

SUPREME COURT OF NIGERIA

YAHAYA SHARIF-AMINU, APPELLANT

V.

ATTORNEY GENERAL OF NIGERIA, RESPONDENT

AMICUS CURIAE BRIEF OF THE INTERNATIONAL SENIOR LAWYERS PROJECT

Summary

Under international treaties to which Nigeria is a party, the individual right to freedom of expression enjoys robust protection. The right is guaranteed by the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, as well as the European Convention on Human Rights, on which the International Covenant on Civil and Political Rights is based. Individual freedom of expression is only derogable the restriction is necessary and proportionate, as required in a democratic society. Generally, blasphemy laws are not considered necessary and proportionate encroachments on the right to individual freedom of expression.

Fundamental Right: Freedom of Expression

The International Covenant on Civil and Political Rights ("ICCPR") Article 19, the European Convention on Human Rights ("ECHR") Article 10, and the African Charter on Human and Peoples' Rights ("African Charter") guarantee freedom of expression in a democratic society. As the European Court of Human Rights ("ECtHR") has explained, this principle requires, in turn, that any punishment related to expression be proportionate means and the least restrictive means to achieve a particular aim. Speech may be limited in the name of public morals (ICCPR Article 19(3) and ECHR Article 10(3)) as is the case with blasphemy laws.

I. Blasphemy laws may violate ICCPR Article 19 right to freedom of expression.

The UN High Commissioner for Refugees ("UNHCR") has consistently called for the elimination of blasphemy laws. However, there is no UNHCR, ECtHR, or African Court of Human and Peoples' Rights ("ACtHPR") case law which blanket invalidates blasphemy laws. The UNHRC General Comment No. 34 on ICCPR Article 19 states "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant [the ICCPR], except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. These prohibitions in Article 20 focus on "incitement to discrimination." Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26." (CCPR/C/GC/34 pg. 12). The requirements of these articles focus on ensuring robust protections for freedom of expression as a right.

Additionally, the Rabat Plan of Action concluded that national blasphemy laws can be counterproductive, as they "may result in de facto censure of all... intra-religious or belief dialogue, debate and criticism, most of which could be constructive, healthy and needed." (A/HRC/22/17/Add.4 pg. 9). It goes on to say "[m]oreover, the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or a belief that is free from criticism or ridicule." (A/HRC/22/17/Add.4 pg. 9). Therefore, even without specific case law banning blasphemy laws, the ICCPR is intended to enforce freedom of expression, which would include countering harsh enforcement of blasphemy laws.

II. The death penalty is a disproportionate punishment for non-violent speech.

Under Article 19(3)(b) which provides that freedom of expression may be subject to restriction "For the protection of national security or of public order (ordre public), or of public health or morals" blasphemy laws may be found not to violate the right to freedom of expression, if they are in support of "public morals." The application of blasphemy laws to the case at hand would be exceeding such scope. Article 19(1) of the ICCPR provides that "[e]veryone shall have the right to hold opinions without interference." Article 19(2) guarantees "the right to freedom of expression," including "freedom to...impart information and ideas of all kinds. . . ." Article 19(3) provides that the exercise of these rights "may...be subject to certain restrictions, but these shall only be such as provided by law and are necessary" for, among other things, "the protection of national security or of public order." Sharif Aminu's speech did not threaten public order nor national security, thus, not falling within the allowable restrictions to freedom of expression. The UN Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, has emphasized the limited scope of Article 19's allowance for restrictions on the freedom of expression. Such restrictions must be provided by law and limited to circumstances where restrictions would be necessary in a democratic society. Interpreting the test under Article 19, the Human Rights Committee has explained that any restriction on free expression "must conform to the strict tests of necessity and proportionality."

ICCPR Article 19, ECHR Article 10, and the African Charter require that any restriction on freedom of expression must be "necessary in a democratic society." As the ECtHR has explained, this principle requires, in turn, that any punishment related to expression be proportionate and the least restrictive means to achieving a legitimate aim. Article 10 of the

ECHR, which contains parallel language to Article 19 of the ICCPR, has been interpreted as limiting restrictions on free expression to circumstances where restrictions are necessary and proportionate. ECHR Article 10 incorporates the same protections for freedom of expression as ICCPR Article 19. Article 10(1) guarantees: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority” Article 10(2) of the ECHR parallels ICCPR Article 19(3) by requiring that “restrictions . . . placed on the exercise of these rights are prescribed by law and are necessary in a democratic society...for the prevention of disorder...for the protection of the rights of others” Thus, under the ICCPR, ECHR, and African Charter, punishments and restrictions on freedom of expression would need to be both necessary and proportional.

All relevant international treaties guarantee freedom of expression. While they contemplate that there may be limited circumstances in which restrictions are allowed, these exceptions must be narrowly construed. By limiting these restrictions to those “prescribed by law,” the treaties demand that a restriction must be clear, precise, and accessible, so that a citizen can regulate his conduct to foresee the consequences that a given action may entail. Vague or imprecise laws tend to chill legitimate expression and violate Article 10. A restriction is “necessary” only when it satisfies three requirements: First, it must correspond to a “pressing social need,” which must be “convincingly established,” second, it must be “proportionate to the legitimate aim pursued,” and, third, it must be the least restrictive means to achieve that aim. Here, such a burden has not been met. In Kano, the Nigerian state Sharif Aminu was convicted in, Shari’a law has been adopted for criminal law under that jurisdiction. However, in the country of Nigeria, the larger jurisdiction has not adopted Shari’a law for criminal law. (Human Rights

Watch Report “‘Political Shari’a?’ Human Rights and Islamic Law in Northern Nigeria” 2004)

Thus, it remains unclear whether this blasphemy conviction would qualify as the necessary “prescribed by law.” Regardless, the Nigerian government has yet to prove that the blasphemy charge here corresponds to a “pressing social need[,]” that the death penalty is the proportionate punishment for the goal of the charge, and that the death penalty is the “least restrictive means” of punishment.

In recent years, there has been enforcement of the right to freedom of speech in Nigeria. In 2022 in SERAP v. Federal Republic of Nigeria, the Community Court of Justice of the Economic Community of West African States (ECOWAS) found that there was a “derivative right” in accessing Twitter to promote the larger right of freedom of expression. In concluding this, ECOWAS relied on Article 9 of the African Charter on Human and People’s Rights and Article 19 of the International Covenant on Civil and Political Rights. Under Article 19, social media platforms are crucial mediums used for freedom of expression and must be protected as such. (SERAP v. Federal Republic of Nigeria (2022) ECW/CCJ/JUD/40/22). In the case at hand, Sharif-Aminu used WhatsApp, a form of social media and communication, to express his personal views. Under Article 9 of the ACHPR and Article 19 of the ICCPR, as well as the precedent from SERAP v. Federal Republic of Nigeria, this use of social media should be protected as a “derivative right” to the right to freedom of expression.

In Okedara v. Attorney General, the Appellate Court upheld the Cybercrime Act. While doing so, they still emphasized that “under the Constitution it was clear that liberty of thought and freedom of expression were paramount.” Even so, this freedom is not absolute and is subject

to limits “[i]n the interest of defense, public safety, public order, public morality, or public health” or “[f]or the purpose of protecting the rights and freedom of other persons.” (Okedara v. Attorney General (2019) Appellate Court CA/L/174/18). Thus, for the case at hand, the court must decide whether an application of a blasphemy law to this instance would fall within these exceptions to freedom of speech.

According to the ECOWAS court, the burden falls on the government to prove the necessity of restrictions on freedom of expression. In Ogwuche v. Federal Republic of Nigeria, the court found that the Nigerian government had violated the plaintiffs’ right to freedom of expression because “[t]he Government of Nigeria indeed failed to establish proof that the plaintiffs’ media programs constituted a threat necessary to justify the International recognized cases in which freedom of expression may be restricted.” (Ogwuche v. Federal Republic of Nigeria (2018) ECW/CCJ/JUD/31/18). In this case, the Nigerian government has put forth zero evidence that Sharif Aminu’s actions would lead to a breach of public order or morality; therefore, the government has not met the burden needed to justify such a restriction on speech.

In Media Rights Agenda and Others v. Nigeria, “[t]he Commission therefore found that Nigeria had indeed violated Article 9 of the Charter given they had abused their position of authority to limit expression.” (Media Rights Agenda and Others v. Nigeria (2000) ACHPR Comm. No. 224/98). Similarly, here, Sharif-Aminu has been convicted for nothing other than speech that certain sections of society disagree with.

In Media Rights Agenda and others v. Nigeria, the African Commission on Human and Peoples’ Rights (ACHPR) directly considered the “proportiona[lity]” and “necess[ity]” of Nigerian restrictions on speech. The court found that the speech “although critical to the

government, did not contain any information that might have threatened national security or public order.” In fact, the speech was actually more of a “personal attack” on the reputation of a government leader rather than speech causing public chaos. The court found that restrictions on and punishment of such critical speech violates Article 9 of the African Charter. Similarly, Sharif-Aminu’s speech was critical toward certain-held views on religion, not disruptive to public order or national security as a whole. Thus, it would not fall within the scope of acceptable limitations to freedom of expression to punish this speech and it would violate Article 9 of the African Charter to do so.

A. The use of death penalty in blasphemy and speech cases has been considered excessive.

The UN has released reports detailing its view on the use of the death penalty in blasphemy cases. The report of the Secretary-General "Moratorium on the use of the death penalty" states:

"66. Pending abolition, States must provide guarantees, including strict fair trial guarantees, and adhere to strict limits, specifically by limiting the imposition of the death penalty to the “most serious crimes”, that is, crimes of extreme gravity involving intentional killing. Even for such crimes, the death penalty should not be mandatory. Crimes not involving intentional killing, such as drug-related offences or terrorism-related crimes not involving intentional killing, should not result in the death penalty. The death penalty should never be imposed as a sanction for non-violent conduct such as apostasy, *blasphemy*, witchcraft, adultery and same-sex relations." (A/75/309 pg. 19-20) [emphasis added].

Furthermore, UN experts have condemned the death penalty as a punishment for blasphemy. The case of Junaid Hafeez, a university lecturer in Pakistan, drew international condemnation. (United Nations Human Rights Office of the High Commissioner “Pakistan blasphemy death sentence for Junaid Hafeez is ‘travesty of justice’ – UN experts” December 27 2019). Mr. Hafeez was charged with making blasphemous remarks during lectures and on his Facebook account and was held in solitary confinement from the start of his trial in 2014 until the death sentence was imposed in 2019. *Id.* The UN experts, consisting of the Special Rapporteur on Freedom of Religion or Belief, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Members of the UN Working Group on Arbitrary Detention, noted that “international law permits the death penalty only in exceptional circumstances, and requires incontrovertible evidence of intentional murder.” *Id.*

The standards under international treaties within Africa are similarly protective of free expression. These even go beyond the African Charter’s guarantee that “[e]very individual shall have the right to express and disseminate his opinions within the law.” The African Commission on Human and Peoples’ Rights has adopted declarations holding that any restriction on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society;” and “[f]reedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest, and there is a close causal link between the risk of harm and the expression.” Another declaration requires that “laws limiting rights be clear, precise and accessible . . . serve a legitimate aim. . .to be the least restricted means of achieving the aim, and be necessary and proportionate . . . where the benefit

of protecting the interest outweighs the harm to the expression” Considering this strong language, it is vital that the Nigerian Supreme Court explore whether there was actually a necessary restriction on freedom of expression in this case and whether it was the least restrictive means possible.

B. In non-blasphemy freedom of expression cases, international courts have found that even imprisonment may be disproportionate punishment for non-violent speech.

The Human Rights Committee, under Article 5(4) of ICCPR Optional Protocol I, considered the communication Berik Zhagiparov vs. Kazakhstan. As the editor of a regional newspaper, Zhagiparov had published articles rallying workers to attend protests for which no permit had been issued. Zhagiparov was prosecuted for causing “social unrest” and sentenced to 22 days of administrative arrest. Zhagiparov filed a communication to the Committee claiming that the government had violated his rights. The state invoked ICCPR Article 19(3) to justify the restrictions. The HRC adopted the views that “restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated . . . it is for the State party to demonstrate that the restrictions on . . . rights under Article 19 of the Covenant were necessary and proportionate.” The HRC stated that “penalization of a journalist solely for being critical of the Government or the political system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.” Based on this language and the logic it is based on, it seems as if criticizing the government would also not be enough for penalizing a journalist. While Sharif-Aminu is not a journalist, his speech was acting to inform people of his viewpoints; additionally, freedom of press and speech are founded on the same principles and should thus be treated similarly.

In Stern Taulats and Roura Capellera v. Spain, the ECtHR held that criminal conviction for burning Spanish royalty in effigy constituted an unlawful infringement on the freedom of expression because restricting this speech was neither proportionate to any legitimate aim nor necessary in a democratic society. Anti-monarchists had set fire to a large photograph of the royal couple and were convicted of insulting the crown. On appeal in Spain, the conviction was upheld, based on the government's arguments that the actions constituted incitement to hatred and violence and that they therefore constituted a threat to democracy. The ECtHR held the opposite: setting fire to the photograph was a symbolic political critique and merely used "a certain permissible degree of provocation to transmit a critical message." Further, the ECtHR stated that the disputed act could not reasonably be construed as incitement to hatred or violence. Moreover, the criminal penalty imposed on the applicants—a prison sentence of 15 months, to be executed in the event of failure to pay the fine of 2,700 euros—amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society. If such a fine were considered to be too much, the death penalty also would seem to constitute an excessive punishment.

In Otegi Mondragon v. Spain, an activist denounced the King of Spain at a press conference, as "the person in command of torturers, who defends torture and imposes his monarchic regime on our people through torture and violence." The activist was imprisoned for serious insult to the King. The ECtHR found that although provocative, the language was of general, political interest and did not incite violence and did not amount to hate speech. The court held that the sanction was disproportionate and violated Article 10.

In Cumpana and Mazare v. Romania, the Grand Chamber of the European Court unanimously held that imprisonment of journalists for publishing insults against public officials was disproportionate and not necessary in a democratic society, and thus violated Article 10. The court explained that criminal sanctions create a chilling effect on speech. The court noted that it must “exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.”

In Şahin Alpay v. Turkey, the ECtHR overturned the conviction of a journalist who had published newspapers articles in support of a political movement. In defending the conviction, the government argued that members of the movement had staged a coup d'état, leading to a national state of emergency. During that state of emergency, the journalist was arrested and charged with attempting to overthrow the constitutional order, the parliament, and the government by force and violence. The prosecutor submitted that Alpay's newspaper articles were not mere expressions of opinion, but rather, endangered social peace and public order. The prosecutor argued that the applicant had called for a military coup. The ECtHR found that, notwithstanding the national emergency, the detention of the applicant after he had expressed his opinions exceeded any necessary and proportionate interference in a democratic society. It reasoned that the pre-trial detention and prosecution of an individual who expressed critical views would chill dissenting opinion. On this basis, the court found that Alpay's detention violated Article 10. The ECtHR emphasized that “the existence of a ‘public emergency threatening the life of the nation’ must not serve as a pretext for limiting freedom of political debate.”

The ECtHR has applied identical reasoning regarding the proportionality and necessity of criminal convictions relating to online speech. In Savva Terentyev v. Russia, the ECtHR held that a sentence of a one-year suspended prison term for insulting online comments directed at police officers was disproportionate to the legitimate aim invoked. While offensive, the comments were entitled to protection because they were part of public discussion, did not promote violence or justify hatred, and were directed at official authorities, who must tolerate a wider scope of criticism. The ECtHR reiterated that criminal-law provisions, especially those related to hate crimes, must clearly and precisely define the scope of relevant offenses, in order “to avoid a situation where the State’s discretion to prosecute for such offenses becomes too broad and potentially subject to abuse through selective enforcement,” amounting to a violation of the right to freedom of expression under Article 10 of the ECHR. Overall, the ECtHR has a history of finding punishments directed at freedom of expression to be excessive.

Conclusion

International agreements protect the individual freedom of expression against blasphemy laws. Under the ICCPR Article 19, the ECHR Article 10, and the African Charter guarantee freedom of expression in a democratic society. Case law from the ECtHR affirms that any violation of the protection of individual freedom of expression must be reasonable, proportional, and necessary in a democratic society. These requirements ensure that the individual right to freedom of expression is protected from encroachment by the state and serve to preserve individual liberties. The Nigerian Supreme Court would uphold strong precedent of many human rights and regional courts in overturning Sharif Aminu’s conviction.

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