

# PRESENTATION

In the maiden edition of this Joint Law Report (2019), the African Court reported on a number of landmark decisions it delivered relating to, among others, fair trial; freedom of movement; right to liberty; right to life and compatibility of mandatory death penalty; right to nationality; and the right to participate in government. Given the reputation it has carved for itself over the years, the Court has begun to receive many more cases, some of which are not in the domain of classical civil and political rights that characterise actions before international human rights tribunals.

In 2020, the Court delivered a total of sixty-one (61) decisions<sup>1</sup>, fourteen of them judgments on merits and reparations.

In this edition, we focus on two judgments: *XYZ v. Republic of Benin* (Judgment of 27 November 2020)<sup>2</sup> and *Jebra Kambole v. United Republic of Tanzania* (Judgment of 15 July 2020).<sup>3</sup>

These two Applications are similar in the sense that the Applicants were challenging the constitutionality of provisions of the constitutions *vis-à-vis* their conformity to international human rights instruments the States have ratified. Both cases also pertain to important questions of human rights as they relate to political participation and democracy in Africa.

In *XYZ*, the Court was called upon to consider, for the first time, questions relating to the right to information, the right to economic, social and cultural development, and national peace and security. The Court also had to pronounce, for the first time, on the question relating to the need for government to obtain national consensus before amending the Constitution and the question of independence and impartiality of the judiciary. In a ground-breaking decision, the Court held that the lack of consensus in the amendment of the Constitution breached the social pact and posed an actual threat to peace. It could be argued the Court was treading on slippery grounds, but if one considers that constitutional amendments in many African countries have, in most cases, led to violence, then it will be easier to contextualise the decision.

In *Jebra Kambole*, the Applicant averred that provisions of the Constitution that oust the jurisdiction of domestic courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner was a violation of human rights, including freedom from discrimination, equal protection of the law and the right to have one's cause heard. The Court held that the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider such challenges, violated the African Charter.

In both cases, the Court reiterated its reluctance to award pecuniary damages for violations that affect the entire or a significant section of the population in the Respondent State, and held the view that the judgment in itself was just satisfaction.

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1. The Court has defined its decisions to mean "any pronouncement of the Court, in the exercise of its judicial powers, which is in the form of a judgment, ruling, opinion or order".

2. Application 010/2020.

3. Application 018/2018.

# CASE OF XYZ v. REPUBLIC OF BENIN

Judgment of 27 November 2020

## FACTS OF THE CASE

On 14 November 2017, the Applicant filed an Application before the African Court challenging Law No. 2019-40 of 07 November 2019 amending the Constitution of the Republic of Benin.

He asserted that the Amendment Law was adopted in secret by a parliament elected in illegal elections and which does not represent the reality of the political forces of the country, and moreover without all the components of Beninese society being invited to it, whereas the international instruments to which the Respondent State has adhered oblige it to ensure that the process of amending or revising the Constitution is based on a national consensus.

The Applicant further avers that the Constitutional Court of Benin declared the Amendment Law in conformity with the Constitution by decision DCC 19-504 of 06 November 2019. According to the Applicant, this decision reflects the partiality and lack of independence of the Constitutional Court.

## ALLEGED VIOLATIONS

The Applicant alleges that the Respondent State has violated

- (i) the obligation to guarantee the independence and impartiality of the Courts and Tribunals provided for in Articles 26 and 7 of the African Charter on Human and Peoples' Rights (the Charter);
- (ii) the obligation to ensure that the constitutional review process is based on a national consensus including, where appropriate, recourse to a referendum, as provided for in Article 10(2) of the African Charter on Democracy, Elections and Good Governance (ACDEG);
- (iii) the right to information protected by Article 9(1) of the Charter;
- (iv) the right to economic, social and cultural development protected by Article 22(1) of the Charter; and
- (v) the right to national peace and security protected by Article 23(1) of the Charter.

## SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

The Applicant asked the Court to:

- find that the relevant human rights instruments have been violated;

- declare and rule that the Republic of Benin has committed the crime of unconstitutional change by revising the Constitution and seizing the powers of the legislature and manipulating the rules on the vacancy of power outside of any consensus and any recourse to a referendum through the nine (9) members of the Committee of Experts;
- order the Republic of Benin to annul the above-mentioned decision DCC 2019-504 of 06 November 2019 of the Constitutional Court and Law No. 2019-40 Amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all laws derived from it;
- proceed urgently to reinstate Law No. 90-032 of 11 December 1990; and
- order the Respondent State to pay him the sum of one billion (1,000,000,000) FCFA as damages.

In the examination of the merits, while the questions relating to the right to information, the right to economic, social and cultural development, and national peace and security were not novel, this was not the case for the question relating to national consensus and the question of independence and impartiality, which was before the Court for the first time.

The obligation to ensure that the constitutional review process is based on a national consensus, including, where appropriate, recourse to a referendum, is enshrined in Article 10(2) of the African Democracy Charter, which provides that “States Parties shall ensure that the process of amending or revising their Constitution is based on a national consensus, including, where appropriate, recourse to a referendum”

The Court held that its competence to apply this instrument is derived from Article 3(1) of the Protocol establishing the Court, which gives it jurisdiction over all cases and disputes brought before it concerning the interpretation and application of the Charter, the Protocol establishing the Court and any other relevant human rights instrument ratified by the States concerned.

Specifically, in its judgment of 18 November 2016 in Application No. 001/2014, *Actions pour la Protection des Droits de l’Homme (APDH) v. Republic of Côte d’Ivoire*, the Court concluded that the African Democracy Charter and the ECOWAS Democracy Protocol are human rights instruments, within the meaning of Article 3 of the African Court Protocol, which it has jurisdiction to interpret and apply.

This being the case, the issue before the Court, in light of the facts of the case, was whether the Constitution Amendment Law No. 2019-40 of 07 November 2019 could be considered consensual within the meaning of Article 10(2) of the African Democracy Charter since it was adopted unanimously by elected MPs.

It is worth noting that in answering this question, the Court largely relied on some decisions of the Constitutional Court of the Respondent State dealing with review of previous constitutional amendments that it declared unconstitutional.

The Court noted that before the ratification of the African Charter on Democracy on 11 July 2021, the Respondent State had established the national consensus as a principle of constitutional value through the Constitutional Court decision DCC 06-074 of 8 July 2006, which stated that

**//** Even if the Constitution has provided for the modalities of its amendment, the commitment of the Beninese people to create a state governed by the rule of law and multiparty democracy, the need to safeguard legal certainty and national cohesion require that any amendment should take into account the ideals that presided over the adoption of the Constitution of 11 December 1990, in particular national consensus, which is a principle of constitutional value.

Furthermore, the Court noted that the same Constitutional Court gave a specific definition of the concept of 'consensus' through its decisions DCC 10-049 of 5 April 2010 and DCC 10-117 of 8 September 2010, where it held that

// Consensus, a principle of constitutional value, as affirmed by Decision DCC 06-074 of 8 July 2006 ..., far from meaning unanimity, is first of all a process of choice or decision without going through a vote; ... it allows, on a given issue, to find by an appropriate way, the solution satisfying the greatest number of people.

Against this finding, which it endorsed, the African Court held that the concept of 'national consensus' requires that the Beninese people be consulted either directly or through opinion leaders and all stakeholders, including the representatives of the people, if the latter truly represent the various forces or components of society, which is not the case here, since all the members of parliament who adopted the Amendment of the Constitution belong to the ruling coalition.

Consequently, in the Court's view, the fact that the amendment bill was adopted unanimously should not obliterate the need for national consensus, which could have only been achieved if the amendment procedure was preceded by a consultation of all the living forces and different groups with a view to reaching a consensus, or if it was followed, if necessary, by a referendum.

Consequently, the Court held that the amendment bill was adopted in violation of the principle of national consensus enshrined in Article 10(2) of the Charter.

The second issue that the Court was called upon to rule on, for the first time, concerned the alleged violation of the obligation to guarantee the independence and impartiality of the Constitutional Court under Articles 26 and 7 of the Charter

It was the Applicant's submission that the lack of independence of the Constitutional Court is evidenced by the fact that the terms of office of the Judges were renewable and the Court did not enjoy financial autonomy. He also averred that the close relationship between the President of the Constitutional Court and the President of the Republic, and the fact that the former had, in his capacity as Minister of Justice and Legislation, participated in the approval of previous attempts to amend the Constitution, had an impact on the impartiality of the Constitutional Court.

The African Court considered that although the Organic Law No. 91-009 of 4 March 1991 on the Constitutional Court contains provisions guaranteeing the administrative and financial autonomy of the said Court, the renewable nature of the Judges' terms in office is likely to weaken their independence, in particular the Judges who seek a renewal of their terms. The African Court thus concluded that the Respondent State had violated Article 26 of the Charter which guarantees independence of the judiciary.

On the other hand, with regard to the alleged violation of the obligation to guarantee the impartiality of the Constitutional Court, the African Court considered that the Applicant had not proved that the President of the Constitutional Court acted in a biased manner, prejudged or in any way imposed his opinions on other Judges of the Court and that, therefore, the Respondent State did not violate the obligation to safeguard the impartiality of tribunals prescribed under Article 7(1)(d) of the Charter.

## ON THE ALLEGED VIOLATION OF THE RIGHT TO INFORMATION

The Applicant alleged that the constitutional amendment bill was not disclosed before its adoption. The Court held that it is the duty of the Respondent State to ensure the publication of debates in the National Assembly on a bill as required by its domestic legislation. The Court further observed that the Respondent State did not challenge the allegation that the amendment bill had not been disseminated among the population in order to enable them to form an opinion and participate in the debate on the proposed amendments. Consequently, the Court concluded that the Respondent State had violated the right to information protected by Article 9(1) of the Charter.

## ON THE ALLEGED VIOLATION OF THE RIGHT TO PEACE AND SECURITY AND THE RIGHT TO ECONOMIC, SOCIAL AND CULTURAL DEVELOPMENT

The Applicant averred that the amendment threatened peace and security in Benin and consequently economic, social and cultural development, insofar as a large part of the people did not recognise it. The Court concluded that these rights protected by Articles 22(1) and 23(1) of the Charter had been violated, and the non-consensual amendment breached the social pact and posed an actual threat to peace in Benin.

### REPARATIONS

On the pecuniary reparation measures, the Court ordered the Respondent State to pay the Applicant the sum of 1 symbolic CFA franc for the moral prejudice suffered.

On non-pecuniary measures, the Court ordered the Respondent State to:

- (i) take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, particularly with regard to the process of renewing the term of Judges;
- (ii) take all measures to repeal Amendment Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and to comply with the principle of national consensus laid down by Article 10(2) of the African Democracy Charter for all other constitutional amendments; and
- (iii) take these measures before holding any election.

# JEBRA KAMBOLE v. UNITED REPUBLIC OF TANZANIA

Judgment of 15 July 2020

## FACTS OF THE CASE

Jebra Kambole (the Applicant) is a national of the United Republic of Tanzania (the Respondent State). He is an advocate by profession and also a member of the Tanganyika Law Society.

## ALLEGED VIOLATIONS

The Applicant alleged that the Respondent State violated his rights under the African Charter on Human and Peoples' Rights (the Charter) by maintaining article 41(7) in its Constitution, which provision bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner. Specifically, the Applicant alleged that article 41(7) of the Respondent State Constitution violated his right to freedom from discrimination under Article 2 of the Charter. The Applicant further averred that the Respondent State had violated his right to equal protection of the law and the right to have his cause heard, especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for in Articles 3(2) and 7(1)(a) of the Charter, respectively.

The Applicant also alleged that the Respondent State had failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under its Article 1. It was also the Applicant's averment that the Respondent State's conduct also violated article 13(6)(a) of its own Constitution.

## SUBMISSIONS OF THE PARTIES AND FINDINGS OF THE COURT

This judgment further develops the Court's jurisprudence on equality and non-discrimination building on the earlier pronouncements in *African Commission on Human and Peoples' Rights v. Republic of Kenya* and *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire*.

## ADMISSIBILITY – AN APPLICANT IS ONLY REQUIRED TO EXHAUST REMEDIES THAT ARE AVAILABLE, EFFECTIVE AND SUFFICIENT

The Respondent State argued that the Applicant never made an attempt to exhaust local remedies and as such did not provide it with an opportunity to address the alleged wrongful conduct. The Court recalled that for purposes of exhausting local remedies, an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient. In this sense, a remedy is available if it can be utilised as a matter of fact without impediment; a remedy is effective if it offers a real prospect of success; and a remedy is sufficient if it

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is capable of redressing the wrong complained against. However, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such remedies is abnormally prolonged.

In the present case, the Court noted that had the Applicant challenged article 41(7) of the Constitution before the Respondent State's courts, the application would have, inevitably, been dismissed on the basis that no court in the Respondent State has the power to nullify provisions of its Constitution. The Court then noted that a domestic remedy that has no prospect of success does not constitute an effective remedy within the context of Article 56(5) of the Charter. In the circumstances, therefore, the Court held that the Applicant did not have a remedy that was available for exhaustion before filing this Application.

## ADMISSIBILITY – FILING WITHIN A REASONABLE PERIOD OF TIME

The Respondent State argued that the Application was inadmissible as the Applicant had delayed in filing his case. Apart from highlighting the fact that no time frame for filing actions is stipulated under Article 56 of the Charter, the Applicant also argued that the alleged violations were continuous in nature thus not subject to a time limit for filing.

The Court confirmed that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application should be filed before the Court. The Court also emphasized that the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and it must be determined on a case-by-case basis. In the present case, since the Court had found that there were no domestic judicial remedies available for the Applicant to exhaust, the question of a reasonable time, after the exhaustion of domestic remedies, within which the Applicant ought to have filed his Application with the Court did not arise.

As for the question of continuous violations, the Court held that the nature of such violations is that they renew themselves every day as long as the State fails to take steps to remedy them. In the present case, the result was that the violations alleged to have been perpetrated by article 41(7) of the Respondent State's Constitution automatically renewed themselves for as long as they were not remedied and the Court could thus have been seized of the case anytime for as long as the violations remained un-remedied. In light of the above, the Court dismissed the Respondent State's objections to the admissibility of the Application.

## ALLEGED VIOLATION OF THE RIGHT TO NON-DISCRIMINATION

The Applicant argued that article 41(7) of the Respondent State's Constitution, by barring any court from inquiring into the election of any presidential candidate after the Electoral Commission has pronounced a winner, entails that any person aggrieved by the results of a presidential election cannot access a judicial remedy. This, the Applicant submitted, violated Article 2 of the Charter. The Respondent State contended that the right to non-discrimination, as provided for under Article 2 of the Charter, "is not absolute where there is a legitimate justified purpose or aim that is justifiable."

In respect of Article 2 of the Charter, the Court reiterated its position that this provision is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment. The Court noted, however, that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and in circumstances where it is not necessary and proportional.

Specifically in relation to article 41(7) of the Respondent State's Constitution, the Court observed that this provision creates a differentiation between litigants in that while the Respondent State's courts are permitted to look into any allegation by any litigant, they are not given equal latitude when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies while litigants with other claims are not similarly barred. The Court thus found that by outrightly barring courts from considering a complaint by anyone in relation to the results of a presidential election, in effect, article 41(7) of the Respondent State's Constitution treated citizens that may wish to judicially challenge the election of



a president differently and less favourably as compared to citizens with grievances other than those related to the election of a president.

The Court also emphasised that while it is for a particular State to determine the mechanisms or steps to be taken for purposes of implementing the Charter, it retains the jurisdiction to assess and review the steps taken for compliance with the Charter and other applicable human rights standards. In particular, the Court's duty is to assess if a fair balance has been struck between societal interests and the interests of the individual as protected under the Charter. The doctrine of margin of appreciation, therefore, while recognising legitimate leverage by States in the implementation of the Charter, cannot be used by States to oust the Court's supervisory jurisdiction.

In the absence of clear justification as to how the differentiation and distinction in article 41(7) of the Respondent State's Constitution is necessary and reasonable in a democratic society, the Court held that article 41(7) effects a distinction between litigants and that this distinction has no justification under the Charter. This distinction is such that individuals within the Respondent State are excluded from pursuing a remedy before the court simply because of the subject matter of their grievances while other individuals with grievances not related to the election of a president are not equally barred. In the circumstances, the Court found that article 41(7) of the Respondent State's Constitution violated the Applicant's right to be free from discrimination as guaranteed under Article 2 of the Charter.

### ALLEGED VIOLATION OF THE RIGHT TO EQUAL PROTECTION

The Court noted that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations. In the present case, the Court noted that article 41(7) of the Respondent State's Constitution did not deny the Applicant equal protection of the laws in the Respondent State. The Applicant, like other citizens, has been guaranteed the same range of rights in respect of contesting the election of a president. Given these circumstances, the Court found that the Applicant had failed to prove a violation of Article 3(2) of the Charter.

### ALLEGED VIOLATION OF THE APPLICANT'S RIGHT TO HAVE HIS CAUSE HEARD

The Applicant averred that by having article 41(7) as part of its Constitution, the Respondent State had violated his rights under Article 7(1)(a) of the Charter. The Respondent State disputed the Applicant's allegation and argued that as a sovereign State it enjoyed "exclusive, ultimate and comprehensive powers of law-making, under its fundamental legal framework. Since all powers arise from the people, the Respondent has the right to make provisions in the Constitution or any other written law." It was also the Respondent State's argument that article 41(7) of its Constitution is protected by the doctrine of margin of appreciation.

The Court observed that the right to have one's cause heard, as enshrined under Article 7(1)(a) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights, and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts. The Court also noted that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.

The Court further recalled that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court noted that article 41(7) of the Respondent State's Constitution had ousted the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This entailed that irrespective of the nature of the grievance or the merits thereof, as long as the same pertained to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge existed to any aggrieved person within the Respondent State.



In the circumstances, the Court held that article 41(7) of the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider challenges to a presidential election after the Electoral Commission has declared a winner, violated Article 7(1)(a) of the Charter.

## REPARATIONS – ADOPTION OF CONSTITUTIONAL AND LEGISLATIVE MEASURES

The Court recalled that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. The Court having found that article 41(7) of the Respondent State's Constitution violated Articles 1, 2, and 7(1)(a) of the Charter ordered the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2 and 7(1)(a) of the Charter.

The Respondent State was also ordered to report to the Court, within twelve (12) months of the judgment, on the measures taken to implement the terms of the judgment.

## OTHER FORMS OF REPARATIONS – *SUO MOTU* ORDER FOR PUBLICATION

The Court recalled that Article 27(1) of the Protocol gives it power to "make appropriate orders to remedy" violations. The Court thus reaffirmed that it can, by way of reparations, order publication of its decisions *suo motu* where the circumstances of the case so require.

In the present case, the Court noted that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to political participation guaranteed under Article 13 of the Charter. In the circumstances, the Court deemed it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, ordered the Respondent State to publish the Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remained accessible for at least one (1) year after the date of publication.