

## The Right to Peaceful Assembly in Botswana: The Constitutionality of the Public Order Act

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### ABSTRACT

*The right to peaceful assembly and association is protected under the International Bill of Human Rights. The Constitution of Botswana protects this right under Section 13. The Public Order Act, governs the exercise of this right. In terms of the Public Order Act, an individual is required to obtain a permit from a police officer prior to convening a public meeting. This requirement is a limitation on the constitutional right to peaceful assembly and association. This article examines the Public Order Act and in particular the manner in which the permit for a public meeting is issued under sections 4 and 8. The author argues that the Public Order Act is unconstitutional because it clothes the issuer of the permit with broad discretion to refuse a permit and offers the applicant little recourse where a permit is refused. The article argues that the wording of Section 13 of the Constitution incorporates the so called “three prong proportionality test” laid down in *R v Oakes* and that the Botswana Courts, in applying the test, would find the provisions of the Public Order Act inconsistent with the provisions of the Constitution. A comparative survey indicates that similar provisions have been struck down as unconstitutional in Nigeria, Ghana and the United States. It is recommended that the Attorney General and the Law Revision Committee of Parliament consider a review of the Public Order Act.*

### 1. INTRODUCTION

The right to peaceful assembly is central to constitutional democracy. It has been said that the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.<sup>1</sup> The importance and instrumentality of the right to peaceful assembly cannot be overstated. It exists primarily to give a voice to the powerless.<sup>2</sup> This includes groups that do

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<sup>1</sup> *United States v Cruikshank* 92 U. S. 542, 92 U. S. 552-553.

<sup>2</sup> *South African Transport and Allied Workers Union and Another v Garvas and Others* CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC).

not have political or economic power, and other vulnerable persons.<sup>3</sup> It provides an outlet for their frustrations.<sup>4</sup> It is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.<sup>5</sup> According to the Human Rights Council, the rights to freedom of peaceful assembly and of association are essential components of democracy, providing individuals with invaluable opportunities to, *inter alia*, express their political opinions, engage in literary and artistic pursuits and participate in governance.<sup>6</sup>

The right to peaceful assembly is rapidly gaining attention in Botswana. A combination of factors may be responsible for this phenomenon, amongst them: a growing discontent by the electorate with the Government's failure to deliver services; tertiary students' dissatisfaction with the treatment from education authorities; the very lively trade union movement and new players in the political ring. As it is the case in other democracies, holding public demonstrations to express displeasure and to influence government conduct is viewed as an effective tool. The law that governs public meetings and processions in Botswana is the Public Order Act.<sup>7</sup> In order to hold public demonstrations in Botswana, the Public Order Act requires one to obtain a permit from the Police. This requirement now constitutes a serious hindrance to holding of public demonstrations in Botswana because in many situations, the application for a permit is either turned down or delayed to a point where the intention to hold demonstrations is ultimately abandoned.

Little literature exists on the protection of the right to peaceful assembly in Botswana. This article examines the protection of the right to association and peaceful assembly under Botswana law. It is argued, in the first place that, whilst the Constitution protects the right to association and peaceful assembly in Botswana, the limitations it imposes are too broad and subject to abuse. Secondly, it is argued that the requirement to obtain a permit prior to exercising the right to peaceful assembly is unconstitutional. Thirdly, it is further argued that the power of the Minister to suspend the right to peaceful assembly in cases of serious public disorder is also unconstitutional.

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> See Resolution 15/21, 21/16, 24/5 of the Human Rights Council.

<sup>7</sup> Chapter 22:02, available at <http://www.elaws.gov.bw/default.php?UID=602>, (accessed on the 3<sup>rd</sup> September 2015).

This article is divided into four sections. The first section discusses the right to peaceful assembly and association under international law. The second section discusses the protection of the right to peaceful assembly under the Constitution of Botswana. This is then followed by an analysis into the constitutionality of the Public Order Act.

## 2. THE RIGHT TO PEACEFUL ASSEMBLY AND ASSOCIATION UNDER INTERNATIONAL LAW

The right to peaceful assembly and association is recognized under various international and regional human rights instruments. It is protected under the International Bill of Human Rights.<sup>8</sup> It is protected under Article 20(1) of the United Nations Declaration of Human Rights (UDHR),<sup>9</sup> subject to the limitation under Article 29(2).<sup>10</sup> Under the International Covenant for Civil and Political Rights (ICCPR), it is protected under Article 22(1), which provides for everyone's right to freedom of association<sup>11</sup> subject to the limitation under Article 22(2).<sup>12</sup> The International Covenant for Economic, Social and Cultural Rights (ICESCR) protects the right of everyone to form and join trade unions, which is an integral part of right of peaceful assembly and association.<sup>13</sup> Other than under the International Bill of Human Rights, the right to peaceful assembly and freedom of association forms a fundamental part of various regional human rights instruments. The European Convention on Human Rights (ECHR) provides for the right to association under Article 11(1).<sup>14</sup> It is also recognized under Article 10(1)<sup>15</sup> of the African Charter for Peoples' and Human Rights (the Banjul Charter), which Botswana is a party to.

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<sup>8</sup> J.P. Humphrey, "The International Bill of Rights: Scope and Implementation," 17 *Wm. & Mary L. Rev* (1976), pp. 527-541.

<sup>9</sup> The Article provides that, "Everyone has the right to freedom of peaceful assembly and association."

<sup>10</sup> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

<sup>11</sup> "Everyone shall have the right to freedom of association with others..."

<sup>12</sup> "No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."

<sup>13</sup> See Article 8.

<sup>14</sup> "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

<sup>15</sup> "Every individual shall have the right to free association provided that he abides by the law."

### 3. PROTECTION OF THE RIGHT TO PEACEFUL ASSEMBLY UNDER THE CONSTITUTION OF BOTSWANA

The right to freedom of assembly and association is protected under Section 13 of the Constitution of Botswana. Section 13(1) states that:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.”

Like the UDHR,<sup>16</sup> the Constitution of Botswana protects both the right to freedom of assembly and association. Save for protecting the right to freedom of assembly and association, the Botswana constitution does not expressly create any positive obligation for the Government to protect the right. This is because, as Fombad contends, the Constitution of Botswana only affords express protection to first generation rights.<sup>17</sup> However, that is not to say that a court of law interpreting the provisions of the Constitution cannot arrive at a finding that there is a positive obligation for the Government to protect the right in certain circumstances. The European Court of Human Rights has held that such an obligation may exist in cases of expression of unpopular opinion by certain groups.<sup>18</sup>

The provision opens with “except with his own consent”<sup>19</sup> symptomatic of the existence of a possibility to waive this right. From the Constitution, it is not clear what the requirements for waiving such a right are. In *Zacharia and Another v Botswana Power Corporation*<sup>20</sup> where the Court of Appeal held that the right of freedom of association can be abridged with the consent of the party concerned. In this case, the Court of Appeal found that the right has been so abridged. However, the Court of Appeal omitted to set out the standard for a lawful waiver. It is argued that where it is alleged that a fundamental rights has been

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<sup>16</sup> Note that the ICCPR does not expressly mention protect both rights.

<sup>17</sup> C. M. Fombad. "The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework." *Essays on the Law of Botswana*, Cape Town, Juta & Co, (2007), pp. 1-31.

<sup>18</sup> *Case of Alekseyev v Russia*, European Court of Human Rights, (Applications nos. 4916/07, 25924/08 and 14599/09). In this case, Mr Alekseyev, a gay rights activist living in Moscow attempted to organise several gay pride marches in Moscow to draw attention to discrimination against the gay and lesbian minority in Russia. He provided required notices according to law. On every occasion, the authorities turned down his application for permission to hold the march on grounds of public order and prevention of violence against the participants.

<sup>19</sup> Several other rights contain this “waiver clause.”

<sup>20</sup> 1996 BLR 710 (CA).

waived such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.<sup>21</sup> In addition, it must not run counter to any important public interest.

As is the norm, the right is limited.<sup>22</sup> Under Section 13 (2),<sup>23</sup> except where an act carried out under the authority of law is shown not to be reasonably justifiable in a democratic society, such act shall not be inconsistent with Section 13 to the extent that the law in question makes provision-

- a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
- c) that imposes restrictions upon public officers, employees of local government bodies, or teachers.<sup>24</sup>

These are necessary limitations in the interest of public order and the need to secure the rights of others. Whilst the limitations are widely crafted, it is a well-known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions.<sup>25</sup>

#### **4. THE RIGHT TO PEACEFUL ASSEMBLY UNDER THE BOTSWANA PUBLIC ORDER ACT**

The right to peaceful assembly in Botswana is governed by the Public Order Act. The Act prescribes specific procedures to be followed and requirements to be met before one can exercise the right. The Act regulates certain public meetings and public processions and defines penalties for violation of provisions in respect of meetings and processions.

<sup>21</sup> *Scoppola v Italy* (No. 3) App. No. 126/05, Eur. Ct. H.R. 23 (2012).

<sup>22</sup> *Botswana Railways Organisation v Botswana Railway Crew Union 2010 (1) BLR 240 (CA)*.

<sup>23</sup> Section 13(2) reads as follows: Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons - ...and 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.

<sup>24</sup> Only the relevant portions of the provision have been cited.

<sup>25</sup> *Petrus v The State* [1984] B.L.R. 14, C.A.

Section 3 empowers any police officer of or above the rank of Assistant Superintendent who, having regard to the time or place and the circumstances in which any public meeting or public procession is taking place or is intended to take place, has reasonable grounds for believing that the meeting or procession may occasion serious public disorder, to give directions imposing on the persons organizing or taking part in the meeting or procession such conditions as appear to him necessary for the preservation of public order. In the case of a procession, the police officer may impose conditions prescribing the route to be taken by the procession and conditions prohibiting the procession from entering any public place specified in the directions. The proviso to Section 3 prohibits imposition of conditions restricting the display of flags, banners or emblems except such as are necessary to prevent a breach of the peace.

The Minister is empowered, by order published in the Gazette, to declare any area of Botswana to be a controlled area and to specify the regulating officer for any controlled area.<sup>26</sup> The Act<sup>27</sup> requires that any person who wishes to convene a public meeting or to form a procession within a controlled area to first make an application to the regulating officer of the area concerned. The provision stipulates that unless the regulating officer is satisfied that such public meeting or public procession is likely to cause or lead to a breach of the peace, he shall issue a permit.<sup>28</sup> The permit shall be in writing<sup>29</sup> authorizing such public meeting or public procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such public meeting or public procession as the regulating officer may deem necessary to impose for the preservation of public peace and order.

The regulating officer may impose the following conditions in the permit:<sup>30</sup>

- a) that the person to whom a permit has been issued shall be present at the public meeting or with the public procession from its first assembly to its final dispersal;
- b) the date upon which and the place and the time at which the public meeting or public procession is authorized to take place;
- c) the maximum duration of the public meeting or public procession;

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<sup>26</sup> Section 4(1) read with 4(2).

<sup>27</sup> Section 4(3).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Section 4(4) and 4(5).

- d) the grating of adequate facilities for the recording of the proceedings of such public meeting or public procession in such manner and by such person or class of persons as the regulating officer may specify, provided that such conditions may not require the convener to provide equipment;
- e) any other matter designed to preserve public peace and order.

A police officer may stop or order to disperse, any public procession or public meeting within a controlled area for which no permit has been issued or which, if such permit has been issued, contravenes or fails to comply with any conditions specified therein.<sup>31</sup> The regulating officer is also empowered to issue directions for the purpose of regulating within his controlled area the extent to which music may be played or to which music or human speech or any sound may be amplified, broadcast, relayed or otherwise reproduced by artificial means in public places or in places other than public places if such playing, amplification broadcasting, relaying or other reproduction is, in his opinion, likely to affect persons who are or may be in public places.<sup>32</sup>

The Act criminalises certain conduct. Any person who knowingly opposes or disobeys any direction issued under the Act<sup>33</sup> or violates any condition or a permit is guilty of an offence and liable to a fine not exceeding P 100 or to imprisonment for a term not exceeding six months, or to both.<sup>34</sup>

Any public meeting or procession within a controlled area which takes place without a permit or in which three or more persons taking part neglect or refuse to obey any orders given under the Act<sup>35</sup> is unlawful and all persons taking part in convening or directing such public meeting or public procession for which no permit has been issued shall be guilty of an offence and liable to a fine not exceeding P 100 or to imprisonment for a term not exceeding six months, or to both.

If at any time the Minister is of the opinion that, by reason of particular circumstances existing in Botswana or in any part thereof, the powers conferred by this or any other written

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<sup>31</sup> Section 4(6).

<sup>32</sup> Section 4(7).

<sup>33</sup> Section 5(a).

<sup>34</sup> Section 5(b).

<sup>35</sup> Section 6.

law will not be sufficient to enable the police to prevent serious public disorder being occasioned by the holding of public processions or public meetings in Botswana or any part thereof, may by order published in the Gazette and in such other manner as he may deem sufficient to bring the order to the knowledge of the general public in the area to which it relates, prohibit the holding within Botswana or any part thereof of all public processions or public meetings, or of any class or public processions or public meetings specified in the order, for such period not exceeding three months as may be so specified.<sup>36</sup>

Any person who knowingly organizes or assists in organizing any public procession or public meeting held or intended to be held in contravention of any order made under this section or takes part in or attends or incites any other person to take part in or attend, any such procession or meeting is guilty of an offence and liable to a fine not exceeding P 200 or to imprisonment for a term not exceeding 12 months, or to both.<sup>37</sup> A police officer may, without a warrant, arrest any person reasonably suspected by him to be committing an offence against the provision.

Unless the Minister otherwise directs, by order published in the Gazette, the provisions of Section 4, 5 and 6 do not apply to any public meeting convened for any religious, educational, recreational, sporting, social or charitable purpose, for the conduct of any agricultural or industrial show or for the sale of goods or cattle, for the purpose of viewing or participating in any theatrical, cinematographic or musical event or any circus or firework display, in *Kgotla*, or by a city council, town council or district council and to any public meeting convened by or on behalf of a candidate for election in any Parliamentary or city, town or district council election after the issue of the writ of election or by a representative of the Government, or to any public procession formed for any religious, educational, recreational, sporting, social or charitable purpose.

## **5. THE TEST FOR CONSTITUTIONALITY**

Unlike other Constitutions, such as the Constitution of South Africa,<sup>38</sup> the Botswana Constitution does not have a single limitation clause. Each right is subject to its own

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<sup>36</sup> Section 8(1).

<sup>37</sup> Section 8(3).

<sup>38</sup> Section 36 of the South African Constitution reads- "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,

limitations. The Court of Appeal has, however, wrongly held, as this author argued elsewhere,<sup>39</sup> that each right is also subject to the limitations under Section 3.<sup>40</sup> It is submitted that Section 3 simply states the purpose of the limitations provided under each right. Detailed analysis of this decision is outside the scope of this article.

Notwithstanding the deficiency pointed out above, it is submitted that the limitations under the Constitution of Botswana can be reduced into a single and all-encompassing standard for testing the constitutionality of laws. The analysis of the limitations under Section 13(2) reveals a three-pronged test.

The phrase, “*Nothing contained in or done under the authority of any law*” suggests that the fundamental right can only be limited by authority of law. As such, the first requirement is that there must be a prescribed law. Any conduct to limit the right that is not based under the authority of law is unconstitutional. Other than this phrase, the requirement of precise and clear laws is, in any event, implicit in the Constitution.<sup>41</sup> Clarity and precision in law are necessary to guide the conduct of individuals who are expected to regulate their affairs and plan their lives in accordance with such laws. The law therefore, must be clear and accessible to individuals. It must also afford individuals protection against arbitrary interferences by public authorities with the right in question. Where the law grants certain bodies discretion, it must also provide procedural protection or remedies against arbitrary use of that discretion.

The second limb of the test can be deduced from the goals that justify the limitations of the right. Section 13(2) provides that any law designed to limit the right to freedom of assembly must pursue any of the stipulated legitimate goals. Thus, faced with an attack on the constitutionality of a law the State cannot advance any aim apart from the prescribed goals to justify interference with a right. The right can only be limited in pursuit of one or some of the following legitimate goals: defence, public safety, public order, public morality, public health

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including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose

<sup>39</sup> G. R. Lekgowe “Mmusi & Ors v Ramantele & Another: An Opportunity Missed to Begin the Burial of Attorney General v Unity Dow?” 15 *UBLJ* (2012), p. 81.

<sup>40</sup> *Ramantele v Mmusi & Others*, Court of Appeal Civil Case No. CACGB 104-12, unreported.

<sup>41</sup> Section 86 of the Constitution reads - “Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, order and good government of Botswana.”

or protection of the rights or freedoms of other persons. This component scrutinizes whether the objective of the law in question is important enough to warrant overriding a fundamental right.<sup>42</sup>

Thirdly, there is the proportionality test. The means chosen to limit must be “reasonably required” or “reasonable justifiable in a democratic society.” No clear definition exists from Botswana case law on the import of these phrases. It is submitted that the phrase injects a reasonableness or proportionality test into the analysis. The celebrated Canadian case of *R v Oakes*<sup>43</sup> provides good guidance of the ingredients of the proportionality test that can assist in defining the content and import of the phrase - “reasonably required.” The case is important because it interpreted a phrase that is almost similar to the one used under Section 13(2) of the Botswana Constitution. According to *R v Oakes*,<sup>44</sup> to establish that a limit is reasonable and demonstrably justified in a free and democratic society, three central criteria must be satisfied. First, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective - the rational connection test. Secondly, the means should impair the right in question as little as possible – the minimum impairment test. Lastly, there must be proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

It is submitted that the Botswana High Court and Court of Appeal must adopt this standard in assessing the constitutionality of laws. Like the Canadian and South African Constitution, the Botswana Constitution uses language such as “reasonably justifiable”, “reasonably necessary,” “reasonably required” and “reasonably justifiable in a democratic society” which require value judgments and a balancing exercise. There is no reason why the Botswana Courts should not apply this proportionality test to interpret and define these limitations. The standard fits into the structure of the Constitution. Because of its high persuasive value, this standard will be applied in testing the constitutional validity of the provisions of the Public Order Act.

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<sup>42</sup> L. E. Trackman, W. Cole-Hamilton and S. Gatien, “R. v Oakes 1986-1997: Back to the Drawing Board” 36 *Osgoode Hall Law Journal* (1998), pp. 83-149.

<sup>43</sup> [1986] 1 SCR 103.

<sup>44</sup> At p. 138.

## **6. CONSTITUTIONALITY OF THE PUBLIC ORDER ACT**

The scope of application of the Public Order Act is restricted only to controlled areas. However, the Declaration of Controlled Areas Order<sup>45</sup> includes all cities<sup>46</sup> and main towns<sup>47</sup> in Botswana as controlled areas. The targeted areas are zones of frequent political activity. As a result, the scope of application of the Act is expansive. Even then, it must be noted that in areas which have not been declared Controlled Areas, the Act does not apply, which in theory means that public meetings may be convened without any need to comply with the provisions of the Public Orders Act. This section assesses the constitutionality of the requirement to obtain a permit before convening a meeting or procession and the powers of the Minister to suspend public meetings.

### **6.1 Requirement of a permit**

The Act<sup>48</sup> requires anyone who wishes to convene a public meeting or to form a public procession within a controlled area to apply for a permit. The application is submitted to the regulating officer of the controlled area, who should grant a permit unless if he is satisfied that such public meeting or public procession is likely to cause or lead to a breach of the peace.

The requirement of a permit prior to convening a public meeting or procession is a limitation to the exercise of the right of freedom to associate and assemble. Is the limitation consistent with the Constitution? The first question is whether the limitation pursues any of the stipulated legitimate goals. The requirement to obtain a permit to convene a public meeting aims to allow the regulating officer the opportunity to assess whether the nature of the meeting, the likely risks and determine whether there is any need for allocation of resources. From this dimension, it can be argued that it is a measure that is aligned to public safety and public order.

Next, is it reasonably required? Here, the test is one of proportionality, which involves three components. The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be proportionality

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<sup>45</sup> Public Order, Statutory Instrument 97 of 1978, 52 of 1982, 89 of 1982 and 76 of 1994.

<sup>46</sup> Gaborone, the capital city and Francistown, the second city.

<sup>47</sup> All the mining towns, except Orapa.

<sup>48</sup> Section 4(3).

between the effects of the limiting measure and the objective - the more severe the deleterious effects of a measure, the more important the objective must be.

It can be seen that the Act places a very wide discretion to grant a permit on the regulating officer after the officer has satisfied himself that the meeting is not likely to lead to a breach of the peace. Firstly, without a permit, a public meeting in a controlled area is altogether prohibited. The obvious effect and injury of this limitation on the right to peaceful assembly and association is that it proscribes individuals from convening spontaneous public meetings or processions. Secondly, the provision prescribes no standards for the exercise of the regulating officer's discretion; there is no indication of what factors the officer must take into account to determine whether or not the meeting is likely to lead to a breach of the peace. As a result, the applicant who makes an application cannot know what needs to be satisfied in order to obtain a permit. Only the regulating officer would know. The applicant is therefore prejudiced in his application as outcomes cannot be predicted with reasonable certainty. A permit can be denied on a whim. Thirdly, on the reading of the Act, there is no requirement to consult the applicant on the matter; the officer can unilaterally arrive at a decision not to grant the permit. This is despite the serious and intruding conditions that the regulating officer is allowed to impose such as the date upon which and the place and the time at which the public meeting or public procession is authorized to take place, the maximum duration of the public meeting or public procession, the extent of the sound to be used at such meeting or procession and "any other matter designed to preserve public peace and order." Consulting the applicant has many benefits. It will allow the applicant to provide any additional information that the regulating officer may not have prior to making his final decision.

Furthermore, no recourse is available to appeal to any other structure where the applicant is not satisfied with the decision of the regulating officer. Even though the common law action of judicial review is available, the fact that arbitrary or capricious action by the licensing officer is subject to judicial review does not cure a bad law.<sup>49</sup> A previous restraint by judicial decision after trial is as obnoxious under the Constitution as restraint by administrative action.<sup>50</sup>

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<sup>49</sup> *Cantwell v Connecticut* - 310 U.S. 296 (1940).

<sup>50</sup> *Ibid.*

Lastly, police officers are charged with the responsibility of maintaining peace and security for the protection of property and persons. Police officers are not neutral parties; their primary task is enforcement of the law rather than judicious determination of rights. Because they are not neutral parties, it follows that they cannot be impartial in the task of determining if individuals must convene public meetings or processions only when it cannot lead to a breach of the peace.

The overall effect of this provision is that the will of the regulating officer has been left absolutely uncontrolled; the peaceful enjoyment of a fundamental freedom is left contingent upon the uncontrolled and unguarded will of an official. With these aspects, it is argued that whilst the purpose of Section 4(1) is a necessary one, the measure adopted to achieve the purpose is arbitrary and unfair. It cannot be said that the measure is rationally connected to the objective. The provision can easily become an instrument of arbitrary suppression of free expression of views on national affairs.<sup>51</sup> It cannot be necessary in a democratic society.

## **6.2 The powers of the minister to suspend public meetings**

As stated above,<sup>52</sup> the Minister, at any time, if of the opinion that, by reason of particular circumstances existing in Botswana or in any part thereof, to, by order published in the Gazette and in such other manner as he may deem sufficient to bring the order to the knowledge of the general public in the area to which it relates, prohibit the holding within Botswana or any part thereof of all public processions or public meetings, or of any class or public processions or public meetings specified in the order, for such period not exceeding three months as may be so specified. The Minister is allowed to exercise this power where the powers conferred by the Public Orders Act or any other written law will not be sufficient to enable the police to prevent serious public disorder being occasioned by the holding of public processions or public meetings in Botswana or any part thereof.

The purpose of the Minister's power appears to be to regulate public meetings and processions in cases of serious public disorder. Serious public disorder is clearly undesirable

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<sup>51</sup> *Saia v New York* - 334 U.S. 558 (1948). The Court found unconstitutional a city ordinance forbidding the use of sound amplification devices in public places except with the permission of the Chief of Police and prescribing no standards for the exercise of his discretion. Even though the constitutions differ, the principle can be applied here.

<sup>52</sup> Section 8.

phenomenon, left unattended, it can destroy a society. So, it is a matter of public interest and public order that the law introduce measures to deal with it. Section 8 appears to have been enacted with this in mind. However, the Act does not describe “particular circumstances” or define “serious public disorder.”

The purpose is achieved by giving the Minister the power to prohibit the holding within Botswana or any part thereof of all public processions or public meetings, or of any class or public processions or public meetings specified in the order, for any period not exceeding three months. Thus, exercising this power, the Minister can proscribe public meetings or processions in the whole country or part of.

Further, the Act requires the Minister to only exercise this power where the powers in the Act and any other written law will not be sufficient to enable the police to prevent serious public disorder caused by the holding of public processions or meetings. It is difficult to establish from the Act how the Minister will determine that the powers contained in the Act and in any other written law are insufficient to prevent serious public disorder. This is a very a very nebulous standard to apply, it does not only give the Minister the power to stop the exercising of a fundamental right for any amount of time up to 90 days, it also gives the Minister the power to judge the sufficiency of “...any written law...” that is, of Acts of Parliament, including the Constitution.

It is submitted that the Minister’s powers are quite far-reaching in that they allow the Minister to suspend, for a period extending to 90 days, the exercise of a freedom by individuals conferred by the Constitution. The invocation of such a power ought to take place in the clearest of circumstances. However, the law is far from being a model of clarity. It is vague. It fails to describe or define serious “particular circumstances” and “public disorder.” The failure to define or describe these terms leaves room not only for abuse but for the Minister to invoke these intrusive powers in cases that may not amount to serious public disorder.

Above all, by giving the Minister, in cases where the powers conferred on the police by Acts of Parliament are insufficient to enable the police to prevent serious public disorder being occasioned by the holding of public processions or public meetings in Botswana or any part thereof, Parliament has abdicated its constitutional mandate to legislate. When Acts of

Parliament are insufficient, Parliament must legislate to make them sufficient. Parliament has no right to abdicate that responsibility to the Executive.

## 7. A COMPARATIVE PERSPECTIVE

The Supreme Court of the United States of America, the Court of Appeal of Nigeria and the Supreme Court of Ghana have struck down similar requirements for obtaining permits before assembly as unconstitutional.

In *Hague v Committee for Industrial Organization*,<sup>53</sup> the Supreme Court of the United States dealt with an ordinance which forbade public assembly in the streets or parks of the city without a permit from the Director of Safety. The Director could refuse such permit upon his mere opinion where such refusal will prevent “riots, disturbances or disorderly assemblage.”<sup>54</sup> The Court held that uncontrolled official suppression of the right of public assembly cannot be made a substitute for the duty to maintain order in connection with the exercise of the right and struck down the ordinance as unconstitutional.

In *Inspector-General of Police v All Nigeria Peoples Party and Others*<sup>55</sup> the Nigerian Court of Appeal dealt with the issue of whether the provisions of the Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990, which prohibit the holding of rallies or processions without a police permit are not illegal and unconstitutional. The Court of Appeal held as follows:

“I hold the view that the Public Order Act does not only impose limitation on the right to assemble freely and associate with others, which right is guaranteed under section 40 of the 1999 constitution, it leaves unfettered the discretion on the whims of certain officials, including the police. The Public Order Act so far as it affects the right of citizens to assemble freely and associate with others, the sum of which is the right to hold rallies or processions or demonstration is an aberration to a democratic society, it is inconsistency with the provisions of the 1999 Constitution. The result is that it is void to the extent of its inconsistency with the provisions of the 1999 Constitution. In particular section 1(2),(3)(4)(5) and (6), 2, 3 and 4 are inconsistent with the

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<sup>53</sup> 307 U.S. at 515-516.

<sup>54</sup> 307 U.S. 496 (1939).

<sup>55</sup> (2007) AHRLR 179.

fundamental rights provisions in the 1999 Constitution and to the extent of their inconsistency they are void - I hereby so declare.”

In *New Patriotic Party v Inspector-General of Police*<sup>56</sup> the Supreme Court of Ghana found the following provisions of the Public Order Decree unconstitutional:<sup>57</sup> Section 7, which gave the Minister for the Interior the power to prohibit the holding of public meetings or processions for a period in a specified area; Section 8, which made the holding of all public processions and meetings and the public celebration of any traditional custom subject to the obtaining of prior police permission; Section 12(c) of the said Decree which gave to a superior police officer the power to stop or disperse such a procession or meeting and section 13 of the said Decree which made it an offence to hold such processions, meetings and public celebrations without such permission.<sup>58</sup> Dealing with the issue of a permit, the Court observed that:

“We are here concerned with permits. Section 8(2) of NRCD 68 requires that the superior police officer shall consider the application for a permit fairly and impartially”. The duty to act fairly and impartially presupposes a duty to make a determination between competing interests. In the instant subsection it involves the choice between two positions, one of which is illusory - the citizen's rights of assembly, procession and demonstration as against the discretion of the senior police officer in determining whether to refuse a permit on the grounds that there is the likelihood of a breach of the peace or that the meeting or procession will be prejudicial to national security. The subsection provides no guide as to the form and content of an application for a permit nor the yardstick nor the standard which the senior police officer shall apply in determining whether or not he shall grant a permit.

<sup>56</sup> (2001) AHRLR 138.

<sup>57</sup> 1972 (NRCD 68). The provisions found that the provision were inconsistent with and in contravention of the Constitution, 1992, especially article 21(1) (d).

<sup>58</sup> Article 21(1)(d) and (4)(a), (b) and (c) of the Ghana Constitution reads: 21(1) All persons shall have the right to - ... (d) freedom of assembly including freedom to take part in processions and demonstrations ... (4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision - (a) for the imposition of restrictions, by order of a court, that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; (b) for the imposition of restrictions by order of a court, on the movement or residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana, (c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons.

Although the senior police officer must inform the applicant of the reasons for his refusal to grant the permit, such refusal cannot be challenged in any court. Thus a senior police officer may, out of prejudice, bias or even political preference, refuse a permit on flippant and untenable grounds...”

The Public Order Act does not lay down any yardstick or standard which the regulating officer must apply in determining whether or not to grant the permit. This creates an opportunity for abuse.

The Office for Democratic Institutions and Human Rights (ODHIR) Guidelines<sup>59</sup> on Freedom of Assembly and Peaceful Assembly set minimum international standards that should be met by national authorities in their regulation of the right to freedom of assembly and peaceful assembly in Europe. The Guidelines contain six principles. The first principle requires that as a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation and a presumption in favour of the freedom should be clearly and explicitly established in law.<sup>60</sup> The second principle states that the State has a duty to protect peaceful assembly.<sup>61</sup> The third and fourth principle deals with legality<sup>62</sup> and proportionality,<sup>63</sup> respectively. The principle of legality requires that any restrictions imposed on the right must have a formal basis in law. The principle of proportionality requires that the least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference. Under this principle, the dispersal of assemblies may only be a measure of last resort. The blanket application of legal restrictions tends to be overly inclusive and thus fails the proportionality test because no consideration is given to the specific circumstances of the case in question. The Guidelines recommend that instead of being required to ask for permission, the law must instead require that individuals who wish to convene a public meeting and procession serve a notice of intent. It is submitted that the Guidelines set acceptable international standards that could be of use in reviewing the Public Order Act.

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<sup>59</sup> OSCE Office for Democratic Institutions and Human Rights (ODIHR), Guidelines on Freedom of Peaceful Assembly (2007). The document is available at <http://www.osce.org/baku/105947>, last accessed on the 11<sup>th</sup> June 2014.

<sup>60</sup> At p. 13.

<sup>61</sup> At p. 14.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

## **8. CONCLUDING REMARKS**

From the above analysis, it has been argued that the requirement for obtaining a permit in order to assemble is unconstitutional. Rather than making a presumption in favour of the right to assembly, it makes a presumption against the right. Because of its unfair and arbitrary nature, it fails to meet the test of legality and proportionality. Those provisions which are inextricably bound, derive life and validity from and cannot be separated from the requirement of a permit are also unconstitutional. The most immediate ones are section 4(4), section 4(5), section 4(6), section 5(b), section 6(a) and 6(b). Section 4(6) empowers a police officer to stop or order to disperse any public procession or public meeting within a controlled area for which no permit has been issued or which if such permit has been issued, contravenes or fails to comply with any conditions specified therein. Section 5(b) and 6 impose criminal penalties for violation of permit issued under Section 4(3) or 4(6).

It has also been contended that the provision that empower the Minister to suspend, for a period extending to 90 days, the exercise of a freedom by individuals conferred by the Constitution is unconstitutional. The invocation of such a power ought to take place in the clearest of circumstances. However, by failing to define vital terms, the provision lacks such clarity.

Finally, by giving the Minister, in cases where the powers conferred on the police by Acts of Parliament are insufficient to enable the police to prevent serious public disorder being occasioned by the holding of public processions or public meetings in Botswana or any part thereof, Parliament has abdicated its Constitutional mandate to legislate.

A survey of comparative jurisdictions has shown that similar statutes have been struck down as unconstitutional. It is recommended that the Attorney General and the Law Revision Committee of Parliament consider a review the Public Order Act with a view to better safeguarding the constitutional rights to assembly and association.