

African Court on Human and Peoples' Rights

The matter of

Harouna Dicko and others

v.

Burkina Faso

Application No. 037/2020

Declaration attached to the Ruling of 13 November 2024

1. I totally disagree with the majority decision in the operative part of the Ruling that is the subject of this Declaration, which declared the Application inadmissibility for failure to exhaust local remedies.
2. My position is justified by the fact that the reasoning underpinning the Court's decision is unconvincing.
3. It emerges from the facts as recounted by the Applicants that, on 10 August 2020, a bill amending the Electoral Code was tabled before the National Assembly and adopted on 25 August 2020, despite protests by the Applicants and other stakeholders in the electoral process.
4. In response, the Applicants brought a case before the Constitutional Council challenging the constitutionality of the law thus adopted. The action was dismissed.
5. It should be noted that although it was served with the Application, the Respondent State did not file any submissions and therefore did not take part in the proceedings.
6. By decision of 16 October 2020, the Constitutional Council dismissed the Applicants' constitutional challenge on the grounds that Article 157 paragraph

2 of the Constitution does not afford the citizen the prerogative of a direct referral concerning a law that has already been promulgated. According to the Constitutional Council, citizens can only mount a constitutional challenge by way of an objection raised before a court in a case concerning them, either directly by themselves or by the diligence of the said court.

7. It emerges from paragraph 46 of its Ruling that the Court's decision to declare the Application inadmissible for failure to exhaust local remedies was based on this same reasoning of the Constitutional Council. In this regard, the Court held that "it follows from these considerations that the Applicants should have raised the objection of unconstitutionality before the ordinary courts, and not before the Constitutional Council, by way of an action against a law that had been enacted".
8. It was on the basis of this reasoning that the Court held that, having followed a procedure other than that indicated above, the Applicants did not exhaust local remedies.
9. However, it is clear from the provisions of Article 152(1) and (2) of the Respondent State's Constitution in force at the time the Application was lodged that the Constitutional Council is "responsible for ruling on the constitutionality of laws, ordinances ...". In other words, the Constitutional Council's review of the constitutionality of laws is a review of "laws" and not of "draft laws".
10. Moreover, the issue raised by the Applicants in their case before both the Constitutional Council and the African Court fell within the jurisdiction of the Constitutional Council since it concerned an electoral law whose constitutionality was at issue.

11. Finally, as it emerges from the provisions of Article 157 of the Constitution, “... any citizen may refer to the Constitutional Council the constitutionality of laws either *directly*¹ or by means of a constitutional objection procedure”.
12. A cross-analysis of the various provisions cited above shows that by adopting the Constitutional Council’s reasoning at face value, the Court failed in its duty to review how domestic courts apply the provisions of domestic law, including the Constitution.
13. Indeed, there is no doubt as to the letter of Article 157 of the Constitution of the Respondent State that individuals have two options to mount a constitutional challenge: either they refer the matter directly to the Constitutional Council by way of an action or they refer it by way of a constitutional objection.
14. With regard to the first option, it is clear that referral by way of a constitutional objection is exercised in proceedings brought before an ordinary court and is applicable in the context of the application of a law that has been adopted, promulgated and enforced.
15. Under this procedure of referral by way of a constitutional challenge, the review is open both to the parties and to the court or administrative tribunal which, where appropriate, must stay the proceedings pending the decision of the Constitutional Council.
16. On the other hand, as regards the other option of appealing directly to the Constitutional Council open to individuals, it should be noted that the individual filing the objection must first have had knowledge of the contested law. It is obviously through promulgation or publication that individuals become aware of laws and can thus decide to challenge their unconstitutionality. This second option is therefore an *a posteriori* recourse which is only possible after the laws have been promulgated.

¹ My emphasis.

17. It is important to note that *a priori* control is not excluded from the constitutional litigation system of the Respondent State, since the first paragraph of Article 157 of its Constitution provides that referral to the Constitutional Council is made by the President of the Republic, the Prime Minister, the President of the National Assembly and at least one tenth of the members of the National Assembly.
18. All of these authorities are likely to be involved in the process of examining, adopting and subsequently finalising a law that is the subject of an objection, and may therefore subject it to constitutionality review since they participate, in one way or another, in its drafting.
19. Moreover, it is noteworthy that the first paragraph of Article 157 of the Respondent State's Constitution does not mention the stage at which the individual may exercise his right to a remedy.
20. In any event, if the Burkinabe constitution had intended to confer on individuals the prerogative of a priori challenge, that is, before the promulgation of laws, it would have expressly provided for this and for the procedure applicable in this respect. The absence of such a provision therefore rules out the possibility of the Applicant exhausting this remedy in the proceedings before the African Court.
21. It emerges from these considerations that the provisions of the Constitution leave no doubt that individuals may refer a matter to the Constitutional Council only after the law has been promulgated. This is so because before this stage, individuals, who are ordinary citizens, are not supposed to be aware of new laws or new or amended provisions of laws in force. As a general rule, it is publicity, a procedure subsequent to promulgation, which establishes the enforceability of new laws or provisions of laws against citizens and other entities.
22. It is therefore surprising, to say the least, that the Court should confine itself, as it does in paragraphs 45 *et seq.* of the ruling that is the subject of this

Declaration , to appropriating the Constitutional Council's reasoning without referring, as its jurisdiction as an international court requires it to do, to the provisions of national law, in particular constitutional law, on which the decision of the domestic court was based. Such an approach is part of an inappropriate observance of the national court's margin of appreciation, whether constitutional or otherwise, which corroborates a manifestly erroneous application of national law, thereby impeding and restricting the implementation of an important rule of international procedural law: the exhaustion of local remedies as provided for in Article 56(5) of the Charter.

23. Moreover, this approach is flawed, since at no point in its judgment does the Court refer to Article 157 of the Constitution, whose interpretation and application by the Constitutional Council nevertheless formed the basis of the Court's decision to declare the Application inadmissible. The least that can be said is that the Court ruled on the exhaustion of a local remedy while ignoring the source of domestic law on which the national court anchored the procedure for that remedy.
24. In doing so, the Court has obviously called into question its own jurisprudential consistency in this area, since it has never been bound - and cannot be bound - by the national court's interpretation of any legal text, including the Constitution. On this question, the Court has constantly recalled that, although it is not a court of appeal against decisions of national courts, it has jurisdiction, under the terms of its Protocol, to examine compliance of those decisions with the international law applicable to the Respondent State. There can be no doubt that, in so doing, the Court has, in its jurisprudence, referred directly to the source of national law applied by national courts. Moreover, the Court is clearly entitled to point to the manifest discrepancy between the letter of that source of law and the interpretation given to it by national courts.
25. Moreover, by refusing in the present case to exercise the prerogatives thus set out, the African Court has tied itself to an erroneous and illogical

interpretation of domestic law - in this case, the Constitution - by national courts, even though that interpretation is contested by the Applicant.

26. Lastly, the Court's position is curious in the light of the general rules of procedural constitutional law. It is noteworthy that direct referral is not provided for in any of the systems of continental constitutional law - widely adopted in French-speaking countries or civil law systems such as Burkina Faso - as one of the means of referral in the context of a constitutional objection procedure. It cannot be disputed that the review of the constitutionality of laws, as known in these constitutional traditions, is undertaken either by direct referral - reserved for certain entities predetermined under the terms of the Constitution - or by a constitutional objection applicable to proceedings pending before the ordinary courts. Direct action and action by way of objection are therefore two completely different procedures!
27. At the risk of insisting on constitutional procedural pedagogy, a constitutional objection is raised by an individual in proceedings pending before an ordinary court, whether criminal or otherwise. In such a case, it is the ordinary court that refers the matter to the Constitutional Court and not the individual himself. The letter of Article 157 of the Respondent State's Constitution unequivocally suggests this approach.
28. Direct referral, on the other hand, is made by the individual himself as set out unequivocally in the letter of the Constitution of the Respondent State, the citizen having the prerogative of both options.

Judge Chafika Bensaoula

Done at Arusha, this Thirteenth Day of November Two Thousand and Twenty-four, the French text being authoritative.

