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Freedom of peaceful assembly and (un)constitutional limitations in South Africa

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Nota a Mlungwana and Others v S and Another (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) (19 November 2018)

This South African case is a landmark case[1] concerning *the right to freedom of peaceful assembly*. A fundamental right, which is frequently ideally «merged» – or «confused into» – freedom of speech and association, though it represents a human right on its own[2].

As stated by the *United Nations Special Rapporteur on the rights of freedom of peaceful assembly and association* (hereinafter the *UN Special Rapporteur)*, the right to freedom of peaceful assembly is among the most important human rights, *i.e., 'his right protects peoples' ability to come together and word for the common good. This right is a vehicle for the exercise of many other civil, cultural, economic, political and social rights, allowing people to express their political opinions, engage in artistic pursuit, engage in religious observance* [...][3].

Indeed, as suggested by Baker, association and assembly are not two overlapping concepts, in so far as '[c]*hallenges to existing values and decisions to embody and express dissident values are precisely the choices and activities*

* Nota valutata dalla direzione Focus.

1 G.N. BARRIE, *Section 12(1)(a) of the Regulation Of Gatherings Act 205 of 1993 declared unconstitutional – criminal sanction an unjustifiable limitation on the exercise of the right to assemble - Mlungwana v S 2019 1 BCLR 88 (CC)*, in *Journal of South African Law*, vol. 2, 2019, pp 405 ss.; M. C. STOFFELS, *The failure to provide notice of an intended gathering - Mlungwana v The State (CCT32/18) 2018 ZACC 45 (CC)*, in *Obiter*, vol. 40, n. 2, 2019, pp 408 ss.

2 An interesting analysis concerning how freedom of assembly might often be unconsidered as an autonomous fundamental freedom has been provided by Inazu. According to this author, '*The disappearance of the freedom of assembly from legal and political discourse is intriguing in a country that attaches so much importance to the Bill of Rights* […] *It may be that the principles encapsulated in the constitutional right of association embrace a kind of group autonomy that broadens the conception of assembly. But* [still] *the right of association* [might be transformed] *into an instrument of control rather than a protection for the people* [losing] *sight of the dissenting, public, and expressive groups that once sought refuge under the right of assembly*'. See, J. D. INAZU, *The Forgotten Freedom of Assembly*, in *Tulane Law Review*, vol. 84, 2010 p. 612.

3 *Amicus Curiae* by the *Special Rapporteur on the rights of freedom of peaceful assembly and association*, *Mlungwana* [2018] ZACC 45, 19 November 2018, at 20. In addition, exploring this issue worldwide, it is interesting to note how the Office of Democratic Institutions and Human Rights (ODIHR) of the Organization of Security and Cooperation in Europe (OSCE) has elaborated on freedom of peaceful assembly, issuing the *Guidelines on Freedom of Peaceful Assembly* in 2007. As described by Jarman and Hamilton through the *Guidelines*, it might be possible to identify six fundamental principles: '*(i) the presumption in favour of holding assemblies whereby the right should, insofar as is possible, be enjoyed without regulation; (ii) the state's positive duty to protect peaceful assembly; (iii) legality and the imperative that any restrictions imposed have a formal basis in law (which itself should be compatible with human rights standards); (iv) proportionality and the need to ensure that any restrictions are the least intrusive needed to achieve the legitimate aim being pursued;(v) good administration; including the accessibility and transparency of the regulatory authority; and (vi) non-discrimination*. See, N. JARMAN AND M. HAMILTON, *Protecting Peaceful Protest: The OSCE/ODIHR and Freedom of Peaceful Assembly*, in *Journal of Human Rights Practice*, vol. 1, n. 2, 2009, p. 7.

that cannot be properly evaluated by summations of existing preferences and that the constitutional right of assembly ought to protect activities that are unreasonable from the perspective of the existing order[4]".

In the case of *Mlungwana*[5], the South African Constitutional Court (ZACC) has been engaged in a deep analysis of those guarantees stemming from art. 17 of the South African Constitution[6] *vis-à-vis* section 12 (1) *letter a*, of the *Regulation of Gatherings Act* (*RGA*) of 1993[7], *i.e.*, a piece of legislation criminalizing protest conveners' failure – willingly or unwillingly – to give notice to the public authorities before organizing a public rally involving more than fifteen people at the same time, and participants in unauthorized gathering.

In *Mlungwana*, the ZACC has secured this fundamental freedom from possible abuses by State's authorities. Indeed, as it will be discussed, this case follows a path that has been already drawn by the constitutional Court its previous case law. It represents a further development of the meaning of one of the most crucial constitutional guarantees in a constitutional democracy.

Given the reasoning and the clear-cut position taken by South African Justices, *Mlungwana* represents a landmark case, that is, this judgment will have lasting effects on the application of laws concerning a limitation of freedom of peaceful association.

The context

On 11 September 2015, members of the Social Justice Coalition (SJC[8]) decided to start a protest in front of the City of Cape Town municipality. At first, the numbers of people involved was fifteen individuals, who decided to chain themselves in small groups of five each[9], and demonstrate in response to what they perceived as dangerous and inadequate sanitation facilities in Khayelitsha[10]. This demonstration was a sequel of another public protests which took place on 11 September 2013[11].

4 C. E. BAKER, *Human Liberty and freedom*, Oxford University Press, 1992, p. 134.
5 *Mlungwana and Others v The State and Another [2018] ZACC 45, 19 November 2018*.
6 Article 17 reads: '*Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.*'
7 *Act to regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith*. Act n. 205, 1993, Government Gazette 28 January 1994.
8 According to their website, this association was founded on 16 June 2008, and it is a membership-based social movement made up of 17 branches across Khayelitsha, Kraaifontein, Crossroads, and Gugulethu in Cape Town. With over 2500 members mainly living in informal settlements; its campaigns are based on research, education, and advocacy to ensure all people have access to a democratic and effective police and criminal justice system (see https://sjc.org.za/about, last retrieved on 05/02/2020).
9 *Mlungwana, at 29*.
10 This area is one of the largest, and fastest-growing townships in Cape Town.
11 *Ibidem*, at 29

Activists were aware about the limits imposed by the South African existing legislation – *i.e.* a prior notification to public authorities was needed – but yet, they decided to convene the demonstration even if the possibility to end up in more than fifteen people was more than a mere hypothesis.

Indeed, several protesters joined the rally and, though the gathering was going on peacefully, the police was called. Officers ordered all people on the street to disperse but they refused to do so[12].

Therefore, the police proceeded by arresting protesters, whose peaceful intentions were upheld during the seizure. Twenty-one individuals involved in the march were charged according to Section 12 (1) *letter a* of the *RGA* of 1993, *i.e.* for convening a gathering with no given notice, and according to Section 12 (1) *letter e* punishing the participation in a non-authorized gathering[13].

The purpose of this Act was preventing a possible abuse of the right to assembly, which could eventually violate the rights of others (not involved in the protest)[14].

[12] *Ibidem*, at 30.

[13] According to Section 12 (1) of the *RGA* of 1993, any person who: *(a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; or (b) after giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4(2)(b); or (c) contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration; or (d) knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or (e) in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act; or (f) knowingly contravenes or fails to comply with a condition imposed in terms of section 4(4) (b) , 6(1) or 6(5); or (g) fails to comply with an order issued, or interferes with any steps taken, in terms of section 9(1) (b) , (c), (d) or (e) or (2)(a); or(h) contravenes or fails to comply with the provisions of section 4(6); or (i) supplies or furnishes false information for the purposes of this Act; or (j) hinders, interferes with, obstructs or resists a member of the Police, responsible officer, convener, marshal or other person in the exercise of his powers or the performance of his duties under this Act or a regulation made under section 10, shall be guilty of an offence and on conviction liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment*. The full text of this Act is available at https://www.gov.za/sites/default/files/gcis_document/201409/act205of1993.pdf (last retrieved on 01/02/2020).

[14] In the *RGA*, no reference is made to the maintenance of public order, i.e., the conditions under which freedom of peaceful assembly can be limited seem to be strictly related to avoid interference with other people's rights. This, in turn, could lead to believe that such a piece of legislation is narrowly (thus legitimately) limiting a fundamental freedom, in the context of «balancing freedoms». Nonetheless, as it will be shown, the *RGA* has been considered as illegitimately, that is, as compromising a basic democratic freedom.

Indeed, as recognized by the *United Nations Special Rapporteur* in its amicus curiae[15], '[…] *advance notification of public gathering is a fairly common regulatory procedure around the world*[16]'.

Nonetheless, despite its aim, those measures taken to achieve this goal – namely the criminal conviction of conveners/participants in an unannounced gathering - have been challenged.

Again, as the UN Special Rapporteur has underlined, '*using criminal law against individuals solely for having organized or participated in a peaceful assembly is, in principle, not a legitimate response available to States* [under the ICCPR and the African Charter[17]] *when the persons concerned have not themselves engaged in other criminal acts. When no other punishable behavior is involved, sanctioning the mere non-notification of a peaceful assembly means* de facto *that the exercise of the right to freedom of peaceful assembly is penalized*[18]'

Indeed, applicants were not questioning the rationality of the required notification itself, but the use of criminal law against individuals for having organized/participated in a peaceful assembly, without charging specific criminal conducts – if any – during a given protest.

This contribution does not analyze in deep allegations under Section 12 (1) *letter e*, since, as a matter of facts, there was no criminal offence at all, given that the demonstration was unauthorized not prohibited[19]. This analysis focuses on Section 12 (1) *letter a*, and its constitutional validity, given that criminal conviction was provided for by the *RGA* for the mere organization/convening (willingly or unwillingly) of an unannounced public gathering. Hence, the aim of this note is to understand the limits

[15] It is important to remember that according to Section 39(1) letter b of the South African Constitution, national Courts must consider international law, and following Section 39(2) '*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights*'. In addition, as established in Section 233 of the Constitution '*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*'. The South African constitutional Court in *Glenister v. President of the Republic of South Africa and Others* (Case CCT 48/10 [2011] ZACC 6) has made clear that international law (and its principles) are to be considered bound by national Courts. In this judgment, the Court emphasized how '[according to] *39(1)(b) states that when interpreting the Bill of Rights a court —must consider international law* […] *and international law, through the inter-locking grid of conventions, agreements and protocols* […] *unequivocally obliges South Africa* […] (see, *Glenister* at. 195*)*

[16] *Amicus Curiae* by the Special Rapporteur on the rights of freedom of peaceful assembly and association, *Mlungwana* [2018] ZACC 45, 19 November 2018, at 4.2.

[17] S. Delaney, *The right to freedom of assembly, demonstration, picket and petition within the parameters of South African law*, in *Socio-economic Rights - Progressive Realization?,* Foundation for Human Rights (ed.), 2016, p.595 ss.

[18] As the *Special Rapporteur* has recognized in its *Joint Report* of the *Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association* and the *Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*, '[f]*ailure to notify authorities od an assembly does not render an assembly unlawful, and consequently should not be used as a basis for dispersing the assembly. Where there has been a failure to properly notify, organizers, community or political leaders should not be subjected to criminal or administrative sanctions resulting in fines or imprisonment* (see A/HRC/20/27 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai). *This applies equally in the case of spontaneuous assemblies, where prior notice is otherwise impracticable or where no identifiable organizer exists. Spontaneous assemblies should be exempt from notification requirements, and law enforcement authorities should as far as possible, protect and facilitate spontaneous assemblies as they would any other assembly*. See, *Amicus Curiae* by the Special Rapporteur on the rights of freedom of peaceful assembly and association, *Mlungwana* [2018] ZACC 45, 19 November 2018, at 77

[19] *Mlungwana,* at 28.

of *the right to freedom of peaceful assembly*, in South Africa, i.e. to what extent South African authorities might legitimately impose regulation without making this fundamental freedom a void one.

The case in Court

According to the *RGA* it was possible to sharply differentiate among «demonstration» and «gathering»; the former made by no more than fifteen people (*RGA*, Section 1, letter *v*), thus not requiring a prior notice, the latter consisting in more than fifteen individuals (*RGA*, Section 1, letter *vi*).

The Act provided that, in case of gatherings, a written prior notice should have been given to the authorities at least seven days before the demonstration (*RGA*, Section 3,), and if given only few hours (in less than forty-eight hours) before, the demonstration could have been unauthorized by local authorities for security reasons.

In addition, public authorities could similarly forbid a demonstration if it had been reasonable to expect – in light of available information – that the protest would end in tumultuous events with extensive damage, or people harm, which would have been impossible to prevent by the police during the event (*RGA*, Section 5).

As for the punished conduct, Section 12 (1), *letter a* of the *RGA* established that it was a criminal offence to convene a gathering without giving information as provided for by Section 3. The organizer – *i.e.* the identified "convener" – could be found criminally responsible, thus liable to a fine up to R 20.000 or to imprisonment for a period up to one year or to both such fine and such imprisonment.

Before the Magistrate Court[20] protesters who were charged under Section 12 (1) of the *RGA,* on one hand pleaded not guilty (under Section 12 (1) *letter e*), while on the other hand required a declaration of invalidity of Section 12 (1), *letter a* of the *RGA*. For the involved activists, the *RGA* was in violation of art. 17 of the South African Constitution, (also) interpreted in the light of international human rights standards, as far as it made the convening of a gathering with no prior notice a criminal offence.

At the end of the trial, all those who were accused were acquitted for participating in the protests – so as mere participants – whilst ten people were identified as conveners, thus responsible and convicted on the main account. However, since according to the Magistrate '*the applicants were at al times* […] *respectful and peaceful* […]' all of them were cautioned and discharged. In addition, the Court has granted the possibility to appeal to the High Court in order to challenge 12 (1), *letter a* of the *RGA*.

[20] The Magistrates' Courts are the lower courts dealing with the less serious criminal and civil cases. They are divided into regional courts and district courts. In Criminal Courts the state prosecutes people for breaking the law. Criminal Courts can be divided into two groups: (a) Regional Magistrate's Courts; (b)Ordinary Magistrate's Courts (also called District Courts).

Justices of the High Court agreed on upholding the request for a declaration of invalidity[21] of Section 12 (1) *letter a* of the *RGA*, explaining how crucial freedom of peaceful assembly is, especially in "young democracies" such as South Africa. The Court, recalling the *Garvas* case underlined how '*in democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important* […]. *Freedom of assembly, by its nature can only be exercised collectively and the strength to influence lies in the number of participants in the assembly. These rights lie at the heart of democracy*'[22].

Justices also made references to the case *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development* highlighting how, when a fundamental right is involved '*a limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution […]. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused*[23]'.

Indeed, judges recognized how the mere threat of criminal proceeding do have a chilling effect on the exercise of freedom of peaceful association; as argued in the judgment, '*the effect of the Section12(1) (a) [of the RGA] sanctions appears to be quite chilling. This is so because of the well-known calamitous effects of a previous conviction recorded against individuals* […] *for the simple reason that they dared to convene a gathering to express their frustration with service delivery, albeit without the requisite notice*[24]'.

The High Court thus concluded that '*the criminalization of a gathering of more than 15 on the basis that no notice was given violates s 17 the Constitution as it deters people from exercising their fundamental constitutional right to assemble peacefully unarmed. In my judgment, the limitation is not reasonable and justifiable in an open and democratic society, based on the values of freedom, dignity and equality*[25]'. Thus, the Court declared Section 12(1) *letter a* of the *RGA* constitutionally invalid.

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[21] It should be reminded that, when a challenge for constitutional validity is raised before the Hight Court, Judges must apply a scrutiny test as it has been set out in the case *Ferreira v Levin NO And Others; Vryenhoek v Powell NO And Others 1996 (1)* SA 984 (CC). Therefore, '[To determine] *whether the provisions […] are invalid because they are inconsistent with the guaranteed rights […] under discussion involves two stages: first, an enquiry as to whether there has been an infringement of the* […] *guaranteed right; if so, a further enquiry as to whether such infringement is justified* […]. *It is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, it is for the Legislature, or the party relying on the legislation, to establish this justification* […] *and not for the party challenging it to show that it was not justified*'. See *Ferreira* case, at 44.

[22] *South African Transport and Allied Workers Union and Another v Garvas and Others* (*Garvas*)(CCT 112/11) [2012] ZACC 13, at. 120.

[23] *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development*, (CCT 12/13) [2013] ZACC 35, at. 95.

[24] *Mlungwana v. S*, Western Cape High Court, Cape Town, (CCT32/18) [2018], ZACC 45, at 42. (this judgment is available as at https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2018/01/Mlungwana-APPEAL-Final.pdf; last retrieved on 1 February 2020)

[25] *Ibidem,* at 95.

As the two respondents (*i.e.*, the State and the Minister of Police) appealed against the decision issued by the Hight Court, the evaluation concerning the constitutional validity of Section 12 (1) *letter a* of the *RGA* has been brought before the South African constitutional Court.

Two main arguments were brought before the ZACC by respondents: first, the concerned piece of legislation was nothing but "*mere regulation*", that is, Section 12 (1) *letter a* of the *RGA* should have been framed in the logic of preventing disorders, not as a measure threatening a fundamental freedom (*i.e.*, art. 17 of the Constitution); second, even if there was a limitation, it should have been considered as legitimate under art. 36 of the South African Constitution[26].

A unanimous Court[27] struck down these arguments analyzing both in deep.

As for the first claim made by the State, the Court noted that '*The respondents' argument is unsustainable. Section 12(1)(a) goes beyond mere regulation*[…][28]', *i.e.* as the ZACC had the occasion to state in *Garvas*, when the State attempts to deterring the exercise of the right enshrined in Art 17 of the Constitution, it is actually limiting that right[29]. As the Court empathized, '[d]*eterrence, by its very nature, inhibits the exercise of the right in section 17. Deterrence means that the right in question cannot always be asserted, but will be discouraged from being exercised in certain instances*[30]'.

In order to reinforce its reasoning, the ZACC has constantly made references to other international human rights treaties and human rights monitoring/judicial bodies[31].

The Court has referred to the United Nations Human Rights Committee's case *Kivenma*[32], where the Committee found that criminalizing a peaceful and spontaneous gathering of a limited amount people was in violation of art. 21 of the ICCPR[33].

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26 Article 36 reads: *(1)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, 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. (2). Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

27 Petse AJ delivered the judgment for the Court.

28 *Mlungwana,* at 46.

29 *Garvas* (CCT 112/11) [2012] ZACC 13, at. 120, quoted in *Mlungwana,* at 46.

30 *Mlungwana,* at 47.

31 As it has been already underlined, (see, *supra* note 15), the ZACC has developed a consistent case law referring to foreign decisions, at national and international level. An interesting contribution on the ZACC's attitude toward international human rights legal instruments is provided by A. RINELLA AND V. CARDINALE, *The Comparative Legal Tool-Kit of the Constitutional Court of South Africa*, in G. F. FERRARI (ed.), *Judicial Cosmopolitanism*, Brill Nijhoff, Boston, 2019, pp. 217 ss. See, also, H. KLUG, *The Constitution of South Africa: A Contextual Analysis*, Hart, 2010.

32 *Kivenmaa v Finland*, Communication No. 412/1990 UN Doc CCPR/C/50/D/412/1990 (1994).

33 As argued by the Committee – while analysing the behaviour of the Finnish State, which prevented a demonstration of about 25 people contesting the visit of a foreign Head of State – *'[a] requirement to pre-notify a demonstration would normally be for reasons of national security or public safety, public order, the protection of public health or morals*

The ZACC has also recalled *Kudrevičius v Lithuania*[34], by the European Court of Human Rights (ECtHR). In this case ECtHR upheld that '*The term "restrictions" in Article 11* [Freedom of assembly and association] *must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards* […]. *For instance, a prior ban can have a chilling effect on the persons who intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. So too do measures taken by the authorities during a rally, such as dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally*[35].'

Thus, South African Justices have concluded that the right to freedom of peaceful assembly, as enshrined in art. 17 of the Constitution must be guaranteed with no interference for those who participate in peaceful and unarmed public assemblies.

The Court underlined how only if those convening and participating in a gathering had acted violently, they would have not enjoyed the constitutional protection[36]. Criminalizing the mere participation in, or the organization of a gathering cannot be considered as "a mere regulation"; on the contrary, it constitutes an attempt to limit a fundamental freedom.

After considering the contents and the scope of application of constitutional guarantees stemming from article 17 of the Constitution, the Court moved on the second argument made by the State, *i.e.* on whether Section 12 (1) limitations were admissible, given the (ideally) pursued aim, and considering art. 36 of the Constitution ("the limitation clause").

At first, the ZACC, recalling the recent past of South Africa, stressed out how '*a quarter of a century ago* [South Africa] *emerged from an era in which a substantial majority of the citizenry was denied their inalienable right to participate in the affairs of their country*[37].

Then, the Court has acknowledged that any "justification analysis" '*requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment*[38]. *This weighing-up must give way to a "global judgment on* [the] *proportionality" of the limitation* [39]'. Moreover, the Court reminded that it is up to the State to demonstrate that a limitation is reasonable, and there exists a real ground to justify a limitation of a fundamental freedom.

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or the protection of the rights and freedoms of others. Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant. See *Kivenmaa*, at para 9.2.

[34] *Kudrevičius v Lithuania*, Grand Chamber of the ECtHR, Application no. 37553/05.

[35] *Ibidem*, at 100.

[36] *Mlungwana,* at 55.

[37] *Mlungwana,* at 64.

[38] *Mlungwana,* at 57, quoting *S v Walters, In re: Ex parte Minister of Safety and Security* [2002] ZACC 6, at 27.

[39] *Mlungwana,* at 57, quoting *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5, at 32.

Respondents argued that the purpose of limitations were – ultimately – to ensure peaceful protests; thus, when asking for a prior notice, public authorities were merely focused on planning the deployment of police in order to avoid possible abuses. Consequently, according to respondents, not giving notice, or giving an inadequate notice, could have undermined public authorities' possibility to monitor gathering and avoid violence.

Moreover, it has been disputed that, given the scarcity of police's resources, to reduce risks related to uncontrolled protests, criminalization could have had a mitigating effect on possible violent protesters.

Nonetheless, the ZACC has not be persuaded by this reasoning. The Court has noted how '*a lack of resources or an increase in costs on its own cannot justify a limitation of a constitutional right. […] Respecting, promoting, and fulfilling human rights comes at a cost, and that cost is the price the Constitution mandates the State to bear*[40]'.

Moreover, conveners as well as peaceful protesters could not be held responsible for actions taken by other violent protesters.

As for the "proportionality" of the limiting legislative measure – *i.e.* when establishing whether less restrictive measure could have been adopted – the ZACC underlined how Section 12 (1) of the *RGA* was *'not "appropriately tailored" to facilitate peaceful protests and prevent disruptive assemblies.* […] [T]*he nature of the limitation is too severe and the nexus between the means adopted in section 12(1)(a) and any conceivable legitimate purpose is too tenuous to render section 12(1)(a) constitutional.*[41]' Again, the ZACC stressed out how official or "recognized" conveners were unproportionally considered responsible for possible abuses, even if their aims had been to carry out a peaceful protest. In other words, instead of punishing individual violent behaviors (of those participating in a gathering) the *RGA* punished organizers and participants merely on the basis they had convened or participated in a protest.

Thus, in the end, the ZACC upheld the decision taken by the High Court declaring Section 12 (1) of the *RGA* unconstitutional.

Afterward, the respondents require the ZACC either to consider only a "partial unconstitutionality" of the RGA – since only criminalizing unannounced peaceful gathering should have been considered unconstitutional, whereas violent gatherings could have prosecuted – or to suspend the declaration of invalidity in order to give the Parliament the time to reform the *RGA*.

[40] *Mlungwana,* at 76. In addition, the ZACC has recalled how in the case of *Tsebe*, Supreme Justice upheld that '*We as a nation have chosen to walk the path of the advancement of human rights* […] *This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid*.' See, *Minister of Home Affairs v Tsebe*, [2012] ZACC 16, at 67.

[41] *Mlungwana,* at 101.

The ZACC has not accepted both requests. First, the Court has reminded that violence should be prosecuted on a case-by-case situation, i.e. criminalizing personal behaviors, not the mere participation in, or the convening of, a gathering.

As for the suspension of validity of a declaration of unconstitutionality, the ZACC clarified that a suspension might be decided only if: '*(a) the declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship; (b) there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation; and (c) the right in question will not be undermined by suspending the declaration of invalidity*[42]'.

The Court considered that no lacuna would have resulted by its decision to uphold the declaration of invalidity. The ZACC also concluded that the right to assemble peacefully and unarmed is too important, and the violation of the right by Section 12(1) *letter a* of the *RGA* was too severe to be tolerated in a democratic country[43]. Besides, the Parliament could always intervene to amend the *RGA* and reform respecting art. 17 of the Constitution.

Concluding remarks

This decision has the merit of reintroducing into the greater debate on human rights, the importance of the right to peaceful assembly, which – as it has been underlined – must be guaranteed against States' attitude to limit demonstrations of dissent.

As a matter of fact, if on the one hand it might be acceptable to set up specific rules – such as the obligation to a prior notification – aimed at preventing possible negative outbreaks during public protests, on the other hand, using criminal law as a preventing measures does not comply with both the South Africa Constitution and international human rights treaties.

Undoubtedly, international standards have been heavily inspiring for the ZACC, and this shows how this legal system is deeply committed in developing a universal understanding of human rights[44].

[42] *Mlungwana,* at 105.

[43] *Ibidem*.

[44] See, A. RINELLA AND V. CARDINALE, *The Comparative Legal Tool-Kit of the Constitutional Court of South Africa*, in G. F. FERRARI (ed.), *Judicial Cosmopolitanism*, Brill Nijhoff, Boston, 2019, pp. 217 ss; D. BRAND AND W. FREEDMAN, *South Africa constitutional Law in Context*, Oxford U.P., 2015, A. LOLLINI, *The South Africa Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, in *Utrecht Law Review*, vol. 8, n. 2, pp. 55 ss.; A. LOLLINI, *Constitutionalism and Translational Justice in South* Africa, Berghaln Publ., 2011; H. EBRAHIM, *The soul of a nation: constitution making in South Africa*, Oxford U.P., 1998; R. ORRÙ, *La Costituzione di tutti. Il Sudafrica dalla segregazione razziale alla democrazia della "rainbow nation"*, Giapichelli, 1998;

Indeed, repeated references to the ICCPR, to the ECHR and the ECtHR' case law might prove there exists either a shared interpretation of this basic fundamental freedom, or at least, a shared understanding of illegitimate limitations of this fundamental right.

Another relevant point highlighted in this judgment – though secondary in the light of the main issue at stake, *i.e.* the protection of freedom of peaceful assembly – is the one concerning the possibility to suspend the declaration of invalidity.

The ZACC has identified three specific grounds according to which the Court could possibly suspend – for a limited amount of time – the declaration of invalidity in order to give the Parliament the possibility to amend the unconstitutional piece of legislation[45].

It could be argued that, by setting (only) these three specific reasons according to which the Court could be likely to suspend a declaration of invalidity, the Court has somehow limited itself for future possible developments.

This, in turn, seems quite unusual for a constitutional Court, at least if compared to other legal systems where Courts have also used the suspension of the declaration of unconstitutionality but without limiting themselves as the ZACC has.

Nevertheless, it might be argued that those grounds identified by the South African constitutional Court are the only reasonable ones.

In other words, if there is no risk of legal lacuna, nor it is possible to contend that there are multiple ways to address a given issue by the legislative power, nor a risk to seriously undermine the right in question, there would be no other reasons to suspend the validity of a declaration of unconstitutionality.

Thus, though unusual, and given the broadness in the scope of application of the three identified criteria, this clear-cut position taken by ZACC seems to be inspired both by the need to reinforce its own legitimacy within the South African legal system, and by the necessity to guarantee (by self-limiting itself) a correct division of State's powers.

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[45] As it has been broadly elaborated by the legal doctrine, the first aim of a suspending a declaration of invalidity is to preserve the spirt of the Constitution in terms of the division of powers. As Carolan undelines, '*It is well known that the traditionally bilateral and adjudicative character of judicial proceedings makes it difficult for the courts to formulate or enforce effective remedies in certain types of situation*', see E. Carolan, *The relationship between judicial remedies and the separation of powers: collaborative constitutionalism and the suspended declaration of invalidity*, in *Irish Jurist*, new series, Vol. 46 (2011), p. 185; See also, C. Mouland, *Remedying the Remedy: Bedford's Suspended Declaration of Invalidity*, in *Manitoba Law Journal*, vol 41, 2018, pp 281 ss.