

XYZ v Benin (provisional measures) (2021) 5 AfCLR 157

Application 003/2021, *XYZ v Republic of Benin*

Order, 8 April 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

In his main Application before the Court, the Applicant claimed that by its processes leading to the holding of presidential elections, including the retention of certain laws and revision of its Constitution, the Respondent State had violated his rights protected by the Charter and other relevant human rights instrument. Claiming further that the Respondent State had failed to abide by certain earlier judgments of this Court relating to its elections, the Applicant filed this request for provisional measures to suspend the electoral process and to guarantee certain protective measures. The Court dismissed the request for provisional measures on the ground that it cannot order measures based on a vague and imprecise request.

Jurisdiction (*prima facie*, 13, 16; effect of withdrawal of article 34(6) Declaration 15)

Provisional measures (urgency, 23, 31; irreparable and imminent risk, 23; irreparable harm, 24, 30-31; preventive nature, 25; delay by applicant, 26-29; mootness, 35, 37; vague and imprecise request, 30-31)

I. The Parties

1. XYZ (hereinafter referred to as “the Applicant”) is a national of Benin. He has requested for anonymity for reasons of personal security. He seeks provisional measures to, among other things, suspend the electoral process for the presidential election.
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”), whereby 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.¹

II. Subject of the Application

3. On September 18 January 2021, the Applicant filed with Court, an Application dated 16 January 2021, for alleged violation of his rights by the Respondent State through the holding of the presidential election, by the maintaining of Law No. 2019-40 of 7 November 2019, by revising the Constitution (hereinafter referred to as the “Revised Constitution”) and all subsequent laws, especially Law No. 2019-43 of 15 November 2019, establishing the Electoral Code (hereinafter referred to as the “Electoral Code”) for the presidential election of 11 April 2021.
4. In the instant request for provisional measures filed on 18 January 2021, the Applicant asserts that this Court held in the judgments rendered in Application No. 059/2019 - *XYZ v Republic of Benin*, Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* and Application No.010/2020, *XYZ v Republic of Benin*, that the Constitutional Court, the body in charge of electoral disputes, is not independent and that the Revised Constitution and the Electoral Code must be repealed before any election. He further asserts that in the first of the judgments cited, this Court added that *Conseil d’Orientation et de supervision de la Liste Electorale Permanente informatisée* (Orientation and Supervision Council of the Permanent Computerised Electoral List) (COS-LEPI), the body in charge of updating the electoral list, is not balanced in its membership and is not independent of the executive .
5. He alleges that, the Respondent State in disregard of the above-mentioned judgments, by Decree No. 2020-563 of 25 November 2020 on the modalities for setting the electoral calendar for the presidential election, the first round of which is scheduled for 11 April 2021, started the electoral process on the basis of these laws whose repeal this Court has ordered.

1 *Ingabire Victoire Umuhoza 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.

6. The Applicant avers that in these circumstances, there is a need for provisional measures to be ordered.

III. Alleged violations

7. The Applicant alleges the following:
 - i. Violation of the right to non-discrimination, protected by Article 2 of the Charter;
 - ii. Violation of the right to equality before the law and the right to equal protection of the law, protected by Article 3 of the Charter;
 - iii. Violation of the right to dignity, protected by Article 5 of the Charter;
 - iv. Violation of the right to freedom of expression and opinion, protected by Article 9(2) of the Charter;
 - v. Violation of the right to freedom of association, protected by Article 10(1) of the Charter;
 - vi. Violation of the right to participate freely in the government of one's country, protected by Article 13(1) of the Charter;
 - vii. Violation of the right to work protected by Article 15 of the Charter;
 - viii. Violation of the right of all peoples to freely determine its political status protected by Article 20(1) of the Charter;
 - ix. Violation of the right of every peoples to economic, social and cultural development, protected by Article 22(1) of the Charter;
 - x. Violation of the right of all peoples to peace and security, protected by Article 23(1) of the Charter;
 - xi. Violation of the obligation to guarantee the independence of the courts under Article 26 of the Charter;
 - xii. Violation of the obligation to recognize the rights enshrined in the Charter provided for by Article 1 of the Charter;
 - xiii. Violation of the obligation to create independent and impartial bodies as provided for in Article 17(1) of the African Charter on Elections Democracy and Governance and Article 3 of the ECOWAS Protocol.

IV. Summary of the Procedure before the Court

8. The Application was filed on 18 January 2021, together with a request for provisional measures and a request for anonymity.
9. On 18 February 2021, the Court requested the Applicant to provide additional information or documents regarding his request for anonymity, within three (3) days of the notification. The Applicant replied on 19 February 2021. He was granted anonymity during the 60th Ordinary Session of the Court (1-26 February 2021).
10. On 9 March 2021, the Application on the merits and the request for provisional measures were served on the Respondent State

for its response, within ninety (90) days and fifteen (15) days respectively, from the date of receipt.

11. At the expiration of the time limit, the Respondent State did not file a response to the request for provisional measures.

V. *Prima facie* jurisdiction

12. Article 3(1) of the Protocol provides:

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.

13. Under Rule 49(1) of the Rules of Court² “The Court shall preliminarily ascertain its jurisdiction...”. However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.³
14. In the instant case, the Applicant’s rights allegedly 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.
15. The Court also recalls its decision that the withdrawal of the Declaration deposited under Article 34(6) of the Protocol has no retroactive effect and has no bearing on new cases filed before the effective date of the withdrawal⁴ as is the case in the instant case. The Court reiterates its position in its Order of 5 May 2020 *Houngue Eric v Republic of Benin*⁵ that the withdrawal of the Respondent State’s Declaration shall take effect on 26 March 2021. Consequently, the said withdrawal does not affect the Court’s personal jurisdiction in the instant case.
16. The Court concludes that it has *prima facie* jurisdiction to hear the request for provisional measures.

2 Rules of Court, 25 September 2020.

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

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67.

5 *Houngue Eric Noudhouenou v Republic of Benin* ACTHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4-5 and *Corrigendum* of 29 July 2020.

VI. Provisional measures requested

- 17.** The Applicant requests the following provisional measures:
- Suspend the current electoral process and take the necessary measures to:
- Guarantee the independence of the Constitutional Court, the body in charge of settling disputes in presidential elections through its consensual reorganisation.
 - Guarantee the independence and impartiality of COS-LEPI, which is in charge of updating the electoral list for the presidential election.
 - Repeal the inter-ministerial Decree No.023/MJL/DC/SGM/DACPG/SA023SGG19 of 22 July 2019 on the prohibition of the issuance of official documents to persons wanted by the courts in the Republic of Benin.
 - Removal of the following eligibility requirements for participation in the 2021 presidential election: sponsorship, vice-presidential position, residence, prohibition of political party alliances.
 - Ending the current term of Mr. Patrice Talon on 5 April 2021 at midnight and allowing all opponents cleared by international courts to participate in the presidential election if they so wish.
- 18.** The Applicant submits that this Court ordered the repeal of the law revising the Constitution and the law on the electoral code, in particular, because they exclude a large part of the citizenry from participating in the political life of their country. He cites as an example, the sponsorship system that restricts the right to participate in elections. He argues that sponsorship is at the discretion of the President of the Republic, who is the only one with the authority to choose the candidates who will run in the following presidential election.
- 19.** He further submits that, by its refusal to implement the judgments of this Court, by maintaining the Revised Constitution and a manifestly illegal Electoral Code, the Respondent State is putting the country at risk of destabilisation insofar as human rights violations are continuing and increasing. He asserts that the radicalisation of the political discourse observed in the opposition camp and that of the President of the Republic, bears witness to this.
- 20.** He argues that this situation will have manifestly serious and irreparable consequences not only on his civil and political rights insofar as he will not be able to present his candidacy or vote in the presidential elections, but also on his rights to life, liberty, security and integrity if he has to claim peacefully the execution of

the decisions that the Court has rendered in his favour.

21. The Applicant concludes that there is a real and imminent risk of irreparable harm to him before this Court considers the merits of his Application.

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. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an “irreparable and imminent risk will be caused before it renders its final judgment”.⁶ The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future.⁷
24. With respect to irreparable harm, the Court considers that there must be a “reasonable probability of occurrence” having regard to the context and the Applicant’s personal situation.⁸
25. In view of the above provisions, the Court will take into account the applicable law on provisional measures, which are preventive in nature and do not prejudge the merits of the Application.

A. Request to suspend the electoral process

26. The Court notes, that while the date for the presidential election was set on 11 April 2021 by Decree No. 2020-563 of 25 November 2020 establishing the modalities for drawing up the electoral calendar, it is on 18 January 2021 that the Applicant filed with this Court his request for provisional measures to suspend the said election.
27. Almost two (2) months elapsed between the date of the decree and the date of the filing of the Application. This period casts doubt on the existence of the urgency claimed by the Applicant.

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

7 *Ibid*, § 62.

8 *Ibid*, § 63.

28. The Court notes that the Applicant has not provided any explanation for his inaction during this lapse of time or claimed the existence of any obstacle to seizing the Court prior. The Applicant's attitude attests to the absence of a real and imminent risk.⁹
29. Accordingly, the Court concludes that there is no urgency.
30. On the other hand, if it turns out that the Applicant's rights were not respected and that the presidential election was inconsistent with the Respondent State's human rights obligations, the Court can always remedy this situation when considering the Application on the merits. Thus, the existence of irreparable harm is not real.
31. The Court concludes that the conditions of urgency and irreparable harm are not met.
32. Consequently, the Court dismisses this request.

B. On the request to guarantee the independence and impartiality of the Constitutional Court and COS-LEPI and the request to abolish the eligibility conditions for candidacy in the presidential election

33. The Court notes that, in the Judgment in Application No. 010/2020, *XYZ v Republic of Benin*,¹⁰ it ordered the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court. In the Judgment in Application No.059/2019, *XYZ v Republic of Benin*,¹¹ it ordered the Respondent State to take measures to bring the composition of the COS-LEPI in line with the provisions of Article 17(2) of the African Charter on Elections, Democracy and Governance and Article 3 of the ECOWAS Protocol on Democracy, prior to any election.
34. It recalls that in these judgments, it also ordered the Respondent State to repeal Law No. 2019-40 of 7 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, including Law No. 2019-43 of 15 November 2019 on the Electoral Code. The Court specifies that these laws spell out, in particular, the eligibility

9 *Houngue Eric Noudehouenou v Republic of Benin*, ACTHPR, Application No. 032/2020, Ruling (provisional measures) (27 November 2020) § 37.

10 *XYZ v Republic of Benin*, ACTHPR, Application No. 010/2020, Judgment of 27 November 2020 (merits and reparations), § 11§159(xiii).

11 *XYZ v Republic of Benin*, ACTHPR, Application No. 059/2019, Judgment of 27 November 2020 (merits and reparations), §179(xii).

conditions for candidacy in elections.

35. The Court notes that, by its purpose, the measure requested has been settled by decisions already rendered by this Court. The Court therefore holds that the request is moot.

C. On the request to repeal the inter-ministerial order of 22 July 2019

36. The Court notes that in the Judgment rendered in Application No. 003/2020, *Houngue Eric Noudehouenou v Republic of Benin*,¹² it ordered the Respondent State to take all measures to repeal the Inter-ministerial Order No. 023/MJL/DC/SGM/DACPG/SA 023SGGG19 of 22 July 2019.
37. The Court concludes therefore, that the measure requested by the Applicant has already been ordered in the above-mentioned judgment. Consequently, this request is moot.

D. The request to terminate the term of the President of the Republic and the request to order the participation of all opposition candidates in the presidential election

38. The Applicant requests that the Court terminate the current term of the incumbent President of the Republic on 5 April 2021 at midnight, and order that all opposition candidates cleared by international courts to participate in the presidential election.
39. With regard to the termination of the President's mandate, the Court considers that, it is an issue to be determined on the merits, which cannot be considered in this request for provisional measures.
40. With regard to the participation of the opposition candidates, the Court notes that the Applicant did not provide any details on the identity of the said opposition candidates or evidence of their alleged clearance by international courts.
41. The Court notes that it cannot order a measure based on a vague and imprecise request.
42. The Court therefore dismisses the request.
43. For the avoidance of doubt, this Ruling is provisional in nature and is without prejudice to any decision the Court may make on its jurisdiction, the admissibility of the Application and the merits.

12 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020 Judgment of 4 December 2020 (merits and reparations) § 123(xiv).

VII. Operative part

44. For these reasons,

The Court

Unanimously,

i. *Dismisses* the request for provisional measures.