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A NEW CHAPTER FOR HUMAN RIGHTS IN ZIMBABWE?

By Carmel Rickard

A KEY section of one of Zimbabwe's most used – and most despised – anti-human rights laws, the Public Order and Security Act (Posa), has been declared unconstitutional by eight senior judges sitting as that country's constitutional court. Among others, the section allowed for repeated month-long bans on all public demonstrations in any areas. The judgment found the section effectively gave the authorities power to nullify two important fundamental rights – to demonstrate and to petition – "completely and perpetually". The outcome has been widely welcomed, among others by Amnesty International.

Read judgment here [2]

SECTION 27 of Zimbabwe's Public Order and Security Act [3] – a law regarded with fear and hatred by the country's human rights community – was challenged in the high court by a number of affected organisations.

The section allows the authorities to ban demonstrations for a month at a time, in any area, and to repeat the ban indefinitely.

When the High Court upheld the section, the organisations appealed to the supreme court. In the process, during July 2017, the supreme court referred the central question – whether s 27 was constitutional – to eight senior judges sitting as a constitutional court. Now, 15 months later, that court has found the section unconstitutional as it violates s 59 of the country's supreme law: "Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully".

Two references to the high court form an interesting sub-text of the judgment. In the first, Judge Rita Makarau, writing for a unanimous bench, approves a remark by the high court. She said she was in "full agreement" with its observation that the "attainment of the right to demonstrate and present petitions was among those civil liberties for which the war of liberation in this country was waged". Her approval of this reference to the country's liberation history is significant, obviously giving further legitimacy to the rights truncated by s 27.

The other reference, a criticism of the high court, is even more significant. The court had found that s 27 imposed greater restrictions than were necessary to achieve their purpose. Despite that finding, the high court still held that the section was constitutional. That cannot be, said Judge Makarau. "Once having found (that the section went further than necessary) the high court ought to have found the provisions unconstitutional without qualification."

Readers who have seen other judicial decisions protecting over-broad legislation may well hope that her colleagues will take note: when a statutory provision limiting a fundamental right is overbroad it should be headed for the bin marked "unconstitutional".

She also made clear that demonstrations and protests were a legitimate and vivid way for the public to make its views known. Not always purely political, mass action sometimes concerned issues such as the environment and the rights of women and children and could have a lasting impact. Mass action had become an "acceptable platform of public engagement and a medium of communication … in open societies based on justice and freedom."

Clearly, s 27 infringed constitutional rights to demonstrate and petition and during the imposition of a ban under this section "the rights are completely negated". All demonstrations would be banned, regardless of the purpose or size.

Was this “limitation” justified? Was s 27 “fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”? In answering the question, a court had to remember that a limitation would not be constitutional if it amounted to the destruction of the right concerned, she said.

Section 27 imposed a blanket ban, a “dragnet”; while it operated both rights were “completely nullified”. It even denied these rights “in advance” condemning all demonstrations before their purpose or nature was known. There was no scope for limiting or prohibiting demonstrations only where appropriate. During the ban period, all demonstrations were condemned as “unworthy of protection”.

The government’s legal team conceded that the limitation was “excessive” and “disproportionate”, a concession that was “well made”, she said: it exceeded its purpose and as the high court found, imposed greater restrictions than necessary to achieve its purpose.

The judge found another feature of the section “disturbing”: it had no time frame or limitation on how often it could be invoked. Thus a “despotic regulating authority” could lawfully invoke these powers “without end”, publishing notices under the section for a month at a time, back to back, and nullify the rights “not only completely but perpetually”.

The court thus declared the section constitutionally invalid, but suspended the declaration for six months so that changes could be made to the law if the government wished.

What is the upshot of the decision? The two sides bear their own legal costs, and the original case returns to the supreme court to finalise the appeal in which the constitutional question arose. In theory, the government may continue to use the section for another six months while, again in theory, it decides whether and how to rescue its demonstration-supervision powers from invalidity. But the most significant part of this intriguing decision is the rare glimpse it gives of what a truly independent court may be able to achieve for constitutional democracy – even in Zimbabwe.

The judgment was immediately welcomed by, among others, Amnesty International [4]. Jessica Pwiti, executive director of Amnesty in Zimbabwe, said Posa was a 2002 version of the colonial Rhodesian Law and Order Act, used to suppress human rights before independence, and now used to prevent and disperse demonstrations. The section was “repressive” and had been used for far too long to systematically “harass, arbitrarily detain and torture”. The new decision was a “landmark” that could open “a new chapter for human rights in Zimbabwe”.

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