often into the voting operations, it also intervened in variety of ways and influenced all three democratic qualities

of elections. There were two elections, the legislative elections of 1993 and 2012, in which few interventions took place but those were all functional. In another two elections, the presidential elections of 1993 and 2007, dysfunctional interventions prevailed. In all other elections different kind of influences co-existed. The influences on competition were mainly negative while legitimacy was mostly influenced in a functional way. Participation was subject to all kinds of influences.

Most complaints filed at the CC were dismissed. Only after the legislative elections of 1993 and 1998 as well as after the presidential election of 2000 results were annulled. After the legislative election of 1998 the CC cancelled the result of nine polling stations. This was the highest level of vote annulments related to the voting procedures within the period of observation. The petitions covered various issues. For instance, it was alleged that 17 polling stations in Bignona were relocated only one day before the poll (CC-42/98), that polling booths were missing at several polling stations (CC-6/93), that non-indelible ink was used (CC-6/93; CC-97/2007) or that ballot papers were distributed outside the polling station before and during election day (CC-6/93). Most complaints concerned the verification of the voters' identities and the use of attendance sheets, incidents at the polling stations and the composition of the polling stations' staff.

For the assessment of the council's interventions it is important to analyse the justifications of the judgments for both, the dismissed complaints and the upheld complaints that led to annulments. The CC exercised in some instances extensive examinations of the issue in question. Sometimes the council acknowledged that a certain behaviour would be a violation of the law but judged that it would not have an effect on the overall results. In many cases the council ruled that the evidence was not sufficient. These justification patterns may overlap for the same complaint. The different kinds of examination and justification send different signals about the council's stance towards irregularities in the voting procedure. Table 54 provides an overview of the justification patterns in the different elections. In the following I will explain more extensively how the council applied the different kinds of justifications. I start with an examination of the rare cases in which the council opted for annulments of votes and then turn to the justification patterns for the dismissals.

Table 54. Outcome and Justification Patterns of Complaints Related to the Voting Operations

Election	Number of issues	Outcome	Justification
PE 1993	6	All dismissed	Extensive examinations (1) Lack of evidence (6) Acknowledgment of potential harm (3) No influence on "sincerité du scrutin" (1)
LE 1993	2	Dismissed Anullment of two polling stations	Extensive examinations (2) Acknowledgment of potential harm (1) Lack of evidence (1) Clarification of procedures and required evidence (1)
LE 1998	10	Dismissed (7) Annullment of nine polling stations (3)	Extensive examinations (1-2) Acknowledgment of potential harm (1) No influence on "sincerité du scrutin" (3) Lack of evidence (3)
PE 2000	7	Dismissed (3) Annulment of three polling stations and two votes (4)	Examinations (6) No "influence déterminante" (1) Lack of evidence (1)
LE 2001	2	Dismissed (2)	Examination (2) No evidence (2) Clarification of attendance sheet procedure (1)
PE 2007	8	Dismissed (8)	No influence on „sincerité du vote" (1) Lack of evidence (6) No examination (1)
LE 2007	No complaint		
PE 2012	4	Dismissed (4)	No influence on the „sincerité du vote" (2) Legal clarification (2)
LE 2012	1	Dismissed (1)	Lack of evidence Inconsistencies already corrected by CNRV

Note: Column "Outcome": numbers in brackets indicate to how many issues the respective outcome (dismissal or annulment) has been applied. These numbers may deviate from the number of annulments. Column "Justification": numbers in brackets indicate how often this kind of justification has been applied. Categories may overlap, thus for one issue the council may have used several kinds of justifications.
Source: Author's own composition.

After the legislative election of 1993 the annulment of 40 polling stations was requested because of unreliable results. The CC nullified the results of two of these polling stations after the examination of the polling stations' PV (CC-10/93). In 1998 the votes of six polling stations were cancelled because their presidents had systematically refused to verify the identity of the voters what had allowed for manipulations (CC-42/98). One complaint had denounced several incidents in polling stations like for instance armed violence directed by a PS-candidate or the expulsion of the polling station's staff and the ONEL-delegates in order to do ballot box stuffing. This led to the annulment of one polling station. For this polling station an ONEL-delegate confirmed an incident that violated the electoral law (Art. L 65) (CC-42/98). Furthermore, the votes of two polling stations in Rufisque were cancelled due to multiple votes. These multiple votes had been confirmed by ODEL-reports. The CC moreover mentioned in its decision that ONEL had reported that the poll in these polling stations was held under conditions of trouble and disorder. The reports included incidents of gang invasions or of voting without the verification of identities (CC-42/98). For all annulments that were undertaken by the CC in 1998 ONEL- and ODEL-documents served as evidence to support the complaints. In 2000 the CC nullified the results of three polling stations. In addition, it cancelled two votes in one polling station. In the latter case the CC responded to a request of Abdou Diouf who alleged that two members of CA 2000 had voted in Madène without having been registered on the electoral list of the polling station. The CC confirmed this fact and subtracted two votes from the CA 2000 (CC-71/2000). This intervention is

noteworthy as the CC usually refrained from annulling votes when they did not have an "*influence déterminante*" on the result. The cancellation of three polling stations was a reaction to Wade's complaint. The result of one polling station was nullified because not sufficient ballot papers for all candidates were present. Another result was annulled due to a missing attendance sheet and a last polling station was cancelled because the polling station's president was not replaced in due course (CC-71/2000). Thus, the annulments undertaken by the CC were all based on the examination of PV or in 1998 additionally on the examination of ONEL reports.

For the dismissal of complaints the CC applied different justifications. One possible approach to the complaints is the question whether the alleged irregularity had a negative effect on the *sincerité du vote* or an *influence déterminante* on the result. This approach is sometimes criticised because it can lead to a banalisation of manipulation attempts and the exemption of responsibilities for the perpetrators (Diop 2013a, 238; Sindjoun 2009, 551–552). However, I argue that the assessment of this justification approach should depend on the plausibility of the argument. The argument is more plausible when further examinations are undertaken or other arguments are given. It is less plausible when the alleged violations appear serious and are quickly dismissed using the argument of no influence on the sincerity of the poll. When the argument is plausible the intervention can be beneficial to DQE but when it is not plausible it is detrimental to DQE.

The analysis of the judgments related to the voting procedure showed that the argumentation of the *sincerité du vote* was adopted by the CC but not as often as sometimes assumed. It was not applied in all elections and not in the majority of cases. The argumentation was not used for issues concerning the voting procedures in the legislative elections of 1993, 2001 and 2012. In the 1998 legislative election the council applied the argumentation of *sincerité du vote* three times; that was the most frequent use in the observation period in relation to the voting operations. The 1998 legislative election was however also the poll with the highest number of complaints related to the voting procedures. Furthermore, the *sincerité du vote* justification was applied in all presidential elections but in each of these elections not frequently. In some cases the argument was however more plausible than in others. For instance one complaint in 2000 alleged that a massive transfer of votes has taken place to the benefit of Niasse by adding voters on the attendance sheet. The council's examination of the PV showed however that only seven voters had been added what should indeed not constitute a result changing influence (CC-71/2000). In 1998 the AJ/PADS challenged that 17 polling stations in their strongholds in Bignona had been relocated only one day before the poll. In this case the CC acknowledged the rule violation and undertook extensive examinations to calculate the effect (CC-42/98). Thus, in this case the court did not use the phrase of *sincerité du vote* as a quick solution for dismissal but engaged in examinations. In other cases it appears more like a strategy to get rid of the allegations. To the allegation of belated and irregular appointments to polling stations in 1998 the council simply replied that it did not have an influence (CC-42/98). In the subsequent election a similar issue motivated the council to annul the results of a polling station (see above). In the presidential election of 2007 opposition parties complained that they were hindered to observe the voting procedures in three polling stations due to belated notifications. In this case the council also simply stated that this did not have an influence on the sincerity of the poll (CC-96/2007).

A frequently cited reason for the council's dismissal of complaints was the lack of evidence. The CC established missing evidence in all elections except for the presidential election of 2012. The assessment of this argument is difficult because it is possible that plaintiffs do not

provide sufficient support for their challenges. Furthermore, electoral manipulations are indeed often difficult to prove as they frequently take place in the informal sphere. The most important source to prove irregularities for the CC were the PV of the polling stations. There is however one problem inherent to the PV as a proof. First, the representatives of opposition parties need to be present at all polling station what is usually an organisational challenge for them. Second, the representatives need to be sufficiently trained to detect rule violations in time and to leave notes on the PV (SEN-20; SEN-16). Third, the president of the polling stations may theoretically have means to hinder the opposition representatives from documenting their observations on the PV. Consequently, it is questionable how reliable the PV as record for manipulations are. In the presidential election of 1993 political parties engaged eagerly in the new instrument and registered many objections on the PV in the polling stations. This was a reason for the stalemate in the processing of votes that will be explained in the next section (Villalón 1994, 183). In the legislative elections of 1998 and 2001 the CC referred in addition to ONEL-reports. This can balance the possible shortcomings of the PV. Those instances in which the lack of evidence was supported by ONEL-reports are assessed as functional to DQE. The same assessment applies to such cases in which the CC undertook own examinations and/or acknowledged the potential rule violation. In contrast, cases which lack the examination of any potential source of evidence are classified as dysfunctional to DQE. This approach occurred mainly in the presidential election of 2007. For instance, Dieng alleged that in some polling stations non-indelible ink had been used what had allowed for multiple votes. He offered a bailiff's report as evidence. The CC argued however that even if non-indelible ink had been used, this would not prove that it had allowed for multiple votes. The CC did not undertake any further examinations. It applied a similar argument towards Dieng's complaints that unpicked voting cards had been used by other citizens for voting or that minors have served as polling station staff (CC-96/2007). There remain those cases that the CC dismissed due to a lack of evidence after the examination of PV. They require a closer look to assess the intervention. For instance, after the presidential election of 1993 the council dismissed a complaint related to the non-indelible character of the supposedly indelibly ink. It had been one of the new electoral code's innovations to use indelible ink for marking citizens that had casted already their vote in order to prevent multiple voting (Kanté 1994, 99). On election day it turned out that the ink had to be used in a distinct way for being indelible what had not been instructed in advance. Even though the Ministry of the Interior broadcasted instruction on how to use the ink on election day, it caused widespread confusion and some polling stations temporarily closed due to that problem. The issue fed existing mistrust in the process among the voters (Kanté 1994, 107; OIF 1993, 3, 8–9; Villalón 1994, 181). The council responded in a rather brief manner stating that no problems had occurred after the instructions of the Ministry of the Interior and that it is not proven that the misuse of the ink had led to fraud. Given the sensitive context of the issue, it was not conducive to participation and the legitimacy of the election that the council did not acknowledge the problem of the late instruction and did not engage in more extensive examinations on the effect of the problem.

As explained in the previous paragraph the CC responded frequently to complaints with the examinations of PV. In few cases related to the voting procedures the CC also engaged in extensive examinations and calculations. This happened in the legislative elections of 1993 and 1998. In 1993 the CC judged on the petition that the use of false ordonnances had affected the reliability of the result, in particular in Dakar and Pikine and that there would be a large gap between the number of registered voters and the number of casted voters in

many polling stations. The petition was lodged by Mamadou Diop and Djibril Ngom, both high ranking PS politicians who had lost their parliamentary seats (Villalón 1994, 188). The CC responded with a long argument in which it clarified certain rules and terms. It further acknowledged that several errors were committed at the polling station in the establishment of the number of registered voters and casted votes that would be almost impossible to detect and to rectify. Moreover, it noted that several persons had been condemned by the criminal courts for the use of false ordonnances. Then, the CC took up the alleged number of delivered ordonnances and calculated what would have been the effect of such false ordonannces on the results in Dakar and Pikine. The calculation showed that the result would not have changed and that the PDS would have nevertheless won the seats (CC-10/1993). The rumours of blank ordonnances being distributed continued in the prelude of the legislative election. This time, however, the PDS seemed to have also engaged in this manipulation technique as the secondary literature as well as the CC posited (Villalón 1994, 188) (CC-10/1993). The council's intervention is assessed as beneficial to participation and legitimacy because the CC engaged in an extensive and transparent examination in the question whether the alleged blank ordonnances had an influence on the result. Secondary literature supports the council's judgment that the PS as well as the PDS have engaged in the practice. Furthermore, the judgment did not favour the party in power. This might have been the reason why the council sought to justify its decision thoroughly.

In some instances the CC dismissed complaints for various reasons but nevertheless acknowledged that this would have constituted a violation of electoral rules and democratic principles or acknowledged that regrettable shortcoming occurred but that they did not have an effect. For instance it stated in 1993 that the lack of polling booths constitutes a violation of the secrecy of the vote or that the distribution of ballot papers outside the polling station is prohibited (CC-6/93). In both cases the council judged however that there was no evidence for the alleged irregularity. The acknowledgment of rule violations in particular if it is embedded in an interpretation of the rule can have an indirect positive influence on DQE because it clarifies rules and defines what kind of behaviour is considered a rule violation. The cited cases were nevertheless assessed as ambiguous and dysfunctional because the council did not engage in further examinations despite reports from secondary sources.

Table 55 summarises the assessments of the CC interventions into the voting operations. The presidential elections of 1993 and 2007 were the elections in which the dysfunctional interventions dominated. In these elections the CC stated in the majority of cases that the evidence was not sufficient for sanctions. While the CC engaged in 1993 at least in one case into extensive examinations and acknowledged in three cases potential rule violations, the council refrained from any such activities in 2007. In both elections the will to uphold the electoral process was strong despite widespread doubts about the credibility of the voting operations. Therefore, the CC closed it eyes on potential rule violations. In the legislative election of 1998 and the presidential election of 2000 the CC intervened comparatively intensively into the voting operations and annulled comparatively many polling stations although the annulments scored still on a low level. In these elections the CC relied on reports of ONEL. This additional source of evidence apparently encouraged the CC for slightly bolder interventions.

Table 55. Assessment of CC Interventions Related to the Voting Operations

Election year	Number of interventions	Participation	Competition	Legitimacy
PE 1993	6	1 (orange), 3 (red)	2 (red)	
LE 1993	2	1 (green)		1 (green)
LE 1998	10	4 (green), 1 (orange), 1 (red)	2 (orange), 1 (red)	2 (green)
PE 2000	7	3 (green), 1 (red)	2 (green)	1 (green)
LE 2001	2	1 (orange)		1 (green)
PE 2007	7	2 (green), 3 (red)	1 (red)	1 (red)
LE 2007	0			
PE 2012	4	1 (green), 1 (orange), 1 (red)	1 (orange), 1 (red)	1 (green)
LE 2012	1	1 (green)		

Note: In the columns "Participation", "Competition" and "Legitimacy", the colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions. The numbers specify how many interventions of each respective type of functionality occurred.
Source: Author's own composition.

5.4.2.6 Processing of Votes

The processing of votes is essential for the legitimacy of an election. During the counting and tabulation of votes, the will of the voters can either be preserved or manipulated. The Senegalese electoral law of 1992 had introduced several measures to increase the transparency of the process. The major innovation was that the representatives of candidates could participate in the counting and tabulation process until the announcement of the provisional result. After the announcement of the provisional result all electoral documents are to be passed to the CC. The verification of the final results is the part of the process that resembles a black box. Candidates can address their remaining challenges to the CC but they do not have any possibility to observe the work of the council. The CC adjudicates the petitions and may rectify the result. Thus, the council has a direct influence on the processing of votes.

The CC rendered decisions related to the processing of votes in all elections except for the legislative elections of 1993 and 2007. The council's interventions mainly concerned legitimacy. Only one intervention was relevant for competition; it concerned the application of the electoral system. The processing of votes is the stage in the electoral cycle in which no dysfunctional intervention took place. The majority of interventions was functional to the legitimacy of elections. However, the CC influenced in some elections legitimacy in an ambiguous way. The majority of interventions concerned local incidents while questions of national scope were rarely adjudicated in this realm. The most prominent case that concerned the whole country happened at the beginning of my period of observation. This was the stalemate at the national tabulation commission. I will start my analysis with an extensive examination of this case. Subsequently, I will give an overview of the other adjudicated issues.

In 1993 Senegal experienced a major crisis in the processing of votes. The presidential election of 1993 was the first one to be ruled by the new electoral code. The new electoral law had introduced the participation of all political parties in the processing of votes. Accordingly, representatives of the political parties are entitled to observe the voting and vote counting at the polling station and to report any irregularities on the PV. The tabulation of votes occurs at the departmental and the national level in the CDRV and CNRV respectively. On both levels representatives of all candidates can participate in the tabulation of votes. After the

calculation of the provisional result at the departmental level the CDRV-PV is passed to the CNRV. The CNRV then verifies the PV and calculates the provisional result. On both levels the notes on the PV from the polling stations are reviewed in order to discuss which votes qualify as valid votes for the result.

After the presidential election of 1993 the opposition parties vividly made use of their new rights to contest the results in the CDRV and CNRV. This engagement even increased after the state-owned newspaper *Le Soleil* had published partial provisional results that indicated a victory of Diouf. The PDS had however also collected PV and was convinced by that a run-off would be necessary. The heated debates at the CDRV and CNRV led to a stalemate at the CNRV because the members of the commission could not arrive at a consensual result. Therefore, the president of the CNRV turned one week after the poll to the CC. He sent all electoral documents to the council and asked for a settlement of the issue. The stalemate was caused by a shortcoming of the electoral law. The law did not prescribe with which internal procedure conflicts at the tabulation commission should be settled. The opposition preferred a settlement by majority and the PS a settlement by consensus (Villalón 1994, 182–183).

The CC applied in its adjudication of the issue a broad interpretation of its competences but refused to proclaim the final results of the election without a prior announcement of the provisional result. It set a deadline for the CNRV to produce a provisional result and defined rules for its work. In the justification of its decision the CC stated that the situation was unforeseen by the electoral law but that it would be the council's responsibility to rule on the issue in order to assure the continuous functioning of the institutions. It would be the only jurisdiction competent to adjudicate problems related to the processing of votes. This stance was already remarkable because in subsequent judgments the council refrained from decisions that had not been explicitly prescribed by the constitution and the law as has already been discussed in previous sections. The council judged that an omission of the provisional result would deprive the candidates from challenging the provisional results and would break the law. The CC further pointed out that the representatives of several opposition candidates had wished to continue the work in the CNRV. The CC then engaged in an explanation of the provisions in the electoral code and stated that the CNRV should only focus its examinations on the PV from the CDRV. Those could be annulled if they would display inconsistencies of numbers or substantial errors in the writing. Moreover, the CC ruled that the CNRV has to announce the provisional results within 72 hours after the constitutional council's decision (CC-5/93).

Several authors considered the decision a bold one because it assertively interpreted the council's competences (Diagne 1996, 115; Diop 2013a, 227; Fall 2011b, 8). Fall stated that the CC had defended the constitution and democracy in this decision. Diop however also highlights that the judgment followed one obvious priority: to uphold the electoral process and to assure the stability of institutions. The CC refrained from annulling the electoral process. Diop argues that the stability of the institution weighed higher for the council than the right of candidates to contest the electoral operations at the CNRV (Diop 2013a, 227, 231).

The counting crises had consequences for the CC and the public perception of the electoral process. Kéba Mbaye, the first president of the CC, resigned immediately after the issue of the decision on the stalemate at the CNRV. Mbaye had chaired the commission that drafted the new electoral code. Thus, the much praised new electoral code was also his work. The new electoral code had the goal to assure more peaceful and transparent elections after the violent outbreaks during the election period of 1988 (Diop 2013a, 112). The blockade at the

CNRV was considered a failure of the new code. Foremost, Mbaye himself considered the stalemate a failure of his endeavours to promote democratic rules in Senegal. In his letter of resignation to President Diouf he expressed his disappointment of how the political actors had applied the electoral code.[144] Mbaye's resignation was a setback for the CC because Mbaye's presidence of the newly created council had been perceived by many Senegalese as a guarantee for the council's independence and weight. The counting crises furthermore seeded mistrust and disappointment in the Senegalese population about the electoral process and the political elite. Several shortcomings had occurred in the organisation of the electoral process like the problems with the electoral register or the indelible ink that turned out delible that had sparked mistrust in the credibility of the process. Furthermore, the population was irritated by the political class who had adopted the new electoral law consensually and nevertheless was stuck in quarrels about irregularities. The delay of the result proclamation nurtured a feeling that the ruling elite and opposition politicians would manipulate the game to their advantage without responding to the will of the people (Kanté 1994, 104–105; Villalón 1994, 165, 182, 184).

Taking the legal and political considerations into account I assess the CC decision on the stalemate as ambiguous. It was positive that the CC applied a broad interpretation of its competences in order to offer a solution in an institutional crisis. However, the solution brought forward by the CC reduced the possibility for political parties to challenge results at the CNRV. Thus, at a stage in which they can observe the process while the adjudication of electoral disputes at the CC is less transparent because representatives of political parties are not present. The CC prioritised in its ruling the upholding of the electoral regime but the mistrust in the electoral process nevertheless persisted.

In the remaining part of the chapter I will analyse the petitions related to the processing of votes that have been lodged after the announcement of the provisional results. They are covered in the CC decisions on the final results. The complaints concerned mainly the alleged irregular transport of PV, the absence of PV, irregularities in the tabulation process and issues related to external voters. Two complaints raised questions of the application of the electoral system. Furthermore, some challenges that are difficult to categorise were brought to the CC. The majority of complaints was dismissed. Only at two occasions, the CC rectified votes: after the presidential election of 2000 and the legislative election of 2001. The CC engaged in most cases in examinations of the alleged irregularities. In other cases the council responded with the clarification of rules or arguments. Table 56 offers an overview of the justification patterns that will be examined in the following paragraphs.

[144] Kéba Mbaye wrote: "Le nouveau code électoral, ce sont les partis politiques qui l'ont voulu. Ils l'ont eux-mêmes adopté. C'est leur enfant, mais il est aussi un peu le mien. J'y croyais. Je me disais qu'il allait servir à l'évélation des mentalités vers l'acceptation sans réserve du jeu démocratique. Malheureusment, ce qui se passe devant mes yeux me démontre que je me suis trompé. Je n'accuse personne. Je constate un fait: je me suis trompé et toute erreur de cette nature es tun échec, qui rejaillit lourdement sur mes fonctions actuelles." The letter was published in Le Soleil on 3 March 1993 (Diop 2013a, 102).

Table 56. Outcome and Justification Patterns of Complaints Related to the Processing of Votes

Election	Number of issues	Outcome	Justification
PE 1993	2	Instructions (1) Dismissed (1)	Expansive interpretation (1) Clarification/acknowledgment (1) Examination (1)
LE 1993	0		
LE 1998	3	Dismissed (3)	Examination (3)
PE 2000	3	Dismissed (2) Rectification (1)	Examination (3)
LE 2001	3	Dismissed (2) Rectification (1)	Argument (2) Recounting (1)
PE 2007	4	Dismissed (4)	Sincerity of vote (1) Acknowledgment/regret (1) Examination (3)
LE 2007	0		
PE 2012	1	Dismissed (1)	Clarification (1)
LE 2012	3	Dismissed (3)	Clarification (2)

Note: Column "Outcome": numbers in brackets indicate to how many issues the respective outcome (dismissal or annulment) has been applied. Column "Justification": numbers in brackets indicate how often this kind of justification has been applied. Categories may overlap, thus for one issue the council may have used several kinds of justifications.
Source: Author's own composition.

Both rectifications were undertaken after examinations. In 2000 Abdou Diouf had complained that in one polling station 107 votes were mistakenly attributed to Ousseynou Fall even though the concerned ballots had been votes for Diouf. The CC confirmed the mistake after having compared the PVs of ONEL, CDRV and the plaintiff (CC-71/2000). In 2001 the MRDS complained that errors in the tabulation process misattributed 52 votes to MRS. In this case the CC recounted the votes, compared its results with the provisional results and finally reattributed three votes (CC-83/2001). Both rectifications are assessed as functional to legitimacy because the CC had engaged in the comparison of several sources.

When the CC dismissed petitions on the processing of votes, it most frequently engaged in examinations of electoral documents. Most of these cases concerned the transport of PV. The cases of alleged irregular transport bear on PV that were transported from the polling stations to the CDRV by unauthorised persons (CC-6/93, CC-42/98, CC-71/2000). The delegates of the Cour d'Appel are actually meant to transport the PV. In one case it had been complained that the PV were transported in unsealed envelopes what would have allowed for manipulations (CC-97/2007). Other complaints criticised that PV did not arrive at all at the CNRV (CC-42/98, CC-71/2000). In all these cases the CC verified the PV, compared different versions of PV and tried to substitute missing PV. As ONEL-delegates or later CENA-delegates also held PV these could serve as basis of comparison (CC-42/98, CC-71/2000, CC-97/2007) or could substitute missing PV (CC-42/98). When the CDRV PV were missing, these were substituted by the PV of the relevant polling stations (CC-71/2000). I assess these instances as functional to the legitimacy of the poll because the CC considered alternative PV to uphold the result. However, in 1993 the upholding of the votes appeared more ambiguous because the CC cited a rather vague evidence. After the presidential election it was alleged that the PV had not been transported by the illegible persons, the delegates of the Cour d'appel. The CC explained that the rule had the aim to prevent modifications of the PV during transport. However, since no candidate had reported a modification of the PV during transport, the PV were upheld (CC-6/93). Given the decision on the stalemate at the CNRV and the consequent

suppression of contestations of PV from polling stations, the argument of the CC appears flawed and rather targeted at the upholding of the result than on the guarantee of credible results. This is why it is assessed as ambiguous.

There were three challenges concerning the processing of external votes within the period of observation. Those were encountered with examinations and a clarification of rules. Two challenges referred to problems with the transmission of the PV and a third one alleged inconsistency of numbers on the PV. The original PV cannot be transported quickly from the polling stations outside Senegal to the CNRV. This is why usually documents sent by fax are used for the vote counting. This procedure has been challenged in 1998 and after the presidential election of 2012. In 1998 the CC verified that the results derived from copies had been compared later with the original PV (CC-42/98). The intervention is consequently gauged functional to legitimacy. In 2012 the CC stated merely to the plaintiff Wade that the electoral law, art. L 353 would allow for using telefax and that they need to be controlled later. However, it remained unclear whether the council had assured that the telefax copies had been verified (CC-112/2012). Consequently, the intervention is assessed as ambiguous. In the third case Abdoulaye Bathily and Dieng alleged that more votes were casted in Italy than candidates had won. The examined in this case also the PV sent by telefax and the original one and consequently dismissed the complaint (CC-96/2007). This intervention is coded as functional because examinations were undertaken.

A petition related to the electoral system was encountered with an argument. In 2001 Wade's Sopi coalition complained that all parties that had participated in the poll were included into the distribution of the remaining seats according to the principle of the largest remainder. In the 2001 poll five small parties had benefitted from this procedure and won one seat each although they had won less votes than the national quotient. The Sopi coalition argued that only those parties that had won seats after the calculation of the national quotient should be factored in according to the electoral law. The CC argued that it would not make sense to exclude small parties if they had be included into the calculation of the national quotient, that this would contradict the very idea of the proportional representation and that the procedure had been constant jurisprudence of the CC. The electoral law does not define the procedure for the distribution of the remaining seats in detail (L 92-16/2001, Art. L 144).[145] However, the procedure applied by the CC was functional to competition as it gave small parties a chance to gain seats and the argument was convincing. Furthermore, the CC did not bend in this case to the will of the ruling party.

There remain complaints that are difficult to categorise and that have been encountered with arguments by the CC. In 2001 the UPRS stated that it should have won 9,600 votes in Pikine because the party counts 9,600 members in this location. The CC rejected the complaint because it would be impossible to prove that all UPRS-members were registered in Pikine and that they would have definitely voted for UPRS (CC-83/2001). In this case the argument of the CC seems plausible and indeed it would be impossible to reconstruct the will of the potential UPRS-voters. Consequently, the intervention is assessed as functional to the legitimacy of the election. After the legislative elections of 2012 Taxawu Askanwi called for a second round because the voter turnout would have been too low and thus the universal

[145] The article explains how the national quotient is to be calculated (the number of casted valid votes have to be divided by the number of seats to be distributed) and how the seats are allocated according to this principle (the number of votes won by a party is divided by the national quotient to obtain the number of the party's seats). Those seats that were not distributed through this procedure are to be allocated according to the principle of the „*plus fort reste*".

suffrage could not have been guaranteed. The CC also dismissed this claim because neither the constitution nor the electoral law would fix a certain threshold of participation for the validation of the results (CC-114/2012). In this instance the argument by the CC is also assessed as plausible. However, it is one of the cases in which the council abided with the rules but the contested issue was nevertheless essential for legitimacy. A low turnout can indeed be a problem for the legitimacy of elections. However, the CC is not the appropriate channel to address this concern. This is why I assess the intervention nevertheless as functional.

At one occasion the CC referred to the principle of the sincerité du vote. It concerned an incident during the presidential election of 2007 in St Louis. The then-minister of Justice Cheikh Tidiane Sy had smashed the door of a polling station to order the continuation of the vote although the counting was already underway. The CC examined the PV of that polling station. The incident was reported but it was also stated that the vote count had afterwards continued and no representative had stated any irregularities in the vote count. The CC expressed regret about the incident but judged that it did not affect the sincerity of the vote (CC-97/2007). I coded the intervention as ambiguous because it was a serious incident that a minister and in particular a minister of justice behaved this way. However, the examinations of the CC appeared plausible.

To sum up, the CC interventions into the processing of votes were mainly functional as Table 57 summarises. They were functional when the CC examined and compared PV of different sources or put forward plausible arguments. However, most complaints concerned local issues that did not have a strong influence on the legitimacy of election on the national level. The most important intervention happened in 1993 in relation to the stalemate at the CNRV. In this case the CC rendered an ambiguous influence that did not improve the public trust into the electoral process. Another intervention that was relevant for the whole country was related to the application of the electoral system. In this case the council influenced competition in a functional way by defending the access of small parties to the National Assembly and by not bending to the preferences of the ruling party.

Table 57. Assessment of CC Interventions Related to the Processing of Votes

Election year	**Number of interventions**	**Participation**	**Competition**	**Legitimacy**	
PE 1993	2			2	
LE 1993	0				
LE 1998	3			3	
PE 2000	3			3	
LE 2001	3		1	2	
PE 2007	4			2	2
LE 2007					
PE 2012	1			1	
LE 2012	1			1	

Source: Author's own composition.

5.5 Patterns of Influences on the Democratic Quality of Elections

In the previous section, I provided a detailed and comprehensive assessment of the CC interventions into the electoral cycle. In the following, I recapitulate the CC's interventions on participation, competition and legitimacy. I present for each quality of democratic elections a brief summary of the comprehensive assessment. Moreover, I will compare these results with the ones of the analysis of major court interventions. I created the sample of major decisions based on my knowledge derived from the comprehensive assessment.

5.5.1 Participation

My comprehensive sample contains 33 CC interventions on participation. Roughly half of these interventions were functional and the other rough half was dysfunctional as Table 58 displays. Additionally, the CC rendered few ambiguous interventions on participation. The CC rendered few interventions on the electoral register but these were predominantly dysfunctional. The council has limited competences in this domain but it further narrowed its scope by applying strict interpretations of its prerogatives. Through these narrow interpretations the council remained silent on major problems with the electoral register. In particular, in 1993 and 2007 delays in the registration process and irregularities in the distribution of the voter cards were widely criticised and reported by secondary resources but the CC neglected these issues in its rulings.

Table 58. CC Interventions on Participation

	Electoral legal framework	Electoral register	Registration of candidates	Electoral campaign	Voting operations	Processing of votes
PE 1993		1			1 3	
LE 1993					1	
LE 1998		2 1			4 1 1	
PE 2000		1			3 1	
LE 2001					1	
PE 2007		3			2 3	
LE 2007						
PE 2012					1 1 1	
LE 2012					1	

Note: The colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions.
Source: Author's own composition.

Interventions into the voting operations were much more frequently. These interventions had functional, ambiguous and dysfunctional characteristics. However, the decisions in this domain often concerned only single polling stations and were therefore of limited importance for the democratic quality of elections on the national level. Consequently, my sample of major interventions does not contain a single CC intervention that was relevant for participation. Yet, the interventions of the comprehensive sample can tell us something about trends in the court behaviour. In 1998 and 2000 the CC wielded mainly functional influences on the voting operations. In these years, the CC relied more often on ONEL reports and dared some annulments of polling stations. After the presidential elections of 1993 and 2007 dysfunctional interventions into the voting operations were in the majority. In these years the problems with the voter cards were also apparent during the voting operations and plaintiffs alleged the abusive use of voter cards. Furthermore, problems with the indelible ink were

denounced in both elections. In these instances the CC refrained from analysing the complaints in-depth and instead set strict standards of proofs.

5.5.2 Competition

The highest number of CC interventions concerned competition. I coded 49 interventions that were targeted at competition. Roughly equal shares of these interventions were functional, ambiguous and dysfunctional. The interventions concerned all parts of the electoral cycle except for the electoral register as can be seen in Table 59.

The stage of the registration of candidates was subject to the highest number of interventions on competition as the CC mandatorily ratifies the list of candidates. These interventions were mostly functional or ambiguous but since 2007 several dysfunctional interventions occurred. Before the presidential election of 2007 the CC refused to recount the support signatures of the dismissed presidential candidate. In the run-up of the subsequent legislative election the CC backed the denial of the Ministry of the Interior to receive the list of candidates by JëfJël. In 2012, the CC rendered several dysfunctional interventions related to the contested candidacy of Wade. All these dysfunctional interventions happened under the presidency of Wade.

Table 59. CC Interventions on Competition

	Electoral legal framework	Electoral register	Registration of candidates	Electoral campaign	Voting operations	Processing of votes
PE 1993			2 (green)	1 (green), 2 (orange)	2 (red)	
LE 1993			1 (green), 1 (orange)			
LE 1998	3 (red)		3 (green), 3 (orange)		2 (orange), 1 (red)	
PE 2000	2 (red)		1 (green)	2 (orange)	2 (green)	
LE 2001			2 (green)	2 (orange)		1 (green)
PE 2007			1 (orange), 1 (red)	1 (red)	1 (red)	
LE 2007	1 (green), 1 (orange), 1 (red)		1 (red)			
PE 2012			1 (green), 1 (orange), 3 (red)		1 (orange), 1 (red)	
LE 2012				1 (red)		

Note: The colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions.
Source: Author's own composition.

The bulk of the CC's major interventions concerned competition. The sample of major interventions shows a clearer picture of the CC's dysfunctional influence on competition. Most major interventions were dysfunctional for competition. In 1997, the CC approved the increase of seats in the National Assembly. As a consequence, the electoral system strongly favoured the ruling party. However, the CC did not address the repercussions for competition in its ruling and further hampered the opposition's petitions against the amendments. In the same year, the CC ratified amendments relevant for presidential elections and hampered the opposition's petitions in a similar manner. In 2007, the CC refused to adjudicate on the appointments to the electoral commission and in 2012 the admission of Wade for a third presidential term was dysfunctional. The safeguarding of competition did not improve after the electoral turnover in 2012. Even though the Cour d'appel prohibited the use of Macky Sall's picture throughout the campaign, the picture was nevertheless used for campaign purposes. There was, however, no venue for demanding the implementation of the Cour

d'appel's decisions. After the poll, the CC did not acknowledge this legal void and refused to judge on this issue.

Not all major interventions were dysfunctional for competition. Before the legislative election of 2001, the CC rendered two functional interventions. The first one allowed the PS to nominate a new candidate after their initial candidate for Tivaouane changed to the PDS. The second one prohibited the coalition led by the PDS to use Wade's name and picture on the ballot paper. Yet, the CC faced after this assertive heavy public critique from President Wade. The dismissal of the parity law in 2007 was also conducive for competition because the law would have seriously hampered the participation of the opposition.

5.5.3 Legitimacy

My comprehensive sample of CC interventions comprises 32 interventions that were relevant for the legitimacy of elections, hence a similar amount as the number of interventions on participation. The majority of these interventions were functional for legitimacy as I show in Table 60. My comprehensive sample only counts three dysfunctional interventions. Before the legislative election of 1998, the CC refused to adjudicate on the question whether the electoral register shall be available to ONEL by interpreting its competences narrowly. Yet, it is crucial for the legitimacy of elections that electoral watchdog bodies such as the ONEL have access to the electoral register. After the presidential election of 2007, the CC refrained from examining whether in several polling stations unqualified persons served as polling station agents. The third dysfunctional intervention was a major one and I will discuss it below.

The bulk of CC interventions on legitimacy concerned the processing of votes. The CC did not render a dysfunctional influence in this stage of the electoral cycle. Even though the CC dismissed the majority of petitions relating to the processing of votes, it nevertheless engaged frequently in extensive examinations for instance by comparing the polling stations' PV with those held by ONEL or later CENA. Some interventions were ambiguous because the CC did not acknowledge the harm for legitimacy, for instance when it did not clarify in 2007 that also the PV from the external votes shall be counted under the supervision of the whole CNRV.

Table 60. CC Interventions on Participation

	Electoral legal framework	Electoral register	Registration of candidates	Electoral campaign	Voting operations	Processing of votes
PE 1993						2
LE 1993	1				1	
LE 1998	2	1			2	3
PE 2000					1	3
LE 2001					1	2
PE 2007	1				1	2 2
LE 2007	1 1					
PE 2012					1	1
LE 2012						2 1

Note: The colour green indicates functional interventions, the colour orange ambiguous interventions and the colour red dysfunctional interventions.
Source: Author's own composition.

While the analysis of my comprehensive sample showed a positive picture of the CC's influence on legitimacy, the picture from the sample of major interventions looks differently. Three major interventions concerned legitimacy. Two of them were ambiguous. The first ambiguous one happened after the presidential election of 1993 when the CC judged on the stalemate at the CC. The CC rendered the second ambiguous intervention before the presidential election of 2007 when it declared itself incompetent to adjudicate on the appointments to the electoral commission. Legitimacy was negatively influenced by the CC before the legislative election of 2007 when it classified the law to the MP's term as a constitutional one and consequently refrained from reviewing it.

My analysis revealed that the CC influenced the democratic quality of elections during my period observation. The council intervened into all stages of the electoral cycle. Yet, the CC conveyed the impression that it sought to get involved as little as possible into the electoral process. Therefore, it frequently refrained from examining petitions in-depth, dismissed the majority of electoral petitions and rarely annulled any votes. According to my analysis of the comprehensive dataset, the CC's influence on participation and competition was roughly balanced between functional and dysfunctional interventions. The interventions on legitimacy were predominantly functional. The examination of the major interventions draws, however, a different picture. Among the major interventions, dysfunctional ones on competition prevailed while legitimacy was influenced in ambiguous and dysfunctional ways.

The CC influence on competition was particularly dysfunctional at the end of the 1990s when the strength of the PS regime faded away. Consequently, Diouf undertook several measures to constrain competition. The CC facilitated these endeavours. In the second term of Wade's presidency, the dysfunctional interventions of the CC on competition as well increased as well. Thus, the CC also supported Wade in his attempts to tilt the playing field. The CC was created in 1992 as part of the reform of the electoral law. The new electoral law increased transparency throughout the electoral process. However, in this process, the CC conducts the final steps by declaring the final results and the procedures at the CC are the least transparent ones. In combination, with the appointment rules that offered the president much leverage in the constitutional bench, the CC provided an entry point for executive influence on the electoral process. In the following chapter, I compare the CC behaviour in Senegalese elections with the behaviour of the HCC in Madagascan elections and discuss the results in the light of theories of court behaviour.

6 Comparing Madagascar and Senegal: Constrained Guardians of Democratic Elections

This chapter is organised into four parts. In the first, I compare the development of the democratic quality of elections in Madagascar and Senegal respectively. I show that in both countries presidential elections attracted more participation and competition than legislative ones did. Moreover, all three qualities of democratic elections – participation, competition and legitimacy – were subject to constraints during the period of observation. The legitimacy of elections was more seriously harmed in Madagascar than in Senegal, however.

In the second part, I compare the conditions for, as well as the actual behaviour of, Madagascar's and Senegal's constitutional courts in electoral matters. I demonstrate that the Madagascan HCC had a slight advantage in terms of formal empowerment, and was much more activated by electoral petitions than the Senegalese CC. This advantage is reflected in a higher intensity of electoral interventions by the HCC. Both constitutional courts adjudicate on the bulk of electoral irregularities after the poll has taken place. This timing limits their degree of leverage over the upholding of the democratic quality of elections. My comparison of the constitutional courts' major decisions reveals that both courts had a predominantly dysfunctional influence on competition and legitimacy. For both qualities, it was the interventions of the Madagascan HCC that had more serious repercussions.

In the third part, I discuss why the two constitutional courts have such a constrained record in the adjudication of elections. For this discussion, I draw on prominent theories from the academic field of Judicial Politics. I find that the appointment rules and practices in place hampered in both countries the emergence of independent constitutional courts. While in Senegal the formal rules guaranteed executive control of the CC, in Madagascar the arbitrary implementation of appointment rules weakened the HCC. Moreover, I ascertain that both courts lacked public support and did not strategically build up a support base. Eventually, I show that the insurance theory has only limited explanatory power for the behaviour of the constitutional courts in these two cases. In the concluding part of this chapter, I compare my findings with the more general development of the rule of law in Madagascar and Senegal. Thereby, I argue that the question of the proper sequencing of the rule of law and elections is less relevant than the one of how to escape from an inextricable stagnating process in which courts impede electoral integrity and contentious elections disable assertive judicial decision making.

6.1 The Democratic Quality of Elections in Madagascar and Senegal

6.1.1 Participation

Participation in Madagascar and Senegal was only limited during the period of observation. In both countries the picture of participation was distorted due to deficient electoral registers, however. Presidential elections attracted more participation than legislative ones in Madagascar and Senegal. Generally speaking, voter turnout tended to be higher in Madagascar than it did in Senegal.

According to official turnout rates, 63 per cent of the Madagascan voting population participated on average in presidential elections. In Senegalese presidential elections, a mean of 61 per cent of the voting population cast their votes (see Table 61). These figures do not deviate from the overall African trend. According to Lindberg, the average official turnout in African free and fair elections between 1989 and 2003 was at 63 per cent (Lindberg 2006, 57). Of course, the turnout rates in Madagascar and Senegal were not static. The Madagascan

presidential election of 1992 (74 per cent), as well as the Senegalese presidential elections of 2000 (75 per cent) and 2007 (71 per cent), deviated positively from the mean. This means that these elections attracted greater participation. Negative deviations from the average occurred in the Madagascan presidential run-off of 1996 (50 per cent), as well as in the Senegalese presidential elections of 1993 (51 per cent) and 2012 (52 per cent). The turnout rates in Madagascar appear to reflect the contemporaneous level of hope and frustration towards the political class. Polls in which new politicians promised a change of the political game, as in 1992 and in 2001, were more intensively frequented than those polls in which incumbents or former presidents sought to renew their grasp on power, as in 1996 and in 2006.

Turnover elections in Senegal did not mobilise voters to a similar extent as they did in Madagascar. The official turnout rate for the 2000 presidential election was high, but the strongly deviating VAP turnout rate (37 per cent) raise doubts about the official rate's actual validity. The turnout at the second turnover election in 2012 was comparatively low. The different effects of turnover elections may stem from differences in the nature of the candidates. In Senegal, both turnover presidents were rather familiar figures in the political arena. Wade, who took over in 2000, was the long-term major opposition leader and had contested the PS regime since 1978. Macky Sall, who won the election in 2012, used to be one of Wade's closest collaborators until Wade abandoned him in 2008. In contrast Marc Ravalomanana, who entered the presidential race in 2001, was a successful businessman and genuine newcomer in Madagascan politics. Albert Zafy, who was the first post-transitional president in 1993, had gained some political experience in the 1970s – but withdrew to the university during the years of Ratsiraka's authoritarian regime.

Table 61. Averages and Medians of Official Turnout (TO) Rates and VAP Turnout Rates in Madagascar and Senegal

Madagascar			**Senegal**		
	Official TO	**VAP TO**		**Official TO**	**VAP TO**
Presidential Elections					
Average	63	53	**Average**	61	42
Median	65	52	**Median**	58	40
Legislative Elections					
Average	57	49	**Average**	44	31
Median	58	51	**Median**	39	28

Source: Author's own compilation, calculated using data from constitutional court decisions and International IDEA. For further details, see Chapters 4 and 5.

Voter turnout tended to be higher in Madagascar than it did in Senegal. While this tendency is modest for presidential elections, it is strikingly evident for legislative ones. The average official turnout in Madagascan legislative elections was at 57 per cent, while it was at 44 per cent in their Senegalese counterparts. Hence, the turnout in legislative elections is in both countries lower than in presidential ones. Furthermore, the legislative averages deviate negatively from Lindberg's African average.

Official turnout rates in Madagascar and Senegal are distorted by imprecise electoral registers. The credibility of the electoral roll has an influence on just how much official turnout rates can tell us about the real level of participation in a given poll. In both countries, huge differences between the official number of registered voters and the estimated VAP occurred. For instance, in the 2000 presidential election in Senegal this difference amounted

to 2.2 million voters. Considering that the VAP was estimated at 4.5m citizens, the electoral roll comprised only roughly the half of the eligible population. Madagascar experienced a similar difference between the two rates in the legislative election of 1998. The official registration rate was 2.5m voters lower than the estimated VAP. As the VAP was estimated at 7.7m citizens in that year, this meant that roughly one-third of the electorate was not registered. However the quality of the electoral roll in Senegal slowly increased after the legislative election of 2001, while that of the Madagascan electoral register was in the early 1990s better than it was after 1998.

6.1.2 Competition

In both countries, the level of competitiveness was in presidential elections higher than in legislative ones. For the Senegalese case, this observation is more evident; Madagascan legislative elections, meanwhile, were in the 1990s more competitive than they were in the 2000s. In the presidential elections, Madagascar as well as Senegal experienced phases of more and of less competition.

Electoral turnovers in the presidential office happened in both countries, but in Madagascar they were accompanied by stark institutional crises. The first electoral turnover in 1993 happened after massive public protests and a transition period, the second one in 1996 emerged out of a contested impeachment procedure – while the third one in 2002 followed a heavy electoral crisis. The two turnovers in Senegal (2000 and 2012) were achieved specifically in incumbent elections. In such elections, the probability of electoral turnovers is lower than in those in which new candidates compete (Przeworski 2015). In both instances, the respective incumbents fought strongly to remain in power but after the polls accepted their defeat immediately.

The conditions for free competition in Madagascar went, roughly speaking, through two phases of development. The breakdown of the Ratsiraka regime at the beginning of the 1990s led to a reconfiguration of political power that was heavily contested. Zafy, who was elected in 1993, had a weak parliamentary majority that eventually turned against him during the impeachment motion. These reconfiguration struggles allowed Ratsiraka to return to presidential office in 1996. Ratsiraka thereafter sought to regain control of competition and to strengthen presidential power. Only Ravalomanana, who possessed strong economic power and religious support, could feasibly contest Ratsiraka's grip on power. However, the conditions for free political competition did not subsequently improve under Ravalomanana. Instead, he sought to dominate the political system in a similar way to how Ratsiraka had done. His domination is reflected in his high winning margin of 43.1 per cent in 2006. His party, TIM, were also able to obtain significant seat shares in the National Assembly. TIM controlled 64.4 per cent of the seats in 2002, and 82.7 per cent thereof in 2007.

In Senegal, phases in which competition was constrained by the contemporary powerholders alternated with ones in which the incumbents' control diminished – and that, consequently, ushered in electoral turnover eventually. The level of competitiveness was comparatively high in the turnover elections. In these, the incumbents attained winning margins of 10.3 percentage points in 2000 and 8.2 percentage points in 2012 – and thus had to enter run-offs. Diouf had attempted several measures in the 1990s to preserve his power and to constrain competition. For instance, he was keen to influence the electoral system for the National Assembly in a way that favoured the PS. Wade, who generated high hopes for democratic reform, took a similar stance to Diouf. He benefitted from the electoral system as designed by the PS, and further sought to adjust the constitution according to his own needs. Similar to

Ravalomanana in Madagascar, Wade was able to attain a winning margin of 41 percentage points in the 2007 presidential election. Furthermore, his coalition held a seat share of 74.2 per cent in 2001 and 87.3 per cent in 2007 respectively. In the latter case, the high seat share gained was due to the boycotting of the election by the opposition.

6.1.3 Legitimacy

The legitimacy of elections was repeatedly questioned in Madagascar and Senegal as part of the political game. The level of the legitimacy's contestation and the channels chosen for doing that varied across time in both countries, but there were also further differences between the two as well. In Senegal, elections were mainly contested on a rhetorical level and with only small-scale violence – with the exception of one outlying extreme episode, namely the assassination of a constitutional judge in 1993. In Madagascar, the majority of elections were less violent; however, the presidential one of 2001 was followed by massive popular protests and tangible post-electoral violence.

In Madagascar and Senegal, elections were the only way to achieve presidential office and parliamentary seats during the period of observation. Thus, elections were considered legitimate on a practical level as political actors complied with the idea that office is distributed through elections. However, in Madagascar the election regime broke down completely at the end of the period of observation in 2009. Furthermore, whether Ravalomanana had really won the absolute majority of votes in the first round is a contested issue among Madagascans. The acceptance of elections as the only mechanism by which to distribute political office did not imply that the regularity of the electoral calendar was also respected, however. That regularity is an important factor in the institutionalisation of elections. The schedule was, however, shifted in both countries, with legislative elections being particularly prone to adjustment. In Madagascar, the majority of legislative elections – namely three out of four polls – were either antedated or postponed. Furthermore, the presidential election of 2006 was antedated. In Senegal, one legislative election was antedated from 2001 to 2002 while another one was postponed from 2006 to 2007.

Table 62 summarises the comparison of the three democratic qualities of elections in Madagascar and Senegal. My analysis shows that participation, competition and legitimacy were subject to constraints in both Madagascar's and Senegal's electoral processes. My observations conform with those by Lindberg, as well as by Bratton and Van de Walle, that competition and legitimacy are indeed most certainly at stake in African elections. Nevertheless, participation was also vulnerable in Madagascan and Senegalese elections. The turnout rates in legislative elections deviate from the average as calculated by Lindberg, and, moreover, reports about reoccurring problems with the electoral registers in both countries call into question the actual validity of the official turnout rates.

Table 62. Comparative Summary of the Democratic Quality of Elections in Madagascar and Senegal

DQE	Madagascar	Senegal	Comparison
Participation	Participation was at a medium level in Madagascar. Turnout was generally higher in PE than in LE. Those PE that promised change attracted the highest turnout levels. Deficient electoral roll, in particular in 1998, afterwards hampered participation.	Participation was low in Senegal. Turnout was comparatively weak, but PE attracted more voters than LE. Deficient electoral roll, in particular in 2000, impeded participation but there have been slow improvements in the register since 2001.	Participation was limited in both countries. Official turnout rates are distorted due to deficient electoral registers, but in Senegal the situation has improved since 2001. PE attracted in both countries more voters than LE. Voter turnout tended to be higher in Madagascar.
Competition	Incumbents sought to constrain competition. Competition was comparatively high in the PEs of 1996 and 2001. Competition in LE decreased in the 2000s.	Incumbents sought to constrain competition. Competition was higher in the turnover PEs (2000 and 2012). Competition in LE was lower than in PE, due to the design of the electoral system.	Competition was in both countries subject to constraint by powerholders. In Senegal, LE are less competitive than PE; in Madagascar, competition in LE has decreased over time. In PE, both countries experienced more competitive and less competitive ones.
Legitimacy	Elections as a legitimate channel for leader selection were on the one hand accepted, but on the other often also accompanied by crises. The most severe one occurred in 2002, when the 2001 presidential election was contested. The election regime broke down completely in 2009.	Elections were accepted as a legitimate channel for leader selection. The conduct of elections was, however, repeatedly contested on the rhetorical level and through small-scale violence. In 1993 a constitutional judge was assassinated after the legislative election.	Elections as a legitimate channel for leader selection were accepted in both countries, but contestations nevertheless still occurred. These were more serious in Madagascar, where in 2002 an electoral crisis took place and in 2009 the election regime broke down entirely.

Source: Author's own composition.

6.2 Conditions for Constitutional Court Behaviour in Madagascar and Senegal

There are two conditioning factors for constitutional courts' behaviour. First, the legal framework defines with what powers the courts are vested to intervene in the electoral process. Second, in many cases the courts need to be activated by plaintiffs in order to adjudicate on electoral disputes. In this section, I thus compare with what powers the constitutional courts of Madagascar and Senegal are equipped as well as to what extent they are activated by potential litigants.

6.2.1 Supply: The Formal Powers for Intervention in the Electoral Process

The formal powers as prescribed in the constitution define, alongside the electoral laws, to what extent the constitutional courts can intervene directly in the electoral process. They are the preconditions for the degree of influence that constitutional courts can exercise on the democratic quality of elections. The formal powers of the Madagascan HCC and the Senegalese CC resemble each other to a large extent.

Both constitutional courts, the HCC and the CC, share four main powers to intervene directly in the electoral process. First, they can influence the electoral legal framework by reviewing laws before their official promulgation. Second, they can impact on the list of candidates by verifying the presidential candidacies and by examining disputed candidacies in legislative

elections. Third, they are entitled to adjudicate on electoral disputes and, fourth, they proclaim the final results of both the presidential and legislative elections. There are, nevertheless, differences in the scope of both courts. The major difference between the HCC and CC is that the former is vested with the power to verify election results on its own behalf. Having this type of power implies that the HCC can annul votes without any prior electoral petitions being submitted. In contrast, the CC only deliberates on topics that have been raised through electoral petitions. It thus holds only reactive power, whereas the HCC may initiate examinations and vote cancellations by itself.

In Table 63 below an overview of the courts' powers throughout the electoral process is provided. The table distinguishes between the direct and indirect powers of the courts. Direct powers allow the court to intervene in the respective matter before the completion of the voting process, whereas indirect ones entitle the court to adjudicate the matter in its ruling made on the election's final results. Thus, having direct power over the electoral register would allow the court to intervene in the registration process before the poll and, as such, in a moment when the register can still be corrected. In contrast, having indirect power over the electoral register only allows for adjudication after the poll and, hence, not the correction of the irregularity – only the mitigation of its effects.

Table 63. The Competences of the CC and the HCC Along the Electoral Cycle in Comparison

Electoral Cycle	Madagascar	Senegal
Legal Framework	Direct power: a priori constitutional review (1992–1998 mandatory review of all laws, since 1998 mandatory review of organic laws).	Direct power: a priori constitutional review (until 2001 mandatory review of all organic laws).
Electoral Register	Indirect power: no specific competence.	Indirect power: no specific competence.
Registration of Candidates	Direct power in: LE: examination of rejected candidacies, proclamation of list of parties and candidates. PE: certification of candidates, proclamation of list of candidates.	Direct power in: LE: examination of rejected candidacies, adjudication of registration disputes. PE: certification of candidates, proclamation of list of candidates.
Electoral Campaign	Indirect power: no specific competence. Since 2000, direct power: disqualification of candidates using public authorities' prerogatives during the campaign.	Indirect power: no specific competence.
Voting	Indirect power: adjudication of electoral disputes.	Indirect power: adjudication of electoral disputes.
Processing of Votes	Direct power: certification of results (including annulments), adjudication of electoral disputes, proclamation of final results.	Direct power: adjudication of electoral disputes, proclamation of final results.

Source: Author's own composition, based on respective constitutions and electoral laws.

Both constitutional courts hold similar direct and indirect powers for the different stages of the electoral cycle. They can intervene directly in the legal framework, the registration of candidates and the processing of votes. For the electoral register and the voting operations, they hold only indirect powers. The courts' prerogatives differ according to the stage of the electoral campaign. While the CC can only intervene indirectly, or in other words after voting, in the electoral campaign, the legal framework has granted the HCC since 2000 direct power

to intervene in the electoral campaign prior to its closure. The analysis of formal powers reveals that the two constitutional courts do not possess the power to intervene in all pre-electoral stages; these stages are particularly vulnerable in sub-Saharan Africa (Elklit 1999; Grömping and Coma 2015; Van Ham and Lindberg 2015). The HCC is formally slightly stronger than the CC. In the pre-electoral stages, the former has more leverage over the legal framework and the electoral campaign – while after the poll the HCC may verify the election results on its own behalf too.

6.2.2 Demand: The Quest for Electoral Adjudication

Constitutional courts need to be activated to be able to intervene in the electoral process. The number of referrals to the courts forms their potential influence on the democratic quality of elections. There is one caveat to this condition, however. If courts can render judgments as part of their general verification competences and without being specifically appealed to, the activation of the court is not required. This is, for instance, the case if courts hold the power to mandatorily review laws or to verify candidacies.

When it comes to the post-electoral stage, the Madagascan HCC is less reliant on activation by plaintiffs because, as noted, it is empowered to verify and rectify election results on its own behalf. However, the HCC has a higher potential likeliness of being activated by plaintiffs because the scope for challenging election results is greater in Madagascar than it is in Senegal. In Madagascar, voters and election observers (since 2000) may challenge election results. In Senegal, only candidates and their representatives may dispute these. Candidates and their representatives also hold standing rights in Madagascar. This difference can also be observed in the reality on the ground. A juxtaposition of the numbers of lodged petitions reveals that these differ massively between the two countries, as can be seen in Table 64. In Senegal, the highest number of petitions ever was 15 – coming after the 1998 legislative election. In Madagascar, the presidential election of 2001 attracted the highest number of complaints: 2,449. This was even an outlier for Madagascar, as in the other poll the number of petitions ranged between 145 and 712 – excluding two outliers in the other direction, 12 and 75 complaints respectively.

Table 64. Number of Complaints About the Provisional Results of Legislative and Presidential Elections in Madagascar and Senegal

Madagascar		**Senegal**	
Election	**No. of Complaints**	**Election**	**No. of Complaints**
PE, 1 1992	145	**PE 1993**	6
PE, 2 1993	No data	**LE 1993**	5
LE 1993	222	**LE 1998**	15
PE, 1 1996	76	**PE 2000, 1**	7
PE, 2 1996	306	**PE 2000, 2**	0
LE 1998	712	**LE 2001**	7
PE 2001 (1)	2449	**PE 2007**	2
PE 2001 (2)	n/a	**LE 2007**	0
LE 2002	272	**PE 2012**	2
PE 2006	12	**PE 2012, 2**	0
LE 2007	177	**LE 2012**	6

Source: Author's own compilation, based on constitutional court decisions.

Even though the number of lodged petitions is much higher in Madagascar than in Senegal, these complaints play a less prominent role in the decisions of the HCC – at least until 2002. Before then, the HCC focused mainly in its judgments on its own verification procedures while it also dismissed the majority of complaints. Since 2002, however, the HCC has downscaled its own verification procedures and reacted instead to electoral petitions. The Senegalese CC organised its judgments during the whole period of observation as responses to the complaints made. Nevertheless, the council also dismissed most frequently these petitions.

To sum up, formal standing rules have created a more accessible constitutional court in Madagascar than in Senegal. This accessibility is reflected in the much higher number of petitions that were lodged with the Madagascan HCC. Therefore, the HCC has theoretically more opportunities to intervene in the electoral process. Yet, the HCC is in practice just as unresponsive to electoral petitions as the Senegalese CC is. Better accessibility and higher numbers of petitions did not trigger more interventions being made.

6.3 Constitutional Court Behaviour in Madagascan and Senegalese Elections

The formal powers define a rough setting for the courts' interventions. The courts hold, however, discretionary power on how to interpret their formal prerogatives. Referrals to the court are important for activation, but they do not indicate in what way the courts will actually deal with the petition in question. To inform the answer to my research question about the contribution of constitutional courts to the democratic quality of elections, it is important to know in what stages of the electoral cycle these courts previously intervened – and, most importantly, whether their influence was functional or dysfunctional to the democratic quality of elections. Before I turn to the analysis of the functionality of the courts' interventions and their distribution along the electoral cycle, I first provide in Table 65 an overview of the number of votes that each court annulled when it ruled on the respective elections' final results.

Table 65. Extent of Annulled Votes by the Constitutional Courts in Madagascar and Senegal

Madagascar		**Senegal**	
Election	**No. of Annulled Votes**	**Election**	**No. of Annulled Votes**
MDG-PE, 1-1992	267,009 + 2 constituencies	**SEN-PE 1993**	None
MDG-PE, 2-1993	85,783	**SEN-LE 1993**	2 polling stations
MDG-LE-1993	109,011	**SEN-LE 1998**	9 polling stations
MDG-PE, 1-1996	56,582	**SEN-PE 2000, 1**	3 polling stations
MDG-PE, 2-1996	49,873	**SEN-PE 2000, 2**	None
MDG-LE-1998	18,732	**SEN-LE 2001**	None
MDG-PE, 1 ,1-2001	148,653	**SEN-PE 2007**	None
MDG-PE, 1, 2-2001	16,307	**SEN-LE 2007**	None
MDG-LE-2002	1,377 + 4 constituencies	**SEN-PE 2012, 1**	None
MDG-PE-2006	261	**SEN-PE 2012, 2**	None
MDG-LE-2007	66,385 + 2 constituencies	**SEN-LE 2012**	None

Source: Author's own compilation, based on the constitutional courts' decisions.

The juxtaposition of the various annulments reveals a major difference between the two courts. The Senegalese CC mostly refrained from annulling votes, while the Madagascan HCC engaged excessively in vote cancellations. In the Madagascan presidential elections of 1992, 1996 and 2001 the cancelled votes amounted to a share of 6.5, 1.5 and 3.5 per cent respectively of the total number cast. After the electoral crisis of 2002, the HCC reduced the extent of vote annulments – but in 2007 it returned to the old pattern. Thus, the HCC exercised in most elections a stronger influence on the election results than the CC did. This more intense activity by the HCC was not triggered by the high number of petitions submitted, but by the court's aforementioned power to verify election results on its own behalf.

6.3.1 Interventions on the Democratic Quality of Elections

How do the interventions in electoral matters by the Madagascan HCC and the Senegalese CC differ? I will present a comparison of the two courts' interventions in two steps. First, I will refer to my comprehensive sample of constitutional courts' interventions, and to the assessments of these interventions' functionality. Second, I present my sample of major interventions and compare it with the comprehensive sample. The sample of major interventions includes the most important constitutional courts' interventions in terms of political influence exerted.

In Table 66 I present how many court interventions of the comprehensive sample concerned participation, competition and legitimacy in Madagascar and Senegal respectively. One difference is evident even at first glance: the Madagascan HCC rendered more interventions than the Senegalese CC did. Furthermore, these interventions are unevenly distributed between the three different qualities of democratic elections. The majority of the Madagascan interventions were targeted at participation, while in Senegal competition was subject to the highest number of interventions. In both countries the remaining interventions concerned, with roughly equal share, the other two democratic qualities – namely legitimacy and competition in Madagascar, and participation and legitimacy in Senegal.

Table 66. Interventions on the Democratic Quality of Elections in Madagascar and Senegal

	Madagascar	**Senegal**
Participation	66 interventions (42/14/10)	33 interventions (14/4/15)
Competition	50 interventions (14/14/22)	49 interventions (15/16/18)
Legitimacy	48 interventions (24/10/14)	32 interventions (20/9/3)

Note: The numbers in brackets refer to functional, ambiguous and dysfunctional interventions respectively.
Source: Author's own analysis.

How functional were the courts' interventions for the three specified qualities of democratic elections? In Madagascar, the majority of interventions relevant for participation and legitimacy were functional by nature. The trend is clearer for participation than for legitimacy, however. Roughly two-thirds of the interventions on participation were assessed as functional, whereas only half of the interventions on legitimacy were functional – approximately one-third were dysfunctional meanwhile. In Senegal, only the interventions on legitimacy were predominantly functional. For the other two qualities, the amount of functional and dysfunctional interventions were roughly equal.

Let us turn to the interventions on competition, because in both countries the majority of these were dysfunctional by nature. Even though competition attracted in Senegal – in relation to the other democratic qualities – the highest number of interventions, the Madagascan HCC rendered approximately the same amount of interventions on competition. In Madagascar, a clear majority of these interventions were dysfunctional while in Senegal

the bulk of interventions were dysfunctional as well – but almost the same amount of interventions were either functional or ambiguous in character.

Empirical studies of African elections by Bratton, van de Walle and Lindberg show that competition and legitimacy are particularly vulnerable in sub-Saharan Africa, while participation is less impeded by the relevant political actors (Bratton 1998; Bratton and Van de Walle 1997; Lindberg 2006). Moreover, in sub-Saharan Africa – as in the rest of the world – it is observable that the extent of participation is influenced by the level of competitiveness (Blais and Lago 2009; Bratton and Van de Walle 1997). Therefore, it is at first sight a good sign that the HCC as well as the CC influenced the legitimacy of elections predominantly in functional ways. Thus, it seems that the courts have contributed positively to the legitimacy of elections. To confirm this first impression, a further investigation of the specific moments and means of these interventions, as well as an examination of the major decisions taken, is necessary.

In contrast, the dysfunctional nature of interventions related to competition suggests that the courts did not serve as guardians of fair competition but rather assisted in the distortion of it. However, this finding will also require further confirmation in the analysis to come. Turning to participation, the high number of related functional interventions in Madagascar require a caveat being made. Many of these punished obstacles to participation by nullifying votes. Such sanctions constrain the effects of participation, because they signal on the one hand that rule violations will be punished but on the other also that votes, the expressions of the electorate's will, will be discarded. This means that the interventions on participation were less positive, due to the less desirable side effects of annulling votes.

How did the courts in Madagascar and Senegal respectively influence the democratic quality of elections via major decisions? In Tables 67 and 68 below, the functionality of these interventions across the various elections are indicated. In Madagascar, the larger part of major decisions concerned competition and legitimacy. Thus, even though the comprehensive overview above reveals that the bulk of the HCC's interventions influenced participation, the analysis of the sample of major interventions shows that those interventions were rarely of any particular importance. The major interventions relevant for competition and legitimacy were predominantly dysfunctional, and they clustered together in the presidential elections of 2001 and 2006. The analysis of the major decisions furthermore points to a more negative influence by the HCC on legitimacy than the comprehensive assessment suggests. This is indeed plausible, as perhaps the most important decision taken by the HCC in electoral matters was the refusal to compare the PVs in 2002. This decision had a clearly negative influence on the legitimacy of the 2001 presidential election.

Table 67. Major Decisions Taken in Madagascar

	Participation	Competition	Legitimacy
PE 1992/1993			
LE 1993			
PE 1996		Registration of candidates	Electoral legal framework
LE 1998			Electoral legal framework
PE 2001		Electoral legal framework Electoral campaign	Processing of votes
LE 2002		Processing of votes	
PE 2006	Electoral register	Registration of candidates Electoral campaign	Electoral legal framework Processing of votes
LE 2007	Electoral register		

Note: Red designates dysfunctional interventions, green functional interventions and orange ambiguous interventions. Furthermore, the stage of the electoral cycle in which the intervention took place is specified in the respective field.
Source: Author's own analysis.

The major interventions in Senegal were also predominantly dysfunctional, but the trend is less straightforward than in Madagascar because the Senegalese CC rendered more ambiguous interventions. The Senegalese presidential elections of 1993 and 2007, as well as the legislative election of 2001, were not subject to any major dysfunctional interventions. However, there was no election in which only functional major decisions were rendered. The major decisions in Senegal concentrated on competition and legitimacy. The CC did not render any major decisions that were relevant for participation. The bulk of the major decisions concerned competition. Thus, the impression given from the initial comprehensive assessment that decisions on competition dominated is confirmed in this respect. Similarly, the CC can indeed be said to have pursued more dysfunctional interventions on competition than functional ones. The analysis of the major decisions on legitimacy adds reservations to the comprehensive analysis, however. In those types of decision, functional interventions prevailed – but no functional interventions on legitimacy appear in the sample of major decisions. Therefore, the CC's influence on legitimacy was less positive than the comprehensive analysis suggests. However, the CC's influence cannot be said to be predominantly dysfunctional either.

Table 68. Major Decisions Taken in Senegal

Election	Participation	Competition	Legitimacy
PE 1993			Processing of votes
LE 1993			
LE 1998		Electoral legal framework	
PE 2000		Electoral legal framework	
LE 2001		Registration of candidates Electoral campaign	
PE 2007			Electoral legal framework
LE 2007		Electoral legal framework Electoral legal framework	Electoral legal framework
PE 2012		Registration of candidates	
LE 2012		Electoral campaign	

Note: Red designates dysfunctional interventions, green functional interventions and orange ambiguous interventions. Furthermore, the stage of the electoral cycle in which the intervention took place is specified in the respective field.
Source: Author's own analysis.

The analysis of the major decisions taken confirms the observation that the two courts could not establish themselves as guardians of fair competition. There were indeed attempts made to wield functional influence, in particular in Madagascar in 1996 – when the HCC upheld the election date and clarified the rules for incumbents in electoral campaigns – as well as in Senegal in 2001 – when the CC prohibited the use of Wade's name and portrait in the electoral campaign. However in both cases these attempts happened at earlier stages of the electoral process, and the courts were subsequently subject to pressure. In Madagascar, HCC members were reportedly bribed with cars before they annulled many votes in an opaque manner in a close race between Ratsiraka and Zafy. In Senegal, the CC was publicly attacked by Wade through a letter openly questioning its judgments. As a consequence, the CC took a more timid approach when judging electoral campaign matters after the poll.

The dysfunctional influences on competition were, however, stronger in both countries, even if they clustered together in certain time periods. Even though the two courts resemble each other by both having a dominance of dysfunctional interventions on competition, there is nevertheless an important difference to be noted. In Senegal, the CC never prevented an electoral turnover. In 2012, it seriously hampered the probability of electoral turnover by admitting Wade to the presidential race – but eventually Sall won the election. In contrast, the HCC did not contribute to a peaceful electoral turnover in 2002 even though we do not know what would have happened if Ravalomanana had agreed to run in a second round.

The analysis of the major decisions taken adds another perspective to the results emerging from the comprehensive assessment. Whereas the latter suggested a rather positive influence on legitimacy, the focused assessment reveals a more negative tendency therein. This is particularly true for Madagascar, where since 1998 several interventions have had a dysfunctional effect on legitimacy – most prominently, the one in the electoral crisis of 2002. In Senegal, less interventions concerned legitimacy – and those were rather ambiguous than dysfunctional in nature. Yet, no functional influence on legitimacy is observable in Senegal according to the examination of major decisions taken.

We have, as noted, learned from other studies that especially the competition and the legitimacy of African elections are vulnerable (Bratton 1998; Bratton and Van de Walle 1997; Lindberg 2006). My findings show that the Madagascan HCC and the Senegalese CC rendered

dysfunctional interventions in these realms, and therefore did not contribute to the democratic quality of elections. Thus, they did not serve as guardians of the three identified democratic qualities but in fact rather assisted in impeding competition and legitimacy in certain critical moments.

6.3.2 Interventions Along the Electoral Cycle

How were the courts' interventions distributed along the electoral cycle? Table 69 shows that in both countries the voting operations attracted the main brunt of court interventions, and that by significant margins. Thus, the courts are judges of the voting day in the first place. In Madagascar, the processing of votes and the electoral campaign were also often subject to HCC interventions. In Senegal, the registration of candidates and the processing of votes also attracted comparatively high numbers of interventions.

Table 69. Distribution of Court Interventions Along the Electoral Cycle in Madagascar and Senegal

	Madagascar	**Senegal**
Electoral Legal Framework	14 (4/5/6)	13 (3/5/7)
Electoral Register	21 (0/13/9)	9 (2/0/6)
Registration of Candidates	12 (5/4/3)	21 (10/6/5)
Electoral Campaign	26 (2/5/18)	9 (1/6/2)
Voting Operations	51 (49/2/4)	39 (20/7/15)
Processing of Votes	31 (20/8/7)	19 (13/6/0)

Note: The numbers in brackets refer to functional, ambiguous and dysfunctional interventions respectively.
Source: Author's own composition.

In both countries, the majority of interventions concerned the voting operations themselves and the processing of votes – and thus matters that happened during or after voting, and not during the vulnerable pre-voting stages. Empirical studies of electoral manipulations in African elections point out that the pre-voting stages of the electoral process require special attention because they are frequently subject to manipulation attempts (Elklit 1999; Grömping and Coma 2015; Van Ham and Lindberg 2015). To leverage the constitutional courts' influence on the democratic quality of elections, interventions in the pre-voting stages are necessary. Yet, both courts studied were less concerned with these sensitive stages.

There are several identifiable reasons for this imbalance. The formal rules did not vest the HCC and the CC with specific competences for all stages of the electoral cycle. In particular, for adjudication on the electoral register and the electoral campaign the courts' competences are limited. Furthermore, it is up to the potential litigants on which specific matters they challenge the electoral process. Moreover, the different reaches of the interventions is also a factor that comes into play. The review of an electoral law requires one intervention being made, and impacts the whole country. In contrast, in the voting process many small-scale irregularities can take place that require many separate interventions. Thus, there are limits to the comparability of the numbers of interventions.

The circumstance that the two constitutional courts were less concerned with pre-voting stages was further exacerbated by the timing of the courts' interventions. I derived from the academic as well as from the practitioners' literature that courts should respond to electoral irregularities in order to improve the democratic quality of elections. Responses and sanctions increase the costs of electoral manipulations, and may therefore trigger a change in the perpetrators' behaviour (International IDEA 2010; Van Ham 2012). Furthermore, it is better for the democratic quality of elections if courts adjudicate on electoral irregularities in close proximity to their actual occurrence. Timely adjudication allows for the correction of any irregularities before the voting as such has taken place, and consequently the upholding

of the election's integrity (International IDEA 2010, 9; Masclet 1998, 38). Moreover, timely adjudication prevents the dilemma of vote annulments arising. This practice always carries with it the risk that credible votes are also affected, and that voters are as a consequence disfranchised. In addition, the cancellation of many votes decreases the legitimacy of an election. The cancellation and subsequent repetition of an election is the only viable option to avoid this problem. However, the repetition of an election is an expensive endeavour, particularly so in poor countries.

Table 70. Distribution of Contested Matters According to the Moment of Occurrence and Moment of Adjudication

	Moment in which Contested Action Happened		Moment in which Contested Action was Adjudicated	
	Pre-voting	**(Post-)voting**	**Pre-voting**	**(Post-)voting**
Madagascar	72	82	23	131
Senegal	52	58	36	74

Note: Pre-voting comprises the following stages of the electoral cycle: electoral legal framework, electoral register, registration of candidates and electoral campaign. Post-voting indicates the stages of actual voting and the processing of votes.
Source: Author's own composition.

Table 70 shows a comparison of the contested electoral issues. I distinguish in the table the moment in which the contested actions happened and the moment in which the respective action was adjudicated on. We can observe that in each country roughly half of the contested actions happened in the pre-voting and the post-voting stages respectively. I want to stress, however, that the pre-voting stages comprise more steps of the electoral cycle than the post-voting ones do. When it comes to the moment of adjudication, the proportion is even less balanced. The vast majority of contested irregularities were adjudicated on after the closure of the poll. In Madagascar this trend is more striking than in Senegal. This means that the constitutional courts not only dealt less with the vulnerable pre-voting stages but also that their interventions concerning those pre-voting stages were less effective too. The reason for the lower effectiveness is the time lag of the courts' responses. After the poll, the irregularities cannot be corrected anymore. Therefore the leverage of the courts' interventions is limited, because they can no longer improve the democratic quality of the electoral process – only punish irregularities through the annulment of votes.

6.4 The Constrained Guardians: Explanations from the Study of Judicial Politics

So far, I have presented the results of my comparative analysis and showed how the constitutional courts of Madagascar and Senegal intervened in the electoral process – as well as how functional these interventions were for ensuring the democratic quality of elections in the two countries. In this section, I discuss how my findings correspond to the literature on judicial politics. The literature on elections offers empirical evidence that judicial independence is beneficial for electoral integrity, and that is in turn good for upholding democratic elections (Birch and Van Ham 2017; Lindberg 2006; Van Ham 2012). My empirical analysis of the constitutional courts in Madagascar and Senegal showed, however, that the courts' contribution to the democratic quality of elections was limited, and that competition in particular was influenced in negative ways. This result triggers the question of why the courts were not able to render a more positive contribution to the upholding of democratic elections. In the following, I refer to theories from Judicial Politics on the formal insulation of courts through appointment rules, the strengthening of courts through public support and the role of political competition for judicial independence.

6.4.1 Formal Insulation

Judicial appointments offer political actors entry points to the influencing of courts (see e.g. Fombad 2014, 251; Ginsburg 2003, 42). The degree of leverage that politicians enjoy depends, theoretically at least, on the specific appointment rules in place. Several authors agree that appointment rules that involve at least two appointment bodies and/or integrate judicial bodies into the selection process are more beneficial to guaranteeing the independence of courts (Feld and Voigt 2003, 502; Herron and Randazzo 2003, 426; Horowitz 2006, 130, 132; Melton and Ginsburg 2014, 196; Ríos-Figueroa 2011, 29). Thus the more actors that are involved in the appointment of constitutional judges and the greater the share of non-political actors in this process, then the more independence these courts should enjoy in principle. Fombad argues, however, that such diversified appointment mechanisms fail in the African context of unstable democracies, because the continent's presidents usually hold strong majorities in the legislative branch and also exercise control over judicial appointment bodies too (Fombad 2014, 257, 260). Appointment policies nevertheless matter in the African context, because the power that constitutional courts hold stimulates the desire to gain control over those courts and to shape perceptions of them (Fombad 2014, 251; Stroh 2016, 10). How was the appointment of constitutional judges organised in Madagascar and Senegal respectively then, and how did this influence the trajectories of their courts?

Appointment rules in Madagascar and Senegal differ considerably. In Senegal, the president of the republic enjoyed the absolute power to appoint all five constitutional judges up until 2016 (C-63/92-Art. 80 bis, C-01-Art. 89). Ginsburg considers exclusive appointment rights for the executive as unusual for democracies, because it dilutes the potency of the idea of constitutional checks and balances (Ginsburg 2003, 44). Fombad further sharpens this argument. Accordingly, executive appointment rights grant the power to control the courts to those who shall be controlled by them (Fombad 2014, 266). The presidential appointment power was only constrained by professional criteria that the constitutional judges to be needed to fulfil. These criteria are defined in the *loi organique* on the CC. Therefore the criteria are, theoretically speaking, ultimately a rather weak constraint to presidential power, because the law can be more easily amended than the constitution can.

In Madagascar, meanwhile, a representative appointment system is in force. Thus, the power to appoint constitutional judges is attributed to a number of different bodies. Each of these may appoint a share of judges without consulting with the other appointment bodies. According to the constitution of 1992, the president of the republic, the National Assembly, the Senate and the Conseil superieur de la magistrature were responsible for selecting constitutional judges (C 1992, Art. 107, C 1998, Art. 119). The president could appoint three out of nine constitutional judges. Thus, the Madagascan as well as the Senegalese constitution granted the president the power to influence the composition of the respective court. However the Senegalese president enjoyed absolute power in this regard, while the Madagascan president could, theoretically, select only one-third of the HCC judges. Hence, the HCC should have enjoyed more independence according to the theory of formal insulation – not only because several actors were entitled to appoint its judges, but also due to the fact that the judiciary was involved in the process too. Fombad observed, however, that these assumptions do not actually hold true in the African context.

Let us observe how the rules were applied in Madagascar and Senegal, and how this influenced the work of the courts. In both countries the executive used the appointment of constitutional judges to exercise influence over the court. In Senegal, the nature of the appointment rules suggested already the strong influence of the president therein. While

interview partners assessed that all presidents within the period of observation had used their appointment prerogatives to their advantage, at least the appointment of the first CC president in 1992 promised a moderate court. The first CC president, Kéba Mbaye, was widely respected and had chaired the commission for the reform of the electoral law. Therefore, observers considered him compatible with the establishment of a strong court. Furthermore, then-President Diouf had consulted with opposition leader Wade about this appointment (Coulibaly 2005, 76). Later appointments to the CC presidency were decided unilaterally by the respective presidents meanwhile. In particular the appointments by Wade in 2002 and in 2010 were strongly criticised, because Mireille Ndiaye and Cheikh Tidiane Diakhaté respectively were considered partisan. In the first case, partisanship was alleged due to family ties to a former PDS leader; in the second, Diakhaté had demonstrated his loyalty through pro-Wade decisions made in his previous positions.

Despite the strong presidential influence exerted on the CC through these appointments, two electoral turnovers occurred under the supervision of judges appointed by the respective incumbent. The time periods after these turnovers were the only occasions during which the CC was not dominated by judges who had been appointed by the incumbent. However, these periods did not last long. Wade, as with Sall, could appoint his first constitutional judges after three months in office. Wade had nominated all constitutional judges after less than two years, Sall after three.

In Madagascar, the executive leverage over the appointment of constitutional judges should have been lower according to the theory of formal insulation – because the appointment rules vested all three branches of government with appointment powers. However, two factors impeded the potential moderating influence of these rules. First, the appointment rules were only arbitrarily applied. Up until 2001, the transitional judges that had been appointed in 1992 remained on the constitutional bench. New judges were appointed out of political considerations before the upcoming presidential election of 2001. The ensuing electoral crisis led to a reshuffle of the court, and after the crisis new judges were appointed. The long neglect of the regular appointment schedule introduced unpredictability into the process. Constitutional judges not only could not rely on formal rules to predict the end of their terms, but were dependent on the decisions of political actors too. The sudden new appointments made out of political necessities further eroded the legitimacy of the court.

Second, the low level of competition as well as the formal design of the Senate and the CSM allowed the president to dominate these institutions and in turn their appointments. The appointment of the transitional judges in 1992 was comparatively balanced. The HAE, led by Zafy, appointed five out of 11 judges, and the institutions dominated by the authoritarian ruling party selected the remaining six. Thus, the ruling party controlled the majority of the judges – but the others were appointed by a genuine opposition power. However Zafy lost the support of the judges appointed by him in the years afterwards, and in 1996 the HCC approved his impeachment. In 2001, Ratsiraka controlled majorities in both houses of parliament. In the National Assembly the AREMA held together with their allies 74 per cent of the seats, and in the Senate 79 out of 90 seats. Since the constitutional revision of 1998 the judicial commission CSM has been headed by the president of the republic, which guarantees him influence over the commission's work (C 1998-Art. 98). When Ravalomanana appointed new constitutional judges in August 2002 he had less control over the parliament. He neither held a majority in the National Assembly nor in the Senate. However he did chair the CSM, while the presidency of the Senate was held by his former campaign director Guy Rajemison Rakotomaharo since July 2002. I do not have at my disposal information about whether the

appointments of 2002 were voted for by the whole chamber, or whether alternatively the chambers' presidents played a decisive role therein – as they had done in November 2001. The Madagascan case nevertheless confirms Fombad's assertion that diversified appointment mechanisms fail in the context of Africa's third-wave democracies, due to the president's close control over both the legislative branch and the judicial commission (Fombad 2014, 257, 260).

To sum up, the appointment of constitutional judges was controlled by the executive in both countries examined. The choices of the executive were repeatedly influenced by political rationales. Appointment decisions were consequently criticised by the public, and thus tarnished the work and reputation of the respective courts.

6.4.2 Public Support as a Defence Shield

Theories of public support posit that courts can render bolder decisions if the level of public confidence in courts is high. In such a situation, the public protects the courts from non-compliance with their decisions or other interferences (Staton 2006, 98–99; Vanberg 2001). In democratising regimes, courts need to actively build up their legitimacy (Gibson and Caldeira 2003, 24). They can do this by demonstrating their independence through strategic decision making, by reaching out to the public and by seeking alliances with potential supporters both inside and outside their country (Ellett 2013; Epstein, Knight, and Shvetsova 2001; Trochev and Ellett 2014; Widner 2001).

There are no studies to date that have analysed public opinion towards the constitutional courts in Madagascar and Senegal. Therefore, I draw instead on the statements that I collected during my interviews with experts in both countries. These interviews confirm the findings by Aydin et al. (2016) as well as those by Salzman and Ramsey (2013) that more educated and informed persons in electoral democracies tend to have negative perceptions of the judiciary. Experts in Madagascar and Senegal gauged their respective constitutional courts as dependent jurisdictions. Accordingly, the courts rather seek to please the president in power, protect his preferences and to prove their loyalty to the executive. In Senegal, the experts painted a picture of a weak court that is somewhat characterised by its non-activity in politically salient matters. In contrast, an expert in Madagascar stated that the HCC existed to approve undemocratic political changes. This statement points to the involvement of the HCC in the impeachment of Zafy in 1996, the electoral crisis in 2002 and the ousting from power of Ravalomanana in 2009.

Beyond the opinions of experts, there are also hints of the mistrust harboured towards the courts by the wider public too in both countries. Prominent examples are protests against the courts. The protests during the Madagascan electoral crisis in 2002 were also targeted against the HCC's refusal to compare the PVs from different sources. In Senegal, the protests against Wade's third-term attempt in 2012 was explicitly aimed at the CC as well. Another sign of critiques against the courts are the reform proposals for them that were prominent in the political debate. In Senegal, these reform proposals were discussed within the framework of the *Assises nationales* that were launched by the opposition after the boycott of the legislative election in 2007. In Madagascar, reforms were discussed during the drafting of the 2010 constitution. Furthermore, mistrust in the HCC became evident in the initiative to install a special electoral court for the adjudication of the first election after the 2009 breakdown, in 2013. To sum up, the negative statements in the expert interviews, the protests related to the courts as well as the reform proposals suggest that the two constitutional courts do not enjoy

wide public support. Therefore, they cannot count on protection by civil society and the wider public if they render decisions that disfavour powerholders.

Are there attempts made by the courts to build public support through strategic decision making or off-bench activities? Before answering this question, it should be noted that constitutional courts face in electoral matters constraints to strategic decision making. Epstein and her co-authors showed that courts can construct their legitimacy and power if they render assertive decisions in cases that are not too important for the political branches and not too unimportant to be noticed by the public (Epstein, Knight, and Shvetsova 2001). Electoral matters are, however, of the utmost importance for political leaders, and courts face enormous pressure during this period – as explained in Section 2.4. Interview partners in Madagascar and Senegal stated that the courts receive attention in particular during the electoral period, and would not be well known without their electoral competences. Therefore, the courts are likely to receive public attention for assertive decisions taken in electoral matters – but the political stakes are also especially high.

In Senegal, we can observe many cases in which the CC served the ruling party's preferences. Examples are the rubberstamping of the rule amendments for the national counting commission in 1993, the increase of the National Assembly's seats and consequent adjustment of the electoral system in 1998, or the extension of the MP terms in 2006. However, there were also instances in which the CC interpreted its competences broadly or constitutional principles purposively, thus in a more democratic sense. This happened in 1993 during the stalemate at the CNRV, and in 2001 in the run-up to the legislative election. The decision of 1993 was, however, followed by the resignation of the council's president, and the decisions of 2001 were answered by a public letter of critique from the president and partial non-compliance with the decision. Thus, in 2001 the CC overestimated its power to strike down presidential preferences. The independence of the 2001 decision was nevertheless recognised by experts (SEN-5; SEN-6; SEN-13), but it was also noticeable that the CC was not successful in this endeavour and rather confirmed the impression of a weak court.

The major HCC decisions were predominantly dysfunctional for democratic elections, as already discussed above. Among these rulings, it was probably the refusal to compare the PVs after the presidential election of 2001 that attracted the most public attention. This verdict was negatively perceived among the general public. However, the HCC rendered also major functional rulings in 1996 when it upheld the regular calendar of the presidential election and clarified how the administration shall deal with incumbents during the electoral campaign in order to guarantee the neutrality of the administration. These rulings were, however, not successful in building public confidence, because they were counteracted by an opaque decision being taken on the close race between Ratsiraka and Zafy in the same election. Furthermore, it was the HCC itself that did not abide by its own jurisprudence in later rulings. While the HCC deemed in 1996 the upholding of the electoral calendar more important than promulgating new laws on voter identification, it approved the postponement of the subsequent legislative election for the very reason of a new law on voter identification. The court was harshly criticised for the postponement of the legislative election, and the house of HCC President Boto was even attacked in the course of these protests. Moreover, in 2006 the HCC ignored its own ruling from 1996 on appropriate behaviour by the administration in electoral campaigns when it adjudicated on the campaign activities of the Ministry of Health and Education's civil servants in the presidential election. All in all, the HCC did not, then, build up public support through strategic decision making.

There were, however, signs that the Madagascan HCC expected the public to notice its decisions and that it could educate them through its rulings. This expectation was reflected in a verdict on the presidential election of 1992, when the court expressed its disappointment that certain irregularities reoccurred even though it had already sanctioned them in its decision rendered on the referendum. The idea that decisions by constitutional courts are widely recognised among the general public may be overly optimistic, as there are structural as well as practical barriers to this. These barriers are in principle similar in Madagascar and Senegal, but in the latter they are actually more severe. Structural barriers are the low levels of literacy as well as of legal literacy, alongside a limited knowledge of the official language – thus undermining the general ability to understand abstract legal texts. Literacy rates for the 1990s are rarely available. In 1988, the literacy rate in Senegal was estimated at 26.9 per cent. The World Bank gauged the Madagascan literacy rate in 2000 at 70.7 per cent. In 2009, the literacy rates in Madagascar and Senegal were 64.5 per cent and 49.7 per cent respectively (World Bank 2017). In Madagascar, Malagasy and French are official languages. Thus official documents are frequently published in both languages, which makes them theoretically more accessible. In Senegal, only French is the official language. The OIF gauged in 2014 that only 29 per cent of the Senegalese population actually speak French (OIF 2014). This implies that a large majority of Senegalese citizens are not able to follow court decisions; to be able to do this, these verdicts need to be accessible. The rulings of both courts are published in the official gazettes. These gazettes do not appear regularly however, and are not read by the wider public.

Do the courts reach out by going public or by seeking alliances? In my interviews, endeavours to build alliances with domestic and international actors were not mentioned. The Madagascan and Senegalese constitutional judges attended international meetings like those of ACCPUF or the Council of Europe's Venice Commission, but there is no evidence that this involvement has had an influence on the courts' work. In the Senegalese case, I observed that the CC actually hid from the public rather than pursuing public relations strategies. Until 2017 the CC did not have a website on which it provides information about its work. A new website was just launched in the run-up to the legislative elections of July 2017.[146] This was peculiar, since Staton found in 2006 that "nearly every constitutional court in the world maintains a wbsite" (Staton 2006, 98). While this assessment may have been biased by a focus on European and American courts, a look to Senegal's neighbouring countries reveals that constitutional courts having websites represents also in the West African region a norm rather than an exception.[147]

In contrast, the Madagascan HCC runs a website that has in recent years been regularly updated.[148] Previously, the HCC also held a website. For instance, the second ruling on the contested presidential election of 2001 referred to the court's website for further information. The internet is not the information channel with the widest reach, neither in Madagascar nor in Senegal, but the lack of a website nevertheless reflects a more general attitude on the part of the Senegalese CC. Constitutional judges in Senegal state that they are not entitled to make public statements. The author could experience this reluctance to interact with the public in a

[146] Available online at: http://conseilconstitutionnel.sn/acceuil/.

[147] Examples are the websites of the constitutional courts of Burkina Faso (http://www.conseil-constitutionnel.gov.bf/), Côte d'Ivoire (http://www.conseil-constitutionnel.ci/), Mali (http://www.courconstitutionnelle.ml/index.php) and Niger (http://cour-constitutionnelle-niger.org/).

[148] Available online at: http://www.hcc.gov.mg/.

wider sense during her fieldwork, when in particular acting judges sought to avoid giving interviews. In both cases the countries sought to limit contact with current judges to only one representative, arguing that the commissioned constitutional judge could answer all the author's questions.

Experts in Senegal confirmed the impression that the country's constitutional judges avoid the general public (SEN-4). The speeches of the CC president at presidential inauguration ceremonies are a rare exception to this practice (Diop 2013). Furthermore in 2011 and 2012, during the protests against Wade's third-term ambitions, the CC was for the first time seconded by a PR advisor. Dominic Ndecky, a journalist at the Senegalese state channel RTS, was charged with this task. However, this intervention could not improve the reputation of the CC as the protests and statements in my interviews showed. Even though the HCC was slightly more outgoing through having a website and the regular issuing of press statements, it still did not succeed in the building of a positive image either – because these attempts could not outweigh the court's record of rendering dysfunctional decisions.

Thus, the Senegalese CC rather adopted so far a strategy that "seeks anonymity rather than publicity for the institution's work" (Gibson and Caldeira 2003, 24). This is a behaviour that Gibson and Caldeira assume to contribute to judicial legitimacy shortfalls in democratising countries. In contrast, Staton (2006, 111) points out that judicial legitimacy may also be grounded in the idea that judges are isolated from daily political life and that public relations activities might generate the image of a politicised court. However, the chosen anonymity strategy did not lead to more public confidence in the Senegalese case.

6.4.3 Political Competition and Court Behaviour

The insurance theory is a prominent one for the explanation of the establishment, and subsequent behaviour, of courts. Accordingly, high levels of political competition foster judicial independence. In fear of losing office, incumbents seek insurance for their policies as well as for themselves. An independent judiciary can offer such insurance (Finkel 2008; Ginsburg 2003; Helmke and Rosenbluth 2009; Landes and Posner 1975; Ramseyer 1994; Stephenson 2003). Opponents of the insurance theory criticise how it advances an overly simplistic conceptualisation of political actors' incentive structures, ignores further explanatory factors and misconceives courts as passive actors (Hirschl 2004b; Staton 2004; Vanberg 2000; VonDoepp 2009; Whittington 2003). Further, scholars assume that political competition has a different effect in third-wave regimes than it does in stable democracies (Larkins 1998; Popova 2012; VonDoepp 2009). They assert that in less stable democracies political competition leads to more pressure being exerted on courts. Recent cross-country tests of this theory find contradicting results. The findings of Randazzo and his co-authors as well as Aydin confirm that political competition in stable democracies enhances judicial independence (Aydın 2013; Randazzo, Gibler, and Reid 2016). Aydin further finds that competition has a reverse effect in developing democracies. In contrast, the group around Randazzo discovered that the positive effect of competition on judicial independence indeed decreases in developing democracies, but does not turn into a negative effect in authoritarian regimes. Epperly observes a positive effect of political competition in authoritarian regimes (Epperly 2017).

My thesis focuses on the question of how constitutional courts contribute to the democratic quality of elections; competition is one element of the latter. Thus, I am interested specifically in analysing whether constitutional courts serve as guardians of competition and not in examining whether competition stimulates judicial independence. However, the insurance

theory has such prominence in the field of Judicial Politics that I want to consider it at least briefly. Furthermore, I introduced in my theory chapter the debate about whether the rule of law is a prerequisite for democracy and whether it should be developed prior to the introduction of elections. Carothers is one of the scholars who questions this assumption, because he considers the rule of law and democracy to be processes that are "inextricably intertwined" (Carothers 2007, 18). Thus, it is the subject of debate how the rule of law – or judicial independence as an indicator – and competition relate to each other. Therefore, I consider it useful to invert my assumption about the causal direction between courts and competition in this section.

For the analysis of the influence of competition on court behaviour, I focus specifically on presidential elections. I consider the Madagascan ones of 1996 and 2001 as well as the Senegalese presidential elections of 2000 and 2012 as highly competitive. The presidential elections of 1993 and 2006 in Madagascar and the ones of 1993 and 2007 in Senegal were, in contrast, not very competitive. In my juxtaposition of them, I will focus on several aspects of court behaviour: the number of interventions, the extent of vote annulment and the functionality of interventions for the democratic quality of elections. Furthermore, I analyse whether the level of court activation – meaning the number of lodged petitions – and the level of informal interference with the courts varied in competitive presidential elections. In Table 71, I present the results of this comparative analysis.

Table 71. The Influence of Competitiveness on Constitutional Court Behaviour, Electoral Complaints and Informal Interference in Madagascar and Senegal

	High Competitiveness	Low Competitiveness	Result
Number of Inter-ventions	MDG-PE-1996: 28/29 MDG-PE-2001: 23/28 SEN-PE-2000: 17 SEN-PE-2012: 8/10	MDG-PE-1993: 16 (17) MDG-PE-2006: 28/30 SEN-PE-1993: 14 SEN-PE-2007: 18	Level of competitiveness does not influence the number of interventions.
Number of Annul-ments	MDG-PE-1996: 1st round 56,587 votes, share of 1.5%; 2nd round 49,873 votes, share of 1.5% MDG-PE-2001: 148,653 votes, share of 3.5% (first decision) SEN-PE-2000: 3 polling stations SEN-PE-2012: no annulments	MDG-PE-1993: 267,009 votes, share of 6.53% MDG-PE-2006: 261 votes SEN-PE-1993:no annulments SEN-PE-2007: no annulments	Competitiveness of elections does not influence the extent of annulments. MDG-PE-1996 is nevertheless unique, because the extent of annulment exceeded the winning margin in the run-off.
Functio-nality of Inter-ventions	MDG-PE-1996: 18/8/4 MDG-PE-2001: 11/7/4 SEN-PE-2000: 10/2/4 SEN-PE-2012: 3/4/5	MDG-PE-1993: 8/7/0 MDG-PE-2006: 5/3/22 SEN-PE-1993: 3/5/6 SEN-PE-2007: 4/4/10	More functional interventions in highly competitive elections, in particular in Madagascar. No clear tendency for dysfunctional interventions in lowly competitive elections.
P Inter-ventions	MDG-PE-1996: 22 (13/6/3) MDG-PE-2001: 5 (5/0/0) SEN-PE-2000: 5 (3/0/2) SEN-PE-2012: 3 (1/1/1)	MDG-PE-1993: 9 (5/4/0) MDG-PE-2006: 5 (0/0/5) SEN-PE-1993: 5 (0/1/4) SEN-PE-2007: 8 (2/0/6)	Highly competitive elections do not attract more interventions relevant for participation. Slight trend of more functional interventions in highly competitive elections. Slight trend of more dysfunctional interventions in lowly competitive elections.
C Inter-ventions	MDG-PE-1996: 2 (2/0/0) MDG-PE-2001: 8 (3/3/2) SEN-PE-2000: 7 (3/2/2) SEN-PE-2012: 7 (1/2/4)	MDG-PE-1993: 3 (1/2/0) MDG-PE-2006: 11 (0/2/9) SEN-PE-1993: 7 (3/2/2) SEN-PE-2007: 4 (0/1/3)	Highly competitive elections do not attract more interventions relevant for competition. Interventions in highly competitive elections are not more dysfunctional. Slight tendency of fewer functional interventions in lowly competitive elections.
L Inter-ventions	MDG-PE-1996: 6 (3/2/1) MDG-PE-2001: 9 (3/4/2) SEN-PE-2000: 4 (4/0/0) SEN-PE-2012: 6 (2/3/1)	MDG-PE-1993: 3 (2/1/0) MDG-PE-2006: 14 (5/1/8) SEN-PE-1993: 2 (0/2/0) SEN-PE-2007: 6 (2/3/1)	Highly competitive elections stimulate slightly more interventions relevant for legitimacy (MDG-PE-2006 is an outlier). No clear trend in the functionality of the interventions.
Number of Com-plaints	MDG-PE-1996: 1st round 76, 2nd round 306 MDG-PE-2001: 2449 SEN-PE-2000: 7 SEN-PE-2012: 2	MDG-PE-1993: 145 MDG-PE-2006: 12 SEN-PE-1993: 6 SEN-PE-2007: 2	In Madagascar, highly competitive elections attracted large number of petitions. This trend is not valid for Senegal.
Informal Inter-ference	MDG-PE-1996: specific report of interference MDG-PE-2001: specific reports of interference SEN-PE-2000: no specific report of interference SEN-PE-2012: specific reports of interference	MDG-PE-1993: no specific report of interference MDG-PE-2006: no specific report of interference SEN-PE-1993: specific report for the election year SEN-PE-2007: no specific report of interference	There are more specific reports of informal interference with CC in highly competitive elections.

Note: P indicates participation, C competition and L legitimacy.
Source: Author's own compilation.

The juxtaposition shows that the level of competitiveness does not influence the number of interventions made by the respective constitutional courts. Nor does competitiveness

influence the extent of vote annulment. The case of the 1996 presidential election in Madagascar is, however, unique. The level of annulment did not follow a theoretical pattern, but it is the only election in which the number of annulled votes exceeded the winning margin. This phenomenon was most likely caused by the high level of competition present.

The level of competitiveness matters nevertheless in some respects. Highly competitive elections stimulated higher numbers of functional interventions, in particular in Madagascar. This result deserves a closer look, in order to see whether the trend holds true if the democratic quality of elections is disaggregated. The functionality of interventions on participation differs between highly and lowly competitive elections. Highly competitive elections stimulated a higher number of functional interventions on participation, while lowly competitive elections incited a higher number of dysfunctional ones. This pattern meets the expectations of the insurance theory that strong competition enhances independent decisions. However, for the other two democratic qualities of elections such patterns cannot be observed. Highly competitive elections attracted slightly more functional interventions on competition than lowly competitive elections did. Yet, the analysis of the major decisions taken indicates that in highly competitive elections more dysfunctional interventions on competitions were rendered. Only the Madagascan presidential election of 1996 experienced a functional major intervention on competition.

In Senegal, competition does not matter for the number of petitions lodged with the CC. In Madagascar, the competitiveness of elections influences the number of petitions submitted. In the highly competitive elections, many more complaints were filed than in the lowly competitive ones. There are two ways to interpret this variance in the Madagascan case. On the one hand, the high level of competitiveness may have encouraged electoral manipulations to which the plaintiffs respond with their petitions. On the other, the close race may have also increased the incentives to challenge the results in order to secure more votes for the respective candidate. In either case, the HCC was asked to settle the dispute.

In my interviews, experts assessed a general level of informal interference with the constitutional courts in both countries. Furthermore, several specific episodes of informal interference were accounted for. In Madagascar, two of these episodes happened during highly competitive elections. In 1996, Ratsiraka was said to have bribed the constitutional judges with cars before the announcement of the election's final result. A more severe seqeunce of interferences occurred after the presidential election of 2001. The appointment of the judges was already manipulated, as explained above. After the poll, the judges received serious threats and some of them even had their houses attacked. Furthermore, the judges were brought to a hotel outside Antananarivo to deliberate there on the final results of the election. However, the HCC was not only pressurised during the highly competitive elections. In 1997, the house of then-HCC President Boto was attacked after the court had approved the postponement of the legislative election. Thus highly competitive elections incited pressure on the court, which confirms Popova's strategic pressure theory. However, in the Madagascan case fierce competition is not a necessary condition for informal interference with the court.

For the Senegalese case, I am not aware of specific accounts of informal interference with the CC during the 2000 presidential election. In contrast, the CC was subject to massive pressure during the presidential election of 2012. In the run-up to the election, the salary of the CC president was increased and all constitutional judges received new cars for their work. In the course of public protests, threats against the CC were chanted and the body also received a hostile letter from a young opposition politician. The other reported episodes of informal

interference occurred in relation to legislative elections. Thus strong competition motivated pressure on the CC, but not in all instances of high competition.

All in all, the level of competitiveness had in some instances an influence on the behaviour of constitutional courts – and also on the behaviour towards them. This trend is more evident for the Madagascan case than for the Senegalese one. However, the directionality of the influence is not straightforward. While higher competitiveness correlates with higher numbers of functional interventions on participation, competitiveness attracts in the Madagascan case at the same time more electoral petitions and more informal interference with the HCC. The increase of functional interventions on participation confirms the insurance theory. However, two caveats to this finding need to be noted. First, participation is, as argued by Lindberg (2006) as well as by Bratton and Van de Walle (1998; 1997), not the most vulnerable democratic quality of elections. Therefore, interventions on participation are not that decisive. Second, interventions on participation in Madagascar have an opaque element to them because they annul votes on a large scale – and consequently also have an impeding effect on participation. In contrast, the increase of informal interference in highly competitive elections motivates incumbents in consolidated democracies to instrumentalise courts for the further entrenchment of their power. This observation is also in line with Aydin's (2013) results that competition leads in developing democracies to less judicial independence. However, in Madagascar and in Senegal not all highly competitive elections and not all lowly competitive elections experience similar repercussions. These findings suggest that confirm VonDoepp's (2009) statement holds true. He argues that competition alone cannot satisfactorily explain judicial behaviour in African countries.

6.5 Sequencing the Rule of Law and Elections

In the discussion of the insurance theory in the previous section, I focused on the relationship between competition and judicial independence. This discussion is a disaggregation of the broader debate about whether there is a proper sequencing of the rule of law and elections in processes of democratisation. In the remaining part of this chapter, I discuss the results of my research in the light of the sequencing debate.

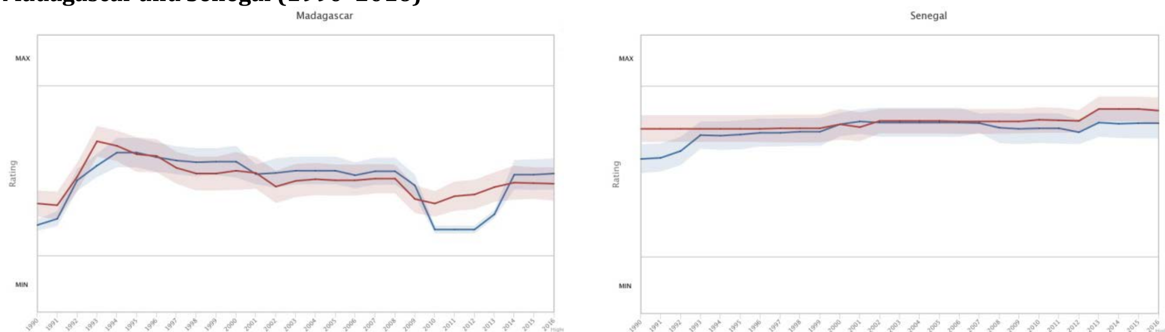
In this debate, Zakaria argues that the too early introduction of elections hampers the chances for democratic deepening and that regimes should first establish the rule of law before the people can express their will at the ballot box (Zakaria 1997). In contrast, Carothers contends that authoritarian regimes dot not offer a conducive setting for the establishment of the rule of law either. Instead, according to him, the development of the rule of law and electoral democratisation are inextricably intertwined processes that can mutually support each other (Carothers 2007, 18).

Møller and Skaaning ascertain in an analysis of 195 countries' regime status in 2011 that the level of electoral democracy and the level of the rule of law correspond with each other in most cases. Thus cases with deficient electoral rights also displayed deficiencies in the state of civil liberties and the rule of law, whereas countries with high levels of civil liberties and the rule of law also scored highly in the realisation of electoral rights (Møller and Skaaning 2013, 146–150). With these results, they question the applicability of the sequencing of the rule of law and free elections to the reality of third-wave democracies – because in the contemporary world the rule of law is not present without free elections.

Do the observations of Møller and Skaaning also hold true for the two cases in focus here? And, how did the rule of law and elections in Madagascar and Senegal develop across time?

Møller and Skaaning used disaggregated sub-components of Freedom House's political rights and civil liberties scores for their measurement. These disaggregated scores are only available from 2005 onwards. This is why I use indices of the V-Dem project to measure how the two features developed in Madagascar and Senegal throughout the period of analysis (Coppedge, Gerring, Lindberg, and Skaaning 2016). V-Dem offers the electoral democracy index and a sub-index of liberal democracy that does not include the features of electoral democracy, even though a liberal democracy of course requires electoral democracy to even be democratic.[149] The exclusion of electoral features allows for the comparison of how the elements of electoral democracy and liberal democracy developed. Figure 3 shows how the two indices developed in the period between 1990 and 2016.

Figure 3. The Development of the Electoral Democracy Index and the Liberal Component Index in Madagascar and Senegal (1990–2016)



Note: The red line indicates the Liberal Component Index, and the blue line the Electoral Democracy Index (Coppedge, Gerring, Lindberg, and Skaaning 2016).

Three points can be taken from these graphs. First, the values in Senegal were higher and more stable than in Madagascar. Second, in Senegal the liberal component was slightly stronger than the electoral one. Third, and most important, in both countries the values of the electoral and the liberal component do not drift strongly apart. The only exceptions are the years following the 2009 coup d'état in Madagascar. According to the indices, the liberal component was less harmed by the political crisis than the electoral one. Thus, the developments in Madagascar and Senegal confirm the findings of Møller and Skaaning that electoral rights and the rule of law develop in tandem.

How do the findings above match my own ones about the contribution of constitutional courts to the democratic quality of elections? I have shown that the constitutional courts in Madagascar and Senegal did not serve in critical situations as guardians of competition and legitimacy. Nor did the courts block competition and legitimacy completely. The flawed ruling of the Senegalese CC to admit Wade's candidacy did not prevent an eventual electoral turnover. The decision of the Madagascan HCC in 2002 not to compare the PVs had definitely a negative effect. Yet, it also has to be stressed that Ravalomanana still had the opportunity to win the election in the run-off – but he himself chose to deny the legality of that run-off. In situations with less pressure, both courts rendered decisions that facilitated the electoral process. For instance, both courts admitted in most elections all of the proposed candidates.

Carothers argues, as noted, that the development of the rule of law and of clean elections are inextricably intertwined processes that mutually support each other. This is an optimistic

[149] The Electoral Democracy Index covers the following aspects: expanded freedom of expression; alternative sources of information; freedom of association; share of population with suffrage; clean elections; and, elected executive. The Liberal Component Index comprises: equality before the law and individual liberty; judicial constraints on the executive, including judicial independence; and, legislative constraints on the executive (Coppedge, Gerring, Lindberg, and Skaaning 2016, 47–49).

reading, the opposite may in fact also be true: courts and elections hinder each other in their development towards more democratic operation. My discussions above have shown that several factors impede the more positive contribution of constitutional courts to the democratic quality of elections. Among these are institutional factors like formal powers, which limit the interventions possible before election day, and the behaviour of the political elite – who interfere with the courts. Yet, the most important factor may be that elections are politically extremely salient events that put courts under pressure. Let us remember why constitutional courts even adjudicate on elections. Birch and Van Ham discover on an aggregated level that judicial independence fosters electoral integrity (Birch and Van Ham 2017; Van Ham 2012). Mazmanyan (2017, 4) argues that constitutional courts tend to be more independent and enjoy higher public confidence, which gives them the standing to arbitrate in electoral disputes. Ginsburg and Elkins (2009, 1458) also assume that constitutional courts are vested with electoral competences due to a belief that constitutional courts enjoy a special legitimacy to resolve political disputes.

My own findings show, however, that the constitutional courts of Madagascar and Senegal do not enjoy public confidence or a reputation for having independent judges on the bench. Hence, the courts do not meet the conditions that have been assumed necessary for constitutional courts to wield a positive influence in electoral disputes. What to do in situations in which courts are not independent yet? Schwartz (2000) argues in his study on post-communist constitutional courts that constitutional courts should not be granted the power to dissolve electoral disputes, because this compels them to choose between what he calls "suicide" and "loss of reputation". If the courts act independently they risk retaliatory measures like court dissolution, and if they rule in accordance with powerholders then they are likely to lose public support. This resembles Bois de Gaudusson's (2003, 1) argument that the adjudication of contested elections is an overtaxing of constitutional courts in the context of fragile democracies, because they neither have the means nor the standing for solving conflicts that the political actors were not able or not willing to solve themselves. Epstein and her co-authors (2001) also assert that courts must stay away from too political cases when they seek to expand their power.

If Schwartz, Bois de Gaudusson and Epstein are correct, then the nature of elections hinders courts making a positive contribution to them. Are elections and constitutional courts stuck, then, in a vicious circle, in which the democratic quality of elections does not improve because the courts do not behave in beneficial ways and in which constitutional courts cannot offer a more positive contribution to democratic elections because elections are politically too salient to offer courts sufficient space for assertive judgments being made? I do not agree with Schwartz that constitutional courts should not adjudicate on electoral matters. My findings show, however, that it is difficult for constitutional courts to strengthen democratic elections and that they do indeed face a protracted situation in this context. Therefore the really intriguing question is not whether the rule of law or elections should come first, but rather how to best move forward from this protracted situation.

There are two possible ways out of the vicious circle in which elections and courts hinder each other's development. First, weak courts can be substituted by independent media and an active civil society. Kaufman and Haggard call, in their recent article, for more research on how local civil society groups and local media can support the consolidation and deepening of democracy (Haggard and Kaufman 2016, 139). Birch and Van Ham offer empirical evidence that independent media and civil society organisations can indeed outweigh any shortcomings in the electoral management and the judiciary in the overseeing of elections

(Birch and Van Ham 2017). Recent Senegalese history offers a good example for the importance of civil society engagement. In the contested presidential election of 2012, Senegalese civil society played an active role. Among other things, civil society networks organised the collection of election results from the whole country to guarantee the transparency of the process (Demarest 2016; Resnick 2013a). This high level of civil society mobilisation contributed to the eventual electoral turnover, even despite the aforementioned flawed CC decision to admit Wade's candidacy.

Second, in the development of the rule of law and electoral integrity agency may matter. Widner and Ellett both stress that courts can actively build up their support base, and that such endeavours depend on individual judges (Ellett 2013; Widner 2001). In my interviews, I encountered repeatedly the statement that judicial independence is not a matter of formal appointment rules or of executive decisions. Instead, it depends on the morality of the individual judge who decides whether to render an independent or a biased judgment. Individuals may change their mind, even if they were appointed to the bench as loyalists. A recent example is the case of Alieu Njie, the president of The Gambia's Electoral Commission. He was appointed by The Gambia's then-dictator Jammeh, after having proved his loyalty in previous years. Nevertheless Njie announced the defeat of Jammeh in the 2016 presidential election, and did not bow to the dictator's pressure to amend the election result. Not only judges can take an individual decision to behave independently. Political actors as well can opt for upholding judicial independence and to refrain from pressurising the judiciary and other watchdog institutions.

7 Conclusion

In the preceding chapters, I have presented the first comparative study on the role of African constitutional courts in elections. The thesis addressed research gaps on the democratic repercussions of constitutional courts in general and on African constitutional courts specifically, as well as on electoral justice. My research was guided by the question of how constitutional courts contribute to the democratic quality of elections. To answer this research question, I systematically integrated the literature of two research strands: judicial politics and electoral integrity. I developed a novel theoretical framework that lays out how the three democratic qualities of elections – participation, competition and legitimacy – are at stake throughout the six stages of the electoral cycle. This part of my theoretical framework is not limited to the study of constitutional courts. It can also be applied to other institutions intervening in the electoral process. Furthermore I conceptualised in my theoretical framework how constitutional courts can influence the democratic quality of elections through functional, ambiguous or dysfunctional interventions, as well as through direct and indirect ones. These analytical categories can also be adapted to the analysis of courts' repercussions on other matters too.

For the evaluation of constitutional court behaviour, I derived from the literature on judicial politics and electoral integrity several key criteria. Accordingly, timely, responsive, consistent and transparent adjudication on electoral challenges is conducive to ensuring democratic elections. Constitutional courts should apply purposive and principle-driven interpretation techniques to foster the democratic quality of elections. Moreover, an electoral jurisprudence that safeguards competition and legitimacy as well as covers the pre-voting stages of the electoral cycle is beneficial to upholding democratic elections.

My findings show that the constitutional courts of Madagascar and Senegal did indeed intervene in their respective electoral processes and consequently rendered an influence on the democratic quality of elections. For my original dataset, I collected 54 and 52 constitutional court decisions from Madagascar and Senegal respectively. These decisions comprise for Madagascar 165 and for Senegal 109 interventions in the electoral cycle. The constitutional court interventions covered all stages of the electoral cycle in both countries. Yet, the bulk of interventions concerned the stage of the voting operations. This concentration points to a more general trend; both constitutional courts adjudicated on the majority of electoral irregularities after the poll had already taken place. Hence, these interventions occurred at a point in time in whereat electoral irregularities can no longer be corrected only punished.

I undertook my analysis of constitutional court behaviour in a two-step manner. In a first step, I examined my comprehensive sample of constitutional court interventions. In a second step, I extracted from the comprehensive sample the most important interventions. This extraction is necessary, because while the comprehensive sample offers an impression of intervention patterns it does not distinguish between different levels of significance therein. The analysis of my comprehensive sample of constitutional court interventions and the examination of my sample of major interventions revealed different tendencies. According to the comprehensive sample, the Madagascan HCC and the Senegalese CC influenced the legitimacy of elections predominantly in functional ways. The HCC further had a mainly functional influence on participation. These observations suggest that both constitutional courts in many instances did not hamper the electoral process but rather facilitated it. The fact that political actors and citizens accepted in most instances the constitutional court as the appropriate channel for the

resolution of electoral challenges further supports this observation. Except for the Madagascan electoral crisis of 2002, the management of electoral disputes by the constitutional courts were not sidelined through extra-legal measures. The constitutional courts' interventions on competition were, however, less positive. The HCC most frequently impeded competition in its rulings. The CC had a more ambivalent influence on competition, since the numbers of functional, ambiguous and dysfunctional interventions in this realm were roughly similar.

The analysis of the major interventions made confirms the observation of predominantly negative influences on competition for both countries. Neither court served as a guardian of competition. In Madagascar such dysfunctional interventions clustered together in the presidential elections of 2001 and 2006, whereas in Senegal the dysfunctional interventions on competition concerned more elections. In contrast, the observations on legitimacy derived from the comprehensive analysis were not confirmed by the analysis of the major interventions. The examination of the major interventions made reveals a mainly dysfunctional influence on legitimacy by the HCC. The CC rendered, according to the sample of major decisions, only interventions that were ambiguous or dysfunctional for the legitimacy of elections. Hence, the positive impression from the comprehensive analysis is not confirmed for the Senegalese case either. My findings therefore do not confirm the notion that constitutional courts are particularly pertinent for safeguarding democracy.

7.1 Factors Impeding a Positive Contribution to the Democratic Quality of Elections

My analysis showed that the constitutional courts in Madagascar and Senegal wielded in critical situations frequently dysfunctional influences on competition and legitimacy. In my thorough examination of the two cases, I discovered several factors that led to this constrained influence on the democratic quality of elections. The degree of influence of the two constitutional courts is shaped by institutional factors, political interferences, choices made by the judges and factors inherent to elections. In the following, I recapitulate these different factors.

Institutional factors

A first institutional factor concerns the core competences of the constitutional courts. Neither court is granted the power to intervene at all stages of the electoral cycle. In particular, for the stages of the electoral register and the electoral campaign, the powers of the courts are limited. This limitation of power implies that the courts have less influence on the democratic quality of elections in these stages. This is not to say that it would be the best institutional solution for constitutional courts to adjudicate on these issues. From a perspective that champions electoral integrity, it can make sense not to attribute the adjudicative power for all electoral matters to the same court. For instance, the competence to arbitrate over disputes regarding registration on the electoral roll may be better situated at the local level – as is the case in Madagascar as well as in Senegal – because it can facilitate access for citizens.

The second point is a consequence of the first. Since the constitutional courts do not hold the adjudicative power for all stages of the electoral cycle they are confronted with complaints related to the electoral register or the electoral campaign after the poll, when they certify the election results. This post-electoral adjudication limits their influence on the democratic quality of elections because any irregularities can no longer be corrected only punished. The third institutional constraint is the standing rules in place. In Madagascar these rules are

more open than in Senegal, where only candidates may contest electoral irregularities at the CC. If voters can also challenge irregularities, as is the case in Madagascar, the process of electoral adjudication is more inclusive. Then, whether and how electoral irregularities are challenged depends less on the strategies of the candidates themselves. A less politicised approach should be better for the democratic quality of elections. Fourth, the appointment rules for constitutional judges offer political actors channels of influence over the constitutional bench. This is particularly true for Senegal, where the president had up until 2016 the power to appoint all constitutional judges. However, the executive dominance of the parliament and the high judicial commission in Madagascar also allowed for the influencing of the constitutional bench through preferred appointments.

Behaviour of political actors

The last institutional factor points already to the behaviour of political actors. It is not only the rules that offer channels of influence over the constitutional bench, it is also the political actor that eventually actually does use this channel. In both countries, presidents appointed loyal judges who were perceived as being biased by the public. Furthermore, in Madagascar, appointment rules were only arbitrarily implemented, which made the judges more vulnerable. Such appointment practices are complemented by means of informal interference. In Madagascar as well as in Senegal, instances of informal interference were observed. Powerholders exercised informal pressure, but opposition politicians also sought to pressurise the constitutional courts too. A grenade attack on the HCC president's house in 1998 and a threatening letter sent to the CC in 2011 are examples for such actions being pursued by the opposition. Appointment practices and informal interferences are both choices that political actors take. Positioning loyal judges and/or building pressure constrain constitutional courts' ability to render beneficial rulings for the democratic quality of elections.

Constitutional court behaviour

In my thesis, I focused on formal constitutional court behaviour as expressed in court rulings. In this respect, both constitutional courts displayed legalistic interpretations of the law and their competences in the electoral process. The courts rarely referred to democratic principles in their rulings, and in many instances they refrained from engaging more extensively with irregularities. In these instances, they either referred to the limitation of their competences or to insufficient evidence for the alleged deeds. Observers criticised both courts for the denial of justice. Accordingly, the constitutional courts did not fulfil their responsibility to arbitrate over electoral disputes but rather withdrew from the affair by interpreting the rules and their competences in only a narrow fashion. This criticism was raised for the HCC during the election crisis of 2002, and for the CC in 1998 when the size of the National Assembly and the electoral system were adjusted. Their frequently legalistic approach to electoral matters reduced their potential for enhancing the democratic quality of elections. Moreover, several rulings by the two constitutional courts lacked transparency. This also impedes the democratic quality of elections. Furthermore, both courts were not very responsive to electoral petitions, as they simply dismissed the majority of these. The Madagascan HCC did not even admit the majority of complaints to adjudication. These non-admissions and dismissals of petitions reduced the inclusiveness of electoral justice ultimately.

Applying formalistic and opaque approaches to judicial decision making, the constitutional courts of Madagascar and Senegal rarely rendered decisions that signalled to the outside

world their independence or their determination to resist political pressure. Therefore they were not able to build up a public support base, which in turn can safeguard the courts against political pressure. Nor did constitutional judges reach out to build strategic alliances with bar associations or civil society organisations.

Election-inherent factor

The final factor impeding a more positive influence of constitutional courts on democratic elections is one inherent to elections. In democratic regimes, elections are the principal channel through which political power is distributed. In African third-wave democracies, access to political power furthermore still represents a major pathway to economic wealth. Consequently, elections there are politically a highly sensitive and frequently contested endeavour. In such a tense atmosphere independent decision making is urgently needed, but at the same time extremely difficult.

I uncovered these impeding factors in the course of an iterative process, wherein my empirical analysis was informed by lessons from the academic literature and my theoretical framework was refined after the empirical analysis had been done (Yom 2015). Furthermore, I systematically selected my two cases on the basis of being examples of African electoral democracies. Therefore the impeding factors, which are condensed in Table 72, should also determine the degree of influence of constitutional courts on the democratic quality of elections in other countries besides just Madagascar and Senegal. Yet, the findings of my systematic exploration of the contribution of constitutional courts to the democratic quality of elections in Madagascar and Senegal still need to be complemented by further research.

Table 72. Factors Impeding a Positive Contribution to the Democratic Quality of Elections

Institutional Factors - Limited competences for pre-voting stages of the electoral cycle - Lagged adjudication on pre-voting issues - Appointment rules allowing for strong political influence - Standing rules limiting the access to courts
Behaviour of Political Actors - Appointment practices to achieve political influence over the bench - Informal interferences
Constitutional Court Behaviour - Legalistic and opaque interpretation techniques - Rare signalling of judicial independence - No outreach activities to build up support base - Low responsiveness to electoral petitions
Election-Inherent Factor - High pressure due to political salience

Source: Author's own composition.

7.2 Avenues for Future Research

In this thesis, I systematically integrated the research strands of judicial politics and electoral integrity by focusing on constitutional courts and electoral dispute resolution. In the following, I elaborate which further research questions evolve from my study drawing on these two research strands.

Constitutional courts (in sub-Saharan Africa)

The investigation of constitutional courts' contributions to the democratic quality of elections served as an example for the repercussions of constitutional courts' decisions for democracy. Yet, adjudication on electoral matters is not the core function of constitutional courts. That is, rather, the review of laws, even though many African constitutional courts may be known in the first place for their electoral powers. We have very little insight at present into the

performance of African constitutional courts with respect to constitutional review. Three aspects of the politics of constitutional review necessitate further research being done. First, we lack information on the demand side of constitutional review. Who refers laws for constitutional review? Under which circumstances does the opposition engage in the referral of laws for constitutional review? If citizens are entitled to invoke constitutional review, which factors can explain their level of activity in this respect?

Second, we know little about how constitutional courts deal with their power of constitutional review. Which laws do constitutional courts uphold, and which ones do they strike down? How do constitutional courts justify their decisions in constitutional matters? Third, examinations of the repercussions of constitutional review are also relevant; this implies the analysis of the political actors' reactions. To what extent are the constitutional courts' rulings respected and implemented? Are there any instances in which the constitutional courts' rulings are overturned or ignored by political actors? Moreover, we require more research on how constitutional court behaviour in constitutional matters influences the type and quality of the ruling political regime. More research on the performance of African constitutional courts in constitutional matters would further allow for a comparison of whether the functionality of court rulings differs between constitutional and electoral matters.

The difficult access to data on constitutional courts is one reason why we know little about these issues at present. Some constitutional courts publish their decisions on their own websites, but this is rarely done in a comprehensive manner. Furthermore, my research has shown that the interpretation of constitutional court behaviour requires deep knowledge of the political context at hand. Therefore, conducting extensive field research is indispensable for the study of African constitutional courts. During field research, court rulings need to be collected, interviews with judges, legal experts, civil society members and political actors need to be conducted and local sources like newspaper articles or legal comments need to be accumulated. Due to these time consuming data collection requirements, the further study of African constitutional courts can be best tackled with small-N research designs.

The ability to generate and test more generalisable theories grows, however, if the number of cases under study increases. One possible way to achieve this increase is to focus on specific aspects that are well reported in the academic and practitioners' literature. One avenue for such focused research could be the response of constitutional courts to constitutional crises, such as coup d'états. The role of constitutional courts in constitutional crises differs in two respects. First, there are differences in how constitutional courts are mobilised in such crises. Second, constitutional courts respond in different ways to these constitutional crises. I illustrated in my thesis these differences with the examples of the Madagascan HCC and the Malian constitutional court during the coup d'états of 2009 and 2012. The HCC was called in by the military once the coup was underway. The military demanded the HCC approve the transfer of presidential power from Ravalomanana to the military, and subsequently to Rajoelina. The HCC approved this handover with a letter, not with a decision. Since a letter is not a legally binding expression of the court's power, it left a backdoor open for the HCC in case the coup failed. In contrast, the Malian constitutional court was simply ignored at the height of the political crisis. In the later stages of the crisis, the constitutional court was eventually appealed to so as to ratify the extensions of the transitional period that the Malian constitution had previously limited in length. Hence, the role of the HCC was more important in the Madagascan crisis than the Malian constitutional court's was in that country's crisis. Nevertheless, both courts simply approved the demands that were brought before them.

The focus on such salient matters as constitutional crises can provide an understanding of the constitutional courts' positions in the respective political systems. Yet these are extreme situations, and therefore cannot teach us how the positions of constitutional courts develop incrementally within those political systems. Furthermore the examination of a medium number of such cases is also likely to face limitations in terms of data for explanatory variables, since such data as the background of constitutional judges, the degree of public support for constitutional courts or the occurrences of informal interferences is for the majority cases simply not available to us.

Electoral dispute resolution

In this thesis, I developed several theoretical assumptions about how constitutional courts can render a positive contribution to the democratic quality of elections and further analysed which factors impede constitutional courts in doing so – as summarised in the previous section. I argue that my assumptions – such as those on purposive interpretation techniques, the appropriate timing of electoral adjudication and the necessity to respond promptly to electoral irregularities – are valid beyond my two cases. Yet, an analysis of more African constitutional courts and their roles in elections would allow for the discovery of possible further relevant factors – as well as for generating more valid theories on what enhances a positive contribution to the democratic quality of elections.

The focus of my thesis was on constitutional courts, but I have shown that they are not the only possible institutional solution for adjudicating on electoral disputes. Supreme courts, courts of lower instances and legislative or election management bodies can also be given the power to adjudicate on elections. Therefore, different potential institutional solutions for the adjudication on electoral disputes deserves further scholarly attention. We lack theories and empirical findings regarding how different kinds of court or other bodies diverge in their handling of electoral disputes. Do African constitutional courts and African supreme courts have different approaches to electoral disputes? Do courts of lower instances have advantages in dealing with electoral disputes? Are non-judicial bodies better equipped to arbitrate over such politically sensitive matters as electoral petitions? Furthermore, we do not know how the different bodies responsible for adjudication on electoral disputes interact with each other in those systems wherein several such bodies are involved. Do they enhance or impede each other? Are there instances in which one specific body is more successful in building up public confidence and a record of positive contributions to democratic elections than other ones are? What influence does this have on the overall system of electoral justice?

Another promising avenue for future research is the relationship between regime type and electoral dispute resolution. Elections happen also in authoritarian regimes, so electoral disputes occur in these regimes as well. Do courts adjudicate on electoral disputes differently in electoral authoritarian regimes than in electoral democracies? How do political actors as well as citizens deal with electoral challenges in electoral autocracies? Do their approaches differ from those in electoral democracies? Such findings would also allow us to interpret my own findings here more broadly. I cannot tell from my data whether the constitutional courts in Madagascar and Senegal display a rather authoritarian approach in their handling of elections, since findings on electoral dispute resolution in authoritarian settings are currently pending.

Electoral disputes are not unique to third-wave democracies. They have also gained importance in so far stable democracies, as recent examples illustrate. In Austria, the constitutional court prescribed in 2016 the repetition of the presidential election due to

formal mistakes in the vote counting process. In the German federal state of North Rhine-Westphalia, the state election results of several constituencies were recounted in response to electoral petitions from the right-populist party Alternative für Deutschland. However, we lack systematic research on how courts and other bodies deal with these challenges. Findings from France revealed that the French Constitutional Council applies the principle of "*de minimis non curat praetor*" differently when it judges on petitions from the right-wing party Front National (Franck 2010).[150] Nor do we know if a constitutional court like the one in Austria or a parliamentary committee like the one in Germany are more pertinent for the satisfactory review of electoral petitions. So far, the above-cited episodes proved that the procedures for dealing with electoral challenges are successful and accepted by the conflict parties. Yet, the pressure on these institutions may increase due to the rise of populism. Current United States President Donald Trump announced during his electoral campaign that it would be proof of election rigging if he lost. If such attitudes proliferate among political actors in so far stable democracies going forward, then it will be crucial that the electoral dispute resolution bodies can uphold public confidence in the credibility of the electoral process – and thereby safeguard democracy itself.

[150] This interpretation implies that irregularities are considered irrelevant unless they change the outcome of the election. Franck found that the French Constitutional Council cancels votes, even when the race is not close, if parties of the far right are involved in an electoral irregularity.

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Legal Framework of Madagascar

Constitution de la République du Madagascar du 19 août 1992.

Ordonnance 92-041 du 2 octobre 1992 portant code électoral.

Ordonnance 92-042 du 2 octobre 1992 relative à l'élection du Président de la IIIe République.

Ordonnance 93-007 du 24 mars 1993 modifiée par l'ordonnance 93-015 du 23 avril 1993 et par l'ordonnance 93-020 du 30 avril 1993 relative à l'élection des députés à l'Assemblée nationale.

Ordonnance 98-001 du 9 avril 1998 constituant loi organique fixant les modalités de scrutin relatives à l'élection des députés.

Constitution de la République du Madagascar du 19 août 1992, revisée le 15 mars 1998.

Loi 97-011 du 20 mai 1997 modifiant certaines dispositions de l'ordonnance modifié 92-041 du 2 octobre 1992 portant Code électoral.

Loi organique 2000-14 du 24 août 2000 portant code électoral.

Ordonnance 2001-001 du 31 août 2001 portant loi organique relative à l'élection du Président de la République.

Ordonnance 2001-003 du 18 novembre 2001 relative à la Haute Cour Constitutionnelle.

Ordonnance 2002-001 modifiant et complétant certaines dispositions de l'ordonnance 2001-001 du 31 août 2001 portant portant loi organique relative à l'élection du Président de la République.

Loi organique 2002-004 du 3 octobre 2002 relative à l'élection des députés à l'Assemblée nationale.

Décret 2006-673 du 12 September 2006 fixant les modèles des certaines pièces à fournir par tout candidat à l'élection du Président de la République.

Décret 2007-724 fixant les conditions d'application de la loi organique 2002-004 du 3 octobre 2002 relative à l'élection des députés à l'Assemblée nationale.

Constitution de la République de la Quatrième République de Madagascar du 11 Décembre 2010.

Legal Framework of Senegal

Constitution de la République du Sénégal du 7 mars 1963 modifié par la loi n°92- 22 du 30 Mai 1992.

Constitution de la République du Sénégal du 7 janvier 2001.

Loi organique n° 92-15 du 7 février 1992 relative à l'élection du président de la République et des députés à l'Assemblée nationale.

Loi organique n° 92-15 du 7 février 1992 relative à l'élection du président de la République et des députés à l'Assemblée nationale modifiée par la loi organiquen°2006-41 du 11 décembre 2006.

Loi n° 92-16 du 07 février 1992 relative au Code electoral.

La loi n°92- 22 du 30 Mai 1992 portant révision de la Constitution.

Loi organique n° 92-23 du 30 mai 1992 sur le Conseil constitutionnel.

Loi n° 92-23 du 30 mai 1992 sur le Conseil constitutionnel modifiée par la loi n° 99-71 du 17 février 1999.

Loi n° 92-23 du 30 mai 1992 sur le Conseil constitutionnel modifiée par la loi organique n° 2007-03 du 12 février 2007.

Loi n° 2005-01 portant amnistie votée par l'Assemblée nationale le 7 janvier 2005.

Loi n° 2012-01 abrogeant et remplaçant la loi n° 92-16 du 07 février 1992 relative au Code électoral, modifiée.

Decisions of the Haute Cour Constitutionnelle

1992-38-HCC/AR : Arrêt 38-HCC/AR du 22 décembre 1992 portant proclamation des résultats officiels du scrutin du 25 novembre 1992 pour l'élection du Président de la République.

1992-12-HCC/D3 : Décision 12-HCC/D3 du 2 octobre 1992.

1993-455-HCC/AR: Arrêt 455-HCC/AR du 7 juin 1993 portant liste des candidatures aux élections législatives du 16 juin 1993.

1993-456-HCC/AR : Arrêt 456-HCC/AR du 21 juillet 1993 portant proclamation des résultats officiels du scrutin du 16 juin pour l'élection des députés à l'Assemblée Nationale.

1995-05-HCC/AV : Avis 05-HCC/AV du 23 août 1995.

1996-226/HCC/AR : Arrêt 226-HCC/AR du 2 décembre 1996 portant proclamation des résultats officiels du scrutin du 3 novembre 1996 pour l'élection du Président de la République.

1996-06-HCC/AV : Avis 06-HCC/AV du 18 septembre 1996.

1996-24-HCC/D3 : Décision 24-HCC/D3 du 10 octobre 1996.

1997-04-HCC/AR : Arrêt 04-HCC/AR du 31 janvier 1997 portant proclamation des résultats officiels du scrutin du 29 décembre 1992 pour l'élection du Président de la République.

1997-01-HCC/AV: Avis 01-HCC/AV du 5 avril 1997.

1997-03-HCC/AV: Avis 03-HCC/AV du 23 mai 1997.

1997-13-HCC/D3: Décision 13-HCC/D3 du 10 juillet 1997.

1998-39-HCC/AR : Arrêt 39-HCC/AR du 24 juin 1998 portant proclamation des résultats officiels des élections législatives du 17 mai 1998.

2002-01-HCC/AR : Arrêt 01-HCC/AR du 25 janvier 2002 portant proclamation des résultats officiels du scrutin du 16 décembre 2001 pour l'élection du Président de la République.

2002-05-HCC/AR : Arrêt 05-HCC/AR du 29 avril 2002 portant proclamation des résultats officiels du scrutin du 16 décembre 2001 pour l'élection du Président de la République.

2002-04-HCC/D3: Décision 04-HCC/D3 du 20 février 2002 concernant la demande de report de la date du scrutin pour le deuxième tour de l'élection du Président de la République.

2002-05-HCC/D3: Décision 05-HCC/D3 du 20 mars 2002 concernant la demande de report de la date du scrutin pour le deuxième tour de l'élection du Président de la République.

2002-07-HCC/D3: Décision 07-HCC/D3 du 26 avril 2002 relative à la récusation de membres de la Haute Cour Constitutionnelle.

2002-17-HCC/D3 : Décision 17-HCC/D3du 3 octobre 2002 concernant la loi organique no 2002-004 du 26 septembre 2002 relative à l'élection des Députés à l'Assemblée Nationale.

2003-01-HCC/AR : Arrêt 01-HCC/AR du 10 janvier 2003 portant proclamation des résultats officiels de l'élection des députés à l'Assemblée Nationale du 15 décembre 2002.

2006-05-HCC/AR: Arrêt 05-HCC/AR du 23 décembre 2006 portant proclamation des résultats officiels du scrutin du 3 décembre 2006 pour l'élection du Président de la République.

2007-03-HCC/AR: Arrêt 03-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-04-HCC/AR: Arrêt 04-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-05-HCC/AR: Arrêt 05-HCC/AR du 12 septembre 2007 aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-06-HCC/AR: Arrêt 06-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-11-HCC/AR: Arrêt 11-HCC/AR septembre 2007 relative à une requête aux fins d'annulation d'une liste de candidats à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-12-HCC/AR: Arrêt 12-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-13-HCC/AR: Arrêt 13-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-14-HCC/AR: Arrêt 14-HCC/AR du 12 septembre 2007 aux fins d'opposition à l'utilisation de bulletin de vote à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-15-HCC/AR: Arrêt 15-HCC/AR du 12 septembre 2007 relative à une requête aux fins de désistement de candidature à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-16-HCC/AR: Arrêt 16-HCC/AR du 21 septembre 2007 relative à une requête aux fins d'application de la loi à l'encontre d'un candidat à l'élection des députés à l'Assemblée Nationale du 23 septembre 2007.

2007-18-HCC/AR : Arrêt 18-HCC/AR du 13 octobre 2007 portant proclamation des résultats officiels du scrutin du 23 septembre 2007 pour l'élection des députés à l'Assemblée Nationale.

Decisions of the Conseil Constitutionnel

CC-5/93: Transmission des procès verbaux à la commission nationale de recensement de votes, 2 mars 1993.

CC-6/93: Proclamation des résultats de la présidentielle, 13 mars 1993.

CC-7/93: Irrecevabilité des candidatures, 31 mars 1993.

CC-9/93: Modification du mode de transmission des procès verbaux de vote, 22 avril 1993.

CC-10/93: Contestation de la régularité des opérations électorales, 22 avril 1993.

CC-22/96: Décision du président de la république de négocier avec le MFDC, 22 avril 1996.

CC-25/97: Modification du code électoral intégrant l'ONEL et le HCA (par loi organique), 05 septembre 1997.

CC-27/98: Amendement augmentant le nombre des députés de 120 à 140, 24 février 1998.

CC-28/98: Modification des règles régissant le déroulement des élections nationales, 24 février 1998.

CC-31/98: Augmentation du nombre de députés de 120 à 140 par une loi organique qui remplace LO 117 du Code électoral, 10 mars 1998.

CC-32/98: Augmentation du nombre de députés de 120 à 140, 10 mars 1998.

CC-33/98: Acceptation de candidatures de la Coalition USD Jef Jel URD et du Front pour la démocratie et le socialisme, 9 avril 1998.

CC-35/98: Liste de candidatures aux législatives, 15 avril 1998.

CC-38/98: Demande de l'inégibilité d'un candidat de la liste de l'ADN aux législatives, 16 avril 1998.

CC-41/98: Demande de la mise à la disposition du fichier électoral à tous les partis, 16 avril 1998.

CC-42/98: Proclamation des résultats des législatives (juger sur demande en annulation partielle, demande en rectification), 8 juin 1998.

CC-44/98: Suppression de la limitation des mandats présidentiels et du quart bloquant (Loi portant révision de la Constitution), 9 octobre 1998.

CC-53/98: Suppression de la limitation des mandats présidentiels et du quart bloquant, 9 octobre 1998.

CC-66/99: Contestation du directoire de campagne du parti socialiste, 31 décembre 1999.

CC-71/2000: Proclamation des résultats du premier tour de la présidentielle, 10 mars 2000.

CC-80/2000: Déclaration complémentaire de candidature aux législatives, 23 mars 2000.

CC-81/2001: Interdiction du nom WADE et de la photographie du président de la république sur le bulletin de vote de la coalition WADE, 26 mars 2001.

CC-83/2001: Proclamation des résultats des législatives, 12 mai 2001.

CC-91/2005: Organisation et fonctionnement du conseil de la république pour les affaires économiques et sociales, 29 aout 2003.

CC-93/2005: Incompétence du conseil pour donner un avis sur la prorogation du mandat des députés, 7 septembre 2005.

CC-94/2005: Récusation du président et du vice président de la CENA, 11 juillet 2005.

CC-95/2007: Publication de la liste des candidats à l'élection du PR du 25 février 2007, 26 janvier 2007.

CC-97/2007: Parité sur les listes de candid ats aux législatives, 27 avril 2007.

CC-96/2007: Proclamation des résultats de la présidentielle, 10 mars 2007.

CC-100/2007: Demande d'annulation de la décision du ministre de l'intérieur refusant une liste de candidats aux législatives, 16 avril 2007.

CC-101/2007: Proclamation des résultats des législatives, 10 juin 2007.

CC-108/2012: Publication de la liste des candidats à l'élection du PR du 26 février 2012, 27 janvier 2012.

CC-109/2012: Demande d'annulation de la candidature de Abdoulaye WADE, Demande d'annulation des candidatures de Idrissa SECK, Macky SALL, Cheikh Tidiane GADIO, 29 janvier 2012.

CC-110/2012: Rejet de leur candidature à l'élection présidentielle, 29 janvier 2012.

CC-112/2012: Proclamation des résultats du 1er tour du scrutin de l'élection présidentielle du 26 février 2012, 6 mars 2012.

CC-114/2012: Proclamation définitive des résultats des élections législatives du 1er juillet 2012, 12 juillet 2012.

Appendix A: Madagascar – Codings of Haute Cour Constitutionnelle Interventions

Key: PE = Presidential Elections; LE = Legislative Elections; P = Participation; C = Competition; L = Legitimacy; F = Functional; A = Ambiguous; D = Dysfunctional; d = direct; i = indirect.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
PE,1 1992	Legal framework	Review of electoral law (ordonnance)	Upheld			d	Not sufficient information for assessment.
PE,1 1992	Legal framework	Electoral law on PE (ordonnance): resignation of PR during candidacy	Partial dismissal	C	A	d	No enhancement of competition but all important candidates were protected and no breach of the constitution.
PE,1 1992	Electoral register	Multiple entries in the electoral register	Annulment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional (indirect), overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1992	Electoral register	Voters under 18	Annulment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional (indirect), overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1992	Electoral register	Verification of electoral list	Cancellation of polling station	P	A	i	Acknowledgment of irregularities and short comings was functional (indirect), overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1992	Voting operations	Votes of non-registered citizens	Annulment of votes	P	F	i	Acknowledgment of irregularities was beneficial.
PE,1 1992	Voting operations	Unauthorised addition to the electoral list	Annulment of votes	P	F	i	Acknowledgment of irregularities was beneficial.
PE,1 1992	Voting operations	Incorrect identification of voters	Annulment of votes	P	F	i	Acknowledgment of irregularities was beneficial.
PE,1 1992	Voting operations	Missing or incorrect signing of attendance sheet by the voters	Annulment of votes	P	F	i	Acknowledgment of irregularities and educational clarification was beneficial.
PE,1 1992	Voting operations	Missing or incorrect countersigning of attendance sheet	Annulment of votes	P	F	i	Acknowledgment of irregularities and educational clarification was beneficial.
PE,1 1992	Voting operations	Incorrect composition of polling station staff	Cancellation of polling station	L	F	i	Acknowledgment and sanctioning of irregularties was functional.
PE,1 1992	Voting operations	insufficient ballot papers	Cancellation of polling station	C	F	i	Free competition requires sufficient supply of ballot papers for all candidates.
PE,1 1992	Processing of votes	Incorrect closing of ballot box	Cancellation of polling station	L	F	d	Acknowledgment of irregularities and exclusion of endangered results.
PE,1 1992	Processing of votes	Counting by polling station staff	Cancellation of polling station	L	A	d	Strict application of a very demanding rule, preservation of votes should weight heavier.
PE,1 1992	Processing of votes	Disturbance of electoral operations at polling stations	Dismissal	P, C	A	d	Acknowledgment that these were serious incidents was functional but no further examination if this hampered participation and competition was dysfunctional.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 1993	Legal framework	Postponement of LE	Approved	L			Not sufficient information for assessment.
LE 1993	Electoral register	Multiple votes	Annulment of votes*	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
LE 1993	Electoral register	Votes of minors	Annulment of votes*	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
LE 1993	Registration of candidates	Clarification of rules, competences and interaction with local registration commissions	Clarification	C	F	i	Rule clarification was functional.
LE 1993	Registration of candidates	17 dismissals, in three cases list of parties for whole constituency, in other cases only some candidates, no further information	Partial dismissal	C	D	d	Opaque decision, not clear why candidates were dismissed.
LE 1993	Registration of candidates	Annulment of GRAD Iloafa list in one constituency after the poll due to ineligibility of candidate	Anullment	C	D	d	Annulment of a list of candidates after the poll was illegal, HCC had previously validated the list.
LE 1993	Voting operations	Unauthorised additions to the electoral list	Annulment of votes*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Voting with electoral card from another bdv	Annulment of votes*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Incorrect signing and countersigning of attendance sheet	Annulment of votes*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Polling station staff signs attendance sheet with fingerprints	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Questionable and "fantaisistes" signatures on attendance sheet	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Closure of poll before the official end	Cancellation of polling station*	P	F	i	Incident created suspense for manipulation, equal chance for all voters to cast their votes was not given, thus acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	PDS or members of local security committee serve as polling staff	Cancellation of polling station*	L	F	i	Incident had potential for pressure on voters, acknowledgment and sanctioning of irregularities was functional.
LE 1993	Voting operations	Non-transport of ballot papers of some lists despite delivery, not all polling stations were concerned but result cannot be calculated adequately	Cancellation of two constituencies	C	F	i	Free competition requires sufficient supply of ballot papers for all candidates.
LE 1993	Processing of votes	Closure of ballot box by a single lock	Cancellation of polling station*	L	F	d	Acknowledgment of irregularites and exclusion of endangered results was functional.
LE 1993	Processing of votes	Counting of votes by polling station staff	Cancellation of polling station*	L	A	d	Strict application of a very demanding rule, preservation of votes should weight heavier.
LE 1993	Processing of	Counting by analphabet scrutineers	Cancellation of	L	F	d	Illiterate persons cannot count reliably, thus acknowledgment of irregularites and

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
	votes		polling station*				exclusion of endangered results was functional.
LE 1993	Processing of votes	Missing signatures on counting sheets	Cancellation of polling station*	L	F	d	Acknowledgment of irregularites and exclusion of endangered results was functional.
LE 1993	Processing of votes	CMRV annulled votes	Rectification	L	F	d	Clarification of rule and competences was functional.
PE,1 1996	Legal framework	Amendment law to electoral law (92-041)	Upheld				Not sufficient information for assessment.
PE,1 1996	Legal framework	Legal classification of voter identification provisions (ID card) (1995)	Provision belongs to regulatory track	P	D	d	No reference to principle of participation, no specific stance on question of voter identification.
PE,1 1996	Legal framework	Legal classification of voter identification provisions (ID card) (1996)	Provision belongs to regulatory track	P	D	d	No reference to principle of participation, no specific stance on question of voter identification.
PE,1 1996	Legal framework	Amendment law to 92-041: introduction of ID for voter identification	Dismissal	P, L	F / D	d	P (dysfunctional): no reference to principle of participation, no specific stance on question of voter identification; L (functional): regularity of elections was upheld.
PE,1 1996	Legal framework	Postponement of PE	Dismissed	L	F	d	Regularity of elections was upheld.
PE,1 1996	Electoral register	Multiple registrations, ommissions	Annullment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1996	Electoral register	Registration of minors	Annulment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1996	Electoral register	Lists “de manière fantaisiste”, no information on birth date	Cancellation of polling station	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,1 1996	Registration of candidates	Resignation of high ranking government incumbents necessary for their candidacy?	No	C	F	d	Transparency, protection of active participation, clarifications to ensure competition.
PE,1 1996	Registration of candidates	Registration of candidates	Partial dismissal (2 out of 17)	C	F	d	Argument appears plausible.
PE,1 1996	Voting operations	Non-authorisation of electoral list	Cancellation of polling station	P	F	i	Acknowledgment and sanctioning of rule violation was functional, correct and authorised electoral list is essential for P.
PE,1 1996	Voting operations	Incorrect signing and countersigning of attendance sheet	Cancellation of polling station	P	F	i	Acknowledgment and sanctioning of rule violation was functional, correct and authorised electoral list is essential for P.
PE,1 1996	Voting operations	Unauthorised voting	Annulment of votes	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,1 1996	Voting operations	Unauthorised additions to electoral list	Annulment of votes	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,1 1996	Voting	Voting in wrong polling station	Annulment of vote	P	F	i	Acknowledgment and sanctioning of rule violation was functional.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
	operations						
PE,1 1996	Voting operations	Incorrect authorisation of ordonnance	Annulment of vote	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,1 1996	Voting operations	Insufficiently authorised vote (electoral card, not on list, no ordonnance)	Annulment of vote	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,1 1996	Voting operations	Missing material in polling stations	Dismissal	P	A	i	Acknowledgment was functional but opaque which materials were missing and non-examination of influences.
PE,1 1996	Voting operations	No shows of polling station agents	Dismissal	L	D	i	Acknowledgment was functional but opaque to what extent polling station agents did not show up and and if and how this has affected the vote.
PE,1 1996	Processing of votes	Counting by polling station staff	Cancellation of polling station	L	A	d	Strict application of a very demanding rule, preservation of votes should weight heavier.
PE,2 1996	Legal framework	Postponement of second round	Dismissed	L	F	d	Regularity of elections was upheld.
PE,2 1996	Electoral register	Registration of minors:	Annulment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
PE,2 1996	Electoral register	Electoral list without birth dates	Annulment of votes	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional, inconsistency with first round.
PE,2 1996	Voting operations	Unauthorised electoral list	Cancellation of polling station	P	F	i	Acknowledgment and sanctioning of rule violation was functional, correct and authorised electoral list was essential for P.
PE,2 1996	Voting operations	Unauthorised additions to electoral list	Annulment of votes	P	F	i	Acknowledgment and sanctioning of rule violation was functional, correct and authorised electoral list is essential for P.
PE,2 1996	Voting operations	Incorrect signing of attendance sheet	Annulment of votes	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,2 1996	Voting operations	Incorrect or missing countersigning of attendance sheet	Cancellation of polling station	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,2 1996	Voting operations	Vacancy of polling stations due to no shows of staff or insufficient material	Dismissal	P	F	i	Acknowledgment and sanctioning of rule violation was functional.
PE,2 1996	Processing of votes	Counting by polling station staff	Cancellation of polling station	L	A	d	Strict application of a very demanding rule, preservation of votes should weight heavier.
LE 1998	Legal framework	Review of organic law on the LE's modalities	Upheld				Not sufficient information for assessment.
LE 1998	Legal framework	Opinion on the MPs' terms' expiration	Official end is 3.8.1997	L	F	d	Correct interpretation of constitutional supremacy.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 1998	Legal framework	Postponement of LE	Validated	L	D	d	Changed jurisprudence, presidential preference for postponement.
LE 1998	Legal framework	MP term	Validated	L	D	d	Presidential preference.
LE 1998	Electoral register	Votes of minors	Annulment of votes*	P	A	i	Acknowledgment of irregularities and short comings was functional, overstretching of competence (criminal court shall sanction) was dysfunctional.
LE 1998	Voting operations	Unauthorised additions to the electoral list	Annulment of votes*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Voting operations	Incorrect signing and countersigning of attendance sheet	Annulment of votes*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Voting operations	Lack of countersigning of attendance sheet	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Voting operations	Questionable and “fantaisiste” signatures on attendance sheet	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Voting operations	Incorrect signing of PV	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Processing of votes	Non-arrival of electoral documents at CMRV	Cancellation of polling station*	L	F	d	Logical consequence of non-arrival.
PE 2001	Legal framework	Review of electoral law (2000-014)	Upheld	L			Not sufficient information for assessment.
PE 2001	Legal framework	Review of electoral law on PE (2001-11)	Upheld	L			Not sufficient information for assessment.
PE 2001	Legal framework	Review of amendment law to 2001-002	Upheld	L			Not sufficient information for assessment.
PE 2001	Legal framework	Postponement of second round (30 days)	Validated	L	A	d	Force majeur was plausible, however, legitimacy was already ruined at that moment.
PE 2001	Legal framework	Postponement of second round (postponement until 28.4.2002)	Validated	L	A	d	Force majeur was plausible, however, legitimacy was already ruined at that moment.
PE 2001	Registration of candidates	1 out of 6 registrations dismissed	Partial dismissal	C	F	d	Argument appears plausible.
PE 2001	Electoral campaign	D1 Ratsiraka did electoral propaganda during the opening of the aérodrome of Morondova on 26 October although the campaign had not been opened yet	Dismissed	C	A	i	HCC was indeed not competent but the opening was at the same time a serious violation of the electoral law.
PE 2001	Electoral campaign	D1 Ratsiraka used the service of state officers, a public building, and administrative cars for his propaganda	Annulment of votes in the concerned	C	F	i	Unlevel playing field was sanctioned.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
			locations				
PE 2001	Electoral campaign	D1 Ratsiraka put up a giant poster at the walls of building by Solima at Ampefiloha without the authorisation of the building's occupant as well as before the windows of immeubles bâtis for propaganda	Dismissed	C	A	i	HCC was not competent but advertisment activities were a problem.
PE 2001	Electoral campaign	D1 Ratsiraka used advertising space Tana for electoral propaganda	Dismissed	C	A	i	HCC was not competent but advertisment activities were a problem.
PE 2001	Electoral campaign	D1 Ratsiraka used a one-hour press conference 14 December, 20 h in the Palais d'état of Iavoloha broadcasted by Télévision Malagasy and the Radio Nationale Malagasy for electoral campaign purposes	Dismissed	C	D	i	Flawed justification, legal loopholes are backed, no discussion of possible negative effects on competition.
PE 2001	Electoral campaign	D1 Ratsiraka threat the voters for trouble and instability if they vote for other candidates, this was broadcasted in public channels after the closure of the electoral campaign	Dismissed	C	D	i	HCC may not be incompetent but this was a serious violation of the electoral law and this should at least be acknowledged.
PE 2001	Voting operations	D1 Ballot boxes with additional holes	Cancellation of polling station	P	F	i	Fraud presumption should lead to sanctions.
PE 2001	Voting operations	D1 Authorised blank ordonnances	Annulment of votes	P	F	i	Violation of electoral law should be sanctioned.
PE 2001	Voting operations	D1 insufficient ballot papers	If caused by administration cancellation of polling station	C	F	i	Clarification of rule, violation sanctioned.
PE 2001	Voting operations	D1 Unauthorised electoral list	Cancellation of polling station	P	F	i	Correct and authorised electoral list is essential for P and L.
PE 2001	Voting operations	D1 Attendance sheet completely signed with fingerprints	Cancellation of polling station	P	F	i	Fraudulent signatures need to be sanctioned by cancellations.
PE 2001	Voting operations	D1 incorrect countersigning of attendance sheet	Annulment of votes	P	F	i	Acknowledgment of irregularities were beneficial.
PE 2001	Processing of votes	D1 Incorrect signing and missing information on counting sheet and PV	Cancellation of polling station	L	F	d	Acknowledgment of irregularities and exclusion of endangered results.
PE 2001	Processing of votes	D1 illiterate scrutineers	Cancellation of polling station	L	F	d	Illiterate persons cannot count.
PE 2001	Processing of votes	D1 signing of counting sheet only by polling station staff	Cancellation of polling station				
PE 2001	Processing of votes	D1 Replacement of counting sheet by a photocopy	Cancellation of polling station	L	A	d	This was a violation of the law but the copy was not necessarily fraudulent, preservation of votes should weight higher.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
PE 2001	Processing of votes	D1: missing results due to the no-show of bdv-members and a maritime accident with electoral documents	Dismissed	L	F	d	Logical consequence.
PE 2001	Processing of votes	D1 Demand: Comparison of PVs under the supervision of all candidates' representatives	Dismissed	L	D	d	Legalistic interpretation of rules, no service to the spirit of the HCC's function (find the real result), biased.
PE 2001	Processing of votes	D2: rectification of results after comparison of different PVs	Rectification	L	D	d	Opaque, flawed circumstances of the decision.
PE 2001	Processing of votes	D2: in some localities in Fianarantsoa Province the Governor commanded to change the results in favor for Ratsiraka	Annullment of polling stations	L	A	d	Measure may have been just but the circumstances of the decision question the legitimacy.
LE 2002	Legal framework	electoral law 2002-004 on LE elections	Partial dismissal	C	A	d	Executive prerogative for boundary drawing was not beneficial for competition but constitutional.
LE 2002	Electoral register	Non-registration on list	Not competent*	P	A	i	HCC was not competent for disputes of electoral register; acknowledgment of problems would have been functional.
LE 2002	Electoral register	Delivery of ordonnances	Not competent*	P	A	i	HCC was not competent for disputes of electoral register; acknowledgment of problems would have been functional.
LE 2002	Registration of candidates	Opinion on the extension of the registration period for LE	Validated	C	A	d	Reference to principle of participation and the spirit of the law was functional for competition but ad hoc adjustment of rule was dysfunctional.
LE 2002	Electoral campaign	Use of public goods, corruption, traffic of influence	Not competent*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Propaganda outside of the official period	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Too early electoral campaign	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Propaganda at prohibited places	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Belligerent and irreverent speeches	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Official openings during the campaign	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations, HCC ruled in 1996 that openings during the campaign are prohibited.
LE 2002	Electoral campaign	Distribution of ballot papers on election day	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 2002	Electoral campaign	Vote buying	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations.
LE 2002	Electoral campaign	Use of public goods or administrative cars for the campaign	HCC not competent but criminal courts*	C	D	i	No acknowledgment or examination of these potential very serious violations, electoral law allows for annulment of votes as a sanction for abuse of public resources.
LE 2002	Voting operations	Incorrect countersigning of attendance sheet	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was beneficial.
LE 2002	Voting operations	Opening of bdv before the official opening hours	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was beneficial.
LE 2002	Voting operations	Closure of the poll on 16.12	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was beneficial.
LE 2002	Voting operations	Proxy vote	Cancellation of polling station*	P	F	i	Acknowledgment and sanctioning of irregularities was beneficial.
LE 2002	Voting operations	Partiality of the local administration, too many irregularities in a high number of bdvs	Annulment of constituency*	P, C	F	i	Partiality was sanctioned, by-elections were possible.
LE 2002	Voting operations	Partiality of the local administration, doings (agissements) that disrupted the public order and hampered the exercise of the right to vote	Annulment of constituency*	P, C	F	i	Partiality was sanctioned, by-elections were possible.
LE 2002	Processing of votes	Non-transmission of electoral documents	Cancellation of polling station*	L	F	d	Logical consequence.
LE 2002	Processing of votes	Discordance between numbers on PV and counting sheet	Cancellation of polling station*	L	F	d	Plausible, results cannot be obtained.
LE 2002	Processing of votes	Partiality of the local administration, non-production of results in a commune without a justification	Annulment of constituency*	P, C	F	d	Partiality was sanctioned, by-elections were possible.
PE 2006	Legal framework	Preponement of PE (ca 3 weeks)	Approved	L	D	d	Served presidential preferences and reading of history, ignored 2nd HCC decision on PE 2001 as starting date for term, climatic reasons as pretext.
PE 2006	Legal framework	Non-respect of the electoral framework by Ravalomanana	Dismissed	L	A	i	There was a widespread mistrust towards the Ravalomanana government in this election, however, petition appears to have been too diffuse.
PE 2006	Electoral register	Discordance of number of registered voters published by MI before the poll and in the provisional results	Dismissed	P	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Electoral register	Incorrect electoral register, undistributed voting cards	Dismissed	P	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Electoral register	Unregistered citizens and undistributed electoral cards in Menabe	Not admitted	P	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
PE 2006	Electoral register	4.31 million citizens are deprived from their voting rights	Dismissed	P, L	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Electoral register	The contract for the computerisation of the electoral lists and the computerised processing of votes was given to a company linked to Marc's electoral campaign director	Dismissed	L	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Electoral register	Electoral lists were not transmitted to the fokontany offices and could not be consulted by the voters, the authorisation of the list was frequently done behind closed doors	Dismissed	P	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Electoral register	Candidates were not informed about the official number of registered voters and the definitive number of bdvs before the announcement of the provisional results	Dismissed	L	D	i	Obvious problems with the electoral register (secondary literature) are ignored, no acknowledgment at all but narrow interpretation of HCC's competences.
PE 2006	Registration of candidates	4 out of 18 candidates dismissed	Partial dismissal	C	D	d	Strict application of amended rule, political context points to political interests.
PE 2006	Registration of candidates	Marc's ballot paper displayed a combination of the three national colours although it is forbidden	Dismissed	C			Not sufficient information for assessment.
PE 2006	Electoral campaign	Distribution of donation in Fianarantsoa II by Ravalomanana's support committee	Dismissed	C	D	i	Allegations were serious but HCC did not engage in examinations.
PE 2006	Electoral campaign	Use of administration's goods for propaganda before, during and after the electoral campaign	Dismissed	C	A	i	HCC did not deny competence to annul votes but cited missing evidence; acknowledgement that this could have been a violation would have been functional.
PE 2006	Electoral campaign	Broadcasting of MBS TV programs on a quasi national scale, this violated the idea of the equal partition of broadcasting times between the candidates no evidence, no effect on the sincerity of the vote or the will of the voter, dismissed	Dismissed	C	D	i	HCC did not address legal loophole and threat to competition.
PE 2006	Electoral campaign	Marc gave during a campaign meeting in Antsonjombe speeches that were violent, defamatory and aggressive against other candidates	Dismissed	C	D	i	Hate speech was according to the law a reason for disqualification of candidates, HCC neither examined the issue nor did it acknowledge the threat to comptetition.
PE 2006	Electoral campaign	Teachers and medical doctors were forced to join a campaign organisations close to TIM	Dismissed	C	D	i	HCC refrained from examinations and applied a flawed argumentation.
PE 2006	Electoral campaign	Appointment of an acting minister as the President's campaign director	Dismissed	C	D	i	HCC did not acknowledge that this could be a problem.
PE 2006	Electoral campaign	Civil servants of the health and education ministry campaigned for Marc	Dismissed	C	D	i	HCC had issued in 1996 clear guidelines for the administration during the campaign in order to guarantee neutrality, annulments would have been possible.
PE 2006	Electoral campaign	Presentation of MAP on Friday, 10 November in the Palais des Sports et de la Culture	Dismissed	C	A	i	There was a legal loophole but HCC did not address the inherent problem of such activities.
PE 2006	Electoral campaign	Closure of schools in Mahamasina on Friday, 1 December, day of campaign meetings of Marc for achieving a high attendance at the	Dismissed	C	D	i	No acknowledgment of problematic behaviour, introduction of legal loophole through "command" requirement.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
		meetings					
PE 2006	Electoral campaign	Broadcasting praises of Marc's achievements on radio nationale Malagasy on 2 December 2006	Dismissed	C	D	i	No acknowledgment of problematic behaviour, introduction of legal loophole through "command" requirement.
PE 2006	Voting operations	Non-publication of the list of polling stations before the 20.11.2006	Dismissed	C, L	D	i	In-depth examination would have been necessary, no acknowledgment of the importance to communication the list of polling stations (representatives).
PE 2006	Processing of votes	Discordance between numbers on the electoral list (516) and number of envelops found in the ballot box (519) in one polling station	Dismissed	L	F	d	HCC had sanctioned the irregularity already.
PE 2006	Processing of votes	Issue of an official note by the Education Ministry's SG to their civil servants on 5 December to stop all administrative tasks and devote their time to the collection of results in their communes	Dismissed	L	D	d	Flawed argumentation, Ministry of Education is not responsible for information on the poll.
PE 2006	Processing of votes	Comparison of the official PVs and the PVs of Ratsirahonana's delegates	Dismissed	L	F	d	Comparison would have been possible.
PE 2006	Processing of votes	Control of numbers in certain bdvs	No discordances	L	F	d	Comparison was functional.
PE 2006	Processing of votes	Comparison of CRMV-PVs and delegates' PVs	No discordances	L	F	d	Comparison was functional.
PE 2006	Processing of votes	Collection and processing of electoral results by DIGITMG Sarl that belongs to the wife of Minister for Education and who is also a representative of Marc	Dismissed	L	D	d	Acknowledgment of potential bias would have been functional.
PE 2006	Processing of votes	The suspension of the publication of provisional results by the MI on 8 December until 16 h, prohibition of public access to the dome what strengthens the certainty that the results have been manipulated	Dismissed	L	D	d	No in-depth examination, widespread reports about the energy cut and mistrust, no endeavour to raise the trust in the results.
PE 2006	Processing of votes	During the counting process a power blackout occurred in a polling station, afterwards 22 additional envelops were found on the table, the delegates refused to sign the PV because the results were manipulated	Dismissed	L	F	d	Examination of issue was functional.
LE 2007	Electoral register	Errors and omissions on the electoral list	Dismissed	P	D	i	Narrow interpretation of competences, inconsistency with earlier jurisprudence, flawed argument (CS is responsible).
LE 2007	Registration of candidates	Withdrawal demands (incl. AREMA)	Dismissed	C	A	d	Strict and consistent rule application, absurdities caused by this strict application, ignorance of that, reference to principle of active participation.
LE 2007	Registration of candidates	Deadlines for ballot paper submission	Upheld	C	A	d	Strict and consistent rule application, absurdities caused by this strict application, ignorance of that, reference to principle of active participation.
LE 2007	Registration of candidates	Verification of state of judicial procedures against candidates (condemned or not)	Information on the cases	C	F	d	Consistent rule application, justifications appear plausible.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 2007	Registration of candidates	General comment that list of candidates cannot be changed after publication of list (result decision)		C	A	i	HCC ignored problems that occurred through its strict rule application.
LE 2007	Electoral campaign	Use of public goods or use of prerogatives of public authority	Dismissed	C	F	i	Acknowledgment of HCC competence and consequently examination of the issues was functional.
LE 2007	Voting operations	Delivery of electoral cards on election day	Dismissed	P	D	i	Apparently no real examination, no acknowledgment that this can be problematic.
LE 2007	Voting operations	Use of false electoral ordonnances	Dismissed	P	F	i	Examination was functional.
LE 2007	Voting operations	Insufficient ballot papers for all candidates	Dismissed	C	A	i	Clarification was functional, no acknowledgment of the rule's structural bias.
LE 2007	Voting operations	Absence of rotation among the delegates at the bdv	Rule clarification	L			Not sufficient information for assessment (bad quality of data).
LE 2007	Processing of votes	Abduction of the ballot box with uncounted votes	Annulment	L	F	d	Logical consequence.
LE 2007	Processing of votes	Transport of votes by unentitled persons	Dismissed	L	D	d	HCC should have examined whether there were problems with the result.
LE 2007	Processing of votes	Comparison of PVs	Dismissed	L	F	d	Comparison would have been possible.

Appendix B: Senegal – Codings of Conseil Constitutionnel Interventions

Key: PE = Presidential Elections; LE = Legislative Elections; P = Participation; C = Competition; L = Legitimacy; F = Functional; A = Ambiguous; D = Dysfunctional; d = direct; i = indirect.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
PE 1993	Electoral register	Domplaint about late registrations and abusive withheld of electoral cards and IDs	Dismissal	P	D	i	Strict interpretation of competences, no further examination, no acknowledgment of problems in the registration process that were reported in the secondary literature.
PE 1993	Registration of candidates	Admission of all candidates	Upheld	C	F	d	No constraint to competition since all candidates were admitted.
PE 1993	Registration of candidates	Withdrawal of candidacy	Validated	C	F	d	Argument was plausible.
PE 1993	Electoral campaign	Diouf propaganda in radio and TV, RTS/Le Soleil montage trompeur	Dismissed	C	F	i	Conditions for electoral campaign had improved according to secondary literature, Cour d'appel was active.
PE 1993	Electoral campaign	Public goods in electoral campaign	Dismissed	C	A	i	CC was not competent but acknowledgment of problem, no further examinations.
PE 1993	Electoral campaign	Broadcasting of Tivouane demonstration	Dismissed	C	A	i	There was a loophole because broadcast was late so that other interventions were not really feasible, more acknowledgment would have been beneficial, broadcasting was presidential preference.
PE 19-93	Voting operations	Polling stations in Darou Mousty, Kébémer, Ziguinchor, Mbacké were moved	Dismissed	P	D	i	CC did not acknowledge the tensed situation in Casamance and engages in no examination or justification.
PE 1993	Voting operations	Lack of polling booths at several localities	Dismissed	P	A	i	Acknowledgment of potential rule violation was functional but more examinations would have been beneficial as OIF reported on lack of booths in Dakar.
PE 1993	Voting operations	Distribution of a candidate's ballot paper before and during election day	Dismissed	C	D	i	Acknowledgment of potential rule violation was beneficial but refusal of examinations was dysfunctional.
PE 1993	Voting operations	Distribution of food and supplies to voters	Dismissed	C	D	i	More examinations would have been beneficial.
PE 1993	Voting operations	Use of non-indelible ink	Dismissed	P	D	i	Reported problems with the ink but no further examination.
PE 1993	Voting operations	Abusive use of orders, false orders or blank orders	Dismissed	P	D	i	Huge problem in 1993, many doubts in population about it, no examinations of the problem, strict standard of proof.
PE 1993	Processing of votes	Transport of PV by non-authorised persons	Dismissed	L	A	d	Flawed argument, will to uphold the election results was strong.
PE 1993	Processing of votes	Stalemate at CNRV	Rule interpretation, deadline for CNRV to announce the provisional results	L	A	d	Broad interpretation of competences was functional and prevented the prorongation of the crisis. Yet, the decision reduced the opposition's possibility to challenge results at the CNRV and reduced transparency of the process.
LE 1993	Electoral legal framework	Changes of rules on PV transmission and composition of CDRV and CNRV	Upheld	L	A	d	Amendment was a non-consensual process in the PS dominated NA of a rule that was part of the consensual electoral law, thus the amendment contributed to the decrease of legitimacy. On the other hand the amendment and its upholding was legal and it sought to prevent further stalemates in the electoral process.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 1993	Registration of candidates	Dismissal of candidacies due to age requirements	Dismissed	C	F	d	Correct rule interpretation.
LE 1993	Registration of candidates	Complaint against MI	Non-admission	C	A	d	No rule violation but rule was overly strict interpreted.
LE 1993	Voting operations	Massive use of fraudulent ordonnances (many specifications)	Dismissed	P	F	i	Reference to other court and extensive calculations were positive (even though the complaint was filed by high-ranking PS politicians), however secondary literature also confirms that boths sides engaged in these fraudulent activities.
LE 1993	Voting operations	"résultats fantaisiste" in 40 polling stations	Annulment of 2 polling stations	L	F	i	Acknowledgment and sanctioning of irregularities was functional.
LE 1998	Electoral legal framework	Introduction of ONEL and HCA	Upheld	L	F	d	Amendment catered for a demand by the opposition and improved the supervision of the eletoral process.
LE 1998	Electoral legal framework	Amendment increasing the number of NA seats	Dismissed	C	D	d	No argument about the amendment's influence on competition.
LE 1998	Electoral legal framework	Improvement of electoral procedures (among them the increase of seats in the National Assembly)	Partial dismissal	L	F	d	Short argument appears plausible, partial dismissal was logical consequence of CC-27/98, no critique in the secondary literature.
LE 1998	Electoral legal framework	Amendment increasing the number of NA seats	Upheld	C	D	d	Amendment tilted the electoral system in favour of PS, rewinded parts of the 1992 consensus, no argument about the amendment's influence on competition.
LE 1998	Electoral legal framework	Demand to postpone the decision on the NA seats law until the Conseil d'état rendered the judgment on the procedural legality of the relevant NA session	Not admitted	C	D	d	The deadline provisions would have given the CC more time to decide, furthermore it could have interpreted the rules more purposeful in order to give the opposition a chance and to protect democratic procedures. Clear preference of ruling party.
LE 1998	Electoral register	Should the electoral register be available to all parties and ONEL?	Not admitted	L	D	d	Narrow interpretation of competences.
LE 1998	Electoral register	Discordance of registration numbers	Dismissed	P	F	i	Extensive examination and justification was beneficial.
LE 1998	Electoral register	Illegal distribution of voter cards	Dismissed	P	F	i	Examination was beneficial.
LE 1998	Electoral register	Malian voters	Dismissed	P	D	i	Serious allegation but no examination.
LE 1998	Registration of candidates	MI complaint on candidates	Candidacy upheld	C	F	d	Weighting of rules was functional.
LE 1998	Registration of candidates	MI complaint on candidates	Candidacy upheld	C	F	d	Consistent rule application, plausible.
LE 1998	Registration of candidates	Eligibility of candidates	Candidacy dismissed	C	F	d	Plausible.
LE 1998	Registration of candidates	Eligibility of candidates	Candidacy upheld	C	A	d	CC interpreted rule consistently and did not violate rules, however, no weighting of rules, age requirement should count more than strict application of deadlines.
LE 1998	Registration of candidates	Complaint against MI	Dismissal validated	C	A	d	Clarification was beneficial (even though pro MI) but it remained unclear whether dismissal was correct.
LE 1998	Registration	Eligibility of organisation	Candidacy upheld	C	A	d	Ruling did not constrain competition but ruling was not transparent.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
	of candidates						
LE 1998	Voting operations	Relocation of 17 polling stations in Bignona (AJ/PADS stronghold)	Dismissed	P, C	A	i	Examination and acknowledgment of rule violation was beneficial, however sanction would have been more functional.
LE 1998	Voting operations	Irregular and belated appointment of polling station staff, cooptation by PS	Dismissed	L	F	i	Extensive examination of the issue was beneficial.
LE 1998	Voting operations	Illegal extension of polling stations' opening hours in Rufisque	Dismissed	P	D	i	No examination of the issue.
LE 1998	Voting operations	President of polling station refused to verify the identity of the voters	Annulment of six polling stations	P	F	i	Acknowledgment and sanctioning of irregularities.
LE 1998	Voting operations	Violent incidents in several polling stations	Annulment of one polling station	P	F	i	Acknowledgment and sanctioning of irregularities.
LE 1998	Voting operations	Irregularity in polling station, representatives of PS-candidates were refused to enter polling stations	Dismissed	L	F	i	Examination of issue was beneficial, decision was against the ruling party.
LE 1998	Voting operations	Multiple votes in certain polling stations in Mérina/Rufisque	Annulment of two polling stations	P	F	i	Acknowledgement, examination and sanctioning was beneficial.
LE 1998	Voting operations	Use of false "certificats de conformité"	Dismissed	P	F	i	Alleged irregularity was examined, ONEL-reports were also used.
LE 1998	Voting operations	Exercise of influence on the voters by PS	Dismissed	C	A	i	Alleged irregularity was serious and therefore more examinations would have been appropriate but complaint was apparently also diffuse.
LE 1998	Voting operations	Insufficient ballot papers	Dismissed	C	D	i	Potentially serious violation of competition, more examination would have been beneficial.
LE 1998	Processing of votes	Non transmission of PVs to CNRV	Dismissed (already rectified)	L	F	d	Examination of alleged irregularity was beneficial.
LE 1998	Processing of votes	Irregular transmission of PVs from external voters	Dismissed	L	F	d	Examination of alleged irregularity was beneficial.
LE 1998	Processing of votes	Irregular transmission of PV from polling station in Kaffrine	Dismissed	L	F	d	Examination of alleged irregularity was beneficial.
PE 2000	Electoral legal framework	Abrogation of two-term limit and "quart bloquant" (10/1998)	Dismissed	C	D	d	Amendment served preferences of the ruling party to preserve power, CC applied a narrow and legalistic interpretation.
PE 2000	Electoral legal framework	Abrogation of two-term limit and "quart bloquant" (10/1998)	Not admitted	C	D	d	Amendment served preferences of the ruling party to preserve power, strict interpretation of deadlines.
PE 2000	Electoral register	Illegal registration of Malian citizens on Senegalese electoral roll	Dismissed	P	D	i	Few information but as allegation was serious, more examinations or justifications would have been functional.
PE 2000	Registration of candidates	Admission of all candidates	Validated	C	F	d	No obstacles to passive participation.
PE 2000	Electoral campaign	Ministers in PS campaign directory violates constitution (arts 1,2,3,5)	Dismissed	C	A	d	Serious problem for competition that the CC did not acknowledge. Narrow interpretation of its competences (Fall deems it right in this case). However, complaint was diffuse. Not evident how the fact violated the cited constitutional articles.
PE 2000	Electoral	State resources and Diouf's ministers in campaign directory	Dismissed	C	A	i	CC regretted the incident. CC competence was arguable (see above) but the case

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
	campaign						harmed competition.
PE 2000	Voting operations	Massive transfer of voters for the benefit of Niasse, addition of voters of other polling stations per hand on the attendance sheet	Dismissed	C	F	i	CC examined the allegation, justification plausible.
PE 2000	Voting operations	Violence, ballot box stuffing, disappearance of attendance sheet and counting sheet in Rufisque	Dismissed	P	D	i	Serious allegation, thus more examinations would have been necessary (for instance ONEL-reports), secondary literature reported disturbances by PS supporters in Rufisque.
PE 2000	Voting operations	2 CA 2000 voters in Madène without being on the respective electoral list	Annulment of 2 CA 2000 votes	P	F	i	Examination and rectification.
PE 2000	Voting operations	Insufficient ballot papers in 1 polling station	Annulment (equality was not given)	C	F	i	Examination and sanctioning of irregularity, reference to principle of equality in justification.
PE 2000	Voting operations	Extension of polling stations' opening hours in 1 polling station	Dismissed	P	F	i	Electoral law allows for extended opening hours to enable the voters to collect certificats de conformité.
PE 2000	Voting operations	Missing attendance sheet in 1 polling station	Annulment	P	F	i	Examination and sanctioning of irregularity.
PE 2000	Voting operations	Replacement of polling station's president per Prefect decision in one polling station	Annulment	L	F	i	Examination and sanctioning of irregularity.
PE 2000	Processing of votes	Absence of CDRV-PV for Kaffrine	Dismissed	L	F	d	Logical consequence, votes are not lost.
PE 2000	Processing of votes	Irregular transport of PVs	Dismissed	L	F	d	Examination and comparison with ONEL-PVs.
PE 2000	Processing of votes	Error in vote attribution in one polling station	Rectification of result (107 votes)	L	F	d	Examination and comparison with ONEL-PVs, sanctioning of irregularity.
LE 2001	Registration of candidates	Affaire Aly Lo	Rectication possible	C	F	d	MI had backed the PDS maneuver and CC apparently sought to mitigate the effect.
LE 2001	Registration of candidates	Name and picture of Wade on ballot paper	Prohibition of name and picture on ballot paper	C	F	d	Reference to principle of equality was functional.
LE 2001	Electoral campaign	Wade and his picture in the campaign	Dismissed	C	A	i	CC was indeed not competent but CC did not acknowledge the problem and fell behind its previous position (the consequence of the prohibition for the ballot paper should be the prohibition in the electoral campaign, on the other hand: Wade was PDS chairperson).
LE 2001	Electoral campaign	State agents in electoral campaign	Dismissed	C	A	i	CC was not competent but no further examinations, no acknowledgment that this was a problem.
LE 2001	Voting operations	Irregularities with the attendance sheets all over the country	Dismissed	P	A	i	The clarification of the attendance sheet were functional but CC tolerated irregularities.
LE 2001	Voting operations	Representatives of AFP were not allowed to enter polling station in Taif, some polling stations were not complete	Dismissed	L	F	i	No information whether alleged incident happened but CC examined the issue and checked ONEL reports. Therefore assessment as functional.
LE 2001	Processing of votes	Error in tabulation caused misattribution of 52 votes	Rectification of three votes	L	F	d	Acknowledgment and sanctioning of irregularities.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
LE 2001	Processing of votes	UPRS should have got 9600 votes from its members in Pikine	Dismissed	L	F	d	Argument was plausible.
LE 2001	Processing of votes	Distribution of remaining votes: which votes are to be included into the calculation of the national quota?	Dismissed	C	F	d	Argument was plausible.
PE 2007	Electoral legal framework	Demand to cancel CENA appointments	Dismissed	L	A	d	CC was not the competent jurisdiction but appointments were a serious problem for the legitimacy of elections and the CC took a restrained approach.
PE 2007	Electoral register	Uneven starting and closing dates for registration	Dimissed	P	D	i	CC tolerated rule violation.
PE 2007	Electoral register	Distribution of voter cards	Dismissed	P	D	i	Severe problemes with voter cards were acknowledged by CENA, CC argument appears flawed, refrains from in-depth examinations.
PE 2007	Electoral register	Publication of external voters' list	Dismissed	P	D	i	CC did not engage in examinations, ignored the potential rule violation and how this threats the legitimacy of elections.
PE 2007	Registration of candidates	Verification of 16 candidates	Partial dismissal	C	A	d	The electoral law requires the signatures but CC-decision was not transparent.
PE 2007	Registration of candidates	Demand to recount signatures	Dismissed	C	D	d	Transparency was denied, flawed argument.
PE 2007	Electoral campaign	Wade promises for votes	Dismissed	C	D	i	Flawed argument that denied problem, CC did not state its incompetence as usual in this field, inconsistent jurisprudence.
PE 2007	Voting operations	Representatives of the opposition could not take their responsibility in three polling stations in Darou Marnane due to belated notification	Dismissed	C	D	i	Rule violation and problem for competition was not acknowledged.
PE 2007	Voting operations	Multiple votes due to use of non-indelible ink in some polling stations	Dismissed	P	D	i	No in-depth examination.
PE 2007	Voting operations	Citizens voted for citizens that did not pick their voter cards	Dismissed	P	D	i	No in-depth examination.
PE 2007	Voting operations	In certain villages in Fatick the polling stations were open until Monday morning what allowed for multiple fraud	Dismissed	P	D	i	Not sufficient information for assessment.
PE 2007	Voting operations	In Sam Lah all members of the polling stations were pupils, thus they were underage and not registered on the electoral roll	Dismissed	L	D	i	No in-depth examination.
PE 2007	Voting operations	Djibo Leyti Ka voted in a polling station in which he was not registered on the electoral list	Dismissed	P	F	i	Argument was plausible.
PE 2007	Processing of votes	PVs of external vote in Italy were not reliable: more casted votes (suffrage exprimés) than votes attributed to candidates	Dismissed	L	F	i	Examination and comparison of the different PV version was functional.
PE 2007	Voting operations	Missing attendance sheets in Mbacke, no verification of multiple votes	Dismissed	P	F	i	Examination was beneficial.
PE 2007	Processing of votes	Cheikh Tidiane SY smashed the door of polling station no 1 Centre Ndatté Yalla and ordered the continuation of the vote although the counting was already underway	Dismissed	L	A	d	Serious incident if a minister intervenes in a such a way, however, CC examined the issue and argument that it did not have an influence on the result appears plausible.
PE 2007	Processing of votes	External votes from Ghana and Benin were not counted by whole CNRV	Dismissed	L	A	d	Examination of PV was good but no acknowledgment that this could have been a problem.

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
PE 2007	Processing of votes	Transport of unsealed envelops	Dismissed	L	F	d	Examinations and comparisons with CENA PV were functional.
LE 2007	Electoral legal framework	PR demanded an opinion on the extension of the MPs' term	Dismissed	C, L	A	d	Strict interpretation of competences, no further examination.
LE 2007	Electoral legal framework	Law on the extension of the MPs' term is an electoral law, not a constitutional law	Dismissed	C, L	D	d	Narrow interpretation of competences even though the regularity of elections was an important feature of democratic elections, law served the president's preferences.
LE 2007	Electoral legal framework	Parity law	Dismissed	C	F	d	Justification was flawed from a gender perspective but dismissal prevented hurdles for opposition parties and did not serve presidential preferences.
LE 2007	Registration of candidates	Jef Jel's complaint against MI's refusal to register JefJel list	Not admitted	C	D	d	CC did not acknowledge the failure of the MI to register candidates, deadline appears like prerquisite not to judge on the issue.
PE 2012	Registration of candidates	Wade's candidacy despite two-term limit	Validated	C	D	d	No justification of the decision. No reference to the constitution's ambiguity.
PE 2012	Registration of candidates	Verification of 17 candidates	Partial dismissal	C	A	d	Admission of bulk of candidates was functional. Verification of support signatures for the three dismissed candidates was opaque and hence dysfunctional.
PE 2012	Registration of candidates	Complaint against Wade's candidacy	Dismissed	C	D	d	No purposive interpretation. No reference to idea of the 2001 constitution and the term limit.
PE 2012	Registration of candidates	Complaint against Seck, Sall and Gadio	Dismissed	C	F	d	CC had verified the payment of guarantees before. No constraint to competition.
PE 2012	Registration of candidates	Complaint by Sarr, Keinde and Ndour against the dismissal of their candidacy	Not admitted	C	D	d	EUEOM reported problems with the signatures and CC refused to make its decision transparent, did not address the contradiction in the electoral legal framework.
PE 2012	Voting operations	Upholding of votes in Touba, attendance sheet was not signed but votes were otherwise confirmed	Dismissed	P, L	F	i	Consistent rule application, acknowledgment and sanctioning of rule violation.
PE 2012	Voting operations	Small winning margin in one polling station due to violence committed by Sall-supporters	Dismissed	P, C	D	i	Incident was examined but no acknowledgment or regret of problem, inconsistent ruling, in 1998 the results in a polling station were cancelled due to violent incidents.
PE 2012	Voting operations	Voter intimidation through gun shot by Macky supporters at University of Touba	Dismissed	P, C	A	i	Apparently no evidence but not clear how deep the incident was examined, no acknowledgment of potential problem.
PE 2012	Voting operations	Upholding of votes in Bignona because all candidates had approved the relocation of polling stations due to security reasons	Dismissed	P		i	Not sufficient information for assessment.
PE 2012	Processing of votes	Telefaxed PV from external polling stations	Dismissed	L	A	d	Clarification of the law was functional but it was not transparent whether the PVs were verified later.
LE 2012	Electoral campaign	Non-implementation of CdA judgment on Sall picture in campaign	Dismissed	C	D	i	Decision of Cour d'appel was not implemented, institutional vacuum because no sanctions for the non-implementation are prescribed, CC made no attempt to fill that void.
LE 2012	Voting operations	Problems with PVs, attendance sheet and consistency of numbers in Kebemer, Dagana and Mbacke	Dismissed	P	F	i	Plausible argument.
LE 2012	Processing of	Non-distribution of CNRV-summary sheets to CAP 21	Dismissed	L	A	d	Clarification of the law was functional but the justification that it did not harm

Election	Electoral Cycle Position	Topic	Outcome	DQE	Functionality	Directness	Assessment Justification
	votes						equality was not convincing.
LE 2012	Processing of votes	Repetition of election due to low turnout	Dismissed	L	F	d	Low voter turnout can indeed be a problem for the legitimacy of elections, however CC was not the appropriate channel to address this concern.
LE 2012	Processing of votes	Due to the law of parity the system of “plus fort reste” should be applied	Dismissed	L	F	d	CC argument appeared plausible.

Appendix C: Interview Guideline on Constitutional Court in General

DECISIONS

One question, we have told you in advance in order to give you the opportunity to take a bit more time for the answer you would like to give. We will return to this question in a second but let me first ask you this:

267.1 In general terms, how powerful is the judiciary, and particularly the constitutional court,
vis-à-vis the elected branches of government in your country?

267.2 What would be your suggestion? What have been the 3 most important decisions taken by the court ever since the return of your country to multiparty politics?

267.3 Would you like to add other very important decisions?

267.4 Why do you consider these decisions to be the most important ones?

INTERNAL PROCEDURES

267.1 How are incoming cases allocated to specific judges in practice? *[optional]* In other words, what are the criteria to become a rapporteur? *[a-d questions are supplementary questions]*

Can you describe the process of finding a decision?

How would you assess the weight of the rapporters opinion vis-à-vis the plenary discussion (in the chamber)?

How does the court deal with dissenting opinions?

What's the role of the president of the court?

267.2 How would you characterize the communication between the judges and the elected officials?

267.3 *[optional]* How often do judges talk to…?

members of government

members of parliament

DECISION-MAKING

267.1 What are the most important factors that shape a judge's decision? How about...? The law? A judge's ideological position? Political affiliations? Public opinion? Interest of the head of state?

COMPLIANCE

Another important step is compliance to the court's rulings.

267.1 Do you remember any cases when the government did not follow the court's ruling?

267.2 Would your general assessment change for different periods since the return to multiparty politics [of courts, presidents, assembly majorities]?

PRESSURES 1

When constitutional judges take decisions their decisions may also be subject to pressures from different sources.

268.1 In very general terms, how would you assess the level of pressure on the constitutional court *[or equivalent]* in your country?

268.2 Who are the main authors of this pressure? How about the president?

PRESSURES 2

268.1 What have been the techniques and mechanisms used to put the court or individual judges under pressure? We will not ask you for specific cases or names. We are only interested in your general assessment. However, if you want to cite specific examples, go ahead.

268.2 *[If not already part of the spontaneous answer:]* How about...?

Rhetorical attacks? Physical attacks? Criminal investigation against judges? Personal threats of violence versus judges?	Informal communications such as phone calls? Bribes? The use of personal obligation due to social linkages? Denial of crucial information or files

268.3 Would this assessment of pressures change for other periods [of courts, presidents, assembly majorities]?

268.4 Have there been any institutional reforms that changed this situtation?

APPOINTMENT

268.1 Would you see any weaknesses of this procedure that might reduce the court's integrity or independence or is this an appropriate procedure? Why?

268.2 Beyond the formal qualifications, what can one do in this country if she or he wants to become a judge at the constitutional court?

268.3 Thus, in sum, what would you call the principle criteria for the choice of judges?

268.4 Has the importance of the criteria changed since the return to multiparty politics?

PUBLIC ATTENTION AND OPINION

268.1 How would you assess the public interest in the court's decisions? How would your assessment have been if you considered [earlier courts/periods]?

PRESS AND MEDIA

268.1 How would you assess the press and media reports on the court's decisions in quantity and quality? Would you make a distinction between newspapers and radio or TV broadcasters?

268.2 Would you like to highlight any media outlet or reporter who publishes or broadcasts particularly good reports on court decisions?

268.3 How would you assess the court's own PR work?

BUDGET (& SALARIES)

269.1 How would you assess the general budget of the court? Does the court as an institution get enough money to do a good job?

269.2 How would you assess the judges' remuneration? Are the judges appropriately paid and supported to do a good job?

FACILITIES

As any public institution needs some fixed facilities, I would like to ask for your assessment:

269.1 How would you assess the state of the court's facilities? Is the court appropriately equipped with rooms, staff, and technical equipment to do a good job?

269.2 In general terms, how would you assess the speed with which the court handles the cases? Are the court's delays…?

269.3 In your point of view, what are the reasons for this level of speed?

COMPARISON, REFORM, AND LAST WORDS

269.1 Your country has introduced a separate Constitutional Court. What, in your view, have been the major reasons to break with the institutional past and to opt for a separate constitutional jurisdiction?

269.2 Imagine the following thought experiment: You are the President of the Republic. Your first and foremost policy goal is to improve the independence of your country's constitutional court. What would you consider to be the most urgent measures or reforms to be taken?

269.3 Finally, we are about to finish this interview, is there anything you want to add about the topic?

Appendix D: Interview Guideline on Elections and Electoral Disputes

A. ELECTIONS

A.1 Comment caractérisez-vous les élections présidentielles et législatives depuis 1992 ?

A.2 Comment jugeriez-vous les conditions pour une compétition libre (fair competition) pendant la campagne électorale ?

A.3 Est-ce que des partis, des politiciens de l'opposition ont considéré des boycotts des élections législatives ?
(Quelles ont été les raisons pour cette considération ? Pourquoi le boycott n'a pas été réalisé ?)

A.4 Comment expliquez-vous l'évolution du taux de participation depuis 1992 ?

A.5 Est-ce que les élections législatives ont connu des éruptions de violence ? (Quelle phase du processus électoral est particulièrement vulnérable aux éruptions de violence ? Qui sont les acteurs qui exercent et mènent la violence ? Est-ce qu'il y a des régions qui ont connu particulièrement souvent des éruptions de violence ? Comment est-ce que le gouvernement a réagit à cette violence ?)

A.6 Si vous faisiez un classement du niveau de régularité des élections présidentielles et législatives depuis 1992, quelles élections évalueriez-vous comme les plus régulières et lesquelles comme les moins régulières ?

A.7 Depuis 1992, quels types d'irrégularités électorales sont apparues le plus souvent ? Est-ce que le type d'irrégularités a changé pendant les élections présidentielles et législatives depuis 1992 ?

A.8 Est-ce qu'il existe à votre avis une différence de niveau de régularité entre les élections présidentielles et législatives ?

B. INSTITUTIONS ELECTORALES

B.1 Quels sont selon vous les forces et défis du système des institutions électorales à Madagascar ?

B.2 Quelle est la fonction au processus électoral du Conseil National Electoral ?

B.3 Comment évalueriez-vous les rapports entre les institutions électorales? Entre quelles institutions la coopération se déroule-t-elle bien et entre quelles institutions existe-t-il des frictions ?

B.4 Quelle influence a eu la réforme du Code électoral de 2000 au processus électoral ?

B.5 Est-ce que depuis 1992 les acteurs politiques ou la société civile ont revendiqué des réformes des institutions électorales / du code électoral ? (Dans quel domaine ? Pourquoi ? Par qui? Comment est-ce que ces propositions ont été traité ?)

C. Réactions des candidats

C.1 Comment réagissent les perdants aux résultats ? (Est-ce qu'ils les acceptent ? Est-ce qu'il y a des partis ou des régions dont les candidats sont particulièrement réticents à accepter les résultats ?)

C.2 Quelles stratégies les perdants poursuivent s'ils ne veulent pas accepter les résultats ? (Quelle stratégie est utilisée le plus souvent ? Pourquoi ? Est-ce que des autres stratégies sont

imaginables? Est-ce que ces stratégies réussissent ? Dans quelles conditions est-ce qu'ils peuvent réussir ?)

D. (HAUTE) COUR CONSTITUTIONNELLE

D.1 Quel rôle joue la (Haute) Cour Constitutionnelle au processus électoral ?

D.2 Comment se déroule la procédure en matière électorale devant la (Haute) Cour Constitutionnelle ?

D.3 Sur quels justificatifs la (Haute) Cour Constitutionnelle, base-t-elle ses décisions en matière électorale ? (Procès-verbaux, rapports des ONGs/missions internationales, auditions)

D.4 Comment jugeriez-vous la jurisprudence de la (Haute) Cour Constitutionnelle en matière électorale (sur le plan de l'indépendance) ?
Est-ce que la juridiction a changé pendant les élections présidentielles et législatives ? Parmi les mandatures différentes ?

D.5 Quelles sont les facteurs majeurs qui influencent la décision du juge en matière électorale?
(La loi ? La position idéologique du juge concerné ? Ses affiliations politiques ? L'opinion publique ? L'intérêt du président de la République ?)

D.6 Qu'est-ce que augmente les chances de gagner un contentieux électoral ? (la stratégie, la qualité du mémoire déposé à la (Haute) Cour Constitutionnelle, la qualité des procès-verbaux, la qualité des autres rapport observatoires)

D.7 Comment considéreriez-vous la crédibilité de la (Haute) Cour Constitutionnelle en matière électorale ?

D.8 Comment est la perception de l'opinion publique de la juridiction de la (Haute) Cour Constitutionnelle en matière électorale ?

E. RÉFORMES

E.1 Quelles réformes proposeriez-vous afin de garantir des élections libres et régulières ?

E.2 Est-ce que vous avez des propositions afin d'améliorer le processus du contentieux électoral ?

Appendix E: Madagascar – List of Interview Partners

Andriamahefarivo, Johnny (2.5.2013, Antananarivo)
Prosecuting attorney at the court of appeal.

Andriamaholy, Dina (8.5.2013, Antananarivo)
Judge at the administrative court, President of CAEED (association of young judges), legal counselor of Rajoelina.

Andriamana, Richard (13.5.2013, Antsirabe)
President of transitional CENI on the district level.

Andrianjanahary, Philippe (11.4.2013, Antananarivo)
Former member of the high judicial council, the judges' union and member of the special electoral court.

Arnaud, August (23.4.2013, Antananarivo)
President of the judges' union.

Esovelomandroso, Manasse (25.4.2013, Antananarivo)
President of LEADER-Fanilo, former president of the National Assembly.

Imbiky, Anaclet (10.4.2013, Antananarivo)
Former minister of justice.

Indrianjahafy, Georges Thomas (8.5.2013, Antanarivo)
Former HCC member, former minister of justice, founding member of AREMA.

Limimy (3.5.2013, Antananarivo)
Former president of the legal commission at the National Assembly (1993-96).

Mananjara (6.5.2013, Antananarivo)
Former HCC member.

Ndriandahy, Mahamadou (2.5.2013, Antananarivo)
Executive secretary of the National Forum of Civil Society.

Rabenarivo, Sahondra (22.4.2013, Antananarivo)
Lawyer, NGO (SEFAFI).

Rabetsitonta, Tovonanahary (13.5.2013, Antananarivo)
Founder of GRAD-Iloafa.

Rabotoarison, Sylvain (22.5.2013, Antananarivo)
Former minister of the interior.

Randrezason, Théodore (22.5.2013, Antatanarivo)
Former president of the National Electoral Council.

Randrimalala, Robert Charly (15.5.2013, Antananarivo)
Civil Society.

Raharison, Hubert (16.4.2013, Antananarivo)
President of the bar association.

Rahelimantsoa, Rondro (26.4.2013, Antananarivo)
Vice President of the judges' association, CAEED member.

Rakotoarisoa, Bruno (24.4.2013, Antananarivo)
Former general secretary of KMF-CNOE (election observation NGO), former general secretary of CENI (2010).

Rakotarisoa, Jean-Eric (12.4.2013, Antananarivo)
Public law professor.

Rakotobe, Nelly (25.4.2013, Antananarivo)
Former president of the Supreme Court.

Rakotodrabao, Andriantsihafa Dieudonné (15.4.2013, Antananarivo)
HCC member.

Rakotomaharo, Rajemison (10.5.2013, Antananarivo)
Former president of the Senate.

Rakotomanana, Hery (21.5.2013, Antananarivo)
Former president of CENI (2010), lawyer.

Rakotomanana, Honoré (17.4.2013, Antananarivo)
Former HCC president, former president of the Senate.

Rakotomandimby, Benjamin (16.4.2013, Antananarivo)
Former HCC member.

Rakotonirina, Aimée (21.5.2013, Antananarivo)
Former HCC member.

Rakotonirina, Manandafy (24.4.2013, Antananarivo)
Former presidential candidate (MFM).

Rakotonirina, Noel (23.4.2013, Antananarivo)
Journalist.

Ralambomahay, Toavina (3.5.2013, Antananarivo)
Author and consultant.

Ralison, Samuel Andriamorasoa (13.5.2013, Antananarivo)
Chief clerk of HCC.

Ramandraibe, Bakalalao (17.5.2013, Antananarivo)
Former minister of justice.

Randranto, André (31.5.2013, Antananarivo)
Member of the transitional CENI.

Ranjeva, Raymond (12.4.2013, Antananarivo)
Former vice-president of the International Court of Justice, NGO president.

Rasoamanava, Alphonsine Mahefamana (30.5.2013, Antananarivo)
Former HCC member.

Rasolonjatovo, Jean-Michel (18.4.2013, Antananarivo)
Former member of the judicial council, founding member and former general secretary of the judges' union.

Ratiaray (30.5.2013, Antananarivo)
Law professor.

Ratrimoarivony, Yves (26.4.2013, Antananarivo)
Lawyer, former president of the bar association.

Razafindraibe, Ernest (8.5.2013, Antananarivo)
President of KMF-CNOE.

Razanarisoa, Germaine Bakoly (31.5.2013, Antananarivo)
Former HCC member.

Wyld, Ke (28.5.2013, Antananarivo)
Civil Society.

Appendix F: Senegal – List of Interview Partners

Babou, Abdoulaye (30.10.2012, Dakar)
Lawyer.

Camara, Fatou Kine (18.9.2012, Dakar)
Law professor, Civil Society.

Camara, Ousmane (26.9.2012, Dakar)
Former president of the Supreme Court.

Crespin, Marie-José (28.9.2012, Dakar)
Former CC member.

Dansou, Adolphe (1.10.2012, St. Louis)
Political science professor.

Diallo, Siricondy (6.11.2012, Dakar)
Former CC member.

Dieye, Abdoulaye (2.11.2012, Dakar)
Law Lecturer at the University Cheikh Anta Diop, member of the commission that created CENA.

Diop, Maréma (17.9.2012, Dakar)
Chief clerk of CC.

Diop, Sérigne (30.10.2012, Dakar)
National ombudsman, former minister of justice

Fall, Ismaïla Madior (19.9.2012, Dakar)
Law professor.

Fall, Mouhamet (2.11.2012, Dakar)
CENA-member, law lecturer at the University Cheikh Anta Diop.

Fall, Thiendella (31.12.2012, Dakar)
Directeur Général des Elections since November 2011, former Directeur des opérations.

Faye, Babacar (8.10.2012, Dakar)
Management director of CC.

Gueye, Babacar (2.11.2012, Dakar)
Chairman of the commission that created CENA, co-author of the 2001-constitution, professor at the University of Social Sciences.

Gueye, Mademba (23.10.2012, Dakar)
General secretary of the judicial council.

Kane, Amadou Aly (31.10.2012, Dakar)
Lawyer.

Kane, Mamadou Ibra (19.9.2012, Dakar)
Director of Futur Medias (RFM, RFM, L'Observateur).

Kanté, Babacar (28.9.2012, Dakar)
Former CC member, law professor.

Kamara, Mamadou (6.10.2012, Dakar)
Lecturer, consultant.

Kebe, Aminata (20.9.2012, Dakar)
OHCHR Programme officer West Africa Regional Office.

Kebe, Mouhamed (2.12.2012, Dakar)
Lawyer, consultant.

Lo, Mamadou (3.10.2012, Dakar)
Former CC member.

Mbodj, Mouhammadou (31.10.2012, Dakar)
Forum Civil, coordinator.

Ndecky, Dominique (17.9.2012, Dakar)
Communication officer of CC.

Ndiaye, Delphine (2.12.2012, Dakar)
President of female lawyers' union.

Ndiaye, Isaac Jacube (18.9.2012, Dakar)
CC vice president.

Ndiaye, Mamadou Kikou (25.9.2012, Dakar)
Former CC member.

Ndiaye, Sady (31.10.2012, Dakar)
Lawyer, member of the commission that designed the electoral law of 1992.

Seck, El Hadj Abdou Aziz (21.9.2012, Dakar)
President of judges' union.

Seck, Mamadou (2.11.2012, Dakar)
Institut de Gorée – Democracy, Gouvernance and Elections Program Coordinator, former assistant of Mazid NDIAYE, RADI, who chaired the commission to reform the code electoral (2011).

Sy, Mahmadou (5.11.2012, Dakar)
CC member.

Sy, Pape Mamour (10.10.2012, Dakar)
Law professor.

Sy, Pape Demba (20.9.2012, Dakar)
Law professor.

Telliko, Souleyman (2.11.2012, Dakar)
General Secretary of the Cour d'appel of Dakar, Member of the CNRV 2012.

Tine, Alioune (9.10.2012, Dakar)
RADDHO (Rencontre Africaine pour la Défense des Droits de l'Homme).

Wally, Manuel (30.10.2012, Dakar)
Member of the EU-Election Observation Mission 2012.