

What's a Constitution Worth?: Bringing an Illegal Detention to Light

- By Joshua N. Auerbach

When Maj. Gen. Katumba Wamala, Inspector General of Police, appeared in High Court last week in connection with treason proceedings against Pascal Gakyaro, it may not have been apparent to the casual observer that the Constitution itself was on trial. Mr. Gakyaro, an airport manager from the upcountry, spent over a week in detention, incommunicado, before Gen. Wamala personally brought him to court. This detention violated Article 23(4) of the Constitution, which provides that every criminal suspect shall be brought to court, or released, “not later than forty-eight hours from the time of his or her arrest.”

Although criminal law often, necessarily, invests police officers with great discretion, Article 23(4) does not. Any person detained on suspicion of having committed an offense, even a serious offense like treason, is entitled to some judicial process within 48 hours of arrest. The police plainly did not afford this right to Mr. Gakyaro.

Article 23's unambiguous rule may well be the most routinely ignored provision in the Constitution. According to the Uganda Human Rights Commission, thousands of citizens have been detained without process beyond the 48-hour limit. Many were innocent of any criminal conduct.

The reasons given for holding suspects incommunicado for periods longer than 48 hours have never been particularly persuasive: that magistrates are not always available, and that suspects might be subject to mob justice if they are released. At least these were the excuses offered during the tenure of Gen. Wamala's predecessor.

In fact, the police, working with the courts, could easily devise an administrative check to ensure that all suspects receive some process within 48 hours of arrest.

Not only would such a check protect human rights, it could help the police improve the efficiency of their investigative work. The Sebutinde Commission recommended two years ago, entirely on operational grounds, that the police establish a system of internal time limits for carrying out investigations. Internal enforcement of the 48-hour rule would compel investigators to do their preliminary work efficiently and transparently.

The practice of detaining individuals without process for indefinite periods nonetheless has become a habit for the police, largely as a result of three interrelated causes. The first is simple inertia. It takes effort to devise and adhere to a system that takes human rights seriously. The second is corruption. Some police officers arrest and detain citizens merely to harass and extort money.

Third, the police often hold detainees, not on suspicion of criminal conduct, but on the orders of an influential person outside the chain of command – for example, a politician suppressing dissent, a businessperson settling a score, or a military commander.

This last problem – that of interference by politicians and other influential third parties – has much to do with the problems of administrative inertia and corruption. When it suits their interests, influential third parties block the police from taking steps to improve the quality of policing and ensure compliance with the law.

Establishing a system for processing suspects within 48 hours would be one such step. If, in practice, the police were required to justify every detention to a magistrate within 48 hours, opportunities to detain for arbitrary, corrupt, or political purposes would be greatly reduced.

When police officers, whose primary duty is to enforce the law, instead routinely disobey it, they do severe damage to the rule of law. When, as here, the rule being disobeyed protects the fundamental right to liberty, and is enshrined in the Constitution, the damage is incalculable.

This point bears emphasis. If not through constitutional law, how can citizens ensure that the government does not use its power of detention arbitrarily? What is the rule of law worth if “We the people” cannot use the words “forty-eight hours” in the constitution and be taken seriously?

Constitutional guarantees are certainly meaningless in the absence of an independent judiciary. Ugandan law recognizes this, empowering the courts, through habeas corpus, to direct the release of any person improperly detained. Moreover, Article 23(7) of the Constitution requires the government to compensate persons detained beyond the 48-hour limit.

A year ago, on the basis of an analogous constitutional provision, the Kenyan courts awarded a man 130,000 Kenyan shillings after he spent several days in detention for holding a sign that said “Corruption Must Go.” Quite likely, thousands of Ugandans are similarly entitled to compensation. Some were deprived of liberty for weeks or months without any kind of judicial process, at significant personal cost.

Many, to be sure, were ultimately shown to have committed crimes. Many others, like the Kenyan protester, were innocent. All had a right under the Constitution to be brought before a magistrate.

Which brings us back to last week’s events in the courtroom. Notwithstanding that the police did not adhere to the Constitution in Pascal Gakyaro’s case, there are reasons to be encouraged. A High Court justice recognized the supremacy of the Constitution, even in a matter as serious as treason, and demanded an explanation from Uganda’s highest-ranking police officer. Gen. Wamala, in turn, complied with the court’s order, demonstrating respect for the court, the Constitution, and the rule of law.

We are far from the day when a person arrested in Uganda can feel confident of seeing the light of day within 48 hours. Nonetheless, there is reason to hope that the Constitution will yet emerge – in practice as well as in theory – as the supreme law of the land.

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