POSA and the Right to Freedom of Assembly[1]

Submissions by Zimbabwe Lawyers for Human Rights to the Parliamentary Portfolio Committee on Home Affairs and Defence

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The Public Order and Security Act [*Chapter 11:17*] (hereinafter referred to as "POSA"), promulgated in 2002, has severely curtailed the right to free assembly that is articulated in various established human rights instruments to which Zimbabwe is, of its own free will, a State Party. These include the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR), amongst others.

This corrosive legislation has also eroded the content of the right to freedom of assembly provided for in section 21(1) of the Constitution of Zimbabwe, as well as the right to freedom of movement, association and expression, amongst other fundamental rights.

Fundamental rights can be sparingly limited, on good and reasonable cause, where this is in the interests of (a) preserving public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights or freedoms of other persons; or (c) where exercising one's fundamental rights imposes restrictions upon public officers in the execution of their constitutional duties.[2]

Whilst it is accepted that the right to assembly can be limited, this must only be done in exceptional circumstances which are ***reasonably justifiable in a democratic society***. Any limitation must therefore be done transparently, and in a manner which respects the principle of separation of powers.

The current limitations to fundamental rights which are imposed by provisions of POSA and the manner in which such provisions and powers have been implemented in the past have clearly shown that the legislation, as it currently exists, does not protect the fundamental rights and interests highlighted above; neither has its implementation in practice complied with permissible limitations provided in the Constitution of Zimbabwe or the regional and international treaties to which Zimbabwe is bound.

Rather, this legislation, which we must never forget replaced and actually tightened the Law and Order (Maintenance) Act which was imposed on the majority population by the racist and illegal minority Smith regime, has been used since 2002 to suppress legitimate political and social dissent and criticism, as well as to unconstitutionally and arbitrarily restrict the exercise by human rights defenders, legitimate political activists, and the general public, of their fundamental rights to move, gather, receive information and speak out – critical aspects of exercising their right to participate in the governance of their country.

One only has to have reference to statistics of POSA use since it came into force and effect for the picture to become clear:

STATISTICS ON THE USE OF POSA AGAINST HUMAN RIGHTS DEFENDERS

[1] (c) reserved - Zimbabwe Lawyers for Human Rights (2010)
[2] Declaration of Rights, Constitution of Zimbabwe

Notes:

1. *These statistics are drawn from the Zimbabwe Lawyers for Human Rights (ZLHR) Human Rights Defenders Project, which was established in 2003.*
2. *The cases are from the entire country, and not Harare-specific.*
3. *The information is drawn from police and court records, as well as the reports of ZLHR project lawyers and ZLHR members who handled the cases.*
4. *These cases are not exhaustive, as some HRDs may have sought legal representation elsewhere, or may not have reported the matters or been represented in court. This is particularly the case in outlying and remote areas.*
5. *In many instances, HRDs who were arrested during the course of the year were released without charge. In a number of these cases, however, they were initially advised by the police upon arrest that POSA was being utilised.*
6. *From 2008, the use of POSA declined markedly. This is due to the advent of the Criminal Law (Codification and Reform) Act, which duplicates entire sections of POSA. In the last few weeks, police have, in some provinces, reverted to using POSA rather than the Criminal Code (as seen in the arrests of NANGO and ZESN members). There is need, therefore, to look at the 2 Acts together when considering reform or repeal, as both are problematic and continue to be used interchangeably.*

2003

- There were 55 cases involving the arrest and detention of Human Rights Defenders (HRDs), involving a total of 822 HRDs
- Of the 822 HRDs arrested, 274 individuals were charged under POSA
- None of them were successfully prosecuted by the State

2004

- The total figures of HRDs arrested are still being retrieved. However a total of 155 HRDs were charged under POSA
- None of them were successfully prosecuted by the State

2005

- A total of 547 HRDs were arrested during this year
- 52 of the HRDs were charged under POSA
- None of them were successfully prosecuted by the State

2006

- A total of 577 HRDs were arrested during the year
- 154 of the HRDs were released without charge
- Of these, 65 HRDs were charged under POSA

- None of them were successfully prosecuted by the State

2007

- There were 96 cases of arrest and detention of HRDs, involving a total of 1,127 individuals.
- POSA was used in just 5 instances, owing to the advent of the Criminal Law (Codification and Reform) Act, which duplicated POSA in entire sections
- As such, the Code was used in 24 instances of arrest and detention
- None of the HRDs were successfully prosecuted by the state – either under POSA or the Criminal Code

2008

- There were 1,446 instances of arrest and detention of HRDs
- Of these, 271 were charged with participating in unlawful gatherings and were charged under either POSA or the Criminal Code
- None of the cases finalised have been successfully prosecuted by the State

2009

- At least 125 people have so far been arrested and accused of participating in gatherings and charged under either POSA or various provisions of the Criminal Code
- None of the cases thus far have been successfully prosecuted by the State, save for one instance in which the HRDs paid admission of guilt fines. This was to secure their release and avoid being detained in inhuman and degrading conditions in police cells. The admission of guilt fines are now being challenged by the affected HRDs in the Magistrates' Court

Zimbabwe Lawyers for Human Rights has consistently opposed the need to have such far-reaching legislation governing the regulation of public gatherings, meetings and demonstrations.

The organisation would have preferred to see the wholesale repeal of the legislation and, if necessary, the introduction of a new, much tighter and more limited statute which cannot be abused.

POSA represents the existence of repressive legislation which has been selectively applied by over-zealous authorities to suppress legitimate public dissent, and to limit fundamental freedoms of assembly, association, movement and expression which are the life-blood of any true and functional democracy. However, in the absence of the will by legislators to repeal, despite the will of the people, ZLHR will support incremental positive changes,

such as the current Private Member's Bill, where the intention is to limit, in any respect, such repressive legislation, whilst continuing to push for full repeal in the future.

COMMENTARY ON PROPOSED AMENDMENTS TO POSA

Section 2: Amendment of definitions of a public demonstration, public meeting

There is a need to have a clear definition of a public demonstration and a public meeting for the purposes of application of POSA. Although the number of individuals constituting a public meeting remains at 15, the definition of a public demonstration and a public meeting for the purposes of application of POSA is much clearer. What is further required, however, is to ensure that relevant law enforcement and judicial officials are aware of the numbers and definition, as in the past this provision has been selectively applied despite the fact that POSA stipulates that when 15 people are gathered this constitutes a public gathering. Court cases reveal instances in which even 2 people who are walking in the street during a peaceful gathering (to which they are not attached) have been arrested and accused of a participating in an unsanctioned public demonstration (see: *State vs Tawanda Zhuwarara and 9 Others*).

Section 3: Protection of freedom of assembly and association

This is a welcome proposed addition which is supported, in that it reminds law enforcement agents of their constitutional obligations and the constitutional rights of individuals and makes it obligatory for such agents to undergo much-needed training. It would be even more welcome if the constitutional freedoms of movement and expression were also to be included herein.

Section 25: Notice of processions, public demonstrations and public meetings

This amendment proposes to reduce the requirement to endeavour to provide notice of a public procession, demonstration or meeting from 7 days to 4 clear days. The notice must be provided to either the regulating authority for the area, or a police officer in charge of a police station near where the proposed meeting is to take place. This will assist in facilitating the requirement to give notice which has, in the past, posed serious challenges to convenors of such activities.

The current 7 days' notice period is unduly long; reducing the time period to 4 clear days will enhance the exercise of fundamental rights, reduce unnecessary restrictions, and will not defeat the purpose of the Act.

In terms of POSA, the convenor is obliged to supply a substantial amount of information in his or her written notice, including the purpose of the gathering, when and where it will be held, the anticipated number of participants, the names and address of the convenors, and the proposed number of marshals and, if possible, their names.[3] It is felt that the amount of information which must be provided remains unduly detailed and harsh, and can be used to intimidate or harass individuals associated with the activity. The proposed amendments should go further and restrict the amount of information – providing the

[3] Section 23(2) & 25(2) of POSA as amended.

name and business address and/or contact telephone number of the convenor/s should suffice.

This provision has, in the past, been misinterpreted by the police, who have consistently interpreted the requirement to give notice as an application for permission to conduct the public gathering. The powers have been wrongly, arbitrarily and selectively used against human rights defenders, civil society organisations and legitimate political activists to restrict or ban their activities. For this reason, the proposed explanation/clarification provided in section 25(5) is required and should be accepted.

Section 26: Vesting of powers to ban gatherings in the judiciary

Presently, POSA provides that the regulating authority (the police) cannot unilaterally decide to ban a meeting or demonstration on the ground that they believe that such gathering will result in public disorder. They must first receive credible information on oath that a proposed gathering will result in serious disruption or traffic, injury to participants or others, extensive damage to property or other public disorder.

This provision has, however, been ignored completely as if it does not even exist. The regulating authority, upon receipt of a Notice, takes it as an application, unilaterally and without providing reasons bans it, and sends communication to the convenor (sometimes the "decision" is not even transmitted to the convenors). This is so even where the police have not received credible information on oath. They have simply proceeded to ban or ruthlessly disrupt and disband gatherings without just cause, and with ever-increasing impunity.

The police have also arbitrarily issued bans of political rallies for periods varying from 1 to 3 months, although legal challenges against such bans and decisions have always succeeded (although after the disruption); this phenomenon is particularly common during election periods.

Experiences in 2007

- In 2007 the police banned rallies for 3 months after the unfortunate events of 11 March 2007, when many political activists and civic representatives were brutally assaulted, tortured, arrested, and detained by various regulating authorities after attempting to attend a Prayer Meeting organised by the Save Zimbabwe Campaign. This ban was challenged in the case of *MDC v Chief Superintendent Jangara and Others (Ref:* 777/07).
- The police later conceded that the ban went beyond the scope of their authority under POSA and was illegal during the hearing of an appeal in the matter of *MDC v Commissioner of Police and Others*. The appeal was filed against several Prohibition Orders in some Harare districts by the major opposition party (at the time) against the Minister of Home Affairs as stipulated by the Act. This appeal challenged the ban of rallies by the police in respect of Mbare, Chitungwiza, Harare South and Harare Central districts. At the hearing, the legal representatives for the Respondents (the Commissioner of Police and Others in this case), conceded that prohibition orders that banned rallies in Harare South and Mbare district were void. The legal representative for the Respondents withdrew the prohibition orders at the hearing. They further submitted that the appellant (MDC) and/or any other non-political organisations were free to hold rallies in these two areas. The parties in the *MDC v Commissioner* case agreed that the prohibition orders in the remaining districts, namely Harare Central and Chitungwiza had not been properly gazetted as required by POSA.

- It can thus be inferred that the actions of the police were illegal *per se* as they had not followed the provisions of POSA.

Experience in 2008

- January 2008- The police unilaterally banned "Freedom Marches" organised by the then-opposition MDC after conducting meetings with conveners where they attempted to defeat the cause of the march by altering the route (see *MDC v The Minister of Home Affairs and Others - Ref*: HH 142/2008). In the past the banning of rallies was done without following the provisions of POSA that require publication of a ban in a newspaper in the area where the convener is likely to conduct the gathering. The MDC (Tsvangirai) had complained that in recent weeks the police had banned all rallies in Masvingo and that armed riot police broke up one of their rallies in Kadoma. The courts held that such "bans" were unlawful.
- June 2008 - In order to prevent the police from illegally disrupting rallies the High Court was approached on a number of occasions. In the case o*f MDC v Commissioner General and others (Ref: HH* 3262/08) a court order was issued by the High Court compelling the police not to disrupt a rally at an open space in Harare. On 21 June, despite this court order, armed ZANU-PF youths and militias sealed off the ground in violation of the provisions of POSA and the court order. The police failed to enforce provisions of POSA in this matter.
- August 2008 – The Crisis Coalition Annual General Meeting which was taking place at the Cresta Oasis Hotel in Harare was unceremoniously disbanded by the police.
- In *MDC v Minister of Home affairs and others (Ref: HH* 2950/08) the then-opposition party wrote a letter to the police to notify them of their run-off campaign rallies to be conducted on 8 June 2008 in Glen Norah, Mufakose, Kambuzuma and Chitungwiza. The police arbitrarily prohibited the rallies. The main reason for the prohibition was the pending investigations to threats of assassinating the MDC leadership and as experts in security the police further advised the MDC that rallies would increase the risk of the assassination. The court allowed the rallies as scheduled and dismissed the arguments of the police. Cognisant of the conduct of the police of disrupting rallies, High Court judge, Justice Chitakunye further held that the police were prohibited from disrupting the rally.
- When notice has been given police have prohibited rallies or gatherings on spurious grounds such as lack of manpower. This was the case in *MDC v Ministers of Home Affairs and Others (Ref: HH* 2828/08*); MDC v Minister of Home Affairs and Others (Ref: 3125/08); and ZCTU v Minister of Home Affairs and Others (Ref: HH 2477/08*). Notification about pending gatherings was duly sent to the police. In response the police indicated, that they did not have enough manpower. The court indicated that the applicants could proceed and provide their own security in the form of marshals.

These examples are clear evidence of the police over-reaching their powers under POSA to unnecessarily restrict and prevent public gatherings, and thus violate constitutionally protected rights. The practice also usurps the powers of the judiciary, which is and should always be the "moderator" in such matters. The judiciary, as an impartial moderator, has the responsibility to ensure that any action is taken in accordance with the law, transparently, and without arbitrariness. The proposed amendments seek to vest such powers in the correct authority and must be supported. The police must always show just cause as to why a public gathering should be prohibited.

Where a prohibition occurs, the convenor is now also given the opportunity to appeal against this decision to a Magistrates' Court, which is the correct procedure in terms of proper administration of justice. The requirement to allow an activity to proceed even where an appeal is lodged by the police is satisfactory, as the police often use this appeal procedure as a means of arbitrarily issuing appeals merely to prevent gatherings and not because there are good grounds for appeal.

Section 27: Temporary prohibitions of public demonstrations within police district

This provision deals with cases in which a Prohibition Order can be issued for a period of up to one month. It is submitted that this proposed provision seeks to address issues relating to upholding public order and safety. However, there is need to interrogate the provisions further – the fact that a magistrate can make such an order where notice is not provided to those who may be affected to come and make arguments against the Prohibition Order is problematic. The phrase "whenever it is practicable to do so" in relation to giving notice of the intention to consider such an order must be removed – a one-month ban is a serious affront to the freedoms of assembly, association, movement and expression, and there is need to hear arguments from both sides. This phraseology can be abused.

In addition, the appeal should not be heard "as expeditiously as possible" – there should be clear time-lines, or else there will be undue delays in the finalisation of the matter in the High Court, which is not reasonably justifiable where a decision impacts on a fundamental constitutional right.

Section 27A: Gatherings in vicinity of Parliament, courts and protected places

Section 27A(1)(a) and (b) of POSA currently bar demonstrations 20 metres from the vicinity of Parliament, 100 metres of the vicinity of the Supreme Court or the High Court, and 100 metres of the vicinity of any protected area in terms of the Protected Areas and Places Act. These provisions are unduly restrictive, and vague — it is difficult to understand what is meant by a specified distance "of the vicinity of" the place concerned as this radius can be expanded at the discretion of the regulating authority. It is also unclear how authority for such gatherings is to be obtained from the Speaker or the Chief Justice who are, in any event, unlikely to readily agree to such gatherings where the purpose will be presentation of petitions relating to the separation of powers, breakdown of the rule of law, and criticism of the legislature and/or judiciary for failure to take action to protect fundamental rights and freedoms.

In the past, as a way of articulating the ever-deteriorating human rights and rule of law environment in the country it was legal to hand over petitions to the Speaker of Parliament and the Chief Justice of Zimbabwe. The POSA provisions – which were added in the 2008 amendment – made this practice unlawful without obtaining prior approval. It has always been extremely difficult and unduly harsh to obtain such permission to approach areas which essentially as "for the people" – especially Parliament (where individuals elected by the people work) and the courts (which exist to uphold and protect the rights of all people).

It is the intention of this Bill to repeal this section in POSA. This intention is wholeheartedly supported. In the past, before such provisions existed, there was never a breakdown of law and order outside these public buildings, and it is felt that the provisions which exist to regulate gatherings are sufficient, without the need to obtain approval from the Speaker or the judges beforehand, which unduly restricts fundamental rights and freedoms.

Section 32: Persons to carry identity documents

The requirement in POSA that everyone must carry an identity document was challenged in the case of *Bryant Elliot vs Commissioner of Police* and was declared to be unconstitutional. As such, the proposal to repeal this section is constitutionally correct and is supported.