

Enhanced rights for detained persons: Application of the remedy of *habeas corpus* under the Cameroon Criminal Procedure Code

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Abstract

The incorporation of habeas corpus and bail in the Cameroonian Criminal Procedure Code has not only entrenched them in law, but has also widened and deepened their scope, with a view to obtaining, as far as possible, the respect for human rights and the rule of law in order to ensure a more functional criminal justice system in Cameroon. The incorporation of habeas corpus and bail in the Cameroon criminal trial process will restrain the arbitrary and illegal use of the powers of the judicial police officers and ensure respect of human rights. Although there are some challenges in the application of habeas corpus and bail such as misuse of the remedies by some overzealous authorities, defiance of court orders in the enforcement of the writ of habeas corpus by administrative authorities, and erosion of confidence in the Judiciary, there is optimism in the conscious efforts being made to ensure that habeas corpus and bail are properly applied so that the Cameroonian Criminal Procedure Code attains its full potential.

Introduction

In practice, the rights of an accused person in any criminal trial will be ineffective, unless they are supported by the very institutions that created them. The use of discretion that in practice belongs to the judicial police officers who are in direct confrontation with the citizen, must be restrained and guided.¹ So also is the case with overzealous administrative authorities.

¹ Mbu ANT, *The mill of justice*, CEPER, Yaoundé, 1989, 218.

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The enormous powers wielded by the police, their possession and use of firearms, and the inevitable practice of discretion in decisions relating to arrest, searches and pre-trial detention, require that law enforcement officers operate within the law.² Indeed, it is in the restraint of the abuse of power and discretion, exercised by the police and administrative authorities, that the respect and equality of the citizen, as well as the liberty and integrity of persons in a State, will be secured.³ Restraint, in the abuse of discretionary powers by competent authorities, could be achieved through the remedy of *habeas corpus* and the right to bail.

The writ of *habeas corpus* enables a person who has been illegally detained to be released from illegal custody. It is the most effective judicial remedy to secure the release of any person within the jurisdiction of the High Court. The object of the writ is not to punish previous illegality, but to release from previous illegal detention.⁴ Where detention laws are spelt out and observed, the writ of *habeas corpus* will, for all intents and purposes, become obsolete. Where detention is arbitrary, indefinite and unjustified, recourse would be to *habeas corpus*.⁵ The incorporation of *habeas corpus* in the Cameroon criminal trial process is, therefore, aimed, not only at restraining the arbitrary and illegal use of the powers of the judicial police officers, but also ensuring that the human rights of a citizen are not abused. This enhances the human aspect in the application of the Cameroon Criminal Procedure Code (CCPC),⁶ thereby lending credibility to the entire criminal trial process.

On its part, bail refers to sureties taken or amount of money deposited by a person duly authorised, to ensure the appearance of an accused person before a magistrate on a certain day and place to answer and be justified by law.⁷ The

² Walsh D, *The Irish Police, A legal and constitutional perspective*, Round Hall Sweet & Maxwell, Dublin, 1998, 345. Alemika E, *Police reform and oversight in Nigeria*, Centre for Law Enforcement Education (CLEEN), Lagos & Police Service Commission Federal Secretariat, 2003.

³ Alemika E, *Police reform and oversight in Nigeria*.

⁴ See Lord Watson in *Barnadu v Ford Gossage* (1892) AC 322. See also *R v Home Secretary ex parte O'Brien* (1932) 2KB 316. *Ogini v Thomas* (1927) 9 NLR 45. *Greene v Secretary of State for Home Affairs* (1942) AC 284.

⁵ See Clementine Nkweta Muna's comment on the decision of the court in the case of *Justice Nyob Wakai & 172 Others (Applicants) v The People (Respondents)*, (1997) 1CCLR. 127 in *Le Monde Judiciaire*, Jan-Feb-Mar, 1993, 27.

⁶ Law No 2005/007 of 27 July 2005, SS. 137(2), 584 – 588.

⁷ See generally "The differing conceptions of bail in Cameroon" originally published in Ewang A (ed), *Readings in the Cameroon Criminal Procedure Code*, Presses Universitaires d'Afrique, Yaoundé, 2007, 179-197. Ntamarik PY, *Lectures on Criminal Procedure, 2nd Year Laws*, University of Yaoundé II, 2000/2001. Okonkwo C, *Cases on the Criminal Law Procedure and Evidence of Nigeria (excluding the North)*, Sweet & Maxwell, 1966, 79.

detained person who is granted bail is called the detainee, while the person who enters into a recognisance to ensure the appearance of the accused is known as the surety. The detention that necessitates bail is not a sanction; it enables judicial authorities to readily get information from the accused person at any time, which would not have been the case had the accused been allowed to go away. In this way, detention facilitates the continuity of investigation into the matter and equally prevents the accused from distorting proofs that may subsequently compromise the evolution of investigation.

However, the law makes it possible for the detained person to be released, and for them to enter appearance when and where demanded so as to give evidence on the matter they are accused of. Such a release is not temporal because of the existence of the presumption of innocence. Bail is therefore a right. Where a person has been tried, convicted and sentenced, but decides to appeal, they may also be granted bail. This means that there is bail before conviction and bail upon appeal.⁸ The surety who takes an engagement to ensure the appearance of the accused when and where demanded, or the sum of money deposited, are guarantees to the State should the accused jump bail.

Unlike *habeas corpus*, bail does not seek to curtail the powers of the judicial police, or redress an illegal detention, or ensure the freedom of an innocent person, but it allows an accused person who has been detained to have their freedom until a final decision is arrived at. It is a kind of an extension of the presumption of innocence that is only made possible by the guarantee of a surety. Bail attaches a human face to the criminal trial process.

The remedy of *habeas corpus*

The preamble of the Constitution of Cameroon⁹ entrenches the remedy of *habeas corpus* expressly when it enacts that ‘no person shall be held in unlawful custody’. Thus, the writ of *habeas corpus* has its foundation in the Constitution. This writ and the other writs of *mandamus*, *prohibition* and *certiorari* are provided for in the various ordinances bearing on judicial organisation in the country. It figured first in Ordinance No 72/4 of 26/08/1972 organising the Judiciary of the Republic, as amended by Ordinance No 72/21 of 19/10/1972 and later by

⁸ *Obaseki v Police* (1959) NRNLR 149.

⁹ 2 June 1972, as amended by Law No 96/06 of 18 January 1996.

Law No 89/19 of 29/12/1989, and has now been incorporated in the CCPC¹⁰ and in Law No 2006/015 of 29 December 2006 on judicial organisation. It is interesting to note that the 1989 law repealed the prerogative writs of mandamus, prohibition and certiorari in administrative matters. Since it is difficult to apply these writs in non-administrative matters, it is therefore only the writ of habeas corpus which, in principle, seemed to have continued to apply all over Cameroon after the new dispensation.¹¹

Prior to these events, however, Peter Ntamark drew attention to the fact that by virtue of the Southern Cameroons High Court Law (SCHCL) 1955,¹² Section 10, the High Court was vested with the jurisdiction to issue these writs.¹³ In effect, Section 10 of the Southern Cameroons High Court Law 1955, to which the late eminent professor made allusion, constitutes one of the exceptions to Section 11 of that same law which limits the reception of English Law to pre-1900 statutes. It provides:

The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this law, or any other written law, or by such rules and orders of court as may be made pursuant to this law or any other written law, and in the absence thereof in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of England.

It follows logically that habeas corpus, being within the domain of practice and procedure, rather than substantive law, should normally be applied by the courts. Hence, in *Etengeneng Joseph Tabe v Governor Oben Ashu & Another*,¹⁴ the High Court of Fako upheld a writ of habeas corpus and seized the opportunity to establish as follows: -

¹⁰ Section 137(2), CCPC.

¹¹ See *The Liquidator, National Produce Marketing Board (NPMB) v Egbe Stephen Batuo* (2001) 2 CCLR, 185 at 189, where the Buea Court of Appeal (Najeme, Fonkwe, Nana, JJJ) held that, 'the order of certiorari no longer exists in the present state of our Laws.'

¹² Section 746 (1) (0) of the new code abrogates the provisions of the SCHCL 1955 with regards to criminal trials.

¹³ Ntamark PY, *Lectures in civil procedure, 3rd Year Laws*, University of Yaoundé II, 1994- 1995. The prerogative writ of habeas corpus was issued by the High Court in *Peter Baseh v Commissioner of Brigade Mobile Mixte* (1978), unreported, while the prerogative writ of certiorari was issued by the Bamenda High Court in *Godfred Fogam v Mankon Customary Court* (1972), unreported. In *DO Ndop v Batowe Zach-eus Yenkong* (1997) 1 CCLR 26, the Bamenda Court of Appeal found that where the act or decision is of a judicial character, its validity could be challenged by certiorari. Justice Nyoh Wakai further held that certiorari may be issued against inferior courts, administrative tribunals, local authorities, statutory bodies and also individual officers discharging public functions.

¹⁴ (1998) 1CCLR 9.

- (i) In a habeas corpus application, the main concern of the court is the person's detention in prison and not the merits of the case.
- (ii) Where an order *nisi* has been made as in the present case, the burden is on the jailer to show cause why they should keep the applicant in detention or release them.
- (iii) The burden to show cause can only be discharged by the filing of a counter affidavit denying, challenging and/or disproving the allegations of fact contained in the supporting affidavit, or by moving the court to dismiss the application on grounds of law.
- (iv) A ruling *nisi* of habeas corpus will be discharged if the person detained is at large or already released and is at liberty.¹⁵
- (v) In exercising the powers of detention conferred on administrative authorities in peace time, the said authorities can renew their detention orders and thus extend beyond 15 days the period of detention of the person who is the object of the detention order.
- (vi) The burden is on the respondents to furnish the court with the detention order since it is in their particular knowledge.
- (vii) The writ (now order) of habeas corpus is of such sovereign and transcendent authority that no privilege of person or place can stand it; and that Hyde CJ stated the law correctly when he said¹⁶:

Whether the commitment be by the King (the President or the Executive Power of the State) or others, this Court (the High Court) is a place where the King (President) shall sit in person, and we have power to examine it, and if it appears that any man hath injury or wrong by his imprisonment, we have power to deliver and discharge him; if otherwise, he is to be remanded by us to prison again.

- (viii) Where there is an allegation of impropriety or illegality of the detention by an administrative authority and, as in the present case, the said authority does not even enter appearance or attend to show cause, it is to be presumed that the allegation of impropriety or illegality is founded and that the Court would order the immediate release of the detainee on pain of the jailer being cited for contempt.

The following submissions by counsel for applicants in the *Nyoh Wakai* case are also worth noting:

- (i) Acts carried out by the administration have to be according to the law, as envisaged by Section 5(6) of the Emergency Law No 90/47 of 19/12/1990 as well as the procedural law applicable in Anglophone Cameroon.
- (ii) In the face of high-handedness on the part of the Government, the court must decide with determination, because it is the clearest indication against rule by tyranny and by sheer force presumption, subjecting the nation to the rule of might as against the rule of rights.¹⁷

¹⁵ See *Kpakpah Dogah v Fiegbenu Kwasinye* (1931) 1 WACA 154.

¹⁶ Halsbury's Laws of England, 4ed, volume II, para 1454.

¹⁷ *Justice Nyoh Wakai & 172 Others v The People*, at p. 136.

In the *Nyoh Wakai* case, the motion on notice filed on behalf of the detainees by 22 Barristers at the High Court of Bamenda during the heat of multi-party politics in Cameroon in the early 1990s, was not a writ of habeas corpus strictly speaking; it was purely and simply an application for an order to grant bail. However, the High Court, in granting bail, also examined the irregularities surrounding the detention of some of the prisoners, thereby ordering the outright release of some 38 detainees including Dr Hameni Bieleu who had been arrested at Nkongsamba, taken to Yaoundé, and later to Bamenda to be subjected to the then state of emergency. It is submitted that the applicants' motion could have had greater chances of succeeding had they applied for a writ of habeas corpus instead of bail.

Obtaining the civil remedy of habeas corpus in Anglophone Cameroon

Civil Procedure in Anglophone Cameroon is governed by the Supreme Court (Civil Procedure) Rules, Chapter 211 of the Laws of Nigeria 1948. But the Supreme Court (Civil Procedure) Rules contain no provision relating to applications for the breach of habeas corpus. Such being the case, reference is made to the Rules of the Supreme Court of England (RSCE) by virtue of Section 10 of the SCHCL and the appropriate rule of the Supreme Court of England is Order 54.

Order 54 Rule 1(1) of the English Rules provides:

Subject to Rule 11, an application for a writ of *habeas corpus ad subjiciendum* must be made to a Divisional Court of the Queen's Bench Division (QBD) or, if no such court is sitting, to a single judge in court, except that:

- a) in vacations or anytime where no judge is sitting in court, it may be made to a judge otherwise than in court;
- b) in cases where the application is made on behalf of an infant, it must be made, in the first instance, to a Judge, otherwise than in court.

Rule 1(2) stipulates that an application for a writ of habeas corpus may be made *ex parte* and subject to paragraph 3, that is, Rule 1(3). It must be supported by an affidavit, which means that the person restrained has to show that it is made at their instance, thereby setting out the nature of the restraint.

Rule 1(3) is to the effect that where the person restrained, for any reason, is unable to make the affidavit required in paragraph 2, the affidavit may be made

by some other person, on their behalf, and that affidavit must state that the person restrained is unable to make the affidavit themselves and for whatever reason.

At common law, there were five different types of the writ of *habeas corpus*, two of which are no longer in use.¹⁸ Those in use today are:

- 1) The writ of *habeas corpus ad subjiciendum*, simply known as the writ of *habeas corpus*. This writ enables a person who has been illegally detained to be released from illegal custody.
- 2) The writ of *habeas corpus ad testificandum* which is available to bring a prisoner to court to give evidence in a given case.
- 3) The writ of *habeas corpus ad respondendum* available to bring a prisoner to court to answer a criminal charge.

This study is concerned with *habeas corpus ad subjiciendum*. This is the most effective judicial remedy to secure the release of any person within the jurisdiction of the court.

The power of the courts to which ex parte applications may be made

It is provided in Order 54 Rule 2(1) of the RSCE that the court or judge, to whom an application is made under Order 54 Rule 1 (that is, made *ex parte*), may make an order forthwith for the writ to be issued or:

- (a) where the application is made to the judge otherwise than to the court, direct that an originating summons be issued or that an application has to be made by motion to a Divisional Court or to a judge in court; or
- (b) where the application is made to a judge in court, adjourn the application so that notice thereof, may be given or direct that an application be made by originating motion to a Divisional Court; or
- (c) where the application is made to a Divisional Court, adjourn the application so that notice thereof may be given.

The summons or notice of the motion must be served on the person against whom the issue of the writ is sought or on such other person as the court or judge may direct and, unless the court or judge otherwise directs, there must be at least eight clear days between the service of the summons or notice and the dates named therein for the hearing of the application.¹⁹

¹⁸ Ntarmark PY, *Lectures in civil procedure*.

¹⁹ Order 54 Rule 2(2), *Rules of the Supreme Court of England (RSCE)*.

Every party to an application under Rule 2(1) must supply to any other party, on demand and on payment of the proper charges, copies of the affidavit which they propose to use at the hearing of the application.²⁰ Where a writ of habeas corpus ad subjiciendum is issued, the court or judge by whom the order is made shall give directives as to the court or judge before whom and the date on which the writ is returnable.²¹ Subject to paragraphs 2 and 3, that is, Rule 6(2) and (3), the writ of habeas corpus ad subjiciendum must be served personally on the persons to whom it is directed.²²

If it is not possible to serve such a writ personally or if it is directed to the governor of a prison or other public official(s), it must be served by leaving it with the servant or agent of the person to whom the writ was directed, at the place where the person is confined.²³ If the writ is directed to one person, it must be served, in the manner provided by this rule, on the person first named in the writ and copies must be served on each of the persons in the same manner as the writ.²⁴ There must be served in the writ a notice, stating the court or judge before whom and the date on which the person restrained is to be brought, and that in default of obedience, proceedings for committal of the party disobeying would be taken.²⁵

The return to the writ of habeas corpus ad subjiciendum must be endorsed on or annexed to the writ and must state all the causes of the detention of the person detained.²⁶ Under Rule 7(1), the person detaining the other must state the reasons for which that other is being detained and, on the 10th day, that is, the day fixed for the hearing (usually 7 days after service), it becomes the duty of the court to examine the cause(s) of the prisoner's detention. The court may do this upon affidavit of evidence. If there is sufficient evidence to justify the detainer for their actions, then the application would be dismissed. If, however, there is no such evidence, then the court must order the release of the prisoner forthwith.²⁷ If the writ of habeas corpus shows, on its face, the valid authority of its detainer, the onus shifts on the applicant to show that the detention is, *prima facie*, illegal.²⁸

²⁰ Order 54 Rule 2(3), *RSCE*.

²¹ Order 54 Rule 5, *RSCE*.

²² Order 54 Rule 6(1), *RSCE*.

²³ Order 54 Rule 6(2), *RSCE*.

²⁴ Order 54 Rule 6(3), *RSCE*.

²⁵ Order 54 Rule 6(4), *RSCE*.

²⁶ Order 54 Rule 7(1), *RSCE*.

²⁷ See *Albadji AM Agabje v Commissioner of Police*. See also Ntarmark PY, *Lectures in civil procedure*.

²⁸ *R v Governor of Risley Remand Centre, ex parte Hassan* (1976). See Ntarmark PY, *Lectures in civil procedure*. See also *R v Secretary of State for the Home Department, ex parte Chaudhary* (1978) 2AER 790.

Procedure at the hearing of the writ: Order 54 Rule 8 (English Rules)

When the order of the writ of habeas corpus *ad subjiciendum* is sought, a motion for discharging or remanding the person restrained or remanded (or questioning the return) is made and, where the person is brought up in accordance with the writ, their counsel shall be heard first, then counsel for the Crown (that is, for the *propositus*) and the one counsel for the person restrained, in reply. The court would grant the order if it finds it necessary.

An application by a parent, or guardian of a minor, for a writ of habeas corpus *ad subjiciendum* relative to the custody, care or control of the minor, must be made in the Family Division of the High Court and this order shall, accordingly, apply to such applications with the appropriate modifications.²⁹ The High Courts in the South West and North West regions of Cameroon function as a single whole, unlike their English counterparts that are divided into Family, Queen's Bench and Chancery Divisions. Consequently, an application for a writ would be heard by a judge in the High Court and there is no question of referring the application to any Division of the High Court.

The other prerogative orders are *mandamus*, *certiorari* and *prohibition*. These are covered by Order 53 of the English Rules. In England, these procedures are no longer called 'prerogative writs', but are now known as 'prerogative orders'.

An application for the writ of habeas corpus is a method by which the legality of a prisoner's detention has traditionally been rested, the purpose being to require the person who has custody of the prisoner to produce him in court so that, if the imprisonment is unlawful, the court may order release.³⁰

Habeas corpus under the CCPC

Under the CCPC, the President of the High Court of the place of arrest or detention of a person, or any other judge of the said court, has jurisdiction to hear applications for immediate release based on grounds of illegality of arrest or detention or failure to observe the formalities as provided by law.³¹ Thus, one of the ways of obtaining the remedy of habeas corpus is by complaining to the High Court. The CCPC, under Section 137(2), also makes provision for the state

²⁹ Order 54 Rule 11, *RSCE*.

³⁰ See *R v Hart* (1932) 23, at 202. *Alimbi v Anike* (1958) WRNLR 16.

³¹ Section 584 (1), *CCPC*.

counsel, of their own motion, to order the release of detainees while controlling the operations of officers and agents of the judicial police. During such controls, they also release detainees who, by virtue of an order of habeas corpus, must immediately be set free.

The provision of habeas corpus proceedings in the CCPC demonstrates the desire of the State to respect the citizen's right to freedom by stamping out cases of illegal and arbitrary arrests.³² The remedy of habeas corpus also applies to enforce the rule of law in cases of deprivation of the right to liberty taken against any person who has been acquitted, discharged or released by an ordinary court of law or by a special tribunal.³³ In *Justice Nyoh Wakai's* case, it was held that where the required period of time within which any person can be detained has elapsed under the law, such a person is entitled to be released as of right. It was further held that the procedure whereby a person could be detained for 7 days, then 15 days and finally 2 months renewable once, giving a maximum of 4 months 21 days, is a flagrant irregularity. The doctrine of administrative trespass (*voies de fait*) that can be directed to a person (battery or false imprisonment) or to land, has been described as one of the most subtle notions of French Administrative Law, as it indicates some irregular act on the part of the administration, which act is so flagrant and gross that it cannot be regarded as an administrative act at all, but is treated as if it were the act of a private person, thereby losing the privilege of being adjudicated upon by the administrative courts.³⁴

The 'principle of *voies de fait*, renders purportedly administrative acts personal, if the acts are manifestly irregular'.³⁵ In *Cour Suprême, Arrêt Mve Ndongo & Anor C/. Ngaba Victor*,³⁶ the Supreme Court of Cameroon defined *voies de fait administrative* as 'acts which are so manifestly irregular that they lose their administrative character'.³⁷ Guez and Deyere write that the principle 'emphasises a material operation of the administration that contains a gross illegality and af-

³² Explanatory Statement to the Draft Bill of the Criminal Procedure Code, Bill No 775/PJL/AN of the 2nd Ordinary Session, June 2005, p. 9.

³³ Section 588, CCPC.

³⁴ Owona J, *Droit administratif spécial de la République du Cameroun*, Photocopie, Université de Yaoundé, 172 at para.2. See also Brown LN & Gamer JF, *French Administrative Law*, 69-70. See also *Minister of Internal Affairs v Shugaba* (1982) 3 NCLR 915.

³⁵ Per Justice SA Njile in *The Sub-Divisional Officer Oku & another v Oku Rural Radio Association & another*, BCA/17/2005, at 9, unreported.

³⁶ Arrêt N° 16 du 17/10/1968, unreported.

³⁷ See *Oku Rural Radio* case. See also *Richard Tikum & 20 Others v Ngwan Mbanyamsick*, Suit No MBHC/17m/2000, unreported (Mbengwi High Court, Justice Tatsi).

fects the private property or liberty of a citizen'.³⁸ The doctrine has further been described by Justice Vera Ngassa in the case of *Jesco Manga Williams v The Fako Land Expropriation Commission & Chantier Naval*,³⁹ thus:

Voie de fait is, in my opinion, something so flagrant and obvious that any right thinking man will conclude that the administrator was either acting on his own or certainly not acting for the interest of the administration he claims to serve, for example, where an administrator seizes an individual's land or slaps him. In which case I will agree with counsel for the defence that the tortfeasor should be stripped of his administrative covering and sued in his personal name.

Ngassa J cited, with approval, Maurice Kamto's approach in deciding on the competence of the court in the case of a wrongful administrative act:⁴⁰

Depending on the nature of the decision or administrative act that infringed on your rights, you must find out which court is competent to hear and determine your matter. In matters of jurisdiction, the dividing line between the ordinary law court and the administrative court is often times delicate and quite often the litigant can make an error. If after everything you still make a mistake as to the proper court, such mistake will not be fatal to the case. In effect, if the court referred to, declares itself incompetent, it is still possible to seek redress in the appropriate court.

The celebrated author cites the example of *Dziethan Pierre c/. Etat du Cameroun*, which after wrongfully being taken before the ordinary law court, was tried before the administrative bench,⁴¹ and before the full bench.⁴² The Supreme Court held that the time lapse in the condition precedent for '*recours gracieux préalable*' or recourse to the competent authority under Section 12 of Ordinance No 72/6 of 26 August 1972 fixing the organisation of the Supreme Court,⁴³ should be waived if the matter had, in the interim, been brought before an ordinary law court which later declared itself incompetent.

Kamto also suggested some indicators that may guide litigants in complaining to the Supreme Court in cases of administrative trespass:

³⁸ Guez P & Deyere G, *Traité de Droit Administrative*, 250. Owona J, *Droit administratif spécial de la République du Cameroun*, 172.

³⁹ (2005) 2 CCLR, Part 11, p. 99 & 114.

⁴⁰ Kamto M, *Droit Administrative Processuel du Cameroun*, Presses Universitaires du Cameroun, Yaoundé, 1990, 25. The original version in French was translated by the author.

⁴¹ Jugement n° 45/CS/CA/81-82 du 27 mai 1982.

⁴² CS Arrêt n° 8/A du 17 novembre 1983.

⁴³ For now, see the relevant provisions of Law No 2006/016 of 29 December 2006 to lay down the organisation and functioning of the Supreme Court, as well as Law No.2006/022 of 29 December 2006 to lay down the organisation and functioning of Administrative Courts.

- Attacking the decision of administrative officers in the exercise of their functions;⁴⁴
- When a Ministerial Order infringes a person's rights recognized by law;
- An Order declaring a person's land to be for public utility or Decree expropriating one's land;⁴⁵
- An Act expropriating one's land for reasons other than public utility, for example, for the benefit of private individuals or companies.⁴⁶

To the above can be added administrative acts which do not take into account, or which disregard, the law,⁴⁷ or administrative decisions lacking legal basis.

Obtaining the remedy under the CCPC

Under the CCPC, an application that does not need to be stamped⁴⁸ may be made personally by the accused or detainee or by someone acting on their behalf,⁴⁹ to the President of the High Court of the place of their arrest or detention, or any other judge of the said court with jurisdiction to hear such applications, as well as applications filed against administrative remand measures. An application for habeas corpus shall be supported by an affidavit and shall state the identity of the applicant and, where necessary, that of the person arrested or detained; the place of arrest or detention; a precise summary of the facts constituting the alleged illegality.

Upon receipt of an application, the judge shall order the authority detaining the accused to produce the detainee in court on a date and time specified in the order, together with the documents authorising the arrest and detention.⁵⁰ This is a significant provision, since it does not give the judge any discretion. After the hearing, if the judge finds that the arrest or detention is illegal, they shall order the immediate release of the detainee.⁵¹ That decision may be subject to appeal. However, the detainee shall be immediately released pursuant to the decision, irrespective of any appeal.⁵² Again, this is a significant feature of the law in favour

⁴⁴ Such administrative officers include the President of the Republic, Ministers, Governors, Senior Divisional Officers, Mayors and Civil Servants.

⁴⁵ CS Arrêt n° 1/A du 6 décembre 1979, Fouda Albert c/. Etat du Cameroun.

⁴⁶ CFJ/CAM Arrêt n° 160 du juin 1971, Fouda Mballa c/. Etat du Cameroun Oriental.

⁴⁷ CS/CA, jugement n° 55 du 22 avril 1976, Mbarga Emile c/. Etat du Cameroun.

⁴⁸ See Section 584 (1) (2) and (3), CCPC.

⁴⁹ Section 584(3), CCPC.

⁵⁰ Section 585(3), CCPC.

⁵¹ Section 586(4), CCPC. See Anoukaha F, 'La liberté d'aller et de venir au Cameroun depuis le nouveau code de procédure pénale' Faculty of Law Annals, University of Dschang, volume 11, 2007, 15-16.

⁵² Section 586(2), CCPC.

of the right to liberty of the citizen, since it goes against the general trend of the law in Cameroon under which an appeal has the effect of suspending execution of the judgment below.⁵³

Worthy of note is Section 585(5) which states that in the event of non-appearance of the detainee in court, the judge shall consider the reasons for this and take a decision on the basis of the documents presented in the application. Thus, the non-appearance of the custodian or the detainee does not preclude the judge from deciding on the legality of the detention.⁵⁴

When the President of the Court gives an interlocutory ruling on a preliminary issue, such ruling shall not be subject to appeal. But when they give a judgment on the merits of the application for *habeas corpus*, that judgment shall be subject to appeal. The appeal shall be lodged in accordance with the provisions of Section 274 of the CCPC. Thus, the unstamped application shall be produced in quadruplicate and addressed to the President of the Inquiry Control Chamber who shall forward the case file to the President of the Court of Appeal within five days following the notice of appeal.⁵⁵ A copy of the ruling appealed against shall be attached to this application.

The application for the appeal shall, under pain of its being declared inadmissible, clearly state and argue the grounds of appeal. The report acknowledging receipt of the application and a copy of the application shall be served on the Procureur General of the Court of Appeal and on the other parties, all of whom shall have a time limit of 48 hours to file their submissions.⁵⁶

The President of the Court of Appeal, or any other judge of that court appointed by them, shall hear and determine the appeal within the time limit of ten days provided for under Section 275(2) of the CCPC.⁵⁷ Any person who has been acquitted, discharged or released by an ordinary court of law or by a special tribunal shall also be subject to the above procedure.⁵⁸ In spite of the detailed provision of the remedy of *habeas corpus* under the CCPC, there are a number of remarkable limitations.

⁵³ Section 453 of the Code states that an appeal shall stay the enforcement of a judgment rendered by the trial court.

⁵⁴ See Sections 585 (1), (2), (3), (4) and (5), *CCPC*.

⁵⁵ Sections 274(1) and 587(1), *CCPC*.

⁵⁶ Sections 274(2), (3) and (4), *CCPC*.

⁵⁷ Section 587 (2), *CCPC*.

⁵⁸ Section 588, *CCPC*.

Limited scope of habeas corpus under the CCPC

As much as CCPC consolidates the texts on habeas corpus in Cameroon, it also has a number of weaknesses. The fact that, in addition to the prerogative of the High Court, the state counsel could order the release of detainees, appears to reduce the impact that previous texts had accorded the writ. Section 137(2) of the CCPC provides as follows:

The state counsel may, at any time, visit the police post or the gendarmerie brigade in order to verify the conditions of persons in custody provided for in Section 124(3). In the course of such control, the persons whose release he orders of his own motion or by virtue of an order of habeas corpus, must immediately be set free, under pain of prosecution for unlawful detention against the judicial police officers in charge of the police post or gendarmerie brigade where the custody takes place.

Contrary to what may be thought, the phrase, ‘the persons whose release he orders of his own motion’, does not reduce the effectiveness of the remedy of habeas corpus. Indeed, in most cases, the state counsel detains persons and the fact that the office holder is the one to control and to determine the release of those persons is no sufficient safeguard to the protection of the rights of the accused. The question that may be asked is thus: is the state counsel’s power to release persons illegally detained an alternative remedy to the writ of habeas corpus?

Another major flaw in the new law is that, apart from the civil action that a detainee may avail themselves, the CCPC does not go as far as to provide for penalties or any sanctions against a custodian who refuses to comply with a court order to produce the detainee in court and explain to the court the basis of the detention. As a result, the disregard for court orders which plagued the law on habeas corpus in Cameroon prior to 2007 has persisted, as illustrated by *DS Oye-bowale v Commander of Gendarmerie for Fako*.⁵⁹

On 11 June 2009, the applicant, a Nigerian sailor, was arrested on the high seas en route to Cameroon by one Mr Leyi Prosper, the Company Commander of the Gendarmerie⁶⁰ Company of Fako Division, Cameroon. The applicant alleged that prior to his arrest, the fuel in his boat was pumped out and, on the intervention of a military colonel, his boat was re-fuelled. There was no apparent reason for his arrest, neither were any charges read to him at the time of the ar-

⁵⁹ Suit No HCF/0040/HB/09, unreported.

⁶⁰ The gendarmerie is a para-military police force operating mostly, but not exclusively, in rural areas.

rest. He was later taken to Cameroon and detained at the Gendarmerie Brigade in Limbe. Even at this time, he was not made aware of the reasons for his arrest and detention. While in detention, his boat was abandoned on the shores where it was looted.

The applicant requested to be released, on medical grounds, due to his deteriorating health. However, the respondent refused to grant that request. On 3 July 2009, the applicant applied to the state counsel in Limbe for release on bail.⁶¹ This process was again hindered by the refusal of the respondent to report to the state counsel for a bail hearing.

On 8 July, the applicant filed a motion on notice in the High Court of Buea for an order of *habeas corpus* under Section 584 of the CCPC⁶² for the determination of the legality of his detention. Pursuant to Section 585(3) of the CCPC, the High Court issued an order for the respondent to produce the applicant in court on 23 July, together with the documents authorising his arrest. This order was flouted by the respondent who failed to release the applicant or to produce him in court as ordered. On 4 August, upon hearing counsel for the applicant and the state counsel, the High Court judge ordered the immediate release of the detainee under Sections 585(4) and 586(2) of the CCPC. However, the respondent again refused to obey this order. The applicant was kept in detention until 20 August when he was released on bail. This belated release was clearly in violation of the court decision which had ordered his immediate and unconditional release.

The judge's decision ordering the immediate release of the applicant was well-founded in law. The applicant had been arrested, without a warrant, at a time when there was no apparent cause to suspect him of criminal activities. He was not made aware of the reason(s) for his arrest, neither were any charges brought against him when he was subsequently detained. The respondent was in breach of sections 30 - 31,⁶³ and 119⁶⁴ of the CCPC, which consequently ren-

⁶¹ See Section 224(1) of the CCPC which provides that any person lawfully remanded in custody may be granted bail. See also Section 225 which states that an application may be made to the judicial police officer, the state counsel, the examining magistrate or to any court seised of the matter.

⁶² And under Section 18(2) (b), *Judicial Organisation Ordinance*.

⁶³ Section 30 defines arrest as the apprehension of a person for the purpose of bringing him without delay to the competent authority. Section 31 provides that, except in the case of a felony or misdemeanor, an arresting officer must disclose his identity to the person being arrested and inform him of the reason for his arrest.

⁶⁴ Section 119 makes it mandatory for a suspect to be informed of the reasons for his detention. The section also requires the custodian to ask the suspect to provide any 'explanation' he (the suspect) deems relevant. It is not clear what the purpose of this requirement is. It may be inferred that this is a means of requesting him to provide information that is/or will be relevant to his defence.

dered the arrest and detention unlawful. Moreover, the respondent failed, in the first instance, to appear in court to advance reasons for his decision to arrest and detain the applicant, despite having been duly served a court order. And, in the second instance, he failed to immediately release the applicant pursuant to the High Court's order. The state counsel, who made an appearance in the 'interest of the State', in his submissions to the High Court, condemned the respondent for failing to comply with the court order twice. He described the respondent's attitude as, 'grossly contemptuous and smacks of unbridled arrogance towards the Judiciary'.⁶⁵

Habeas corpus flouted by the Executive

In Cameroon, it is common for members of the Executive (to which the gendarmerie belongs) to show contempt towards the Judiciary. As earlier stated, this is usually manifested in the defiance of court orders. A glaring example of Executive arrogance towards the Judiciary was exhibited in *Benjamin Itoe v Joseph Ncho*⁶⁶ where an administrative authority trespassed on the claimant's property, ransacked his home, confiscated and retained his property (a petrol tanker) and tried to escape liability by claiming to have acted in his capacity as a public official.⁶⁷ The Bamenda High Court issued an order for the release of the claimant's petrol tanker. This order, however, was defied by the administrative authority.⁶⁸

This defiance has even greater consequences in the area of securing the right to liberty which almost exclusively involves administrative authorities and security forces. Given that they are the State's representatives charged also with enforcement, a conduct undermining the image of the State must be deemed reprehensible and untenable. The implication for the Judiciary is the ensuing dent on its credibility and, by extension, its ability to protect human rights, but

⁶⁵ See, Suit No HCF/0040/HB/09 (unreported), at 3.

⁶⁶ Suit No BCA/1/81 (unreported).

⁶⁷ Cameroon has the system of administrative justice inherited from France which operates a separate system of justice for administrative authorities. A claim against an administrative authority who has acted in his administrative capacity must be brought in the administrative court (such as the Administrative Bench of the Supreme Court) and not an ordinary court. However, an action can be brought against him in the ordinary courts, in his personal capacity if he acts in excess of his authority as was in *Benjamin Itoe's* case.

⁶⁸ See *Innocent Bonu v Bakongo Simon* (1997) 1CCLR 142 where the orders of a state counsel were disobeyed by a police officer. See also *SDO v Shey & Oku Rural Radio Association* in which the Senior Divisional Officer failed to make appearances in court in defiance of a court order and persistently interfered with the activities of a radio station in defiance of a court order.

more importantly for detainees, is the continued violation of their human rights. The case of *Justice Nyoh Wakai & Ors v The People*⁶⁹ demonstrates the pitiable position of a detainee resulting from non-compliance with a court order. The case concerned an application for bail in the Bamenda High Court in the North-West region. The problems in this case originated from the arrest and detention of a large number of protesters (which included some of the applicants) reacting to the proclamation of the results of the 1992 presidential elections in Cameroon. A state of emergency was proclaimed in that region, which prompted massive violations of the right to liberty and security. Some of the catalogued violations against the applicants included arrests without warrants, night arrests, the issuing of post-dated warrants to legalise unlawful detentions and detentions beyond the four months limit imposed by the Emergency Law.⁷⁰ Some of the applicants were also arrested in different jurisdictions but brought to the North-West region where the emergency laws were applicable. The High Court considered these procedures highly irregular and a violation of human rights and, on those bases, granted bail. Yet, the Government, without appealing the decision, refused to release the applicants and, in further violation of their right to liberty, it instead transferred them to Kondengui Prison in Yaoundé, a different jurisdiction from Bamenda.⁷¹

Defiance of court orders, in relation to enforcement of the writ of *habeas corpus*, was a problem that undermined its effectiveness under Section 16(1)(c) of the 1972 Judicial Organisation Ordinance. That problem occurred in *Eteneng JT v The Governor of South West Province*,⁷² where the applicant was arrested and detained by the Governor of the South West Province⁷³ (an Executive authority). He made an application to the High Court for an order of *habeas corpus* under Section 16(1)(c) of the 1972 Judicial Organisation Ordinance, for the purpose of determining the legality of his detention. The High Court issued an order compelling the Governor to produce the applicant in court for the legality of his detention to be duly examined. The Governor did not attempt to conceal

⁶⁹ (1997) 1CCLR, 127.

⁷⁰ Law No 90/47 of 19/12/90.

⁷¹ Fombad C, 'Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?' 48 *Journal of African Law*, 2004, 79-80. It is ridiculous that the State, in response to the UN Human Rights Committee on the measures available to redress illegal detention in Cameroon, cites the *Nyoh Wakai* case, even though it had failed to comply with the Court's order. See *Consideration of Cameroon's Fourth Periodic Report*, 2009, CCPR/C/CMR/4, 92 at para 309.

⁷² (1998) 1CCLR 9. See also *Namondo Makake v Bernard O Bilai*, Suit No HCF/164/IR/04-05 (29 September 2005) unreported.

⁷³ As the region was then called.

his contempt for the Judiciary by emphatically refusing to be served by the bailiff appointed by the Court. Rather, in a characteristic manner, he failed to produce the applicant in court; neither did he make an appearance on the appointed day. The High Court ordered the immediate release of the applicant. In a similar situation, the decision of the Mvila High Court, ordering the immediate release of two unlawfully detained victims, was not respected.⁷⁴

The problem of disregard for court orders by the Executive is exacerbated by the fact that the courts have to rely on these same authorities to assist in the enforcement of their judgments. To enforce judgments or orders, bailiffs and process servers rely on the Executive.⁷⁵ As earlier seen, Executive officials, such as the Company Commander in the *DS Oyebowale* case, have shown little respect for the Judiciary and any orders ensuing from the courts. The Company Commander in this case claimed that they defied the court order because they were only answerable to the Governor of the South West region who set up a commission to investigate the applicant.⁷⁶ In spite of the Company Commander's unacceptable conduct, the *Procureur General* (the highest prosecuting authority in the region), who, by law, is the Company Commander's superior,⁷⁷ did not denounce their conduct or take measures to ensure compliance with the court order. Moreover, the conduct was not denounced by the Governor of the South West region, the highest executive authority in the region, to whom the respondent pledged allegiance.⁷⁸

The inability of the court to enforce its judgments and to check defiance from senior members of the Executive appears to encourage the junior authorities in their disregard for court decisions. The regrettable consequence is the erosion of confidence in the judicial system and, more particularly, in the effectiveness of the writ of habeas corpus. It may be asked, at this point, why this unbridled arrogance towards the Judiciary? It is submitted that the answer lies in the absence of real judicial power in Cameroon.

⁷⁴ Judgment No 19/CIV/LI/TGI of 19 July 2002 on the arrest and detention of Ngoa J Bienvenue and Tachoula Jean in the Ebolowa prison. Reported in *Consideration of Cameroon's Fourth Periodic Report*, 2009, 92 at para 309.

⁷⁵ Anyangwe C, *The magistracy and the bar in Cameroon*, CEPER, Yaoundé, 1989, 35.

⁷⁶ The Post (web edition) Issue No 01079, 24 August 2009.

⁷⁷ Section 78(3) of the CCPC states that in each jurisdiction of the Court of Appeal, the judicial police shall be under the control of the Attorney General. See also Section 81 which makes gendarmes judicial police agents.

⁷⁸ The Post (web edition) Issue No 01079, 24 August 2009.

Habeas corpus and bail distinguished

One may fall into the temptation of considering habeas corpus as bail especially as the line, dividing the two concepts, is, indeed, very fine.⁷⁹ It is true that under both circumstances, the accused is in detention. But, unlike in bail where the accused may justifiably be under custody awaiting trial, the purpose of a writ of habeas corpus is to release a detainee from illegal detention. Before granting the remedy, therefore, the matter must have been examined on its merits. There should be no problem where it is the High Court judge who hears an application for bail. But one wonders how the state counsel, not being a member of the bench, can order the release of detainees under Section 137(2) of the CCPC. The fact that an application for habeas corpus, under certain provisions of the CCPC, has to be supported by an affidavit, which shall precisely state a summary of the facts constituting the alleged illegality,⁸⁰ lays credence to the fact that the application has to be examined on the merits. The decision to release the detainee is, therefore, tantamount to a discharge and an acquittal. This is why Section 588 of the CCPC is to the effect that the remedy of habeas corpus shall also be available to any person who has been acquitted, discharged or released by an ordinary court of law or by a special tribunal, but illegally continues to be in detention.

However, under Section 137(2) of the CCPC, the state counsel releases detainees on the basis of sub-section (1) of the section, which gives them the prerogatives to direct and control the operations of the officers and agents of the judicial police. They thereby have the power to release persons they think ought not to be in detention.

One should not get confused with the attributions of an examining magistrate vis-à-vis bail and habeas corpus. Some people may fall into this temptation when they read the provisions of Section 221(2) of the CCPC:

Upon expiry of the period of validity of the warrant, the examining magistrate shall, under pain of disciplinary action against him, order the immediate release on bail of the defendant, unless he is detained for other reasons.

As earlier pointed out, the phrase, ‘order the immediate release on bail of the defendant’, means that the examining magistrate gives the defendant liberty, by granting them bail, but not that they grant them the remedy of habeas corpus.

⁷⁹ See the *Nyoh Wakai* case.

⁸⁰ Section 585 (1) (c), CCPC.

An accused, who has been granted bail, is still to be tried because their offence subsists. Where they have been tried, convicted and sentenced, they may also be granted bail but on condition that they go on appeal.⁸¹ Their release is provisional as they have to enter appearance when and where demanded in order to be justified by law. The surety taken or amount of money deposited with judicial authorities acts as a guarantee to the State should the accused jump bail.

While habeas corpus may be granted only by a High Court judge or a state counsel, an application for bail may be made, as the case may be, to the judicial police officer, to the state counsel, to the examining magistrate, or to the court seised of the matter.⁸²

In spite of the legal nuance mentioned above, habeas corpus and bail are lofty concepts whose express incorporation in the uniform code would go a long way to ensure the respect of human rights in the criminal trial process.

Conclusion

So far, a diligent attempt has been made to examine habeas corpus and bail in this contribution. From the provisions of the common code, it has been shown that the CCPC has not only taken these concepts on board, but has also widened and deepened their scope, with a view to obtaining, as far as possible, the respect for human rights and the rule of law in order to ensure a more functional criminal justice system in Cameroon. Despite the limitations raised above, particularly in the first part of this chapter, on the misuse of the remedies of habeas corpus and bail by some overzealous authorities, conscious efforts are being made to ensure that habeas corpus and bail are properly applied so that the CCPC can attain its full potential.

⁸¹ See *Ngufor Alexander v The People* (2001) 2 CCLR 219,220.

⁸² Sections 225, 584 (1) and 137(2), CCPC. For further details on habeas corpus, see John D & Sone E, 'Habeas Corpus under the Cameroon Criminal Procedure Code' in Sone E (ed) *Readings in the Cameroon Criminal Procedure Code*, Presses Universitaires d'Afrique, Yaoundé, 2007, 151-177.