

Dicko & ors v Burkina Faso (provisional measures) (2020) 4 AfCLR 784

Application 037/2020, *Harouna Dicko & 4 ors v Republic of Burkina Faso*
Ruling (provisional measures), 20 November 2020. Done in English and French, the French text being authoritative.

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

The Applicants brought this action alleging that an amendment to the Respondent State's Electoral Code amounted to a violation of the right of people to participate in elections. Along with the action, the Applicants filed a request for provisional measures to suspend the application of certain provisions of the amended Electoral Code. The Court held that the circumstances did not warrant the issuance of provisional measures.

Jurisdiction (*prima facie*, 15, 20)

Provisional measures (extreme gravity or urgency, 24-25; irreparable harm to person, 26; burden of proof of irreparable harm, 30)

I. The Parties

1. Messrs Harouna Dicko, Aristide Ouedraogo, Bagnomboé Bakiono, Lookmann Mahamoud Sawadogo and Ms. Apsatou Diallo (hereinafter referred to as "the Applicants") are Burkinabe nationals. They allege the violation of the right of participation of the Burkinabe people following amendments made to the Electoral Code.
2. The Application is filed against Burkina Faso (hereinafter referred to as the "Respondent State") which became 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 25 January 2004. On 28 July 1998, the Respondent State also deposited the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to accept Applications filed by individuals and Non-Governmental Organisations (NGOs).

II. Subject of the Application

3. In the initial Application, the Applicants allege that in July 2019, the

President of the Respondent State issued a decree to organise a National Dialogue Forum in preparation for the elections scheduled for 2020. At the end of the Dialogue Forum which took place from 5 to 22 July 2019, a report was produced.

4. The Applicants maintain that on 23 January 2020, the Government tabled before the National Assembly a bill to amend the Electoral Code based on the Report of the Dialogue, whereas the population of several regions of the territory of the Respondent State had fled their localities to take refuge in border regions with neighbouring countries due to prevailing insecurity in the country. Similarly, several Mayors had abandoned their towns for the same reason. In addition, on 5 February 2020, the Government drew up the electoral register and scheduled elections for 22 November 2020.
5. In response to this decision, various political actors met to discuss the issue and published a Report in which they proposed that the elections be postponed. In light of the Report, the Government tabled before the National Assembly a bill introducing new amendments aimed at removing legal obstacles to the holding of elections on the initial date. The said bill was later withdrawn on 13 July 2020 in a bid to give political dialogue a chance.
6. However, according to the Applicants, on 20 July 2020, without organising a new political dialogue, and based on consultations held with only a few members of the National Dialogue Monitoring Committee, the Government again tabled the amendment bill before the National Assembly.
7. The Applicants allege that, on 10 August 2020, they tried without success to block the amendment bill, as it was finally passed on 25 August 2020 and promulgated into law by the President of the Respondent State on 28 August 2020. Following the amendments introduced, Articles 148(2) and 155(2) (new) contain similar provisions to the effect that: “where due to supervening impossibility [force majeure] or an exceptional circumstance duly established by the Constitutional Council upon referral by the President of Faso, upon a detailed report of the CENI, it becomes impossible to organize presidential or legislative elections in a part of a constituency, the election shall be validated based on the results of the part of that constituency not affected by the supervening impossibility or exceptional circumstance”.
8. On 16 September 2020 the Applicants filed a petition before the Constitutional Council on the anti-constitutionality of the amendments to the Electoral Code. On 16 October 2020, the Constitutional Council declared the said petition inadmissible on the grounds that it was filed against a law that had already been promulgated.

9. In their request for provisional measures, the Applicants pray this Court to order the Respondent State to “stay the application of the of the provisions of Articles 148 and 155 (new) of Law No. 034-2020/AN given the imminence of the violation of the inalienable right of the people of Burkina Faso as a whole to take part by universal suffrage in the twin elections of 22 November 2020 as set forth in Article 4(2) of the African Charter on Democracy, Elections and Governance”.

III. Summary of the Procedure before the Court

10. The initial Application was filed on 5 November 2020 together with the Application for provisional measures.
11. On 10 November 2020, the Registry acknowledged receipt of the Application and informed the Applicants that it had been registered. On the same date the Registry served the Application to the Respondent State, requesting the Respondent State to respond on the Application for provisional measures within three (3) days, submit the names of its representatives within thirty (30) days and submit its Response to the main Application within ninety (90) days of receipt of the notification.
12. At the expiry of the time-limit so accorded, the Respondent State did not submit any comments on the Application for provisional measures.

IV. Alleged violations

13. In the main Application, the Applicants allege that by amending the Electoral Code as it did through the abovementioned new Articles 148 and 155 of Law No. 034-2020 of 25 August 2020 to amend Law No. 014-2001/AN of 3 July 2001 on the Electoral Code, the Respondent State violated the right of the Burkinabe people to participate in elections, guaranteed under Article 4(2) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as “the ACDEG”).

V. *Prima facie* jurisdiction

14. When an Application is submitted to the Court, it ascertains its jurisdiction pursuant to Articles 3, 5(3) and 34(6) of the Protocol and Rule 49(1) of the Rules of Court (hereinafter referred to as “the Rules”).

15. However, as far as provisional measures are concerned, the Court does not have to ascertain its jurisdiction on the merits of the matter but only that it has *prima facie* jurisdiction.¹
16. Article 3(1) of the Protocol provides that:
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.
17. Under Article 5(3) of the Protocol:
The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.
18. In the instant case, the Applicants allege violation of certain provisions of the African Charter on Democracy, Elections and Governance, an instrument to which the Respondent State is a Party and which the Court has determined to be a human rights instrument which it has jurisdiction² to interpret and apply under Article 3(1) of the Protocol.³
19. The Court further notes, as established in paragraph 2 of this Ruling, that the Respondent State is a Party to the Charter and to the Protocol and has also made the Declaration in which it accepts the jurisdiction of the Court to admit applications from individuals and NGOs in accordance with Article 34(6) read together with Article 5(3) of the Protocol.
20. The Court therefore finds that it has *prima facie* jurisdiction to entertain the Application for provisional measures.

VI. Provisional measures requested

21. The Applicants pray this Court to order the Respondent State to “stay the application of the of the provisions of Articles 148 and 155 (new) of Law No. 034-2020/AN given the imminence of the

1 *Guillaume Kigbafori Soro & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 012/2020, Order (provisional measures) of 15 September 2020 § 17; *Babarou Bocoum v Republic of Mali*, ACtHPR, Application 023/2020, Ruling (provisional measures), of 23 October 2020, § 14; *Suy Bi Gohore Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Order (provisional measures) of 28 November 2019, § 18; *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 149, § 10; *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 687, § 8.

2 The Respondent State became Party to the said instrument on 28 November 2013.

3 *Actions pour la protection des droits de l'homme v Republic of Cote d'Ivoire* (merits), 18 November 2016, 1 AfCLR 697, § 52; *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Judgment of 15 July 2020 (merits and reparations), § 45.

violation of the inalienable right of the people of Burkina Faso as a whole to take part by universal suffrage in the twin elections of 22 November 2020 as set forth in Article 4(2) of the African Charter on Democracy, Elections and Governance”.

22. 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.”
23. Furthermore, under Rule 59(1) of the Rules: [...] the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.
24. The Court notes that it emerges from these provisions that in considering an Application for provisional measures, it takes into account the extreme gravity or urgency and the irreparable nature of the harm to be suffered.
25. With regard to urgency, the Court thus reiterates that extreme gravity or urgency presupposes the existence of a real and imminent risk that irreparable harm will be caused before it makes a determination on the merits. Accordingly, there is said to be urgency each and every time this Court finds the violation of human rights while hearing a matter on the merits and the damage suffered can no longer be repaired.⁴
26. In the present case, the Court notes that the Application for provisional measures pertains to the presidential and legislative elections scheduled for 22 November 2020. The Court notes that while the decision of the Constitutional Council dismissing their petition for unconstitutionality was delivered on 16 October 2020, the Applicants did not submit the matter to this Court until 5 November 2020. That said, the Court maintains that the provisional measures provided for in Article 27(2) of the Protocol

4 *Guillaume Kigbafori Soro & ors v Côte d'Ivoire* (provisional measures), 15 September 2020, § 29; *XYZ v Republic of Benin*, ACtHPR, Application 057/2019, Order (provisional measures), 2 December 2019, § 24; *Komi Koutché v Benin* ACtHPR, Application 020/2019, Order (provisional measures), 2 December 2019, § 31.

- are primarily intended to avoid “irreparable harm to persons”.
27. In the instant case, the main Application and the request for provisional measures preceded the election day and the elections will hold even before the Court rules on the merits.
 28. Accordingly, the Court finds that, in the instant case, urgency is established by the imminent holding of the elections.
 29. The Court recalls that in matters of provisional measures, it does not suffice for urgency be established, but it is also necessary that such urgency be corroborated by the virtually certain possibility of irreparable harm.
 30. As regards the existence of irreparable harm, the Court reiterates that such harm can be established if the acts which the Applicant complains about are likely to seriously jeopardise the rights allegedly violated, such that the Court’s subsequent judgment on the merits would be without effect.⁵ Generally, the burden of proof of the irreparable nature of the harm lies with the Applicant.
 31. The Court recalls that in the instant case, the Applicants claim that the application of the amendments to the Electoral Code would cause irreparable harm to the Burkinabe people as a whole in that it would prevent them from participating in the said elections. According to the Applicants, such harm would be suffered because of the displacement within the country of a large number of the population and mayors of certain localities as well as the lack of political consensus on the holding of the election on 22 November 2020.
 32. The Court notes that the amendments concerned provide that “where due to supervening impossibility [force majeure] or an exceptional circumstance duly established by the Constitutional Council upon referral by the President of Faso, upon a detailed report of the CENI, it becomes impossible to organize presidential or legislative elections in a part of a constituency, the election shall be validated based on the results of the part of that constituency not affected by the supervening impossibility or exceptional circumstance”.⁶
 33. The Court notes that the means adduced by the Applicants in support of their request for provisional measures mainly concern: (i) the proportionality between the persons who would be prevented from taking part in the election and the rest of the Burkinabe

5 *Guillaume Kigbafori Soro & ors v Côte d’Ivoire* (provisional measures), 15 September 2020, § 29.

6 Articles 148 and 155 of Law No. 034-2020 of 25 August 2020 to amend Law No. 014-2001/AN of 3 July 2001 on the Electoral Code.

people; and (ii) determining the concept of national political consensus and its application in the circumstances of the case. In addition, and in the light of the amendments to the Electoral Code, the issue of applicability of the principle of supervening impossibility arises and the authorities of the Respondent State have used it to rebut the argument of vote prevention advanced by the Applicants.

34. From the preceding, the Court holds that determining the irreparable nature of the harm in the instant case would necessarily entail examining these various issues, which are particularly relevant to the merits of the case. In this regard, the Court recalls that on the merits, the Applicants allege that the amendments to the Electoral Code violate the right of the people to participate in elections as guaranteed in Article 4(2) of ACDEG. Against such a backdrop, the Court cannot rule on the application for provisional measures submitted by the Applicants without running the risk of prejudging the outcome of matter on the merits.
35. From the foregoing and having regard to the circumstances of the case, the Court finds that it is not necessary to order a stay of application of the amendments to the Electoral Code in preparation for the organisation of the elections of 22 November 2020.
36. Accordingly, the Court finds that the circumstances of the matter do not warrant the pronouncement of provisional measures pursuant to Article 27(2) of the Protocol and Rule 59(1) of the Rules.
37. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudice the determination the Court will make regarding its jurisdiction, admissibility and the merits of the main Application.

VII. Operative part

38. For these reasons,
The Court,
Unanimously,

- i. *Dismisses* the request for provisional measures.