

DEMOCRATIC GREEN PARTY OF RWANDA v. GOVERNMENT OF RWANDA (2)

[Rwanda SUPREME COURT – RS/SPEC/0002/15/CS (Rugege, P.J., Nyirinkwaya, Mukanyundo, Hatangimbabazi, Munyangeri N., Hitiyaremye, Gakwaya, Karimunda M., Nyirandabaruta, J.) October 8, 2015]

Constitution – Amendment of the Constitution – Filing a case against the State of Rwanda – The State is obliged to intervene to provide explanation on the prerogatives of its organs vis-à-vis amendment of the Constitution – Constitution of the Republic of Rwanda of 4 June 2003 as amended up to date, article 193.

Constitution – Amendment of article 101 – Meaning of article 193 with regard to the amendment of this article – Constitution of the Republic of Rwanda does not prohibit that article 101 relating to the Presidential Terms to be amended pursuant to the provision of article 193 of the Constitution – Constitution of the Republic of Rwanda of 4 June 2003 as amended up to date, article 2 – African Charter on Democracy, elections and good Governance, article 23.

Facts: The Democratic Green Party of Rwanda filed a petition against the State of Rwanda requesting that article 101 of the Constitution should not be amended. The first hearing was not held due to the fact GREEN PARTY had no advocate and the hearing was postponed on another date. Meanwhile, Mukamuzoni Antoinette, counsel for GREEN PARTY, produced additional court submissions. In addition to that, Centre for Human Rights Law Firm Ltd wrote to the Supreme Court requesting to be allowed to appear in Court as “Amicus curiae” to support the claim filed by GREEN PARTY requesting the court to decide that the amendment of article 101 of the constitution concerning the term of president is not allowed.

On the day of hearing, the court first analysed the request of Center for Human Rights Law Firm Ltd to be “amicus curiae” in this case but after its analysis, the court found its request not admissible. The hearing continued with the analysis of incident regarding the jurisdiction of the Court lodged by the state attorneys, the court took the preliminary judgment and ruled that that incident is not valid and ruled that this court has jurisdiction of hearing the case that was filed by GREEN PARTY

The hearing in substance continued on 23 September 2015 whereby GREEN PARTY pleaded stating that the constitution does not allow the amendment of article 101 stating that the term of the President of the Republic should be amended while the State Attorneys pleaded stating that the Attorney General of the Republic of Rwanda should not be seized in this case while regarding article 101 of the constitution, they stated that there is no prohibition that it can be amended.

Held: 1. The State is obliged to intervene to provide explanation on the prerogatives of its organs vis-à-vis amendment of the Constitution, in case the petitioner states that there is a provision of the Constitution which cannot be amended especially that the state organs have the power to initiate the amendment of the Constitution, either in its entirety or in its some provisions.

2. The Constitution of the Republic of Rwanda does not prohibit that article 101 relating to the Presidential Terms to be amended pursuant to the provision of article 193 of the Constitution. Furthermore, in case the Constitution is amended, it would not affect the

democratic principles when the opinions of the people are put into consideration and the amendment done according to the laws.

The petition has no merit;
The Constitution of the Republic of Rwanda does not prohibit that article 101 can be
amended in its parts;
The court fees given by GREEN PARTY covers the cost of the case.

Statutes and Statutory instruments referred to:

Constitution of the Republic of Rwanda of 4 June, 2003 as amended up to date, articles 2, 101 and 193.

African Charter on Democracy, Elections and good governance, articles 10(2) and 23.

No case referred to.

Author cited:

S. Holmes “Precommitment and the paradox of Democracy” in J. Elster & R. Slagstad (Eds), Constitutionalism and Democracy (1988) at 231.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The Democratic Green Party of Rwanda (hereinafter GREEN PARTY), filed a petition in the Supreme Court stating that there are people who write letters to the Parliament requesting that article 101 of the Constitution be amended so that the President of the Republic can run for elections of being the President without limitation as to the number of terms.

[2] In its petition, GREEN PARTY prayed for an order that article 101 of the Constitution should not be amended. The hearing was scheduled for 8 July 2015. On that day, the case was not heard because GREEN PARTY had no legal counsel. GREEN PARTY requested the hearing to be postponed for six months so that it could find legal counsel but the Supreme Court found all this period not necessary and the hearing was adjourned to 29 July 2015.

[3] Meanwhile, on 23 July 2015, on behalf of GREEN PARTY, Counsel Mukamisoni Antoinette filed additional court submissions on the claim that was filed by that political party. On 24 July 2015, the Center for Human Rights Law Firm Ltd wrote to the Supreme Court requesting the Court to allow it appear in the case as “Amicus curiae” to support the claim filed by GREEN PARTY for the court to decide that the amendment of article 101 of the Constitution concerning presidential terms is not permissible.

[4] On 29 July 2015, the case was reopened with GREEN PARTY represented by its president, Habineza Frank, assisted by Counsel Mukamisoni Antoinette while the Republic of Rwanda was represented by State Attorneys Rubango Epimaque, Mbonera Theophile and Malala Aimable. On that day, the court first considered the request of Center for Human Rights Law Firm Ltd to be “amicus curiae” in this case but after its analysis, the court

rejected the request. The hearing continued with the preliminary objection submitted by the state, regarding the jurisdiction of the Court. On 9 September 2015, the Court delivered a ruling dismissing the objection and ruled that that the Court had jurisdiction to hear the case that was filed by GREEN PARTY.

[5] The hearing in substance continued on 23 September 2015, GREEN PARTY represented by its president Habineza Frank, assisted by Counsel Mukamuzoni Antoinette while the State was represented by State Attorneys: Rubango Epimague and Mbonera Theophile. GREEN PARTY argued that the Constitution does not allow the amendment of article 101 relating to the term of the President of the Republic. The state attorneys on the other hand submitted that the Republic of Rwanda should not have been sued in this case regarding article 101 of the Constitution. They argued that there is no prohibition against its amendment.

II. LEGAL ISSUES TO BE EXAMINED BY THE COURT

1. To examine whether the Government of Rwanda should not be sued in this case.

[6] State Attorney, Mbonera Theophile, argued that the petition filed by GREEN PARTY in the Supreme Court regarding the interpretation of Articles of the Constitution, did not explain why the State was made party to the case. He argued that the interpretation of the Constitution in general goes through the procedure provided for in article 96 and that its interpretation does not require the State to be party to the proceedings.

[7] State Attorney, Rubango Epimague, submitted that in other cases relating to the interpretation of the laws which are contrary to the Constitution, the State intervenes in them without being made a defendant in them. He concluded requesting the Court to give clear guidance as to whether the State should be sued in such cases or if it should be summoned to appear and give explanations if deemed necessary.

[8] Frank Habineza, the President of Green Party, explained that the party he leads opted to file a petition against the Government of Rwanda after noting that the requests of amendment of article 101 of the Constitution of the Republic of Rwanda were initiated by some senior officials of the government, among others Ministers and some of the Members of Parliament and Senators. He went on to say that the government failed to condemn such acts of its officials but rather opted to remain silent.

[9] Mukamuzoni Antoinette, the counsel for GREEN PARTY argued that the reason for initiating the application against the State was due to the fact that whenever the State determines that any act is prejudicial, it stops it. However, in this case, people were allowed to come from different parts of the country, to deliver petitions to the Parliament, passing by the Police without being stopped. This, she argued, was the reason for filing the action against the State as it failed to prevent whatever acts that aimed at amending the Constitution.

THE VIEW OF THE COURT

[10] In Rwanda, the Constitution cannot be amended without engaging state organs. Article 193 of the Constitution provides for the procedure for its amendment. It sets out the state organs vested with the powers to initiate the amendment of the Constitution. The article states, "The power to initiate amendment of the Constitution is vested concurrently in the

President of the Republic upon the proposal of the Cabinet and each Chamber of Parliament upon a resolution passed by a two thirds majority vote of its members. The passage of a constitutional amendment requires a three quarters majority vote of the members of each chamber of Parliament [...]”.

[11] Given that the Petitioner maintains that there is an article of the Constitution which cannot be subject to amendment and given the fact that state organs are vested with the powers to initiate the amendment of the Constitution, the Court finds that there is no reason why the State cannot be sued so that it can provide explanations regarding the amendment of the provisions of the Constitution. The Government of Rwanda had to be brought before the Court represented by the Attorney General, to provide explanations with regard to its role in the process. As it was held in the interlocutory judgment, the main legal issue in this case is to examine provisions of the Constitution and to determine whether amending of article 101 so as to make it possible for the President of the Republic to run for the position of head of state for more than two terms, is prohibited. The fact that GREEN PARTY filed the petition alleging that the State is linked to acts leading to amendment of the Constitution especially its article 101, also reinforces the position that there is no reason as to why an action may not be initiated against the State so long as it is allowed to defend itself on the allegations and the basis of those allegations is assessed by the Court.

[12] Apart from a case like this one where an action is initiated against the Government of Rwanda to account for its actions relating to amendment of the Constitution, in actions of the same nature as that filed by GREEN PARTY, the State invariably is called upon to appear since the disputes relate to the rights of the people or the interests of the public in general. In particular, in constitutional cases, the State must be involved as the representative of the electorate and show its position, in the name of the people, with regard to the interpretation of the provisions of the Constitution, either in its entirety or in part. Furthermore, in proceedings of this nature, the decision of the Court does not only concern those who initiated the claim but also all those who are subject to the Constitution including the State and the citizens it represents. What is stated above may also constitute a ground for filing the case against the State.

2. To examine whether the Constitution of the Republic of Rwanda prohibits the amendment of its article 101 concerning the Presidential term limit.

[13] Habineza Frank, the president of GREEN PARTY argued that article 101 of the Constitution must not be amended for the President of the Republic to compete for more than two terms when the article provides that the President of the Republic is elected for 7 years renewable once. He insisted that the fact that the Constitution stipulates that he may run again only once is clear enough and the Constitution cannot be amended to permit the President to run for more than two terms.

[14] Furthermore, Habineza stated that article 193 of the Constitution which has often been cited by those who request for the amendment of article 101 as the basis for the amendment, does not authorize changing the number of terms of the President of the Republic but rather authorizes the holding of a referendum only with regard to the length of the term instead of the number of terms. He stressed further that the amendment of the Constitution would constitute a threat to democracy and peace since in the countries where the constitution was amended every now and then, there was disruption of peace and security and Rwandese are likely to experience the same situation.

[15] Frank Habineza prayed for the Court to declare that article 193 of the Constitution does not authorize the amendment of article 101. He concluded praying to Court also to order the suspension of the acts of amending the Constitution and to order the termination of the activities of the support Commission to Parliament for Review of the Constitution.

[16] Mukamuzoni Antoinette, counsel for GREEN PARTY argued that as it is the Parliament that passed the Constitution which was subsequently approved by the people, they cannot turn around and urge for its amendment. She insisted that article 101 of the Constitution can only be amended with regard to the length of the term and that no one should use the clamor of the people to amend the Constitution as an excuse, because not every wish of the citizens is granted especially when it is inconsistent with the law.

[17] Mukamuzoni Antoinette further argued that the legislator established the two term limits based on sound reasons among others preventing military coups and bloodshed. She stated that two terms of 7 years each not renewable were conceived in the context of preventing the President who fails in his/her duties to hold on to power.

[18] Mbonera Théophile, State Attorney, submitted that article 193 lays down the procedure for holding a referendum and specifies in the last paragraph that no amendment to that article is permissible. He further submitted that article 193 is the sole article which cannot be amended under any circumstances, whereas all the others, including 101, are not excluded from being amended provided the procedures are in accordance with the Constitution.

[19] Mbonera Théophile, argued further that the amendment of the constitution is not an obstacle to democracy because for him, democracy means that the government power is vested in the people who determine their destiny. He stated also that if the amendment of the provision of article 101 of the Constitution is done through a referendum with full participation of the people, then that would be democratic.

[20] State attorney, Rubango Epimague, submitted that the petition filed by GREEN PARTY was without merit because there is no reason to prevent the amendment of the Constitution with the purpose of addressing some issues including the socio-economic development of the population and to make the Constitution consistent with the times. He argued in addition that the way GREEN PARTY interpreted article 101 was wrong, because for him, this article 101 relates to the number and duration of the presidential terms, and that this provision could be amended in accordance with the procedure provided for by article 193.

[21] Rubango Epimague submitted further that articles 101 and 193 of the Constitution provide in general terms that the president of the Republic is elected for two terms of seven years each and that the provision relating to the term can be subject to amendment but through referendum as provided for in article 193. He concluded his submissions by stressing that there is no provision that prohibits the amendment of the Constitution, especially as the Rwandan one has been modified three times through the procedures laid down by the law and therefore, there was nothing to prevent other amendments being made, whenever those charged with making the constitution, that is the people, deem it necessary.

OPINION OF THE COURT

[22] GREEN PARTY contended that although many people have petitioned the parliament for the amendment of the Constitution to allow the President of the Republic to stand again for presidency after the end of his term, such amendment should not be permitted because it is not permissible under article 101. It is true that in a democracy, not everything demanded by the people is automatically granted or accepted by the authorities, especially when it contravenes the law. As said by the scholar Steven Holmes: “Democracy is never simply the rule of the people but always the rule of the people within certain pre-determined channels according to the pre-arranged procedures...”¹. In this case the Court must examine the basis of the claim by GREEN PARTY that amending article 101 of the Constitution would be contrary to the pre-arranged procedures laid down in the Constitution, notwithstanding the fact that such amendment was requested by the people and whether it would be contrary to democratic principles the country adheres to.

[23] Article 101 of the Constitution provides that “The president of the Republic is elected for a term of seven years renewable only once. Under no circumstances shall a person hold the office of President of the Republic for more than two (2) terms”.

[24] The article mentioned in the preceding paragraph contains three ideas. The first relates to the length of the terms of the President of the Republic, which the Constitution sets at seven years. The second idea concerns the number of terms, which was fixed at two by the Constitution. The third idea relates to the fact that a person shall not hold the office of the President of the Republic for more than two terms.

[25] As indicated above, the current Constitution of Rwanda of 04 June 2003 does not permit the President of the Republic to be re-elected for another term after serving two terms. The prohibition against any individual being re-elected for more than two terms “under no circumstances” must be considered in the context of article 101 of the Constitution in force today. As long as the Constitution remains in its current form, no one is allowed to run for the position of the President of the Republic more than two terms.

[26] The Constitution however provides procedure for its amendment. This is found in its last parts under Title XI “Amendment of the Constitution”. Nowhere else in this Constitution is there provision for articles which can or cannot be amended, or the procedure for their amendment. It is only Article 193 of the Constitution which lays down the procedure for its amendment. It reads: “The power to initiate amendment of the Constitution is vested concurrently in the President of the Republic upon the proposal of the Cabinet and each Chamber of Parliament upon a resolution passed by a two thirds majority vote of its members. The passage of a constitutional amendment requires a three quarters majority vote of the members of each chamber of Parliament. However, if the constitutional amendment concerns the term of the President of the Republic or the system of democratic government based on political pluralism, or the constitutional regime established by this Constitution especially the republican form of the government or national sovereignty, the amendment must be passed by referendum, after adoption by each Chamber of Parliament. No amendment to this article is permitted”.

¹ S. Holmes “Pre commitment and the paradox of Democracy” in J. Elster & R. Slagstad (Eds), *Constitutionalism and Democracy* (1988) at 231 available at <https://books.google.com/books?hl=en&lr=&id=WeedJnRFvVcC&oi=fnd&pg=PA195&dq=%E2%80%9CPrec+ommitment+and+the+paradox+of+De+mocracy%E2%80%9D+&ots=gjInRoktk&sig=TnTQp-4Vbfr-rLwXP9Izp2cWEZQ#v=onepage&q=%E2%80%9CPrec+ommitment%20and%20the%20paradox%20of%20De+mocracy%E2%80%9D&f=false>

[27] Article 193 stated in the preceding paragraph provides for the procedures for the amendment of the Constitution. Of particular significance is its last paragraph which states that no amendment to this article is permitted. This indicates that the amendment of the Constitution is not prohibited; especially as it establishes its own amendment procedure. What is prohibited is the amendment of the process provided for in its article 193. The purpose of prohibiting the amendment of this article is clear: the process of amending the constitution should not be easy, otherwise it could be amended even in circumstances that do not require amendment of the Constitution which may affect peace and stability of the country. The Amendment process of the Constitution is made complex, requiring super majorities, for its provisions to be amended by Parliament. Concerning the third paragraph of article 193, that process is made even more complex due to the importance accorded to what is contained therein. It requires not only the super majority of votes in Parliament but also the submission of the issue to the population to decide through a referendum. This does not mean that these provisions are unshakable and not subject to amendment.

[28] With regard to the amendment of the term of the President of the Republic, article 193 provides that it should be decided through a referendum, after adoption by each chamber of the Parliament. The Constitution itself provides for the possibility of the amendment concerning the term of the President of the Republic and provides for the related process. The Court finds that article 193 of the Constitution does not provide anywhere that an amendment in relation to the number of terms of the President of the Republic is impossible or prohibited. This Article permits, in general terms, the amendment of the term of the President of the Republic. This may be the length of the term or the number of terms the President of the Republic is permitted to contest for presidency. The claim by Green Party that the provisions of article 193 relate to the length of the term rather than the number of terms, is not justified by the wording of this article and the Party was not able to substantiate its claim. Indeed, it is incomprehensible that a provision of the Constitution can bind the citizens forever without the possibility to correct any errors or misconceptions and have the opportunity to bring the Constitution in line with the times by amending outdated provisions².

[29] GREEN PARTY argues that the amendment of article 101 of the Constitution would be inconsistent with democratic principles and a threat to national security. Rwanda is indeed a nation that follows the democratic path of governance. Article one of the Constitution of Rwanda provides, the Rwandan State is an independent, sovereign, democratic, social and secular Republic; the principle governing the Republic is “government of the people, by the people and for the people”. One element of the provisions of the above mentioned article is that Rwanda is a democratic state.

[30] Article 2, paragraph 3 of the Constitution explains the way democracy is exercised. “National sovereignty belongs to the people who shall exercise it directly by way of referendum or through their representatives”. The People of Rwanda are the ones who have the power to establish a government and determine the way to be governed through their representatives or through referendum.

² *Opinions in paragraph 28 are in line with the views of the former President Thomas Jefferson of the United States who said: “A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and unalienable rights of man”.* Thomas Jefferson to John Cartwright, 1824. ME 16:48.

[31] In the event that the People of Rwanda choose to amend the Constitution through “referendum”, or other procedures provided for by its article 193 depending on articles to be amended, it cannot be considered to be contrary to democratic principles. On the contrary, prohibiting them from making that choice would be considered undemocratic as they would be denied their Constitutional right of determining how they are governed.

[32] The Court finds that it is not the particularity of the Constitution of Rwanda to provide for amendment, but almost all constitutions worldwide provide for their amendment. Furthermore, the African Charter on Democracy, Elections and Governance³ concluded among African states, does not prohibit the amendment of constitutions, rather, it provides in its article 10.2 that in case of amendment of their constitutions, it shall be done based on national consensus. It stipulates as follows: “State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum”. What is clear in the Charter is that the amendment is not prohibited. What the member-states agreed upon is that their constitutions could be amended only by national consensus, and where necessary, through referendum. This is not different from the provisions of article 193 of the Constitution of Rwanda.

[33] What is prohibited by The African Charter on Democracy is the amendment of the Constitution by such means as may undermine the principles of democratic change of government. Article 23 of the Charter sets out what the African Union member states, including Rwanda, agreed to regarding seizing or holding onto power, or change of government by means that are contrary to the law. The article stipulates as follows: “State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

- 1) Any putsch or coup d'état against a democratically elected government.
- 2) Any intervention by mercenaries to replace a democratically elected government.
- 3) Any replacement of a democratically elected government by armed dissidents or rebels.
- 4) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
- 5) Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

[34] The illegal methods of change of government prohibited by the Charter mentioned above can in no way be said to fit what GREEN PARTY claims is underway in Rwanda. The part of article 23 that may be considered as relevant to this case is the fifth paragraph that provides that one of the prohibitions is “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government”.

[35] What is essential in the democratic principles referred to above is to give the people the sovereign right to determine or change the government through elections or

³ Law N° 47/2009 of 30/12/2009 authorizing the ratification of the African Charter on Democracy, Elections and Governance adopted by the eighth general assembly of the African Union held at Addis Ababa in Ethiopia on 30 January 2007, in the Official Gazette of the Republic of Rwanda, N° 4 bis of 25/01/2010.

“referendum”. Among the processes that GREEN PARTY claims are being prepared towards amendment of the Constitution, there is none involving changing the government without following the said democratic means. It contends that holding a “referendum” would be undemocratic which is contrary to what was agreed upon by the African Union, including Rwanda as member state. With regards to Rwanda, in the event that article 101 of the Constitution that provides for the Presidential terms is changed, it does not mean that anyone would be prevented from running for office of the President of the Republic nor would it hamper competition through elections. The process would be consistent with common principles practiced by democratic countries in governance.

[36] Constitutions of different countries in the world provide how they are amended and, where necessary, updated, enabling the people to determine how they are governed, either through a “referendum” or through their representatives. The fact that even in Rwanda, the Constitution can be amended should not be surprising. Just like the people of other countries have the right to amend their constitutions, Rwandan are the only ones who have the right to determine, through a “referendum” or through their representatives, how they should be governed.

[37] Considering the explanations provided in the preceding paragraphs, the Supreme Court finds that the Constitution of the Republic of Rwanda does not prohibit the amendment of article 101 relating to the Presidential terms in accordance with the provisions of article 193 of the Constitution. Furthermore, in case the Constitution is amended, it would not undermine the democratic principles as long as the ideas informing the amendment are those of the people and the amendment is done according to law.

III. THE DECISION OF THE COURT

[38] Court finds the petition by The DEMOCRATIC GREEN PARTY OF RWANDA without merit;

[39] Court finds that the Constitution of Rwanda does not prevent any amendment of article 101;

[40] Court confirms that the court fees paid by the DEMOCRATIC GREEN PARTY of Rwanda cover the Court costs in the case.