DEMOCRATIC SPACE AND STATE SECURITY: ZIMBABWE'S PUBLIC ORDER AND SECURITY ACT[1]

by Derek Matyszak

Introduction

This paper seeks to examine the way in which the Government of Zimbabwe, under the guise of providing for State security and public order, has closed the democratic space for those opposed to its rule. I am concerned with activity that would be considered innocuous or healthy in any vibrant democracy. Those sections of the Public Order and Security Act (POSA) that relate to the use of force against the State are not discussed here.[2]

On attaining independence in 1980, the new Government in Zimbabwe retained the Draconian[3] legislation that had been enacted by the previous Smith regime[4] to curtail the Nationalist threat to its hold on power.[5] The incoming Government stated that the very legislation they had campaigned against during the liberation war, was now needed to counter destabilization by apartheid South Africa. Amongst this legislation was the precursor to the present Public Order and Security Act, the Law and Order (Maintenance) Act (LOMA).[6] Furthermore, for the first eleven years of independence the country retained the State of Emergency initiated by the Smith government. Zimbabwe's Constitution provides[7] that during a State of Emergency, an Act of Parliament may derogate from those sections of the Declaration of Rights that deal with liberty, freedom from arbitrary search, freedom of expression, freedom of association, freedom or movement and discriminatory laws.[8] Accordingly, for the first eleven years of independence, most of the provisions of LOMA could not be subjected to constitutional challenge.

The State of Emergency was allowed to lapse on 25 July 1990. The following decade saw a widening of democratic space as civil society took advantage of a Bill of Rights that

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[1] Chapter 11:17

[2] Although these provisions have many aspects which are not acceptable in a democracy - see generally *Professional Audit of the Public Order and Security Act* commissioned by the Zimbabwe Liberators Platform August 2002 (hereafter the ZLP Report).

[3] The Government's own memorandum to the first version of POSA announced that the intention was to replace the "Draconian" Law and Order (Maintenance) Act.

[4] The Government of Ian Smith, which sought to entrench white minority rule.

[5] Amongst this legislation is the Sedition Act, 1936; the Subversive Activities Act, 1950; the Public Order Act, 1955; the Unlawful Organisations Act [*Chapter 91*]; The Emergency Powers Act [*Chapter 83*] and the Law and Order Maintenance Act [*Chapter 65*]. Such was the Draconian nature of this latter piece of legislation that the then Chief Justice resigned in protest describing the Act as a "savage, evil mean and dirty law".

[6] Act 53 of 1960 and subsequently, Chapter 39

[7] Section 25 as read with the Second Schedule.

[8] Sections 13, 17, 20, 21, 22, & 23 respectively.

had become fully justiciable for the first time in the country's history.[9] Civil society grew at a rapid pace in these years.

The year 2000 is generally accepted as a watershed year in Zimbabwean politics. In that year a new constitution for the country, proposed by the Government, was rejected in a nation-wide referendum. Civil society had campaigned against this proposed Constitution and had clearly played a key role in its rejection. Given the disaffection with the Government at the time of the referendum, the poll was largely seen as a vote for or against the Government rather than a vote for or against the proposed constitution itself. With parliamentary elections due a few months after the referendum and the presidential election due in 2002, the ruling ZANU (PF) party had good reason to fear defeat at the polls in both elections.

ZANU (PF) moved rapidly to close down the democratic space that had led to this first major defeat at the polls. Its *modus operandi* involved a confluence of the authoritarian legislative techniques inherited from the former colonial regime and the tactics of the liberation struggle – which included the use of endemic violence. The amalgam is a singularly nasty form of authoritarian nationalism which is at its most articulate in the form of POSA and its praxis - the subject of this paper.

Legislative history of POSA

The legislative history of POSA itself evinces a sudden change in the present Government's previous policy of reluctant tolerance of such democratic fundamentals as the freedom of expression and assembly.

In 1960, when POSA's predecessor, LOMA, was introduced in the Southern Rhodesian legislature, it provoked a storm of opposition from African Nationalists (many of whom constitute the present government), white liberals, and church leaders. Only one parliamentarian opposed the Bill in words that are worth recalling:

> This type of legislation develops] a disrespect for law, once the seed of disrespect for law is sown the basis of good government is attacked. It is most important that people should realize that governments change, that policies of governments change and indeed even the colour of governments change. This type of legislation is such that it would be putting such power into the hands of government that I would not wish to see in the hands of any government at all. The idea that the civil liberties of an individual may be casually eroded is an idea fraught with danger.[10]

Nonetheless, the Bill was passed into law in 1960 and became the key legislative mechanism stifling dissent against white minority rule. Many Ministers of the present Government were imprisoned under its provisions. Rather than immediately repealing the legislation at independence, the vast powers conferred by this legislation proved too

[9] Under the 1961 and 1965 Constitutions law in existence prior the coming into force of the constitutions was protected from constitutional challenge - sections 70(1)(b) and 79(1)(b) respectively. LOMA was in fact rushed through parliament so that it would be in place before the 1961 Constitution. Under the 1969 Constitution the Declaration of Rights was not justiciable at all.

[10] Hansards Legislative Assembly Debates vol 46 1960 –61 col 2902.

seductive for the new Government. At a seminar held at the University of Zimbabwe in 1992, the then Minister of Justice, Legal and Parliamentary Affairs[11] was asked when this legislation would be removed from the Statute books. His reply was to invite people to contact his Ministry and indicate provisions thought to violate civil liberties[12]. This breathtakingly disingenuous approach came unstuck when the Declaration of Rights became fully justiciable and key provisions of LOMA came under successful Constitutional attack.[13] The result was not less Draconian legislation relating to maintenance of public order during public processions, but none at all, as the provisions were held to be void. Furthermore, it was obvious that many of the remaining provisions that the Government might wish to use in the future also would not pass constitutional muster. Accordingly, in 1997 the Government began to moot the repeal and replacement of LOMA and, after circulating a white paper for discussion, introduced the prototype of POSA into parliament in 1998. Although still an authoritarian piece of legislation, the Bill was not, as some posturing opposition politicians proclaimed, "worse than LOMA"[14]. Most of the worst excesses of LOMA had been removed. After all, the Government's intention had been to draft a Bill that would withstand constitutional challenge. Civil rights activists and opposition politicians probably now look back on this prototype with some nostalgia. The Bill never became law. Although passed by parliament in 1998 the Bill did not receive the requisite presidential approval. The Bill remained on the desk of the President until June 1999 when it was returned to parliament for amendment.[15] Two important events had taken place since the first reading of the Bill. In January 1998 a wave of demonstrations and rioting related to the increase in the cost of basic food products swept through the country.[16] The rioting was brutally suppressed with the (unlawful) aid of the military. Secondly, in January 1999, journalists Mark Chavunduka and Ray Choto were arrested and tortured for the publication of an article in *The Standard* newspaper, which alleged the arrest of Zimbabwean army officers in connection with an attempted military coup. The journalists were charged under the still valid Law and Order (Maintenance) Act for making a false statement likely to cause fear, alarm and despondency.[17] The State defended the use of the Law and Order (Maintenance) Act, saying that the story of the foiled coup published by Chavunduka and Choto had shown that the army was vulnerable to attacks by the press and that the Public Order and Security Bill would need to be revised accordingly. When the Bill re-emerged it indicated a clear intention on the part of Government to suppress freedom of assembly and speech and to utilize the Act as a means of stifling opposition to its governance. Many of the more liberal provisions of the earlier Bill had vanished. In the analysis of

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[11] Emmerson Mnangagwa

[12] See Peter Propotkin *Order, the Daughter not the Mother of Liberty – An inquiry into the legality of the Law and Order (Maintenance) Act of Zimbabwe [Chapter 65]* Legal Forum Volume 6 No 1 1994 p 41.

[13] *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S)

[14] This assertion was made by several politicians at the time, including by the late opposition activist and legal academic, Kempton Makamure during a State radio interview in 1998 in which the writer also took part.

[15] President Mugabe reportedly wrote to the Speaker of the House of Assembly that the Bill was "too liberal" and required amendment – see *Country Reports on Human Rights Practices for 1999* Released by the Bureau of Democracy Human Rights, and Labor U.S. Department of State Z*imbabwe February 2000*

[16] See http://www.hrforumzim.com/members_reports/foodriots98/food9801a.htm

[17] Section 49

POSA which follows, frequent reference will be made to the earlier form of the Bill, as the changes are a graphic indication of Government's intentions. I shall distinguish the earlier Bill from the enacted POSA by referring to it as the POSB..

Analysis of POSA

Suppressing freedom of assembly: public meetings, demonstrations and processions

The right to demonstrate and hold processions had previously been subject to s 6 of LOMA. However, in 1993 this section of LOMA was found to be unconstitutional by the Supreme Court.[18] Accordingly, between 1993 and 2000, when POSA became law, demonstrations were ostensibly governed by common law. Notwithstanding this fact, the police unlawfully and routinely prevented demonstrations from taking place and routinely broke up gatherings and processions with the use of tear gas and baton wielding police. Student demonstrations at, and emanating from, the University of Zimbabwe were the most frequent example of this. The intention of POSA was to bring these actions of the police into a legislative framework, whilst seeking to retain a veneer of constitutionality.

The Constitution provides, in s 21:

> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in 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 political parties or trade unions or other associations for the protection of his interests.
> (2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.
> (3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—
> (a) in the interests of defence, public safety, public order, public morality or public health;
> (b) for the purpose of protecting the rights or freedom of other persons;
> (c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or
> that imposes restrictions upon public officers;
> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.
> (4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

Section 6 of LOMA had made all demonstrations illegal unless permission had been granted by a "regulating authority" – usually a designated police officer – and such police officer was only entitled to grant permission if he was satisfied that the demonstration "was unlikely to lead to a breach of the peace or public disorder". As such the section was held to be *ultra vires* the constitution in that: the discretionary power of the regulating authority was completely unfettered; the regulating authority was not obliged

[18] *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S)

to take into account whether the possible threat to public order could be averted by the imposing of suitable conditions; the section made all demonstrations unlawful unless certain conditions were met, rather than lawful unless certain circumstances warranted otherwise - thus reversing the order provided for by the Constitution and finally, the holding of a demonstration without a permit was criminalized irrespective of whether there was a possible threat to public safety or order.[19]

Defining public gatherings

The redrafted POSA attempted to leave as much power over demonstrations as possible in the hands of the executive while still remaining constitutional. Unlike LOMA that had provided separately for processions and gatherings, POSA applies the same provisions to both, defining both as public gatherings. The obvious intention is to retain control over any public gathering that might be construed as "political". POSA contains a Schedule, copied from LOMA, of non-political gatherings which do not fall within the ambit of the Act. Rather telling of the Act's intentions is paragraph (i) of this Schedule excluding from the Act public gatherings "held by any club, association or organization which is not of a political nature and at which the discussions and matters dealt with are not of a political nature". The exemptions appeared in the body of the legislation in the more benign POSB but have been moved to a Schedule in the present Act. This is presumably in anticipation of the Minister exercising the power granted to him in terms of s 41(1) which did not appear in the POSB. That is, the power to amend the Schedule and make more meetings subject to the controls provided for by the Act.[20] The POSB also limited the ambit of the Act to public gatherings of twelve or more persons[21]. The present Act, like LOMA, does not indicate the number of persons required to constitute a gathering.[22]

The law governing "public gatherings"

Sections 24 & 25

Section 24 of POSA requires the organizer of a public gathering to give the regulating authority four clear days notice of the intended gathering.[23] The legislation is at pains to be constitutionally secure, providing in subsection 2, "for the avoidance of doubt" that the purpose of this notice is not an application for permission to hold the gathering but to afford the regulating authority the chance to make appropriate arrangements to ensure the

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[19] See *In Re Muhunmeso (supra)* p15

[20] To give credit where little is generally due, if the Minister's amendment is to reduce the class of exempted gatherings, the amendment does not become valid unless Parliamentary approval is obtained within 14 days.

[21] Section 2.

[22] The Statement by the Solidarity Peace Trust that sections 24 & 25 indicate that any two or more persons constitutes a public gathering is not correct and is possibly due to a misreading of section 24(4) or a tranposition of the provisions of sections 17 and 19 to sections 24 & 25 – see *"Disturbing the Peace" An Overview of Civilian Arrests in Zimbabwe: February 2003 – January 2004* hereafter "Disturbing the Peace".

[23] This is one of the few areas where the final POSA is more liberal than the earlier Bill which required 7 days notice – section 14(1). Another is the power to impose curfews, which appeared in the earlier Bill but is not in the Act.

gathering can proceed peacefully and without interference to traffic, and to liaise with the organizer to this end. On receipt of such a notice the regulating authority is not entitled to issue any directions in relation to the public gathering unless, based on all the circumstances in which the public gathering is taking place, he has reasonable grounds for believing that the public gathering will "occasion" public disorder, a breach of the peace, or an obstruction of any thoroughfare.[24] Where such conditions exist he may then, in terms of s 25, issue such directions as appear to him to be reasonably necessary for the preservation of public order and to prevent such obstruction.[25] These directions relate to the time and place of the gathering and can include a requirement that the organizers appoint marshals and take other precautions to maintain order.[26] The directions are effective immediately and wherever practicable a written copy must be served on the organizer[27]. However, the regulating authority must give the organizer the opportunity to make representations in regard to the directions "wherever practicable to do so"[28] and if the organizer is aggrieved by any direction issued by the regulating authority there is a right of appeal.[29]

The drafting of ss 24 and 25 seeks to take into account the Constitutional objections to s 6 of LOMA. The regulating authority's discretion is not unfettered. The directions may only be issued if there are reasonable grounds for believing that public order etc will be endangered without them. The test is objective. A law which entitles a police officer to issue directions to control a public gathering on objectively assessed reasonable grounds that the directions are reasonably necessary for the preservation of public order is one which derogates from the right to freedom of assembly, but is arguably one which is allowable as a derogation to preserve public order and is reasonably necessary in a democratic society. However, s 25 has two flaws, repeated in s 26, and which will be outlined immediately below in the discussion of that section.

Before leaving ss 24 and 25 the following important point need be noted. Section 24 relates only to the requirement of an organizer of a public gathering to give notice, and the criminalisation of the failure to do so. It makes no mention of the lawfulness or otherwise of a gathering convened without notice. Accordingly, it does not prohibit spontaneous gatherings which by definition do not have an organizer.

Section 26

This section provides that:

> Without derogation from section twenty-five, if a regulating authority believes on reasonable grounds that a public gathering will occasion public disorder he may ... prohibit the meeting.

[24] Section 25(1)
[25] Section 25(1)
[26] Section 25(2)
[27] Section 25(4)
[28] Section 25(3)
[29] Section 25(5)

Like s 25, this notice of prohibition must be reduced to writing and served on the organizer wherever practicable to do so[30], and the organizer is also given the benefit of *audi alteram partem* where practicable[31]. The prohibition may be subject to appeal by the organizer.[32]

It is unclear what is intended by the phrase "without derogation from section twenty-five". Section 25 provides that "if a regulating authority, having regard to all the circumstances in which a public gathering is taking or is likely to take place, has reasonable grounds for believing that the public gathering will occasion" public disorder etc he may issue appropriate directions to prevent the same. What is meant by the provision that s 26 shall not derogate from this? Is the intention that s 26 should only be applied if the regulating authority believes that public disorder cannot be averted by the giving of appropriate directions? If so, why does it not say as much in simple terms? The point is crucial, as one of the grounds for holding s 6 of LOMA unconstitutional was the failure to require the regulating authority to consider whether public order could be preserved by the giving of directions before prohibiting a public gathering.

It is also worth noting at this juncture that s 26 seems to deliberately diverge from the wording used in s 25. Section 25 requires that directions are issued only after "having regard to all the circumstances the regulating authority has reasonable grounds" etc. The requirement in s 26 is "if the regulating officer believes on reasonable grounds". Although the test is still objective in the sense that the grounds must still be reasonable, in s 26 the reasonableness or otherwise is considered from the perspective of the regulating authority only. Hence if the regulating authority is acting in good faith on information which he believes to be true and if true would be a reasonable ground for prohibiting public gathering, but which is generally known by others to be incorrect (and it would thus unreasonable to act on it) the order is nonetheless *prima facie* valid. This difference in wording renders constitutionality of the section suspect. Can it be said to be reasonably justifiable in a democratic society to derogate from the right to freedom of assembly, not because objectively there are reasonable grounds to believe that public order is threatened, but because from information held by a regulating authority, which is not patently false, the regulating authority believes so? Does such a law make a justifiable provision for the preservation of public order, or is it wider than need be?

Turning then to the flaws in s 25, repeated in s 26. One is in the wording that the public gathering "will occasion" public disorder etc. This suggests that the disorder need not be caused by the persons forming part of the public gathering, but could be caused by those who find the public gathering objectionable. Often, the very purpose of a public demonstration is to give vent to unpopular opinions. The depth of that unpopularity cannot be a basis for prohibiting a demonstration, thus allowing what is called a "hecklers' veto". Freedom of speech and assembly in a democracy requires the expression of unpopular views. The second flaw is that, unlike the first more benign POSB from which the President withheld his signature, the appeal by an aggrieved

[30] Section 26(3)
[31] The right of the other side to be heard. Section 26(2)
[32] Section 26(4)

organizer lies to the Minister of Home Affairs and not as in the POSB to the courts. A law which provides that the appeal from an executive decision lies to a member of the executive cannot be reasonably justifiable in a democratic society, particularly when the decision relates to a derogation from the freedom of assembly. And the more so when that member of the executive may not, in terms of Zimbabwe's Constitution, have been democratically elected[33] and whom, as head of the Ministry responsible for the police, might himself or his Ministry is the subject matter of the demonstration.

In short, therefore, once a designated police officer has received notice of a public gathering he may think that he has reasonable grounds for believing that the meeting will occasion public disorder, say, on the basis on the deep political divisions and political tension in Zimbabwe, and prohibit the public gathering.

Other sections prohibiting public gatherings

Section 27

Section 26 is not the only way in which a public gathering can be stopped. In terms of s 27, if a regulating authority "believes on reasonable grounds"[34] that the powers granted in terms of ss 25 and 26 are inadequate he may prohibit all meetings in the area of his authority for a period of up to one month. The prohibition must be published in the Gazette, but may appear *ex post facto*. Appeals are once again to the Minister. The previous criticisms regarding constitutionality arising from this phrasing and the forum of the appeal apply with equal force here.

Section 25(8)

Given the general tenor of the Act, it is odd that there is no provision that renders unlawful a public gathering convened without the requisite s 24 notice.[35] Section 25(8) provides that a police officer may order a public gathering to disperse if there is a failure to comply with a direction as to the conduct of the gathering or if there are reasonable grounds to believe that the continuation of the public gathering will endanger public order. The fact that the meeting has been convened without the requisite notice is not a basis upon which the meeting may be dispersed.

Section 25(8) is also likely to face Constitutional difficulties as it is not a requirement that the failure to comply with a direction under s 25(1) will occasion or is reasonably believed will occasion, public disorder. To allow such a public gathering to be dispersed is thus a derogation wider than required in a democratic society to preserve public order. The matter might be otherwise if the "or" were replaced with "and". This section also needs to be read in conjunction with s 25(1), which not only allows for directions to be given for a public gathering which is about to take place, but allows for directions to be

[33] See section 31G of the Constitution and section 38(1)(d)
[34] Thus using the phrasing of section 26, rather than the more objective phrasing of section 25.
[35] See for example section 6(6) of LOMA which made it unlawful to take part in a procession for which notice had not been given.

given at a public gathering in progress. These directions need not be necessary for the preservation of public order, but simply need be those which *the regulating authority* deems necessary for the preservation of public order. Accordingly, failure to comply with an order which objectively may have nothing to do with public order, may result in the meeting being dispersed.

Sections 17 & 19

These sections ostensibly deal with public violence and "gatherings conducing to riot" respectively. Section 17 makes it an offence for any person acting in concert with anyone else to forcibly disturb the peace, public order or security or to "invade the rights of others" either intending the disturbance or realizing a risk or possibility of the disturbance. Section 19 merely repeats s 17 almost word for word, but in addition provides for the offence of publishing hate speech against specified sections of the population and an offence of publishing in anyway anything "obscene, threatening, abusive or insulting" intending to cause a breach of the peace or realizing the risk of so doing.

Sections 22 & 5

As indicated at the outset, it is not the intention of this paper to deal with non-democratic forms of seeking regime change. However, the broad definitions provided for by these sections makes it necessary to include them as they both touch upon the use of boycotts and stay-aways as a method of resistance.

Section 22 makes it an offence for "any person who, with the intention of unlawfully furthering a political objective in Zimbabwe, and by means of an express or implied threat of unlawfully inflicted harm, compels or induces another person to do something which he is not legally obliged to do or to refrain from doing something which he is legally entitled to do."

Section 5 is a bit more convoluted but in the area under concern amounts to substantially the same thing, though the penalties are much more severe.[36] Under this section it is an offence to establish or even suggest the establishment of a body or group that has the intention of "coercing" the Government. Coercing is broadly defined:

> "coercing" means constraining, compelling or restraining by—
> (a) physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott, civil disobedience or resistance to any law, whether such resistance is active or passive; or
> (b) threats to apply or employ any of the means described in paragraph (a);

The section is a partial re-enactment of the Preservation of Constitutional Government Act, a Draconian piece of legislation drafted by the Government of Southern Rhodesia in

[36] See the section immediately below.

1964. Its intention was to suppress nationalist movements pressing for democracy. It was repealed in 1999.[37]

Failure to comply

Penalties

An organizer who fails to give the requisite four days notice of a public gathering is liable to a fine[38] not exceeding $10 000 or to imprisonment for a period not exceeding six months. The penalty for proceeding with a public gathering which has been prohibited by a s 26 notice, or for failing to disperse from a public gathering when ordered to do so in terms of s 25(8) is the same. It should be noted that since the prison sentence which might be imposed does not exceed six months, the offence is not a first schedule offence and thus an arrest without warrant cannot take place unless the offence is committed in the presence of a police officer.[39] Accordingly, no person should be arrested without warrant for failure to notify the police of a public gathering, as this is not an offence which can take place in the presence of a police officer. Furthermore, nothing in the Act renders a meeting called without notice in terms of section 24 unlawful and unlike public gatherings in contravention of ss 26 & 27,[40] it is not an offence to attend a public gathering called without the requisite s 24 notice. This appears to be a lacuna in the legislation. The effect is that if one gives notice of an intended pubic gathering and that pubic gathering is prohibited in terms of s 26, proceeding with the pubic gathering will render every person who knows that the pubic gathering has been prohibited guilty of an offence.[41] But if one does not give notice of the pubic gathering, only the organizer is guilty of an offence and not those attending the pubic gathering, even if they are aware that no notice has been given. As indicated earlier such a pubic gathering can also only be dispersed if the requirements of s 25(8) are met.

It is also not an offence to fail to comply with a direction given under s 25(1), and a public gathering which does not comply with the directions is not *ipso facto* unlawful. However, the failure to comply with the directions may entitle a police officer to order the public gathering to disperse under s 25(8) and the failure to so disperse constitutes a criminal offence. Again this appears to be a legislative oversight[42].

Once a s 27 moratorium has been placed on public gatherings, failure to comply with that notice, either by organizing the meeting or taking part in it is an offence attracting a penalty of a fine not higher than $5000 or a period of imprisonment not exceeding one year or both.

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[37] B. Crozier *Memorandum on the Public order and Security Bill (HB25, 2001)* hereafter Crozier

[38] Recently, the Criminal Penalties Amendment Act 22/2001 replaced the quantum of fines which various levels which can be altered periodically by Statutory Instrument to keep pace with Zimbabwe's triple digit inflation. Oddly POSA seems to have been excluded from this Act.

[39] Section 25 of the Criminal Procedure &Evidence Act , [Chapter 9:07]

[40] That is, section 24 does not contain the equivalent of sections 26(5) & 27(5).

[41] Section 26(5)

[42] Section 29 seems to be predicated on the basis that a public gathering proceeding without following issued directions is unlawful.

Sections 17 & 19 carry maximum penalties of fines of $100 000 and $50 000 respectively and 10 years imprisonment or both. Section 22 carries a penalty of a fine of $100 000 or five years imprisonment or both, and s 5 up to 20 years imprisonment. There is no option of a fine for this offence. In addition, if one is arrested on reasonable suspicion of having committed an offence in term of section 5,6,7,8,9,10 or 11 of POSA recent legislative amendments provide that the arrestee may not be admitted to bail for 28 days, thus effectively providing for detention without trial[43]. The only way in which the arrestee might secure his or her freedom would be if it can be proved that the arrest was made without reasonable suspicion.

The use of force

Section 29 allows a police officer, and any person assisting him, to do all things necessary to disperse or arrest persons attending an unlawful public gathering and may use such force as is reasonably justifiable in the circumstances of the case to overcome such resistance. If such reasonably justifiable force to overcome resistance results in the death of the person concerned, the killing is deemed lawful. Here the drafter of the Act has employed the phrase "reasonably justifiable in the circumstances of the case" which appears in our Constitutional protection of the right to life. This constitutional provision is not entirely clear. One possible interpretation is that "the circumstances of the case" is meant to refer to the degree of resistance rather than the triviality of the offence. The Constitution provides in section 12(2):

> A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case—
> (a) for the defence of any person from violence or for the defence of property;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) for the purpose of suppressing a riot, insurrection or mutiny or of dispersing an unlawful gathering.

However, the more liberal interpretation is that the gravity of the situation is a factor and that attendance at an unlawful public gathering is not so grave an offence that it could ever be "reasonably justifiable in the circumstance of the case" to kill a person in course of attempting arrest. Accordingly, the unlawful gathering would have to be of such a violent nature that it would then be "reasonably in the circumstances of the case to use lethal force.

Civil liability

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[43] Section 2 of the Criminal Procedure and Evidence Amendment Act, 2004 amending s 32 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and s 8 of the Amendment Act amending the Fifth Schedule of the Criminal Procedure and Evidence Act to incorporate in that Schedule various offences under the Public Order and Security Act.

Unlike the POSB, the present Act introduces civil liability for the organizers of a public gathering in certain circumstances. Thus if a public gathering is organized without the requisite notice in terms of section 24, or if the organizer fails or refuses to comply with a direction relating to the meeting "to the best of his ability", or if the organizer "incites or encourages persons taking part in the gathering to engage in conduct which amounts to or could reasonably be expected to lead to public disorder or a breach of the peace"[44] then the organizer is "liable, at the suit of any injured party, for any loss of or damage to property and any injury to or death of a person occasioned by any public disorder or breach of the peace caused by or arising out of or occurring at the gathering."

It thus appears that in terms of this section the organizer is liable regardless of whether there is any causal connection between the legislated conditions which give rise to liability and the injury or damage. Liability attaches even if the damage is not caused by persons attending the public gathering but by a person attempting to disrupt the public gathering.

Other seemingly tangential, but relevant provisions

Identity documents

In 1997 the Supreme Court struck down as unconstitutional a requirement to carry a National Registration Card[45]. The re-introduction of this provision, albeit slightly differently worded, is an indication of Government's deep cynicism and perhaps not ill placed confidence that the newly constituted Supreme Court, stacked with additional appeal judges appointed in July 2001[46] and headed by its chosen-to-order-Chief Justice, might uphold the provision this time around.[47] It will certainly require some legal gymnastics to do so, but the present Chief Justice has shown considerable willingness and agility in this regard, even if the degree of flexibility he has sought to coax from jurisprudential reasoning in the past has resulted in the snapping of a few basic bones in the body of our law.[48]

Section 32 requires every person above the age the age of 16 in a public place to be in possession of an identity document and the police may at any time require a person to produce the same. The section does not create an offence of failure to carry a document or refusal to produce it. Most egregiously, however, subsection 5 provides that a person found without identification shall be "afforded the opportunity" of producing the same at a police station within seven days. Once again there is no penalty for failure to do so. Presumably, this peculiar set up is the result of the legislature trying to render legitimate that which has already been found unconstitutional. However, in certain circumstances a person may be detained until his or her identity is satisfactorily established. These

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[44] Section 28
[45] *Elliot v Commissioner of Police & Anor* 1997(1)ZLR 315(S)
[46] *See International Bar Association Report of Zimbabwe Mission 2001* at 12.34.
[47] On the subversion of the judiciary see D. Matyszak *Creating a Complaint Judiciary in Zimbabwe 2000-2003* publication pending – presently University of Zimbabwe Library.
[48] See for example *Tsvangirai v Registrar-General of Elections & Others* S-20-2002

circumstances are when required to do so by a police officer in the course of investigating or preventing an arrestable offence, at the scene of or in the immediate vicinity of an arrestable offence committed within the preceding 48 hours, within a police cordon, at a police road block, in the immediate vicinity of any area controlled or protected in terms of specific legislation [49] and at a public gathering of a political nature.

The changes made to the requirement to carry identification do not meet the constitutional objection to the law and it is difficult to see how even the reconstituted Supreme Court will find the provisions constitutional. Previously, the Supreme Court held that the underlying objection to legislation of this nature is the restriction upon the freedom of movement. It permits people to be randomly stopped to ascertain whether an identity document is being carried. The discretion as to whether or not to stop a person is not linked to any ground - public order, security or otherwise - and rests entirely with the police officer concerned. As such it does not meet minimum constitutional standards. In addition, due to the fact that the section does not create an offence, the requirement for the derivation of liberty in Section 13(2)(e) of the Constitution - reasonable suspicion of having committed, or being about to commit, a criminal offence – is not met.

Police roadblocks

For many years it has been a routine part of life in Zimbabwe for police to stop buses and cars and search the vehicles and persons in those vehicles. No law has previously authorized this action, which surprisingly does not seem ever to have been challenged in the courts.[50] Even LOMA only allowed for blanket searches of vehicles for limited periods by Gazetted notice when the President believed such searches to be in the interests of public safety.[51] Section 34 of POSA permits a police officer of the rank of inspector and above to erect roadblocks for the purpose of stopping and searching vehicles so long as that police officer considers it reasonably necessary in the interests of the usual pantheon of public safety, public order or public health. This section ought not to be held constitutional. While public order might be served by allowing blanket searches without any reasonable suspicion, if such searches are allowed one has moved well away from a democracy to a police state. The derogation from a right cannot have the effect of removing the right entirely or rendering it nugatory as is the case with this provision. Perhaps due to the patent unconstitutionality of this provision, the draftsperson has not made any other attempt to bring it within the confines of the Constitution. Thus the question as to whether the roadblock is necessary in the interests of public safety etc is left to the subjective determination of the police officer, rather than providing that the police officer must have "reasonable grounds to believe" as the Constitution would require. This would be an academic improvement only as the provision would still be unconstitutional for the reasons stated.

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[49]Defence Act [*Chapter 11:02*], the Protected Places and Areas Act [*Chapter 11:12*] or the Parks and Wild Life Act [*Chapter 20:14*];

[50] In terms of s72(1) (c) of the Road Traffic Act [*Chapter 13:11*] the police are entitled to inspect any part of a vehicle or the equipment thereof in order to ascertain whether or not such part or equipment complies with any law. It does not authorize a general search of vehicles.

[51] Section 61(2)

Cordons

Like roadblocks, the establishment of a cordon is once again at the discretion of a police officer of or above the rank of inspector if such officer considers it necessary to contain public disorder or violence in the area or to protect the area from the same[52]. Leaving or entering the area around which a cordon has been established is an offence[53]. Once the cordon has been established the police may conduct a search without warrant for any person reasonably suspected of having committed an offence arising out of public disorder or public violence or any evidence relating to the same. The area around which a cordon can be established is not limited other than by physical practicality. It would not be realistic for a police officer to declare a cordon around the whole of Zimbabwe for example. However, it is possible to cordon off a town and since this would allow for blanket searches of, say, the whole of Harare, the section should not withstand Constitutional scrutiny for the reasons stated earlier.

Actual application of POSA

The Police Force

The manner in which the police force is structured leaves it vulnerable to political interference and partisanship. The Commissioner of Police and members of the regulating body for the force, the Police Service Commission are both appointed by the President[54]. The Commissioner of Police has publicly declared his support for ZANU (PF) and in the build up to the 2002 presidential election stated that he would not acknowledge the main opposition candidate as President if that candidate won the election.[55] It was thus no surprise that the policing of the violence that accompanied the elections was more than merely blatantly partisan. The police not only detained and harassed opposition supporters, and aided and abetted the violence against them but also actively participated in this violence.[56] Those police officers who attempted to enforce the law impartially and who attempted to bring charges against ZANU (PF) supporters risked being transferred to undesirable stations or dismissed from the force. More senior commissioned officers are transferred to a "commissioners pool" where it appears they have few responsibilities.[57]. In extreme cases the militia were called upon to beat up police officers who had arrested persons involved in violence against the opposition[58]. The police have acted in the same patently partisan fashion when policing attempts to exercise the freedoms of speech and assembly.

Hypothetical example of operation of Act

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[52] Section 33
[53] The penalty is a fine not exceeding $10 000 or imprisonment not exceeding 6 months or both.
[54] Section 94 of the Constitution.
[55] The Statement was made at a press conference on 9/1/02 and reiterated later that year - *Herald* 10/09/02.
[56] See *Justice in Zimbabwe* A Report Compiled by the Legal Resources Foundation, September 2002 pp 42 – 46.
[57] See for example *The Independent* 10/09/04
[58] *Daily News* 02/09/02.

This hypothetical example is intended to indicate how a partisan police force might deploy the powers conferred by POSA. It is hypothetical in only two senses. Firstly, the police do not usually deploy all the powers granted under POSA simultaneously as usually only two or three enabling sections are adequate to achieve the intended objective. Secondly, as will be seen later from the actual examples of police operations, notwithstanding the vast powers afforded by POSA, action frequently taken by the Police to disrupt gatherings, purportedly in terms of POSA, is not in fact authorized by the legislation.

Assume the opposition MDC party calls for a national stay-away, encouraging people not to go to work but to attend a rally at a large suburban stadium instead. The party youth are deployed to go door to door to encourage attendance at the rally. The legal options open to the police are as follows:

a) To maintain that ZANU (PF) supporters and war veterans are strongly opposed to the rally and that there is a possibility of a threat to public order if the public gathering goes ahead.
b) To issue a notice prohibiting the public gathering -s 26.
c) To set up roadblocks along all routes leading to the venue of the public gathering - s 34(2).
d) To search each and every vehicle proceeding to the public gathering - s 34(2).
e) To demand identification from every person in any vehicle stopped at the roadblock - s 34(4).
f) To detain every person unable to produce identification – s 34(4)
g) To disperse the people at the public gathering – s 29.
h) To call upon members of the National Youth League, a ZANU (PF) supporter or war veterans to assist in the dispersal – s 29
i) To kill or injure or permit a National Youth League member, ZANU (PF) supporter or war veteran to kill or injure any person showing determined resistance to such dispersal – s 29.
j) To arrest any person present at the public gathering – s 29.
k) To establish a cordon around the suburb in which the venue is located – s 33.
l) To search every house, vehicle and person within the cordon – s 33.
m) To arrest any person alleged to have threatened anyone with the use of force if they did not heed the stay-away –ss 5 and 22.
n) To detain any such person arrested under s 5 for 28 days without the right to bail – s 44.

Other than the establishment of a cordon, all these powers have in practice been used by the police, although not simultaneously. And all these powers are authorized by POSA. However, police practice diverges from that which is actually permitted under POSA. In practice the police tend to take whatever action they believe expedient, using political criteria, and then seek to justify such action, *ex post facto* in terms of POSA. The next

section analyses the actual operations of the police in suppressing the freedom of assembly and association.

Actual *modus operandi*

It is not possible to document all of the large number of police intrusions into the right of freedom and assembly. The statistics that follow are extracted primarily but not exclusively from a report prepared by the Solidarity Peace Trust in July 2004.[59] In that report the Solidarity Peace Trust analysed 1 225 cases of "political arrest" over a one year period from February 2003 using information supplied by 27 law firms in Harare, Bulawayo, Gweru, Mutare and Masvingo.[60] Of these arrests 735 or 60% were under POSA.[61] Given that this represents only clients receiving representation at the 27 firms it is not reflective of the total number of arrests over this period, as persons may have obtained representation elsewhere, or as is more likely, were not represented at all. Police action will be considered under three heads – meetings, rallies and demonstrations.

Meetings

Meetings held without notification

The police have frequently stated that POSA requires people to apply to them for permission if they want to convene any gathering of a political nature[62]. Technically speaking this is not correct. As seen above, what is required is that the police be notified of the public gathering by the organizer in terms of section 24. However, given that in terms of section 26, the police can immediately prohibit the public gathering on the basis that they believe it will occasion public disorder, it is not surprising that the police regard the question of whether POSA requires one to apply for permission or merely to give notice as a semantic nicety. In addition, the police go one step further and place another interpretation on POSA that is completely insupportable. This interpretation is not only that one is required to apply for permission to hold a public gathering but that failure to do so renders the gathering unlawful and all those attending it liable to arrest[63]. As indicated above, this is not correct. Nothing in the Act renders the public gathering unlawful. Only the organizer, under section 24, commits an offence in failing to give the

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[59] *Disturbing the Peace* see *supra* fn 22

[60] See p 13 of the Report.

[61] Of the remainder 266 or 22% were under the Miscellaneous Offences Act Chapter 9:15, 23 or 2% Under the Criminal Procedure and Evidence Act, 68 or 5% were charged with the common law offences ranging from of incitement to violence to malicious injury to property to murder, and 133 or 11% were not charged at all – p 13 of the Report.

[62] At one stage it was reported that the Police had developed a proforma titled ""Application for permission to hold a public gathering in terms of section 24 of POSA" see Irene Petras *An Analysis of the Public Order and Security Act [Chapter 11:17]* Unpublished Paper June 2003 p48.

[63]See for example *The Independent* 10/09/04. *The Standard* of 11/7/04 reported that an aspiring MDC candidateTeresa Makoni for Hwedza constituency was charged with several others under POSA for attending a National Constitutional Assembly meeting. The charges were reported as being "organising and staging a political meeting without police approval".She is also accused of making comments about food shortages and thus "making comments that might affect the Governments standing in the public eye" - see comments on section 15 below.

requisite notice. Furthermore, since that offence cannot be committed in the presence of a police officer and does not attract a sentence of more than six months imprisonment, it is not an arrestable offence. Nonetheless, in the sample group, 21% of all arrests, 153 people, were purportedly arrested under section 24. Furthermore, the police also regard themselves as entitled to disperse any public gathering for which they have not received a section 24 notice. They have thus used this perceived power to target specific meetings which government does not wish to take place. These include many of the political meetings of the main opposition parties and meetings of civic organizations, particularly those involved in human rights and governance matters. One example of this is the disruption of regular Harare City Councilors meetings and arrest of the MDC mayor[64]. The action was the culmination of an extended and successful campaign by the Minister of Local Government and Housing to drive the opposition mayor from office. The clear intention of the police action was to prevent the mayor from assuming his duties. On the 16 May 2004 the press[65] reported that armed riot police officers had stormed into a hotel in Gweru which was a venue of a workshop by the Civic Alliance for Economic Progress and the NCA[66]. The police fired tear gas at and beat up participants. Nine participants were arrested and 15 people were injured in the attack by the riot police.[67] Such heavy-handed tactics by the police is not atypical of their *modus operandi* and is not, of course, sanctioned by POSA. The public gathering is not unlawful and can only be dispersed if a police officer has reasonable grounds for believing that public order is likely to be endangered if the public gathering continues.[68]

The police have also sought to broaden the power they have under the Act by seeking to monitor who does or does not fall within the exclusionary provisions of the Schedule to the Act. The present opposition MDC was born out of the labour movement and Government maintains an uneasy relationship with the main trade union federation the ZCTU[69]. The government is anxious to subject its activities to surveillance. Legally, the union is excluded from the ambit of the Act by virtue of paragraph (j) of the Schedule, which excludes a public gathering:

> held by a registered trade union for bona fide trade union purposes for the conduct of business in accordance with the Labour Relations Act [*Chapter 28:01*].

The police argue that they are thus entitled to sit in on meetings where trade union business is being discussed to ascertain that the public gathering is for "*bona fide* trade

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[64]The former mayor of Harare was arrested while he and fellow councillors were having a civic meeting with residents in Mabvuku, a suburb of Harare. He was to be charged under s24 of POSA.His lawyers complained of a denial access to him and had been forced to make a habeas corpus application to the High Court. The order was granted by Paradza J on 11 January 2003 calling the police to produce the mayor before the court or to release him from detention within an hour of receipt of the service of the order. This order was ignored and the state went on to apply for further detention of the mayor. This was not granted and again the police were ordered to release him.

[65] The Standard.

[66] National Constitutional Assembly, an NGO formed to pressed for constitutional change in Zimbabwe.

[67] Information given to Amani Trust concerning the incident.

[68] Section 25(8) – see above.

[69] See *Professional Audit of the Public Order and Security Act* Commissioned by the Zimbabwe Liberators Platform August 2002 (hereafter ZLP Report) p 15

union purposes". The same argument would permit their surveillance of all other groups excluded by the Schedule. The courts have ruled that this approach has no legal basis.[70] Despite this court ruling, the police have continued to disrupt union business. On 8 August 2004, the police proceeded to disrupt a ZCTU public gathering initially holding that it was unlawful in terms of s 24, but subsequently charging the speakers in terms of section 19.[71]

Notification of a public gathering in terms of section 26

Where the police receive notification of a public gathering by the opposition MDC or a civil or human rights NGO, the response in generally to ban the same by verbal order[72]. Often the reasons given by the police for the ban do not accord with the requirement of s 26, that is that there are reasonable grounds for believing that the meeting will occasion public disorder. For example, *The Standard* newspaper of 9 August 2004 reported that the POSA had been used 11 times in the past two weeks to prevent the MDC leader, Morgan Tsvangirai from meeting his party's rural leadership. The meetings, which were barred, were meant to occur in the rural constituencies of Bikita East and West, Masvingo North, Gutu South and North, Gokwe Central, East, West, Kadoma central, Silobela and Hwedza. The reasons given for the ban included that there was a shortage of manpower, that ZANU (PF) also wanted to use the same venue as the MDC or that the officer who is supposed to give the go ahead was off duty. The prohibition is also frequently justified by the belief that the public gathering will occasion public violence and the basis for the belief is the deep antagonism towards the opposition or human rights activists by "war veterans". There is no indication whether the police consider whether public order might be maintained if the public gathering is allowed, but with suitable directions or whether the organiser should be invited to make representations in relation to the prohibition. The result is to make organisation by opposition groups extremely difficult.

Rallies

All the comments about notification of a public gathering and prohibition by the police apply with equal force to rallies. However, several additional factors come into play owing to the very nature of rallies. Due to the higher profile of rallies and their value as a campaign strategy the government, and thus the police, are even more reluctant to allow this democratic space to be occupied than that of indoor public gatherings. Whereas the tactics directed at indoor public gatherings relies on the use and abuse of authoritarian legislation, rallies combine the use of this legislation with liberation war tactics. One such tactic is the creation of "no-go" areas for "the enemy". The strategy is at it most intense during pre-election periods. Here the police work in concert with "war veterans" and the

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[70] The High Court of Zimbabwe in the case of *ZCTU v O C Police, Harare District & Anor* HH 56-02 ruled that trade union meetings were exempt from the notification requirements contained in article 24 of POSA and that such meetings are not to be considered "public" in terms within the terms of the Act

[71] See *The Standard* 08/08/04.

[72] Section 26(3) requires publication in one of three ways: in a newspaper circulating in the area in question, by notices distributed amongst the public or by verbal order. The last means of publication is invariably used.

National Youth Service to ensure that any opposition rally is disrupted. The police establish roadblocks, stopping and searching vehicles perceived to be conveying people to the rally and demanding national identification cards. On occasion members of the National Youth League operate these roadblocks and unlawfully confiscate national identification cards from people passing through.[73]. The identify card is crucial for the purposes of voting and failure to have it may lead to detention as indicated above. In other instances the militia have simply attacked vehicles and people attempting to attend rallies. ZANU (PF) T–shirts and party cards become the only passport which allow safe movement in these areas.[74] Since the rallies take place out doors, people attending them are susceptible to attack by militia members. POSA itself makes the disruption of a public gathering an offence[75], but despite numerous documented instances of these attacks no member of the militia has ever been prosecuted for this offence. The police then use the violence attendant upon these rallies as a justification to ban any further rally on the grounds of the threat to public order. .

Demonstrations

Demonstrations have an even higher profile than rallies and thus are the most threatening to government. All the comments made in regard to indoor public gathering and rallies apply *a fortiori* to demonstrations. Since the enactment of POSA no demonstration by the MDC or opposition activists has been allowed to proceed without being dispersed by the police or militia. The fact that the intention behind the enactment of POSA is to suppress political dissent was graphically illustrated on the 14 February 2004. A woman's group WOZA,[76] planned nation wide marches as a St. Valentine's Day event. The regulatory authorities were notified of the event and had authorized the processions. When WOZA was about to make the payments for the police escorts they were told that the authority had been revoked as the police had received information to the effect that the women's group intended to use the occasion to call for the end to violence and human rights violations in the country.

[73]By way of example on 13 January 2002 "PM" together with four members of her family were stopped at a roadblock by Zanu-PF militia between Bindura and Madziwa. The militia was dressed in Zanu-PF t-shirts and caps and was armed with sjamboks, knobkerries and thick sticks. The group of about 30 youths demanded that they produce Zanu-PF party cards. When the family told them they did not possess any they were ordered out of the car and manhandled. Her 7-year-old nephew was also harassed. They were told to give very good reasons for not having Zanu-PF cards failing which it was possible this would be their 'last day on earth'. Buses were stopped at the roadblock from which all the passengers were made to disembark. Each person was asked for his or her Zanu-PF card. Those that produced a valid party card were allowed to re-board the bus. However, those without harassed and detained while the buses they had been traveling in were allowed to proceed. Some of them were badly beaten. Whilst this was happening, a police vehicle with two police officers in it passed by. They made no attempt to stop and render any assistance but instead hooted and made a Zanu-PF fist sign at the militia as the went by. The militia eventually let PM and her family go after they had pleaded with them and convinced them that they actually were Zanu-PF supporters and would purchase party cards as soon as they returned to Harare.'

[74] See preceding footnote.

[75] Section 31.

[76] Women of Zimbabwe Arise.

Without the protection of a stadium that a rally affords, participants in demonstrations are particularly susceptible to attacks by members of the militia and police brutality. The police always have knowledge of any proposed demonstration well in advance through its extensive surveillance of opposition groups and human rights NGOs. When a large demonstration is proposed, police erect roadblocks along all routes into the city and turn away vehicles conveying people believed to be intending to attend the protest. Police in the city centre fire tear gas at and disperse any gathering of people, whether would-be demonstrators or otherwise. A s 26 notice renders any person attending the demonstration subject to arrest, and where an intending demonstrator is attacked by the militia or baton wielding police, *the victim* is often charged with the offence of public violence (s 17) or behaviour conducting to riot etc (s 19). In the study sample, s 17 represented the most common section cited on arrest throughout the country. Of the sample some 239 arrests, or 32% were in terms of section 17. Some 141 arrests or 19% were in terms of s 19. Hence over half of all POSA arrests are in terms of these two sections. The reason for this may well lie in the broad way in which both crimes are defined. Both sections make it a crime to forcibly "invade the rights of others". This latter term is not defined, and any public demonstration could conceivably fall within its ambit.[77] In addition s 19 makes it an offence to say anything "abusive or insulting" if one realises that the statement might provoke a breach of the peace. Since the militia seem to regard any criticism of the present government as abusive or insulting, and react violently thereafter, it is easy to see why this section is popular with the police[78].

After arrest for attending an unlawful public gathering, persons are often held in inhuman conditions at police stations, subjected to further police brutality and denied access to treatment for injuries received. In 658 out of the 1 225 reported cases those arrested were the victims of brutal beatings by the arresting officers during or after the arrest[79]. Not surprisingly, therefore, demonstrations as a means of protest against the government have largely fallen away. The last proposed major demonstration dubbed "The Final Push" attracted few participants.[80] Accordingly, the opposition shifted its emphasis away from major demonstrations to nationwide stay-aways. However, organizations like the NCA continue to mount demonstrations which are invariable brutally broken up by the police with some of the demonstrators being arrested, taken into custody and being beaten up by the police[81].

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[77] The law is largely a restatement of the common law though differs in that the common law requires considerably more than the two people sufficient for this section of POSA. "Invading the rights of others" is an element of the common law offence.

[78] In a number of instances the police have released persons taken into custody after making them pay deposit fines for contravening s 7 of the Miscellaneous Offences Act Chapter 9:15 for engaging in conduct likely materially to interfere with the ordinary comfort, convenience, peace or quiet of the public or which are likely adversely to affect the safety of the public or does any act which is likely to lead to a breach of the peace or to create a nuisance or obstruction

[79] See *Disturbing the Peace* at p 20

[80] See *Zimbabwe Independent* Newspaper 08/04/04 and see the Crisis in Zimbabwe Coalition report at http://www.sarpn.org.za/documents/d0000386/index.php accessed 27/08/04

[81] The head of the NCA, Dr Lovemore Madhuku, advised in an interview with me at the University of Zimbabwe on the 16/09/04 that he had been arrested and detained more than ten times ostensibly in terms of POSA.

Boycotts and stay-aways

It is not correct to state, as others have done[82], that these forms of democratic protest have been rendered unlawful by s 5 of POSA. The activity is only unlawful if accompanied by "physical force or violence or the threat thereof". On this basis the section might seem defensible. However, two factors render the effects of the section more far reaching than might at first appear. Firstly, in practice those people trying to encourage people to support a boycott or stay-away are susceptible to a false accusation by the police of threatening force; or the police simply ignore this element of the offence. Secondly, the penalty imposed for this offence is particularly severe being a maximum 20 years imprisonment without the option of a fine. These two factors combine to make people extremely reluctant to participate in the organisation of boycotts and stay-aways. Of the sample group, 81 people or 11% were arrested in terms of s 5. One would hope, however, that the courts would find that threatening to let the air out of the tyres of a car belonging to someone who had indicated an intention to go to work during a stay-away, which would fall under this section, would merit a sentence less than the maximum of 20 years that could lawfully be imposed.

Finally in this regard it should be noted that many people attending work in Harare are civil servants and thus vulnerable if seen to be supporting a stay-away. The same could be said of other workers with unsympathetic employers. In the past the possibility of violence, real or fabricated, has served as an excuse for those complying with the boycott or stay-away. Without this, and without persons prepared to picket those going to work, attempts to arrange stay-aways have had limited success since the enactment of POSA.

The extent to which the Government has deliberately set about closing this form of democratic protest is not only reflected in the fact the section is a re-enactment of white minority rule legislation.[83] The following appeared in the predecessor of the section in the POSB:

> For the avoidance of doubt, it is declared that nothing in this section shall prevent the doing of anything by lawful means directed at:
> a) the correction of error or defects in the system of government or constitution of Zimbabwe or the administration of justice in Zimbabwe; or
> b) the replacement of the government or president of Zimbabwe; or
> c) the adoption or abandonment of policies or legislation; or
> d) the alteration of any matter established by law in Zimbabwe.

Suppressing freedom of speech

The chief restrictions placed upon freedom of speech appear in the Orwellian titled Access to Information and Privacy Act[84]. However, several sections of POSA also impact upon this basic democratic right.

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[82] See *Disturbing the Peace* at p18.
[83] See above in the discussions of sections 22 & 5.

[84] Chapter 10:27

Section 15[85]

Section 15(1) section makes it an offence to publish a false statement with the intention or "realising that there is a risk or possibility of" inciting or promoting public disorder, endangering public safety; or adversely affecting the defence or economic interest of Zimbabwe; or undermining public confidence in a law enforcement agency, the Prison Service or Defence Forces; or interfering with, disrupting or interrupting any essential service. Whether or not the stated adverse consequences actually materialise is not relevant for purposes of determining whether this offence has been committed. Furthermore, to establish this offence the State does not have to prove that the actual intention was to bring about the stated adverse effects. It need only prove that the person charged realized that there was a risk that the statement could result in one or more of these consequences. The fact that the person publishing the statement did not know that it was false is also not an element of the offence.

Under s 15(2) an offence is also committed if the stated adverse consequences do follow upon a statement which the publisher knows to be false "or does not have reasonable grounds for believing to be true". The publisher need neither intend the stated adverse consequences to result nor realise that the stated adverse consequences might possibly follow for an offence to have been committed. The falsehood need only relate to one material aspect of the published statement.

The penalty for contravening both subsections 1 or 2 is severe, being a fine not exceeding $100 000 or five years imprisonment or both. This section is intended to replace section 50 of LOMA, while taking into consideration the Supreme Court Judgment in *Chavunduka & Anor v Minister of Home Affairs & Anor*[86] which struck down that section of LOMA as unconstitutional.

However, s 15 in all probability remains unconstitutional. The subsection 1 provides for a speculative offence in that it matters not that no adverse consequence actually results. An offence is thus "created out of the conjectural likelihood of adverse consequences which may arise out of the publication of any statement, rumour or report, even to a single person."[87] The provisions of s 15 are likely to have " a chilling effect" on freedom of expression as people engage in self-censorship to avoid the zone of application of the Act. The section may also be unconstitutional on two other grounds. The derogations from the freedom of speech in the constitution are only allowed to the extent that the same are necessary in the interests of public safety, order, health etc. A criticism of the Prison Service may well undermine public confidence in that institution without affecting the protected interests. The law is thus wider than the Constitution allows. Secondly, as stated in the *Chavunduka case* [88]:

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[85] I am indebted for the analysis of this section & sections 16 and 19 to B. Crozier *op cit* p5-6
[86] 2000(1)ZLR 552 (S)
[87] See Crozier op cit p5
[88] At 562G-H.

> It is simply not possible to divide statements into categories of fact and opinion. Rhetorical devices, figures of speech, comedy, metaphor and sarcasm are all examples of superficially false statements which either may be substantially correct or be expressions of opinion.

Given that that the section does not enjoin the Court to have regard to the meaning that would have been ascribed to the statement by the people to whom it was addressed, it may well be wider than the constitution allows.

Section 15(2) is also objectionable in that it purports to create a serious offence attracting a drastic penalty for which a person can be convicted even though he had no actual or legal intention to bring about the adverse consequences. This is therefore essentially a strict liability offence; except that the State has to prove that the accused person knew that the statement was false or did not have reasonable grounds to believe it was true.

Section 16

This section makes it an offence, in terms of subsection 2(a) to "publicly and intentionally" make a false statement about the President knowing or "realising there is a risk or possibility of" causing hatred, contempt or ridicule of the President or causing hostility towards him. It is also an offence in terms of subsection 2(b) to publicly and intentionally to make an abusive, indecent, or obscene or false statement about the President. A statement can include a gesture. This section does not appear in the POSB and is again a reincarnation of a former provision of LOMA[89]. The element of intention in subsection 2(a) is ambiguous. It is not clear whether the offence is committed if the statement is merely intentionally published and unbeknown to the publisher turns out to be false or the intention must be to publish a statement, knowing the same to be false. Obviously the first interpretation is more likely to fall foul of the constitution. On the basic principles of restrictive interpretation of penal provisions the second interpretation should be adopted. However, such an interpretation would mean that the offence of making a false statement about the President in subsection 2(b) would render 2(a) superfluous. Secondly, the legislator seems to have deliberately avoided the phrase "which he knows to be false" used in section 15(2)(b). We must assume that the omission is deliberate.

Either way, the constitutionality of the section is doubtful. Once again the provision is speculative inasmuch as it prohibits the making of a statement if there is a risk or possibility that it will have the stated adverse consequences. There is no requirement that the statement must have that effect. Since the office of President in Zimbabwe is a executive one, a functioning democracy demands that both the person and the office of the presidency be open to criticism. This applies even if the criticism turns out to be unwarranted or based on a misapprehension of the facts. The law relating to defamation and criticism of public figures should be more liberal, not more restrictive than that

[89] Section 46

applying to common citizens[90]. This section could be used to arrest persons making any critical comment about the President. In 2000 a lighting technician at a concert held by popular musician Oliver Mtukudzi was arrested when he shone a spotlight on the picture of Mugabe (which it is mandatory to display in all public places) during the song Wasakara. The term means "you are worn out" in Shona but the song makes no specific reference to the 80-year-old Mugabe.[91] Since the section includes gestures, such an arrest would now be lawful under this section.

Section 19

The first paragraph of this section, subsection1(a), has been dealt with previously in this article. Subsections 1(b) and 1(c) are again reincarnations of LOMA[92], though section 1(c) appeared in a milder form in the POSB. Subsection 1(b) makes it an offence to perform any action, utter any words or distribute or display any writing, sign or other visible representation that is obscene, threatening, abusive or insulting, intending thereby to provoke a breach of the peace or realising that there is a risk or possibility that a breach of the peace may be provoked. Once again this section may go too far in preventing freedom of expression. Unpopular opinions are often characterized as insulting or abusive by those who disagree with them, but it would be undemocratic to prevent them from being expressed.

Subsection 1(c) makes it an offence to utter any words or distribute or display any writing, sign or other visible representation with the intention to engender, promote or expose to hatred, contempt or ridicule any group, section or class of persons in Zimbabwe solely on account of the race, tribe, nationality, place of origin, national or ethnic origin, colour, religion or gender of such group, section or class of persons or realizing that there is a risk or possibility that such behaviour might have an such an effect. The effect of the section is attenuated slightly relative to subsection 1(b). In 1(b) it need not be the intention of the publisher that the words be insulting. In 1(c) the effect of the words need to be intended in the equivalent part of the clause. This difference is largely academic however, as the same provision of realizing a risk or possibility of it having that effect appears in 1(c). Accordingly, it is open to the same criticism. The deliberate intention of the government to phrase this offence widely is readily discerned from the fact that the equivalent offence in the POSB required not just a "risk or possibility" but the "realization of a substantial risk". This section has been widely used by police to arrest speakers at public gatherings, sometimes before they have even addressed the gathering, and may account for the frequency of POSA arrests under this section.

d) Section 21

Once again this section did not appear in the POSB and is a reincarnation of section 39(2) of LOMA. The section makes it an offence to make a statement that is "false in a material

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[90] See the recent South African Judgment on this point in *Sankie Mthembi-Mahanyele v Mail and Guardian Limited and Another* Supreme Court of Appeal - 054/2003

[91] See ZWNews http://www.zwnews.com/issuefull.cfm?ArticleID=9815. accessed 27/08/04

[92] Section 36.

particular" with the intention or realizing that there is a risk or possibility of engendering feelings of hostility towards a police officer or the Police Force or to exposing the police officer or Police Force to contempt, ridicule or disesteem. It is an essential element of the office that the statement it is made in a public place. Where a police officer is present, even if that police officer is off duty but it is realized that there is a risk or possibility that the person is a police officer, the offence can be committed not merely through a statement "false in any material particular", but by "any act or thing whatsoever". Presumably "any act or thing whatsoever" would include true statements critical of police operations. As such the section should not withstand a constitutional challenge, but even if this is not the case it is subject to the same criticisms leveled at ss 15, 16 and 19 as being so broad in its operation as to constitute an unacceptable limitation on the freedom of expression. The section also seems formulated to deter any person from exposing the presence of an undercover police officer at a public gathering. Presumably such exposure would fall within the ambit of "any act" and would frequently entail hostility being directed towards the officer so exposed.

Manner of policing of public order

While POSA is itself highly objectionable on democratic principle, the chief difficulty arises in the manner in which public order is policed. The majority of arrests ostensibly carried out under POSA do not in fact accord with the legislation and for this reason as at the time of writing. At the time of writing[93], there has not been a single successful prosecution under POSA for offences arising out of the exercise of speech and assembly. In the survey sample 73% of cases remain unresolved, which means that the charges have not been pursued or that the accused have been repeatedly remanded without a trial date ever having been set. Of the remainder, 133 or 11% were released without charge, 85 or 7% were acquitted by the courts, and 50 had charges withdrawn. In 55 cases or 5%, those arrested paid admission of guilt fines. These fines are commonly paid by arrestees to avoid extended incarceration at the police station and should not be taken as a genuine admission of guilt. Research by Amani Trust indicated 1213 documented reports of arrests ostensibly in terms of POSA[94] since its enactment and August 2004. Of these arrests 639 people were released without charge. Only 8 of the arrests were of members of ZANU (PF)[95]. Some 63 public gatherings were dispersed all being those of the MDC or civic society. On the other hand, there are no reported instances of the police stopping meetings, rallies and demonstrations by supporters of the ruling party. It is likely in many instances the police are not even notified in advance of these gatherings, but if they are, the police will almost invariably facilitate them by providing police security. These statistics are a grave indictment of the policing of public order in Zimbabwe. They show

[93] Early September, 2004

[94] This information was be a researcher at Amani gleaned from various Human Rights reports over the period, particularly those of the Human Rights NGO Forum.

[95] The Commissioner of Police has cynically used the fact that arrests are predominantly of MDC members to suggest that it is evidence of the lawlessness of the MDC – see *Justice In Zimbabwe* at p 43 and Amnesty International 2002 *Policing to Protect Human Rights.*

that the police selectively apply the law so that dissent is suppressed and pro-government gatherings are facilitated.

CONCLUSION

The principle objection to POSA is the manner in which it facilitates gross executive interference in the freedoms of speech and assembly. This is largely achieved through the fact that its legislates a "hecklers veto." Hence meetings are banned and statements suppressed on the supposed basis that their subject matter is deeply objectionable to a certain section of the population and thus may occasion disorder. The executive makes this determination, and thus not surprisingly, objectionable subject matter is inevitably found to be [96]that which criticizes the executive. In a democratic society the ability to allow or prohibit a public gathering does not lie with the executive. The role of the police is limited to ensuring that the logistical arrangements pertaining to the public gathering do not unduly interfere with public life, that is, that the inconvenience occasioned by the public gathering is kept to a minimum. Thus the role of the police should be restricted to matters pertaining to the time, route etc of the public gathering. And even such determinations should be subject to appeal to an independent body. The common law offences pertaining to incitement to violence sufficiently cover the needs of public order relating to freedom of expression. There is clearly a need to remove or substantially overhaul all repressive and undemocratic legislation interfering with freedom of assembly and freedom of speech.

There is also a pressing need for a return to impartial policing which will require a radical a change in the ethos of the police. The police force must become a force that performs its duties fairly and professionally. They must no longer apply or misapply the law so as to destroy the democratic right to freedom of assembly and speech.

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