Media Rights Agenda and Others v. Nigeria, African Commission on Human and Peoples' Rights, Comm. Nos. 105/93, 128/94, 130/94 and 152/96 (1998).

105/93, 128/94, 130/94, 152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/ Nigeria

Rapporteur:

17th Session: Commissioner Janneh

18th Session: Commissioner Umozurike

19th Session: Commissioner Umozurike

20th Session: Commissioner Dankwa

21st Session: Commissioner Dankwa

22nd Session Commissioner Dankwa

23rd Session Commissioner Dankwa

24th Session Commissioner Dankwa

The Facts as submitted by the complainant

1. Communications 105/93, 128/94 and 130/94 state that after the annulment of the Nigerian elections of 12 June 1993, several decrees were issued by the government. These proscribed the publication of two magazines. State officials sealed the premises of the two magazines embarking upon frequent seizures of copies of magazines critical of its decisions and arrest of newspaper vendors selling such magazines.

2. By decree, the government also proscribed 10 newspapers published by four different media organisations. The complainant alleges that the newspapers and their operators were not previously accused of any wrongdoing either publicly or before a court of law or given any opportunity to defend themselves before their premises were sealed up on July 22 and they were subsequently outlawed by Decree 48 of 1993, which was released on 16 August 1993.

3. Constitution (Suspension and Modification) Decree no. 107 of 17 November 1993 Article 5 specifies: "No question as to the validity of this Decree or any other Decree made during the period 31st December 1983 to 26th August 1993 or made after the commencement of this Decree or of an Edict shall be entertained by a court of law in Nigeria."

4. On 16 August 1993, the Government also announced the promulgation of the Newspaper Decree No. 43 of 1993. By virtue of Section 7 of the Decree, it is an offence, punishable with either a fine of N250.000

or imprisonment for a term of 7 years or both for a person to own, publish or print a newspaper not registered under the Decree. The registration of existing newspapers under a previously subsisting law (the Newspaper Act) is extinguished by the Decree.

5. The decision whether or not to register a newspaper is vested exclusively in the Newspapers Registration Board set up under the Decree. Compliance with the formal pre-registration requirements stipulated in the Decree does not guarantee registration of a newspaper because the Newspaper Registration Board has total discretion to decide whether the registration of a newspaper is "justified having regard to the public interest". There are no procedures for challenging the Board's decision not to register a newspaper.

6. If the Board decides to register a newspaper, N100.000 must be paid as registration fee. Furthermore, N250.000 must be deposited into a fund to meet the amount of any penalty imposed on or damages awarded against the owner, printer, or publisher of the newspaper by a court of law in the future. Under the Newspapers Act (now repealed by Decree 43), a bond for N500 with sureties was sufficient security for possible penalties or damages which might be imposed on or awarded against a newspaper.

7. Although released by the Government on 16 August 1993, the Decree is given a retroactive commencement date to 23 June 1993 and persons intending to own, print or publish newspapers in Nigeria are obliged to apply for registration within three weeks of the commencement of the Decree (i.e. by 14 July 1993) after complication with pre-registration requirements, thus making all newspapers in Nigeria immediately "illegal", and owners, printers and publishers liable to be arrested and detained.

8. Communications 128/94 and 130/94 deal specifically with the events of 2 January 1994 when 50,000 copies of TELL magazine were seized by heavily armed policemen and other security officers on the printer's premises. In addition, twelve films and fourteen plates, used for processing, were also confiscated. TELL is a popular weekly magazine whose aim is to promote and protect human rights in Nigeria. That week's issue was entitled: "The Return of Tyranny - Abacha bares his fangs". The story involved a critical analysis of certain legislation enacted by the military government which ousts the jurisdiction of the courts. The complainant stated that no remedies were available at the local level, the jurisdiction of the courts having been ousted in considering the validity of such actions.

9. Communication 152/96 was submitted by Constitutional Rights Project. It states that on 23 December 1995 Mr. Nosa Igiebor, the Editor in Chief of TELL Magazine was arrested and detained. The Constitutional Rights Project alleges that he was not told the reason for his arrest and that no charge has been made against him. Furthermore, Constitutional Rights Project alleges that he has been denied access to his family, doctors and lawyers and that he has received no medical help even though his health is deteriorating.

10. Constitutional Rights Project also claim that TELL Magazine was declared illegal and in violation of Decree No. 43 of 1993 which requires all newspapers to register with the Newspaper Registration Board and to pay a pre-registration fee of N250,000 and a non-refundable fee of N100,000. These payments would be put into a fund for payment of penalties from libel actions against the owner, publisher or printer. Constitutional Rights Project stated that Decree No. 43 of 1993 had been declared null and void by two different courts, namely the Ikeja High Court on 18 November 1993, and the Lagos High Court on 5 December 1993. The Nigerian Government did not appeal against these decisions.

11. In his oral arguments before the Commission, the complainants' representative emphasised that the government's prerogative to make laws for peace and good government does not entitle it to evade its obligations under international law.

The State Party's Response and Observations

12. The government has made no written submissions in respect of this communication. At the 19th session, held in March 1995 in Ouagadougou, Burkina Faso, the government sent a delegation of several persons. Mr. Chris Osah, Assistant Director General of the Legal and Treaties Department at the Ministry of Foreign Affairs, made the following statements in his presentation on the communication.

13. He stated that "Decree No. 43 of 1993 was made to underscore not only the government's sovereign rights but also its policy of free enterprise. Registration fees are payable to an independent board. It is in the public interest that all newspaper providers or publishers should ensure registration of their enterprises. The government is convinced that such registration fees are reasonable and justifiable in any democratic society. In any case, many newspapers and magazines operate although they have not registered".

14. On ouster of the jurisdiction of the courts, the government stated that "there is nothing particularly new about this. It is the nature of military regimes to provide for ouster clauses, the reasons being that for a military administration which has come in, the resources of litigation become too cumbersome for the government to do what it wants to do".

15. As for retroactive effect, the government maintained that, although the decree technically did have retroactive effect, not a single newspaper was declared illegal or harassed for violating the decree.

Complaint

16. The communications allege violations of Articles 6, 7, 9, 14 and 16. of the Charter.

Procedure before the Commission

17. Communication 105/93 is dated 1 September 1993. The Commission was seized of the communication at the 14th Session. The state concerned was notified on January 1994.

40. Communication 128/94 is not dated but was received at the Secretariat between January and April 1994. The Commission was seized of the communication at the 15th session. The text of the communication was sent to the state concerned on 29 July 1994.

41. Communication 130/94 is dated 5 January 1994. The Commission was seized of the communication at its 15th session and the text was sent to the state on 29 July 1994. The procedure relating to these three cases is the same.

20. On 14 September 1994 a letter was sent to the complainants concerning communications no. 105/93, 128/94 and 130/94, asking whether all domestic remedies had been exhausted and whether any further seizures of TELL Magazine has occurred since 2 January 1994.

21. A reminder was sent by the Secretariat of the Commission to the government of Nigeria on 22 September 1994.

22. At the 16th session, held in October 1994 in Banjul, The Gambia, the Commission declared the communications admissible.

23. At the 17th session, held in March 1995 in Lomé, Togo, it was decided to delay final decision on the cases so that they might be taken up with the Nigerian authorities when the Commission undertook its mission to that country. It was also declared that the chairman of the OAU should be informed of the situation in Nigeria.

24. On 20 April 1995, a letter was sent by the Secretariat of the Commission to the complainants stating that the communications were declared admissible, and that a mission would be sent to Nigeria, and that a decision on the merits would be taken at the 18th session.

25. On 7 June 1995, a letter was sent by the Secretariat of the Commission to the government of Nigeria stating that the communications were declared admissible and that a mission would be sent to Nigeria.

26. On 1 September 1995, a letter was sent to the government of Nigeria stating that the communications would be heard on the merits at the 18th session of the Commission and inviting the government to send a representative.

27. At the 18th session of the Commission it was decided that the communications would be taken up by the mission to Nigeria, and if the government did not facilitate the visit, the Commission would at the next session adopt a decision on the facts available.

28 On 30 November 1995 a letter was sent to the complainants reflecting this decision.

29. On 30 November 1995 a note verbale was sent to the government of Nigeria reflecting this decision.

30. At the 19th session, the Commission heard Mr. Chidi Anselm Odinkalu, who was duly instructed to appear for all the complainants in all cases against Nigeria, except that brought by International PEN. The Commission heard Mr. Osah and Mr. Bello for the Nigerian Government in reply. At the end of the hearing the Commission took a general view on the cases and deferred taking final decision in each case pending the accomplishment of its proposed mission to Nigeria.

31. On 9 May 1996 letters were send to the Nigerian Government, Constitutional Rights Project and Media Rights Agenda informing them of the Commission's renewed decision to take a mission to the country and that the three communications detailed above would be considered on their merits at the 20th session in October 1996.

32. At the 20th session held in Grand Bay, Mauritius, October 1996, the Commission decided to postpone the final decision on the merits of the communications to the 21st session, awaiting the result of the planned mission to Nigeria.

33. On 10 December 1996 the Secretariat sent a note verbale to this effect to the government.

34. On 10 December 1996 the Secretariat sent letters to this effect to the complainants.

35. Communication 152/96 is dated January, 1996.

36. On 5 February 1996 a letter was sent to the complainant acknowledging receipt of the communication and that the admissibility of the case would be examined at the 20th session in October 1996.

37. At the 19th session the communication was not examined.

38. At the 20th session held in Grand Bay, Mauritius 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. At the same time it was joined with communications 105/93, 128/94 and 130/94.

39. On 29 April, the Secretariat received a letter from Mr. Olisa Agbakoba entitled 'Preliminary objections and observations' to the Mission of the Commission which visited Nigeria from March 7-14 1997. The document was submitted on behalf of Interights with regard to 14 communications including this one.

40. Among the objections raised and or observations made were on: the neutrality, Credibility and Relevance; and, composition of the Mission.

41. At its 21st session held in April 1997, the Commission postponed taking decision on the merits to the next session, pending the submission of scholarly articles and court case by the complainants to assist it in its decision. The Commission also awaits further analysis of its report of the mission to Nigeria.

42. On 22 May, the complainants were informed of the Commission's decision, while the State was informed on May 28.

43. From this date on, the procedure in respect of the communication is identical to that in communication 105/93, 128/94 and 130/94, above.

44. At the 22nd Ordinary session the Commission postponed taking a decision on the cases pending the discussion of the Nigerian Mission report.

45. At the 23rd ordinary session held in Banjul, The Gambia, the Commission postponed consideration of the case to the next session due to lack of time.

46. On 25 June 1998, the Secretariat sent letters to the parties concerned informing them of the status of the case.

The Law

Admissibility

47. Article 56 of the African Charter reads:

> Communications...shall be considered if they:...Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged

48. Specifically, in the four decisions the Commission has already taken concerning Nigeria, Article 56.5 is analyzed in terms of the Nigerian context. Communication 60/91 (Decision ACHPR/60/91) concerned the Robbery and Firearms Tribunal; Communication 87/93 (Decision ACHPR/87/93) concerned the Civil Disturbances Tribunal; Communication 101/93 (Decision ACHPR/101/93) concerned the Legal Practitioners Decree; and Communication 129/94 (ACHPR/129/94) concerned the Constitution (Modification and Suspension) Decree and the Political Parties (Dissolution) Decree.

49. All of the Decrees in question in the above communications contain "ouster" clauses. In the case of the special tribunals, these clauses prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals. (ACHPR/60/91:23 and ACHPR/87/93:22). The Legal Practitioners Decree specifies that it cannot not be challenged in the courts and that anyone attempting to do so commits a crime (ACHPR/101/93:14-15). The Constitution Suspension and Modification legal prohibited their challenge in the Nigerian Courts (ACHPR/129/94:14-15).

50. In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government. A few courts in the Lagos district 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" (Reprinted in the Constitutional Rights Journal). It remains to be seen whether any Nigerian courts will be courageous enough to follow this holding, and whether the government will abide by their rulings should they do so.

51. In communication 152/96 the complainant states that Decree no. 43 has been declared null and void by two different courts, but these decisions have not been respected by the government. This is a dramatic illustration of the futility of seeking a remedy from the Nigerian courts.

52. For these reasons, consistent with its earlier decisions, the Commission declared the communications admissible.

Merits

53. Article 9 of the African Charter reads:

> 1. Every individual shall have the right to receive information.
>
> 2. Every individual shall have the right to express and disseminate his opinions within the law.

54. This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country. The problem at hand is whether the decrees requiring the registration of newspapers, and prohibiting many of them, violate this Article.

55. A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are "justifiable in any democratic society", and the Commission does not categorically disagree.

56. However, the amount of the registration fee should not be more than necessary to ensure administrative expenses of the registration, and the pre-registration fee should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper. Excessively high fees are essentially a restriction on the publication of news media. In this case, the fees required for registration, while high, are not so clearly excessive that they constitute a serious restriction.

57. Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1. There has thus been a violation of Article 9.1.

58. Also of serious concern is the retroactivity of the decree. The government bases its defense on the non-enforcement of this aspect of the decree. The government representative offered this defense: "Article 7.2 of the Charter is very specific: "no one may be condemned", and we are saying that no one has been condemned. Second, it says "no penalty may be inflicted" we are also submitting that

there has been no penalty inflicted...We are even going further to say that more than 3/4 of the newspapers in Nigeria have registered and yet nobody has taken them to court."

59. While it is reassuring to hear that no one has suffered under the retroactivity clause of the Decree No. 43, the Commission must take a stand on the issue of justice underlying Article 7.2 and condemn the literal, minimalist interpretation of the Charter offered by the representative of Nigeria. Article 7.2 must be read to prohibit not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself. It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment.

60. Furthermore, the Commission unfortunately cannot rest total confidence in the assurance that no one and no newspaper has yet suffered under the retroactivity of Decree 43. Potential prosecution is a serious threat. An unjust but un-enforced law undermines, as above, the sanctity in which the law should be held. The Commission must thus holds that Decree no. 43 violates Article 7.2.

61. Communication 152/96 states that two different courts have declared Decree no. 43 null an void, without any result.

62. This shows not only a shocking disrespect by the Nigerian government for the judgments of the courts, it is also a violation of Article 7.1. The right to have one's cause heard by competent and independent courts must naturally comprise the duty of everyone, including the state, to respect and follow these judgments.

63. Decree No. 48 proscribes approximately 10 newspapers published by four different media organizations without having subjected them to the due process of the law. Decree No. 48 likewise permitted the newspapers and their operators to have their premises sealed without being given any opportunity to defend themselves and without previously being accused of any wrongdoing before a court of law.

64. The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that "competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards."(ACHPR\A\101/93:18).

65. With these words the Commission states a general principle that applies to all rights, not only freedom of expression. Governments should avoid restricting rights, and have special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.

66. According to Article 9.2 of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

67. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

68. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest."

69. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.

70. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

71. The government has provided no evidence that the prohibition was for any of the above reasons given in Article 27.2. Given that Nigerian law contains all the traditional provisions for libel suits, so that individuals may defend themselves where the need arises, for the government to proscribe a particular publication, by name, is disproportionate and uncalled for. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law, guaranteed by Article 3. The proscription of "The News" cannot therefore be said to be "within the law" and constitutes a violation of Article 9.2.

72. Communications 128/94 and 130/94 allege that 50,000 copies of TELL magazine were seized without any possibility of having the decision judged by a court of law, because of an article critical of the government.

73. In the present case, the government has provided no evidence that seizure of the magazine was for any other reason than simple criticism of the government. The article in question might have caused some debate and criticism of the government, but there seems to have been no information threatening to, for example, national security or public order in it. All of the legislation criticized in the article was already known to members of the public information, as laws must be, in order to be effective.

74. The only person whose reputation was perhaps tarnished by the article was the head of state. However, in the lack of evidence to the contrary, it should be assumed that criticism of the government does not constitute an attack on the personal reputation of the head of state. People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.

75. It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the head of state, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication. The seizure of the TELL therefore amounts to a violation of Article 9.2.

76. Article 14 of the Charter reads:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

77. The government did not offer any explanation for the sealing up of the premises of many publications. Those affected were not previously accused in a court of law, of any wrongdoing. The right to property necessarily includes a right to have access to property of one's own and the right not for one's property to be removed. The Decrees which enabled these premises to be sealed up and for publications to be seized cannot be said to be "appropriate" or in the interest of the public or the community in general. The Commission holds a violation of Article 14. In addition, the seizure of the magazines for reasons that have not been shown to be in the public need or interest also violates the right to property.

78. In his oral argument, the complainant specifically raised the ouster of the court's jurisdiction over the decrees at issue here, denying the alleged victims the right to challenge the acts which affected them. The government offered the surprising defense that "[I]t is in the nature of military regimes to provide for ouster clauses", because without such clauses the volume of litigation would make it "too cumbersome for the government to do what it wants to do".

79. This argument rests on the assumption that ease of government action takes precedence over the right of citizens to challenge such action. It neglects the central fact that the courts are a critical monitor of the legality of government action, which no lawful government acting in good faith should seek to evade. The courts' ability to examine government actions and, if necessary, halt those that violate human rights or constitutional provisions, is an essential protection for all citizens.

80. It is true that if national tribunals are not deprived of their powers, they will almost certainly eventually pronounce on the legality of military government itself. The government representative's argument implicitly admits what the Commission has already said in its decision on communication 102/93, which is that military regimes rest on questionable legal ground. Government by force is in principle not compatible with the rights of peoples' to freely determine their political future.

81. A government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law.

82. The Commission must therefore reject the defense of "the nature of military regimes" offered by the government's representative, and holds that the ouster of the court's jurisdiction violates the right to have one's cause heard, under Article 7.1

83. Article 6 of the African Charter reads:

> Every individual shall have the right to liberty and to the 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.

84. Communication 152/96 alleges that Mr. Nosa Igiebor was arrested and detained without being told any reason and without any charges being made.

85. The government has offered no substantive response to this allegation.

86. The Commission, in several previous decisions, has set out the principle that where allegations of human rights abuses go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the government at treat those facts as given

(See, e.g., the Commission's decisions in communications 59/91, 60/91, 64/91, 87/91 and 101/93). Therefore the Commission finds that there has been a violation of Article 6.

87. Article 7.1 (c) of the African Charter reads:

> 1. Every individual shall have the right to have his cause heard. This comprises:
>
> .....(c) The right to defense, including the right to be defended by counsel of his own choice;

88. Constitutional Rights Project alleges that Mr. Nosa Igiebor was denied access to lawyers. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant. To be denied access to a lawyers is a violation of Article 7.1(c) even if there were no charges against Mr. Igiebor. People who are detained in violation of the Charter must not have lesser rights that those detained in conformity with the rules in Article 7.

89. Article 16 of the African Charter reads:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. States Parties to the present Charter shall take the necessary measures to protect the health go their people and to ensure that they receive medical attention when they are sick.

90. Constitutional Rights Project alleges Mr. Nosa Igiebor was denied access to doctors and that he received no medical help even though his health was deteriorating through his detention. The government has made no response to this allegation. Therefore the Commission must take a decision on the facts as presented by the complainant.

91. The responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of Article 16.

For these reasons, the Commission

Holds a violation of Article 6, 9.1, 9.2, 7.1(c), 7.2, 14, et 16 of the African Charter;

Requests that the Government of Nigeria take the necessary steps to bring its law into conformity with the Charter.

Banjul, 31st October 1998.