

Ajavon v Benin (provisional measures) (2020) 4 AfCLR 123

Application 062/2019, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*

Order (provisional measures), 17 April 2020. Done in English and French, the French text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant who had alleged, in his main action, that the Respondent stated had violated a number of his rights, sought provisional measures to postpone pending national elections and suspend certain national laws on the grounds that the acts and omissions of the Respondent posed urgent risk to his right to participate in the affairs of his country and his right to life. The Court partially granted the provisional measures sought.

Jurisdiction (*prima facie*, 18, 22)

Provisional measures (admissibility requirements unnecessary, 30; exclusion of hypothetical risk, 62; non-execution of judgment, 67; risk of exclusion from elections, 68)

I. The Parties

1. Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as “the Applicant”), is a national of Benin and company administrator residing in Paris, France, as a political refugee.
2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as the “Charter”) on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as “the Protocol”) On 22 August 2014, the Respondent State also deposited, on 8 February 2016, the Declaration under Article 34(6) by virtue of which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.
3. The Respondent State also ratified the International Covenant on Civil and Political Rights on 12 March 1992, the African Charter on Democracy, Elections and Governance on 28 June 2012, as well as the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance additional to the Protocol relating to the Mechanism

for Conflict Prevention, Management, Resolution, Peacekeeping and Security, on 21 December 2001.

II. Subject of the Application

4. In his main Application, the Applicant alleges the violation of his rights enshrined in Articles 3, 4, 5, 6, 7(1)(c), 10, 11, 13, 15 and 26 of the Charter, Articles 2(2), 3(2), 4(1), 10(2), 23(5) and 32(8) of the African Charter on Democracy, Article 25 of the International Covenant on Civil and Political Rights and Article 22 of the International Covenant on Economic, Social and Cultural Rights.
5. In his Application for Provisional Measures, the Applicant alleges the violation of his right to participate in the public affairs of his country and his right to life. He contends that the legislative elections of 28 April 2019 were unlawful and that the Benin National Assembly elected in the said election clandestinely passed several laws at night so that the general public became aware only after the said laws were published.
6. He further submits that it is in this context that the election for municipal and local councillors is scheduled for 17 May 2020 (hereinafter “the elections of 17 May 2020”), following a Cabinet decision of 22 January 2020 convening the electorate. The Applicant contends that his non-participation in these elections will cause him irreparable harm.

III. Summary of the Procedure before the Court

7. The Application was filed on 29 November 2019 while the Application for Provisional Measures was filed on 9 January 2020.
8. On 16 January 2020, the Registrar served the above-mentioned Applications on the Respondent State, pursuant to Rule 35(2) of the Rules of Court (hereinafter, “the Rules”), requesting it to submit its Response to the Application for provisional measures within fifteen (15) days of receipt.
9. On 20 February 2020, the Court received a request from the Respondent State for sixty (60) days’ extension of time to respond to the Application for provisional measures.
10. The said request was notified to the Applicant to submit his observations within seven (7) days. The Applicant did not respond.
11. The Respondent State filed its Response to the Application for Provisional Measures on 10 March 2020.

IV. Jurisdiction

12. The Respondent State raises an objection based on the Court's jurisdiction, contending that ascertaining the *prima facie* jurisdiction of the Court is objective and presupposes that plausible human right violations have occurred.
13. The Respondent State further contends that the criteria for the Court's material jurisdiction under Rule 34(4) of the Rules excludes all abstract assumptions or circumstances insofar as the Applicant must specify the alleged violations, which has not been done in the instant case.
14. Furthermore, the Respondent State notes that the Applicant is engaged in speculation when he submits that his political party, *Union Sociale Libérale* (USL), which did not exist at the time of holding the 2019 parliamentary elections, could not participate in the 2021 presidential elections.
15. The Respondent State avers that this election, in respect of which it has done nothing of a nature to restrict the rights of third parties, is not under consideration.
16. The Applicant submits, based on Article 27(2) of the Protocol and Rule 51(1) of the Rules that, in granting provisional measures, the Court is not required to satisfy itself that it has jurisdiction on the merits, but simply that it has *prima facie* jurisdiction.
17. Relying on Article 3(1) of the Protocol, the Applicant contends that the Court has jurisdiction insofar as Benin is a party to the Charter and the Protocol and has deposited the Declaration under Article 34(6) of the Protocol. Furthermore, he alleges violations of the right to participate in the public affairs of his country and his right to life, protected by the Charter.

18. When considering an application, the Court conducts a preliminary examination of its jurisdiction pursuant to Article 3 and Article 5(3) of the Protocol.
19. Article 3(1) of the Protocol provides as follows: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

20. The Respondent State is a party to the Charter and other international instruments whose violation is alleged.¹
21. The Court emphasises in relation to the Respondent State's argument that the alleged violations must be specified, that it is premature, at this stage, to examine the plausibility of the violations referred to by the Respondent State. Plausibility, which refers to the link between the provisional measures and the Application on the merits, is assessed only when there is a need to decide whether or not to grant the provisional measures requested.
22. In view of the foregoing, the Court dismisses the Respondent State's preliminary objection based on jurisdiction and finds that it has *prima facie* jurisdiction to hear the Application.

V. Admissibility

23. The Respondent State raises an objection based on admissibility, arguing that there is no urgency or extreme gravity and no irreparable harm.
24. In support of its position, the Respondent State submits that urgency means "the nature of a situation likely to cause irreparable harm if not remedied immediately", while extreme gravity describes a situation of increased and of exceptional nature requiring the intervention of the Court for it to end.
25. Citing the jurisprudence of the European Court of Human Rights which describes provisional measures as "urgent measures which apply only when there is an imminent risk of irreparable harm", the Respondent State argues that such measures aim to contain extraordinary situations of urgency and extreme gravity.
26. The Respondent State contends that the Applicant's allegation that "there is extreme urgency because he came third in the legislative elections and that the Constitution of Benin requires candidates to be sponsored by elected political leaders" is merely an assumption and does not justify granting of provisional measures.
27. With regard to irreparable harm, the Respondent State submits that it is different from harm that is difficult to remedy and refers to acts whose consequences cannot be erased, remedied or compensated, even by payment of compensation.
28. The Respondent State submits that provisional measures are only envisaged in exceptional cases where an Applicant faces a real risk of irreparable harm, such as a threat to life, cruel

1 See Paragraph 3 of the Order.

treatment prohibited by international legal instruments or a grave and manifest violation of his rights.

29. Finally, the Respondent State contends that the laws cited by the Applicant have caused him no harm as a citizen.

30. The Court emphasises that in relation to provisional measures, neither the Charter nor the Protocol spells out admissibility requirements, as the consideration of the said measures are subject only to prior determination of *prima facie* jurisdiction, which has been done in the instant case.
31. Article 27(2) of the Protocol and Rule 51(1) of the Rules, on which the Respondent State buttresses its objection based on the inadmissibility of the Application, are, in fact, the provisions that enable the Court to grant or dismiss the request for provisional measures.
32. Consequently, the Court dismisses the objection based on admissibility.

VI. Provisional measures requested

33. The Applicant seeks the postponement of the elections of 17 May 2020. He also seeks an order suspending the following laws: Organic Law No. 2018 – 2 of 4 January 2018 amending and completing Organic Law No. 4 – 027 of 18 March 1999 relating to the Higher Judicial Council (4 articles); Law No. 2017 – 20 of 20 April 2018 on the Digital Code (647 articles); Law No. 2018 – 34 of 5 October 2018 amending and completing Law No. 2001 – 09 of 21 June 2002 on the Right to Strike (6 articles), Law No. 2018 – 016 on penal code and Law No. 019 – 40 of 7 November 2019 (47 articles) on the amendment of Law No. 90 – 032 of 11 December 1990 on the Constitution of the Republic of Benin, that is, a total of one thousand seven hundred and twelve (1712) articles. Lastly, he seeks an order suspending the municipal orders which, in his view, prohibit public demonstrations by way of protest.
34. In support of his requests, the Applicant submits that there is a situation of extreme urgency arising from the fact that he risks not being allowed to participate in the said election.

35. He contends that Article 44 *in fine* of the Law No. 2019-40 of 7 November 2019, amending the Constitution of Benin requires that candidates in presidential elections be sponsored by 10% of members of Parliament and local elected officials, that is, at least 16 members of Parliament and local elected officials.
36. The Applicant submits that owing to not having been issued a certificate of compliance, his political party, '*Union Sociale Libérale (USL)*', was unable to participate in the legislative elections of 28 April 2019 and that, without participating in the election of May 17th 2020, he will not be able to run in the 2021 Presidential elections.
37. He further contends that in spite of the Ruling for Provisional Measures issued by this Court on 20 December 2018, his criminal record still features a twenty-year conviction.
38. According to the Applicant, a decision of the Cotonou Court of First Instance excluded his party from the legislative elections for the same reason, which, in his opinion, is evidence of lack of independence of the judiciary arising from Organic Law No. 2018-02 of 4 January 2018 amending Law No. 94-027 of 18 March 1999 on the High Judicial Council.
39. The Applicant further avers that Law No. 2017-20 of 20 April 2018 on the Digital Code also creates other situations of extreme gravity, by criminalising media offences and authorizing the detention of journalists for libel.
40. In the Applicant's view, the said gravity is further confirmed by statements made by the Prosecutor at the Cotonou Court of First Instance at a news conference that "... the laws in this case are not clear [...] this Digital Code is like a weapon aimed at the head of each journalist or of each web activist [...]".
41. According to the Applicant, Law No. 2018-34 of 5 October 2018 amending Law No. 2001-09 of 21 June 2002 on the Right to Strike, drafted and declared consistent with the Constitution by the same official, Joseph DJOGBENOU, former Minister of Justice, Keeper of the Seals and current President of the Constitutional Court, undermines democracy by prohibiting all forms of protests".
42. The Applicant contends that Law No. 2018 – 31 of 9 October 2018 on the Electoral Code, under which the legislative elections of 28 April 2019 were held, and the Constitution was amended, is irregular.
43. In his view, this law also allows for Presidential elections to be held without the major opposition party candidates, owing to the sponsorship requirement, which enables the Government to ignore the decisions issued by this Court on 29 March 2019 and 28 November 2019.

44. The Applicant notes that Law No. 2018 – 16 on the Penal Code imposes restrictions on the freedom to demonstrate, to hold peaceful meetings and to organise political party activities.
45. The Applicant considers that there is a situation of extreme gravity and a risk of irremediable violations of his civil and political rights protected under the Charter, in this case, the right to participate in the public affairs of his country and the right to life.
46. The Applicant indicates that this postponement of elections will not be the first given that municipal and council elections were postponed for two (2) years owing to the unavailability of the permanent Computerized Voters List (*LEPI*).
47. The Applicant further avers that at the Cabinet meeting of 22 January 2020, the Respondent State issued a decree convening the electorate for elections on Sunday, 17 May 2020 although the said elections were initially scheduled for the month of June 2020.
48. In the same vein, the Applicant avers that the National Autonomous Electoral Commission (*CENA*) released an election timetable, whereas a case had been brought before the ECOWAS Court of Justice seeking its dissolution for lack of independence and impartiality.
49. According to the timetable, candidates were required to submit their applications from 2 to 11 March 2020.
50. In the Applicant's view, this election is a violation of Article 2(1) of the ECOWAS Protocol, which provides that "No substantial modification shall be made to the electoral laws in the last six (6) months before elections, except with the consent of a majority of political actors". He asserts that it is high time this electoral process, which he describes as anti-democratic, was abolished.
51. In his additional submissions filed on 14 February 2020, the Applicant avers that the Benin Electoral Code prohibits independent candidates from running in the election of 17 May 2020, given that it requires that every candidate to be a member of a political party.
52. He further avers that as a result of the non-execution of the judgment rendered by this Court on 29 March 2019, he cannot be issued "*official documents*" such as civil status documents and travel or administrative documents.
53. The Applicant emphasises that there is conspiracy to keep him in exile in order to exclude him from the electoral process.
54. The Applicant contends that, in the circumstances, his participation in the 17 May 2020 elections is thwarted, since he cannot be issued any of the documents that a candidate is required to submit to *CENA* between 2 and 11 March 2020.

55. In its Response, the Respondent State prays the Court to dismiss the request for provisional measures. It submits that the Applicant's allegation that the Constitutional Court lacks independence is unfounded.
56. It affirms that the Constitutional Court's independence and functionality have never been disputed, either in terms of the appointment of its members, most of whom are chosen by the Bureau of the National Assembly, or in terms of their competence, given that five of the seven members have extensive legal expertise.
57. The Respondent State notes that the number of members, their profile (requirements in terms of expertise, professional experience and probity), security of tenure, method of appointment (majority granted by parliament) and the mode of selecting the President of the Court by his peers is sufficient proof that pressure cannot be exerted on the said court.

58. The Court notes that Article 27 (2) of the Protocol provides that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".
59. Rule 51(1) of the Rules provides as follows: "[...] The Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".
60. In view of the foregoing, the Court takes into account the law applicable to provisional measures which are of a preventive nature. It can order them *pendente lite* only if the basic requirements are met, namely extreme gravity or urgency and the prevention of irreparable harm to persons.
61. The Court notes that urgency, which is consubstantial with gravity, means a "real and imminent likelihood that irreparable harm will be caused before it renders its final decision"². Therefore, there is urgency whenever acts that are likely to cause irreparable harm

2 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gambia v Myanmar*), § 65, International Court of Justice, 23 January 2020; Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v United States of America*), 3 October

can “occur at any time” before the Court renders its final decision in the matter³.

62. The Court emphasises that the risk in question must be real⁴, which excludes a purely hypothetical risk to justify the necessity to remedy it immediately.
63. Concerning irreparable harm, the Court is of the view that there must be a “reasonable risk of its occurrence”⁵ with regard to the context and the personal situation of the Applicant.
64. The Court notes that, in spite of the Ruling on Provisional Measures of 7 December 2018, the Respondent State did not suspend “the enforcement of Judgement No. 007/3C.COR of 18 October 2018, rendered by the Special Court for the Repression of Terrorism and Economic Crimes, established by Law No. 2018 – 13 of 2 July 2018”⁶ and also failed to take “all the necessary measures to annul Judgement No. 007/3C. COR, rendered on 18 October 2018 by CRIET, in a manner that would wipe out all its effects”⁷, notwithstanding the Judgment rendered on 29 March 2019 by this Court.
65. The Court notes that this accounts for the fact that the Applicant’s criminal record still features a twenty-year (20) conviction by *CRIET*.
66. The Court further notes that the Respondent State does not dispute the Applicant’s allegation that the twenty-year conviction on his criminal record prevented him from taking part in the legislative elections of 28 April 2019 and that the Minister of the Interior refused to issue his political party, *Union Sociale Libérale*, a certificate of compliance which was one of the documents to be submitted by candidates.
67. The Court considers that the non-execution of the Judgment of 29 March 2019 caused the Applicant prejudice since without a clean criminal record, it was impossible for him, to submit his candidacy as flagbearer of his party.
68. The Court emphasises that it is therefore indisputable that the risk of the Applicant not being able to run in the election of 17

2018; Immunities and Criminal Proceedings (*Equatorial Guinea v France*), 7 December 2016, para 78, International Court of Justice.

3 *Idem*, Note 2 below.

4 InterAmerican Court of Human Rights, *Cuya Levy v Peru*, 12 March 2020, § 5;

5 See note 5.

6 See the Order issued on 7 December 2018 by this court.

7 See the Operative Part of the Judgement of 29 March 2019, rendered by this Court.

May 2020 is real, so that the irreparable character of the resulting harm is indisputable.

69. Accordingly, the Court is of the view that in order to prevent irreparable harm to the Applicant, the elections of 17 May 2020 must be suspended until a decision on the merits is rendered.
70. As regards the suspension of the laws enumerated by the Applicant, the Court considers that such a measure would require an in-depth examination of the said laws, which can only be done when considering the Application on the merits, not in the instant procedure on provisional measures.
71. Accordingly, the Court dismisses the Applicant's request to suspend the application of the said laws.
72. For the avoidance of doubt, The Court clarifies that this Ruling is provisional in nature and in no way prejudices the findings the Court on its jurisdiction, on the admissibility of the Application, and the merits thereof.

VII. Operative part

73. For these reasons,

The Court,

Unanimously,

- i. *Dismisses* the preliminary objection based on jurisdiction.
- ii. *Finds* that it has *prima facie* jurisdiction.
- iii. *Dismisses* the objection based on admissibility.
- iv. *Orders* the Respondent State to suspend the municipal and council elections of 17 May 2020 pending its decision on the merits.
- v. *Dismisses* the request to suspend the application of the laws passed by the National Assembly, to wit, Organic Law No. 2018 – 02 of 4 January 2018 to amend and complete Organic Law No. 4 – 027 of 18 March 1999 relating to the Higher Judicial Council, Law No. 2017 – 20 of 20 April 2018 on the Digital Code in the Republic of Benin, Law No. 2018 – 34 of 5 October 2018 to amend and complete Law No. 2001 – 09 of 21 June 2002 on the Right to Strike in the Republic of Benin, Law No. 2018 – 016 on the Penal Code of the Republic of Benin, Law No. 2019 – 40 of 7 November 2019 on the amendment of Law No. 90 – 032 of 11 December 1990 on the Constitution of the Republic of Benin, as well as municipal orders which, according to the Applicant, prohibit public demonstrations by way of protest.
- vi. *Orders* the Respondent State to submit a report to it on the measures taken to implement this Ruling within thirty (30) days of its notification