

## The Public Order Act: an analysis

Nazhat Shameem: Pacific Dialogue Associate, former High Court Judge

*Fiji, 2012*

---

*This analysis was written to ensure that members of the public are aware of the amendments to the Public Order Act which were passed last week, and so that those reading it will be aware of the new provisions as well as the old provisions in the Act which have been retained. I am not the author of the Public Order Act Amendment Decree, and I have not expressed my personal opinion on any of its provisions.*

### **The Public Order Act Cap 20 (Act No. 19 of 1976, and Ordinance 15 of 1969)**

Under this Act, which has been in place since 1969, an assembly is a gathering of three or more persons assembled for a common purpose. A meeting is defined as an “assembly held for the purpose of discussion on matters of public interest or for the purpose of the expression of views on such matters”. By definition, a “meeting” is not a school or religious gathering therefore. Nor is it a dinner party, or an afternoon tea at a friend’s house. A “public place” is defined as “ (a) any highway, public street, public road, public park, or garden, any sea beach, river, public bridge, wharf, jetty, lane, footway, square, court, alley, or passage whether a thoroughfare or not.... or (b) land or open space.....place or building of public resort....to which for the time being the public have access whether on payment or otherwise.”<sup>1</sup>

The Public Order Act also prohibited the wearing of particular uniforms, the drilling of persons for the purpose of enabling them to use physical force (for instance the training of rebel or alternative militia groups)<sup>2</sup> and taking an unlawful oath to commit capital offences. This last was the subject of the prosecution of Ratu Jope Seniloli and Others after the 2000 George Speight coup.

Meetings were and are dealt with under section 8 of the Act. Any person who wishes to organise a meeting or procession in a public place shall first apply for a permit from the appropriate authority. Under the Public order Act before the amendments, the appropriate authority was the District Officer. The District Officer had to issue a permit unless “satisfied for good reason that such a meeting or procession is likely to prejudice the maintenance of peace or good order”. Any permit granted had to specify the routes the procession could take, or the purpose for which, the place at which, and the times of the proposed meeting. The permit also had to be issued in the name or names of a person or persons, who had applied for it.<sup>3</sup> Applications for permits had to be made at least 7 days in advance. Marriage ceremonies, funerals, sports, social events, private entertainment, religious gatherings, or charitable events carried out with the permission of the local authority where the event was to take place, were exempt from the requirement of applying for a permit.<sup>4</sup>

Section 9 of the Act gave the Minister powers to prohibit all meetings and processions whether in public or private places “in the interests of public safety and the maintenance of public order” or to prohibit the holding of meetings and processions in any area generally or subject to conditions.

Section 10 of the Public Order Act allowed the police to stop any meeting or procession if there was the contravention of any written law, and to order the meeting or procession to disperse. Any person taking part in a meeting without a permit, or in contravention of any condition of the permit, or in breach of any order given by a police officer to stop the meeting and to disperse committed an offence under section 11, and section 13, for which the maximum penalty was 6 months imprisonment or a fine not exceeding \$200 or both. The organisers of an illegal meeting or procession were guilty of an offence under section 13 (2) and the maximum fine was 1 years imprisonment and/or \$400 fine.

Other offences created by the 1969 Act were; Disturbance in a public place ( 3 months imprisonment and/or \$100 fine); Malicious acts defined as “maliciously fabricating or knowingly spreading abroad or publishing, whether by writing or word of mouth, any false news or false report tending to create or foster public alarm, public anxiety or disaffection or to result in the detriment of the public or..... Acting in a manner prejudicial to the public safety or to the peace and good order in any part of Fiji..... Or endeavour[ing] to disturb the public peace by inciting hatred or contempt of any class of person...”<sup>5</sup>; and incitement to violence and disobedience of the law.<sup>6</sup> This last offence was committed when a person without lawful excuse (the burden of proof being on him/her on this issue) utters, spreads or publishes any words or does any act or thing which is calculated to bring death or physical injury to any person or to any class, community or body of persons, or to lead to the damage or destruction of any property, or to prevent the execution of any written law by violence or any other unlawful means. The maximum sentence was 2 years imprisonment and/or a fine of \$1000. This offence was probably the closest offence to terrorism that existed in Fiji’s statutes prior to the Public Order Amendment Decree.

Section 17 of the Public Order Act<sup>7</sup> said that any person, who by words, spoken or written and intended to be heard or read, spread any report or made any statement which was likely to incite racial hatred of any race or community, or to promote feelings of enmity or ill-will between different races or communities, or to prejudice the public peace, or makes intimidating or threatening statements in relation to a community which is likely to spread fear, alarm or insecurity amongst members of that community, or spreads a report or makes a statement which incites people to violence, or counsels people to disobey the law or any lawful order given by the police, prison officers, or members of the armed forces, commits an offence.<sup>8</sup>

Section 17 (2) stated that where the newspapers or the FBC merely reported accurately and fairly, a statement likely to prejudice the public peace, an offence was not committed by the relevant media agencies. Persons in possession of statements or documents containing speeches in contravention of section 17 committed an offence unless they had no intention of spreading or circulating the report. The police had a power of arrest without a warrant for any offence under the Public Order Act, and section 20 allowed the Minister to pass Regulations under the Act.

The Schedule to the Act contained a permit for a public meeting/procession, and an application form for a permit.

These provisions have been a part of Fiji law since 1969, and for some provisions, since 1976. In summary, under the Act, a permit was always required for a meeting unless the meeting was specifically exempt. A gathering in a house to celebrate Christmas was not a “meeting” under the Act. Nor was a gathering at the temple church or mosque. Hate speeches were an offence. ‘Terrorist’ acts were offences, although acts and speeches had to be “calculated” to bring about death, destruction, damage, or to prevent the execution of any law.

### **The Public Order (Amendment) Decree**

The new definitions included in the Act after the amendment, include that of “explosive” and “offence against public order”. The latter lists the following as offences to which the Act generally applies;

Terrorism	Crimes against humanity (by murder, extermination, enslavement, forcible transfer of population, torture, rape, sexual slavery, forced pregnancy, enforced prostitution, enforced sterilisation, persecution, apartheid, inhumane acts and sexual violence)
Treason	
Urging political or inter-group force or violence	
Sedition	
Urging a person to assist the enemy	Slavery
Urging a person to assist those engaged in armed hostilities	Sexual servitude
Inciting to mutiny	Deceptive recruitment
Aiding soldiers or police in act of mutiny	Human Trafficking
Inducing desertion from the police force or armed forces	People smuggling
Aiding prisoners of war to escape	Document Offences in relation to people trafficking
Genocide	Foreign enlistment
	Piracy

Terrorism is specifically defined and covers in particular, any act involving death, serious bodily injury, danger to a person’s life, a serious risk to the health or safety of the public or a part of the public, the use of weapons, the introducing into the environment harmful or dangerous substances including toxic chemicals, and any act which involves serious disruption to any critical infrastructure or to the provision of services to communications, banking or financial services. It covers acts intended to or by its nature or context reasonably be regarded as being intended to, intimidate the public, or to compel a government

to do something or to refrain to do something. Internet based attacks including acts of large-scale disruption of computer networks for the primary purpose of creating alarm and panic are included in the definition of terrorism. Any of these acts must have been done or the threat made with the intention of advancing a political, religious, or ideological cause, and must have been done with the intention of coercing or influencing by intimidation the Fiji Government or intimidating the public or a section of it.

The word “appropriate authority” is amended to now mean the Divisional Police Commander. Previously the person issuing the permits was the District Officer.

The definitions of “meeting” and “procession” have remained unchanged. Therefore any meeting held to discuss matters “of public interest”, and any assembly of three or more persons assembled for a common purpose, continue to require permits, as has been the case since 1969.

However the words “racial vilification” are defined as including “conduct that offend, insult, humiliate, intimidate, incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or group of people on the grounds of their race, colour, national or ethnic origin.”

The words “religious vilification” has a similar meaning.

Section 3 of the Act is amended by increasing the penalty for wearing uniforms, or distinctive dress or bearing a flag, and by empowering the minister to order that the manufacture and sale of flags, emblems and dress be prohibited.

The Act is also amended by inserting sections 7A, 7B, 7C, 7D, 7E and 7F after section 7. All these sections are to do with the possession of arms and ammunition without a licence, and with the powers of the Police Commissioner to prohibit the buying, selling and dealing in arms and ammunition in any part of Fiji. Section 7B creates the offence of being in possession of arms without a license or ammunition without lawful authority. The maximum penalty is 3 years imprisonment, and/or \$5000 fine. There is a statutory obligation to report a suspected offence of carrying arms or ammunition without a licence or lawful authority<sup>9</sup> and the burden of proving that the defendant had no opportunity to report to the police, is on the defence<sup>10</sup>.

Sections 4, 5, 6 and 7 of the Public Order Act have remained untouched.

Section 8 (the section on the holding of meetings and processions) remains untouched, except that subsection (5) has been repealed. That was the subsection which exempted sporting, recreational, social events, private entertainment, and religious and charitable gatherings from the need to apply for permits. This means that the holding of all such functions now require permits. However if a group of people gather for purposes other than a common purpose, or gather to discuss issues which are not public interest issues, the gathering is not a “meeting” or an “assembly” for the purposes of the Act. This definition has remained unchanged since 1969.

Section 8(5) now reads;

“ The appropriate authority may, in its discretion, refuse to grant a permit under this section to any person or organisation that has on any previous occasion been refused a permit by virtue of any written law, or to any person or organisation that has on any previous occasion failed to comply with any conditions imposed with respect to any meeting or procession or assembly, or any person or organisation which has on any previous occasion organised any meeting or procession or assembly which has prejudiced peace, public safety and good order and/or which has engaged in racial or religious vilification or undermined or sabotaged or attempted to undermine or sabotage the economy or financial integrity of Fiji.”

In other words, if an organisation has previously acted in breach of a section 8 permit, or has been refused a permit, or which has previously organised a meeting which has prejudiced public safety and order, or has made hate speeches or has tried to damage Fiji’s economy, a permit can be refused.

Sections 9, 10 and 11 of the Public Order Act are deleted.<sup>11</sup> Under those sections the Minister could prohibit the holding of meetings<sup>12</sup>. Under those sections the police also had the power to stop and disperse meetings for which no permit had been granted<sup>13</sup>. In their place, under section 9, the Commissioner of Police or Divisional Police Commander has powers to prohibit and disperse a meeting or assembly or procession even if a permit has been granted. The Commissioner may make such orders as he considers necessary for the securing of public safety or for the maintenance of public order or for maintaining supplies and services to the community, and may exercise these powers if the organisation or person organising or participating in the gathering has previously breached the conditions of the permit or has engaged in hate speeches, or has tried to sabotage Fiji’s economy.

What powers do the police have under this section?

To prohibit a meeting, procession or assembly<sup>14</sup>.

To direct any meeting assembly or procession to disperse<sup>15</sup>.

After due warning, a police officer may use any force he/she deems necessary including the use of arms to disperse the meeting, procession or assembly, and to apprehend any person present.<sup>16</sup> In such a case the police officer is immune from civil or criminal suit.

These provisions are similar to regulation 3 of the repealed Public Emergency Regulations although there is no longer a power to attend meetings on reasonable suspicion that there will be a breach of the peace<sup>17</sup>. The power to use whatever force is necessary to disperse a riot was previously given to the police under section 90 of the Penal Code. Immunity from civil and criminal suit was also provided under section 90 of the Penal Code. Thus these are old powers.

The new section 10 creates offences of taking part in a meeting held without a permit or in breach of the conditions of a permit. The maximum penalties are 5 years imprisonment and/or a fine of \$10,000. A person who organises a meeting in breach of the Act is liable to the same penalty.

The new section 11 of the Act gives the Commissioner of Police or the person in charge of the police district powers to close roads or to regulate the use of public places in order to secure public safety or to

maintain public order. In an emergency a police officer above the rank of inspector can exercise these powers but for only 24 hours or until the order is endorsed by the Commissioner or the officer in charge of the police district<sup>18</sup>. Section 11A, is comparable to section 5 of the Public Emergency Regulations, except that one of the grounds on which the Commissioner can act under the Public Order Act is “for ensuring that the economic and financial integrity of Fiji is not undermined or sabotaged”.

The Decree also adds a new Part 3A to the Public Order Act. Section 12A provides that the penalty for an act of terrorism is a maximum of life imprisonment. Section 12B creates an offence of harbouring a person who has committed an act of terrorism. Section 12C creates an offence of knowingly providing or offering to provide a weapon to a group or organisation involved in terrorism. Participating in terrorist groups is an offence under section 12D and recruiting into terrorist groups is an offence under section 12E.

Sections 14, 15, and 16 are left untouched in the Public Order Act except for an increase in the penalties for the offences. Section 17, which is the “hate speech” offence, is amended by adding two further categories of result which is likely to be caused by the report or statement. One is “incite or promote religious, ethnic, or communal hatred or dislike” and the other is “undermine or sabotage or attempt to undermine or sabotage the economy or financial integrity of Fiji”. Further after the word “race” the words “religion, ethnicity, or community” are added wherever “race” appears in the section. Subsection (2) which permitted newspapers to report hate speeches is deleted. The offence is given extra-geographical jurisdiction by the insertion of a new subsection (5). This means that hate speeches made overseas by Fiji citizens and residents can be tried in Fiji by the Fiji courts. The new sentence for hate speeches is now a maximum of 5 years imprisonment and/or \$10,000 fine

A new section 17A gives powers of arrest for police officers in relation to public order offences or offences under the Act. These offences include terrorism, racial vilification and trafficking in persons. Where a police officer has reasonable suspicion that a person has acted or is about to act in a manner prejudicial to public safety or the preservation of peace, or is about to commit a public order offence, or on being questioned by the police a person fails to satisfy the officer as to name or address, or purpose for being in the place where he or she is found, the officer may arrest the person without a warrant. The police may also detain the person for investigations for up to 48 hours. Thereafter the person can be detained for 14 days but only on the authority of the Minister, who must be satisfied that the enquiries cannot be completed within 48 hours. After 48 hours or up to a further 14 days the person must either be released or brought to court.

The Criminal Procedure Decree gives the police powers to detain for enquiries for up to 24 hours, for offences other than murder or treason, and to grant bail after the expiry of 24 hours unless the case is of a serious nature. If the case is serious, then the suspect can be kept in custody and produced in court “as soon as practicable”.<sup>19</sup>

The Public Emergency Regulations allowed the police to detain persons in custody while acting under those Regulations for up to 7 days after the initial 24 hours, with the authority of a magistrate or police officer<sup>20</sup>.

Section 17B permits any police officer to use whatever force is necessary to arrest a person suspected of having committed a public order offence. This provision is similar to section 90 of the repealed Penal Code in relation to powers of arrest for riot and unlawful assembly. It is an offence to obstruct officers under the Act<sup>21</sup>. Section 17C provides that a member of the armed forces, when directed by his/her commanding officer, at the request of or with the concurrence of the Commissioner of Police, to exercise any of the duties or functions of the police or prisons officers.

A new Section 21 is inserted in the Act. It reads that no court, tribunal, commission or other adjudicating authority may hear a challenge to the validity, legality or propriety of any decision made under the Public Order Act by the Commissioner of Police, Divisional Police Commander or Minister or any public official. Where any such claim is brought, the file will be taken to the Chief Registrar for termination of the proceedings.

That is a summary of the provisions of the Public Order Act after the amendments.

### **The Public Order offences 22**

Are the public order offences, to which the Act now applies new offences? If they are old offences which previously existed under the Penal Code, have they been modified either in the Crimes Decree, or in the Public Order Act itself?

Treason – Under the Penal Code there were several treason offences, defined under sections 50,51, 52, 53 and 54. Treason itself was simply defined as any act which in England would be termed treason. The term was defined in *State v. Timoci Silatolu and Josefa Nata* [2006] AAU0024/03S. Section 51 of the Penal Code stated that any person who instigated any foreigner to invade Fiji with an armed force was guilty of treason. Section 52 created the offence of misprision of treason<sup>23</sup> and section 53 of the Penal Code created the offences of “treasonable felonies”. Any person who formed an intention to depose the State or to levy war against it or instigated an armed invasion of the state by foreigners committed treasonable felonies.

The Crimes Decree definitions of treason and related offences are more specific. Levying war against the State is still treason<sup>24</sup>, but so is instigating invasion, killing the President or the Prime Minister or engaging in conduct that materially assists another country which is engaged in armed hostilities against Fiji. There is a special offence under section 65(1) of intentionally urging another person to overthrow by force or by violence the Constitution of Fiji, or the Government of Fiji, or the lawful authority of the Government of Fiji. These were not specific offences under the Penal Code, although they could be alleged as overt acts to the offence of treason. Spreading racial or communal hatred or antagonism is a new offence under section 65 (2). However although a new offence, it is very similar to the offence in the Public Order Act of inciting racial antagonism<sup>25</sup> which is retained and extended after amendment.

Sedition – now under sections 66 and 67 of the Crimes Decree, the offences of sedition are identical to the old Penal Code definition of sedition under sections 65 and 66. However, Sections 67 and 68 of the Penal Code which allowed the court to suspend the operation of a newspaper found to contain seditious material and to prohibit the circulation of seditious reports are not included in the Crimes Decree.

Important safeguards to freedom of speech are set out in the proviso to section 66 of the Crimes Decree<sup>26</sup>.

Terrorism – Is made an offence for the first time, although the Financial Transactions Reporting Act 2003 made the financing of terrorist activity unlawful and defined terrorism in similar terms to the Public Order Amendment Decree.

Human Trafficking and People Smuggling– Offences created in accordance with the definition of trafficking in the United Nations Trafficking in Persons Protocol were incorporated into our laws for the first time in 2009 when the Crimes Decree was passed. The offences are based on the prohibition on the transportation of people in and out of Fiji, or within Fiji, for the purpose of exploitation, or by deceit.

Genocide, crimes against humanity, slavery, sexual servitude and apartheid are all offences from the Rome Statute of the International Criminal Court. Fiji was required by her obligations under the Rome Statute to pass laws identical to the Rome Statute laws for international crimes.

Hate speeches and incitement to violence – These are all old offences created by the 1976 edition of the Public Order Act itself. There is a new offence under section 65 (2) of inciting communal antagonism which falls within the ambit of “public order offence” for the purposes of the Public Order Act.

## **The Media**

The provisions in the Public Emergency Regulations permitted the Permanent Secretary to check on stories before publication. The Permanent Secretary no longer has these powers now that the Public Emergency Regulations have been lifted. However the Minister for Information has similar powers under section 80 of the Media Industry Development Decree.

Complaints against the media can be made under section 54 of the Decree, and non-compliance with the code of ethics in the 1st Schedule is one of the possible grounds for complaint. A complaint may be dismissed summarily or referred to the Media Tribunal for adjudication.

What advice should be given under the Act since it was amended and the Public Emergency Regulations were lifted?

When organising a meeting of three or more persons, you should apply for a permit from the police. This law has remained unchanged since 1969.

When a permit is granted you must adhere to its conditions because failure to do so may lead to a refusal of a permit when you next apply.

The Media is now regulated by the Media Industry Development Decree. Media agencies should be aware of its provisions, and of the powers of the Media Industry Development Authority, The media will be judged ultimately by adherence to the Media Code of Conduct, in the Media Industry Development Decree.

In making statements in public you must not incite racial antagonism. You must not make a report or make a statement that is likely to promote feelings of enmity amongst the different communities, religious groups, or classes of the community. You must not become involved in terrorist activity. You must not cause any harm to others, nor must you make threats of harm to others.

You must not make hate speeches or speeches in contravention of section 17 of the Public Order Act even when you are travelling abroad.

In seeking to promote changes to our laws and constitution, you must not urge the use of force or violence.

In seeking to make changes to the law you must not cause discontent or disaffection amongst the people of Fiji unless you are pointing out factors which cause any such discontent.

When asked for your name and address by the police you must not give a false name and address. When asked you should explain what you are doing in the place where you are being questioned.

When in doubt about the effect of the law on your conduct or proposed conduct, consult a lawyer.

### ***End notes***

1 Section 2 Public Order Act

2 Section 4 Public Order Act

3 Section 8 (1) (a) (b) and (c)

4 Section 8 (5)

5 Section 15 (a) (b) and (c)

6 Section 16

7 Inserted in 1976 by Act No. 19 of 1976

8 Maximum sentence – 1 years imprisonment and/or \$500 fine

9 Section 7F

10 Section 7F(2)

11 These were the sections which empowered the Minister to prohibit assemblies and meetings, empowered the police to stop and disperse meetings and processions, and created a “deeming” provision that a meeting in breach of a permit was deemed to be an unlawful assembly.

12 Section 9 (1) (a) and (b)

13 Section 10 (1) and (2)

14 Section 9 (1) (a)

15 Section 9 (1) (b)

16 Section 9 (3)

17 Formerly Regulation 3(5) of the PER

18 Section 11(2)

19 Section 24 (1) (2) and (4) of the Criminal Procedure Decree 2009

20 Regulation 18 of the PER

21 Section 17D

22 As defined in the Public Order Act (Amendment) Decree 2012

23 Defined in State v. Viliame Savu [2002]HAC 010/02S

24 Section 64(1)(d) Crimes Decree

25 Section 17

26 See also DPP v. Afasio Mua and Others (1992) 38 FLR 226