

JUDICIAL INDEPENDENCE UNDER POLITICAL PRESSURE: THE HIGH CONSTITUTIONAL COURT AND ELECTORAL JUSTICE IN MADAGASCAR (2009–2023)

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Abstract

This paper investigates the relationship between constitutional justice and political power in Madagascar, focusing on the High Constitutional Court (HCC) and its handling of electoral disputes involving Andry Rajoelina from 2009 to 2023. Against the broader principles of constitutional law (i.e., separation of powers, equality before the law, and the integrity of democratic choice) the study explores whether the HCC's repeated validation of Rajoelina's candidacies and election results reflects sound constitutional reasoning or risks fostering a de facto constitutional immunity. Using a doctrinal legal method, complemented with comparative approach, centred on close analysis of eight pivotal HCC decisions, the paper examines the normative framework governing Madagascar's constitutional justice and how it has been applied, with particular attention to judicial independence and the accessibility of constitutional complaint. The findings indicate a pattern: first, the HCC has demonstrated notable interpretative flexibility, particularly regarding nationality and eligibility requirements, often resolving ambiguities in favour of Rajoelina; second, the Court's consistent dismissal of substantial electoral challenges raises concerns about judicial independence and potential

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structural partiality; third, this judicial posture may erode equal access to constitutional complaint, subtly privileging certain political actors. The paper concludes by urging Malagasy institutions to reinforce the integrity of constitutional justice, ensure rigorous scrutiny of electoral disputes, and uphold the principle that no one stands above constitutional accountability, thereby preserving public trust in democracy and the rule of law.

Keywords: Constitutional complaint; High Constitutional Court (HCC); Judicial independence; Madagascar; Presidential election

I. INTRODUCTION

Constitutional law occupies a singular place in any rule of law, as it constitutes the ultimate guarantor of institutional legitimacy and coherence.¹ Through its foundational principles, such as the separation of powers, the hierarchy of norms, and equality before the law, it safeguards the public interest against abuses of power.² Within this framework, constitutional justice carries a delicate yet essential mission: ensuring that the Constitution remains the supreme norm, not only in texts but also in political and administrative practice. As Carré de Malberg underlined, “*the rule of law is established solely and exclusively in the interest and for the safeguard of citizens: it seeks only to ensure the protection of their rights and their individual status.*”³ This reminder situates constitutional justice as a bulwark for the individual against constituted powers, a role that resonates closely with the very rationale of the constitutional complaint mechanism.⁴ Respect for constitutional law is thus not merely a procedural safeguard but the first condition of an authentic and durable democracy.⁵

¹ Rainer Arnold, “L’État de droit comme fondement du constitutionnalisme européen [The rule of law as the foundation of European constitutionalism],” *Revue française de droit constitutionnel* no. 100 (2014): 769–7.

² Olivier Jouanjan, “Histoire de la science du droit constitutionnel [History of the science of constitutional law], in *Traité international de droit constitutionnel* [International treatise on constitutional law],” ed. Michel Troper and Dominique Chagnollaude (Paris: Dalloz, 2012), 69–111.

³ Louis Favoreu et al., *Droit constitutionnel* [Constitutional law], 21st ed. (Paris: Dalloz, 2019), 32.

⁴ It should be noted that Madagascar’s constitutional system does not formally provide a constitutional complaint mechanism in the strict sense of individual access to constitutional justice. However, this paper employs the term ‘constitutional complaint’ in a functional and contextual sense to describe petitions and electoral disputes submitted before the High Constitutional Court. These cases, although proceduralised under electoral law, engage core constitutional questions such as the protection of democratic legitimacy and the independence of constitutional justice.

⁵ Dominique Rousseau, “Constitutionnalisme et démocratie” [Constitutionalism and democracy], *La Vie des Idées*, September 19, 2008.

This role as guardian of the Constitution confers on constitutional courts a special responsibility. Their task is not confined to abstract review of norms; it extends to protecting democratic values, ensuring the respect of rights and freedoms, and adjudicating electoral disputes that directly affect the credibility of the political system.⁶ In many jurisdictions, constitutional jurisprudence has shaped public life by affirming the primacy of constitutional rules over partisan calculations or temporary political balances.⁷ The constitutional complaint, in this sense, emerges as a central instrument enabling individuals and political actors to challenge violations of their constitutional rights before an independent court.

It is precisely in this perspective that the present study situates itself, offering a critical analysis of the role and functioning of the High Constitutional Court (HCC) of Madagascar. The aim is to determine whether the HCC, in the exercise of its prerogatives in electoral matters and constitutional review, has fully assumed its mission as guarantor of constitutional principles, or whether, on the contrary, some of its decisions reveal a more flexible, or even conciliatory, interpretation of the requirements of the rule of law. Particular attention is devoted to the recent period, namely the 2009, 2018, and 2023 presidential elections, each of which carried decisive stakes for the constitutional order.⁸

The political trajectory of Andry Rajoelina offers a privileged case study for interrogating the strength of Madagascar's institutional safeguards. From the recognition of the transitional regime in 2009, to the validation of his candidacy in

⁶ Guillaume Glénard, "La doctrine constitutionnelle de l'égalité et la parité" [The constitutional doctrine of equality and parity], *Revue du droit public* 2021, no. 2 (March 2021): 489–518.

⁷ Antoine Basset and Eleonora Bottini, "Chronique de droit constitutionnel comparé (janvier 2020 à juin 2020)" [Chronicle of comparative constitutional law (January 2020 to June 2020)], *Titre VII* 5, no. 2 (2020): 180–93; Célestin Keutcha Tchpnga, "Droit constitutionnel et conflits politiques dans les États francophones d'Afrique noire [Constitutional law and political conflicts in francophone states of Black Africa]," *Revue française de droit constitutionnel* 63, no. 3 (2005): 451–91.

⁸ The decision to focus the analysis on the High Constitutional Court (HCC) is justified by its central role within the institutional architecture of Madagascar, particularly in the areas of electoral regulation and constitutional review. As the guardian of constitutional compliance, the HCC exerts a direct influence on the legitimacy of political processes and the legal stability of the State. Its interpretative power, often exercised with wide discretion, grants it a decisive capacity to shape the practical application of constitutional law, especially during critical electoral periods. Examining its decisions therefore provides a deeper understanding of whether this institution functions as a bulwark of the rule of law or, whether intentionally or not, it contributes to an institutional drift that favours certain political actors.

2018 despite various objections, and finally to the dismissal of multiple complaints in 2023, Rajoelina's constitutional itinerary has left a distinctive mark on the jurisprudence of the HCC.⁹ This repeated pattern of favourable rulings raises the question of whether such outcomes reflect the strict application of law or rather the emergence of an implicit form of constitutional immunity. Put differently: does the treatment afforded to Rajoelina by Madagascar's constitutional justice stem from faithful adherence to legal guarantees, or does it suggest a form of institutional leniency liable to undermine the principle of equality of citizens before the law and institutions?

Scholarship has addressed different aspects of Madagascar's constitutional democracy. Rabary-Ranovona highlighted the significance of the blank vote as a genuine political expression, exposing persistent democratic malaise within the electoral system.¹⁰ Giammaria Milani emphasised the structural and normative fragility of Madagascar's successive constitutions, underlining their formalistic drift and opportunistic revisions by political elites.¹¹ More recently, Ramalina R. M. Manitra examined the issue of President Rajoelina's dual nationality, analysing the legal implications of the automatic loss of Malagasy citizenship for presidential eligibility.¹² Yet no study to date has examined in depth the cumulative effect of repeated HCC rulings in favour of the same political actor and the potential construction, *de facto*, of a constitutional immunity that conflicts with the foundational principles of the rule of law. This study distinguishes itself by adopting a systemic and critical approach, shedding light on how the jurisprudence of the HCC might contribute to asymmetrical institutional consolidation and the personalisation of constitutional law in Madagascar.

⁹ For further understanding on the political trajectory of Andry Rajoelina, see McKenna and Amy, "Andry Rajoelina | Biography, Age, Education, Nationality, & Wife," *Encyclopedia Britannica*, November 17, 2023.

¹⁰ Bako Mahaliana Rabary-Ranovona, "Les enjeux du concept de vote blanc pour le régime démocratique malgache – hypothèse sur les élections présidentielles de 2018 [The Stakes of the Concept of the Blank Vote for the Malagasy Democratic Regime: Hypothesis on the 2018 Presidential Elections]," *Revue juridique de l'Océan Indien [Legal Review of the Indian Ocean]* 29 (2020): 549–94.

¹¹ Giammaria Milani, "À quoi sert la Constitution malgache? Les défis pour l'édification d'une Constitution effective et efficace à Madagascar [What Is the Use of the Malagasy Constitution? Challenges for Building an Effective and Efficient Constitution in Madagascar]," *Federalismi.it [Federalism.it]* 3 (2018): 1–25.

¹² Ramalina Ranaivo Mikea Manitra, "Constitutional Fragility and Dual Nationality Disputes: Legal Implications of Madagascar 2023 Presidential Election," *Constitution Journal* 4, no. 1 (June 30, 2025): 93–120.

Accordingly, this research seeks to answer a central question: Is constitutional immunity in Madagascar a mere perception, or a legal reality? To do so, the paper will first examine the normative and doctrinal framework of Malagasy constitutional justice; then analyse key HCC decisions rendered in 2009, 2018, and 2023; before engaging a broader reflection on the possible existence of a *de facto* constitutional immunity, shaped by the Court's own jurisprudence. From a legal standpoint, this study adopts a constitutionalist position that judicial bodies must remain strictly bound by the principle of constitutional supremacy and equality before the law, rejecting any interpretation or practice that implicitly grants immunity to political actors. By linking these perspectives to the thematic of judicial independence and constitutional complaint, the study aims to clarify the true place of constitutional law in the face of contemporary political dynamics in Madagascar.

II. RESEARCH METHOD

This study adopts a doctrinal legal research method, which consists of a systematic and critical analysis of primary and secondary legal sources in order to clarify the normative framework governing constitutional justice in Madagascar. The primary sources examined include the Constitution of Madagascar, the Code of Nationality, relevant organic laws, and, above all, the decisions of the High Constitutional Court (HCC) between 2009 and 2023, with a particular focus on cases involving the eligibility and candidacies of Andry Rajoelina. These sources are interpreted using established tools of legal hermeneutics, aimed at identifying the principles of constitutional law such as equality before the law, separation of powers, and the rule of law, and assessing how they have been applied in practice. Secondary sources, such as comparative constitutional jurisprudence, international human rights instruments including the International Covenant on Civil and Political Rights, and scholarly commentary, are used to contextualise the Malagasy experience within broader theoretical and comparative perspectives. The doctrinal method is particularly appropriate for this research because it allows for

an evaluation of the consistency, coherence, and legitimacy of judicial reasoning, and provides a solid basis to question whether the jurisprudence of the HCC reflects the independence required of a constitutional court or, conversely, risks fostering a form of constitutional immunity through its interpretative practices.

III. DISCUSSION

3.1. Legal Framework of Constitutional Justice in Madagascar

The High Constitutional Court (HCC) of Madagascar constitutes the supreme body for the review of constitutionality and the regulation of institutional disputes. Pursuant to Article 27 of Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, it is vested with a wide range of competences, notably disputes relating to referendum operations, the election of the President of the Republic, and that of members of Parliament. It also exercises a priori constitutional review over legislative and regulatory norms, including:¹³

1. autonomous regulations,
2. treaties,
3. the internal rules of parliamentary assemblies,
4. organic laws.

These powers find their constitutional basis in Article 116 of the 2010 Constitution, which expressly enumerates the jurisdiction of the HCC in matters of constitutional review and electoral disputes, including the proclamation of official election results.¹⁴ Article 200 of Organic Law No. 2018-008 on the general regime of elections and referenda (hereinafter Organic Law No. 2018-008) confirms this competence to adjudicate any contentious complaint relating to a referendum, the presidential election, as well as legislative and senatorial elections.¹⁵

The HCC is also solely competent to hear complaints relating to preparatory acts and to electoral operations themselves, including applications for partial

¹³ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, *Official Journal* No. 2747, November 19, 2001, p. 3077, Article 27.

¹⁴ Constitution of the Republic of Madagascar (Fourth Republic), *Official Journal* No. 3350, January 20, 2011, p. 85, Article 116.

¹⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, *Official Journal* No. 3814, May 16, 2018, p. 2071, Article 200.

or total annulment arising from substantial defects.¹⁶ It is vested with sovereign authority to verify the admissibility and eligibility of candidatures for the presidency of the Republic. Pursuant to Articles 15 and 16 of Organic Law No. 2018-009, it issues a definitive receipt when the legal conditions are fulfilled or, failing that, refuses the registration of the candidature by a duly reasoned decision.¹⁷ It draws up and publishes the official list of candidates no later than five days after the deadline for submission, and in cases of similarity of names or symbols, it rules with sovereign authority.¹⁸

The procedure before the HCC is predominantly written.¹⁹ However, oral submissions may be presented if notified in advance. This modality is reinforced by Article 201 of Organic Law No. 2018-008, which provides that the procedure is essentially written, while permitting lawyers, upon notification, to make oral submissions.²⁰ The constitutional complaint must meet strict conditions of admissibility: full identification of the plaintiff, clear statement of grounds, and supporting documents.²¹ Article 204 of Organic Law No. 2018-008 requires that the complaint be signed, accompanied by a certified copy of the voter card and all supporting grounds and documents, failing which it shall be inadmissible.²²

Where the complaint is declared admissible, a High Councillor-rapporteur is appointed, and the case is entered on the roll.²³ A hearing is then scheduled, and the decision must be rendered within one month. The HCC may order supplementary investigation if the documents produced are insufficient to establish the facts.²⁴ In the event of a finding of a criminal offence linked to an electoral irregularity, the HCC is obliged to refer the matter to the Public Prosecutor, pursuant to Article 207 of Organic Law No. 2018-008.²⁵ This

¹⁶ Organic Law No. 2018-009 on the Election of the President of the Republic, *Official Journal* No. 3814, May 16, 2018, p. 2121, Article 65.

¹⁷ Organic Law No. 2018-009, Articles 15–16.

¹⁸ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 17.

¹⁹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 29.

²⁰ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 201.

²¹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Articles 30–31.

²² Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 204.

²³ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 33.

²⁴ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 35.

²⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 207.

investigative role, combined with its judicial authority, strengthens its standing in the objective handling of electoral disputes.

The right to contest the regularity of electoral operations or results is guaranteed to any registered voter as well as to candidates in their constituency.²⁶ Provisional results are transmitted to the HCC within seven days by the Independent National Electoral Commission (CENI).²⁷ Thereafter, the HCC officially proclaims the results within the following nine days.²⁸ This power of proclamation is expressly enshrined in Article 116 of the 2010 Constitution, which confers sovereign authority upon the HCC in electoral matters.²⁹ This arrangement ensures institutional centralisation of electoral disputes and regulation.

Decisions of the HCC are rendered collegially with a quorum of at least six members, under the chairmanship of the President of the Court.³⁰ In the event of a tie, the President's vote is decisive. Decisions are reasoned, published in the Official Gazette, and acquire final and unappealable status.³¹ This rule is consistent with Article 120 of the 2010 Constitution, which imposes the binding authority of these decisions upon all public powers as well as administrative and judicial authorities.³² This irrevocability enshrines the supreme authority of the HCC in constitutional review and electoral disputes.

Finally, the HCC is composed according to the modalities laid down by Article 114 of the 2010 Constitution, which defines the appointment procedure, conditions of office, and the non-renewable term of its members.³³ This provision guarantees institutional stability and the independence of the High Court. Furthermore, in electoral matters, the time limits for appeals and for filing the defence brief are strictly regulated, and the decision of the HCC, delivered no later than seven days after the expiry of the appeal period, constitutes the official proclamation of the final results.³⁴ Article 206 of Organic Law No. 2018-008 further specifies

²⁶ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 202.

²⁷ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 60.

²⁸ Organic Law No. 2018-009 on the Election of the President of the Republic, Article 61.

²⁹ Constitution of the Republic of Madagascar (Fourth Republic), Article 116.

³⁰ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 43.

³¹ Ordinance No. 2001-003 on the Organic Law relating to the High Constitutional Court, Article 44.

³² Constitution of the Republic of Madagascar (Fourth Republic), Article 120.

³³ Constitution of the Republic of Madagascar (Fourth Republic), Article 114..

³⁴ Organic Law No. 2018-009 on the Election of the President of the Republic, Articles 66–67.

that the electoral judge rules in accordance with that law and that no ordinary avenue of appeal is open,³⁵ thereby reinforcing the enforceability of decisions rendered.

3.2. Analysis of the Decisions of HCC between 2009 and 2023: Legal Coherence or Institutional Leniency?

3.2.1. 2009 Decisions: Recognition of the Transitional Regime

The analysis of the decisions of the HCC handed down in March 2009 highlights a situation of manifest rupture of the constitutional order, marked by a succession of acts taken outside the established normative framework. Ordinance No. 2009-001, issued by the outgoing President Marc Ravalomanana, conferring full powers on a Military Directorate, did not correspond to any of the cases provided for by the Constitution empowering the President to legislate by ordinance. It was neither adopted in the Council of Ministers nor submitted to prior constitutional review as required by Article 113 of the Constitution. Moreover, the purpose of this ordinance was not legislative in nature but directly undermined the constitutional structure of the State by instituting an authority not provided for by the fundamental text.³⁶

In its decision (No. 03-HCC/D2 and 02-HCC/AV), the HCC acknowledged both the formal and substantive unconstitutionality of this ordinance and recognised that the Military Directorate had no constitutional basis. However, it took note of its existence and justified this recognition by the need to safeguard the principle of continuity of the State, an implicit principle of modern constitutionalism which, in certain exceptional circumstances, allows for the survival of institutions in cases of vacancy of power. It thus referred to a logic of constitutional reality, grounded in crisis circumstances, even though no provision expressly authorised it to validate *de facto* institutions.³⁷

³⁵ Organic Law No. 2018-008 on the General Regime of Elections and Referendums, Article 206.

³⁶ Such practices illustrate a common feature of coup-like interventions, which often suspend constitutional processes and dismantle institutional safeguards, thereby weakening the very foundations of constitutional legitimacy. See Baladas Ghoshal, "Anatomy of Political Atrophy in Thailand," *Strategic Analysis* 39, no. 2 (March 4, 2015): 156–69.

³⁷ This reasoning reflects the broader problem observed in comparative practice, where military or transitional authorities often claim functional legitimacy while eroding democratic legitimacy, as seen in Chile under Pinochet and in several African contexts marked by recurrent coups. See Géraldine Pflieger, "Santiago de Chile Prototype

The appointment of Mr. Andry Rajoelina to head the High Authority of the Transition, endorsed by letter No. 79-HCC/G and later consecrated by an official installation ceremony by the HCC itself, marked a form of officialisation of a power outside the constitutional framework. Yet, the Constitution, in Article 52, provided a clear procedure in cases of vacancy of power: interim rule was to be assumed by the President of the Senate or, failing that, by the collegial Government. The Court disregarded this procedure, invoking the impossibility of applying it under the circumstances, which amounted to recognising the substitution of norms in favour of a transitional order not legally provided for. This form of “institutional accommodation” corresponds to what scholars have identified as the cycle of coups, in which unconstitutional access to power normalises alternative institutional practices and generates risks of further instability.³⁸

The foundation of this stance rested on reconciling the rigidity of the constitutional text with the adaptability required in a context of institutional crisis. However, by admitting de facto authorities without explicit legal basis, the HCC departed from its traditional role as guardian of the Constitution to adopt a regulatory, even pragmatic, posture. It relied on general principles of constitutional law such as the preservation of national unity, the continuity of the State and the stability of institutions, but at the cost of interpretative flexibility that weakened the normativity of the Constitution.³⁹

Thus, the legal analysis of the 2009 decisions reveals a tension between formal legality and functional legitimacy. While the HCC’s objective appeared to be the immediate stabilisation of state order, its attitude raises questions regarding the hierarchy of norms and respect for constitutional supremacy. By indirectly

of the Neo-Liberal City: Between a Strong State and Privatised Public Services,” in *Governing Megacities in Emerging Countries*, Institute for Environmental Sciences, Department of Political Science, University of Geneva, Switzerland (Taylor and Francis, 2016), 217–68; Ndzalama Mathebula, “Democratic Deficit and Resurgence of Military Coups: An Assessment of Regional Insecurity in Africa,” *African Renaissance* 22, no. 1 (2025): 375–89.

³⁸ Inesta Brunel Lenzoumbou, “Aid Sanctions and Constitutional Order: The US and France’s Responses to Military Coups in Sub-Saharan Africa and the Rise of Multipolar Competition,” *Third World Quarterly* 46, no. 9 (June 13, 2025): 987–1012.

³⁹ The international experience suggests that even so-called “democratic coups,” which purport to ensure a transition, often entrench the preferences of military or transitional elites in constitutional design, thereby undermining long-term constitutionalism. See See Ozan O. Varol, “The Democratic Coup d’État,” *Harvard International Law Journal* 53, no. 2 (2012): 292–356.

validating the accession to power of Rajoelina through unconstitutional means, the HCC set a precedent whereby institutional practice may prevail over written law, risking the effectiveness and predictability of Malagasy constitutional law.⁴⁰

3.2.2. 2018 Decisions: Validation of a Contested Candidature and Electoral Results

In 2018, the HCC validated, by Decision No. 26-HCC/D₃ of 22 August 2018, the candidature of Andry Rajoelina for the anticipated presidential election of 7 November 2018. It concluded that his file, as well as those of the other 35 selected candidates, complied with the conditions set out in the Constitution, Organic Law No. 2018-009 and implementing decrees. The formal review of the documents submitted was deemed satisfactory, and the Court affirmed that the selected candidates fulfilled the eligibility criteria. In this respect, the HCC's approach a priori respected constitutional requirements of regularity and equality of treatment.

However, a substantive legal flaw emerged when examining Ruling No. 09-HCC/AR of 5 September 2018, which rejected a constitutional complaint challenging the validity of Rajoelina's candidature on the grounds of his involvement in the 2009 regime change.⁴¹ The complainant argued that such action constituted an unconstitutional change of government, which should have disqualified him under the principle of respect for constitutional order. International legal practice underlines that coup leaders should be disqualified from participating in elections, as their candidacy undermines both accountability and the integrity of democratic order.⁴² The HCC, however, declared the constitutional complaint inadmissible due to a procedural defect, without

⁴⁰ As comparative studies emphasise, such precedents not only erode national constitutional legitimacy but also threaten regional stability, as coups often have repercussions beyond national borders and trigger mixed responses from regional organisations. See Franziska Hohlstein, *Regional Organizations and Their Responses to Coups* (Bristol: Bristol University Press, 2022); Nikolay Marinov and Hein Goemans, "Coups and Democracy," *British Journal of Political Science* 44, no. 4 (October 28, 2014): 799–825.

⁴¹ From a comparative constitutional perspective, permitting a political figure who previously engaged in an unconstitutional change of government to stand for election runs contrary to the anti-coup principle, which is rooted in the protection of democratic institutions and the rejection of arbitrary power. See Michael Kreis, "Coups and Punishment in the Constitutional Order," *Wisconsin Law Review* 2025, no. 2 (2025): 459–83.

⁴² Deymah Alweqyan, "Coup in International Law: Between Theory and Reality," *Journal of East Asia and International Law* 17, no. 1 (May 31, 2024): 61–86.

examining the merits, even though the grievance concerned a serious violation of fundamental constitutional principles, namely the prohibition of extra-legal seizures of power.

This purely procedural rejection calls into question the rigour of the judicial scrutiny exercised by the HCC. While the Court is bound to respect procedural rules, its constitutional mission is not limited to a formalistic reading of the law: it is also the guardian of the Constitution and guarantor of institutional order. In comparable jurisdictions, courts have assumed a proactive role in ensuring electoral integrity, for instance, through anti-corruption and integrity enforcement measures, precisely to safeguard public confidence in democratic processes.⁴³ In this case, the argument concerning unconstitutional regime change could have justified substantive review in the name of constitutional public order, particularly in a post-crisis context. The absence of any substantive analysis leaves unresolved uncertainty regarding the interpretation and application of ineligibility principles related to institutional ruptures.

The HCC's stance may thus be perceived as a restrictive application of its contentious jurisdiction, hiding behind a strict procedural reading to avoid deciding on a politically sensitive issue. This choice casts doubt on its impartiality, especially since Rajoelina's involvement in the 2009 crisis was well known and documented. Even if no provision explicitly prescribes ineligibility for unconstitutional regime change, the Court's silence on this point reflects a jurisprudential vacuum and a lack of constitutional activism where it might have been expected. By contrast, the U.S. constitutional tradition, through Section Three of the Fourteenth Amendment, provides an explicit safeguard for constitutional order by disqualifying from public office any individual who, after taking an oath to "support the Constitution of the United States," has "engaged in insurrection or rebellion" or given "aid or comfort to the enemies thereof." This provision reflects a clear constitutional mechanism ensuring that loyalty to the Constitution is a prerequisite for holding public authority.⁴⁴

⁴³ Omer Yair, Raanan Sulitzeanu-Kenan, and Yoav Dotan, "Can Institutions Make Voters Care about Corruption?" *The Journal of Politics* 82, no. 4 (October 1, 2020): 1430–42.

⁴⁴ William Baude and Michael Stokes Paulsen, "The Sweep and Force of Section Three," *University of Pennsylvania Law Review* 172, no. 3 (2024): 605–745.

In sum, the 2018 decisions show that while the HCC respected legal forms in dealing with candidatures, it also avoided addressing substantive grievances that could affect the credibility of the electoral process. This posture reveals a tension between jurisdictional neutrality and strategic abstention.⁴⁵ In a post-crisis institutional environment, such restraint may be interpreted as indirect leniency, exposing the limits of the HCC in fully exercising its role as supreme guarantor of the Constitution when major political interests are at stake.

3.2.3. 2023 Decisions: The Question of Dual Nationality and Electoral Disputes

In 2023, the HCC of Madagascar was at the centre of the politico-legal stage, notably in relation to decisions concerning the candidature of Andry Rajoelina for the presidential election. The process formally began with Ruling No. 04-HCC/AR of 22 August 2023, handed down following a constitutional complaint seeking the invalidation of Rajoelina's candidature, on the grounds of the alleged loss of his Malagasy nationality. The complainant alleged that Rajoelina acquired French nationality by naturalisation in 2014. Under Article 42 of Ordinance No. 60-064 (the Nationality Code), a Malagasy adult who voluntarily acquires a foreign nationality thereby loses Malagasy nationality. Consequently, if the allegation were established, he would fail to satisfy Article 46 of the Constitution, which expressly requires that any candidate for the Presidency be of Malagasy nationality. The HCC, in its decision, dismissed the complaint, ruling that the issue of nationality could not be settled by it but rather fell under ordinary jurisdiction. This position of withdrawal, although legally defensible within a certain reading of jurisdictional competence, raises questions in light of the Court's constitutional review duties, particularly when it concerns safeguarding the integrity of republican principles. Concerns of conflicting loyalty linked to dual citizenship are central here, since constitutional courts are expected to prevent candidates with divided allegiances from occupying the highest political office.⁴⁶

⁴⁵ In doing so, the HCC missed an opportunity to fortify the rule of law against coup-linked actors, a failure that risks normalising unconstitutional paths to power and weakening public trust in electoral legitimacy. See ., Max Steuer, "The 'Will of the People' as Means for Pressuring the Rule of Law?," *Zeitschrift für Vergleichende Politikwissenschaft* 19, no. 2 (January 20, 2025): 247–71; Ben Klein, "A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes," *Fordham Law Review* 86, no. 3 (2017): 1361–91.

⁴⁶ Joachim Blatter, "Dual Citizenship and Theories of Democracy," *Citizenship Studies* 15, no. 6–7 (October 2011):

Shortly thereafter, the HCC confirmed its stance in Decision No. 11-HCC/D3 of 9 September 2023, finalising the official list of candidates for the first round of the presidential election scheduled for 9 November 2023. This decision officially included Rajoelina among the thirteen validated candidates. The Court stated that it had recorded admissible candidatures without substantially addressing the previously raised nationality concerns. Institutional stability and adherence to the electoral timetable appear to have prevailed in the HCC's analysis. Yet this absence of an explicit position on such a fundamental issue as the nationality of the incumbent President raises constitutional concerns. Article 46 of the Constitution expressly requires presidential candidates to hold Malagasy nationality, and disregarding this condition, even under the pretext of competence, could be interpreted as sidelining the principle of electoral legality. The omission also risks undermining democratic egalitarianism, since dual citizens may enjoy advantages or exert political influence across more than one jurisdiction, which contradicts the principle of equal political power.⁴⁷

This jurisprudential orientation was confirmed in Ruling No. 06-HCC/AR of 9 September 2023, ruling on several constitutional complaints seeking the invalidation of Rajoelina's candidature. Once again, the Court dismissed the applicants' arguments, finding that the evidence provided was insufficient to establish ineligibility. Significantly, the HCC recalled that it lacked investigative powers regarding nationality, a legal argument that seems to elude the responsibility of verification inherent in its role. By adopting this stance, the Court exposed itself to criticism for delegating a major constitutional issue to other jurisdictions, even though it is the guarantor of electoral regularity and the conformity of candidatures with the Constitution. This judicial restraint overlooks the security risks associated with dual citizenship, particularly in high offices where national interest could conflict with foreign allegiances.⁴⁸

769–98; Patrick Wautelet, "The Next Frontier: Dual Nationality as a Multi-Layered Concept," *Netherlands International Law Review* 65, no. 3 (October 3, 2018): 391–412.

⁴⁷ Robert E. Goodin and Ana Tanasoca, "Double Voting," *Australasian Journal of Philosophy* 92, no. 4 (October 2, 2014): 743–58.

⁴⁸ Daiva Stasiulis and Darryl Ross, "Security, Flexible Sovereignty, and the Perils of Multiple Citizenship," *Citizenship Studies* 10, no. 3 (July 2006): 329–48.

The election proceeded despite political tensions and calls for postponement by several candidates. In this climate of mistrust, the official proclamation of the first-round results by Ruling No. 08-HCC/AR of 1 December 2023 was a decisive moment. The HCC validated Rajoelina's election in the first round with 58.95% of the votes cast, while rejecting challenges to the regularity of the poll. It justified its decision by the lack of sufficient proof of irregularities capable of undermining the sincerity of the vote. Nevertheless, the conditions in which the campaign was conducted, with opposition calls for boycott, a record abstention rate, and widespread distrust of institutions, cast a shadow over the symbolic weight of this proclamation. By failing to take these contextual elements into account, the HCC prioritised a formal reading of the electoral process at the expense of a more substantive assessment of democratic legitimacy. In contexts where public opinion perceives dual nationals as a symbolic threat to cohesion and national identity, judicial inaction may further undermine institutional legitimacy.⁴⁹

Taken together, the 2023 decisions reveal a jurisprudence of restraint by the High Constitutional Court. Its role as guardian of the Constitution seems to have been diluted in favour of a procedural approach, refusing to intervene on substantive issues directly linked to the essence of the constitutional order. By not ruling clearly on the dual nationality of a presidential candidate, a matter central to constitutional provisions, the HCC exposed itself to criticism of institutional complacency, particularly in its treatment of a dominant political figure such as Rajoelina. Comparative experiences, such as the absence of clear legal regulation on dual nationality in Jordan, show how the lack of decisive judicial intervention can generate recurring constitutional disputes and weaken public trust.⁵⁰

Ultimately, the 2023 decisions of the HCC highlight a tension between institutional stability and the constitutional requirement of rigour and impartiality.

⁴⁹ Maarten Vink, Hans Schmeets, and Hester Mennes, "Double Standards? Attitudes towards Immigrant and Emigrant Dual Citizenship in the Netherlands," *Ethnic and Racial Studies* 42, no. 16 (December 10, 2019): 83–101.

⁵⁰ Omar Almahzoumi, Abdulhakim Atroosh, and Mustafa Al-Khasawneh, "The Right of Dual Citizenship to Vote and Run as Candidate for the House of Representatives in Jordanian Law," *Review of International Geographical Education Online* 11, no. 3 (2021): 1176–85.

While it may be understood that the Court sought to avoid an open political crisis, its refusal to adjudicate on substantive issues relating to the conformity of candidatures to constitutional requirements raises concerns about the effectiveness of judicial review in electoral matters. The principle of the rule of law rests on the capacity of constitutional courts to assert themselves as genuine counter-powers, including against the executive. In this respect, the 2023 decisions could represent a risky precedent for the weakening of constitutional review in electoral periods, with profound implications for judicial independence. Failure to resolve the dual nationality issue risks entrenching instability by allowing contested legitimacy to persist, rather than securing the supremacy of constitutional norms.⁵¹

Overall, these decisions illustrate a jurisprudence oscillating between pragmatism and restraint (see Table 1). While the HCC has often prioritised institutional stability and procedural regularity, it has consistently avoided substantive rulings on sensitive constitutional issues such as unconstitutional regime change (2009, 2018) and dual nationality (2023). This pattern reveals an institutional leniency that weakens the Court's role as guardian of constitutional supremacy, raising doubts about its capacity to act as an effective counter-power in moments of political crisis.

Table 1. HCC Decisions Concerning Andry Rajoelina (2009–2023)

Year	Decision No.	Subject Matter	Key Legal/ Institutional Issue	Court's Stance
2009	03-HCC/D2 (23 Apr)	Transitional regime	Ordinance creating Military Directorate unconstitutional but recognised de facto authority to ensure continuity of the State	Departure from constitutional text; prioritised stability over legality
	02-HCC/AV (31 Jul)	Interpretation of Art. 53, Constitution of 2010	Advisory opinion on transitional arrangements	Confirmed pragmatic interpretation during crisis

⁵¹ Thomas Faist, ed., *Dual Citizenship in Europe: From Nationhood to Societal Integration* (Abingdon: Routledge, 2016).

Year	Decision No.	Subject Matter	Key Legal/ Institutional Issue	Court's Stance
2018	26-HCC/D3 (22 Aug)	Presidential candidatures	Validation of Rajoelina and 35 others as eligible	Formal compliance with constitutional and statutory requirements
	09-HCC/AR (5 Sep)	Challenge to Rajoelina's candidature	Alleged ineligibility due to 2009 unconstitutional regime change	Rejected on procedural grounds, no substantive review
2023	04-HCC/AR (22 Aug)	Request to invalidate candidature (dual nationality)	Alleged loss of Malagasy nationality (French naturalisation)	Declared not competent, deferred to ordinary jurisdiction
	11-HCC/D3 (9 Sep)	Official list of candidates	Inclusion of Rajoelina despite nationality controversy	Finalised list without addressing nationality issue
	06-HCC/AR (9 Sep)	Complaints on ineligibility (dual nationality)	Multiple challenges to Rajoelina's candidature	Dismissed; held insufficient evidence and lack of investigative powers
	08-HCC/AR (1 Dec)	Proclamation of results	Rajoelina elected with 58.95% first round	Validated results; rejected irregularity claims, prioritised formal legality

Source: Author's analysis

3.3. Reflection on the Potential Existence of a Constitutional Immunity in Madagascar

The concept of “constitutional immunity” refers, in its strict sense, to the protection enjoyed by certain holders of public office against being brought before ordinary or constitutional courts for acts carried out in the exercise of their functions. In Madagascar, the Constitution does not expressly provide for presidential immunity or any jurisdictional privilege for the Head of State. Nevertheless, in the case of Andry Rajoelina, the HCC has, over the span of fourteen years, rendered eight decisions systematically dismissing complaints that sought either to contest his candidacy or to challenge the regularity of the electoral process that resulted in his presidency. This consistent jurisprudence raises doubts as to whether a de facto, if not de jure, immunity exists.⁵²

From the standpoint of constitutional complaint, this practice calls into question the effective availability of remedies to citizens. The constitutional complaint mechanism, as developed in comparative constitutional law (for instance, in Germany or South Korea), is designed to ensure that every individual may challenge violations of constitutional rights, even against the highest authorities. If the HCC consistently shields one candidate from scrutiny, the institution risks undermining the very purpose of judicial review, which is to guarantee equality before the law. Indeed, Article 6 of the Constitution of 2010 and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the principle that no one is above the conditions set by the Constitution for eligibility to the presidency.⁵³

⁵² Such repeated rulings risk creating a legitimacy crisis, whereby electoral victories are perceived as judicially manufactured rather than democratically earned, thus eroding public trust in both the judiciary and the democratic process. See Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford: Oxford University Press, 2003); Klein, “A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes.”

⁵³ This form of judicial avoidance resembles judicial overreach in reverse: rather than exceeding its power, the Court abdicates it, thereby distorting the separation of powers by silently favouring a dominant political actor. See, *cp.*, Richard L. Pacelle, *The Role of the Supreme Court in American Politics: The Least Dangerous Branch* (University of Missouri-St. Louis, United States: Taylor and Francis, 2018), <https://doi.org/10.4324/9780429495885>; Thomas R. Bell, “The Law : Perverse Politics: Recess Appointments, Noel Canning , and the Limits of Law,” *Presidential Studies Quarterly* 48, no. 2 (June 16, 2018): 373–86, <https://doi.org/10.1111/psq.12460>.

Yet, when faced with complaints challenging Rajoelina's candidacy, especially those concerning the sensitive issue of his nationality (Decision No. 04-HCC/AR of 22 August 2023 and Decision No. 06-HCC/AR of 9 September 2023), the HCC took a restrictive position. It held that the potential loss of Malagasy nationality could only be established by a formal decree of forfeiture. This reasoning, privileging form over substance, echoes the Court's earlier stance in 2018 when it declined to examine arguments of ineligibility linked to the unconstitutional change of power in 2009. The Court, instead of probing the substance of the grievances, confined itself to procedural and formal considerations. Such a pattern invites reflection on whether the HCC is exercising genuine judicial independence or whether it is, in practice, limiting its own capacity for constitutional adjudication.

The implications of this restrictive interpretation are profound. In electoral matters, the HCC is constitutionally empowered to verify the regularity of eligibility conditions under Article 27 of Ordinance No. 2001-003. By refusing to examine substantive evidence, such as allegations of possession of a foreign passport, the Court effectively allowed administrative silence to shield a candidate from legal scrutiny. This sets a dangerous precedent: that mere procedural shortcomings by the administration can protect political figures from constitutional challenge. In the absence of a robust constitutional complaint mechanism, the citizenry is left without recourse, undermining both electoral fairness and the principle of separation of powers. Over time, such judicial complacency risks transforming the Court itself into an institution of political manipulation, sacrificing its constitutional function for short-term stability.⁵⁴

This approach has created a judicial barrier around Rajoelina that resembles immunity in practice. Article 79 of the Malagasy Nationality Code provides that a nationality certificate constitutes proof until rebutted. A genuinely independent constitutional court would have opened an inquiry into the nationality dispute in order to dispel doubts. Instead, the HCC concluded that the lack of a decree

⁵⁴ James A. Gardner, "The Illiberalization of American Election Law: A Study in Democratic Deconsolidation," *Fordham Law Review* 90, no. 2 (2021): 423–65; Roberto Viciano Pastor, "When Judges Declare Constitution as Unconstitutional: Presidential Reelection in Latin-American According to the Last Decisions of the Constitutional Courts," *Anuario Iberoamericano de Justicia Constitucional*, no. 22 (December 11, 2018): 165–98.

on loss of nationality was sufficient to dismiss the challenge. Such reasoning erodes the constitutional guarantee of equal opportunity in elections and weakens confidence in the impartiality of constitutional justice.⁵⁵

From a comparative perspective, constitutional courts in Kenya and Senegal have examined candidacies more thoroughly, addressing allegations of nationality or corruption to safeguard electoral equality. By contrast, the HCC's reluctance to exercise substantive review recalls the doctrine of "constitutional reality" it invoked in 2009 to validate an unconstitutional change of government in the name of national stability. Judicial independence, however, is not measured by the preservation of political equilibrium but by the court's ability to enforce constitutional norms against all actors, including those in power. As scholarship on democratic deconsolidation demonstrates, once courts are perceived as partisan, the very foundations of constitutional democracy are at risk of long-term erosion.⁵⁶

The jurisprudence of 2023 reinforces the impression of institutionalised protection. Decision No. 11-HCC/D3 of 9 September 2023, establishing the definitive list of candidates, included Rajoelina while implicitly dismissing serious objections to his eligibility. Decision No. 08-HCC/AR of 1 December 2023, proclaiming the first-round results, rejected all complaints contesting the regularity of the vote, whether related to nationality or electoral transparency. The repetition of such outcomes, echoing 2009 and 2018 precedents, suggests not judicial neutrality but judicial avoidance, which in practice functions as a disguised immunity. The resulting perception of bias corrodes not only the legitimacy of elections but also the credibility of the judiciary as a neutral constitutional guardian.⁵⁷

Equally concerning is the Court's method of reasoning. Many of its decisions provide only minimal motivation, focusing narrowly on procedural admissibility

⁵⁵ Perceived judicial favouritism has been shown to encourage corruption and clientelism, as political actors seek to secure favourable rulings through patronage rather than through law. See Mohammed Halim Limam, "Detailed Analysis of the Phenomenon of Political Corruption in Algeria: Causes, Repercussions and Reform," *Contemporary Arab Affairs* 5, no. 2 (April 27, 2012): 252–78.

⁵⁶ Gardner, "The Illiberalization of American Election Law: A Study in Democratic Deconsolidation."

⁵⁷ Rebecca L. Brown and Andrew D. Martin, "Rhetoric and Reality: Testing the Harm of Campaign Spending," *New York University Law Review* 90, no. 4 (2015): 1066–94.

while leaving substantive issues unexamined. This lack of reasoned analysis contradicts the principles of transparency and accountability that are essential to constitutional adjudication. A constitutional complaint system without meaningful reasoning risks becoming an empty formality, incapable of delivering genuine constitutional protection.⁵⁸

At the international level, the ICCPR (Articles 2 and 25) obliges states to ensure effective remedies against violations of political rights. By closing the door to substantive examination of electoral disputes, the HCC risks breaching Madagascar's international commitments. Judicial independence requires more than structural safeguards; it requires a willingness by judges to confront politically sensitive issues. A constitutional court that refrains from doing so risks being perceived as an instrument of political validation rather than as a guardian of the Constitution.⁵⁹

Thus, based on the analysis of the eight decisions of HCC, it is difficult to say that there is an explicit recognition of a constitutional immunity in favour of Rajoelina. Rather, it shows a convergence of restrictive judicial practices that have produced the same effect. By retreating behind procedural formalism and adopting a narrow interpretation of its powers, the HCC has created a de facto shield for the political elites, incompatible with the essence of judicial independence and the principle of constitutional complaint.⁶⁰

⁵⁸ As noted in comparative jurisprudence, when courts fail to provide substantive reasoning, they risk being seen as complicit in partisan manipulation of electoral law. See Edward B. Foley, "Voting Rules and Constitutional Law," *George Washington Law Review* 81, no. 6 (2013): 1836–64.

⁵⁹ The danger lies not merely in isolated decisions but in the long-term institutional damage: once the judiciary is identified with political favouritism, it may lose its authority as a constitutional actor altogether. See Stephen Menendian, "Race and Politics: The Problem of Entanglement in Gerrymandering Cases," *Southern California Law Review* 96, no. 2 (2023): 301–54.

⁶⁰ Similar patterns of judicial bias in constitutional adjudication during presidential elections can be observed across Africa. In Benin, Alexander Stroh, "Sustaining and Jeopardising a Credible Arbiter: Judicial Networks in Benin's Consolidating Democracy," *International Political Science Review* 39, no. 5 (November 13, 2018): 600–615, found that the credibility of the Constitutional Court was compromised due to political representation bias linked to executive and legislative appointment practices, undermining its impartiality in electoral disputes. In Angola, David Boio, "Elements of Electoral Manipulation and Fraud Detected in the 2022 Angolan Elections," *Cadernos de Estudos Africanos* 45 (2023): 101–33, demonstrated that the 2022 elections were marred by manipulations, including voter bribery, media control, and biased post-election litigation, revealing how the judiciary and electoral bodies operated as instruments of regime preservation. In Ghana, Christopher Appiah-Thompson, "The Politics of Judicial Review of Elections in Ghana: Implications for Judicial Reforms and Emerging Electoral Jurisprudence," *Africa Review* 13, no. 2 (November 11, 2021): 251–69, highlighted that excessive executive powers over judicial appointments created perceptions of political bias during the review of the 2012 presidential election complaint, weakening public trust in judicial independence. These experiences echo the situation in Madagascar, showing that

This situation calls for serious reflection on the future of constitutional justice in Madagascar. To prevent the mere “impression” of immunity from becoming a juridical reality, the role and methodology of the HCC must be rethought. Only a constitutional justice that embraces transparency, substantive examination of grievances, and strict equality before the law can ensure that the presidency remains under, rather than above, the Constitution it is bound to protect.

IV. CONCLUSION

In conclusion, the analysis of the decisions rendered by the High Constitutional Court (HCC) between 2009 and 2023, when examined against the backdrop of fundamental principles of constitutional law, reveals a profound ambivalence. On the one hand, the HCC has consistently affirmed its function as the regulator of electoral processes and the formal guardian of the Constitution. On the other hand, the remarkable consistency with which its rulings have upheld the positions and candidacies of Andry Rajoelina, sometimes through flexible interpretations of constitutional and statutory requirements, casts doubt on the effective realisation of the principle of equality before the law. Without establishing the existence of an explicitly organised institutional immunity, the recurrence of favourable decisions towards the same political actor exposes a structural fragility: the risk that constitutional justice, under the weight of major political pressures, may shift from strict judicial review to a form of institutional accommodation. This finding highlights the urgent need to strengthen the credibility of constitutional review through more robust guarantees of judicial independence. In particular, the effective operation of a constitutional complaint mechanism, whether direct or indirect, is essential to ensure that citizens and political actors alike have access to meaningful remedies against violations of constitutional rights and electoral irregularities. If such remedies remain formal rather than substantive, the very purpose of constitutional complaint as a safeguard of constitutional democracy is undermined.

judicial restraint or bias in politically sensitive disputes is part of a broader regional trend in which constitutional courts risk legitimising incumbents at the expense of democratic consolidation.

Accordingly, this situation calls on Malagasy institutions, chief among them the HCC but equally the legislature, the executive, and political parties, to reflect on ways of reinforcing the independence of constitutional adjudication and the integrity of electoral justice. More broadly, it requires a collective commitment to consolidating constitutional democracy in Madagascar, so that the Constitution ceases to serve merely as an instrument of legitimisation for those in power and instead becomes the genuine bulwark of equality, transparency, and the protection of political rights for all citizens. As a recommendation for future research, further studies should explore how constitutional justice in Madagascar could be reformed through targeted legal reforms aimed at strengthening judicial independence and preventing similar institutional vulnerabilities. Ultimately, it is the trust of the Malagasy people in their institutions, which constitutes an indispensable condition for the stability and consolidation of the rule of law, that is at stake.

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