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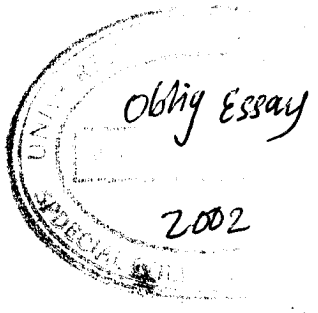


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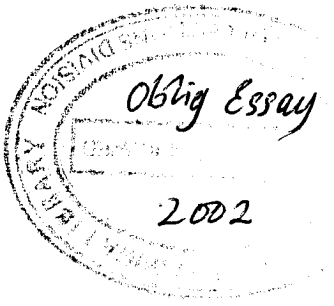


**TITLE :** **THE IMPACT OF THE PUBLIC ORDER ACT ON THE FREEDOMS OF SPEECH, ASSEMBLY AND ASSOCIATION**

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**SUBMITTED BY:** FORTUNE KAMUSAKI IN PURSUANT OF THE AWARD OF THE BACHELOR OF LAWS DEGREE IN THE SCHOOL OF LAW, UNIVERSITY OF ZAMBIA

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# DEDICATION

**To my late Father**

Thomas Kamusaki

## ACKNOWLEDGEMENTS

I wish to acknowledge with gratitude the unfailing and immeasurable support of my family and friends who have encouraged me all along to finish my law studies.

Special thanks goes to my Supervisor, Dr. Alfred Chanda for his illuminating ideas and suggestions on the improvement of this work.

Finally, I thank Mrs. C. Ngwira for typing this work.

## PREFACE

The existence of the Public Order Act (POA) has been seen by a broad section of the Zambia populace as an obstacle to the enjoyment of political rights such as the freedom of speech, assembly and association and the deepening of the democratic process in Zambia.

The Public Order Act, inherited from the colonial government, has been widely seen as a mere tool by the government in power to suppress political dissent and discourage civil society from actively participating in matters of national interests.

The Police Force has been used by the Government in power to deny permits to the opposition and civil society to hold meetings and many citizens have been arrested in the past on trumped up charges in connection with the Public Order Act.

What has been the impact of the POA on constitutional rights in Zambia since independence? Can the POA be reformed? Can the Zambian legal system alone be counted on to offer solutions to this problem? What must be done to maintain the balance between upholding law and order on the one hand, and upholding the constitutional right of freedom of speech, assembly and association on the other?

This work will attempt to address these issues. This work will argue that it is not enough to amend the POA. What is required is to call for the complete abolition of the POA and the strengthening of other branches of law such as criminal law. The POA is inherently anti-democratic and anti-constitutional.

In order to achieve this, there is need to mobilise public opinion against the negative impact of the POA on freedom of expression assembly and association and the democratic process. Only a broad coalition of all forces in Zambia will lead to the abolition of POA and strengthening of the democratic process and in turn contribute to the overall development of mother Zambia.

## TABLE OF CONTENTS

**CHAPTER FOUR:**

# CHAPTER ONE

## 1.0 INTRODUCTION

This chapter is a general introduction to this work and will therefore try to define the major concepts with which this work is concerned.

The major concepts are: public order; Public Order Act; Freedom of speech, assembly and association.

It is important to note that this work seeks to show the impact of the Public Order Act on the freedoms of speech, assembly and association in Zambia.

## 1.1 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 the peace, fighting, rioting, disturbance or conduct which causes unreasonable interference or disturbance to quiet living."[1]

The main component of the above definition of public order have been defined by specific statutes, notably:

- The Public Order Act
- The Penal Code
- The Societies Act.

## 1.2 PUBLIC ORDER ACT

This work is concerned with the impact of the Public Order Act on the freedoms of speech, assembly and association.

The Public order Act (POA) regulates public meetings and processions. Anyone who participates in a meeting or procession for which a permit has not been issued may be arrested without warrant and charged with unauthorised assembly. The powers given to the police are vast and not amenable to any effective check. They can be considered to be unconstitutional as they violate the rights of expression, assembly and association.

The powers are not reasonably necessary for the preservation of public order and not justifiable in a democratic state.

## 1.3 FREEDOM OF EXPRESSION

Article 20(1) of the Zambian Constitution provides that:

> *"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 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."*

Article 20(1) of the Zambian Constitution reflects Article 19 of the International Covenant on Civil and Political Rights, 1966 and the Universal Declaration of Human Rights, 1948, as well as Article 10 of the European convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The guarantee afforded by Article 20(1) of the Zambian Constitution is very broad. Freedom of expression includes the right to hold opinions without interference, the right to receive ideas and information without interference and freedom from interference with one's correspondence.[1]

However, freedom of expression is not absolute. Article 20(3) of the Constitution places restrictions on the freedom of expression by stating:

> *"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 defence, 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 the legal proceedings, preventing the disclosure of information in confidence....;*
>
> *(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."*

The legal system as can be seen imposed restrictions on the freedoms of expression and most of these laws were enacted during the colonial days in order to suppress the independence struggle. At independence, however, these repressive laws were not repealed and instead were carried over by the new post independence government. The democratic dispensation of 1991 has had no effect on these laws. This has been entrenched in the derogation clauses of the Constitution.

## 1.4 FREEDOM OF ASSEMBLY AND ASSOCIATION

Article 21(1) of the constitution provides that:

> *"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 freedom of assembly and association just like the freedom of expression is subject to a number of limitations. The limitations are imposed by Article 20(3) of the constitution.

Further, they are a host of statutes and regulations that impose limitations on the freedom of association and assembly. For example there is the Societies Act and the Public Order Act. In this work we will concentrate on the Public Order Act and its impact on freedom of Assembly and Association.

## 1.5 CONCLUSION

This chapter has basically defined the major concepts of this work namely; public order , Public Order Act, freedoms of speech, assembly and association.

The succeeding chapters will look at the evolution of the Public Order Act in Zambia, up to the current day. We will look at the application of the Public Order Act by the courts vis a vis the impact of the POA on freedoms of speech, assembly and association.

The work ends with a summary and recommendations.

## ENDNOTES

[1] Walker David – The Oxford Companies of Law, Oxford, Clarendon Press, 1986 p.1015

[2] A. Chanda, Freedom of Expression and the Law in Zambia, Zambia Law Journal (Vol. 30, 1998), p. 124

## CHAPTER TWO

## HISTORICAL DEVELOPMENT OF THE PUBLIC ORDER ACT

### 2.1 PRE-INDEPEDENCE DEVELOPMENT OF THE POA

#### 2.1.1 Northern Rhodesia Police Ordinance, 1953

The 1953 Northern Rhodesia Police Ordinance (NRPO) was the first colonial legislation to deal with assemblies and processions in the then Northern Rhodesia (now Zambia).

Section 28(1) of the NRPO empowered an officer to issue orders for the purpose of:

(a) regulating the extent to which music may be played on public roads or streets on the occasion of festivities or ceremonies; and

(b) directing the conduct of assemblies and processions on public roads or streets, and the route by which and the times at which any procession may pass.[1]

It must be pointed out that clause (a) was enacted in order to combat the problem of impoverished street singers, while clause (b) was meant to regulate the time, route and manner of processions. Further, clause 28(3) of the Northern Rhodesia Police Order provided 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 officer is satisfied that such 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."*[2]

Clause 28(3) of the Northern Rhodesia Police Order further gave powers to the police in regard to assemblies. "The Officer in charge of police or any magistrate may stop any procession for which no permit has been issued under this section, or which violates any of the conditions specified in such a permit, and may order such procession or any assembly which has been convened without a permit issued under this section or which violates any of the conditions specified in such a permit to disperse."[3]

Clause 29 provided that the penalties for disobeying an officer's orders or violating conditions of an obtained permit were a maximum fine of £20 and imprisonment for up to three months or both. Clause 30 made illegal any unauthorised assemblies and described assembly as "three or more persons taking part in an unauthorised assembly"[4] i.e. an assembly not sanctioned by police permit, could be fined up to £50 and imprisoned for up to six months or both.[5]

The above clauses applied strictly to assemblies on public property. The Northern Rhodesia Police Order was passed with this legislative purpose and understanding.

### 2.1.2 The Public Order Ordinance, 1953

In 1955, the Public Order Ordinance (POO) was introduced in Northern Rhodesia. The alleged aim of the Public Order Ordinance was to "circumvent those who wish to create a breach of the peace, or to take unto themselves powers of control which rest properly only in the hands of Government". [6] But it is clear that the reason for the introduction of the POO was to control the

indigenous Africans who were fighting for independence from the British colonialists. The Public Order Ordinance also served to reassure the white settlers that the government would hold the African political independence leaders responsible for unruly public demonstrations. Specifically, the Public Order Ordinance was designed "to prohibit the wearing in any public place of any uniform which signifies association with any political organisation; to prevent the growth of quasi-military organisations which might appear to any member of the public to usurp the functions of the police or of the armed forces of the Crown."[7]

The coming into being of the Public Order Ordinance was received with anger and outrage by the African population. The Public Order Ordinance was repeatedly used against the African independence leaders.

#### 2.1.2.1 The Structure of the Public Order Ordinance

The Public Order Ordinance had ten clauses, of which clauses one and two dealt with the short title and interpretations respectively.

Clause three prohibited the wearing of uniforms and flying of flags in connection with political objects. Under the clause the police had powers in sub-clause one to arrest without a warrant any person suspected by them to be committing an offence against the section. Sub-clause two required all proceedings pursuant thereto, to be commenced only with the Attorney-General's consent.

Clause four made provisions for the prohibition of the formation of any quasi-military organisations and for the prosecution of persons involved in such organisations.

Under sub-clause three, the Attorney General could apply to the High Court to consider whether any association was an association of which members or adherents were organised or trained in contravention of section 4. In response, the court could make such orders as appeared necessary for the disposition of the property of the organisation. Further, the Chief Justice could direct an inquiry and report to be made as to any such property.

Sub-clause four of clause four contained further orders the court could make, which included the payment of moneys to persons who became subscribers or contributors in good faith, and the forfeiture by the crown of any property which was not directed by the court to be applied for purposes of the association.

Sub clause five tried to conform with the Public Order Act, 1936 of the United Kingdom, although the ordinance under this sub-clause created broader powers than the said Act.

The fifth clause prohibited the carrying of offensive weapons at public meetings and processions, with a provision in clause 10 for arrest without a warrant for an offence under the section.

Clause six dealt with offensive conduct conducive to breaches of the peace. An arrest could be effected without a warrant hereto.

Clause seven made general provisions in relation to public meetings and processions.

Clause eight carried the offence of making any statement or doing any acts intended to promote hostility between sections of the community. This clause was another departure from the 1936 Act of the United Kingdom, in which no such or similar provision was contained.

Clause nine provided for the offence of advising, encouraging, inciting, procuring, commanding or aiding any other person working in the essential service to do or omit to do any act likely to interfere with the carrying on of such essential service.

Clause ten carried penal provisions in relation to the major parts of the Ordinance.

### 2.1.3 Impact of Public Order Ordinance on Rights of Speech, Assembly and Association

The coming into being of the Public Order Ordinance was received with anger and outrage by the African population. The Public Order Ordinance was repeatedly used against the African independence leaders.

The provisions of the Public Order Ordinance gave very wide powers to the colonial government. This left no room for the enjoyment of human rights

such as the rights of assembly, association and expression by the African natives.

The Ordinance lacked clear-cut and adequate definitions which would have given guidelines to police officers in deciding which types of meetings, *processions or statements were prohibited by the law. The interpretation* clause, clause 2, was both vague and silent on many important issues, posing a threat to the citizens, as anything could be brought within, the terms of the ordinance, making the enjoyment of the rights dependent upon the will of both government officials and law enforcement agents.

The other threat to the enjoyment of the rights of assembly, association and expression was the vast powers given to the police to 'arrest without warrant' persons suspected by them of committing offences against the ordinance. This was perceived by the African leaders as a serious constraint to their freedom to hold meetings with their people.

Objecting to the Public Order Ordinance bill, African member of the Legislative Council, Mr. R. Nabulyato observed as follows:

> *"Mr. Speaker, my difficulties are mainly based on clause eight, sub-clause (1). I have not seen occasions in this country which might have called for this bill apart from what the African national congress (ANC) has done as far as the African people are concerned. The ANC has shown a tendency of wearing uniforms or flying flags at their meetings. Apart from that I have not seen any necessity for bringing this bill forward and because of that I feel that the Universal effects of this bill have serious repercussions on the people of Northern Rhodesia... These two clauses (i.e. clause six and eight (1).. infer to my mind that I, as a member of legislative Council, will find it difficult to hold meetings because the African people*

*will find it difficult to see the difference which we see in this honourable house....*[8]

Dr. Alfred Chanda, a noted academic, observed in his unpublished thesis titled "Zambia: A Case Study in Human Rights in Commonwealth Africa", that:

> *"Under the Public Order Ordinance (1955) any person who wished to convene an assembly or to form a procession in any public place had to apply for written permit from the authorities. But written permits were rarely granted. As a result, many Africans who participated in illegal meetings were arrested, prosecuted, and failed."*[9]

One can therefore conclude that the colonial government used the Public Order Ordinance as a pretext to suppress political dissent in Northern Rhodesia.

### 2.1.4 The Public Order (Amendment) Ordinance, 1959

The provisions of the 1955 Public Order Ordinance proved inadequate in controlling the conduct of public assemblies and processions, which were the order of the day during this phase of the history of Northern Rhodesia. This was mainly due to the activities of the African National Congress, which spear-headed the struggle for political independence. As a result of this the colonial government found it necessary to amend the Public Order Ordinance of 1955 by giving the police more powers with regard to the maintenance of law and order.

The purpose for amending the Public Order Ordinance was to "transfer the ... provisions in the Northern Rhodesia Police Ordinance (1953) referring to public meetings and assemblies to the Public Order Ordinance [and to] .

Introduce modifications to the provisions relating to the control of assemblies."[10]

The Police Ordinance was confined to police administration while public order regulations during public meetings and assemblies were to be confined to Public Order Ordinance.

The 1959 amendments expanded the power of the regulating officer to specify any conditions he deemed necessary to the holding of any procession or assembly to the holding of any procession or assembly as long as they were "for the preservation of public peace and order."[11]

Under section 4A of the Amendment Ordinance any person who wished to convene an assembly or form a procession in any public place was required to get prior permission from an approved police officer. A well known law scholar, Ruedisili pointed out that "this pre-requisite gave the regulating officer absolute and unconditional 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".[12]

If the officer allowed the assembly to proceed, the amendment also affirmed the officer's right to provide any conditions on the assembly as he deemed necessary to preserve public order and peace. These limitations or conditions included:

(a) The date, time and place at which the assembly or procession was authorised to take place.

(b) The maximum duration of the assembly or procession.

(c) Persons who were allowed to address assemblies and matters they would or not be permitted to address.

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

Section 4C declared

(a) all assemblies, meetings and processions held without a permit and;

(b) those in which three (3) or more persons taking part neglected or refused to obey any orders given under subsections (3) or (7) of Section 4A; to be illegal assemblies.

Persons involved in such assemblies or convening, calling or directing such assemblies were liable to be arrested without warrant.

Section 4d(1) gave the Chief Secretary discretion to exempt by order in writing, any religious organisation from the provisions of sections 4A and 4C, whereby by virtue of subsections 4c(2) and 4c(3) respectively, such exemption could apply either to the religious organisation generally, or branches of it in the territory; and could be made subject to such conditions as the Chief Secretary could impose, or be revoked by him at any time by notice in writing.

The bill was passed in June, 1959 without any objections in the Legislative Council. It remained law until it was amended by the government of Zambia after independence.

### 2.1.5 CONCLUSION

The above discussion was on the nature of Zambia's colonial public order legislation. We have seen that the objective behind the ordinances was to suppress the independence struggle and perpetuate colonialism. It is therefore not surprising that debate about the exercise of freedoms of assembly, association and expression was ignored by the colonialists.

Despite these draconian laws, the struggle for independence went on and political independence was attained in 1964.

However, the attainment of independence did not lead to an improvement in the enjoyment of the freedoms, although the rights became enshrined in the post independence constitution. It will be interesting to note that post independence public order legislation was used to maintain the ruling elite in power at all costs.

The succeeding chapters will therefore focus on how the indigenous leaders have used public order legislation and in particular the Public Order Act to suppress the rights of speech, assembly, and association.

## 2.2 POST INDEPENDENCE EVOLUTION OF THE PUBLIC ORDER ACT

### 2.2.1 The 1967 Amendments to the Public Order Act

At independence, the Public Order Ordinance was renamed the Public Order Act (POA). Surprisingly, not only were most of the provisions of the Public Order Ordinance kept but the Public Order Act was strengthened by the ruling UNIP party.

The Public Order Act exempted government officials from the requirement to obtain police permits prior to convening public meetings. These officials included the President; Vice President, the Speaker and Deputy Speaker of the National Assembly.[13]

The justification for the exemption was that these officials spent a great deal of time touring the country, explaining government policy.

It was thus 'embarrassing and inconvenient for his Excellency or a cabinet minister to have to go along to the local police station to get a permit.

One would have expected the post independence government to seek for the repeal of that section of the Public Order Act requiring every person to get permits for every meeting.

But, as Ruedisili has pointed out, the amendment was "simply a pretext for consolidating additional power in the hands of the UNIP government."[14]

The opposition denounced the amendment and pointed out that the Public Order Act had been used to suppress the very independence movement which was now in power.[15]

The other change in 1967 to the Public Ordinance Act made the singing of the National Anthem compulsory at the beginning of every public meeting.[16] The alleged reason for this amendment was to foster unity among the many tribes of Zambia. The song instilled a sense of nationhood which was essential for the sake of uniting people of diverse tribal and cultural backgrounds.[17]

This justification for the national anthem proviso was based on Justice Frankfurter's words in the US supreme court's decision in **Minersville School District v Gobitis**[18] and Attorney General Skinner paraphrased Justice Frankfurter as follows:

> *"... the national anthem is the symbol of national cohesion in the State. It is something that is necessary in order to bring about national cohesion. If you have not national cohesion, you cannot have national security, and your civil liberties depend upon national security."*[19]

However, three years later, the US Supreme Court repudiated such reasoning and overruled the **Gobitis** decision in the case **West Virginia State Board of Education v Barnette**.[20]

This amendment was again vehemently opposed by the opposition but to no avail, as both amendments became law.

The Public Order Act was seen as being incompatible with the guaranteed freedoms under the constitution. The exemption of government officials was discriminatory as only those who did not belong to the ruling party would be required to obtain police permits if they wished to hold public meetings and processions.[21]

Further the compulsory singing of the national anthem was unnecessary interference with people's liberties. There was nothing in the song that would unite the people of Zambia if they were divided by tribal differences.[22]

In conclusion one can say that the 'new' government did not only retain colonial statutes on the subject under discussion but went a step further by

enacting more stringent laws which were more restrictive on the extent to which rights could be exercised.

The state of affairs could not be reconciled with the earlier agitation for respect to individual liberties made by most of the leaders in the new government, before the attainment of independence.

### 2.2.2 THE 1996 AMENDMENTS TO THE PUBLIC ORDER ACT

#### 2.2.2.1 The Public Order Amendment Act

On 27 February, 1996, the MMD- dominated Parliament passed a bill amending the Public Order Act to require, among other things, a mandatory fourteen day notice period prior to any public assembly.[23]

The bill passed the MMD Parliament in record time, passing all stages to become law in one sitting.

This Act was the legislature's reaction to the decision of the Supreme Court in ***Christine Mulundika and Others v. The People****(24)* which declared certain provisions of the Public Order Act null and void for being ultra-vires articles 20 and 21 of the Constitution.

The MMD government officials castigated the Supreme Court itself for its decision and for meddling in "governmental affairs." Moreover, the government unceremoniously dumped Supreme Court Chief Justice Mathew Ngulube, the author of the decision, as the head of the Law Practice Institute.

However, some opposition members of Parliament were outraged by this new Act declaring it "shameful in bad faith, and hypocritical" and "evil" with "dangerous intentions to revert Zambia to a police state."

### 2.2.2.2 Salient Provisions of the New Act

Section 1 deals with the short title. It further provides that the Act is to be "read as one with the ... principal Act."

Section 2 repeals the definition of "uniform" in Section 2 of the principal Act. This in line with the repeal of Section 3 of the principal Act which prohibited the wearing of uniforms in connection with political objects.

It must be noted here that by virtue of the repeal of Section 3 of the principal Act the main object of the Public Order Act, as can be declared from its preamble, has been taken away altogether.

Section 4 of the Amendment Act repealed subsections 4 to 7 (inclusive), of Section 5 of the principal Act. The following are substituted therefore: The new section 4(4) requires that 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. Subsection 5 thereof outlines the conditions which such notice must meet, i.e. that such notice shall be in a prescribed form and that it must contain an undertaking from the applicants or convenors to the effect that order and peace be maintained at the meeting or procession, under the following heads:

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

(b) The route and its width must have been certified suitable for processions by statutory order from the Minister;

(c) The commencement, duration and destination of the public meeting procession or demonstration should be notified to the police.

(d) Marshals of a number sufficient to monitor the public meeting, procession or demonstration, who shall co-operate with the police, must be available.

(e) 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 neighbourhood; and

(f) The convenors of the 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 policed.

Subsection 6 provides that where it is not possible for the activity to be policed, the regulating officer shall inform the convenors 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. Where this is done, no meeting or procession shall be held.

Under subsection 8 the convenors have a right to appeal to the Minister if they are unsatisfied with the reasons given by the regulating officer, who should decide and inform them of his decision in writing within five days. A further appeal can lie to the High Court within thirty days of the Minister's decision.

'Normal' processions (which phrase is not defined by the Act) are exempted from the requirements of Section 4 under Section 4(10) while subsection 11 gives further conditions for the notice, that is to say it shall be delivered to the police station in the area in which the meeting is to take place. In the case of a procession or demonstration, it must be delivered to the police station in the area in which it is proposed to start.

Section 5 repeals Section 6 of the principal Act and replaces it with a provision to the effect that punishment of offenders under the *Public Order Act* will be in accordance with the provisions of Chapter Nine of the *Penal Code*. The Act winds up in Section 6 by the repeal and replacement of Section 7 of the principal Act, by giving the Minister general powers to make "regulations for the better carrying out of the provisions of the Act."

The following observations can be made about the Amendment Act. Firstly the requirement for furnishing notice under section 4 does not make the enjoyment of freedoms of speech, assembly and association any better than before. Convenors cannot be said to have the liberty to assemble any public meeting, procession or demonstration as the law still gives police power to decide whether or not this can be done. The same problems associated with

the permit scheme under the repealed section 5(4) of the principal Act are reproduced here. The fact is that the police can still refuse to let the meeting go ahead by simply writing down their reasons whether genuine or otherwise. This indicates a discretion vested in the police which as already shown, may be abused to the detriment of convenors of public meetings.

Secondly, although aggrieved persons have an option to appeal to the Minister, the latter may not be impartial as to deserve public confidence, especially from persons in opposition parties.

Thirdly, the final option of an appeal to the High Court makes the procedure for obtaining redress too lengthy and cumbersome. It amounts to a denial of the freedom of speech, assembly and association as it entails that a person wishing to hold a public meeting or procession cannot do so at the time of his choice. By the time the High Court decides the case, the period during which one intended to hold the meeting or form the procession or demonstration will have expired already and the circumstances necessitating the meeting or procession would have ceased to exist, hence the whole planned activity would have been overtaken by events.

The other danger here is that police, under pressure from their political superiors can take advantage of the Act to frustrate any plans to hold demonstrations against the government which in itself amounts to censorship of the right of expression.

The fourteen-day notice period in Section 4 is too long and restrictive of freedom of expression. As Ruedisili points out:

> *"It places an unnecessary prior restraint on all speech with no regard to the real regulatory needs of the police. Smaller assemblies and rallies certainly should not have to comply with such a provision."(25)*

Subsection 5(e) is unconstitutional because of its requirement that the demonstration "shall not create disaffection amongst the inhabitants of that neighbourhood." A march should not be restricted because it may offend the inhabitants of a certain neighbourhood.

Section 6 is also in bad taste. It has been said that the police should respond within forty-eight hours of any request and state in writing, the specific reasons why a permit is denied or delayed. Why should the police be allowed to take no action if they receive an application for a permit fourteen days in advance, for nine days before replying to the request?

Section 8 is also a poor provision. How can the Minister of Home Affairs, who is a government appointee be expected to be impartial if the appeal is from the opposition?

Section 10 is vague as to the definition of what a "procession that is commonly or customarily held without police intervention" is. The vagueness of this section is a potential area for litigation.

Due to the problems discussed in the foregoing paragraphs the Public Order Act has been found wanting. Concerns have been aired from several different political groups including opposition parties and civic organisations.

In conclusion one can say that the 1996 amendments to the Public Order Act were harsher, more restrictive and less democratic provision than the previous Public Order Act. The Public Order Act should be rewritten or be scrapped altogether.

## END NOTES

[1] Ruedisili, Zambia 's Elusive Search for a Valid POA, ZLJ, p.4
[2] Ibid
[3] NRPO, Section 28(3)
[4] Ibid, Section 30(b)
[5] Ibid.
[6] Hansard (No. 85) 3 July – 19 August, 1955, p.11
[7] Ibid, p.10.
[8] Ibid at column 769 to 771
[9] A. Chanda, Zambia: A Case Study in Human Rights in Commonwealth Africa (unpublished thesis), July 1992, Yale University p.84.
[10] Hansard Number 98 (23rd June to 7th August, 1959) column 113
[11] Ibid
[12] Ruedisili, Zambia's Elusive Search for a Valid POA Law Journal, Vol. P.10.
[13] Hansard, 13 December, 1966 at 40
[14] Supra no. 1, p.11
[15] Hansard, 13 December at 42.
[16] Ibid at 41
[17] Hansard, No. 8, 14th February, 1966, Col. 42
[18] [1940] 310 US 586, 60 S.ct. 1010, 84L.Ed. 1375
[19] Hansard, 13 December, 1966, at 65.
[20] [1943] 319 US 624, 63 S. ct. 1178, 87 L.Ed. 1628
[21] Mr. Liso's arguments in the National Aeembly, Hansard 8, Supra Co. 45.
[22] Ibid, Co. 46
[23] The Post, 26 January 1996, page 3, Co. 4
[24] The Post, 28 February, 1996
[25] Supra no. p.56

## CHAPTER THREE

## APPLICATION OF THE PUBLIC ORDER ACT BY THE JUDICIARY

### 3.0 INTRODUCTION

This chapter looks at the role of the courts both in Zambia and England in balancing the thin line that divides constitutional rights and the Public Order

### 3.1 ZAMBIAN CASES

#### 3.1.1 Pre-Independence Cases

The first case to deal with the interpretations of the NRPO was Attorney General for NR v Hagamata [1959]1R & N 226. In this case the defence argued that Section 28(1) of the Ordinance speaks only of 'defined areas' allotted to particular 'regulating officers' and thus appears to apply only to those areas which are defined by the Commissioner. In this case, Hagamata had assembled without a permit, in an undefined area which had no assigned regulating officer. He argued that since there was no particular officer to obtain a permit from because of the Commissioner" lack of assignment, the NRPO did not apply to 'undefined areas' such as where he had assembled. Section 28 of the NRPO required a permit for lawful assembly and section 30(a) defined unlawful assembly as any meeting, procession or assembly which takes place without a permit. The Magistrate found for the defence, but on appeal the Federal Supreme Court rejected this interpretation of the statute.

The court found, "section 30 is very wide in terms and makes every assembly, meeting or procession in Northern Rhodesia unlawful, unless it is held under permit. It is therefore to be expected that provision should be made for a

permit system covering the whole Territory and not only areas designated by the Commissioner of Police... In my opinion, this court should rule that ... a permit is required for any assembly, meeting of procession, whether in an area designated by the Commissioner of Police or not...."[1]

It is argued that this decision was influenced by the colonial politics during this time and therefore the decision has no real precedental value.

### 3.1.2 Cases During the 1st and 2nd Republics (1964-91)

Before Zambia's independence in 1964, political freedom fighters like Kenneth Kaunda continued to speak out against the POO. However, after independence, nothing was done to amend the Act.

Instead, Kaunda continued to strength and consolidate his political power by curtailing the right to assemble. As Dr. Alfred Chanda has noted,

> *"Prior to December 1972, freedom of association and assembly included the right to form and belong to any political party. However, the right was removed under the One Party Constitution which stipulated that only one political party, UNIP, could exist and that it was unlawful for anyone to form or belong to or assemble with any other party."*[2]

Dr. Chanda further notes, "over the years the government used these regulations and the POA to suppress dissent, much the same way as the colonial government used them to suppress the nationalist struggle for independence ... Opposition parties were often denied permits to hold public meetings or processions. Permits were, as a rule, never granted for anti-government demonstrations by students, workers, and other interest groups."[3]

During Kaunda's last years, he ruthlessly used the POA to stifle the growing democratic aspirations of Zambians and in particular the Movement for Multiparty Democracy (MMD).

MMD members, including Frederick Chiluba, the MMD President were harassed and prosecuted for unlawful assembly.

### 3.1.3 Arthur Wina & Six Others v. The Attorney General

Members of the MMD petitioned the court for redress alleging denial of their fundamental rights. In this case the petitioners alleged that the government was 'refusing them permits to hold meetings' and thus denying them their constitutional rights of association, assembly and expression. On two occasions, the MMD had requested for permits to hold meetings and they had been refused by the police in Lusaka and Ndola.

The permits were denied on dubious grounds. The court first found that an individual can apply for a permit for himself or for an organisation and need not be a part of any formal society recognised under the Societies Act in order to obtain a permit under Section 5 of the Public Order Act. The court then determined that Article 4 of the 1971 Constitution, mandating a one-party state only declared that a person may not "form any other political party or organisation with any other than UNIP" and assemble or association with any other political party or organisation," so that any individual could assemble "even if contrary to those of the only political party."[4]

The court held that MMD at that time was not a "political party' but a "pressure group" and thus they fell outside the ambit of Article 4 of the 1971 Constitution and the Control of the Societies Act.

The court decided that an officer's discretion must be exercise by the regulating officer alone and that he cannot be bound by a general operational instructions" of his Superiors which deny all permits for no reason. The court said, "exercise of discretion means that the regulating officer's decision must be based on the exercise of independent judgement of himself and not to be dictated to him by those not entrusted with the power to decide."

Given the denial of all permits to MMD based on "instructions from above," the court held that the officers had 'surrendered or abdicated their discretion in refusing to grant permits. Further, the court concluded that MMD was denied its constitutional rights for expression, and of assembly and association.

### 3.1.4 Cases During the Third Republic (1991-2001)

In the book "Democracy: The Challenge of Change"(5) the former President of Zambia, Chiluba said his government believed in democracy and profession of fundamental human rights like the freedom of assembly, expression and association. However, government made sure that the Public Order Act was used to suppress political dissent. Below are instances on how the MMD government used the Public Order Act to suppress opposition to its rule.

### 3.1.4.1 William S. Banda v. The Attorney General

William Steven Banda v. Attorney General[6] was the first major case during the Chiluba era to do with the prosecution of the opposition. Mr. Banda was an outspoken senior UNIP official. In the William Steven Banda case the plaintiff was the Lusaka District Party Chairman of UNIP. Another official of UNIP applied for an received a permit to hold a political rally in order to reorganise UNIP after their defeat in the 1991 general and parliamentary elections. The permit was approved by the regulating Officer but he deleted William Banda's name from the list without any reason.[7]

Mr. Banda attempted to get his name on the speaker's list but was rejected by *the regulating officer because the regulating officer "had been directed not to allow your petitioner to address any political rally."*[8] *No other reasons were advanced.*

Later, in the 20 April, 1992 issue of the government owned Newspaper, The Daily Mail, Mr. Banda read that the basis for his rejection was that "his utterances were likely to cause a breach of the peace."[9]

The Dail Mail's article explained that the regulating officer would continue to reject the plaintiff's applications until he turned down his "provocative utterances." Assistant Commissioner of Police, Francis Ndhlovu commented, "as far as I am concerned, I am not going to allow him to address any meetings for sometime."[10]

Commissioner Ndhlovu's affidavit claimed that he was under no obligation to *give reasons to the petitioner.*[11] *Ndhlovu also declared that members of the*

public told him that because Mr. Banda was not a Zambian national he should not, therefore, be permitted to address political rallies.

Judge C.M. Chitoshi delivered the judgement. He pointed out that the right to freedom of expression is indispensable for the development of one's own individuality and for the success of parliamentary democracy, and that this right is "not only the right of an individual but rather a right of the community to hear and be informed."[12]

Further, he said "freedom of assembly is an essential element in a democratic government. The purpose of public meetings is the education of the public and formation of opinion on religious, political, economic and social problems. Hence the right of assembly is intimately connected with the right of freedom of speech and expression..."[13]

Judge Chitoshi then observed that none of the rights are absolute under the Zambian Constitution because of the derogation clauses.[14] Then, he looked at the wide discretionary power given to the regulating officer under Section 5 of the Public Order Act. Generally, courts do not interfere with administrative action in the exercise of discretionary powers. However, there is some judicial control over administrative discretion. The courts have the power to review administrative action to make sure such discretion is not abused and that the administrator is using his power "properly, responsibly and with a view to doing what is best in the public interest."[15]

Judge Chitoshi declared that denying Banda a permit because he was non-Zambian was irrelevant consideration because it violated the Constitution's

clause on discrimination on the basis of political opinion and place of origin, and thus was an abuse of discretion.[16]

Judge Chitoshi further found that banning the petitioner from speaking on the basis that some people found his speeches provocative was also an illegal use of discretion. He found that the MMD supporters who planned to create trouble for Mr. Banda should not be allowed to go ahead with their plans unpunished.[17]

Next, he found that the government's action in this case constituted an illegal prior restraint on Mr. Banda's freedom of expression.

Judge Chitoshi found that the police cannot suppress a speaker on the basis of news reports, hysteria, or influence "on what he did yesterday, he will do today."[18]

He encouraged the police to use the current criminal law to punish law breakers and argued that the criminal law deals with these problems adequately through offences such as unlawful assembly, not, affray and proposing violence or breach of the law to assemblies.[19]

Judge Chitoshi said that the Public Order Act itself allows for the arrest of any person who uses "threatening, abusive or insulting words at any public meeting or procession with intent to provoke a breach of the peace or whereby a breach of the peace is likely to occur.[20] He pointed out that the good of Section IX of the Penal Code is to punish those who abuse the freedoms of speech and assembly.[21]

Judge Chitoshi concluded by stating that the state's case was not properly handled because the state rested on unproved allegations, lacked witnesses, and depended on fabrications.

The true citizenship of Banda was dealt with later in the Supreme Court decision titled **William Steven Banda v. The Chief Immigration Officer and the Attorney General.**[22] In fact, Mr. Banda was later deported to Malawi by the Chiluba government. However, in 2002 the "New Deal Administration" of President Mwanawasa revoked his deportation and invited him to come back to Zambia. Presently, Mr. Banda is back in Lusaka and going about his normal life.

### 3.1.4.2 ALFRED MTHAKATI ZULU V. THE ATTORNEY GENERAL

In the case of **Alfred Mthakati Zulu v. Attorney General**[23] the Honourable Justice K.C. Chanda rejected the Secretary General of the University of Zambia student Union's (UNZASU) petition asking for a declaratory judgement that the cancellation of a student procession by the police force was invalid and a violation of constitutional rights.

The facts of the case were that a permit was originally granted for a student rally by an Inspector Buchisa on 21 September, 1992, with the proviso that "no political speeches were to be made at the meeting." Later on, the Senior Assistant Commissioner of Police, Mr. Francis Ndhlovu, informed the student leaders that the permit had been cancelled.[24] The students went ahead with their meeting and were stopped by the paramilitary on the Great East Road.

They were then told to disperse and when they ignored the orders, many students were arrested including the petitioner.[25]

The students alleged that the cancellation of the original permit issued by Inspector Buchisa by Commissioner Ndholvu was illegal and improper. Ndholvu deemed ever cancelling the permit at all. He claimed that he did not have sufficient police manpower to cover the meeting and so he asked the students to have their meeting on campus.

In his judgement Judge Chanda declared that because Ndhlovu was "the highest and last authority to decide whether a particular meeting was likely to degenerate into disorder", his attachment of a condition changing the venue of the procession from Kafue roundabout to the university grounds was valid.[26] The judge said that the permit was really never cancelled at all. The students simply could not go where originally they were told they could go. He said that because the students' cause was reported in the press, the press would still have been there at campus to cover the rally and published the message. He finally dismissed the petition.

The decision of Judge Chanda has been criticised by certain quarters. Ruedisli had the following to say over the decision of Judge Chanda:

> *"First, the learned judge obviously did little research into the issue. There was a comparably recent decision of Judge Chitoshi of the Lusaka High Court which Judge Chanda apparently ignored. Second, the Commanding Officer orally advised the students of the change in the police's decision regarding the permit, which is constitutionally suspected as well. Such a change should certainly be written down and authenticated... Thirdly, the commanding Officer never gave any reasons for his change and given the chain of events which*

*occurred, it is easy to impute improper governmental influence on his actions,.*

*Fourth, there is no reason why the Commanding Officer should have an absolute veto power over his subordinate regulating officers, when it comes to the permitting process..... Fifth, the Commanding Officer was not the regulating Officer under these facts. Sixth, the decision misconstrues the nature of the right of assemble... However, the right to assemble includes the right of the students to assemble off campus if they choose."*[27]

On appeal, the Supreme Court in the Alfred Zulu case[28] again decided in favour of the government. The court found that the regulating officer is subject to the ordinary chain of command and that Inspector Buchisa was obliged therefore to receive instructions from Commissioner Ndhlovu. The decision by the court ignores the fact that the location where the march is held has a communicative effect and impact on the message.

The court's ruling that Inspector Buchisa's decision as the junior officer can be overturn or modified with impunity is very strange. This reasoning is contrary to the Public Order Act. Under this Public Order Act and the Arthur Wina decision, the regulating officer has discretionary power. The court also ignored any examination of the constitutional validity of the internal police regulation which gives the power to issue permits for political meetings solely to the Commissioner. Such a policy is unconstitutional as it allows the officer to determine what is or is not political according to his own personal beliefs. Giving the Commissioner the right to discriminate against causes which are political violates the constitutional prohibition on discrimination on the basis of political opinion.[29]

### 3.1.4.3 The People v. Christine Mulundika[30]

On 19th February, 1995, the former President of Zambia, Kenneth Kaunda was arrested for allegedly attending an unauthorised assembly in Chongwe. Seven others including Christine Mulundika who allegedly took part in an unlawful assembly were arrested in Chongwe on the day of the meeting and appeared in court. The arrests were made on the premise that the Public Order Act had been violated.

Kaunda's legal defence team argued three separate grounds of appeal:

(1) They argued that Section 5(4) of the Public Order Act's requirement of a police permit prior to holding any public meeting violates Article 20 and 21 of the Zambian Constitution.

(2) That the Public Order Act confers absolute powers on a regulating officer to grant or refuse a permit for any reason and this unlimited discretion is contrary to the freedom of expression, assembly and association found in Article 20 and 21 of the Zambian Constitution; and that such unlimited powers were not reasonably justifiable in a democratic society. [31]

(3) That Section 6 of the Public Order Act improperly discriminates against non-governmental politics because the Act expressly exempts all ministers, junior ministers, and the President from having to apply to the police to obtain an obligatory permit.[32]

High Court Judge David Lewanika denied all the plaintiff's contentions and declared the Public Order justifiable and constitutional.

Thereupon Kaunda appealed Judged Lewanika's decision to the Zambian Supreme Court. The Supreme Court declared on 10th January 1996 that the Public Order Act was unconstitutional. What followed was summarised by Ruedisili as follows:

> *"The Zambian Government's reaction to the landmark supreme court decision was unusually swift and decisive. On 27 February, 1996, the Zambian Parliament passed a new, revised version of the Public Order Act requiring at least fourteen days notice to be given to the police prior to any public meeting, assembly, or demonstration. This bill was passed in an uncharacteristically rapid manner, being ratified into law by the Parliament in only one sitting."*[33]

Coming back to the landmark Supreme Court majority decision delivered Chief Justice Ngulube, the court felt that Section 5(4) simply went too far in giving unlimited power to the regulating officer reducing the "fundamental freedoms to a mere license to be granted or denied on the subjective satisfaction of a regulating officer."[34]

The court further declared that despite the illegal prior restraint that the Public Order Act imposes on constitutional rights, the lack of proper guidelines rendered the law seriously flawed.

However, the court found that certain features of the Public Order Act were constitutional including the issuing of directions for an assembly to regulate the date, time and place, duration and manner of the procession.

In conclusion, one can say that the decision of Supreme Court was indeed a landmark judgement based on internationally recognised democratic

principles of fundamental human rights. As Ruedisili argued "the judgement sets a valuable precedent and indicates a real willingness of the court to assert its weight on an issue of great public importance."[35]

### 3.1.4.4 Oasis Forum* v. Attorney General, Inspector General, Commanding Officer

In this case, the Commanding Officer at Lusaka Central Police, Francis Kabondo on 18th April 2001 refused to sanction the applicant's notice to hold their planned procession or march from Freedom Statue to Kafue Round About and to hold their planned public rally at Kafue Roundabout on 21 April, 2001 from 10.00 hours to 17.00 hours.

The applicants were aggrieved by the refusal and thereupon applied to the High court for a judicial review of the same by means of orders of declaration and injunction.

The applicants relied on the decision in **Wynter Kabimba v. The Attorney General and Lusaka City Council.**[36] Grounds of review included the fact that the decision complained of had been generally applied in a manner ultra vires the Public Order (Amendments) Act in that it presupposed police power to allow or disallow a public gathering or deny or issue a permit or prior authorisation to hold public gatherings.

Among the relief sought was also a declaration of the Public Order (Amendments) Act No. 1 of 1996 no longer required the public to obtain police permits in order to hold public gatherings, either indoor or outdoor.

The notice by the applicant had been refused by the Commanding Officer on the grounds the police had intelligence reports that the public gathering is likely to bring disturbances and that on this particular day the Police had no sufficient manpower to handle a volatile situation.

The court gave the injunction and declared that there was no need to get a permit.[37] This was in line with the Public Order (Amendment) Act No. 1 of 1996

## 3.2 APPLICATION OF THE PUBLIC ORDER ACT BY ENGLISH COURTS

Although both English and Zambian courts' treatment of public order stems from a common legal background, the judicial decisions differ dramatically.

**Humpries v. Connor**[38] was one of the first recorded cases to deal with the issue of speaker interference in a lawful march. Connor, a police constable, removed an orange lily (a symbol of the Protestant nationalist movement in Northern Ireland) worn by a Protestant marcher in Northern Ireland, when an angry, predominantly Catholic crowd had gathered at the Protestant march because such a flower might have agitated Catholics in the area and led to a breach of the peace. Humphries sued the constable Connor for assault and although, this court indicated that the wearing of the lily was entirely lawful, it held that the officer's removal of the flower was also lawful. The court reasoned that the officer had a duty to keep the peace and as long as the officer thought it necessary for him to remove the flower to preserve the peace, then the officer was not liable for assault of the marcher. The court did not specifically address the intent of the marcher in wearing the flower,

although it is assumed that she wore the flower to stir up animosity between the two religious.[39]

In **Beaty and Others v. Gilbanks**,[40] members of the Salvation Army were convicted of unlawful assembly and 'bound over' to keep peace, because they had been attacked by the antagonistic "skeleton Army" group and it seemed likely to the court that these clashes would continue. The Salvation Army appealed and their conviction was overturned and the bind-over quashed.

The decision of the court can be said to be speech protective and places no onus on the speaker or marcher to be held responsible for the actions of antagonistic groups. The police need not speculate on the likelihood of a breach of peace, but instead focus on what the speaker says or what the marcher explicitly does and nothing more.

In **O'Kelly v. Harvey**,[41] tenants protested against the raising of rent by a landlord in Ireland. The tenant's disputed the landlord's ability to raise the rent and refused to pay him. They then decided to meet to protest the rental increment. Harvey, the justice of the peace, asked the meeting to disperse but the tenants refused. Harvey then 'laid hands' upon the plaintiff, O'kelly, in order to break up the meeting. O'kelly alleged a battery upon his person and Harvey in defence explained that he had reasonable grounds to believe that a breach of the peace would occur and thus, justified his actions.

The court found Harvey's justification a valid defence to the crime of battery. The majority opinion declared, "the duty of the justice of peace is to preserve the peace unbroken, he is, of course, entitled, and in fact, bound to intervene

the moment he has reasonable apprehension of a breach of the peace being imminent; and therefore he must in such cases, necessarily act on his own reasonable and bona-fide belief as to what is likely to occur.[42]

The court did limit its holding to the extent that the officer's actions of dispersing the assembly must be the only way of preventing a breach of the peace.[43]

In **Wise v. Danning**,[44] the court ignored the Beatty precedent and instead decided that a speaker could be bound over even though his opponents were the only ones threatening violence, and the violence was directed toward the speaker himself. The speaker was a Protestant preacher and he had given several anti-Catholic speeches in the predominantly Catholic section of Liverpool. After those speeches, riots had occurred. The court held that since the riots and disorder were a "natural consequence" of his abusive language, his conduct could be prescribed.[45] This holding was subsequently codified in Section 5 of England's Public Order Act of 1936, the precursor to the Northern Rhodesia Public Order Ordinance.

In **Duncan v. Jones**,[46] a Police Officer asked a noman suffragette who was about to address an assembly to move along and give her speech elsewhere. A year earlier at this same location, a disturbance had broken out at the training centre after she had spoken. The defendant ignored the officer's request and instead began speaking. She was then immediately arrested and subsequently convicted for "wilfully obstructing a peace officer when in execution of his duty" in violation of the Prevention of Crimes Act.[47]

She appealed contending that the officer acted ultra vires his duty when asking her not to hold her meeting as scheduled. The court found that because the officer had "reasonably apprehended a breach of the peace", it then became his duty to prevent anything which in his view would cause that breach of the peace."[48]

**In Jordan v. Burgoyne**,[49] Burgoyne was a Superintendent of the Metropolitan Police. Jordan was an anti-Semitic speaker at Trafalgar Square. There, Jordan addressed an assembly of approximately 5000 people, of which approximately 200 to 300 were Jews, Communists and those in favour of nuclear disarmament. Jordan uttered, "more and more people every day are opening their eyes and coming to see that Hitler was right. They are coming to see that our real enemies, the people we should have fought, were not Hitler and the National Socialists of Germany, but world Jewry and its associates in this country."[50] After this outburst, there was commotion and a surge toward the platform where a line of police had formed. Complete disorder ensued and twenty listeners were arrested for breach of the peace. A prosecutor then cancelled the rest of Jordan's speech.

The state argued that while courts need to be cognisant of free speech; if speakers choose to threaten, abuse or insult somebody they must do it in a way that did not provoke the people they were addressing. Knowing who was in his audience, Jordan must have realised that his harsh words were likely to lead to a disturbance.[51]

Jordan, in his defence, argued that the 200 or 300 dissenters had come to the meeting voluntarily with the intent to stop the meeting from ever happening. Jordan argued that the test for determining whether a violation of the Public Order Act happened should not be the reaction of "deliberate trouble makers," but rather the response of "ordinary, reasonable British people."[52]

The court framed the issue this way: "whether the words in Section 5 of the Public Order Act of 1936 'whereby a breach of the peace was likely to be occasioned' could be properly construed to mean 'likely to lead to a breach of the peace by the ordinary citizen in the circumstances of the case?"[53]

The court reasoned that although the 200 to 300 citizens in the crowd who were incensed by the speaker's words intended to prevent the speaker from continuing, the police acted correctly in arresting the speaker. The court said that the defendant's words were deliberately intended to be insulting to the people who were being restrained by the police. Further, the court said that a man was entitled to express his views as strongly as he liked, but he must not threaten, abuse or insult by hitting with words.[54]

In conclusion one can say that Zambian courts could have applied the rule in Beatty and Others v. Gilbanks. The rule in this case allows for the speaker or marcher to be responsible for his speech or march, but not to hold him liable for illegal and unruly actions of a crowd antagonistic to his position. This principle of holding people responsible for only their own actions has too often been overlooked by the Zambian courts when it comes to examining the issues of free speech and public order.

[1] [1959]1 r & n 226, 230.
[2] A. Chanda, Zambia: A Case Study in Human Rights in Commonwealth Africa (unpublished thesis), July 1992, Yale University at p. 75.
[3] Ibid, 180-181
[4] 1990/HP/1511 (unpublished) at p.7
[6] 92/HP/1005 (1992) unpublished
[7] Ibid, at 3
[8] Ibid, at 3
[9] Ibid.
[10] Ibid, at 5
[11] Ibid, at 16
[12] Ibid, at 7
[13] Ibid, at 18-19
[14] Ibid, at 19
[15] Ibid, at 22
[16] Ibid at 24
[17] Ibid, at 24
[18] Ibid, at 26
[19] See Sections 74-93 of Chapter IX of the Penal Code
[20] 92/HP/1005 (1992) at 27
[21] Ibid.
[22] SCZ Judgement No. 16 of 1994
[23] 1992/HP/2225 (unpublished)
[24] Ibid, at 4, 5.
[25] Ibid, at 4
[26] Ruedisli, Zambia Law Journal, p. 34-35
[27] Ibid p. 35-36
[28] SCJ No. 5 of 1994
[29] Ruedisli, ZLJ, p.38
[30] 1995 SCZ No. 25
[31] see Submission of Professor Patrick Mvunga
[32] see Submission of Sebastian Zulu
[33] Ruedisli ZLJ, p.2
[34] SCJ Judgement No. 25 of 1995, p.8
[35] Ruedisli, ZLJ, p.52 [1995/97] ZR 152
[38] [1864]17 Ir. CLR.
[39] see Ruedisli ZLJ, p.13
[40] [1882]9 QBD 308
[41] [1883]15 Cox CC 435
[42] Ibid, at 445
[43] Ibid
[44] [1920]1KB 167
[45] Ibid at 176
[46] [1931]1KB 218
[47] Prevention of Crimes Amendment Act (1885) Section 2
[48] Ibid, supra No. 45 at 223
[49] [1963]2 QD 744
[50] Ibid

[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid

# CHAPTER FOUR

# SUMMARY AND RECOMMENDATIONS

## 4.1 SUMMARY

The aim of this work has been to demonstrate the impact of the POA on the freedoms of speech , assembly and association. To achieve this aim we have looked at the evolution of the POA from the colonial period and the application of the POA by Zambian courts. English cases have been used for comparison purposes only.

### 4.1.1 Definition of concepts

The major concepts used in this work are public order; Public Order Act; Freedom of speech, assembly and association.

The main component of the definition of public order have been defined by specific statutes, notably:

- The Public Order Act
- The Penal Code
- The Societies Act.

This work has been concerned with the impact of the Public Order Act on the freedoms of speech, assembly and association.

The Public order Act (POA) regulates public meetings and processions. Anyone who participates in a meeting or procession for which a permit has not been issued may be arrested without warrant and charged with

unauthorised assembly. The powers given to the police are vast and not amenable to any effective check. They can be considered to be unconstitutional as they violate the rights of expression, assembly and association.

The powers are not reasonably necessary for the preservation of public order and not justifiable in a democratic state.

Article 20(1) of the Zambian Constitution deals with the freedom of expression

Article 20(1) of the Zambian Constitution reflects Article 19 of the International Covenant on Civil and Political Rights, 1966 and the Universal Declaration of Human Rights, 1948, as well as Article 10 of the European convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

The guarantee afforded by Article 20(1) of the Zambian Constitution is very broad. Freedom of expression includes the right to hold opinions without interference, the right to receive ideas and information without interference and freedom from interference with one's correspondence.

However, freedom of expression is not absolute. Article 20(3) of the Constitution places restrictions on the freedom of expression.

The legal system as can be seen imposed restrictions on the freedoms of expression and most of these laws were enacted during the colonial days in order to suppress the independence struggle. At independence, however,

these repressive laws were not repealed and instead were carried over by the new post independence government. The democratic dispensation of 1991 has had no effect on these laws. This has been entrenched in the derogation clauses of the Constitution.

Article 21(1) of the constitution deals with the freedom of assembly and association.

The freedom of assembly and association just like the freedom of expression is subject to a number of limitations. The limitations are imposed by Article 20(3) of the constitution.

Further, they are a host of statutes and regulations that impose limitations on the freedom of association and assembly. For example there is the Societies Act and the Public Order Act. In this work we will concentrate on the Public Order Act and its impact on freedom of Assembly and Association.

### 4.1.2 Historical development of the Public Order Act

The 1953 Northern Rhodesia Police Ordinance (NRPO) was the first colonial legislation to deal with assemblies and processions in the then Northern Rhodesia (now Zambia).

In 1955, the Public Order Ordinance (POO) was introduced in Northern Rhodesia. The alleged aim of the Public Order Ordinance was to "circumvent those who wish to create a breach of the peace, or to take unto themselves

powers of control which rest properly only in the hands of Government". But it is clear that the reason for the introduction of the POO was to control the indigenous Africans who were fighting for independence from the British colonialists. The Public Order Ordinance also served to reassure the white settlers that the government would hold the African political independence leaders responsible for unruly public demonstrations. Specifically, the Public Order Ordinance was designed to prohibit the wearing in any public place of any uniform which signifies association with any political organisation; to prevent the growth of quasi-military organisations which might appear to any member of the public to usurp the functions of the police or of the armed forces of the Crown.

The coming into being of the Public Order Ordinance was received with anger and outrage by the African population. The Public Order Ordinance was repeatedly used against the African independence leaders.

The provisions of the Public Order Ordinance gave very wide powers to the colonial government. This left no room for the enjoyment of human rights such as the rights of assembly, association and expression by the African natives.

The Ordinance lacked clear-cut and adequate definitions which would have given guidelines to police officers in deciding which types of meetings, processions or statements were prohibited by the law. The interpretation clause, clause 2, was both vague and silent on many important issues, posing a threat to the citizens, as anything could be brought within, the terms of the

ordinance, making the enjoyment of the rights dependent upon the will of both government officials and law enforcement agents.

The other threat to the enjoyment of the rights of assembly, association and expression was the vast powers given to the police to 'arrest without warrant' persons suspected by them of committing offences against the ordinance. This was perceived by the African leaders as a serious constraint to their *freedom to hold meetings with their people.*

The provisions of the 1955 Public Order Ordinance proved inadequate in controlling the conduct of public assemblies and processions, which were the order of the day during this phase of the history of Northern Rhodesia. This was mainly due to the activities of the African National Congress, which spear-headed the struggle for political independence. As a result of this the colonial government found it necessary to amend the Public Order Ordinance of 1955 by giving the police more powers with regard to the maintenance of law and order.

The purpose for amending the Public Order Ordinance was to transfer the provisions in the Northern Rhodesia Police Ordinance (1953) referring to public meetings and assemblies to the Public Order Ordinance and to introduce modifications to the provisions relating to the control of assemblies.

The Police Ordinance was confined to police administration while public order regulations during public meetings and assemblies were to be confined to Public Order Ordinance.

The 1959 amendments expanded the power of the regulating officer to specify any conditions he deemed necessary to the holding of any procession or assembly to the holding of any procession or assembly as long as they were "for the preservation of public peace and order."

If the officer allowed the assembly to proceed, the amendment also affirmed the officer's right to provide any conditions on the assembly as he deemed necessary to preserve public order and peace. These limitations or conditions included:

- The date, time and place at which the assembly or procession was authorised to take place.
- The maximum duration of the assembly or procession.
- Persons who were allowed to address assemblies and matters they would or not be permitted to address,

The granting of adequate facilities for the recording of the proceedings Persons involved in such assemblies or convening, calling or directing such assemblies were liable to be arrested without warrant.

At independence, the Public Order Ordinance was renamed the Public Order Act (POA). Surprisingly, not only were most of the provisions of the Public Order Ordinance kept but the Public Order Act was strengthened by the ruling UNIP party.

The Public Order Act exempted government officials from the requirement to obtain police permits prior to convening public meetings. These officials

included the President; Vice President, the Speaker and Deputy Speaker of the National Assembly.

The justification for the exemption was that these officials spent a great deal of time touring the country, explaining government policy.

It was thus embarrassing and inconvenient for his Excellency or a cabinet minister to have to go along to the local police station to get a permit.

One would have expected the post independence government to seek for the repeal of that section of the Public Order Act requiring every person to get permits for every meeting.

The other change in 1967 to the Public Ordinance Act made the singing of the National Anthem compulsory at the beginning of every public meeting. The alleged reason for this amendment was to foster unity among the many tribes of Zambia. The song instilled a sense of nationhood which was essential for the sake of uniting people of diverse tribal and cultural backgrounds.

This amendment was again vehemently opposed by the opposition but to no avail, as both amendments became law.

The Public Order Act was seen as being incompatible with the guaranteed freedoms under the constitution. The exemption of government officials was discriminatory as only those who did not belong to the ruling party would be required to obtain police permits if they wished to hold public meetings and processions.

Further the compulsory singing of the national anthem was unnecessary interference with people's liberties. There was nothing in the song that would unite the people of Zambia if they were divided by tribal differences.

On 27 February, 1996, the MMD- dominated Parliament passed a bill amending the Public Order Act to require, among other things, a mandatory fourteen day notice period prior to any public assembly.[23]

The bill passed the MMD Parliament in record time, passing all stages to become law in one sitting.

This Act was the legislature's reaction to the decision of the Supreme Court in ***Christine Mulundika and Others v. The People*** which declared certain provisions of the Public Order Act null and void for being ultra-vires articles 20 and 21 of the Constitution.

The MMD government officials castigated the Supreme Court itself for its decision and for meddling in "governmental affairs." Moreover, the government unceremoniously dumped Supreme Court Chief Justice Mathew Ngulube, the author of the decision, as the head of the Law Practice Institute.

However, some opposition members of Parliament were outraged by this new Act declaring it "shameful in bad faith, and hypocritical" and "evil" with "dangerous intentions to revert Zambia to a police state."

The following observations can be made about the Amendment Act. Firstly the requirement for furnishing notice under section 4 does not make the enjoyment of freedoms of speech, assembly and association any better than before. Convenors cannot be said to have the liberty to assemble any public meeting, procession or demonstration as the law still gives police power to decide whether or not this can be done. The same problems associated with the permit scheme under the repealed section 5(4) of the principal Act are reproduced here. The fact is that the police can still refuse to let the meeting go ahead by simply writing down their reasons whether genuine or otherwise. This indicates a discretion vested in the police which as already shown, may be abused to the detriment of convenors of public meetings.

Secondly, although aggrieved persons have an option to appeal to the Minister, the latter may not be impartial as to deserve public confidence, especially from persons in opposition parties.

Thirdly, the final option of an appeal to the High Court makes the procedure for obtaining redress too lengthy and cumbersome. It amounts to a denial of the freedom of speech, assembly and association as it entails that a person wishing to hold a public meeting or procession cannot do so at the time of his choice. By the time the High Court decides the case, the period during which one intended to hold the meeting or form the procession or demonstration will have expired already and the circumstances necessitating the meeting or procession would have ceased to exist, hence the whole planned activity would have been overtaken by events.

The other danger here is that police, under pressure from their political superiors can take advantage of the Act to frustrate any plans to hold demonstrations against the government which in itself amounts to censorship of the right of expression.

Subsection 5(e) is unconstitutional because of its requirement that the demonstration "shall not create disaffection amongst the inhabitants of that neighbourhood." A march should not be restricted because it may offend the inhabitants of a certain neighbourhood.

Section 6 is also in bad taste. It has been said that the police should respond within forty-eight hours of any request and state in writing, the specific reasons why a permit is denied or delayed. Why should the police be allowed to take no action if they receive an application for a permit fourteen days in advance, for nine days before replying to the request?

Section 8 is also a poor provision. How can the Minister of Home Affairs, who is a government appointee be expected to be impartial if the appeal is from the opposition?

Section 10 is vague as to the definition of what a "procession that is commonly or customarily held without police intervention" is. The vagueness of this section is a potential area for litigation.

Due to the problems discussed in the foregoing paragraphs the Public Order Act has been found wanting. Concerns have been aired from several different political groups including opposition parties and civic organisations.

### 4.1.3 Application of the Public Order Act by Zambian and English

This work has looked at the application of the POA by Zambian and English courts.

Although both English and Zambian courts' treatment of public order stems from a common legal background, the judicial decisions differ dramatically.

However, Zambian courts could have applied the rule in **Beatty and Others v. Gilbanks**. The rule in this case allows for the speaker or marcher to be responsible for his speech or march, but not to hold him liable for illegal and unruly actions of a crowd antagonistic to his position. This principle of holding people responsible for only their own actions has too often been overlooked by the Zambian courts when it comes to examining the issues of free speech and public order.

## 4.2 RECOMMENDATIONS

### 4.2.1 Amending the Act

#### (i) Object of the Act

The Act must be re-enacted into one coherent whole in order to clearly state its object. The remainder of the Act after the repeal of Section 3 on the prohibition of uniforms, seems to suggest that the entire Act seeks to regulate public assemblies.

This being the main object, the Act must be designed in such a manner that it will give the police powers that will be compatible with their regulatory role and

nothing more. Therefore, Section 4 must be repealed in its totality as it vests the police with too much power, as it puts them in a position of determining whether or not a public meeting, procession or demonstration will be held, which goes beyond merely regulating the conduct of such activity.

**(ii) Definitions**

The Act must clearly define what is termed as 'normal or customary' processions in section four. Equally 'public meeting' and "public place" must be defined by the Act.

The importance of defining these important phrases is so as to give clear guidelines to the police in enforcing this law who, if not guided by the Act, may begin to arrest people on their personal whims and caprices. This must be guarded against by any democratic system for the purpose of guaranteeing to the citizens, the free exercise of their rights and freedoms.

**(iii) Guidelines for Police Officers**

The police should be given guidelines outlining what type of limitations on assemblies are not permitted. For instance, police should be told that permits cannot be denied on the basis of orders from superior officers, or on orders from the executive branch, nor on the basis of political opinion nor on the basis of nationality.

**(iv) Denial of a Permit**

If a permit is a denied, factual, and solid and verifiable reasons must be given which can stand up in court. A permit cannot be denied on the basis of rumour and innuendo.

**(v) Shortening of the Permitting Process**

The permitting process should be shortened and allowance made for quick appeals. A person or organisation should try to prepare a permit request several days before the actual demonstration. England requires a minimum of six days for such a request in the Public Order Act. Fourteen (14) days notice in the Zambian case is too long a period.

The police should respond to a permit requester proposal at least within 46 hours. This give the police adequate time to make sure that they have the necessary forces to deal with the request.

If a permit is denied, the aggrieved person must be allowed to immediately appeal the regulating officer's decision to the High Court. This appeal should be treated as an extraordinary writ requiring the High Court to sit within 48 hours of the permit. This speedy legal process is necessary to protect fundamental constitutional rights.

If a citizen is granted a permit but finds the time, place, and manner restrictions too cumbersome, then he/she can appeal to the High Court judge at the same process as above.

Fourteen days notice is indeed too long and so is the proposed seven days under the amendment bill. This should be replaced by a shorter period such as two days to be complemented by a provision in the Act which will place a duty on the police to comply with such notice by ensuring that they police the activities. Such provision can have a proviso enabling police where a breach of the peace is imminent, which factor must be determined on the basis of clearly defined circumstances under the Act, to 'recommend' that the activity should not be held.

Where the police have reasons to suspect that a breach of the peace may occur, the Act should provide that they should apply to the courts for a declaration to the effect that a meeting by the applicants should not be held. This is in order to make determination of likelihood of a breach of the peace occurring, which is a major concern under the public Order Act, a matter of law for the courts to decide, rather than for the discretion of the police or the Minister whose objectivity cannot be assumed by the public.

Where the courts are found to be busy so as to delay the determination of such a matter which by its nature requires expediency, the alternative would

be to provide under the Act for a special tribunal to hear such applications, which should be made subject to the courts of law.

Nor it might be argued on the contrary that such a law would take away from the police's duties of maintaining law and order during public assemblies and processions. It must be pointed out here that such worries must be allayed by the fact that breach of the peace itself, which was the main apprehension of the Legislature in clothing the police with far-reaching powers under the public Order Act, is an offence punishable under the penal code, which is the general source of criminal law of the land. There is thus no need whatsoever to give the police any extra-powers. Besides, the general criminal law has the advantage of being removed from political considerations.

In its present state, the public Order Act ignores that the duty of the police is to maintain law and order at all times. This assumption is founded on the scope of police under the Act which appears to assume further that once people wish to convene a public assembly, peace and order are unlikely to exist and so the role of the police in such circumstances is definitely that of 'creating' peace and order as opposed to maintaining what is already there. This assumption which by itself is incompatible with the theory behind freedom of assembly and association, i.e. that people are born free and peaceful ought to be removed from the Public Order Act. There is nothing essentially tyrannical in a group of people unless the individuals making that group cannot themselves be peaceful. On that basis crime is no more imminent from an assembly of people than it would be from individuals. There

is thus no justification for making public order legislation more restrictive of freedoms than any other type of legislation.

**(vi) No discrimination Based on Political Affiliation or Opinion**

There should bot be discrimination in the permitting process based on political opinion or political party. Government ministers should not be given legal advantages allowing them to circumvent the need to obtain a permit. The police need to know the particulars of any government meeting just as they would need the information about an opposition parties' meeting. A distinction must be made between a governmental function, where the Minister is acting in the scope of his employment as minister, and a partisan political function, where the Minister is speaking on behalf of the party. Such a distinction is necessary in order to eliminate the discriminatory application of the Public Order Act. Government officials must follow the laws which they pass.

**(vii) Familiarisation with the Penal Code**

Police Officers should re-familiarise themselves with the crimes of unlawful assembly, riot, affray, and proposing violence(1). These crimes have often been ignored by the police who have instead concentrated on muzzling freedom of speech, assembly and association through the permitting process. The criminal code must be used to stop criminal action. Police Officers must also be re-educated in modern techniques of handling crowds. If the speaker incites the crowd to violence, then arrest him. If the crowds are riotous, arrest them.

### 4.2.2 Abolition of the Act

Should the proposed amendments to the POA fail to go through the only option then will be to demand for the abolition of the POA.

In the past , civil society and the opposition parties have called for the abolition of the POA.

Recently, some Members of Parliament(MPs) have called upon the government to immediately repeal the POA because it has been used against the opposition by the ruling party(2). Speaking during a consultative lunch workshop organised by the Southern Africa Centre for Constructive Resolution of Disputes(SACCORD) held on the 24th of September 2002 in Lusaka, the MPs said the law was archaic and was not good for a country liker Zambia that preached the rule of law and democracy.

The MPs came from the opposition parties(FDD and UPND). One of the MPs said that the ruling party was using the POA to disadvantage the opposition during election times. He went on to say that there had been no proper attempt to repeal the POA.

Kaoma MP, Mr Austin Liato pointed out that the POA was interfering with the tenets of democracy as it was inhibiting freedoms of association and speech. "We need to repeal the entire chapter, the Act is used by the ruling party to deal with the opposition"(3), the lawmaker emphasised.

The MP for Mandevu, Ms Patricia Nawa said the Act was prohibiting developmental meetings. "This Act is even affecting our developmental meetings. MPs need to get permission even for developmental meetings"(4), she said.

Such pronouncements from lawmakers is encouraging. However, in order to succeed in abolishing the POA, a rainbow coalition of forces has to be mobilised.

## END NOTES

[1] Penal Code, Cap. 146, Sec. 74(1)
2 The Monitor, September 27-30, 2002
3 Ibid p. 1
4 Ibid p. 1

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