

CONSTITUTION WATCH 7/2019

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ID Checks at Roadblocks – Are they Legal?

For several days after the MDC-A attempted to hold a demonstration in Harare last month, the police mounted roadblocks along routes leading into the city centre [*the CBD*]. They stopped and searched commuter omnibuses and other vehicles and forced passengers without identity documents to disembark, leaving them to walk the rest of their journey. A Member of Parliament raised the issue in the National Assembly, calling the conduct of the Police “unlawful”, and received the following response from the Minister of Justice, Legal and Parliamentary Affairs:

“Where there is a threat to the peaceful co-existence of members of the society, the police will use every necessary means that they have to ensure that there is peace, and that includes having roadblocks, ensuring that everyone who is in a commuter omnibus gets out and they search to ensure that there are no dangerous weapons that will get into the city centre. So that is standard practice.”

Perhaps emboldened by the Minister’s support, the Police adopted the same tactics late last month when the MDC-A celebrated their 20th anniversary in Harare. Again, they set up roadblocks, searched vehicles and demanded IDs from passengers.

The Minister was correct in saying that the Police are entitled to use “every necessary means that they have” to preserve peace, i.e. to prevent violent disorder. But the “necessary means that they have” are those the law gives them: the Police must not act unlawfully, and when the Minister went on to suggest that their conduct was lawful, he was with respect wrong. In fact, the conduct of the Police violated the Constitution and the law in several respects.

Freedom of Movement

Section 66(2)(a) of the Constitution provides that:

“Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to ... move freely within Zimbabwe.”

As long ago as 1997 our Supreme Court ruled that arbitrarily stopping either people or vehicles infringes the constitutional right to freedom of movement, though the court held that the random stopping of vehicles to check for vehicle defects could be regarded as a justifiable limitation if it was done for the purpose of ensuring safety on the roads.

Section 72(1)(a)(i) of the Road Traffic Act authorises the Police to stop vehicles, but they may do so only for the purposes specified in the Act, namely to check the vehicles and their equipment for compliance with the law and to ensure the vehicles are not overloaded. This provision is probably

constitutional, but there is no suggestion that the Police were checking for vehicle defects when they stopped vehicles and required passengers to identify themselves. So the section cannot be used to justify the conduct of the Police. A statute which the Police might more plausibly rely on for their actions is the Public Order and Security Act [POSA] — which is still in force, not yet having been replaced by the Maintenance of Peace and Order Bill [MOPO]. Section 34(2) of POSA states that the Police can set up roadblocks to stop and search vehicles and everyone in them, “in circumstances where there are reasonable grounds for believing that the search is in the interests of public safety, public order or public health”. Another section of POSA, section 32(4)(d), permits the Police to require anyone stopped at a police roadblock to produce an identity document and, if they do not, to detain them until their identity is established. These two sections of POSA, far-reaching as they seem to be, probably do not authorise the Police to stop and search all vehicles and to prevent passengers without IDs from continuing their journey. Section 86 of the Constitution allows fundamental freedoms such as freedom of movement to be limited by a law which is “fair, reasonable, necessary and justifiable in a democratic society”, but the law cannot go so far as to remove the freedom altogether. By ordering passengers without IDs to disembark from their vehicles the Police were denying many if not all of those passengers their right to travel to the Harare CBD. That was not fair, reasonable, necessary or justifiable in a democratic society.

In any event, section 32(4)(d) of POSA does not permit the Police to order people without IDs to get out of their vehicles and proceed for the rest of their journeys on foot. No law allows them to do that.

The action by the Police was clearly illegal.

The Right to Privacy

Another ground for regarding the Police action as illegal is that it infringed peoples’ right to privacy guaranteed by section 57 of the Constitution. This right includes the right not to have one’s home, premises or property (including a vehicle) entered or searched without permission. Zimbabwe, like other countries, accepts that there can be limitations on this right, though in our case any limitation must be “fair, reasonable, necessary and justifiable in a democratic society”.

We noted above that freedom of movement can be limited by a law which allows vehicles to be stopped so that they can be checked for vehicle defects and to ensure that their drivers are licensed to drive them. The right to privacy can be limited for the same purpose, to search vehicles in order to see that they are roadworthy – for example, to check that they are carrying a spare tyre. The right to privacy can also be limited to allow the Police to search premises and vehicles if there are reasonable grounds for believing that the search will yield evidence of a crime — the Criminal Procedure and Evidence Act [CP&E

Act] makes provision for this. But neither the Constitution nor the CP&E Act allows the Police to stop and search vehicles on the off-chance that one or two of them may be carrying something that may be connected with a crime: the Police must have a reasonable and prior ground for believing that an item of evidence concerning the commission of a known offence is likely to be in the particular vehicle they want to search. The CP&E Act certainly does not allow random searches, and section 34(2) of POSA, if it is interpreted to comply with the Constitution – and the Constitution is supreme – must be construed restrictively so as not to permit the Police to stop and search at random any vehicle and person at a roadblock.

Conclusion

Under section 219(1)(d) of the Constitution the Police are responsible for maintaining law and order in Zimbabwe. In carrying out that responsibility they must comply with the law because they, like all other institutions of government, are subject to the Constitution and the law. They must remember that their responsibility is not just to maintain order: it is to maintain law and order.

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