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political rights? Enhancing democracy
through the principle of national
consensus and the ACDG in the case
of *Hongue Eric Noudehouenou v*
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A new venue for the protection of political rights? Enhancing democracy through the principle of national consensus and the ACDG in the case of *Houngue Eric Noudehouenou v Republic of Benin**

Nota a [African Court on Human and Peoples' rights, *Houngue Eric Noudehouenou v Republic of Benin*](#).

1. Introduction and background

On 4 December 2020 the African Court on Human and Peoples' Rights issued its judgment in the case of *Houngue Eric Noudehouenou v Republic of Benin*¹. The case concerned the cumulative effects of a number of amendments to the 1990 Constitution of the Republic of Benin, namely Law n. 2019/40 and modifications to Benin's electoral Law. The applicant, Mr Houngue Eric Noudehouenou, complained that such modifications violated several International Law provisions, and in particular the principle of national consensus as enshrined in the African Charter on Democracy, Elections and Governance², together with the right to participate in public affairs, the right to equality, the right to freedom of association, the right to freedom of religion and the right to freedom of expression.

The African Court decision is of importance in the light of the country's socio-political crisis on the eve of the 2021 Presidential elections. It is also fundamental to put the judgment and Houngue's complaint in the context of Benin's political evolution. Indeed, the country was the first in Africa to overthrow a dictatorship by means of democratic elections in the 1990s and has from then been regarded as an

* Nota valutata dalla direzione del Focus.

¹ African Court on Human and Peoples' Rights, *Houngue Eric Noudehouenou v Republic of Benin*, appl. No 03/2020, judgment of 4 December 2020, available at: [https://www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue Eric Noudehouenou v Benin- Judgment.pdf](https://www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue_Eric_Noudehouenou_v_Benin-Judgment.pdf)

² African Charter on Democracy, Elections and Governance, 30 January 2007.



example of democratic role model³, being one of the most stable democracies in the Sub-Saharan political landscape⁴.

Such an idyllic picture changed within as long as three months, when the country held its parliamentary elections in 2019, which sparked stunning reactions filled with disappointment due to the commission restrictions preventing opposition parties from presenting their candidates⁵. This was followed by a growing number of protests, silenced through arrests, police brutality and even deaths of some protesters⁶. Since then, Benin has been affected by a steady and growing democratic erosion, also due to the political strategy of its Presidential leader Patrice Talon, in power since 2016 and who eventually won the 2021 elections, accused by the media and namely by the African Confidential of “turning back the clock”⁷.

The applicant, Mr Houngbe, a political opponent, was arrested in 2018 and then sentenced to 10 years imprisonment for poaching public funds and complicity in abuse of office. Such a conviction was criticised as it would seem to represent the wider political crackdown of the country, which takes place, first and foremost, through the delegitimization of political opponents⁸.

In this framework, the legislative changes brought to the attention of the Court represent a further step “forward” in this anti-democratic in-volution. In particular, under Article 44 of the revised Constitution, candidates running for President and vice president shall be sponsored by at least sixteen parliamentarians and/or majors. Moreover, the applicant complains that the new electoral law adopted in 2018 coupled with the decision of the Beninese Constitutional Court of 2019 concerning the documents to be submitted in order to participate in the elections, have the effect of excluding independent candidacies and opposition political parties. In particular, the new criteria provide that first of all, parties have to reach 10% votes threshold in order to win seats in the national Assembly; secondly, that they have to

³ D. KOHNERT-H. J., PREUSS, *Benin's stealthy democracide: How Africa's model democracy kills itself bit by bit*, IN ZBW – Leibniz Information Centre for Economics Working Paper, 2019, available at: <https://www.econstor.eu/bitstream/10419/205259/1/KOHNERT%26PREUSS2019.Benin%27s%20stealthy%20democracide.WP.10.10.19.pdf>

⁴ Ivi

⁵ M. DUERKSEN, *The Testing of Benin's Democracy*, 29 May 2019, available at: <https://africacenter.org/spotlight/the-testing-of-benin-democracy/>; V. CARLINO, *La Corte Costituzionale del Benin si dichiara incompetente a statuire sul meccanismo del parrainage per le elezioni presidenziali*, in *Federalismi. Rivista di diritto pubblico italiano, comparato e europeo*, 1/2021, pp. 2-8

⁶ J. COLE, *What Are the Stakes of the Upcoming Elections in Benin?*, 5 April 2021, available at: <https://www.justsecurity.org/75665/what-are-the-stakes-of-the-upcoming-elections-in-benin/>

⁷ Africa Confidential, *Talon turns back the clock*, 2019, available at: https://www.africa-confidential.com/article-preview/id/12630/Talon_turns_back_the_clock

⁸ O. D. AKINKUGBE, *International decisions commentary: Hongue Eric Noudehouenou v Republic of Benin*, in *American Journal of International Law*, 115/2, 2021, pp. 281-287; S. MASLIN NIR, *It Was a Robust Democracy. Then the New President Took Power*, N.Y. TIMES, 4 July 2019, available at <https://www.nytimes.com/2019/07/04/world/africa/benin-protests-talon-yayi.html>



give the equivalent of 380.000 euros deposit as a prerequisite for admission in the elections; finally, in 2019, the Constitutional Court decided that, in addition to the ordinary electoral documents, any party has to provide a “Certificate of Conformity” issued by the Ministry of the Interior. Following these new criteria, only two parties were admitted to participate in the 2019 elections⁹. As a result, any person not belonging to a political party or to a party list and opposition parties were prevented from participating freely in political elections.

In this light, Houngue complained a violation of his right to an effective remedy under Universal Declaration of Human Rights (UDHR) Article 10, African Charter on Human and Peoples’ Rights (Charter) Article 7(1)(a), and International Covenant on Civil and Political Rights (ICCPR) Article 2(3) (para. 6), as the State failed to provide a mechanism to appeal the Constitutional Court in order to ensure compliance of the revised law with human rights.

The applicant also raised an issue of procedural nature, complaining that such modifications were approved in violation of the principle of national consensus as enshrined in article 10 ACDEG¹⁰. Finally, Hongue also complained an infringement of a number of provisions of regional and international human rights instruments protecting the freedoms of association and expression, and the right to non-discrimination.

In this light, the Court issued an order for provisional measures twice. The first time, on 5 May 2020, the Court indeed ordered the State to remove all administrative, judicial and/or political obstacle to the applicant’s candidacy, and in practice to suspend the measures against him, and to report on the implementation of such measures within 30 days. The second order, dating 20 September 2020, followed the failure of the State to comply to such measures.

2. Admissibility and jurisdiction

The respondent State contended, first of all, that the Court had material jurisdiction over the case, in the light of the fact that the Constitutional Court ruled that the amendments were in conformity with constitutional law. For this reason, the State argued that once that constitutionality is established, the law cannot be challenged on the basis that it infringes human rights law¹¹. Moreover, Benin argued that the application shall be deemed inadmissible as the applicant lacked the locus standi in order to file a complaint to the Court, based on the fact that the authority to initiate a procedure to change a law belongs

⁹ See D. KOHNERT-H. J., PREUSS, cit.

¹⁰ African Court on Human and Peoples’ Rights Houngue, *Éric Noudehouenou v Republic of Benin*, App. No. 003/2020, Provisional Measures – 2, available at: https://www.african-court.org/en/images/Cases/Orders/Apppl._003-2020_-_Houngue_Erc_-_RULING_-_Engl.pdf

¹¹ Hongue Eric Noudehouenou v Republic of Benin, para 21



to the President and to Parliamentarians only¹². Furthermore, the government observes that the applicant is acting on behalf of all his fellow citizens not having the mandate to do so and assessing the interests of all citizens¹³.

The Court rejected both arguments. As to the matter of material jurisdiction, it stated that it does have jurisdiction to assess the conformity of national laws with the conventional provisions and any other relevant human rights instrument ratified by the States concerned, and that it is therefore sufficient that the complaint involves an infringement of such instruments¹⁴. As to the admissibility stage, the Court underlined that the fact that the applicant is raising issues of general interest does not prevent him to file an application to the Court. Indeed, Benin had ratified the Protocol allowing NGOs and individual to institute cases before the Court¹⁵. As a result, the Court dismissed the State's argument observing that "Indeed, it is an estimable virtue and duty of a responsible citizen to stand for the preservation of public interest. In any event, as was indicated above, neither the Charter, the Protocol, nor the Rules require an applicant to be a direct victim of human rights violations or demonstrate interest in a matter to institute a case in the Court"¹⁶.

3. Merits

Once established its jurisdiction and assessed the admissibility of the case, the Court evaluated the merits of the applicant's complaints.

As to the first complain, the Court found that the Revised Constitution was adopted in violation of the principle of national consensus enshrined in Article 10(2) ACDEG.

Indeed, as a result of the legislative modifications leading to the 2019 elections, which prevented independent candidacies and opposition political parties from running for elections, such Revised Constitution was approved-unanimously-by the members of the ruling party only¹⁷. On this basis, the Court notes that the Beninese Constitutional Court had indeed provided a definition of such a principle, which "far from signifying unanimity, is first and foremost a process of choice or decision without going

¹² Para 31-34

¹³ Ivi

¹⁴ Paras 27-28

¹⁵ Para 38. Benin withdrew from the Protocol shortly after the applicant filed the application under examination.

¹⁶ Para 40

¹⁷ See V. AYUDHI-T. ANIRUDH, *Hongue Eric Noudehouenou v Republic of Benin: Rejuvenating Democracy in Troubled Times*, in Human Rights Pulse, 5 July 2021, available at: <https://www.humanrightspulse.com/mastercontentblog/houngue-ric-noudehouenou-v-republic-of-benin-rejuvenating-democracy-in-troubled-times>



through a vote; (...) it makes it possible, on a given issue, to find solution that satisfies a greater number of people through an appropriate channel”¹⁸.

In this light, the Court observes that the fact that the Revision passed unanimously is indeed irrelevant, as the principle of national consensus defined by the Constitutional Court would have required “consultation with all the stakeholders in the country and people of various opinions in order to reach a national consensus, or were it to be followed, if need be, by a referendum as required by the Constitution”¹⁹.

Most importantly, “[t]he fact that the Revised Constitution was passed unanimously cannot conceal the need for national consensus driven by the "ideals that prevailed during the adoption of the Constitution of 11 December 1990"14 and by Article 10(2) of the ACDEG”²⁰.

Secondly, as to the alleged violation of the rights to participate in public affairs, equality, freedom of association, freedom of religion, and freedom of expression, the Court considered that it was not necessary to rule on those matters, in view of the country’s non-compliance with the principle of national consensus, as “[...] it is superfluous to give a detailed ruling on violations that would result from any of the revised articles because the Constitutional revision as a whole violates Article 10(2) of the ACDEG”²¹.

Finally, the Court rejected the applicant’s complaint on his right to an effective remedy. Indeed, national legislation provides that the Constitutional Court might be appealed not only by the President of the Republic and members of the national Parliament but also by any citizen, any association or human right NGOs, raising issues related to all laws and regulatory acts deemed to violate fundamental human rights and public freedoms.

In this light, the Court found that Beninese citizen do have an effective remedy against human rights violations at the national level²².

As to the reparations, in the absence of Houngue’s request for pecuniary reparations, the Court ordered Benin to “take all necessary measures to ensure cessation of all effects of the constitutional revision and the violations which the court found”²³.

¹⁸ Para 62

¹⁹ Para 64

²⁰ Para 65

²¹ Para 79

²² Para 92

²³ Para 123



2. Conclusion: The African Court on Human and Peoples' Rights as an arena for political rights protection and activism?

In the light of the aforementioned, the judgment seems relevant in the light of the role given to the principle of national consensus and to the ACDEG. Many have stressed how the decision of the Court is an unprecedented within the context of remedies, and that the judgment is a step forward the protection of political rights by political and human rights activists, “as part of a wider and growing mobilization of the African Court by opposition politicians as an alternative forum for engaging in political warfare against repressive national governments and for mobilizing social movements”²⁴.

In particular, the principle of national consensus played a significant role in the case. Such principle is enshrined in Article 10(2) of the ACDG, which states that:

“[...] State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained, if need be, through referendum.”

This principle is a unique feature of the African system of protection of rights and it finds its legal basis at article 10 of the ACDG, which is a legally binding instrument dealing with a number of requirements in order to respect democracy and democratic processes in constitutional changes. The principle of national consensus provides that any constitutional change shall be based on “broad social contract” in order to reduce conflict and ensure a “healthy” nation building²⁵. The term consensus has not been clearly defined but, as the Charter states, it does not mean “unanimity” in itself²⁶. It is linked to the quality of the national law and of the process of constitutional reform, which must be inclusive. In order to define such inclusiveness, the provision must be read in conjunction with other norms of the African system²⁷. In particular, it implies that any constitutional change shall include the opinion of different groups in society and are done with the active participation of the citizens²⁸. Most importantly and relevant to the case at stake, “Participation demands opportunities for people, including opposition groups, to engage in open debate”²⁹. In order to understand the place of such a principle in international human rights law, it must be framed within the objective and the relevance of the ACDG with respect to the AU and to its human rights law conception. The literature faced the issue whether the ACDG in general, can be defined

²⁴ O. D. AKINKUGBE, cit. p. 285; see also J. T. GATHII, (edited by) *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change*, Oxford University Press, Oxford, 2020

²⁵ M. WIEBUS, *Presidential Term Limits and the African Union*, in *Journal of African Law*, 1/63, 2019, pp. 131–160

²⁶ See also Hongue Eric, para 66

²⁷ *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2003; *the African Youth Charter*, 2006; *the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa*, 2016; and *the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*, 2018.

²⁸ AU, *Decision on Governance, Constitutionalism and Elections in Africa*, 2016, Assembly/AU/Dec.592(XXVI)

²⁹ M. WIEBUS, cit., p. 160



as a human rights instrument or is limited to the protection of political-collective rights³⁰. The ACDG is generally seen as a complement to the more human rights oriented African Charter, even though they sometimes overlap³¹. The justiciability of the ACDG under the African Court system is indeed based on, inter alia, Article 7 of the Court Protocol, which states that “[t]he Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned”. The question as to whether the ACDG can be defined as a human rights instrument is indeed linked to the African Union human rights conception, which, differently from the western tradition, does not clearly distinguish between human rights and collective/political rights³².

Indeed, the ACDG is strictly linked to the will of the African civil society of enhancing democracy and the rule of law in the African continent through an African approach, as “it embodies an African vision of democracy, elections and governance that broadens the conventional liberal or Western discourse on these issues”³³.

Such an “African vision” is build on the fact that, while the general concept of democracy is based on Western standards and instruments involving a “minimalist” conception limited to the presence of elections and democracy and individual political rights³⁴, with lower attention to the collective dimension of democracy, such an approach has adapted differently in African countries, where “authoritarianism may well and often does tie the knot with elections and an integral multipartyism”³⁵.

In this light, the unique approach of the ACDG consists in the continuum established between human rights and good governance, and in the importance attached not only to individual rights but also and especially to peace and to the care for a collective political culture, consciousness and sensitivity³⁶. The standards set in the ACDG, among which is the principle of national consensus, are always more often taken as a base for African countries constitutions³⁷, and are part of the Commitment of the AU to enhance constitutionalism in the African continent.

³⁰ G. NIYUNGEKO, *The African Charter on Democracy, Elections and Governance as a Human Rights Instrument*, in *Journal of African Law*, 1/63, 2019, pp. 63-80; B. KIOKO, *The African Charter on Democracy, Elections and Governance as a Justiciable Instrument*, in *Journal of African Law*, 1/63, 2019, pp. 39-61

³¹ Such as Article 13 of the African Charter, which states the right to participate in Government, which has a strong political dimension

³² A. MBATA MANGU, *African civil society and the promotion of the African Charter on Democracy, Elections and Governance*, in *African Human Rights Law Journal*, 12/2, 2012, pp. 348-372.

³³ Ivi

³⁴ Such as, for example, the International Covenant Civil and Political Rights, which is more focused on the individual dimension of participation in the public sphere

³⁵ Ivi, p. 353; F. J. AIVO, *Les constitutionnalistes et le pouvoir politique en Afrique*, in *Revue Française de Droit Constitutionnel*, 4/104, 2015, pp. 771-800

³⁶ Ivi; C. AKE, *Democracy and development in Africa*, 1996, Brookings Institution Press, pp. 137-139; I. G. SHIVIJI, *Fight my beloved continent: New democracy in Africa*, 1992, Harare: SAPES Books.

³⁷ O. B. K. DINGAKE, *Towards a People's Constitution for Botswana*, Notion Press, 2020.



The strength of such an approach through the application of such an instrument by the African Court is paradoxically demonstrated by the fact that on 25 March 2020 Benin, like many other African countries already did, withdrew its declaration under its Protocol allowing individuals and NGOs to access the Court³⁸, as the country judged the Court's activism as an excessive intrusion into its own domestic and sovereign affairs³⁹.

The Court's approach, coupled with the consideration given to the ACDG, as in the present case, shows how such an instrument can play a role in the enhancement of democratic processes in the African continent and it has indeed been increasingly used by different actors in order to build a multilevel democratic governance framework⁴⁰. Such an instrument is indeed a fundamental one for the AU in order to create a solid legal and practical framework in order to safeguard democracy from the growing attempts to, *inter alia*, anti-democratic consolidation of power and always more numerous cases of withdrawals from human rights instruments from African countries⁴¹.

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³⁹ S. H. ADJOLOHOUN, *A Crisis of Design and Judicial Practice? Curbing Disengagement from the African Court on Human and Peoples' Right*, in *African Human Rights Law Journal*, 2020, pp. 1-40; O. WINDRIDGE, *Assessing Rwexit: The Impact and Implications of Rwanda's Withdrawal of Its Article 34(6)-Declaration before the African Court on Human and People's Rights*, in *African Human Rights Yearbook*, 2/2018, pp. 243-259

⁴⁰ M. WIEBUSH-C. C. ANIEKWE-L. OETTE-S. VANDEGINSTE, *The African Charter on Democracy, Elections and Governance: Trends, Challenges and Perspectives*, in *Africa Spectrum*, 54/2019, pp. 95-105

⁴¹ Ivi; African Union, *Africa's Democratic Dividends and Deficits. Commemorating the 10th Anniversary of ACDEG*, vol. 4(1), 2017, January–June. Available [here](#).