

OPINION N°02/2020

from 07 July 2020

**Request for an opinion submitted by The Minister of Justice of the State
of Burkina Faso relating to Article 6 of Regulation No 05/CM/WAEMU of
25 September 2014 on the harmonisation of the rules governing the
the legal profession in the WAEMU area**

The Minister of Justice of the State of Burkina Faso referred to the Court of Justice of the WAEMU by correspondence No 19/0863/MJ/CAB of 24 September 2019, received at the Registry on 25 September 2019 and registered under No 19DA005, a request for an opinion as follows:

"Mr President,

I have the honour of addressing to you herewith, and on behalf of the State of Burkina Faso, a request for an opinion relating to Article 6 of Regulation No 05/CM/WAEMU of 25 September 2014 on the harmonisation of the rules governing the legal profession in the WAEMU area.

The purpose of the request for an opinion is to ascertain the exact scope of Article 6 of the Rules, which states that "Lawyers, in the exercise of their profession, enjoy immunity from all speech and writing.

They may not be heard, arrested or detained without an order from the Public Prosecutor of the Court of Appeal or the President of the Indictment Division, after prior consultation with the President of the Bar.

Lawyers' chambers are inviolable. They may only be searched in the presence of the President of the Bar duly called or his delegate".

The purpose of the request for an opinion addressed to the Court is to find out whether the opinion given by the President of the Bar is binding on the prosecuting authorities and whether the latter can also move forward with the management of a case involving a lawyer when the President of the Bar referred to by the Public Prosecutor for his opinion does not react within a certain period?

I look forward to receiving the Court's opinion. Please accept, Mr President, the assurance of my highest consideration.

Bessolé René BAGORO
Officer of the Order of the
Stallion

Amplification :
HE the Prime Minister "

The Court, sitting in Consultative General Assembly under the chairmanship of **Mr Daniel Amagoin TESSOUGUE, President of the Court of Justice** of the WAEMU, on the report of **Mr Sangoné FALL, Auditor** at the said Court, in the presence of :

- **Mr Salifou SAMPINBOGO, Judge;**
- **Ms Eliane Victoire ALLAGBADA Jacob, Advocate General;**
- **Mr Bawa Yaya ABDOULAYE, First Advocate General ;**
- **Mr Euloge AKPO, Judge ;**
- **Mr Augusto MENDES, Judge ;**
- **Mrs Joséphine Suzanne EBAH TOURE, Judge ;**
- **Mr Ervé DABONNE, Court Auditor ;**

With the assistance of **Maître Boubakar TAWEYE MAIDANDA, Registrar** providing the secretariat, examined the above application at its sittings of 24 June 2020 and 07 July 2020.

THE CONSULTATIVE GENERAL MEETING,

- VU** the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;
- VU** Additional Protocol No. 1 on the supervisory bodies of the WAEMU;
- VU** Additional Act No. 10/96 of 10 May 1996 on the Statute of the Court of Justice of the WAEMU;
- VU** Regulation n°01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU, in particular article 7 ;
- VU** Regulation n°01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU;
- VU** Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;
- VU** Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;
- VU** Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;
- VU** Decision n°001-2013/CJ of 21 June 2013 on the Statute of Auditors of the WAEMU Court of Justice;
- VU**

- VU** Order N°021/2019/CJ of 20 November 2019 fixing the days of the Assemblies of the WAEMU Court of Justice;
- VU** the request for an opinion from the State of Burkina Faso No 19/0863/MJ/CAB of 24 September 2019, registered at the Registry under No DA No 05 of 25 September 2019;
- VU** Order n°023/2019/CJ of 18 December 2019 appointing a Rapporteur ;
Order No. 012/2020/CJ of 7 February 2020 extending the deadline;
- VU** the documents in the file ;
- VU**

ON THE SHAPE

The request for an opinion from the Minister of Justice of the State of Burkina Faso complies with the provisions of Article 27 in fine of the Statutes of the WAEMU Court of Justice and Article 15.7 of the Rules of Procedure of the said Court.

These provisions give the Court of Justice the power to give an opinion on any difficulty encountered in applying or interpreting acts of Community law.

It should therefore be declared admissible.

AT THE BOTTOM

I. SUBJECT OF THE CONSULTATION

It follows from the letter from the Minister of Justice of the State of Burkina Faso that the opinion of the Court is sought to ascertain the exact scope of Article 6 of Regulation No 05/CM/WAEMU of 25 September 2014 on the harmonisation of the rules governing the legal profession in the WAEMU area.

The State of Burkina Faso's request for an opinion is based on the provisions of paragraph 2 of article 6 of the said Rules, according to which "(Lawyers) may not be heard, arrested or detained, without an order from the Public Prosecutor of the Court of Appeal or the President of the Indictment Division, the President of the Bar having first been consulted".

II. DISCUSSION

The State of Burkina Faso requests the interpretation of paragraph 2 of Article 6 of the above-mentioned Regulation No. 5, through two questions, namely:

- 1°) If the opinion given by the Bâtonnier is binding on the prosecuting authorities ;

2°) Whether the prosecuting authorities can also move forward with the management of a case involving a lawyer when the President of the Bâtonnier, referred to by the Public Prosecutor for his opinion, does not react within a certain period of time.

1- On the first question relating to the nature of the Bâtonnier's opinion

This request for an opinion involves an analysis of the powers of the prosecuting authorities in relation to cases in which a lawyer is criminally implicated.

Paragraph 2 of article 6 of the Rules governing the legal profession expressly states that lawyers may only be heard, arrested or detained under specific conditions, i.e. by order of the Public Prosecutor or the President of the Indictment Division, after prior consultation with the President of the Bar.

It is important to note that it is clear from this text that prior consultation of the President of the Bar by the Public Prosecutor at the Court of Appeal or the President of the Indictment Division is a requirement of the Rules.

Two conditions are required before a lawyer can be heard, arrested or detained: firstly, an order from the Public Prosecutor at the Court of Appeal or the President of the Indictment Division and, secondly, prior consultation with the President of the Bar. Thus, the prior nature of the consultation in relation to the Attorney General's order implies an obligation.

Prior consultation, which is a procedural requirement, consists of the prosecution authorities seeking an opinion from the President of the Bar, who is the guarantor of the ethics and discipline of lawyers in the exercise of their profession.

The principle of discretionary prosecution means that the public prosecutor is free to decide whether or not to prosecute a case.

In addition to the principles governing the appropriateness of prosecutions, where the prosecution is the exclusive responsibility of the public prosecutor, there are considerations of a legal, political or administrative nature which derogate from the normal exercise of the prosecution authorities' powers and even limit their discretionary powers, such as the case of immunities which, it should be noted, are not provided for lawyers, except as regards immunity from speech and writing in the exercise of their profession.

Under the terms of the request for an opinion, the question is whether the opinion sought through this prior consultation is binding on the prosecuting authorities.

The response given by the authority consulted may either take the form of a simple opinion which is not binding on the addressee, or that of an assent, the meaning of which the authority consulting is obliged to follow.

As assent is always expressly provided for by the legislator, the lack of precision in the aforementioned Article 6 as to the nature of the opinion expected from the President of the Bar indicates that it is a simple opinion.

Consultation also makes it possible, by referring a matter to the President of the Bar, to initiate disciplinary proceedings if necessary and, moreover, to ensure a certain courtesy with regard to the moral leader of the legal profession, i.e. the President of the Bar.

In this case, it could not be a request for a prosecution order.

This is not apparent from either the spirit or the body of the text. In other words, the Community legislator did not intend to institute an assent procedure. It cannot be otherwise because the Public Prosecutor has a monopoly on prosecution.

The consultation is limited to informing the President of the Bar, in writing, of the facts of which the lawyer is accused and the legal action envisaged.

Consequently, while the prior consultation provided for in paragraph 2 of article 6 of Regulation no. 5 relating to the legal profession is mandatory, the resulting opinion is in no way binding on the prosecuting authorities.

2- On the second question relating to the Bâtonnier's failure to react within a certain period of time

It should be emphasised that neither the Regulation relating to the legal profession nor any other Community act sets a time limit for the Bâtonnier's response when he is consulted in connection with a case involving a lawyer in criminal matters.

Faced with this silence, the useful effect of the aforementioned Rules and the rules of courtesy require the consulting authority to specify, in the request for consultation, a reasonable time limit within which the Bâtonnier must give his opinion.

Given the requirements of criminal proceedings and the nature of the cases, the Bâtonnier's response must be made within the time limit set by the Public Prosecutor at the Court of Appeal or the President of the Indictment Division in the consultation letter.

In any event, the absence of a response beyond the deadline set by the Public Prosecutor or the President of the Indictment Division may not have any influence on the continued management of the case in progress.

Consequently, the Court, acting as a Consultative General Assembly, is of the opinion that :

1°) the Bâtonnier's response to the consultation carried out, pursuant to paragraph 2 of Article 6 of Regulation No 05/CM/UEMOA of 25 September 2014 on the legal profession in a case involving a lawyer, is not binding on the prosecuting authorities; it is a simple opinion.

2°) The Bâtonnier's failure to respond to a referral from the Public Prosecutor at the Court of Appeal or the President of the Indictment Division does not constitute an obstacle to the continued management of the case once the time limit has expired.

And signed by the Chairman, the Reporter and the Registrar.

Illegible signatures follow.

Ouagadougou, 09 July 2020

The Registrar

Boubakar TAWEYE MAIDANDA