Australian court finds anti-democratic World Youth Day "annoyance" law invalid

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The full bench of the Australian Federal Court held on July 15 that a law imposed by the New South Wales state Labor government, outlawing conduct that "causes annoyance" to Catholic pilgrims during World Youth Day (WYD) in Sydney, was invalid.

As with last September's Asia Pacific Economic Cooperation (APEC) summit in Sydney, Premier Morris Iemma's government utilised WYD to enact police-state laws. The *World Youth Day Act 2006*, together with the *World Youth Day Regulation 2008*, gave the WYD "Co-ordination Authority," operating through the NSW Police, State Emergency Services and NSW Rural Fire Services, the power to criminalise conduct from July 1 through to July 31, well beyond the period of WYD activities.

Clause 7 of the regulations gave the authority the power to direct anyone in a WYD "declared area" to cease "conduct" that was "a risk to the safety of others", "causes annoyance" or "inconvenience" to participants in a "WYD event" or "obstructs" such an event. Refusal to comply without "reasonable excuse" became a criminal offence, with fines of up to $5,500.

The laws operate in over 600 locations throughout Sydney, including major public areas such as the Opera House, Darling Harbour, the Domain, the University of Sydney and the Art Gallery of New South Wales, as well as "transport sites," including railway stations, such as Central.

The WYD Act also prohibits anyone from "selling" or "distributing" prescribed articles in an "Authority controlled area" without the authority's approval. Areas include a "transport facility" or a WYD venue or facility, or any part of a "public place" within 500 metres of such a location. The laws therefore cover a large portion of the city centre. The prescribed items include "items of apparel", for example T-shirts, and "giftware", such as button badges and stickers, and the penalties range up to $5,000.

Rachel Evans and Amber Pike, members of the protest organisation "NoToPope Coalition" challenged a portion of the laws. The group opposes the policies of the Catholic Church on a range of issues, and according to the Federal Court judgment, plans to discuss questions such as Catholic Church policy on homosexuality, contraception and abortion with WYD pilgrims at events. They will also hand out condoms and leaflets and speak through megaphones to express their political views.

Supported by the NSW Council for Civil Liberties, the applicants firstly argued that the laws breached the Australian constitution. Unlike in the United States, the constitution contains no Bill of Rights guaranteeing individual freedoms. However, courts have recognised an extremely limited "implied right" to freedom of political communication, particularly related to making informed electoral choices. The NoToPope Coalition said the regulations, by criminalising "annoying" and "inconvenient" conduct, enabled the authority to suppress discussion of the policies of the Catholic Church, and the state and federal governments. They also argued that the Act potentially prevented the distribution or sale of items that had a political content.

In the alternative, the applicants said the laws were invalid on administrative law grounds, because the regulations exceeded the powers of the Act. While the Act allowed the executive to make regulations to "give effect to" the Act, it did not specifically authorise measures outlawing causing "annoyance" or "inconvenience".

In a unanimous judgment, Acting Chief Justice French and Justices Branson and Stone invalidated only the "annoyance" provision of the regulations. The judges refused to rule on the constitutional issues, stating that if the regulation was not authorised by the Act, it was not valid law, and "the question of constitutional validity falls away".

The Act allowed the executive to make regulations with respect to "the conduct of the public" on WYD events and facilities, but provided no definition of "conduct," potentially allowing the executive to criminalise all forms of human behaviour, including speech and communication. But applying a traditional common law principle, the court said parliament would not infringe "the fundamental freedom of speech" without "expressing its intention with irresistible

clearness".

Furthermore, the notion of annoying conduct was too subjective and prone to idiosyncratic reactions to be enforced. The court defined "annoyance" as resulting in WYD participants being "ruffled, troubled, vexed, disturbed, displeased or slightly irritated". As the regulations stood, police and other officials could employ their own individual assessments of whether a Catholic pilgrim was subjectively annoyed.

By contrast, however, the court ruled that the prohibition of "inconvenience" was valid because the term had an objective content, defined as "harm, injury, mischief or trouble". Such behaviour could arise where protestors "by their locations or actions hinder or obstruct the movement of participants" or were "so loud" as to "impair communications between groups of participants and officials".

On the distribution and sale of goods during WYD, the court also carefully avoided ruling on the constitutional issue. It held that virtually all the items that the NoToPope coalition plan to distribute, such as "button badges" and "stickers", did not fall within the class of WYD souvenirs, goods and merchandise. Since the provisions did not prevent the applicants "from doing the things they want to do," no constitutional question arose.

To some extent, the anti-democratic impunity with which the Iemma government sought to operate was exposed at trial. Evidence submitted by the NSW Solicitor General showed the government's official list of WYD "events" included such vague phrases as "various locations" and "various Catholic dioceses" in Sydney. Some scheduled event times were said to be "all day". The government only produced the list after the applicants requested it. That is, the government passed laws enabling the WYD Authority to fine people $5,500, without even setting out exactly where and when the laws would operate. Presumably, the police would simply use their discretion.

Evans hailed the outcome as a "major victory for the protest movement". According to the *Sydney Morning Herald*, Greens MP Sylvia Hale saluted the court for upholding the "basic rights of the citizens of NSW" against the "incompetence and excess" of the state government.

The court's ruling is undoubtedly a political setback for the Iemma government, and exposed its blatant attempt to use WYD as a pretext to greatly expand police powers. However, the decision should not be interpreted as a landmark victory for fundamental democratic rights. The judges relied on a narrow technicality, which can easily be overcome. Regulations criminalising "annoying" conduct can be made in the future, so long as the legislation expresses this intent clearly.

Indeed, the judgment underscored the extent to which the Iemma government has already extended the reach of broad police powers into everyday life. The court stated that the "general criminal laws of the State" regulating "disorderly and offensive conduct" could be invoked for WYD if required. These measures have been massively expanded in recent years, under the banner of the "war on terror", after the racial Cronulla riots in 2005, and most recently, during and after the APEC summit.

Iemma said the government would not appeal against the court's decision, saying it would have negligible impact on police enforcement powers, allowing the government to achieve the "same objective" of preventing protestors "disrupting the pilgrims or the events". Police can still impose a $5,500 fine for causing "inconvenience" to a WYD participant, even if such conduct is not dangerous.

The court's decision should be viewed in the context of widespread hostility to WYD, the Catholic Church, the Iemma government, and the constant expansion of police powers at the state and federal level.

Ean Higgins commented in the *Australian* on July 5 that hostility to the new laws had coalesced in growing interest in the NoToPope Coalition, and around the broader democratic issue of freedom of speech. Jesuit priest Frank Brennan said the laws "simply provided a lightning rod conductor for all those wanting to agitate against WYD," while NSW Opposition justice spokesman Greg Smith said the laws "did more to annoy people and provoke rebellion than anything else".

The court's ruling was aimed at defusing this situation. The judges elected to rule on the laws before anyone had been actually charged with a criminal offence, a scenario that could well have led to broader political radicalisation. Their decision, handed down on the first official day of the WYD calendar, gave the appearance of reining in the Iemma government, while leaving the bulk of the new laws untouched.