THE CONSTITUTIONALITY/NECESSITY OF
THE PUBLIC ORDER ACT CHAPTER 104 OF
THE LAWS OF ZAMBIA AND ITS IMPACT ON
HUMAN RIGHTS IN A DEMOCRATIC ZAMBIA

BY

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PREFACE

The Public Order Act can be described as one of the most politically controversial statutes contained in the Zambian statute books. It has been described by many as a law that is dangerous not only to democracy but also to national security of the country. On the other hand, it is believed to be a necessary statute for regulation of Public Order and prevention of anarchy and chaos.

The controversy over the Public Order Act arises because it contains certain provisions which restrict one's freedoms of assembly and association and hence freedom of expression. These restrictions, however, do not apply to the President, Vice President, Ministers, Junior Ministers, the Speaker of the National Assembly and the Deputy Speaker therefore making them discriminatory.

The controversy over the Public Order Act has led to questions as to its compatibility with the Bill of Rights. Therefore, it is the objective of this paper to examine the constitutionality of Act and its impact on human rights in a democratic Zambia. In addition, this paper will evaluate the necessity of the Act in a democratic Zambia. This will be done by looking at the history of the statute, establishing its salient provisions vis-a-vis human rights and accessing the compatibility of these salient provisions with constitutionally guaranteed rights and freedoms. From this conclusions will be drawn as to the constitutionality of the Public Order Act and its necessity too. This paper will conclude by making recommendations based on the conclusions.
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I'm out: PEACE!
DEDICATIONS

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CHAPTER ONE

THE HISTORY OF THE PUBLIC ORDER OF 1955

1.1 THE ENACTMENT

The Public Order Ordinance was enacted in Northern Rhodesia in 1955 by the British Colonial Government at the height of the African's struggle for independence. It was a creation of the white dominated legislative council, with the United Federal Party (UFP) as the ruling political party. Only three Africans participated in the debates after the introduction of the bill, for the ordinance, for it's second reading on 29th July, 1955 by then Chief Secretary, A.T. Williams.

The Bill for the Public Order Ordinance was proposed in order to give the Northern Rhodesian Government the powers in the Public Order Act, 1936 (1) of the United Kingdom. It was believed by the UFP Government that the bill was specifically to contribute towards public confidence and towards ensuring that the rights of individuals are exercised without infringement of the rights of others (2). In his opening address to the second session of the Legislative Council, the Governor of Northern Rhodesia, Evelyn Hone, stated the objectives of the bill as seeking to:

"Prohibit the wearing in any public place of any uniform which signifies association with any political organisation; and to prevent the growth of any quasi-military organisation which might appear to any member of the public to usurp the functions of the Police or of the armed forces of the crown".(3)
The Governor further stated that:

"the Bill will also deter anyone who, for whatever object, seek to excite enmity between tribe and tribe or between sections of the community. And it will give power to the Governor in Council in times of stress and strain, when public meetings in a given area might be the spark to set alight on conflagration, to prohibit such public meetings entirely for a period exceeding three months".(4)

The Bill, as presented, had ten clauses. Clauses 1 and 2 simply stated the short title and interpretation respectively. Clause 3 dealt with the prohibition of uniforms and flags in connection with political objects while clause 4 prohibited quasi-military organisations. The prohibition of weapons at public meetings and processions was contained in Clause 5 while the prohibition of offensive conduct conducive to breach of the peace was in Clause 6. Clause 7 contained powers for the preservation of public order in respect of public meetings and processions while Clause 8 and 9 stated penalties for making statements or doing acts intended to promote hostility between sections of the community, and the penalty for inciting people to strike in certain circumstances, respectively. And finally Clause 10 contained measures of enforcement of the penalties. It must, however, be noted that all Clauses except Clause 3(3) and Clause 8 were reproduced from the United Kingdom Public Order Act, 1936.
The Bill was greatly objected to by the African Members of the Legislative Council while the majority of the white members supported it. The Africans believed that the bill was introduced to thwart the activities of the African National Congress (ANC), the political party to which the majority of Africans, who were fighting for independence, belonged. Mr Nabulyato, an African member of the Legislative Council stated in his objections to the bill:

"The ANC has shown a tendency of wearing uniforms or flying flags at their meetings but apart from that I have not seen any other necessity for bringing the bill forward and because of that I feel that the Universal effects of the bill might have serious repercussions on the people of Northern Rhodesia". (5)

Mr Franklin, a white member, admitted that the intention of the bill was to thwart the ANC when he said:

"The U.K Legislation of which this is a copy was enacted in 1936 and directed to prevent the activities of the racist group which were becoming of an intimidatory and violent nature". (6)

Mr Franklin further stated:

"....The present bill is being brought because elements... of the ANC are beginning to use intimidatory and violent methods to gain their ends.... The Government has no intention whatsoever of allowing the African Congress through its action groups to have a private Police Force
It is obvious from Mr Franklin's statement that an analogy was made between the fascists in the United Kingdom and the members of the ANC in Northern Rhodesia; the conclusion being that the activities of the two groups were similar, and hence the need for the legislative council of Northern Rhodesia to enact legislation similar to the Public Order Act of the United Kingdom in order to deal with the ANC members in the same way that the Public Order Act of the United Kingdom was enacted to deal with the fascists in that country.

Mr Nabulyato raised objections to two Clauses of the Bill, namely Clause 6 which stated that:

"Any person who in any public place or at any public meeting uses threatening, abusive or insulting words with intent to provide a breech of peace or whereby a breech of the peace is likely to be occasioned shall be guilty of an offence:

and to Clause 8(1) which stated that:

"Any person who utters any words or does any act or thing whatever with intent to excite enmity between tribe and tribe or between one or more sections of the community on the one hand and any other section or sections of the community on the other hand, or with the intent to encourage any person or persons to do any act or acts or to omit to do any act or acts so as to defeat the purpose or intention of any law in force in the territory or in any part thereof, shall be guilty of an offence".(8)
He was supported in his argument, by fellow African Members of the Legislative Council, that as an African Member of the Council, it would be difficult to hold meetings because African people might, whenever a meeting was called for, feel that they would be caught by the two Clauses if they attended such meeting. Nabulyato further argued that they as Legislative Council members would be afraid that if they spoke, they would speak of something that the law would regard as insulting and perhaps exciting; and consequently they, therefore, would be afraid to express themselves.

However, in spite of the strong objections, the bill went through and was passed as law on 18th August, 1955. The colonial Government believed that no law abiding citizen of the territory had anything to fear in the ordinance as it was designed only to circumvent those who wished to commit breaches of the peace, or those who would want to take unto themselves power of control which rested "properly" only in the white hands. (9)

1.2 THE 1959 AMENDMENT

In 1959 there was a major amendment to the Public order Ordinance which gave the colonial Government more power and control over the activities of the Africans fighting for independence.

The Bill to amend the Public Order Ordinance of 1955 was introduced to the Legislative Council on 25th June, 1959 by then Chief Secretary, Mr Wray, who said that the purpose of the amendment was to transfer provisions from the Northern Rhodesia Police Ordinance to the Public Order Ordinance, which afford Police power to regulate assemblies and processions, following upon the duty of Police to maintain order on public roads.
His rationale for this was in order to confine the Northern Rhodesia Police Ordinance to matters affecting the Police and the Public Order Ordinance to the general administration of law and order in the territory.

In addition the Chief Secretary introduced two modifications to the existing provisions dealing with the control of assemblies. The modifications were intended to serve two purposes, firstly, to clarify the conditions which could be imposed by a regulating officer when he was required to issue a permit for holding a meeting; and secondly, to make provisions for the exemption of approved religious organisation. (10)

The proposed sub-clauses 1 to 4 of Clause 4A of the bill, dealing with regulations of assemblies and processions, were exactly the same as the provisions contained in sub section 1-4 of section 28 of the Northern Rhodesia Police Ordinance, except the last two lines of sub-section 4 which was extended to make it obligatory for the regulating officer to specify such conditions attaching to the holding of any assembly or procession for the 'preservation of public peace and order'. Clause 4A(5) was newly designed to overcome difficulties of the preceeding sub-clause vis-a-vis the conditions a regulating officer may impose. It allowed for the imposition of conditions relating to the dates time and place of the assembly or procession; the maximum duration of the assembly or procession; persons who may address the assembly and matters which may not be discussed; and any other matter designed to preserve public peace and order.
Clause 4B contained the penalty for disobeying a direction or violating the conditions of a permit issued while clause 4C was merely a provision taken from section 30 of the Police Ordinance relating to unauthorised assemblies.

There was no opposition to the implementation of these amendments. Members of the Legislative Council commended the Government for exempting religious organisations from the requirement to obtain a Police permit.

1.3 THE 1967 AMENDMENT

1967 saw the final major amendment to the Public Order Ordinance by the Government of the now independent Zambia. It was expected that the Africans, having been against the introduction of the statute, would immediately repeal the relevant sections upon attaining independence but instead they decided to make amendments to suit themselves as Government.

The Vice President, Mr Kamanga, on 13th December, 1966 presented a bill seeking to exempt the President, the Vice President and Ministers of Government from the requirement to obtain a permit to convene a meeting. (At the committee stage an amendment to include, junior ministers, the speaker and the deputy speaker was made). The Vice President explained this action by saying:

"The President, Vice President, Ministers and Junior Ministers spend a great deal of time touring the country to explain Government Policy to the people, as indeed do the speaker and his deputy. It is obviously embarassing and inconveniencing in such tours for the President or a Cabinet Minister to have to go along to the local Police Station to get a permit as the law requires at present".(12)
The bill, in addition, proposed to make compulsory the playing or singing of the national anthem at the beginning of all public meetings. The Vice President acknowledged the fact that there may be some who would consider this as a restriction of individual freedom but explained that:

"Zambia is a young nation still in the process of achieving unity in nationhood. There are different groups of people living in Zambia, people of different social, racial and religious backgrounds and it is our task to mould these varying groups onto one nation". (13)

The bill was strongly opposed by the opposition in the National Assembly. Mr Nkumbula, the leader of the ANC, opposed it on the ground that it was a law for a selected few and not for the majority of people and therefore discriminatory to protect those few.(14) Fellow opposition member, Mr Liso, expressed the same sentiments. They both were of the opinion that it was not necessary to make legislation making it compulsory for the National Anthem to be played as it would not necessarily unite people but instead it would cause them to have less respect for it. However, the then Attorney General, Mr Skinner, to counter their arguments and hence justify Government position quoted Mr Justice Frankfurter who said in the case of GABBITAS V THE WEST VIRGINIA STATE BOARD OF EDUCATION.(16)

"The National Anthem is the signal of national cohesion in the state. If you have national cohesion you cannot have national security and your civil liberties depend on national security.

The opposition having been in the minority, the bill was passed.
END NOTES


2. Ibid; P. 10

3. Ibid; P. 10

4. Ibid; P. 10

5. Ibid; P. 769

6. Ibid; P. 789

7. Ibid

8. PUBLIC ORDER ORDINANCE, NUMBER 38 OF 1955, OF NORTHERN RHODESIA


11. DEBATES OF THE 3RD SESSION OF THE NATIONAL ASSEMBLY HANSARD NO. 8 (13TH DECEMBER-20TH DECEMBER 1966, GOVERNMENT PRINTER, LUSAKA) P. 40

12. Ibid; P. 41

13. Ibid; P. 41

14. Ibid; P. 51

15. Ibid; P. 65
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DEBATES OF THE 3RD SESSION OF THE 1ST NATIONAL ASSEMBLY, HANSARD NO. 8
13TH DECEMBER - 20TH DECEMBER 1966, LUSAKA.
CHAPTER TWO


2.1 INTRODUCTION

The maintenance of Public Order is a fundamental responsibility of every Government. This responsibility stems from the fact that Government exists to serve and protect the people of its country and only through the maintenance of Public Order will anarchy be prevented. However, Laws enacted for the maintenance of Public Order may conflict with an individuals guaranteed rights and freedoms. This Chapter therefore highlights the salient provisions of the Public Order Act 1955, which can be said to be in conflict with an individual's rights and freedoms which are guaranteed and protected by the constitution.(1)

2.2 THE CONSTITUTION

The constitution can be defined as a formal document having the force of law, by which a society organises a Government for itself; defines and limits its powers and prescribes the relations of its various organs inter se and with its citizens.(2)

In Zambia, there exists a written constitution under the constitution of Zambia Act, 1991; which is the supreme law of the land. All other laws are to be consistent with it, or failure to which, they are considered as void to the extent of their inconsistency. The rationale for this supremacy is that the constitution is (or is supposed to be) an original act of the people directly; an act of Government is a derivative and ipso facto a subordinate act.(3)
2.2 BILL OF RIGHTS

A Bill of rights is contained in Part III of the 1991 Constitution. It was incorporated for the first time in Northern Rhodesia's (now Zambia) history in the self Government constitution of 1963. It was reproduced with minor amendments on both the independence constitution of 1964 and the one party state constitution of 1975, and today it exists in the 1991 constitution.(4)

The Bill of rights guarantees an individual's fundamental rights and freedoms. Article 11 of the 1991 constitution recognises an individual's rights and freedoms regardless of his race, place of origin, political opinions, colour, creed, sex or marital status as:

a) life, liberty, security of the person and the protection of the law;

b) freedom of conscience, expression, assembly, movement and association;

c) protection of young persons from exploitation; and

d) protection for the privacy of his home and other property and from depreciation of property without compensation.

It must, however, be noted that these rights are not absolute as they are subject to a number of limitations.

The bill of rights need not be exhaustive as all human rights are predicated on the common law.
According to an eminent African Constitutional Scholar Professor Nwabueze, the bill of rights creates no rights de vivos but declares and preserves already existing rights which they extend to the legislative bourne out by the negative sociology of some of the provisions. He believes that to say that no person shall be deprived of his personal liberty clearly presupposes an existing right, for it would be an abuse of language to talk of depriving a person of the rights which he does not have. (5)

Regardless of whether there exists a constitution, an individual's fundamental rights and freedoms exist. In England, for example, there is no written constitution but a bill of rights exists. Even in countries such as Nigeria which are governed by a military junta, these rights and freedoms continue to exist although the country's constitution may have been suspended.

2.3 THE PUBLIC ORDER ACT

The Public Order Act was enacted for the maintenance of Public Order. However, some of its salient provisions do have a bearing on the enjoyment of human rights under the constitution. The salient provisions fall under section 5 of the Act which regulates assemblies, public meetings and processions. The section empowers the commissioner of Police to appoint a Police Officer above the rank of Assistant Inspector to be the regulating officer, for assemblies, public meetings and processions, in respect of an area as the Commissioner may define. (6) This is done by Gazette notice.
The regulating officer has the power to issue directions for the conduct of assemblies and processions in any place within his area and the route by which and the time at which any procession may pass.\(^{(7)}\)

By sub-section 4 of section 5 of the Act, any person who wishes to convene an assembly, public meeting or to form a procession in any public place shall first make application in that behalf to the regulating officer of the area concerned and if such officer is satisfied that such assembly, public meeting or procession is unlikely to cause or lead to a breach of peace, he shall issue a permit in writing authorising such assembly, public meeting or procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such assembly public meeting or procession as the regulating officer may deem necessary to impose for the preservation of public peace and order.

Sub-section 5 of the same section sets out the conditions a regulating officer may impose as follows:-

a) the date upon which and the place and time at which the assembly, public meeting or procession is authorised to take place;

b) the maximum duration of the assembly, public meeting or procession;

c) in the case of an assembly or public meeting the persons who may or may not be permitted to address such assembly or public meeting and the matters which may or may not be discussed at such assembly or public meeting;
d) the granting of adequate facilities for the recording of the proceedings of such assembly or public meeting in such manner and by such person or class of person as the regulating officer may specify; and

e) any other matter designed to preserve public peace and order.

A notable feature of section 5 is that it exempts the President, the Vice President, Ministers, Junior Ministers, the Speaker of the National Assembly and his Deputy, from the application of section 5(4) and section 5(5) in the event of any public meeting convened by, or at the request of and intended to be addressed by any one of them. (Sub-section 6).

2.4 THE PUBLIC ORDER ACT AND THE CONSTITUTION

The requirement that one obtains a Police permit before holding an assembly, public meeting or procession, with set conditions, conflicts with the freedoms of assembly, association and expression. And the fact that there are people exempted from this requirement (section 5(6) is in conflict with the constitutional protection against discrimination on political grounds.

2.4.1 FREEDOM OF ASSEMBLY AND ASSOCIATION

It was stated in the case of MC ARA V EDINBURGH MAGISTRATES (8) that freedom of assembly arises essentially from the fact that no permission is needed from any public authority before a group of individuals meets to discuss a matter of common concern; nor do public authorities have the power to ban in advance the holding of assemblies.
Freedom of association is a principle of law which imposes no restrictions upon the freedom of individuals to associate together for political purposes by forming political parties, action groups, campaign committees and so on without any official approval or registration. (9)

Article 21(1) of the 1991 constitution guarantees freedom of assembly and association. It states that except with his own consent no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union, or other association for the protection of his interests. However, this freedom is not absolute as Article 21(2) allows for laws to be enacted limiting this freedom, that are reasonably required in the interest of defence, public safety, public order, public morality or public health; and laws that are reasonably required for the purpose of protecting the rights and freedoms of other persons.

The key for the enactment of laws limiting freedom of assembly, and association is their 'reasonable requirement' in the public interest. In Zambia, a number of laws have been enacted which do not seem to be reasonably required in the public interest. An example of such a law is the Societies Act (10) which requires all political parties and non-government organisations to be registered. This is a breach of the freedom of association as the registrar of societies has the power to refuse under section 8 which states that: -
any society where it appears that such a society has among its objects, or is likely, to pursue or to be used for, an unlawful purpose or for any purpose prejudicial to or incompatible with peace, welfare or good order in Zambia or that the interests of the peace, welfare or good order in Zambia otherwise be likely to suffer prejudice by reason of the registration of a society.

The registrar has wide discretionary power which may be subject to abuse. The Government may influence the registrar in order to deny registration to organisations it is against. In addition, the Minister of Home Affairs may in his absolute discretion, where he considers it to be essential in the public interest, by order, to declare to be unlawful any statutory Society which in his opinion:

a) is being used for any purpose prejudicial to or incompatible with the maintenance of peace, order and good government; or
b) is being used for any purpose at variance with its declared objects.

The power given to the Minister of Home Affairs is not reasonable required in a democratic society as all opposition parties and non-government organisations, therefore, exist on his goodwill. In a multi-party democracy people should be free to associate and assemble without fear of disappointing any authority.
2.4.2 FREEDOM OF EXPRESSION

Freedom of expression is fundamental to an individual's life in a democratic society. It has a specific political content. The freedom to receive and exercise political opinions, both publicly and privately, is linked closely with the freedom to organise for political purposes and to take part in free elections. (11)

The 1991 constitution protects the freedom of expression under Article 20(1) which provides that except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

Like the freedom of assembly and association, freedom of expression is not absolute. Article 20(3) limits it by allowing laws to be enacted that are reasonably required in the interest of defence, public safety, public order, public morality or public health; or that are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the court and any such laws in the public interest.
The rationale behind the limitations is that there must be a process of balancing whereby the public interest in freedom of expression is weighed against other public interests such as the administration of justice or the protection of confidentiality.

In Zambia, a number of laws have been enacted which limit freedom of expression.

(A) SEDITION

Sedition is an offence under section 57(1) of the penal code, chapter 146 of the laws of Zambia. It is committed by any person who:

a. does or attempts to do, or makes any preparation to do, or conspire with any person to do any act with a seditious intention;

b. utters any seditious words;

c. prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;

d. imports any seditious publication unless he has no reason to believe that it is seditious.

A seditious intention is defined in section 60 of the penal code as an intention:

a. to advocate the desirability of overthrowing by unlawful means, the government...; or

b. to bring into hatred or contempt or to excite disaffection against the Government...; or
c to excite the people of Zambia to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zambia....;
or
d to bring hatred or contempt or to excite disaffection against the administration of justice in Zambia; or
c to raise discontent or disaffection among the people of Zambia; or
f to promote feeling of ill will or hostility between different parts of a community; or
g to promote feeling of ill-will or hostility between different classes of the population of Zambia; or
h to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the republic; or
i to incite violence or any offence prejudicial to public order or in disturbance of the public peace; or
j to incite resistence, either active or passive or disobedience to any law or the administration thereof.

The laws against sedition are too wide and therefore inhibit criticism of Government. Any criticism may be interpreted as seditious.

B PRESIDENTIAL POWER TO BAN PUBLICATIONS

The President of Zambia has the power under section 53(1) of the Penal Code to ban any publications published within or outside the country, that he considers to be contary to public interest. The provision makes it an offence for any person to import, publish, sell, distribute, offer for sale or reproduce any prohibited publication. This seriously limits
freedom of expression as 'public interest' is not defined; it determined by the sole, subjective, discretion of the President.

In the case of SHAMWANA v ATTORNEY GENERAL, (12) Mr Edward Shamwana and Mr Valentine Musakanya sent a petition to parliament asking it to review its semi state of emergency. This petition was banned by the President and the court held that he had the power under section 53(1) of the Penal Code to do so and further, that he was not under any obligation to state his reasons for doing so.

Although the court in the case was correct on the position regarding Presidential powers and discretion, it is obvious that it failed to address the question with regards to whether the ban was in the public interest and not merely in the executive interest.

C DEFAMATION OF THE PRESIDENT

Section 69 of the Penal Code limits freedom of expression by making it an offence for any person to bring the President into hatred ridicule or contempt, publishes any defamatory or insulting matter whether by writing, print, word of mouth or in any other manner. This provision, therefore, strictly prohibits criticism of the President as justification is not considered as a defence.
2.4.3 DISCRIMINATION ON POLITICAL GROUNDS

Discrimination is prohibited by Article 23(1) of the 1991 constitution. It is defined in Article 23(3) as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place or origin, marital status, political opinions, colour or creed. The exemption of cabinet members, the speaker and his deputy, from the requirement to obtain a Police permit, with set conditions, is discriminatory in a multi party democracy on political grounds. Political opinions of members of the opposition are regulated by this provision whilst those of members of the ruling party are easily disseminated. Campaigning, therefore, cannot be considered as fair because the President and his colleagues have a clear advantage over their opponents. They are not restricted by time and are able to address any issue.

2.5 CONCLUSION

The constitution may guarantee an individual's fundamental rights and freedoms but the limitations it places makes them subject to other legislation. Many statutes such as the Societies Act and the Penal Code, contain provisions which seriously limit the rights and freedoms of individuals, not necessarily in the Public interest. It is therefore important that the courts of law protect constitutionally guaranteed rights and freedoms by ensuring that the limitations placed on them are reasonably required in the public interest and in a democratic society.
END NOTES

1. PART III OF THE CONSTITUTION OF ZAMBIA

2. B. O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES (LONDON, BILLINGS & SONS LTD 1973) P.2

3. Ibid; P.5


5. Ibid; P110

6. SECTION 5(1)

7. SECTION 5(3)(b)

8. (1973) S C 1059


10. CHAPTER 105 OF THE LAWS OF ZAMBIA

11. A W BRADLEY, OP: CH: P508

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CHAPTER THREE

THE ROLE OF THE ZAMBIAN COURTS IN SAFE GUARDING CONSTITUTIONALLY GUARANTEED RIGHTS

3.1 INTRODUCTION

The primary judicial function is to determine disputes whether between private persons or between a private person and a public authority. This is done by Judges assessing the facts and applying the law. It is clearly of great importance that justice be dispensed even-handedly in the courts and that the general public feel confident in the integrity and the impartiality of the judiciary. This can only be checked through the independence of the judiciary.

Independence of the judiciary means that the judiciary must be secure from undue influence, able to act without fear or reprisals and autonomous within its own field. This is only possible if it is independent of the executive, the legislature and of wealthy corporations.

This chapter shall assess the independence of the judiciary in Zambia by analysing the procedure of appointment, security of tenure and remunerations of judges. It will, in addition, analyse their immunity and protection. The role of the Zambian Courts in Safeguarding constitutionally guaranteed rights will then be assessed by critically examining relevant decided cases.

3.2 INDEPENDENCE OF THE JUDICIARY IN ZAMBIA

Zambia has a judiciary, headed by the Chief Justice (1), made up of four courts organised in a hierachical order. These are Local Courts (2),
Subordinate Courts (3), High Court (4), and the Supreme Court (5). Its independence is guaranteed by the Constitution (6).

The executive has publicly recognised the independence of the Judiciary. In 1972 President Kaunda stated:

"......the independence of the judiciary is the freedom from interference by the executive or the legislature with the exercise of judicial function........"(7)

It must be noted, however, that the independence of the judiciary does not mean isolation of judges from society; there is no reason why they should be immune from public opinion and the discussion of current issues in the media.

An eminent author, Ben Nwabueze, correctly stated that the method of appointment and security of tenure of judges are of vital importance to the administration of justice and hence form the gist for ensuring the independence of the judiciary(8). This is because the quality of justice depends more upon the quality of the men who administer the law than on the content of the law they administer. In addition, the renumeration of judges and their immunities and protections form part of the gist for ensuring the independence of the judiciary.
3.2.1 APPOINTMENT

The President has the power to appoint the Chief Justice, the Deputy Chief Justice and all other Judges of the Supreme Court subject to the ratification by the National Assembly (9). He also has the power to appoint puisne judges and commissioners of the High Court, on the advice of the Judicial Service Commission, subject to ratification by the National Assembly (10).

The executive may nominate members of the judiciary, but once the legislature has ratified the nominations, the executive has no power over them. There, however, exists a loophole with regard to commissioners of the High Court as such persons are not confirmed puisne judges and therefore they may try to appease the executive. In addition, commissioners of the High Court, being practising lawyers, may use their positions in order to attain an undue advantage over other lawyers.

3.2.2 SECURITY OF TENURE

The Constitution provides a very good security of tenure for judges in Zambia (11). Judges can only vacate their office upon the attainment of the age of 65 years. The President has no power to remove a judge unless for inability to perform the functions of his office, whether arising from infirmity of body or mind or for misbehaviour. However, this can only be done by the President appointing a tribunal of not less than three people, who have held high judicial office, to inquire into the matter and report back to him. In their report they are to advise the President on whether to remove the judge or not; and this advice is binding on him.
3.2.3 RE NUMERATION

Salaries and allowances paid to judges are charged by statute on the general revenue of the Republic and the salaries cannot be altered to the disadvantage of a judge after his appointment (12).

3.2.4 IMMUNITY

A Judge is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do an act omitted to be done (13).

This immunity is important for the independence of the judiciary because a judge must be able to act without fear of reprisals. However, there should be administrative action taken against judges for abuse of power or negligence.

In the case of **MIYANDA V MATTHEW CHAILA** (14) it was established that judges are immure from civil liability. In this case the petitioner sued the judge for his inordinate delay in preparing and delivering judgement in a civil suit in which the petitioner was a plaintiff.

In his judgement, Justice Sakala dismissed the petition by saying:

"Zambia cherishes the independence of the judiciary. It will therefore be setting a very dangerous precedent and a serious threat to the independence of the judiciary if suing a judge is established as a remedy to a delayed judgement... there is no civil remedy..."
3.2.5 PROTECTION

Judges are protected from unrestrained criticism. (15) This protection is circumscribed in the sense that criticism must be made bona fide and must not impute improper motives to the judges because it must be genuine criticism and not malicious or calculated to subvert the administration of justice. (16)

3.2.6 AUTONOMY

Previously, the Zambian judiciary was a part of the Ministry of Legal Affairs but now the Judicature Administration Act (17) has been enacted to provide for the administration of the judiciary.

The Act confers on the judicial service commission power to appoint staff of the judicature and to provide for matters connected with or incidental to the foregoing. Therefore, it ensures the autonomy of the judiciary as the Judicial Service Commission is an independent body as opposed to the Ministry of Legal Affairs which is a part of the executive.

3.3 INTERFERENCE IN JUDICIAL FUNCTIONS BY THE EXECUTIVE

Although all the tenets have been put in place to ensure the independence of the judiciary in Zambia there has, however, been at least one recorded incidence of interference with the judicial function by the executive.

In 1969, two Portuguese soldiers based in Angola crossed into Zambia via Chavuma, without their weapons, to find out why a Zambian immigration official was calling them. They were then arrested and detained for illegal entry into Zambia and each fined K5,000 or in default two years imprisonment.
In the High Court review of the case Judge Evans quashed the sentence and released the soldiers on the ground that the two fines were "too severe and unlawful" as default should have led to 9 months imprisonment, not 2 years. In passing judgement Judge Evan stated that there was nothing sinister on the part of the soldiers as they left their weapons and came openly in daylight after an exchange of words with a Zambian immigration officer. He further stated that their immediate arrest, subsequent detention and charging 'did not redound to the credit of the Zambian authorities.

This judgement greatly angered President Kaunda who demanded an explanation from the Chief Justice and refused to release the two soldiers by detaining them under the immigration and deportation Act. The President accused Judge Evans of making a political judgement and demanded an immediate apology.

However, Chief Justice Skinner wrote to the President to inform him that he saw nothing wrong with Judge Evans judgement and further that:

"...it is one of the functions of the judiciary to criticise the actions of the executive or its individual servants when need arised".

This reply sparked public protest with about 500 youths storming the High Court in search of both the Chief Justice and Judge Evans who had hidden in an underground chamber. The Chief Justice subsequently left the
country and took up the same position in Malawi while Judge Evans resigned together with another Judge Wheelen.

The reaction of both the executive and the public left the members of the judiciary intimidated and with the full knowledge of the danger of deciding against government. Although a general conclusion cannot be drawn from the above case, the case does offer some example of executive interference with the judiciary.

3.4 THE PROTECTION OF CONSTITUTIONALLY GUARANTEED RIGHTS BY THE ZAMBIAN COURTS

It is incumbent upon the courts to protect all constitutionally guaranteed rights of all individuals in the Republic. This duty must be exercised without fear or favour.

Zambian courts have not had much opportunity to adjudicate over cases involving constitutionally guaranteed rights as most Zambians are illiterate and cannot afford the costs that come with judicial proceedings. Most cases that have come up before the courts have had to do with detention by the executive but this chapter will concentrate on three major cases involving the infringement of the bill of rights.

The case of KACHASU V ATTORNEY GENERAL (18) was one of the first before the courts alleging the infringement of one of the rights guaranteed by the Zambian Bill of rights. In this case the applicant, a Jehovah's witness, in her up bringing was taught that it was against God's law to worship idols or to sing songs of praise or hymns to anyone else other
than God himself. The refusal by the applicant, at school, to sing the national anthem resulted in her suspension in accordance with regulations 25 and 31 (1) (i) of the Education (Primary and Secondary School) regulations, 1966. Regulation 25 makes it compulsory for all pupils at Government schools to sing the national anthem and salute the national flag on certain occasions and regulation 31 (i) (j) empowers the headmaster of all such schools the right to suspend any child who refuses to do the aforesaid.

The applicant raised two constitutional issues, namely:

1. That the suspension from school and the subsequent refusal of her application for unconditional readmission thereto, constituted a hinderance in the enjoyment of her right to freedom of conscience, thought and religion, guaranteed to her by section 13 and 21 of the 1964 constitution.

2. That the regulations by which she was suspended were themselves in conflict with section 21 of the 1964 constitution and consequently invalid.

The court found that the applicant had been hindered in the enjoyment of her freedom of conscience upon being coerced to sing the national anthem against her beliefs but held that the regulations were reasonably required in the interest of public safety as singing the national anthem and saluting the flag promote national unity and national security. The judge correctly stated that the applicant could only succeed if it was established that it was not in the interest of defence, public safety or public order but he wrongly put the onus on the applicant to establish this.
Similarly, in the case of *Patel v Attorney General*, (19) although strictly speaking the applicants' rights were violated, the court found otherwise. In this case, Patel was charged with contravening Regulation 35 of the Exchange Control Regulations, 1965 by attempting to externalise Zambian currency to London. He allegedly placed in the post 65 Airmail envelopes containing Zambian currency which were discovered by a customs officer. The customs officer opened, examined and seized the postal articles without a search warrant. On Patel's complaint of a violation of his rights, the High Court had to determine whether the opening, examining and seizure of the postal articles constitute a contravention of the applicants:-

i) Right to privacy of property as then guaranteed by section 19 of the 1964 constitution.

ii) Freedom of expression as guaranteed by section 22 of the 1964 constitution

iii) Right to protection from deprivation of property as then guaranteed by section 18 of the 1964 constitution

Regulation 35 of the Exchange Controls Regulations allowed a customs officer who reasonably suspected postal articles containing foreign currency or Zambian Currency are being imported or exported, to open and examine such postal articles.
The court held the following:

i) That the applicant's right to privacy was not infringed as Regulation 35, was reasonably required for the development or utilization of property for a purpose beneficial to the community.

ii) That the applicant's freedom of expression had not been infringed as the packets containing money did not constitute a correspondence within the meaning of section 22.

iii) That the applicant's right to protection from deprivation of property was expedient for a scheme of exchange control which was designed in order to secure the development of the nation's financial resources for a purpose beneficial to the community.

The court in both the KACHASU and the PATEL cases found the respective statutes to be within the permitted derogations. Derogations appear on most of the constitutionally guaranteed rights, which therefore limits these rights and freedoms. They allow for the enactment of laws reasonably required in the interest of defence, public safety or public order or for the purpose of protecting the rights and freedoms of others. What is 'reasonably required' can, obviously, not be defined. Hence, a person's rights may clearly have been violated per se but because of the derogations, the violation becomes permissible.
In the case of **NKUMBULA V ATTORNEY GENERAL** (20) a petition was brought by Mr Nkumbula for redress on the grounds that section 13, 22 & 23 of the 1964 constitution were likely to be contravened in relation to himself with the government announcement of its intention to set up a one part system in Zambia and the appointment of a commission to recommend changes to bring about a one party system in Zambia. The terms of reference of the commission were restricted to discussion of how to bring about a one party system. Further, a party official of the ruling party, the United National Independence Party (UNIP) had announced that his party would crush all those who opposed the formation of a one party state.

Chief Justice Doyle held against Mr Nkumbula as he observed that although the set up on a one party state would be contrary to section 23 of the constitution, which guaranteed freedom of assembly and association and therefore the formation of political parties, there was no indication that the rights would be infringed when introduced as parliament had the right to change the constitution. He further denied that the petitioners freedom of expression (section 22) was prohibited by the terms of reference of the commission as the petitioner could freely air his opposition to the one party state in another arena. In addition, Chief Justice Doyle said that the UNIP official did not prohibit the freedom of expression of the petitioner as he was merely a junior party official and not a member of government.
These cases indicate that the court tried to play its role in the protection of constitutionally guaranteed rights but because of the derogatory clauses and other strict factors, it is very difficult for the complainant to succeed unless the Attorney General fails to show that the statutes are reasonably required.

In the case of **EDITH NAWAKWI V ATTORNEY GENERAL** (21) in which the petitioner, a single mother of two boys, petitioned to the High Court on the ground that she had been discriminated against due to her sex, the petitioner succeeded because it was proved that she had been discriminated against and there was no derogatory clause under which a statute could have been enacted, to justify this discrimination.

3.5 **CONCLUSION**

The Judiciary can only protect constitutionally guaranteed rights and freedoms if it is assured of its independence and autonomy. As has been established from the study of relevant cases, the constitution places limitations on some of the guaranteed rights and freedoms. Therefore, there is nothing the court can do to protect them unless it can be shown that they are not 'reasonably required' for whatever purpose they are enacted. It is important that the courts ensure that these limitations are 'reasonably required'; if not the notion of guaranteed rights and freedoms will become a mere fallacy.
ENDNOTES

1. ARTICLE 92, CONSTITUTION OF ZAMBIA, 1991
2. LOCAL COURTS ACT, CHAPTER 54 OF THE LAWS OF ZAMBIA
3. SUBRODINATE COURTS ACT, CHAPTER 45 OF THE LAWS OF ZAMBIA
4. ARTICLE 91, CONSTITUTION OF ZAMBIA, 1991
5. IBID
6. IBID
7. KENNETH KAUNDA, THE FUNCTIONS OF A LAWYER IN ZAMBIA TODAY, ZAMBIA LAW JOURNAL, VOL. 303 NO. 1 - 2, 1971/72
9. ARTICLE 93, CONSTITUTION OF ZAMBIA, 1991
10. ARTICLE 95, CONSTITUTION OF ZAMBIA, 1991
11. ARTICLE 98, CONSTITUTION OF ZAMBIA, 1991
12. ARTICLE 105, CONSTITUTION OF ZAMBIA, 1991
13. SECTION 15, PENAL CODE, CHAPTER 146 OF THE LAWS OF ZAMBIA
15. SECTION 116, PENAL CODE, CHAPTER 146 OF THE LAWS OF ZAMBIA
17. 
18. (1967) Z.R. 145
20. (1972) Z.R.
21. (1990) HP/1724
22. ARTICLE 25, CONSTITUTION OF ZAMBIA, 1973
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Government opponents, who are almost always the ones denied Police permits because of the Government's influence over the Police force.

The Public Order Act has been abused by the Zambian Government in the first, second and third Republics and by the Colonial Government in Northern Rhodesia. They have all done so by exercising influence over the Police in order to suppress the opposition. Police Permits are not given to persons protesting or demonstrating against Government. For example, on 1st August, 1995 students of the University of Zambia were denied a permit to protest against a Government decision to rename their institution Nkumbula University.

However, permits are easily obtained by persons who wish to demonstrate in favour of Government; such demonstrations would not be thwarted even if the participants do not have a Police Permit. This has been evidenced by the recent instances in which women on the Copperbelt, in support of President Chiluba, were advocating for the banning of the Post Newspapers on 15th June, 1995 and when pupils from various schools proceeded to State House to demonstrate support for President Chiluba on 24th July, 1995.

Very recently on 13th September 1995 the Police denied cadres of the Movement for Multi Party Democracy (MMD) a permit to hold a demonstration in support of President Chiluba's exposure of State house tunnels. This Police denial was highly publicised which therefore gave warrant to the thought that it was merely a publicist stunt to salvage the credibility of the Police force and to make it look independent.
The Government opposition has, however, not sat back and accepted the abuse of the Public Order Act. On a number of occasions, both in the second and third Republics, members of the opposition have challenged the police over their refusal to issue a permit.

4.2.1 THE SECOND REPUBLIC

In 1990, advocates for the re-introduction of a multi-party system in Zambia were being denied permits by the Police. Members of the Movement for Multi Party Democracy (MMD) challenged the Police over their refusal to issue them with permits in the case of ARTHUR WINA & SIX OTHERS V ATTORNEY GENERAL (2).

The facts of this case are that on 24th September, 1990 President Kaunda held a press conference at which he announced a Government decision to cancel a planned referendum and hold general elections after a change to the constitution to allow for Multi Party politics. Three days later the ruling United National Independence Party (UNIP) announced that no campaigns or meetings, from other than its party, will be held until the constitution was changed. Mr Mwanawasa, one of the petitioners, reacted to this statement from UNIP on 28th September, 1990 by saying that the statement, if effected, is contrary to Articles 22 and 23 of the constitution. Therefore, in order to put the position clear as to the holding of meetings and campaigns, the Minister of Legal Affairs on 1st October, 1990 announced that meetings could be held as long as Police issued a permit. However, the Police refused to issue the petitioners with permits in consequence of the UNIP statement.
The petitioners therefore sought declarations from the Government that their rights as members of the M.M.D. are likely to be contravened or alternatively that their rights as citizens of Zambia individually and severely are being and are likely to be contravened, by the decision of the party and its government not to allow them to campaign. They also asked the government to make any declaration that it may deem fit to make for the effective enforcement of the said rights.

In cross examination, the police admitted to having received instructions 'from above' in the exercise of their duties. They argued that they refused to issue permits to the petitioners because the M.M.D. was not a registered society.

Justice Bobby Bwalya held that the refusal by the Police to grant permits to the M.M.D constituted a violation of Articles 22 (freedom of expression) and 23 (freedom of assembly and association) of the constitution because the decision of the Regulating Officer was invalid and illegal as instructions came from above. The Judge correctly stated that there is no need for registration under the Societies Act as the position of an unincorporated body or society or association is recognised in law.

Justice Bwalya explained that section 5(4) of the Public Order Act did not stipulate that in the exercise of his discretion the Regulating Officer shall do so under the instruction from his superiors or higher authority. To explain the use of discretionary power he cited the case of COMMISSIONER OF POLICE V GUORD HANDAS in which it was stated that:
"...the exercise of discretionary power when a discretion is vested in an administrative authority or person is that it must be exercised by that very authority or person in its or his own independent judgement and not under directions of others, including Government, to whom the administrative authority or officer is subordinate."

4.2.2 THE THIRD REPUBLIC

In spite of the challenges made by members of the M.M.D against the abuse of the Public Order Act in the second Republic by the Government, they as Government in the 3rd Republic have not changed the scenario. Police have continued to deny Government opponents permits and hence the challenges have continued.

In the case of WILLIAM BANDA V ATTORNEY GENERAL (3) a member of UNIP on 15th April, 1992 submitted an application for a police permit to authorise the party to hold a rally in Lusaka. Amongst the list of speakers was the name of the petitioner who was the District Party Chairman of UNIP. All the names on the list were approved except that of the petitioner. On 30th March 1992 the petitioner submitted another application for a permit to hold a rally which was not accepted by the Regulating Officer of Police Mr Ndhlovu.

The petitioner therefore petitioned alleging that he had been prevented from enjoying his fundamental rights relating to freedom of expression and association. He asked that the court award him damages and such other order or other relief as it may deem fit.
In cross-examination Mr Ndhlovu gave evidence to the effect that he as regulating officer denied the petitioner a permit because he was believed to be a non-Zambian, whose speeches members of both the M.M.D and UNIP were against as they were considered to be provocative. He argued that the petitioner was likely to be beaten by members of both the M.M.D and UNIP had a permit been issued.

Judge Chitoshi held the following:

i) that the petitioner's rights under Articles 20 & 21 of the constitution were violated because the discretionary power granted to the Police was abused by the use of an irrelevant consideration that the petitioner was a non-Zambian, as the constitution protects the rights of every person in Zambia.

ii) that the fact that certain people did not want the speaker to speak and could have beaten him was an unacceptable ground because it was those who had planned to cause trouble who ought to have been stopped and not the speaker.

iii) that the Police had no power under the constitution or the Public Order Act to exercise prior restraint of the expression of views unless it is demonstrable on a record that such expression would immediately and irreperably create damage to the public.

iv) that the ordinary murmuring and objections of a hostile audience cannot be allowed to silence a speaker unless he goes overboard as to incite the crowd.
The Judge stated that despite the fact that the permit was issued by Inspector Buchisa, Mr Ndhlolvu had the right as a Superior Officer to attach conditions to it.

The Supreme Court upheld the holding of the lower court. It held that Mr Ndhlolvu as Superior Officer was responsible for giving instructions and orders to Mr Buchisa about the issuance and cancellation or variation of permits which Mr Buchisa had a duty to obey. The court found no impropriety on the part of the Police and therefore it held that the students rights had not been infringed by the cancellation or variation of the permit valid.

It is submitted that the ALFRED ZULU case was wrongly decided by both the High Court and the Supreme Court. As was established in the cases of ARTHUR WINA and WILLIAM BANDA, once a Regulating Officer is granted with a discretionary power, he is to exercise this power independently. However, in this case, the Regulating Officer obeyed an instruction from Mr Ndhlolvu which therefore made his decision null and void because of the improper exercise of a discretionary power. An Officer may consult his superiors but what they say is merely to be taken as advice because the final decision rests on the officer granted the power.

The court should have considered the evidence showing that the Police were acting on orders from Politicians as the President had invited the student leaders to State House where he requested that they cancel the rally or hold it on the University grounds.
4.3 THE CONSTITUTIONALITY/NECESSITY OF THE PUBLIC ORDER ACT IN A DEMOCRATIC ZAMBIA

As a result of constant Police refusal to issue permits to Government opposition members for assemblies, processions, and meetings many people have started to question the compatibility of certain provisions of the Public Order Act with the Bill of rights in Zambia. This is because by their abuse of the Public Order Act the Police are, rather than regulating public order, infringing on people's freedoms of expression, assembly and association which is unconstitutional.

There has only been one case brought before the courts to determine the salient provisions of the Public Order Act. The case, involving two parties jointly litigating, is THE PEOPLE V CHRISTINE MULUNDIKA & SIX OTHERS (5). THE PEOPLE V DR KENNETH KAUNDA (6) which was brought before the High Court by way of reference under article 28(2) of the constitution.

There were three legal issues for the determination of the court. These are:

1) whether the provisions of the Public Order Act requiring a person to apply for a Police permit, to hold a public meeting, to a regulating officer are null and void for being inconsistent with Articles 20 and 21 of the constitution.

2) whether those provisions of the Public Order Act granting absolute power on the regulating officer to grant or refuse a Police Permit are null and void for being inconsistent with Articles 20 & 21 of the constitution.
3) whether the provisions of the Public Order Act exempting the President, Vice President, Ministers, Junior Ministers, the speaker of the National Assembly and the Deputy Speaker, from obtaining a Police Permit are null and void for being inconsistent with Article 23 of the constitution.

Professor Mvunga argued the first two grounds on behalf of the applicants. He argued that section 5(4) of the Act, which requires one to apply for a permit, can be construed as granting absolute powers to the Regulating Officer therefore making it, to that extent, ultra vires Articles 20 and 21 (freedom of expression and freedom of assembly and association respectively) and hence null and void. Professor Mvunga argued that the Articles are only subject to regulation, reasonably required, as per the derogatory clauses in them. He said this is not the case with section 5(4) which he argued extinguishes, diminishes and denies the freedoms.

The Professor further argued that the provision leaves the issuance of a permit to the subjective determination of the Regulating Officer which therefore makes it subject to abuse. He stated that this is not justifiable in a democratic society in which plural politics is practised.
Mr Zulu, who argued the 3rd ground on behalf of the applicants, submitted that section 5, 7 & 8 of the Public Order Act were discriminatory in relation to the applicants and ultra vires Article 23 of the constitution. He argued that section 5(6) which exempts the President, his cabinet and the speaker of the National Assembly and his Deputy, from the requirement to apply for a permit is discriminatory of itself and in its effect therefore making it ultra vires Article 23 (Protection from discrimination) and hence null and void.

The rationale for Mr Zulu's argument was that in a plural political society like Zambia in which members of Government are from the ruling party, undue advantage is given to the ruling party in elections as, unlike the opposition, they do not need to obtain a police permit before holding a political rally. He therefore concluded that the provision was not reasonably justifiable in a democratic society.

In reply, Mr Kinariwala who argued on behalf of the respondents, submitted that section 5(4) of the Public Order Act is not a hinderance to the applicants in the enjoyment of their freedom of assembly as long as they apply for and obtain a permit. He argued that the freedom is not absolute, hence the provision of the Act. Mr Kinariwala submitted that the Regulating Officer must satisfy himself that the assembly is unlikely to cause or lead to a breach of peace and once he is satisfied, he has no alternative but to issue a permit. Therefore, he argued that the power is discretionary which must be exercised judiciously and not capriciously.
Mr Kinariwala argued that the re\effect and impact of section 5(4) neither extinguishes nor diminishes nor denies the said freedom but merely restricts it because the freedom is not absolute.

Mr Kinariwala submitted that section 5(6) of the Public Order Act is not discriminatory. He argued that "discrimination" refered to in Article 23 of the constitution refers only to discrimination based on race, tribe, sex, place of origin, marital status, political opinion, colour or creed therefore making it exhaustive and not illustrative.

Judge David Lewanika held the following:-

1) that the power conferred on the Regulating Officer is not an absolute one but discretionary, which discretion must be exercised judiciously and if not properly exercised, it can be challenged and corrected.

2) that although section 5(4) of the Public Order Act limits the freedom of assembly, it does not do so excessively or arbitrarily, but within the derogations contained in the constitution.

3) that Article 23(3) in its definition of discrimination is exhaustive and not illustrative and therefore the discrimination argued about by the applicants is not within its ambit.

4) that section 5(4) of the Public Order Act is intra vires Article 20 & 21 of the constitution and that section 5(6) of the some Act is intra vires Article 23 of the constitution.
It is submitted that it was correct for the Judge to hold section 5(4) of
the Public Order Act Intra Vires Articles 20 & 21 of the constitution.
This is because the derogatory clauses allow for the limitation of the
rights and freedoms guaranteed by the Bill of rights which the Public
Order Act merely does.

The power granted to the Regulating Officer is a discretionary power
which gives him only one consideration to take account of in determining
whether to issue a Police Permit or not. He is to consider whether such
an assembly, procession or meeting is likely to lead to or cause a breach
of peace. If the assembly, procession or meeting is unlikely to lead to
a breach of peace then the Regulating Officer has no choice but to issue
a permit.

Section 5(4) of the Public Order Act does not extinguish, diminish or
deny the freedoms of assembly and association but merely regulates them
because, as Mr Kinariwala correctly pointed out, political parties may
wish to hold rallies at the same venue, on the same date, at the same
time which could lead to a breach of peace. The Police, therefore, as
the custodians of peace and security must regulate assemblies and
processions to avoid anarchy and chaos.

In separate interviews this author conducted with Chief Justice Matthew
Ngulube and Justice Bobby Bwalya the same view that the Public Order Act
is a necessary requirement was explained. The Justices expressed the
opinion that the Act merely regulates Public Order rather than restrict
it as the Regulating Officer has no choice but to issue a permit unless there is likely to be a breach of peace.

It is submitted that Judge Lewanika wrongly held that Article 23 is exhaustive. By reference to discrimination on the ground of political opinion, Article 23 therefore includes the dissemination of that political opinion. There cannot be discrimination on the ground of political opinion if people are not aware of the political opinion.

The President and Vice President obviously do not need to apply for a police permit because by viture of their respective offices there will be a police presence at their assemblies which therefore will make it unlikely that there will be a breach of peace. However, as for Ministers and Junior Ministers undue advantage is given over members of the opposition as they easily express their political opinion without restrictions or conditions. It is a fallacy to think that there cannot be a breach of peace at an assembly being addressed by a Minister or Junior Minister; therefore a Police Permit should be obtained. The Police must be present, but not by way of notice but by an application as provided for under section 5(4) of the Public Order Act.

Judge Lewanika, in an interview, admitted that section 5(6) is discriminatory but argued that the discrimination does not fall within the ambit of Article 23 of the constitution. However, it is submitted that it does fall within the ambit of Article 23 as "political opinion" includes dissemination.
4.4 CONCLUSION

The Public Order Act is a necessary evil especially in a multi-party political society like Zambia. Section 5(4) of the Act merely regulates assemblies, processions, and meetings therefore making it compatible with Articles 20 & 21. However, section 5(6) of the Act is incompatible with Article 23 because it confers an undue advantage on members of the ruling party.
END NOTES

1. SECTION 5(4), PUBLIC ORDER ACT, CHAPTER 104 OF THE LAWS OF ZAMBIA
2. 1990/HP/1511
3. 92/HP/1005
4. (1994) SCZ NO. 5
5. HPR/10/95
6. HPR/11/95
CHAPTER FIVE

DOES DEMOCRATIC ZAMBIA NEED THE PUBLIC ORDER ACT 1955

5.1 INTRODUCTION

Having concluded in the previous chapter that the Public Order Act is a necessary evil in a democratic Zambia, this chapter will make recommendations to check the abuse of this statute. It will then make a conclusion on the subject of this paper.

5.2 RECOMMENDATIONS

It is hereby recommended that the Public Order Act be maintained as it is necessary for the regulation of assemblies and processions and hence the prevention of anarchy and chaos in Zambia. However, the Act should not be maintained in its present form because it is being abused by being used as a tool to suppress the opposition.

In a society like Zambia in which the Police force is not independent in the exercise of its duties, section 5 of the Public Order Act should be repealed as it is the main source of abuse. Rather than apply for a Police Permit, people should be allowed to give the police advance notice concerning planned processions and assemblies.

The Zambian Legislature should amend the Public Order Act by repealing Section 5 and incorporating section 11, 12, 13 & 14 of the English Public Order Act, 1936. These sections in the English Statute deal with processions and assemblies.
Rather than making an application for a Police Permit, in England people are required to give advance notice of processions and assemblies. (1) Notice must be given 6 clear days before the procession or assembly and it must specify the date when it is intended to hold the procession, the time when it is intended to hold the procession, the time when it is intended to start and the name and address of the person (or one of the persons) proposing to organise it.

After receiving the notice, a senior Police Officer may give directions imposing conditions on the person organising the procession if he believes that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or that the purpose of organising it is to intimidate others. (2) The conditions set by the Officer are whatever he believes necessary to prevent public disorder, damage, disruption or intimidation. These conditions must be given in writing by the Police Officer and they must be obeyed by the person organising the assembly or procession. In the case of processions, the Senior Police Officer may include conditions as to the route of the procession or prohibiting it from any public place. And in the case of assemblies, he may give directions imposing conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it. (3)
The Police in England have the right to prohibit a public procession if the Chief Officer of Police reasonably believes that because of the particular circumstances existing, no conditions imposed will be sufficient to prevent a procession from resulting in serious public disorder. (4) This is done by an order prohibiting for such period not exceeding 3 months, the holding of all public processions (or of any class of public processions). The order is only effective with the consent of the Secretary of State and it can be revoked or varied by a subsequent order made in the same way. It must be in writing or, if not, it must be recorded in writing as soon as practicable after being made.

The four provisions of the English Public Order Act are good because they merely give the Police the power to impose conditions necessary for the maintenance of public order. Only a procession, and not an assembly, can be prohibited which will apply to all such processions and therefore no discrimination can be complained of by political parties or pressure groups.

In interviews conducted with Chief Justice Ngulube, Justice Bwalya and Judge Lewanika, all expressed the view that there was need for an amendment to the Public Order Act to make it conform with the English Public Order Act. They all were in favour of a system whereby notification is given to the police about assemblies and processions rather than an application for a Police Permit.
5.3 CONCLUSION

The Public Order Act is a necessary evil in an ostensibly democratic society like Zambia. Although it may have been introduced by the Colonialists in Northern Rhodesia in order to thwart the activities of the ANC, the fact still remains that it is intended to regulate public order.

As the Act is intended to regulate Public Order, it does not therefore infringe on people's freedoms of expression, assembly and association. These freedoms all contain derogatory clauses which allow for the enactment of limiting or restricting laws which are reasonably required in the interest of Public Order. Thus the Public Order Act is compatible with these freedoms guaranteed and protected by the Bill of rights. However, section 5(6) of the Act is incompatible with Article 23 of the constitution because it is discriminatory against members of opposition parties.

In view of the fact that Zambia does not have a professionally trained and independent Police Force, it is important that the Public Order Act be amended to conform with the Public Order Act 1986 of England. This will therefore go a long way in ameliorating the abuse of the Act by the Government through the Police.
Unless the Public Order Act is amended sooner than later, people's rights and freedoms guaranteed and protected by the constitution will continue to be infringed upon because of the current susceptibility of the Act to suppression of opposition by Government. This will have a great impact on human rights and democracy in Zambia.
END NOTES

1. SECTION 11
2. SECTION 12
3. SECTION 14
4. SECTION 13