

UGANDA / JUDGMENT

Constitutional Rights Project v Nigeria (Communication 143 of 1995; Communication 150 of 1996) [1999] ACHPR 7 (15 November 1999) [1999] ACHPR 7

COURT

African Commission on Human and Peoples Rights

CASE / FILE NUMBER

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1996

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15 November 1999 Communication No. 143/95, 150/96

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS Twenty-Sixth Ordinary
Session 1-15 November 1999

CONSTITUTIONAL RIGHTS PROJECT v. NIGERIA

DECISION

| BEFORE: | CHAIRMAN: Prof. E. V. O. Dankwa
VICE CHAIRPERSON: Mrs. Julienne
Ondziel
Gnelenga
COMMISSIONERS: Professor Isaac Nguema,
Dr. Ibrahim Ali
Badawi El-Sheikh, Dr. Hatem
Ben Salem, Mr. Kamel Rezag-Bara, Dr.
Nyameko Barney
Pityana, Mr. Andrew
Ranganayi Chigovera, Mrs. Florence Butegwa,
Mrs. Vera
Mlangazuwa Chirwa, Mrs. Jainaba
Johm |

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143/95, 150/96, 13th ACHPR AAR
Annex V
(1999-2000) |

| Publications: | IHRDA, Compilation of Decisions on
Communications of the African
Commission On
Human and Peoples' Rights Extracted from the
Commission's Activity
Reports 1994-2001, at
257 (2002); Documents of the African
Commission on Human and
Peoples' Rights,
Vol. 2, at
155 (Malcolm D. Evans & Rachel
Murray eds., 2009); (2000)
AHRLR 235
(ACHPR 1999) |

RAPPORTEURS

18th Session: Commissioner Umozurike

19th Session: Commissioner Umozurike

20th Session: Commissioner Kisanga

21st Session: Commissioner Dankwa

22nd Session : Commissioner Dankwa

23rd Session : Commissioner Dankwa

24th Session : Commissioner Dankwa

25th Session : Commissioner Dankwa

26th Session : Commissioner Dankwa

SUMMARY OF FACTS

1. Communication 143/95 alleges that the Government of Nigeria, through the State Security (Detention of Persons) Amended Decree No. 14 (1994), has prohibited any court in Nigeria from issuing a writ of habeas corpus, or any prerogative order for the production of any person detained under Decree no. 2 (1984). Complainant argues that this law violates the African Charter on Human and Peoples' Rights. The Decrees were applied to detain without trial several human rights and prodemocracy activists and opposition politicians in Nigeria.

THE STATE PARTY'S RESPONSE AND OBSERVATIONS:

2. The government has presented no written response to this allegation, but in oral statements before the Commission (31 March 1996, 19th Ordinary Session, Ouagadougou, Burkina Faso, Chris Osah, Head of Delegation) maintains that no individual is presently being denied the right to habeas corpus in Nigeria. It has said that the provision of Decree No. 14 suspending the right to habeas corpus applies only to persons detained in respect of state security, and was implemented only between 1993 and 1995, during the period of political insecurity following the annulled elections of June 1993.
3. The government acknowledges that this provision is still on the statute books in Nigeria, but suggested that the right to habeas corpus would be restored in the future by saying, "as the democratisation of society goes on, all these [decrees] will become superfluous. They will have no place in society".
4. Communication 150/96 complains that the State Security (Detention of Persons) Decree No. 2 of 1984, which enables a person to be detained for a reviewable period of three months if he endangers State security, violates Article 6 of the Charter. It also complains of the amended Decree of 1994 prohibiting the writ of habeas corpus.

5. The communication alleges that Mr. Abdul Oroh, Mr. Chima Ubani, Dr. Tunji Abajom, Chief Frank Kokori, Dr. Fred Eno, Honourable Wale Osun and Mr. Osagie Obayunwana were detained under this decree, without charge and also deprived of the right to bring habeas corpus actions. The communication alleges that they are detained in dirty, hidden, sometimes underground security cells; denied access to medical care, to their families and lawyers; and not permitted to have journals, newspapers and books. It is alleged that the detainees are sometimes subjected to torture and rigorous interrogations. The communication alleges that these conditions, combined with the courts' inability to order the production of detained persons even on medical grounds, places the detainees' lives in danger. The communication alleges that these circumstances constitute inhuman and degrading punishment or treatment.
6. The communication complains that the clauses ousting the jurisdiction of the courts to consider the validity of decrees or acts taken thereunder is a violation to the right to have one's cause heard, protected by Article 7(1)(a) and 7(1)(d) of the Charter, and undermines the independence of the judiciary in contravention of Article 26.
7. The government has presented no response in respect of this communication.

COMPLAINT

8. The communications allege violation of Articles 5, 6, 7 and 26 of the Charter.

PROCEDURE

9. Communication 143/95 dated 14 December 1994 and filed by the Constitutional Rights Project, was received at the Secretariat on 2 February 1995.
10. In February 1995, the Commission was seized of the communication, and on 7 February 1995, a notification was sent to the Nigerian Government with the attached communication asking the said Government to respond within three months.
11. At the 18th Session in October 1995, the communication was declared admissible, and should be brought up by the proposed mission to Nigeria.
12. Communication 150/96 is submitted by Civil Liberties Organisation and dated 15 January 1996. It was received at the Secretariat on 29 January 1996.
13. At the 20th session held in Grand Bay, Mauritius in October 1996, the Commission declared the communication admissible, and decided that it would be taken up with the relevant authorities by the planned mission to Nigeria.
14. The mission went to Nigeria from 7 to 14 March 1997 and a report was submitted to the Commission.
15. The parties were duly notified of all the procedures.

LAW

ADMISSIBILITY

16. Article 56 (5) of the Charter requires that a complainant exhausts local remedies before the Commission can consider the case. Section 4 (1) of the State Security (Detention of Persons) Decree No. 2 of 1984 states:

"(1) no suit or other proceedings shall lie against any persons for anything done or intended to be done in pursuance of this Act."

"Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of that Constitution shall not apply in relation to any such question."

17. In its decision on communication 129/94, the Commission accepted the argument of complainants that the above ouster decrees create a situation in which "it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results." (ACHPR 129/94:8.)
18. The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos Division have occasionally found that they have jurisdiction; in 1995, the Court of Appeal in Lagos relying on common law, found that courts should examine some decrees notwithstanding ouster clauses, where the decree is "offensive and utterly hostile to rationality". On their face, ouster clauses remove the right of courts to review decrees.
19. For these reasons, the Commission declared the communications admissible.

MERITS

20. Both communications allege that the government has prohibited the issuance by any court of the writ of habeas corpus or any prerogative order for the production of any person detained under Decree No. 2 of
1984. Decree No. 14 denies the right to those detained for acts "prejudicial to State security or the economic adversity of the nation". A panel has the power to review the detentions but this is not a judicial body and its members are appointed by the President.
21. Article 6 of the Charter reads:

"Every individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

22. The problem of arbitrary detention has existed for hundreds of years. The writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment.
23. Habeas corpus has become a fundamental facet of common law legal systems. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those instances in which charges have not, or may never be, brought against the detained individual.
24. Deprivation of the right to habeas corpus alone does not automatically violate Article 6. Indeed, if Article 6 were never violated, there would be no need for habeas corpus provisions. However, where violation of Article 6 is widespread, habeas corpus rights are essential in ensuring that individuals' Article 6 rights are respected.
25. The question thus becomes whether the right to habeas corpus, as it has developed in common law systems, is a necessary corollary to the protection of Article 6 and whether its suspension thus violates this Article.
26. The African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country. The government has conceded that the right to habeas corpus is important in Nigeria, and emphasised that it will be reinstated "with the democratisation of society."
27. The importance of habeas corpus is demonstrated by the other dimensions of communication 150/96. The government argued that no one had actually been denied the right to habeas corpus under the Amended Decree. Communication 150/96 provides a list of such individuals who are detained without charges in very poor conditions, some incommunicado, and are unable to challenge their detention due to the suspension of this right. The government has however made no
specific response.
28. First of all, in accordance with its well-established precedent (See the Commission's decisions in communications 59/91, 60/91, 64/91, 87/93 and 101/93), since the government has presented no defence or contrary evidence that the conditions of detention are acceptable, the Commission accepts the allegations that the conditions of detention are a violation of Article 5 of the Charter, which prohibits inhuman and degrading treatment. The detention of individuals without charge or trial is a clear violation of Articles 6 and 7(1)(a) and (d).

29. Furthermore, these individuals are being held incommunicado with no access to lawyers, doctors, friends or family. Preventing a detainee access to his lawyer clearly violates Article 7(1)(c) which provides for the "right to defence, including the right to be defended by a counsel of his choice." It is also a violation of Article 18 to prevent a detainee from communicating with his family.
30. The fact that the government refuses to release Chief Abiola despite the order for his release on bail made by the Court of Appeal is a violation of Article 26 which obliges States parties to ensure the independence of the judiciary. Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary.
31. These circumstances dramatically illustrate how a deprivation of rights under Articles 6 and 7 is compounded by the deprivation of the right to apply for a writ of habeas corpus. Given the history of habeas corpus in the common law to which Nigeria is an heir, and its acute relevance in modern Nigeria, the amended Decree suspending it must be seen as a further violation of Articles 6 and 7(1)(a) and (d).
32. The government argues that habeas corpus actions are still available to most detainees in Nigeria, and that the right to bring habeas corpus actions is denied only to those detained for state security reasons under Decree No. 2. While this does not create a situation as serious as when all detainees were denied the right to challenge their detention, the limited application of a provision does not guarantee its compatibility with the Charter. To deny a fundamental right to a few is just as much a violation as denying it to many.
33. The government attempts to justify Decree No. 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.
34. Finally, as noted in the admissibility section of this decision, there is a persistent practice of ouster clauses in Nigeria, which remove many vital matters from the jurisdiction of the ordinary courts. A provision for

habeas corpus is not of much use without an independent judiciary to apply it. The State Security Decree contains a clause forbidding any court from taking up any matter arising under it. In previous decisions on ouster clauses in Nigeria, the Commission has found that they violate Articles 7 and 26 of the Charter, the duty of the government to ensure the independence of the judiciary (See the Commission's decisions in communications 60/91, 87/93 and 129/94).

FOR THESE REASONS, THE COMMISSION finds that there are violations of Articles 5, 6, 7(1)(a), (c) and (d), 18 and 26 of the Charter and recommends that the government of Nigeria brings its laws in line with the Charter.

Done at Kigali, Rwanda on 15 November 1999.

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