

# Rally and public gathering bans in Zimbabwe

## A position paper by Zimbabwe Lawyers for Human Rights<sup>1</sup>

### **Abstract**

*The right to free assembly incorporating processions is the cornerstone of any democratic state. This paper will examine the implications of banning political meetings, assemblies and demonstrations by the police in Zimbabwe. The discussion will center on human rights law relating to free assembly. This paper is divided in four parts. The first part shows the importance of assemblies. The second part covers freedom of assembly as a human right and whether it can be limited or derogated from under human rights instruments. The third part will highlight the critical provisions of the Public Order and Security Act (POSA) of Zimbabwe in a nutshell, emphasising relevant sections dealing with rallies, gatherings and demonstrations that impede on the freedom of assembly. A discussion on the ban for three months of political gatherings and meetings by the police will ensue.*

### **Introduction**

Since time immemorial, protests, rallies, assemblies and mass demonstrations have played a central role in the political struggles of any nation.<sup>2</sup> A single voice can be drowned in the polity.<sup>3</sup> A choir is more likely to get the message across.<sup>4</sup> The right to gather as a group in a political rally, gathering or meeting is known as freedom of assembly.

Rallies are the bringing or coming together as support for, or action against the political order of the day. Rallies, gatherings and public meetings are some of the various ways in which the right to freedom of assembly can be exercised. This right is a fundamental

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<sup>2</sup> S Woolman et al 'Freedom of assembly: voting with your feet' in (eds) D van Wyk et al *Rights and constitutionalism the new South African Legal order* (1994) 292.

<sup>3</sup> I Currie et al *The bill of rights handbook* (2005) 396.

<sup>4</sup> *S v Turrell* 1973 (1) SA 248 (C) 256; *In Re Munhumeso* 1995 1 SA (ZS) 557.

freedom, it creates the space to speak and be heard. Freedom of assembly is an important right for it is generally only organised opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly.<sup>5</sup> Assembly provides an effective means of communication for those who feel that their needs are not being adequately addressed by the state. Assemblies draw attention to the topical issues of the moment in any state. According to Matysak, public assemblies do not only impact upon those who personally see the demonstration but the community at large.<sup>6</sup>

Rallies, assemblies and gatherings ensure that voters are able to articulate their expectations to the rulers rendering the rulers accountable. Assemblies are a potent political tool that is bound to yield positive results in any society. Democratic participation means taking part in the public life of the community or society. It is difficult to participate democratically in instances where individuals are prohibited from meeting and debating burning political issues as a party. Assembly is essential as it creates space for large vocal social formations that service representative democracies. These social formations act as catalyst for debate.<sup>7</sup> It is important to note that assemblies can be for non-political reasons whilst demonstrations normally are associated with a form of support or opposition for a moral or political position.<sup>8</sup>

Assemblies have been described as the poor man's media and means of communication. This is particularly true in Zimbabwe where at least 70 to 75% of the population is unemployed.<sup>9</sup> As such, most people cannot afford to buy newspapers especially due to the prohibitive costs.<sup>10</sup> Public meetings are a cheap mode of

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<sup>5</sup> (n 4 above).

<sup>6</sup> R Hanzi 'Workshop report; J Tshuma- Repressive legislation, the phenomenon of its selective application on the administration of justice in Zimbabwe' in (eds) O Saki, A Tsunga et al *Symposium on the administration of justice in SADC* (2004) 27; A quote from D Matysak 'Order the daughter and not the mother of liberties/ processions and the constitution'.

<sup>7</sup> I Currie et al (n 3 above) 407.

<sup>8</sup> I Currie et al (n 3 above) 408.

<sup>9</sup> UNESCO 70% - 75% of the population is unemployed, [www.unesco.org/ccivs/News-SiteCCVVI/CcivsOther/Documents/ppzimbabweporfull.pdf](http://www.unesco.org/ccivs/News-SiteCCVVI/CcivsOther/Documents/ppzimbabweporfull.pdf)-(accessed on 30 March 2007); these statistics are subject to debate some commentators indicate that 70% of the population live in the rural areas and are not formally employed as such but practice subsistence agriculture.

<sup>10</sup> 'Newspaper prices go up' *The Chronicle* 24 March (2007) 1; costs of newspapers have been going up due to the high costs of newsprint.

communication that ensures the transmission, exchange of information and views at no cost at all.<sup>11</sup>

### **Freedom of assembly as a human right**

The right to freedom of association and assembly is recognised in several human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR),<sup>12</sup> African Charter on Human and Peoples' Rights (ACHPR)<sup>13</sup> and the Universal Declaration of Human Rights (UDHR).<sup>14</sup> Some of the provisions of the UDHR have crystallized into customary international law. Customary international law is the conduct or the conscious abstention from certain conduct of states, that becomes in some measures a part of the international legal order.<sup>15</sup>

All nations are bound to uphold, promote and protect the rights articulated in the UDHR. ICCPR expressly states that derogation from rights in the Covenant can only be done in cases where there is a public emergency that threatens the life of a nation.<sup>16</sup> Upon derogation the state is required to inform other state party members to the ICCPR through the Secretary General of the United Nations of the provisions to which it has derogated and the reasons for that action.<sup>17</sup>

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<sup>11</sup> G Feltoe 'The right to hold meetings in Zimbabwe' 2 *Legal Forum* 3 September (1990) 34.

<sup>12</sup> International Covenant on Civil and Political Rights (ICCPR) that came into force on 23 March 1976 see T van Banning *Human Rights Instruments* (2004) 9; "The right to peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others"

<sup>13</sup> The African Charter on Human and Peoples' Rights (ACHPR) in Centre for human rights *Compendium of key human rights documents of the African Union* (2005) 20. Article 11 of the ACHPR.

<sup>14</sup> Article 20 of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to assemble in T van Banning *Human Rights instruments* (2004); Other instruments that recognise this right include; This right is also recognised in the Convention on the Rights of the Child(CRC) in T van Banning *Human Rights instruments* (2004); article 15 of CRC; The African Charter on the Rights and Welfare of the Child (ACRWC) in Centre for human rights *Compendium of key human rights documents of the African Union* (2005)article 8 of ACRWC; The Convention on the Elimination of all forms of Violence against Women (CEDAW) in T van Banning *Human Rights instruments* (2004); article 7 of CEDAW.

<sup>15</sup> HJ Stenier et al *International human rights in context, law, politics, morals : Texts and materials* (1996) 28.

<sup>16</sup> Article 4(1) of ICCPR.

<sup>17</sup> Article 4(3) of ICCPR.

The ACHPR states that;

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health and ethics and rights and freedoms of others”

Under the ACHPR, states are further obliged to recognize all the rights, duties and freedoms enshrined in that charter and shall take legislative and adoptive measures to give effect to them.<sup>18</sup> The ACHPR does not permit state parties to derogate from their treaty obligations at all unlike the ICCPR.<sup>19</sup> Even in the case of a civil war, derogation is not permissible.<sup>20</sup> Limitation of the rights prescribed in the ACHPR can only be done when the limitation is in the legitimate interest of the state and the evils of the limitation must be proportionate and absolutely necessary for the advantages to be obtained.<sup>21</sup> Further, the only legitimate reasons for limiting the rights set out in the ACHPR are that the rights in the Charter must be exercised with due regard to the rights of others, collective security, morality and common interest.<sup>22</sup>

The right to assembly was subject to the deliberations of the African Commission in a communication filed against the government of Nigeria.<sup>23</sup> The importance of freedom of assembly was stated by the European Court of Human Rights (ECHR) in the case of *Handyside v United Kingdom*.<sup>24</sup> Other than contributing to a democratic society, freedom of assembly contributes to the progress of the democratic society and development of every person.<sup>25</sup>

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<sup>18</sup> Article 1 of the ACHPR.

<sup>19</sup> *Commission National des Droites de l'Homme et des liberties v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21 69; *Amnesty International v Sudan* (2000) AHRLR (ACHPR 1999) para 42& 79.

<sup>20</sup> As above; *Malawi African Association and others v Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

<sup>21</sup> *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 69.

<sup>22</sup> Article 27(2) of the ACHPR.

<sup>23</sup> *International Pen and others ( on behalf of Saro Wiwa v Nigeria)* (2000) AHRLR 212 (ACHPR 1998).

<sup>24</sup> *Handyside v United Kingdom* European Court of Human Rights 7 December 1976 para 49 available at [http://www.uio.no/studier/emner/jus/humanrights/HUMR5120/h06/undervisningsmateriale/Handyside\\_v\\_UK.doc](http://www.uio.no/studier/emner/jus/humanrights/HUMR5120/h06/undervisningsmateriale/Handyside_v_UK.doc) (accessed on 29 March 2007).

<sup>25</sup> As above.

## The right to assemble *vis à vis* domestic legal provisions

Zimbabwe is party to the ICCPR and ACPHR.<sup>26</sup> International treaties or conventions ratified under the authority of the President are not self-executing unless passed into law by parliament.<sup>27</sup> Zimbabwe is predicated on the doctrine of constitutional supremacy.<sup>28</sup> Domestication of international and regional human rights on assembly and association is recognised in the bill of rights as;<sup>29</sup>

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.

The Constitution places a limitation on this right by allowing anything done under the provisions of any law not to be in contravention of the rights in the Constitution.<sup>30</sup> Generally, under most human rights instruments, rights can generally be limited in accordance with the law. This has however been interpreted to mean international law not domestic law.<sup>31</sup> This limitation clause, condoning limitation of freedom of assembly under provisions of any law is inconsistent with human rights obligations of Zimbabwe under instruments such as the ACHPR that obliges Zimbabwe to give effect to the rights and not undermine or ignore at any time. Against this constitutional background, the notorious Public Order and Security Act (POSA) was promulgated into law.<sup>32</sup>

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<sup>26</sup> Zimbabwe ratified the ICCPR on 13 May 1991. It is party to the African Union and the ACHPR.

<sup>27</sup> Section 111B of the Constitution of Zimbabwe.

<sup>28</sup> Section 3 of the Constitution of Zimbabwe

<sup>29</sup> Section 21(1) of the Constitution of Zimbabwe.

<sup>30</sup> Section 21(3) of the Constitution of Zimbabwe; section 24(1) of the Constitution stipulates that if anyone feels like their rights are violated or about to be, they can apply to the Court for redress.

<sup>31</sup> *Legal Resources Foundation v Zambia* 27/89 (2001) AHRLR 84 (ACHPR 2001).

<sup>32</sup> This Act came into force on 22 January 2002.

This Act repealed the Law and Order (Maintenance) Act (LOMA).<sup>33</sup> The predecessor of POSA, LOMA was met with resistance during the colonial era.<sup>34</sup> The restrictive provisions of POSA rest mainly around conducting and holding public gatherings and denigrating the office of the President.<sup>35</sup> Provisions that are critical to the conducting of demonstrations and bans in POSA are highlighted below.

Organisers of public gatherings have to give four days written notice.<sup>36</sup> As an attempt to put a veil of constitutionality, the Act states that the notice should not be taken as application for holding of a gathering.<sup>37</sup> It should be noted that this has been subject to the interpretation of regulating authorities, who are senior ranking police officers. Ordinarily the notification is intended to give the regulating authority time to organise security issues, traffic and other possible hindrances to such gatherings.

The regulating authority has to give directions on best ways of carrying out such gatherings upon receiving the notification of intention to hold a gathering. There should however not be any interference with the rights of others.<sup>38</sup> The directives must be reasonable and justifiable in a democratic society.<sup>39</sup> The right to assembly is greatly curtailed since the regulatory authority has the discretion of banning or prohibiting such public gatherings. This ban can be enforced for one month.<sup>40</sup>

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<sup>33</sup> Chapter 11:07; Section 6 of LOMA suppressed the right of assembly, demonstration or procession unless permission was granted by the regulating authority. It was declared to be unconstitutional by the Supreme Court in the case of *In re Munhumeso* 1994 (1) ZLR SC 49.

<sup>34</sup> This type of legislation develops 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 see Derek Matyszak *Hansards Legislative Assembly Debates* vol 46 1960 –61 col 2902, Derek available at [http://www.kubatana.net/docs/opin/matysak\\_posa\\_050302.pdf](http://www.kubatana.net/docs/opin/matysak_posa_050302.pdf) (accessed on 27 March 2007)

<sup>35</sup> These provisions are also incorporated in the Criminal Law Codification Act Chapter 9: 23 of 2005.

<sup>36</sup> Section 24(1) of POSA.

<sup>37</sup> Section 24(2) This is merely to ensure that the police can take measures to combat any violence that might occur, to facilitate cooperation between the police and the organiser.

<sup>38</sup> Section 25 of POSA.

<sup>39</sup> Section 26 and 27 of POSA.

<sup>40</sup> Section 27(1) of POSA.

The regulating authority can use reasonable force to disperse the gatherings.<sup>41</sup> Where individuals resist the directives, the police are entitled in terms of the Act to use such force as is reasonably justifiable in the circumstances of the case to overcome any resistance.<sup>42</sup> People can be killed as a result of the use of reasonably justifiable force directed at overcoming the resistance to lawful measures such as killing is lawful.<sup>43</sup> It is however difficult to justify the use of force to the extent that it causes death violating the right to life.<sup>44</sup> However, certain categories of meetings whether public or private are ordinarily excluded for notifying the regulatory authorities of such a meeting and or gathering. Activities of trade unions or civic organizations are some of the meetings that do not require notification of the police.

The actions of the overzealous police officers that sought to intervene and prohibit activities of a trade union was challenged in the case of *Zimbabwe Congress of Trade Unions v Officer Commanding Zimbabwe Republic Police Harare District & anor.*<sup>45</sup> The salient facts of this case are as follows;

The Zimbabwe Congress of Trade Unions (ZCTU) organised a routine General Council meeting at a local hotel. The police claimed that they had the right to attend the meeting and disrupt the activities by virtue of the authority vested in them by POSA. The General Council aborted the meeting when the police persisted in attending to ascertain whether genuine trade union business would be discussed in the meeting. ZCTU approached the

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<sup>41</sup> Section 29 of POSA.

<sup>42</sup> Section 29 of POSA; the use of force justifies torture that is prohibited by article of 5 UDHR, article 5 of ACHPR, article 7 of the ICCPR.

<sup>43</sup> As above; The Herald 'State assists in the burial of MDC activist' *The Herald* Monday 19 March (2007) 1.

<sup>44</sup> Article 5 of the UDHR; this force can result in torture. Torture is not justifiable under any circumstances, states cannot derogate from guaranteeing this right as it is considered to have become part of customary international law, torture is also prohibited in article 7 of the ICCPR.

<sup>45</sup> The High Court has ruled that organisations such as but in particular the trade unions are not governed by the notification in terms of POSA as their activities are not a political nature, this is not the situation obtaining on the ground, 2002 (1) ZLHR 323 (h) High Court, Harare Judgment No. HH-56-02, Chinhengo held that the Schedule of POSA on gatherings to which section 24 and 25 require notification does not apply.

court on an urgent basis for an order compelling the police to refrain from *gate-crushing*.<sup>46</sup> In delivering his judgment, Chinhengo as he then was, held that;

Notification of a public meeting had to be given to the police, the purpose of such notification was for limited reasons as stated in section 24 of POSA. The purpose that the police wished to pursue, to establish whether the meeting was *bonafide*, was not included. In any event certain categories of public meetings are excluded from notifying the police in accordance with section 24(5) of POSA. A public gathering by a registered trade union was ordinarily excluded.

The meeting was not in any event a public meeting as defined by the act. A public meeting was one held in public with the public being allowed to attend. The discussions had to center around issues of public interest. In any event section 24 did not apply to this meeting at all.

The urgent chamber application was granted and the police were prohibited from attending the meeting. The court also stated that a public meeting had to be held in a public place and the public must be allowed to attend, the purpose of the meeting will be to discuss public interest business.<sup>47</sup>

Provisions of POSA were also challenged in the case of *Tendai Laxton Biti and another v Minister of Home Affairs and another*.<sup>48</sup> The applicant challenged the powers of the police to issue directives limiting the number of public gatherings that can be conducted by political parties. The applicant had applied for police clearance as in accordance with section 24(1) of POSA. Sandura JA, referred to the case of *In Re Munhumeso*<sup>49</sup> and indicated that the freedom of assembly is of great importance and must never be underestimated, this right lies at the foundation of any democratic society.

As aforementioned, rallies and gatherings can only be banned for a maximum period of one month. It is against this background that the legality or otherwise of bans by the police is discussed.

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<sup>46</sup> Gate crushers are those who attend a party or meeting without being invited to do so.

<sup>47</sup> (n 45 above); In this case the court went on to clarify what a public meeting was according to the definitions set out in section 2 of POSA; it is interesting to note that even as the author writes this article police are still disrupting activities of the ZCTU who are in the habit of informing them of their proposed meetings as a cautionary measure.

<sup>48</sup> SC 9/02.

<sup>49</sup> (n 4 above).

## **The legality or otherwise of banning rallies and gatherings in the light of human rights**

The right to associate and assemble is one of the most crucial rights in any society. It must not be limited by any claw back clauses. The right to assembly in Zimbabwe besides being limited by claw back clauses in POSA has been effectively withdrawn or suspended by administrative decree. Acting under the guise of POSA, the police who are the regulating authorities that facilitate the holding of meetings and public demonstrations have banned meetings and demonstrations selectively.<sup>50</sup>

A ban on rallies and demonstrations was imposed for three months.<sup>51</sup> The prohibition of rallies by the regulating authorities (the police) was challenged in the case of *MDC v Chief Superintendent Janga and others*.<sup>52</sup> This application for contempt of court against the police was a follow up to the application filed by the political party at the High Court for an interdict to compel the police to refrain from disrupting rallies or sealing off grounds where rallies were to be conducted. The court granted an interdict against the police and held that the political party must proceed to hold political rallies without disruption. The police still disrupted the meeting nevertheless in contempt of a court ruling. This total disregard of court orders by the police has been on the increase resulting in the deterioration of the rule of law.

The police have conceded that the ban goes beyond the scope of their authority under POSA and is illegal during the hearing of an appeal *MDC v Commissioner of Police and others*.<sup>53</sup> The appeal was filed against several prohibition orders in some Harare districts by the major opposition party with the Minister of Home Affairs as stipulated by the Act.<sup>54</sup>

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<sup>50</sup> *The Herald* 'Ban on demonstrations police to rule on MDC appeal' Monday 19 March (2007) 4; the police also have the discretion to prohibit a rally upon application if they have a reasonable belief that the gathering will result in public violence under section 25 & 26 of POSA.

<sup>51</sup> The police in Harare banned rallies or demonstrations for three months since 21 February 2007 see BBC Protest ban in Zimbabwe capital available at <http://www.bbc.co.uk/2/hi/africa/6382405.stm> (accessed on 4 March 2007).

<sup>52</sup> This was an urgent chamber application filed with the High Court of Zimbabwe unreported case number High Court Harare 777/07.

<sup>53</sup> This case is unreported and forms part of the jurisprudence that the Minister of Home Affairs will develop according to the powers vested in him by POSA.

<sup>54</sup> As above.

This appeal challenged the ban of rallies by the police in respect of Mbare, Chitungwiza, Harare South and Harare Central districts. At the hearing, the legal representatives for the respondent, the Commissioner of Police and others in this case, conceded that prohibition orders that banned rallies in Harare South and Mbare district were void. The legal representative for the respondent withdrew the prohibition orders at the hearing. They further submitted that the appellant, MDC or any other non political organisations were free to hold rallies in these two areas.

The parties in the *MDC v Commissioner* case agreed that the prohibition orders in the remaining districts, namely Harare Central and Chitungwiza had not been properly gazetted as required by POSA.<sup>55</sup> It can thus be inferred that the actions of the police were illegal *per se* as they had not followed the provisions of POSA.

There must be a compromise between maintenance of public order by the state and exercise of freedom of assembly. The police as regulating authority of peace and order Zimbabwe purport to ban public gatherings and public demonstrations in terms of POSA,<sup>56</sup> these prohibition orders whether for a period of one month or the illegal three months must be scrutinized in light of Zimbabwe's obligations emanating from the various treaties and conventions that it has acceded to and voluntarily accepted jurisdiction under the international and regional arena. In limiting the right of assembly Zimbabwe has an obligation to recognise, promote and protect rights under the African Charter such as assembly.<sup>57</sup> In limiting the right to freedom of assembly the police must be wary of Zimbabwe's human right obligations.

It is not disputed that the doctrine of the margin of appreciation applies when a state seeks to limit rights. The doctrine of margin of appreciation refers to the degree of discretion that can be condoned when a state seeks to limit rights guaranteed in the

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<sup>55</sup> Section 27 (2)(a), this section requires the police to publish an order in the gazette and in a paper circulating in the area, to be given to the person who is organising the rally that will be prohibited.

<sup>56</sup> Section 27 POSA.

<sup>57</sup> Art 1 of the ACHPR.

human rights conventions.<sup>58</sup> The basis of this doctrine is that, although states can limit rights under certain circumstances since rights carry special duties and responsibilities, this margin of allowing states to limit rights is limited by the criterion of necessity or proportionality to prevent abuse.<sup>59</sup>

First and foremost, Zimbabwe did not inform other state parties that it has derogated from certain provisions of the ICCPR. When rallies and meetings were banned for three months no tangible reasons were advanced as to why this had transpired. It must be realised that during a state of emergency the freedom can be abridged to the extent necessary to deal with the emergency.<sup>60</sup> Currently, one can not imply that there is a state of emergency in Zimbabwe. As such the ban does not pass the criterion of necessity or proportionality and violates the doctrine of margin of appreciation.

Be that as it may, the state has proceeded to ban all rallies that are political in nature. Such derogation is not justified in a democratic society. A democratic state cannot afford the 'police officer' commanding a district with far reaching powers to ban all political rallies for a period that exceeds that set out in the relevant legislation. This is tantamount to making law by administrative decree. This ban arbitrarily invades the enjoyment of a constitutional right.

The Supreme Court of Zimbabwe has observed that a procession is a crowd in motion which by its very nature is a highly effective means of communication, not provided for by the media. It stimulates public attention and discussion of the opinion expressed.<sup>61</sup> The right of assembly can also be expressed through public procession. Crowd action that is loud, noisy and disruptive must be viewed as a direct expression of popular sovereignty.<sup>62</sup>

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<sup>58</sup> Interights '*Blecic v Croatia*'; In the European Court of Human Rights available at <http://www.interights.org/doc/Blecic%20Amicus%20Brief%202%20May%202005.doc>- (accessed on 25 March 2007).

<sup>59</sup> M Nowak *Introduction to international human rights regime* (2003) 59.

<sup>60</sup> G Feltoe (n 11 above) 35.

<sup>61</sup> (n 4 above).

<sup>62</sup> I Currie (n 3 above) 397.

Be that as it may, assemblies and public gatherings can be banned if they pose a threat to public security. Previously the courts in Zimbabwe took a dim view to banning.<sup>63</sup> They required the state to show that they were no alternative means of dealing with the threat to public order such as relocating the gathering to another venue. The state has a right to safeguard citizens against violence. This obligation is articulated in several human rights instruments that include the ACHPR,<sup>64</sup> ICCPR<sup>65</sup> and UDHR.<sup>66</sup> On the other hand, individuals have a right to individually or collectively express their opinions in a crowd even when such opinions are controversial.<sup>67</sup> There is a need to balance the competing interests of the individual, society at large and the state.

It is not disputed that constitutional rights and freedoms are not absolute. Boundaries are set by rights of others and important social concerns such as public order, safety and democratic values.<sup>68</sup> The reason for limiting rights must be strong. The limitation must serve a purpose that most people regard as strong.<sup>69</sup> This limitation must be justifiable in an open and democratic society based on human rights such as dignity, equality and freedom.<sup>70</sup>

The African Commission has stated that when a state party limits rights, this must not undermine the rights guaranteed in the Constitution and international standards.<sup>71</sup> The police acting for the state in Zimbabwe has not only limited the right to freedom of assembly as such, by requiring notice to be given to the police before conducting a rally, it has effectively withdrawn or suspended this right at the discretion of the 'Officer

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<sup>63</sup> (n 4 above); I Currie et al (n 3 above) 412.

<sup>64</sup> Article 6 of the ACHPR.

<sup>65</sup> Article 9 of the ICCPR.

<sup>66</sup> Article 3 of the UDHR.

<sup>67</sup> *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC); freedom of assembly can never be divorced from freedom of expression as such these rights are vital to the exercise of electoral rights and democratic participation see *A Conte Defining civil and political rights: jurisprudence of the Human Rights Committee* (2004) 59.

<sup>68</sup> I Currie et al (n 3 above)163.

<sup>69</sup> D Meyerson *Rights limited* (1997) 36 – 43.

<sup>70</sup> *S v Makwanyane* 1995 (3) SA 491 CC Para 104.

<sup>71</sup> *Amnesty International v Sudan* (2000) AHRLR (ACHPR 1999) para 59 & 80.

Commanding District' according to police maps. It is imperative to note at this juncture that the state does not confer any human right on individuals but that there are inherent in humans by virtue of being human. The state has the obligations of upholding these rights as articulated in all human rights instruments. The ICCPR states that every state party has a duty to observe human rights and freedoms.<sup>72</sup>

**The only compelling good reason is that the limitation serves a purpose that is considered to be legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations.**<sup>73</sup> (emphasis is mine) This blanket ban applies to activities of all political parties must be assessed against these values.<sup>74</sup> POSA empowers police officers commanding districts to issue directives without consulting the Minister or Commissioner of Police to ban rallies.<sup>75</sup> The aggrieved parties have a right to appeal to the Minister against such a directive.<sup>76</sup> The ban for three months blatantly violated provisions of the repressive POSA that caters for a ban of one month.<sup>77</sup>

In practice this ban of political gatherings or meetings in Zimbabwe has been specifically directed at the opposition political parties only. As such this ban is discriminatory as it excludes gatherings or demonstrations by the ruling party.<sup>78</sup> It vitiates the right to equality before the law<sup>79</sup> and does not value human dignity<sup>80</sup> or freedom at all. Civil society organizations have not been spared the brunt of this ban. Such a ban is discriminatory *per se* and cannot be said to be justifiable in any open and democratic society.

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<sup>72</sup> Preamble of the ICCPR.

<sup>73</sup> D Meyerson (n 69 above )17.

<sup>74</sup> *The Herald* 'Ban on demonstrations police to rule on MDC appeal' Monday 19 March (2007) 4.

<sup>75</sup> Section 27 of POSA.

<sup>76</sup> Section 25(5) of POSA.

<sup>77</sup> Section 27 of POSA.

<sup>78</sup> T Chipangura ' Mugabe vows Tsvangirai will never rule' *City Press* 25 March (2007) 2.

<sup>79</sup> Section of the constitution of Zimbabwe guarantees this right.

<sup>80</sup> Especially when the members of political parties are arrested and tortured after carrying out rallies that are deemed to be legal by the court see *Tendai Biti v Minister of Home Affairs and others* High Court Harare unreported urgent chamber application 800/07; Civic society leaders were also tortured and assaulted.

Although these restrictions are not imposed in conformity with national law (POSA) the restriction is not necessary in a democratic society. The police did not prove that the ban is in the interests of national security, public safety, public order, health, morals and freedoms of others.<sup>81</sup>

Limitation of freedom of assembly must satisfy the two-fold requirement of legality and necessity according to Fastah Ougergouz.<sup>82</sup> The ban of political meetings or gatherings in several districts for three months does not satisfy the legality requirement at all, this ban was for three months whilst the act allows for a ban of a month. The act only confers powers on the regulating police to ban gatherings for a month. This ban was not properly gazetted as stated earlier in the paper. When this ban was effected the police did not show any strong compelling grounds that it was necessary to do so.

Exercising the right to assembly must be done without infringement on rights of others. In the case where the state fails to show that a public meeting or gathering will disrupt the enjoyment of rights of others, the state must not infringe upon this right at all.<sup>83</sup> Derogations from rights are not a solution to national problems as was stated in the case of *Sudan*.<sup>84</sup>

The limitation of rights that are guaranteed in the Constitution for the purpose that is reasonable and necessary in a democratic society involves the weighing of different competing values and ultimately an assessment based on proportionality.<sup>85</sup> When balancing the considerations, this involves looking at the nature of the right that is limited

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<sup>81</sup> Art 21 of the ICCPR.

<sup>82</sup> F Ougergouz *The African Charter on Human and Peoples' Rights a comprehensive agenda for human dignity and sustainable democracy in Africa* (2002)174.

<sup>83</sup> Art (5)(1) of the ICCPR.

<sup>84</sup> (n 72 above).

<sup>85</sup> *S v Makwanyane* ( n 70 above) para 104.

and the importance of that right in a democratic society.<sup>86</sup> The purpose of limiting the right and the importance of that purpose to society is the yardstick.<sup>87</sup>

The Supreme Court of Zimbabwe stated in the case of *Nyambirai v NSSA and another*<sup>88</sup> that the criteria to follow to determine whether or not a limitation is permissible and not excessive or arbitrary are that;

The legislative objective has to be sufficiently important to justify limiting a fundamental right;  
The measures designed to meet the legislative objective are rationally connected to it;  
The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

The measures that have been used by the police to regulate and prohibit gatherings and rallies such as the arrest of organizers and leaders of opposition political parties when such prohibition orders have not been carried out in accordance with the requirements of POSA cannot be said to be designed to meet the legislative objective. The objective behind POSA is to maintain public order and security in Zimbabwe.<sup>89</sup> The police have to act within the ambit of the act when carrying out their regulatory duty, in this case they have been acting *ultra vires* by not gazetting the prohibition orders.

Arresting leaders of civic groups and opposition political parties cannot be said to be necessary to accomplish the objective of POSA in instances where the rallies have been declared to be legal by the court. The outcome of these arrests has been the continuous violations of human rights of the nation, through torture and inhuman and degrading punishment. Certain members of the opposition have been subjected to inhuman and degrading punishment, torture and death after they refused to abide by the illegal bans on rallies imposed that violate international law.<sup>90</sup>

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<sup>86</sup> (n 85 above).

<sup>87</sup> As above.

<sup>88</sup> 1995 (2) ZLR 1 (S) 13.

<sup>89</sup> Preamble of POSA.

<sup>90</sup> *The Herald* (n 39 above); these violations occur despite the fact that Zimbabwe is party to the ICCPR article 6, CRC article 6, ACHPR article 4 and other instruments that oblige it to uphold the right to life. Prohibition from torture is guaranteed in the Convention Against Torture of Zimbabwe has not ratified this instrument, however torture and protection against inhuman and degrading treatment is also prohibited in several human right instruments that Zimbabwe is party to such as the ACHPR article 5, ICCPR article 7 to which Zimbabwe is party; See also T Chipangura (n 78 above).

It is important to note that most of the people arrested under POSA have not been convicted by the courts at all. The action of the police is therefore left wanting and does not satisfy the criteria set out by the Supreme Court of Zimbabwe in the case of *Nyambirai*.

The South African Constitutional court has also stated that a law may legitimately limit a constitutional right if it is a law of general application this has also been the stance adopted by the African Commission.<sup>91</sup> This means that the law must be accessible, precise to the extent that those affected by it can ascertain their rights and obligations.<sup>92</sup> On a substantive level, this law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.<sup>93</sup> This ban is targeting opposition political parties in practice. Several rallies have been conducted by the ruling party, demonstrations and processions have been conducted by members of the women's league and the youth.<sup>94</sup> Attempts by other parties to hold rallies have resulted in the arrest of the leaders and organizers who have turned to the courts for redress such as release from police custody.<sup>95</sup>

The current ban raises the issue of discrimination on the basis of political affiliation. It is differentiation on illegitimate grounds *per se*. This is despite the fact that the constitution has an anti-discrimination clause. Discrimination on the basis of political affiliation is also prohibited under the ACHPR.<sup>96</sup> The ban of political rallies expressly and shamelessly violates the rights recognized in several human rights instruments. It cannot be justified in a democratic society at any cost.

Democracy means that people have to be able to effectively choose a leader of their own choice. This cannot be done when political rallies are banned, how can the

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<sup>91</sup> *Constitutional Rights Projects and others v Nigeria* (2000) AHRLR 191 (ACHPR 1998).

<sup>92</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

<sup>93</sup> I Currie et al (n 3 above) 169.

<sup>94</sup> T Chipangura (n 78 above); *The Herald* 'ZANU PF gears up for 2008 polls- Women's league Harare province back Mugabe' 31 March (2007) .

<sup>95</sup> *Tendai Biti v Minister of Home Affairs and others* High Court Harare unreported urgent chamber application 800/07.

<sup>96</sup> Article 2 of the ACHPR; see *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999).

electorate informatively cast votes in elections when the prospective candidates do not have space to lay down their manifestos before the public, to enable the public to make informed decision? Banning of gatherings in such a manner can be viewed as a way of consolidating the 'de facto one party state' that has characterised Zimbabwe since independence.

The use of repressive legislation is not a new phenomenon in Zimbabwe.<sup>97</sup> POSA resurrected the provisions of LOMA<sup>98</sup> This Act had been promulgated during the colonial era. Participation in a demonstration was criminalized when police clearance had not been obtained.<sup>99</sup> Zimbabweans cannot continue to be haunted by ghosts from the past. Old wine in new wine skins (POSA) cannot be continuously served on the nation. Provisions of POSA relating to ban of gatherings, rallies or demonstrations and other unnecessary restrictions must be repealed.

## Conclusion

Banning political gatherings or rallies in Zimbabwe is tantamount to toying with fundamental liberties and must not be condoned. The duty to give effect to the right recognised in ACHPR must never be undermined or ignored at any time. The ban of rallies and gatherings by the Police in Zimbabwe must never be condoned at any time especially considering the fact that elections have been harmonized, with presidential and parliamentary elections taking place at the same time.<sup>100</sup> The provision that seeks to ban elections for a month must be repealed.

When the police limit the right of assembly, such limitation must not render a right illusory.<sup>101</sup> In this case the state through the police has not rendered the right to

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<sup>97</sup> R Hanzi (n 6 above) 27.

<sup>98</sup> Chapter 65.

<sup>99</sup> Section 6 of LOMA.

<sup>100</sup> 'Zanu PF endorses Mugabe' *The Herald* 31 March (2007).

<sup>101</sup> *Media Rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

assembly illusory by limiting but by suspending it at times rendering it virtually non-existent. It must be remembered that legitimacy is the relationship between the governed and the governors that engenders a belief that the state's leaders and institutions have a right to exercise authority over a society.

Legitimacy will convince rather than force citizens to obey the state.<sup>102</sup> Suspending the right to assembly does not improve the ratings of Zimbabwe as a pseudo-democracy by Diamond<sup>103</sup> or virtual democracy according to Richard Joseph.<sup>104</sup> Freedom House uses the term partly free. In this case competition, pluralism and rights of association and expression are curtailed by the state. Over the years, particularly from the year 2000 ratings of civil liberties in Zimbabwe have been retrograde reaching rock bottom with the advent of the clean up or *Operation Murambatsvina* ( Restore Order) in 2005. The ban on gatherings exacerbates the situation. It drastically limits the democratic space, spooking the opposition into submission and silence.

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<sup>102</sup> A Thomson *Africa- politics and government* (2004) 107.

<sup>103</sup> R Mattes 'Healthy democracies? The potential impact of AIDS on democracy in Southern Africa' (2003) available at <http://www.iss.co.za/Pubs/Papers71.html> (accessed on 27 March 2007); L Diamond 'Is the third wave over?' 7 *Journal of democracy* 3 (1996) 20- 27; R Joseph 'From Arbertura to Closure' 9 *Journal of democracy* 2 (1998) 3- 17.

<sup>104</sup> As above.

