

**African Court of Human and Peoples' Rights.**

***Landry Angelo Adalakoun and others v. Republic of Benin.***

**Application No. 009/2021**

**STATEMENT BY JUDGE BENSAOULA CHAFIKA**

1. I disagree with the conclusions reached by the Court in its Order and the grounds thereof. I would therefore like to make a brief observation of a general nature and express some more detailed views on the question of the Court's prerogatives in matters of provisional measures.
2. In the request for provisional measures attached to the Application on the merits, the Applicants prayed the Court to suspend the enforcement of Decision dcc 20/43 of 30/04/2020 issued by the Constitutional Court.
3. This decision would violate the right of access to community justice and the principle of non-regression, because the Constitutional Court of the Respondent State declared null and void all the decisions rendered by the Economic Community of West African States Court of Justice and non-binding to the Respondent State, the Additional Protocol A/P1/7/91 relating to the ECOWAS Court of Justice.
4. These facts would constitute a violation of the right of access to justice protected by Article 7 of the Charter and the principle of non-regression enshrined in Article 5 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

5. Article 27/2 of the Protocol clearly states that provisional measures are ordered in cases of

- extreme gravity and
- if it is necessary to avoid irreparable harm.
- The measures ordered must be deemed appropriate by the court.

6. The Court, relying on its jurisprudence on the subject, defines urgency consubstantial with extreme gravity as "irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision".

There is a requirement that the risk involved must be real and require immediate remedy (para 24).

7. In paragraph 26, the Court notes that **it is up to the Applicants to provide evidence of urgency or extreme gravity as well as irreparable harm.**

8. Finally, the Court emphasizes that the Applicants have not provided any evidence of all these elements. Accordingly, it dismisses the request.

9. It is my observation that the Court often dismisses provisional measures on the ground that **applicants have not provided evidence that the conditions required for ordering such measures exist.**

10. It is clear that, following the example of American and European jurisdictions, the facts that would require ordering provisional measures should be related to fundamental rights, essentially the right to life and the right to personal integrity (physical, psychic and moral), in the sense that they seek to avoid irreparable harm to the human person as a subject of the International Law of Human Rights, since it is essentially a right that protects the human being.

11. I think that the Court, instead of basing its orders on the "lack of evidence", could often, and for some of the emergency measures requested, apply the **presumption** that the protective measures requested are necessary and that a substantial and reasonable

proof of the existence of the facts is not required, because the very purpose of requests for measures **is of an urgent nature with a risk of real harm.**

12. This is all the more so as there does not seem to me, from a legal and epistemological point of view, to be any obstacle to extending urgent measures to other human rights, as these are all inseparable and indivisible.

13. Internationally, provisional protection can, at best, only prevent an aggravation of human rights violations already committed by the States with regard to those **other rights** that are excluded by international judicial institutions from being the subject of provisional measures.

14. Common sense tells me that it is not for nothing that the law requires that a request for provisional measures be linked to a request on the merits, given that their effects will disappear with the pronouncement of the decision on the merits. In my opinion, it would often be practical to refer to these requests on the merits in order to determine the gravity, urgency and harm related to the request for provisional measures, without judging the merits of the case.

15. In fact, in the Order that is the subject of this declaration, it is clear that the Applicants impugn the decision taken by the Respondent State, through its Constitutional Council, for having violated their right of access to justice and the principle of the non-retroactivity of laws, both of which are enshrined in Article 7 of the Charter and Article 5 common to the ICESCR and the PDCIP respectively.

16. Although in paragraph 20 of the Order the Applicants clearly state that **suspending the execution of the Respondent State's decision would allow Beninese citizens to continue to benefit from access to Community justice**, the Court notes in paragraph 27 that the Applicants have not developed any arguments or produced any evidence of urgency or extreme gravity as well as irreparable harm. Hence the Court's dismissal of the request in paragraph 28 of the Order.

17. Article 27/2, to which the Court refers in paragraph 23, gives the Court the prerogative to order the provisional measures it deems appropriate, if it considers that there is extreme gravity and the need to avoid irreparable harm to persons. It is my understanding

that the power to determine the appropriateness of provisional measures is given to the Court in paragraph 23, with exclusive jurisdiction to determine extreme gravity, urgency and irreparable harm.

18. It is obvious, then that as the provisional measures judge being judge of the obvious and the incontestable, the Court cannot divest itself of its power to define the relevance of the provisional measures to the benefit of the Applicants and in any case, to the latter.

19. As I underlined above, it happens that the very nature of the request for provisional measures is urgent, if not grave, and would avoid irreparable damage

20. If a judge cannot take up a request himself, once seized, his competence extends to the point where he must say the law and render justice. A decision that ignores the right to access to justice and the principle of non-retroactivity of laws due to the allegations of the Applicants, and that does not elicit any response from the Respondent State can only be urgent, grave and cause irreparable harm.

21. In their reply in paragraph 20, the Applicants made an unequivocal summary of the urgency, gravity and irreparable harm, and there was no need to elaborate on their reasons, since the Court, by virtue of its prerogatives, could deduce the elements of urgency from the very nature of the facts alleged without ignoring the principle of neutrality.

22. The disturbance caused by the decision that was the subject of the application was manifestly unlawful because it nullified acquired rights and rights protected by the Charter, given that the power of the provisional measures judge is limited to what is manifest. This is all the more so because as regards the case on the merits, the Court is bound by the procedure and the interest of good justice which require a meticulous examination of the case, a process that is often long.

23. Emergency measures will remain for me a means of treating urgency resulting from the delays of a justice system that is slow by necessity. The Court's only concern would be the style of drafting the order because if the order must not prejudge the merits, the order issued must be based on simple presumptions of damage and prejudice which would make urgency easy to assess. One could for example say that "it would appear

that, if the Applicants' allegation is found by the Court to be true on the merits, the harm and damages alleged would be certain....." or that "it would appear from the decision that is the subject of the requests for provisional that if it were to be implemented the resulting harm and damage would be certain....."

Judge Bensaoula Chafika

Judge at the Court

