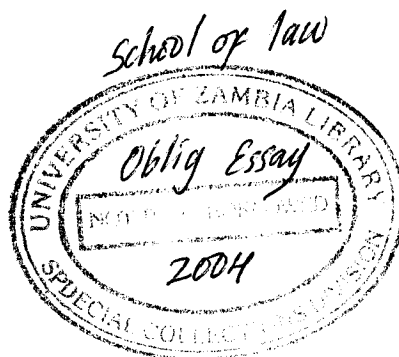


CURRENT PUBLIC ORDER AND MEDIA LAWS AND THEIR EFFECT ON DEMOCRACY IN ZAMBIA



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be accepted for examinations. I have checked it carefully and I am satisfied that it fulfils the requirements relating to the format as laid down in the regulations governing Directed Research.

Signed:
SUPERVISOR

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DEDICATION

To my late father.
Boniface. Jim. Mukaya.

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Chapter One

Introduction

This chapter serves to provide a general introduction to the work and will seek to define the major concepts concerning the major issues of discussion. The major issues have been enumerated as: democracy; public order; freedom of expression; and freedom of assembly and association.

It is noteworthy to mention from the onset that this work has as its major concern the impact of the current laws relating to public order and the media have on Zambia's democratic dispensation.

Democracy

Today's modern world holds democracy as arguably the most legitimate form of governance. As opposed to Communism and other totalitarian models, the rights of citizens are said to be realized and appreciated in a democratic state.

It must be acknowledged that the phrase democracy has no precise definition. One common conception is that it means 'government of the people by the people for the people'.¹

It is originally a Greek word combining two short words – **demos** and **kratos**. 'Demos' means the whole citizen body living within a particular city or state. 'Kratos' means power or rule. Thus, democracy in this sense implies the rule by

¹ Lincoln, Abraham, **Address delivered at The Dedication of The cemetery at Gettysburg Pennsylvania**, November 19, 1863.

the people or the many. Hence, the right of making laws in a democracy lies in the people at large.²

It is in this vein therefore that Jean Jacques Rousseau defines democracy as the rule of the people.³ Rousseau's definition is favored by many modern thinkers as it forwards the rights of citizens as being paramount to issues of governance. The people's place in society is the cornerstone of democracy and their ability to participate in governance issues as well as enjoy a free and quality life is essential to its efficacy. This notion is lucidly captured by Claire Gaudiani who states of John Locke's Social Contract that,

"The social contract Locke envisioned and the rights he affirmed for all men – free and equal – to life, liberty, and the pursuit of happiness now have serious caveats in community responsibilities and in complex situations. Now the importance of tolerance, civility, compassion, empathy, self discipline and justice come with particular implications for an increasingly diverse society. Now the definition of 'all men created equal' includes men and women of color, as well as who are physically challenged; property owners and the homeless; and those who come from any part of the globe."⁴

² Jones. Gareth, (1973), **The Sovereign of The Land**, Macmillan: London.

³ Birch, A.H. (1971), **Key Concepts in Political Science: Representation**, Pallmall Ltd: London.

⁴ Gaudiani, Claire, (1999), "**In Pursuit of Global Civic Virtues**" in Democracy is a Discussion, Connecticut College.

Thus, it is seen that democracy entails freedom of the people and that the virtues highlighted by Gaudiani are guaranteed by governments.

Democracy necessarily prioritizes the people. It is with such a background that Vaclav Havel states that;

“I favor a political system based on the citizen with all of his basic civic and human rights in their universal validity and therefore in their basic equality.”⁵

Thus, democracy envisages a political system in which the people take centre stage in governance issues.

Public Order

Public order has been defined as the state of peaceful co-existence among members of the public generally in which there is an absence of breach of peace, fighting, rioting, disturbance or conduct which causes unreasonable interference or disturbance to quiet living.”⁶ This definition is not exhaustive, and, in the Zambian context, constituent components of the term ‘public order’ are to be

⁵ Havel, Vaclav, (1999), “**On Civic Society**” in Democracy is a Discussion, Connecticut College.

⁶ Walker, David, (1986), The Oxford Essays of Law, Clarendon Press, p 1015

found defined in specific statutes, namely, the Public Order Act, the Societies Act, and the Penal Code.

Of these, the most relevant to this work is the Public Order Act, which regulates public meetings and processions. Under the Act, anyone who participates in a meeting or procession for which prior police authorization was not granted may be arrested without warrant and charged with unlawful assembly.

The Act vests immense powers in the police – which powers are seldom amenable to an effective check. This has led to debate over violation of the rights of expression, assembly and association. To this end, civil society has been asking questions relating to whether these powers are reasonably necessary for the preservation of public order and whether they are justifiable in a democratic state.

Freedom of Expression

Freedom of expression is a virtue of democratic states which is seen as indispensable. In Zambia, it is enshrined in the Republican Constitution which provides in Article 20 (1) that,

20. (1) Except with his own consent, a person shall not 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.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

(a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; or

(b) that is 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 courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably

justifiable in a democratic society.”⁷

Such a concept of the freedom of expression is also envisaged by Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

Article 20 of the Zambian constitution is very broad and includes the right to hold opinions without interference and the right to receive information and ideas without interference. It is implicit in the Article that a free press is essential to the virtues of a successful democracy. The value of a free press to democracy is outlined by Jay Rosen who writes that,

“We hold these truths to be self evident.....wrote the authors
of the Declaration of Independence (American). That democracy
requires a free press is a truth of that kind: self evident to all who
understand. So let us be clear; government cannot control what is
written or broadcast, and it cannot throw people into jail for their
views. The most obvious sign of an undemocratic regime is the
violation of these fundamental rights.”⁸

⁷ Cap 1 of The Laws of Zambia

⁸ Rosen, Jay, (1999), **“An Independent Press and The Public Sphere”** in Democracy is a Discussion, Connecticut College

However, though the constitution guarantees these rights, there are instances where the government may derogate from its obligation as contained in Article 20 (3) of the constitution which restricts freedom of expression.

From the above, it can be seen that avenues for the abuse of the rights of expression are created by the law. The derogation clause can easily be used for the purposes of oppression and thereby have a negative impact on democracy.

Freedom of Assembly and Association

Freedom of assembly and association is covered by Article 21 (1) of the Constitution which provides;

21 (1) Except with his own consent a person shall not 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.

The guarantee of freedom of assembly is also subject to limitations through the derogations allowed under Article 21 (3). In addition to Article 21 (3), a number of statutes enforce the derogations, namely, the Public Order Act, the Societies Act and the Penal Code. A vast amount of discussion in this work will be drawn from

the provisions of the Public Order Act in relation to the freedom of assembly and association vis a vis democracy.

Conclusion

This chapter has generally defined the major concepts relating to the subject matter behind this work. However, to assess the real impact of public order and media laws on democracy in Zambia, the succeeding chapters will look at the problem by way of a brief historical account of these laws up to the present day. A full comprehensive analysis of the laws will then be undertaken and the work will end with a summary and recommendations.

CHAPTER TWO

The Historical Development of Laws Relating to Public Order and The Media in Zambia

This chapter will trace the historical development of the media and public order laws currently in force. The laws that will be considered are mainly the Public Order and the Zambia national broadcasting acts respectively.

Historical Development of the Public Order Act.

The first piece of legislation that sought to deal with assemblies and processions, and public order generally was the Northern Rhodesia Police Ordinance of (NRPO) 1953. This was a pre-independence piece of legislation that stipulated various provisions relating to the conducting of processions and assemblies. For instance, section 28 (1) of the NRPO gave power to a regulating officer to issue orders that not only regulated the extent to which music may be played on public roads on the occasions of festivities, it also went further to direct the conduct of assemblies and processions on public roads or streets as well as the route by which, and the times at which any processions may be held and take.⁹

⁹ Ruedisili, "Zambia's Elusive search for a valid public order act" *Zambia Law Journal*, Vol. 25-28

In addition to the provisions set out above, the Northern Rhodesia Police Ordinance also compelled everyone wishing to convene a public meeting to obtain a permit by stating that;

“Any person who wishes to convene an assembly or form a procession on a public road or street shall first make application for a permit in that behalf to the officer in charge of police and if such an officer is satisfied that assembly or procession is unlikely to cause a breach of the peace, he shall issue a permit in writing specifying the name of the person to whom it is granted and the conditions on which the assembly or procession may take place.”¹⁰

Section 28 also stipulated the powers of the police or a magistrate to stop a procession or assembly for which a permit had not been given or which violated any of the conditions under which the permit was given.

The Northern Rhodesia Police Ordinance specified various penalties including fines of up to fifty Pounds or imprisonment for up to three months for the breach of its provisions.

As the impetus of the African freedom fighters increased, the British colonial authorities introduced the Public Order Ordinance (P.O.O.). The aim of the

¹⁰ NRPO, sect 28 (3)

ordinance was clearly to forestall African Independence efforts as it was allegedly passed to circumvent those who wish to create a breach of peace, or to take unto themselves powers of control which rest properly only in the hands of government. The ordinance, passed in 1955, also served to reassure the white settlers that African independence agitators would face the government's wrath for any unruly conduct.

The gist of the Ordinance lay heavily on the need to suppress indigenous independence movements by prohibiting the wearing in any public place of any uniform which signifies association with any political organization, to prevent the growth of any quasi military organizations which might appear to any member of the public to usurp the functions of the police or armed forces of the Crown.¹¹

The Public Order Ordinance, which was widely used against the African population, contained numerous prohibitive provisions. For example, clause 3 banned the wearing of uniforms and flying of flags which had political connotations or connection with political objects. Under this provision, the police had power to arrest any person whom they suspected of committing an offence under it.

Clause 4 prohibited the formation of any quasi military organization and also sought to prosecute any person involved in such an organization.

Clause 5 prohibited the carrying of offensive weapons at public meetings and processions and persons could be arrested without warrant.

¹¹ Hansard No. 85 (3rd July to 19 August, 1955) p 11

The sixth clause addressed aspects of prosecution of offensive conduct conducive to breaches of the peace.

The ordinance was not favored by the indigenous African population who bore the brunt of its lack of clear cut and adequate definitions characteristic of its provisions. Thus, the law gave a carte blanche mandate to the colonial government to interpret anything that threatened them as falling within the terms of the ordinance.

Due to the activities of the African National Congress (A.N.C) which spearheaded the struggle for political independence, the colonial government found it necessary to amend the Public Order Ordinance of 1955 by giving the police more powers with regard to maintenance of law and order.

The main aim of the amendment of the ordinance was to incorporate the provisions of the antecedent Northern Rhodesia Police Ordinance (1953) referring to public meetings and assemblies, with the Public Order Ordinance, and introduce modified provisions relating to the control of assemblies. Thus, the amendments of 1959 expanded the power of the regulating officer to specify any conditions he deemed necessary to the holding of any procession or assembly as long as they were for the preservation of **public peace and order**.¹²

Section 4A of the amended ordinance required any person wishing to convene an assembly or form a procession in a public place to obtain prior permission

from an approved police officer. This pre-requisite gave the regulating officer absolute and unconstitutional veto power to deny a permit if, in his opinion, the assembly or procession was likely to cause or lead to a breach of the peace.¹³

Moreover, if the officer allowed the assembly to proceed, the new law also affirmed the officer's right to prescribe any conditions on the assembly necessary to preserve public order and peace including:

(a) the date, time and place at which the assembly or procession was authorized to take place;

(b) the minimum duration of the assembly or procession;

(c) persons who were allowed to address assemblies and the topics they could speak on;

(d) the granting of adequate facilities for recording of proceedings of such assembly

This Bill went through in June 1959 without any objections in the Legislative Council.

¹² Hansard No. 98 (23rd June to 7th August, 1959) p 113

¹³ Ruedisili, "Zambia's Elusive Search For a Valid P.O.A, Zambia Law Journal," Vol. 25 - 28, p 10.

However, despite the draconian laws designed to suppress self-determination, the struggle for independence went on and political freedom was finally attained in 1964.

At independence, the Public Order Ordinance was renamed the Public Order Act, (P.O.A). It is therefore perplexing to note that most of the provisions of the Public Order Ordinance were maintained, and, in some cases strengthened, by the ruling United National Independence Party, (U.N.I.P).

The new Public Order Act exempted government officials such as the president, vice president and other senior public officials from the requirement to obtain a permit prior to the convening of any meetings.¹⁴

However, it is clear that the 1967 amendment was a pretext to consolidate additional power in the hands of the U.N.I.P government.¹⁵

The Public order Act was largely seen by the opposition as incompatible with the guaranteed constitutional freedoms. Furthermore, the exemption of government officials from the requirement to obtain a permit was discriminatory as only those that did not belong to the ruling party would be required to obtain permits.¹⁶

The status quo could not be reconciled with the earlier agitation for respect of individual liberties advanced by most leaders of U.N.I.P prior to independence. The Act remained favorable to successive regimes until the dramatic events of 1995 that were to set a new precedent in Zambia. The former Republican Dr.

¹⁴ Hansard, 13 December 1966, p 40

¹⁵ Supra No. 6, p11.

Kenneth Kaunda and other demonstrators were arrested in Chongwe after they went on with a demonstration that the police had failed to endorse by purporting to be very busy whilst giving unacceptable excuses for not being able to process the permit. The resultant high profile case of **Christine Mulundika and 7 Others v The People**¹⁷ saw some sections of the Public Order Act declared unconstitutional by the Supreme Court, the government enacted law on 22nd February amending the Public Order Act again.

The amendment does away with the requirement of a permit but section 4(4) requires a person intending to assemble or convene a public meeting, procession or demonstration shall notify the police in writing fourteen days before the meeting, of such intention.

Sub-section 5 outlines the conditions which such notice must meet including that it shall be in the prescribed form and must contain an undertaking from the conveners to the effect that order and peace must be maintained at the meeting or procession under the following criteria:

- (a) the applicant must have been informed by the police that the proposed site for their meeting or procession has not already been allocated to another convener;

¹⁶ Argument by Mr. Liso, Hansard No. 8, p45

¹⁷ The Post, 28 February, 1996

(b) the time of commencement, duration and destination of the public meeting, procession or demonstration should be notified by police;

(c) the public meeting, procession or demonstration shall not create a risk to security or public safety, a breach of the peace or disaffection amongst the inhabitants of that neighborhood;

(d) the conveners of the meeting or procession must have been assured that at the time the proposed activity shall be held, it shall be possible for it to be adequately policed.

Section 6 of the 1996 amendment Act further states that where it is not possible for the activity to be policed, the regulating officer shall inform the conveners in writing, five days before the proposed date of the meeting, procession or demonstration, of the inability, and propose an alternative date for activity.

Where this is done, no meeting or procession shall be held.

The amendment of 1996 remains the current state of affairs and constitutes the bulk of the current law relating to public order in Zambia.

Historical Development of Media Laws: The Zambia National Broadcasting Act

In Zambia, the colonial government started the first radio broadcasting station in 1941. Harry Franklin, who was Director of Information in the Northern Rhodesian government, established a small radio station in Lusaka which broadcast in six vernacular languages and from that it could be seen that the objectives of the broadcasts were to perpetuate the colonial rule in Northern Rhodesia although agricultural and other programmes were included later.¹⁸

Another important service that the Lusaka station provided was educational information to the people (Africans) in the Federation in order that they lead better lives.¹⁹ This was done pursuant to the Interim Report of The Committee on Broadcasting Services in The Colonies (1937) which recommended that radio broadcasting was to be an instrument not only, and perhaps not even primarily for the entertainment of the population, but also for their instruction in public health, agriculture and so on.²⁰

This newly formed radio station which later became the Zambia Broadcasting Corporation (Z.B.C.) got most of its support from the settler community and a few indigenous people who could listen to it from the community sets provided at chief's courts and administrative centres.²¹

However, the use of radio for disseminating information about political party events and news about African nationalists was curtailed and restricted to

¹⁸ Banda, Fackson, (2001), **Up In the Air – The State of Broadcasting in Southern Africa**. PANOS, p 106

¹⁹ Kasoma, Francis (2000), **Community Radio: Its Management and Organization In Zambia**, p 4

²⁰ Op.cit, p 5

²¹ The Media and Political Change: African Freedom Forum Report on The Media in Zambia (2001), p 16

occasional announcements in news bulletins. There were hardly any magazine or discussion programmes on politics.²²

Television broadcasting was initially introduced in 1961 in Kitwe by Jimmy Rowland's London Rhodesia Company (Lonrho). It was mainly introduced to serve the mining and commercial community on the Copperbelt and it was essentially an extension of the Rhodesia television based in Salisbury (Harare).²³

In 1966, the Zambia Broadcasting Corporation was dissolved through an Act of Parliament to pave way for the Zambia Broadcasting Services (Z.B.S.) which was established under full government control and became a department of the Ministry of Information and Broadcasting Services. This meant that the London Rhodesia Company lost control of the broadcasting station with the government taking full control of the Kitwe studios by 1967.²⁴

At this time, the Zambia Broadcasting Corporation was still a government department.

A change in the law did not occur until 1987 when the government transformed the Zambia National Broadcasting Services into a body corporate styled the Zambia National Broadcasting Corporation (Z.N.B.C.) with perpetual succession. This was done by enacting the ZNBC Act (1987) which formulated the structure

²² Kasoma, p5

²³ Banda, Fackson, Ibid, p 106.

²⁴ Op.cit, p 106.

of future broadcasting in Zambia and included provisions that would assist in the licensing of radio and television stations.²⁵

The Act also empowered the Minister of Information to appoint members of the Board to control the operations of the Corporation. The Board members served at the minister's pleasure and under his direction.²⁶

Upon the occurrence of regime change in 1991, the Movement for Multi-party Democracy (M.M.D.) immediately undertook political reforms that did not spare the media.

These reforms included opening up the sphere of broadcasting to allow for private radio and television stations such as Trinity Broadcasting Network (T.B.N.), Multi-choice Zambia Limited and Cable Satellite Television (C.A.S.A.T.).²⁷

In an attempt by the government to shift control of Z.N.B.C from a state owned and controlled (media) broadcaster to a public broadcaster, the ZNBC Act was amended in 2002 to include more liberal and independent roles to be played by the public broadcaster. This new Act now provided for the appointment of the ZNBC board by an independent body and for such appointments to be ratified by parliament. Furthermore, in order to address issues of licensing, the government passed another law – the Independent Broadcasting Authority Act.²⁸

²⁵ Section 25, ZNBC Act 1987.

²⁶ Ibid, section 4

²⁷ Kajokoto, Rueben, Media Law Reforms: "The Quest To Transfer The Zambia National Broadcasting Corporation From State Owned to Public Broadcaster", PANOS Article, p 5

²⁸ ZNBC Amendment Act of 2002

However, the media in Zambia does not only revolve around radio and television broadcasting. Though they have become the most far reaching media of mass communication, newspapers were first used to try and bridge the gap caused by the complexity of a nation whose peoples spoke 73 different languages.

Thus, in 1936, the colonial government began a newspaper for Africans called *Mutende*. The Newspaper was published in four local languages namely Bemba, Nyanja, Tonga and Sikololo (Lozi).²⁹

This marked the advent of the laws regulating the media in Zambia up to the present day.

Conclusion

This chapter has traced the development of the laws relating to the media and public order from the colonial era up to date. It has been revealed that successive governments that have assumed power have kept a yoke on the freedoms to assemble and to speak by tailoring legislation such as the Public Order Act and the Zambia National Broadcasting Act to their autocratic ideals thus continuing to

CHAPTER THREE

The Impact of Present Media Laws on Democracy in Zambia

This chapter aims to highlight and bring to the fore the extent to which current media laws have had an effect on Zambia's fledging democracy. In doing so, certain cases that have been decided by the courts will provide an insight into the depth of the discussion at hand.

Its clear that most pieces of legislation enacted since independence in Zambia have always given sweeping regulatory powers to the Minister of Information and Broadcasting Services. All manner of legislation from the Broadcast Act of 1966 to the latest Zambia National Broadcasting Act (Licensing) Regulations Act of 1993 always tend to empower the Minister to decide who should broadcast where, when and how he or she should broadcast.³⁰

This heavy handedness is reflected in many instances where the government has undertaken scathing attacks on the media quite openly and without restraint. For example, MISA Zambia in a paper on the state of the media in 2002 noted how arbitrary government was in dealing with the media, especially the public media. The paper observed that,

²⁹ Kasoma, p 7

³⁰ Kasoma, **Community Radio In Zambia**, p 231

"The minister cautioned, however, that management in public media institutions needed to be responsible enough and not publish or broadcast materials that would endanger the security and peace of the country."³¹

This kind of wanton regulation has continued to work against any genuine efforts by advocates of democratic ideals and governance to establish a meaningful democratic order.

The question that comes to the minds of many proponents of democracy is how can a seemingly liberalised broadcasting system allow a politically partisan individual in the person of the Minister of Information to determine who gets a broadcasting licence and how they should use it?

Would it not have been more liberal to remove this politically beneficial power away from the government of the day to an independent authority representing the main political interests but which is not answerable to government?³²

Further controversy in terms of the control that the government wishes to continue to wield on the public Broadcaster ZNBC has manifested itself.

This was especially seen over the minister's refusal and failure to submit names of appointees to the ZNBC Board to Parliament for ratification of the appointments. This refusal by the minister to submit the names recommended by

³¹ State of The Media in Zambia, 06/11/2002, www.ifex.org

³² Kasoma, Ibid, p 232

the appointments committee means that government continues to control the function of appointing the Board.³³

Arguing against the minister's refusal, senior lawyer and a noted advocate of media law reform Mr. Patrick Matibini said that the intentions of the amendment ZNBC Act were clearly reflected in section 42 which stated that the Minister would appoint nine part-time members of the Board on recommendation from the Appointments Committee subject to ratification by Parliament.³⁴ In furthering his arguments, Mr Matibini candidly stated that;

"This means that the appointments committee will submit names to the minister who in turn should present them to Parliament for ratification and we do not know where the Minister (Nalumango) has imported the provision of rejecting and accepting the appointees."

The foregoing account is of a debate that raged after the amendment of the ZNBC Act in 2002 and clearly shows that the continued heavy handedness that government applies in meddling with the affairs of the media is a very undesirable affront to the effective development of democracy in this country.

Also, the effect that current media laws have on the democratic dispensation has been largely retrogressive especially in terms of the treatment that government has accorded to those media houses that have tried to raise a voice in favour of the enhancement of democratic ideals.

³³MISA Zambia, 2002, www.africapulse.org

³⁴ Op.cit.

This state of affairs stems from the current set up in the media administration which has witnessed the birth of a government media vs. private dichotomy.

Apart from the two largest newspaper circulations: the Times of Zambia and the Zambia Daily Mail, the government controls the largest sources of information in terms of the Zambia News Agency (ZANA), the Zambia Information Services (ZIS); and the National Agricultural Information Services (NAIS) which are all wholly owned by government. Furthermore, despite the amendments to the Zambia National Broadcasting Act being designed to transform the corporation into a public broadcaster, the degree of control is very high.

Government owns ZNBC and the corporation is exempted from obtaining as well as renewing a broadcasting licence. ZNBC is also exempted from paying annual broadcasting fees that the non-government stations are subjected to.

This continues to perpetuate the discrepancy in treatment of broadcasters and newspapers from the government on one side and the private sector on the other.

For instance, in August 2001, Radio Phoenix was shut down on government orders for over one month. The station had not paid its annual fees for the year and though the station's management had offered to pay the money immediately the non-payment was discovered, government insisted that the station's licence status was now subject to review by the licensing authority.³⁵ Though government finally lifted its suspension of Radio Phoenix's broadcasting licence on 18th September 2001, the fact that it was coupled with a stern warning that government would not hesitate to suspend any licence of a station that did not

remit annual licence fees only goes to show that the current retrogressive structure of the laws continues to impact negatively on the development of an efficient and sound democratic state.

This continual haggling between government and private companies has also manifested itself prominently as evidenced by the relationship which has existed between the two parties with regard to the print media. On numerous occasions the government has harassed private newspapers, using in some instances, a wide range of prohibitive legislation covering deportation to defamation and in some cases sedition.

Quite recently, the government demonstrated its characteristic heavy handedness by attempting to deport a famous and popular satirical columnist, Roy Clarke of The Post Newspaper because he allegedly expressed anti-government views.

Reacting to the High Court's stoppage of the intended deportation, Transparency International Zambia (TIPZ) president Dr Alfred Chanda charged that government's decision to deport Clarke smacked of arbitrariness of an administration that condemned the Previous Chiluba regime for deporting Majid Ticklay. He said Clarke was protected and had, like everyone else in Zambia, the right to freedom of expression.³⁵ Dr Chanda emphasised the point by stating:

"Arbitrary decisions should not be taken! The rule of

³⁵ Kasoma, Ibid, p 233

³⁶ www.fi.oneworld.net, Judge Musonda Stops Clarke Deportation.

law demands that an accused be given an opportunity to give his side of the story.”³⁷

Still stating the point further, Dr. Chanda said government could not hastily deport Clarke merely because they did not like what he had written. He said the whole action was not in consonant with the rule of law.³⁸

The above sentiments only go to show the extent to which various legislative provisions in Zambia go to undermine the rule of law and basic democratic ideals.

In the case of **William Banda v The Attorney General**³⁹, the court found that the petitioner’s freedom of expression had been violated and that the regulatory officer had not properly exercised his discretionary powers. The court observed:

“ The freedom of expression rests on the assumption that the widest possible dissemination of information from divergent and antagonistic sources is essential to the welfare of the government of a free people. The purpose of such a guarantee is to prevent public authorities from assuming the guardianship of the public mind.”

³⁷ Ibid.

³⁸ Ibid.

³⁹ (1992), 92/HP/1005, Unreported.

Though the judiciary has intervened in a few instances such as in the case of **Bright Mwape and Fred Membe v The Attorney General**⁴⁰, and that of Roy Clarke, their efforts continue to be frustrated by the activities of a powerful executive that invariably also controls the legislature. Zambia remains a fertile ground for dictatorship. Each government has left behind its own set of laws detrimental to freedom of expression. The task of cleaning the statute books has been left to the judiciary who have to discharge it under the watchful eye of a powerful executive.

Thus, often judges have not risen to the occasion, and where they have, the advances made have been reversed through the enactment of new legislation.

In such a hostile legislative climate, the media, particularly those in the private sector have found that this wanton interference with the freedom of expression has greatly impeded their quest to provide balanced views to the people.

In addition to already existing laws, the government attempted to enact another draconian law when in 1995, the Minister of Information and Broadcasting announced that he was to present a bill on the proposed Media Association of Zambia. However, the Press Association of Zambia (PAZA) challenged this action in court and the High Court reviewed the decision. The High Court Commissioner said that such a law would contravene the constitutional guarantees of freedom of expression and association. The Court further stated that:

⁴⁰ (1995 – 97) ZR

“The decision to create the to create the Media Association of Zambia is no doubt going to have an impact on the freedom of journalists to freely assemble and associate with other persons or among themselves, to form and belong to any association for the protection of their interests This would also have an impact on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the Council would entail one loosing his status as a journalist, and with it denial of the opportunity to express and communicate his ideas through the media.”⁴¹

Such attempts to suppress the private media have had, and continue to have a very negative impact on democracy in Zambia.

Furthermore, in addition to suppressing the private media, the control that the law vests in government in regulation of the public media only serves to undermine freedom of expression, and ultimately, democracy.

The ZNBC Act ensures government controls the editorial decisions, management and financing of the Zambia National Broadcasting Corporation. There are no mechanisms for complaints against the corporation. A change in government entails a change in Board of Directors and the Director General, since the continuation of tenure of Board members or of Director General is subject to the

continuation in power of the government which appoints them.⁴² This compromises any effort to manage the institution in a professional way for the public benefit which makes it impossible for the Board and the institution to remain neutral and non-partisan in activities necessary for the fulfilment of democratic ideals such as elections.

Hence, Zambia's democracy struggles to strive in a precarious legal set up as the restrictions stated earlier are exacerbated by the fact that the Minister of Information can influence the context of any broadcast. If the minister is of the opinion that a broadcast is defamatory, blasphemous, obscene or seditious, he may, by notice in writing, prohibit the corporation or any other broadcaster from making such a broadcast.⁴³

It is thus clear that the current state of the law in Zambia continues to inhibit meaningful democratic progress regardless of the mischief they purport to cure. This can be attributed to the fact that the foundation of government inherited at independence was authoritarian.

Although safeguards have been incorporated in the Independence Constitution and its various successors to ensure constitutionalism, authoritarianism has been too deeply entrenched to be reversed merely by constitutional prescriptions. Zambia's experience in the past ten years has shown that peaceful transition from a one party constitutional order to a multi-party dispensation does not necessarily signify the beginning of responsible government sensitive to the

⁴¹ **Media Law and Practice In Southern Africa**, (Feb 1998), No. 7, Zambia, Article 19

⁴² Ibid

needs and demands of the people. The combined effect of these factors on media institutions is that there is no legislation enabling or protecting the media. Conversely, pieces of legislation have been enacted by past governments which undermine independence of the media and their role in the consolidation of democracy in Zambia.⁴⁴

⁴³ Ibid.

⁴⁴ Ibid.

CHAPTER FOUR

The Impact of Public Order Legislation on Democracy in Zambia: An Appraisal of the Public Order Act

In tandem with the antecedent chapter this chapter shall assess the impact current public order legislation has on democracy in Zambia. The discussion shall mainly focus on the Police Service's execution of the provisions contained in the Public Order Act of 1996 with reference to the reaction by the courts where challenges have been made.

A cursory study of the development of laws relating to public order in Zambia is enough to reveal that most regulatory pieces of legislation have been attempts by those in power to stifle dissent and perpetuate their stay in Government. From the 1953 Northern Rhodesia Police Ordinance to the current state of the laws, the desire of successive governments to stamp out their opponents has manifested itself in various ways according to the needs of a particular regime. Hence, the effective development and fulfillment of democratic ideals in Zambia has been greatly hampered.

The 1996 Amendment⁴⁵ introduced the need for a person wishing to convene a demonstration to obtain a permit by giving a mandatory fourteen-day notice period in section 4. This provision is clearly undemocratic as 14 days is too long

⁴⁵ Act No. 1 of 1996

a period and is thus very ominous to the effectiveness of the constitutionally guaranteed freedoms of speech and assembly.

It places an unnecessary prior restraint on all speech with no regard to the real regulatory needs of the police⁴⁶. This prior restraint has had a very telling impact on the democratic freedoms to associate as has been evidenced by numerous litigation that has been undertaken on the matter. A case in point is when the police frustrated the efforts of an Alliance of civil society organizations to demonstrate in March 2003. The conveners had indicated that the purpose of the public demonstrations was 'to restore sanity and civility in the conduct of public issues and style of governance'⁴⁷. The conveners enumerated their grievances as being:

- a) That the Task Force on corruption demonstrated a blatant bias in the discharge of their duties and are being turned into an effective tool and instrument of oppression and victimization of individuals by the incumbent President;
- b) That the Task Force on corruption had deliberately ignored to institute investigations into recent acts of corruption committed by the Mwanawasa's government such as US \$ 65 million paid to Sahara Trading for purchase of crude oil but is yet unaccounted for,

⁴⁶ Supra, No. 13.

⁴⁷ THE POST. Thursday March 11, 2003

and the disappearance of US \$ 1.8 million from Nitrogen Chemicals of Zambia (NCZ);

- c) The President's interference and premature refusal to award minimum wage of K 1.5 million to all civil servants which is prerogative of the collective bargaining process between government and the public service unions;
- d) The immediate reopening of the University of Zambia (UNZA) and the restoration of the recognition agreement signed between the University Management and Lecture's Union;
- e) The comprehensive review of the entire oppressive tax regime in Zambia including the reduction of income tax from 30% - 15% and abolition on tax on second hand clothing and;
- f) The reduction of mealie-meal prices that had gone up from K 50 000 to K 22 000.⁴⁸

Owing to the public nature of their demands conveners encouraged citizens to participate in the demonstration. However, the police responded by stating that the group which had styled itself **Zambian Indigenous Friends**, had not satisfied the conditions required for such a procession and that the demonstration could

⁴⁸ Zambia Human Rights Report, 1998, Afronet, Lusaka.

not go ahead because the subject of the march related to the former President whose case was before the courts.

More interestingly, the police claimed that the regulations of the Public Order Act Amendment 1996 says that the would-be conveners are supposed to meet with the police so that the latter are satisfied that the conveners will abide by the conditions set, but the conveners did not meet with them and that therefore, the demonstration was unlawful and could not go ahead⁴⁹.

A prominent civil society activist and convener of the demonstration, Mr. Alfred Zulu, contested the position taken by the police and stated any attempt to stop the demonstration would be met by force⁵⁰. A warn and caution statement was recorded from Mr. Zulu and a case in which he allegedly embezzled donor funds was suspiciously re-started⁵¹. This demonstrates how public order legislation has deliberately been designed to forestall and curtail freedom of assembly and speech which are cardinal to any democracy.

The prior restraint on freedom to associate, assemble and express oneself imposed by section 4 of the Amendment Act is further strengthened in subsection 5. This is by way of the conditions set out, namely, that applicants must be informed by the police that the proposed site for their meeting or procession has not already been allocated to another convener⁵², and that the conveners of the

⁴⁹ Ibid.

⁵⁰ THE POST, Wednesday 12th March, 2003.

⁵¹ Ibid.

⁵² subsection 5, paragraph (a)

meeting or procession must have been assured that at the time the proposed activity shall be held, it will be possible for it to be adequately policed⁵³.

Further, subsection 6 provides that where it is not possible for the activity to be policed, the regulatory officer shall inform the conveners in writing, five days before the proposed date of the meeting, procession or demonstration of the reasons for the police's inability and propose an alternative date for the activity; in which case the more meetings or processions shall be held. The conferment of such wide discretion has had to flimsy reasons being advanced for why demonstrations, especially those organized by the opposition, cannot take place. For instance, in March 2003, the Patriotic Front notified the police of its intention to hold a rally at Kafue Roundabout on the 29th of March 2003.

The police advised that the public meeting could not be approved due to the current unfavorable security situation obtaining in the country⁵⁴. As opposed to being merely flimsy, the reasons that were advanced by the police for frustrating the public meeting demonstrates just how wide a discretion which the police which is exercise in a literally *carte blanche* fashion whilst blatantly making illogical reference to public order laws. This has placed the democratic freedoms of assembly in a perilous position to the extent that Zambia has been reduced to a virtual police state devoid of the 'actual' guarantee of freedom to assembly and speak.

Hence, the fact remains that the police can still refuse to let the meeting go ahead by simply writing down their reasons whether genuine or otherwise,

⁵³ subsection 5, paragraph (f)

⁵⁴ Saturday 22nd March 2003

indicating discretion vested in the police which is used to the detriment of free thinking citizens.

Furthermore, even though aggrieved persons have an option to appeal to the minister⁵⁵, this option is rarely exercised, as the latter may not be as impartial as to engender public confidence.

Also, the final option of an appeal to the high court⁵⁶ makes the procedure for obtaining redress to cumbersome and burdensome which amount to the denial of freedom of speech, assembly and association as persons awaiting to hold public meetings and processions cannot do so at the time of their choice. This meant that citizens cannot respond to matters they consider urgent because the police can inadvertently impede delay them.

The courts in Zambia have in certain instances tried to uphold democratic ideals where public order legislation has been challenged. The first and most important case to uphold a citizen's right to free speech and assembly was the constitutionally based matter of **Christine Mulundika and others vs. The people**⁵⁷. The appellant challenged section 5 (4) of the Public Order Act, which required a permit for a public meeting, and section 7 which criminalized the contravention of this requirement. The challenge was also premised on the fundamental rights and freedoms relating to freedoms of expression and Assembly⁵⁸.

⁵⁵ Supra, No. 1.

⁵⁶ Ibid.

⁵⁷ (1995 – 1997) ZR 20.

⁵⁸ These freedoms are guaranteed by articles 20 & 21 of the court

An alternative ground of appeal was lodged in connection with the exemption of certain officers from the need to obtain a permit because it violated article 23 of the constitution⁵⁹.

In the main case, the appellants argued that section 5 (4) could not be reasonably justifiable in a democratic society when it reduced the fundamental freedoms to the level of a mere license to be granted or denied, on the satisfaction of a regulatory officer⁶⁰. The Supreme Court observed that the requirements of prior permission is an obvious hindrance to two very important freedoms under the constitution since the right to organize and participate in public gatherings is inherent in the freedom to express and receive ideas and information without interference. The court further observed that the fact or possibility that permission to assembly and to speak might be refused so that constitutional freedoms are denied altogether on improper or arbitrary grounds or even on unknown grounds renders the section objectionable.

Hence, though the police were now proscribed from **denying permits**, they were under a duty to regulate public meetings and assemblies strictly for the purpose of preserving public peace and order.

Though this landmark decision was a shot in the arm for the development of efficient democratic ideals, the governments' reaction to the ruling demonstrated how dictatorial and draconian they were prepared to be in order to preserve their hold onto power. On 22nd February, 1996, the MMD dominated parliament passed a bill amending the public order act to require inter alia, a mandatory 14

⁵⁹ Provides protection from discrimination based on race, tribe, sex, political opinion colour ancestry or marital status .

⁶⁰ Mulundika and others vs. The People at page 25.

day notice period prior to any public meeting as well as the conditions that must be satisfied in connection therewith⁶¹. The bill was passed into law in a record speed of one sitting.

Further, MMD government officials castigated the Supreme Court for declaring certain provisions of the P.O.A invalid for being ultra vires articles 20 and 21 of the Republican constitution.

The government took it a step further by unceremoniously dismissing the then Chief Justice and author of the decision as head of the Law Practice Institute.⁶² This shows that currently, the state of public order laws greatly hampers the realization of fruitful democratic governance.

The courts however, have put on a brave face by continuing to defend the spirit of the decision in the Mulundika case despite the above limitations.

In the later high court case of **Resident Doctors Assn of Zambia and others vs. The Attorney General**⁶³, Justice Peter Chitengi held that any person wishing to hold a public meeting or procession or demonstration does not require to obtain a permit from the police and that the police have no power to refuse any person from holding such a public meeting, procession or demonstration at all. The courts further stated that it was time for those that administered the P.O.A to permit the word 'permit' from their minds.

⁶¹ Section 5.

⁶² Supra, No. 2.

⁶³ (1997) /HP/ 0817 (Unreported).

From the foregoing, can be discerned the fact that the current laws on public order are a great hindrance to democracy and that the extent to which people can display dissent to governmental action or inaction is very minimal. This dismissal stat of affairs continues to be perpetuated by successive regimes with only the courts to step in and protect the rights of helpless citizens that have to bear the brunt of such repressive laws.

CHAPTER FIVE

Summary and Recommendations

This chapter is dedicated to making general conclusions concerning the subject and to making recommendations on how legislation governing the media and regulation of public order can be ameliorated.

The work has shown how laws relating to public order and most pieces of legislation relating to the media since the colonial era have tended to give sweeping regulatory powers to the Minister of Information and Broadcasting or police officers. Numerous civil society groups and other media activities have displayed displeasure at such kind of wanton heavy handedness on the part of the government to control the media and this has turned Zambia into a nation with high levels of censorship.

Chapter one provided a general introduction to the work by highlighting the major concepts constituting the subject matter namely Democracy, public order, freedom of expression and the freedoms of assembly and association.

The major philosophical underpinnings of democracy from renowned authors such as John Locke, Jean Jacques Rousseau and Abraham Lincoln were highlighted as well as a basis established for the examination of the impact that laws on public order and the media have on the democratic principles of free speech and assembly.

Chapter two traced the historical development of laws relating to public order with particular reference to the Public Order Act as the main piece of legislation identified as relevant. A brief history of how media activities and the laws regulating them emerged in Zambia was also laid down with the Zambia National Broadcasting Act dominating the discussion.

In chapter three, the impact of the current laws regulating the media was assessed with glaring revelations as to the state of democracy in Zambia emerging therein. The occurrences in the past where media houses have been shut down, journalists arrested and detained has put the position of democracy in a sorry state as the freedom to speak is highly regulated and violated quite arbitrarily. Further, the emergence of a public media vs. private media dichotomy has eroded the efficacy of the media as a media of self expression as the conditions under which journalists continue to operate leaves much to be desired.

In consonant with chapter three, the fourth chapter endeavored to assess the impact that public order laws have on democracy in Zambia. This was done by way of singling out the Public Order Act as the major regulatory piece of legislation. It has been revealed that Zambia has not made much progress in as far as protecting the guarantee to freedom of assembly is concerned.

The tradition since the pre-independence era has been a high level of regulation with harsh penal sanctions for anyone adjudged to abrogate them. The Public

Order Act and its predecessors have played a major role in serving the selfish desires of various regimes much to the detriment of an organized democratic set up.

The freedom to assemble freely has been greatly violated by the police acting on orders from the Executive as has been noted over the years including the most recent denial of a permit for civil society and opposition political parties to demonstrate over the need for swift enactment of the constitution. In this instance, even the police Inspector General and acting Home Affairs minister have come out in the open to sternly warn the conveners of the demonstration against exercising their democratic right.⁶⁴

However, it has been observed that the courts have begun to step up to the task of protecting these fundamental freedoms as evidenced by the rulings in the Christine Mulundika and Resident Doctors Association cases.

Recommendations

The Media

Given the current state of affairs, it is recommended that the new provisions of the ZNBC Act that tries to turn ZNBC into a public broadcaster be implemented. Particularly, the provision in new Act for an independent body to suggest names of ZNBC Board members to be ratified by parliament must be enhanced as it would ensure a non partisan and independent management team at ZNBC.

⁶⁴ Sunday POST, 19th December 2004

Further, the Minister's power to interfere with the operations of the media should be clipped in order to encourage the free dissemination of information and to avoid unreasonably justified acts of oppression such as the shutting down of Radio Phoenix in 2001.

Another area in which improvements are desirable is that of protection of journalists. It must be ensured that constitutional guarantees of privacy and freedom to express oneself are enhanced.

Repressive laws on deportation, defamation of the President and various other offences used as a pretext to merely harass journalists in a bid to shut them up should be abolished.

Hence, in this light, the arrests of prominent journalists including Fred M'membe and Roy Clarke all give credence to the claim that immigration and all manner of draconian laws must be revised in order that an enabling environment in which journalists can work freely is created for the ultimate benefit of the people.

Thus, those in power need to realize that the aim of the constitution by guaranteeing freedom of expression is to ensure that the benefits of self-determination accrue to the peoples of a democratic state.

Public Order

In the realm of public order, it is recommended that current laws in Zambia must be amended to be in line with modern societal needs.

For instance, the P.O.A must be amended so as to design it in a way which gives the police powers compatible with their regulating role.

Thus, section 4 must be repealed and rephrased as it confers on the police wide discretion to the extent that they determine whether or not a public meeting or demonstration can be held.

Further, the police must be provided with guidelines that determine the limitations that can acceptably be applied to public assemblies in order that public peace is maintained.

Hence, using such guidelines, the police should not be in a position to frustrate convenors of public meetings or processions on account of superior orders or differences in political opinions.

Also, it is proposed that section 4 of the Act, which proscribes quasi-military organizations, must be repealed, as it is obsolete.

It is further proposed that legislation must provide immunity for regulatory officers against disciplinary action or persecution as a result of them exercising their functions.

Additionally, the clause that requires convenors of a public meeting to give the police notice must be amended to shorten the notice period as 7 days is too long and administratively cumbersome. For instance, the notice period in England⁶⁵ is 6 days and there is a provision for a shorter period where the urgency of the matter demands that it cannot be dealt with within the 6-day period.

⁶⁵ See P.O.A (1986) of England

Also, the provision in section 14 of the P.O.A Act that criminalizes inciting of any person to strike must be repealed because it has no bearing on matters relating to the maintenance of public order.

Finally, public order legislation must not confer power on the police over and above what is already prescribed for them. For instance, the current Public Order Act ignores the fact that it is the duty of the police to maintain law and order at all times and hence the police premise their so called denial of permits on a pre-determined assumption that once people wish to convene a public assembly, peace and order are likely to be breached.

Such an assumption is an affront to the freedoms of assembly and association, which entail that people are born free and peaceful.

Thus, there is no justification for making public order legislation more restrictive as the general criminal law on riot and other such crimes is adequate. The general criminal law is a better method of regulating public order as it relates to all individuals at all times thereby making everyone, including those in power, amenable to its jurisdiction.

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