

## Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 130

Application 028/2020, *Houngue Eric Noudehouenou v Republic of Benin* Order, 29 March 2021. 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 Applicant brought an Application to challenge the validity of a domestic law as well as a decision of the Constitutional Court of the Respondent State which affirmed the constitutionality of the challenged law. Further alleging that he and his attorney faced a risk of domestic criminal prosecution for bringing the main Application, the Applicant subsequently filed a request for provisional measures which was dismissed by the Court. The Applicant then filed this request for provisional measures. The Court dismissed the request for provisional measures on the grounds that it did not consider the measures necessary.

**Jurisdiction** (*prima facie*, 15-16, 18; effect of withdrawal of article 34(6) Declaration 17)

**Provisional measures** (urgency, 31; irreparable harm, 32, 38; preventive nature, 33; breach of national law, 42)

### I. The Parties

1. Mr. Houngue Eric Noudehouenou, (hereinafter referred to as “the Applicant”) is a national of Benin. He seeks provisional measures, essentially to suspend the application of a provision of the Beninese Criminal Code.
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. It further deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as “the Declaration”) through which it accepted the jurisdiction of the Court to receive Applications from individuals and non-governmental organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument of withdrawal of its Declaration. The Court has

previously held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its deposit.<sup>1</sup>

## II. Subject of the Application

3. On 17 September 2020, the Applicant filed with the Court, an Application dated 15 September 2020, to challenge the law of 2 July 2018,<sup>2</sup> which amends and supplements the organic law of 18 March 1999<sup>3</sup> on the Higher Judicial Council. He also challenges the decision of 18 June 2018 of the Constitutional Court of Benin<sup>4</sup> which held that, the above-mentioned law of 2 July 2018 is in conformity with the Constitution.
4. In this request for provisional measures filed on 4 January 2020, the Applicant states that he had criticised decisions of the national courts.<sup>5</sup> He also states that, the application of Article 410 of the Criminal Code places him and his Counsel at a permanent and imminent risk of arbitrary deprivation of their liberty and possible conviction, which gives the Court the justification to grant the provisional measures requested.
5. He alleges that the Respondent State may, at any time and arbitrarily, apply against him and his Counsel the provisions of Article 410 of the Criminal Code of Benin,<sup>6</sup> which punishes with imprisonment and a fine, anyone who publicly, by action, words or writing, seeks to discredit a judicial act or decision in

1 *Ingabire Victoire Umuhoya v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Request No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and *Corrigendum* of 29 July 2020.

2 Law N°2018-02 of 02 July 2018.

3 Law N°94-027 of 18 March 1999.

4 DCC Decision 18-141 of 18 June 2018.

5 These are decisions of: the Constitutional Court, the Court of Repression for Economic Offences and Terrorism (CRIET) and the Cotonou Court of First Instance.

6 Article 410 “Anyone who has publicly, by deeds, words or writings, sought to discredit an act or a judicial decision, under conditions likely to undermine the authority of justice or its independence, is punished with (1) months to six (6) months of imprisonment and from one hundred thousand (100,000) CFA francs to one million (1,000,000) CFA francs fine or one of these two penalties only. The Court may also order that its decision be displayed and published under the conditions it determines, at the expense of the convicted person, without these costs being able to exceed the maximum fine provided for above. The foregoing provisions may in no case be applied to purely technical comments in specialist journals, nor to acts, words or writings tending to review a conviction. When the offence has been committed through the press, the provisions of article 455 of this code are applicable “

a manner likely to undermine the authority of the judiciary or its independence.

6. He adds finally that Article 410 violates the Respondent State's international commitments in that, criticism of local decisions before national courts and the Court is a right protected by Articles 7(1) of the Charter, 2(3), 14(1-3) and 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR").

### III. Alleged violations

7. The Applicant alleges the following:
  - i. Violation of the right to an independent judiciary protected by Article 26 of the Charter, Articles 2 and 14(1) of the ICCPR, Articles 10 and 30 of the Universal Declaration of Human Rights (UDHR), Article 1(h) and Article 33 of the ECOWAS Protocol on Democracy.
  - ii. Violation of the right of magistrates to strike protected by Articles 9, 10 and 11 of the Charter;
  - iii. Violation of the right to appeal enshrined in Article 56(5) of the Charter (*sic*), Article 8 of the UDHR, Article 1(h) of the ECOWAS Protocol on Democracy, Article 7(1) of the Charter, and Articles 2(3), 14(1-3) and 19 of the ICCPR;
  - iv. Violation of the right to freedom of communication protected by Article 19(2) of the ICCPR;
  - v. Violation of the right to equality and non-discrimination protected by Articles 2 and 3 of the Charter;
  - vi. Violation of the right to human integrity protected by Article 5 of the Charter;
  - vii. The violation of the right to the effective guarantee, protection and enjoyment of fundamental rights protected by Articles 1 of the Charter, 2 of the ICCPR and 1(h) of the ECOWAS Protocol on Democracy;
  - viii. Violation of the right to freedom of religion protected by Article 18 of the ICCPR;
  - ix. Violation of the right to freely take part in the conduct of public affairs of one's country protected by Article 13 of the Charter;
  - x. Violation of the right of defence protected by Article 7(1)(c) of the Charter.

### IV. Summary of the Procedure before the Court

8. The Applicant filed an Application on the merits on 17 September 2020 followed by a request for provisional measures on 28 September 2020. On 27 November 2020, the Court issued a

Ruling dismissing the request for provisional measures for lack of urgency and irreparable harm. The Ruling was duly notified to the Parties.

9. On 4 January 2021, the Applicant filed a new request for provisional measures which was served on the Respondent State on 14 January 2021 for its response within fifteen (15) days from the date of receipt.
10. The Respondent State did not file any Response to this request for provisional measures.

#### V. *Prima facie* jurisdiction

11. The Applicant submits, on the basis of Articles 27(2) of the Protocol and Rule 59(1) of the Rules<sup>7</sup> of Court, that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.
12. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as, the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration. The Application contains alleges violations of rights protected by human rights instruments.
13. He further argues that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal will not take effect until 26 March 2021.

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14. 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, the Protocol and any other relevant human rights instrument ratified by the States concerned.
15. According to Rule 49(1) of the Rules<sup>8</sup> “(t)he Court shall preliminarily ascertain its jurisdiction...”. However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction

7 Rules of Court, 25 September 2020.

8 Rules of Court, 25 September 2020.

- on the merits of the case, only that it has *prima facie* jurisdiction.<sup>9</sup>
16. In the present case, the rights alleged by the Applicant to have been violated, are all protected by the human rights instruments ratified by the Respondent State. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol.
  17. The Court also recalls that it has ruled that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect, and has no bearing on pending and new cases filed before the withdrawal comes into effect<sup>10</sup> as is the case in the present matter. The Court reiterated this position in its Ruling of 5 May 2020, *Houngue Eric Noudehouenou v Republic of Benin*,<sup>11</sup> and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that the said withdrawal does not affect its personal jurisdiction in the instant case.
  18. From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the present request for provisional measures.

## VI. Provisional measures requested

19. The Applicant seeks the following orders on provisional measures:
  - i. To declare that the content of Article 410, paragraph 3 of the Beninese Criminal Code makes no mention of the remedies of appeal, cassation and unconstitutionality before the Court, for actions which are punishable under paragraphs 1 and 2 of Article 410, paragraph 3, when a court decision is criticised in the course of its enforcement.
  - ii. Order the Respondent State to take all necessary measures to stay any application of Article 410 of the Criminal Code against the Applicant and his counsel with regard to the criticisms made by them against decisions handed down by the Beninese Constitutional Court, the CRIET and the Cotonou Tribunal in the appeals lodged by the latter before the Court in Applications No. 003/2020, No. 004/2020, 028/2020 and No. 032/2020 until the final judgment of the Court in the instant case is pronounced and to report thereon within ten days.

9 *Komi Koutche v Republic of Benin*, ACTHPR, Application No. 020/2019, Order of 2 December 2019 (provisional measures) § 11.

10 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

11 *Houngue Eric Noudehouenou v Republic of Benin*, ACTHPR, Application No. 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4- 5 and corrigendum of 29 July 2020.

- iii. Order that, without being subject to criminal prosecution on this count, the Applicant, members of his family and his counsel shall be authorised to record and produce before the Court any form of threat made against them and any form of verbal persecution suffered by them.
20. The Applicant argues in this regard that, criticism of decisions of local courts, both before the local courts and before the Court, for, *inter alia*, human rights violations, is a right enshrined in Articles 7(1) of the Charter, 2(3), 14(1-3) and 19 of the ICCPR, to which the Respondent State is a Party.
21. The Applicant avers that the Respondent State's legislation criminalises the exercise of this right of appeal, notably through Article 410 of the Criminal Code, which provides that "anyone who has publicly by deed, word or writing, sought to discredit a jurisdictional act or decision, in a manner likely to undermine the authority of the judiciary or its independence, is punishable by one (1) to six (6) months' imprisonment or a fine of one hundred thousand (100,000) to one million (1,000,000) CFA francs, or both fine and imprisonment".
22. The Applicant states that because of his applications to the Court, this Article places him and his Counsel at imminent and constant risk of arbitrary and unlawful deprivation of liberty of and conviction.
23. He maintains that this risk is all the more evident since, the Public Prosecutor's office can, at any time, institute proceedings against them on the basis of this Article and that he has been in the bad books of the Respondent State ever since he has been close to the political opposition figure Mr. Sebastien Ajavon, whose tax interests he defends.
24. The Applicant further argues that if he and his Counsel were to be imprisoned, this would cause them irreparable harm since the Respondent State, which is accustomed to the non-enforcement of the numerous decisions rendered against it by the Court, would never release them and they would be unable to properly exercise their rights before this Court.
25. He therefore believes that the conditions of urgency and irreparable harm are present to enable the Court grant his request for provisional measures to stay the application of Article 410 of the Beninese Criminal Code.
26. The Applicant further submits that he, his family and Counsel continue to receive verbal threats, including from officials of the Respondent State, which violate their rights to moral integrity and defence protected, by Articles 5 and 7(1) of the Charter,

respectively and cause them harm.

27. He states that he was, however, unable to provide evidence of these violations before this Court in the context of the Application on the merits, since the threats were verbal and Articles 608 and 609 of the Beninese Criminal Code prohibit and punish the recording of a person without his knowledge or consent.
28. He therefore prays the Court to authorise him to record and produce before it any threats made and any verbal persecution against him, his family, and his Counsel, without running the risk of criminal conviction on this count, in order to prove these violations.

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29. The Court notes that Article 27(2) of the Protocol provides that “in cases of extreme gravity or urgency, and when necessary to avoid irreparable harm to persons, the Court shall order such provisional measures as it deems appropriate.”
30. The Court notes that it decides on a case-by-case basis whether, in the light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.
31. The Court recalls that urgency, which is consubstantial with extreme seriousness, means that “an irreparable and imminent risk must exist before the Court renders its final decision”.<sup>12</sup> The risk involved must be real, which excludes assumed or abstract risk. This constitutes serious risk which calls for its immediate remedy.<sup>13</sup>
32. With respect to irreparable harm, the Court has held that there must be a “reasonable probability of occurrence” having regard to the context and the personal situation of the Applicant.<sup>14</sup>
33. In light of the above provisions, the Court will take into account the applicable law on provisional measures, which are preventive

12 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Order of 17 April 2020 (provisional measures) § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

in nature and do not prejudice the merits of the Application.

**A. On the request to find that remedies of appeal, cassation, unconstitutionality and remedies before the Court are covered by Article 410 of the Criminal Code**

34. The Applicant is requesting the Court to find that even though paragraph 3 of Article 410 of the Criminal Code does not mention the remedies of appeal, cassation, and unconstitutionality and remedies before the Court, these remedies are covered by paragraph 1 and 2 of the said article.
35. The Court observes that Article 410<sup>15</sup> paragraph 3 does not expressly mention remedies of appeals, cassation, unconstitutionality and remedies before the Court, and the literal reading of paragraphs 1 and 2 of this article does not lead to the conclusion that the exercise of these remedies is prohibited. Moreover, paragraph 3 of the said Article 410 clearly indicates that: “[t]he preceding provisions may not be applied in any case to purely technical comments in specialised journals, nor to acts, utterances or writings aimed at the revision of a conviction”.
36. Consequently, the Court dismisses this request.

**B. On the request for suspension of the application of Article 410 of the Criminal Code**

37. The Applicant is requesting the Court to suspend the application of Article 410 which he contends that, the Respondent State will implement against him and his Counsel because of the applications he has brought before this Court.
38. The Court notes that the Applicant has not proved the reality or the imminence of the criminal proceedings likely to be instituted against him and his Counsel as a result of filing applications before this Court. The Applicant has also not proved the risk of irreparable harm that he faces.
39. The Court notes that the allegations made by the Applicant are unsubstantiated and therefore dismisses them.

**C. On the authorisation to record and produce proof before this Court**

40. The Applicant prays this Court to authorise him to record, all

15 See note 6.



persons proffering any verbal threats and verbal persecutions against him, his family, and his Counsel, without their consent and without running the risk of criminal conviction on this count, in order to prove the violations he alleges in this regard in his Application.

41. The Court finds, as the Applicant admits, that Articles 608<sup>16</sup> and 609<sup>17</sup> of the Benin Criminal Code make it an offence to record a person without his or her knowledge and consent, and nothing on the record shows that these provisions violate human rights or are no longer in force.
42. The Court can therefore not authorise the Applicant to breach the internal laws of the Respondent State. Accordingly, the request is dismissed.
43. The Court therefore concludes that it is not necessary to order the provisional measures sought.
44. For the avoidance of doubt, the Court recalls that the present Ruling is provisional in character and in no way prejudices the Court's findings as to its jurisdiction, the admissibility of the application and the merits of the application.

## VII. Operative part

45. For these reasons,

### **The Court**

*Unanimously,*

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

16 Article 608: Anyone who wilfully violates the privacy of another person's private life by: - listening to, recording or transmitting or using any of the words spoken without the person's consent shall be liable to imprisonment of six months or five years and a fine of five hundred thousand CFA francs (500,000) or two million CFA francs (2,000,000). Where the acts stated or this article are carried out or take place in the course of a meeting with the knowledge of its participants, their consent shall be presumed.

17 Article 609: The penalties provided for in the preceding article shall be imposed on anyone who knowingly keeps, brings to the attention of the public or a third party, or who uses publicly or not, any record or document obtained by means of the acts provided for in that article.