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# The constitutional boundaries of freedom of expression in South Africa

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Nota a Economic Freedom Fighters and Another v. Minister of Justice and Correctional Services and Another [2020] ZACC 25, 27 November 2020

**Contextualizing the case**

Freedom of expression is a *core liberty* for all constitutional democratic systems. It ensures that ideas, opinions, and beliefs can be circulated and discussed among individuals with no governmental interference. This vital freedom means more than freely expressing opinions: it secures the possibility to seek, receive, and impart information. Indeed, these three features—*seeking*, *receiving*, *imparting*—should all be considered when freedom of expression is under analysis, particularly if we consider that when someone's freedom of expression is limited, someone else will be deprived of the chance of hearing that idea.[1]

Hence, while freedom of expression in its "*individual dimension*" means more than "the right to speak up", in its "*collective/social dimension*", it implies the sharing of ideas and information, using all the available tools and allowing the possibility to reach the widest audience possible.

* Nota valutata dalla direzione del Focus.

[1] This issue is now being heavily debated after President Trump's speech and the following riots in Capitol Hill on 6 January 2021. The 45th President of the United States, in his last attempt to overturn his defeat in the 2020 presidential elections, incited his supporters "[...]*to show strength and* [being] *strong.* […] *walk down to the Capitol* […] *to cheer on our brave senators and congressmen and women and we're probably not going to be cheering so much for some of them."* [...] (Speech given on 6 January 2021). Short after, social network platform (Facebook) decided to shut down the President's social accounts, *de facto* preventing him from further disseminating his ideas about the elections. This decision has sharply divided the legal scholarship among supporters and opponents of limitations. Indeed, if silencing Trump could be considered necessary to limit incitement to violence, it should be noted that limiting a fundamental freedom such as freedom of expression should not be a prerogative of a private company, i.e., a public authority should be in charge of acting in the delicate field of fundamental freedoms. For an overview on the issues related to the contemporary use of internet, *see*, G. ZICCARDI, *L'uso dei social network in politica tra alterazione degli equilibri democratici, disinformazione, propaganda e dittatura dell'algoritmo: alcune considerazioni informatico-giuridiche*, in *Ragion pratica*, n. 1, 2020; T. SHADMY, *The new social contract: Facebook's community and our rights*, in *Boston University Law Journal*, n. 37, 2019; G. RESTA, Governare, l'innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza, in Politica del diritto, n. 2, 2019; S. ZUBOFF, *Il capitalismo della sorveglianza. Il futuro dell'umanità nell'era dei nuovi poteri*, Luiss University Press, Roma, 2019; G. PITRUZZELLA, *La libertà di informazione nell'era di Internet*, in *Medialaws*, *Rivista di diritto dei media*, n. 1; 2018; G. AZZARITI, *Internet e costituzione*, in *Politica del diritto*, n. 3, 2011.

As underlined in the judgment examined in this contribution, freedom of expression is an "[…] *indispensable facilitator of a vigorous and necessary exchange of ideas and accountability*."[2] Given its importance, freedom of expression is protected not only by national democratic constitutions, but also by all international human rights declarations and conventions. Yet, both national and international provisions identify legitimate limitations of this essential liberty.[3] Restrictions usually refer to hate speech or incitement to commit violent acts, as well as defamation or other associated crimes. In other words, freedom of expression does not represent a limitless freedom enabling anyone to say anything.[4]

On the contrary, its boundaries are rooted in the necessity to protect the democratic system itself (e.g., to preserve national security sensible information) and to avoid harm against individuals (e.g., hate speech or incitement to violence). Therefore, it is a matter of balancing the enjoyment of freedom of expression with the necessity to preserve other compelling interests of the state.[5] However, there are many cases in

[2] South Africa Constitutional Court, case CCT 201/19, *Economic Freedom Fighters and Another v. Minister of Justice and Correctional Services and Another* [2020] ZACC 25, decided on 27/11/2020, para. 1.

[3] Indeed, while article 19 of the UDHR reads that "*everyone has the right to freedom of opinion and expression*", article 29 underlines that: "*in the exercise of* […] *rights and freedom*", [individuals are subject to the limitations necessary] "*for the purpose of securing due recognition and respect for the rights and freedom of others*". Article 18 and 19 of the 1966 ICCPR support freedom of speech, but Article 20 goes even further in limiting offensive expressions: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*". The ICERD calls for criminalization of any organization disseminating racial or religious propaganda and to consider making membership in such organizations a criminal offense. Trying to achieve a common position concerning the hate speech and freedom of expressions related issues, the Council of Europe on 30 October 1997 at the 607th meeting of the Minister's Deputies has adopted Recommendation no. R (97) 20 in which the Council has expressed a clear position on hateful expressions: "*the principles set out hereafter apply to hate speech, in particular hate speech disseminated through the media. For the purposes of the application of these principles, the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".

[4] Historically, the most durable argument for a free speech principle has been based on the importance of open discussion to discover the truth. Truth may be regarded an autonomous and fundamental good, or its value may be supported by utilitarian considerations concerning the progress and the development of society. Mill's truth argument put forward different possibilities, depending on whether the expression at issue is possibly true or almost certainly false. Prohibition of the former category of speech is, according to this theory, undesirable because it entails an unwarranted assumption of infallibility on the part of the state. See, I. M. TEN CATE, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defense*, in *Yale Journal of Law and Humanities*, Vol. 22, issue 1, 2013, pp. 35–81, p. 37.

[5] S. COLIVER, *Striking a Balance: Hate speech, Freedom of Expression and Non-discrimination*, University of Essex. Human Rights Centre, 1992, p. 20.

which legal scholars—as well as courts[6]—could disagree on the constitutionality of limitations on freedom of expression.[7]

Indeed, the legal doctrine is still divided. On one side, there are those who support the idea that "speech" is not just as all the other human activities, but it represents a special kind of conduct ("just mental") deserving special immunity against governmental interferences. Recalling Bracken theorization, the mind and the body should not be confused since there is a "*vast difference between them*",[8] and thus, speech is (just) the "*creative aspect of language use*"[9] and "prosecuting words" would be "*falsely and mischievously conflating ideological dissidence with overt acts*". [10]

On the other hand, this argument tends to disregard[11] how some expressions have the ability to infringe the common "*content neutrality principle*"[12] because they can actually produce effects that can potentially harm other individuals or create problems for the maintenance of public order.

The African Charter on Human and People Rights (ACHPR), unlike other regional human rights treaties—e.g., the European Convention on Human Rights (ECHR) or the American Convention on Human Rights (ACHR)—seems to conceive a much broader margin of discretion left on the State parties when imposing limitations on freedom of expression. According to art. 9 (2) of the ACHPR, "*Every individual shall have the right to express and disseminate his opinions within the law*", and therefore, it is the domestic law that eventually defines the borders of this freedom, thus—in theory—an evident margin of appreciation rests on national public authorities.[13]

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[6] The traditional Millian approach, developed in the second chapter of '*On Liberty*' was associated with the "*marketplace of ideas*" slogan, and it is best known through the words of Justice Holmes: "*Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition* [...] *But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution*" (250 U.S. 616, 630 (1919), Abrams v. United States, *Holmes, dissenting*). See, J. BLOCHER, *Institutions in the market place of ideas*, in *Duke Law Journal*, vol. 57, n. 4, 2008, pp. 821-889; S. INGBER, *The Marketplace of Ideas: A Legitimizing Myth*, in *Duke Law Journal*, 1984.

[7] W. SADURSKI, *Freedom of Speech and Its Limits*, Springer Netherlands, 1999, p. 1.

[8] Bracken argues that the philosophical foundation of the free speech principle lies in Cartesian philosophy, which rests on a mind/body dualism, the idea that the mind and the body are two very different substances. See H. M. BRACKEN, *Freedom of Speech: Words Are Not Deeds*, Westport, CN, 1994, p. 253.

[9] See N. CHOMSKY, *Language and Mind*, New York, 1968, p. 63.

[10] See E. BARENDT, *Free Speech in Australia*: *A Comparative Perspective*, Sydney Law Review, 1994, pp. 149–165.

**[11] See R. DELGADO, J. STEFANCIC, *Understanding Words That Wound*, Westview Press, New York, NY, 2004, p. 24**

[12] See S. SHRIFFIN, *Dissent Justice, and the Meaning of America*, Princeton University Press, NJ, 1999 and also R. DELGADO, *Toward A Legal Realist View of the First Amendment*, in Harvard Law Review, vol. 113, 2000, p. 778.

[13] Art. 10 (2) of the ECHR reads "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for*

Considering art. 9 of the ACHPR, the African Commission—in an interpretative effort aimed at defining the margin of states' discretion—states that "*though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties* […] *the phrase 'within the law' must be interpreted in reference to international norms which can provide grounds of limitation on freedom of expression*".[14]

The African Court on Human and Peoples' Rights (ACtHPR)[15] has also clarified its position concerning art. 9 (2) of the ACHPR. Indeed, in *Lohé Issa Konaté v. The Republic of Burkina Faso*,[16] the ACtHPR has confirmed that it is not sufficient that a limitation to freedom of expression is provided by the law; the limitation must pursue a legitimate aim. In addition, "*the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained*",[17] and restrictions should be deemed necessary in a democratic society.[18]

**The judgment**

*the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*." Art. 13 (2) of the ACHR reads "*The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals*". As it is evident, both regional conventions do describe in which circumstances it is possible to legitimately restrict this basic freedom, thus explicitly limiting the domestic margin of discretion.

[14] African Commission on Human and Peoples' Rights, *Kenneth Good v. The Republic of Botswana*, Communication No. 313/05, para 188, and African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Communication No. 54/91-61/91-98/93-164/97-196/97-210/98, para 102

[15] The Republic of South Africa has ratified the ACHPR, and it recognized the competence of the ACtHP, but it is yet to make the declaration—necessary according to art. 34 (6) of the Protocol to the the ACHPR—to allow individuals to directly submit a complaint. *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998.

[16] ACtHPR, *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. n. 004/2013, decided on December 5, 2014. In this case, the African Court had to verify whether the limitation imposed on freedom of expression was necessary in a democratic society. In particular, the Court noted how there was a disproportionate restriction on the right to freedom of expression concerning the possibility to have a public debate related to a public figure. See, B. KIOKO, *Perspective from the African Court on Human and Peoples' Rights*, in *Journal of Human Rights Practice*, vol. 12, n. 1, 20; M. J DUFFY, *Konate v. Burkina Faso: An Analysis of a Landmark Ruling on Criminal Defamation in Africa*, in *Journal of International Media & Entertainment Law*, vol. 6, n. 1, 2016; D. SHELTON, *Konaté v. Burkina Faso*, in *The American Journal of International Law*, vol. 109, n. 3, 201

[17] *Ibidem*, para 133.

[18] *Ibidem*, para 148. At this specific point, the ACtHPR recalled its homologous, the Inter-American Courts on Human Rights in *Tristant Donoso v. Panama*. In this case, the IACtHR has clarified how limiting freedom of expression is not *per se* contrary to international human rights law; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity of a state intervention (*Tristant Donoso v. Panama*, Series C, n. 193, decided on 27 January 2009, para 120).

The case under scrutiny concerns the attempt to prosecute Julius Malema, the president of a political party known as Economic Freedom Fighters (EFF), for having made a series of statements exhorting his supporters to unlawfully occupy "the land of South Africa",[19] strongly inciting his followers to act "*by whatever means necessary*".[20]

Malema was thus charged under Section 18(2) (b) of the *Riotous Assembly Act*[21]—for inciting individuals to committee a crime—and under Section 1(1) of the *Trespass Act*,[22] concerning the occupation of land in the names of others without lawful permission or lawful reason.[23]

Before the High Court, Malema and the EFF claimed that charges were *per se* unconstitutional in the light of Section 16 (1) of the South African Constitution,[24] which guarantees South Africans the right to free expression. Indeed, the High Court underlined how, while Section 16(1) protects this fundamental freedom, Section 16(2) does not cover incitement to commit a crime, and the limitation provided by the *Riotous Assembly Act* was—according to the Court—reasonable and acceptable in the light of Section 36 of the Constitution (*Limitation of rights*).[25]

Nevertheless, the Court found Section 18(2)(b) of the *Riotous Assembly Act* illegitimate *vis-à-vis* Section 36 of the Constitution on another ground: on the basis that the degree of liability for the "inciter" and person who actually committed the crime was the same.[26]

The EFF then decided to appeal to the Constitutional Court (ZACC), arguing that the definition of "*any offence*" in Section 18(2)(b) was too broad and disproportionate regarding the limitation of freedom of

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[19] On 16 December 2014, Malema stated "*I can't occupy all the pieces of land in South Africa alone. I cannot be everywhere. I am not* [the] *Holy Spirit. So you must be part of the occupation of land everywhere else in South Africa*"; on 26 June 2016 he supposedly said "*If you see a piece of land, don't apologise, and you like it, go and occupy that land. That land belongs to us*"; again, on 7 November 2016, after his court appearance related to his statement of 26 June 2016, he allegedly said "*Occupy the land, because [the State has] failed to give you the land. If it means going to prison for telling you to take the land, so be it. I am not scared of prison because of the land question. We will take our land, it doesn't matter how. It's becoming unavoidable, it's becoming inevitable – the land will be taken by whatever means necessary*". See, case CCT 201/19, para. 7-8-9.

[20] *Ibidem*, para. 9.

[21] Section 18(2) (b) reads "*Any person who* […] *incites, instigates, commands, or procures any other person to commit, any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable*". The *Riotous Assemblies Act 17*, 16 March 1956, text available online at: https://www.gov.za/documents/riotous-assemblies-act-22-may-2015-1350# (last retrieved on 20 March 2021).

[22] The*Trespass Act* 6, 20 March 1959, text available online at: https://www.gov.za/documents/trespass-act-20-mar-1963-0000 (last retrieved on 20 March 2021).

[23] ZACC, CCT 201/19, para. 10.

[24] Section 16 reads (1) "*Everyone has the right to freedom of expression, which includes: a) freedom of the press and other media; b) freedom to receive or impart information or ideas*; c) *freedom of artistic creativity*; *and* (d) *academic freedom and freedom of scientific research*; (2) *The right in subsection* (1) *does not extend to* (a) *propaganda for war*; (b) *incitement of imminent violence*; *or* (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*"

[25] South Africa High Court judgment, *Economic Freedom Fighters v Minister of Justice and Constitutional Development* 2019 (2) SACR 297 (GP)at para 60.

[26] *Ibidem*, at para 62.

expression and the (legitimate) purpose pursued by the legislator according to Section 36 (1)(d) of the Constitution.

A direct appeal to the ZACC represents an exception, given that, normally, the appeals for the High Court's decisions are brought before the Supreme Court of Appeal. However, the Constitutional Court accepted to hear the case, considering the necessity not to waste—by skipping further steps—the judicial system time,[27] and the importance of the issue at stake.[28]

While the Constitutional Court did not confirm the dictum of the High Court in relation to the finding that the same sanctioning regime for "instigators" and "perpetrators" in Section 18(2)(b) was unconstitutional,[29] the ZACC eventually found this piece of legislation unconstitutional on other grounds. The question of whether the definition "*any offence*" should be considered too broad—therefore unconstitutional—has divided justices within the Constitutional Court; on one side Chief Justice Mogoeng delivered the majority judgment, (joined by Khampepe, Madlanga, Mhlanta, Theron JJ and Mathopo and Victor AJ) finding Section 18(2)(b) in violation of Section 16 and 36 of the South African Constitution, while Judge Majiedt (joined by Jafta and Tshiqi) delivered their dissenting opinion.[30]

The Minister of Justice contended that *Riotous Assembly Act* was sufficiently clear and precise in the definition of when incitement amount to a crime, that only a real and actual intention to commit a crime was meant to be prosecuted by the contested Act. In this context, the government recalled the principles

[27] The ZACC argued that "*Delays in the finalisation of cases in virtually all our courts bear testimony to the scarcity of judicial resources. The aspects of this matter that should ordinarily be appealed to the Supreme Court of Appeal are intertwined with the confirmation application that must of necessity come directly to this Court* […] *The applicants have reasonable prospects of success in respect of the constitutionality challenge. And it is in the interests of justice that the applications for confirmation of the declaration of constitutional invalidity of the penal aspect of Section 18(2)(b) and for direct appeal relating to incitement and trespass be heard and disposed of together. They are essentially one application. All of the above, put together, constitute compelling reasons or exceptional circumstances that justify the grant of leave for direct appeal*". CCT 201/19, para. 24.

[28] As the ZACC noted in *Mazibuko*, "*For the existence of exceptional circumstances there must, in addition to other factors, be sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government, to justify such a procedure. An additional consideration is whether there are any issues, and evidence relating to those issues, that would be better isolated and clarified through the multi-stage judicial process.*" (*Mazibuko v Sisulu and Another,* CCT 115/12, [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC), decided on 27 August 2013. at para. 35.

[29] The Court held that the word liable "*does not connote inescapability, compulsion or absence of judicial discretion*", and noted that the case law related to this kind of crimes demonstrates that courts retain a wide margin of discretion in imposing different sentences on the "instigator" and "perpetrators" of crimes. ZACC, CCT 201/19, para. 27.

[30] The dissenting opinion will not be examined in this analysis. However, it is worth noticing that dissenting justice not only supported the legitimacy of Section 18(2)(b), but they also argued that that Section 16(2) of the Constitution does not refer to "*serious offence*", and that it does exclude "*incitement to imminent violence*" from the protection of the right to freedom of expression. In addition, when looking at the relation between the limitation and its purpose, the minority affirmed that there was a causal connection and that Section 18(2)(b) was proportionate. ZACC, CCT 201/19, para. 103 and para. 132.

of *de minimis non curat lex*, thus excluding that prosecutors would have used the *Riotous Assembly Act* to charge "any offence" in broad and generic terms. [31]

At first, the Constitutional court had highlighted the importance of securing freedom of expression, in particular considering the history of South Africa, a country in which this fundamental right has been violated during the "*highly intolerant and suppressive past*".[32] Then, the ZACC acknowledged that Section 16 does not protect an absolute freedom, prevailing over other freedoms or public interests. The majority within the Court then stressed how limitations can affect freedom of expression, but only in specific circumstances, as provided by Section 16(2) in conjunction with Section 36 (1) of the Constitution, *i.e.*, when national interest, dignity, physical integrity, or democracy is threatened, and when restrictions are reasonable and the least restrictive to achieve the pursued aim.

As usual, the South African Justices referred to international human rights[33] standards—namely, the ICCPR[34] and the ECHR[35]—to reinforce their reasoning, focusing specifically on the nature, the purpose, and the extent of the limitation to freedom of expression under the *Riotous Assembly Act*.

Recalling its previous decision in the case *Islamic Unity*,[36] the ZACC analyzed the structure of Section 16 of the Constitution and confirmed the reasonableness of restrictions for those activities and expressions that can bring a real and substantial threat to the democratic constitutional order itself.[37] Nevertheless, the Constitutional Court noted how the wording "*any offence*" was in violation of Section 36 Cost., which states that "*[t]he rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society* […] *taking into account all relevant factors including the nature of the right; the importance, purpose, nature and extent of the limitation; the relationship between the limitation and its purpose; and whether there are less restrictive means to achieve the limitation's purpose*". Accordingly, the ZACC refused to recognize that the *Riotous Assembly Act* was legitimate simply because it was aimed at crime prevention. On the contrary, the Court considered it essential for all criminal laws to have both

[31] ZACC, CCT 201/19, para. 53.
[32] *Ibidem*, para. 2.
[33] As Nicolini noted, legal transplantation characterizes African constitutionalism, so that human rights catalogues are framed similarly to those provided for by the European Convention of Human Rights. M. NICOLINI, *La governance dell'emergenza sanitaria in Africa Subsahariana: modelli "piramidali" e "frattalici" di conformazione dei diritti individuali*, in *DPCE online*, n. 2, 2020, pp. 4296.
[34] Art. 19 ICCPR, see *supra* note 3.
[35] The ZACC made a specific reference to the ECtHR in *Handyside* when the Strasbourg Court emphasized how freedom of expression is so essential for democracy that its guarantees should fully apply '*not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb* […] *Such are the demands of such pluralism, tolerance and broadmindedness without which there is no "democratic society".*' ECtHR, *Handyside v The United of Kingdom*, application n. 5493/72, decide on 7 December 1976, para. 49.
[36] Case CCT 36/01, *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 5 BCLR 433 (CC).
[37] *Ibidem*, para. 29.

a legitimate purpose and a specific, pressing, and substantial definition in order to justify a reasonable limitation to the right of freedom of expression.[38]

Indeed, even accepting the necessity to criminalize certain categories of incitement, the main issue concerning Section 18(2)(b) of the *Riotous Assembly Act* was found by the ZACC in its lack of distinction between serious and trivial offences. As stated by the Court, the impact of Section 18(2)(b) on freedom of expression was "*unquestionably overbroad and its inhibition is markedly disproportionate to its conceivable benefit to society*".[39] The Court further stressed that citizens should not rely on the assumption that they are likely to be exempt from criminal charges considering the *de minimis* principle or the necessity.[40] The Court also indicated that "*less restrictive means for proscribing constitutionally objectionable incitement is the exclusion from its range, of those offences that are minor but not necessarily* de minimis *in character*".[41]

The Constitutional Court has thus invalidated Section 18(2)(b) of the *Riotous Assembly Act*, but only to the extent it was disproportionate in its invasion of the guarantees of free expression enshrined in Section 16(1) of the Constitution. To ensure that Section 18(2)(b) does not violate the Constitution, the ZACC suggested the legislator to substitute "*any offence*" with "*any serious offence*".[42] Justices afforded the Parliament the opportunity to amend the existing legislation within 24 months.[43] In the meantime, courts are required to interpret Section 18(2)(b) of the *Riotous Assembly Act* considering only "*serious offence*".[44]

**Concluding observations**

The South African Constitutional Court has demonstrated once again its commitment to maintain the highest possible standards in the protection of fundamental freedoms recognized by the Constitution and by the international human rights law. The ZACC has reminded the legislator the necessity not to interfere with this democratic fundamental freedom. As South African Justices emphasized, some decades ago, in the country, expression was so extensively and severely circumscribed that a person could be arrested, banned, banished or even killed by the apartheid regime for labelling as unjust, what everyone now accepts is unjust. Inciting people to protest against apartheid—a crime against humanity—or to break its unjust laws, was not only criminalized but could also attract untold consequences.

The Court—as affirmed in *Islamic Unity*—has explained why free expression came to, and should continue to, enjoy a special place in the constitutional South African system: "[South Africa has emerged] *from a*

[38] ZACC, CCT 201/19, para. 49.
[39] *Ibidem*, para. 61.
[40] *Ibidem*, para. 56.
[41] *Ibidem*, para. 63.
[42] *Ibidem*, para. 69.
[43] *Ibidem*, para. 72.
[44] *Ibidem*, para. 70.

*severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments. The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa*".[45]

Indeed, freedom of expression it is of utmost importance for an open and democratic society. As the Human Rights Committee affirmed in its General Comment n. 34,[46] freedom of expression is an indispensable condition for the development of the person, and for any society.[47] It is a basic requirement to ensure the principles of transparency and accountability, which are, in turn, essential for the promotion and protection of human rights in general. Dissenting opinions, vigorous protests, minority and radical views, as long as they do not amount to an actual threat, should not be limited.

As the ZACC pointed out, punishing "incitement" can be considered legitimate only if this is related to a "*serious offence*", which means that in this context, limitation to freedom of expression must be a deterrence for dangerous crimes, *i.e.,* it is possible to criminalize only offenders who pose a serious societal threat, not a mere protester.

The South African Court preferred to adopt a delayed declaration of invalidity,[48] thus holding the unconstitutionality of Section 18(2)(b) of the *Riotous Assembly Act*; at the same time, it suspended the validity of this judgment leaving the parliament the possibility to intervene following the Court's suggestions.[49] The South Africa's Constitution—in Section 172(1)(b)—explicitly bestows constitutional judges the power to suspend the declaration of invalidity. Moving beyond a merely binary choice—between declaring a measure to be valid or invalid—this is a judicial technique that allows a temporary maintenance of unconstitutional laws while urging an immediate response from the legislator. Therefore, having regard to the principle of separation of powers, a claim concerning the violation of a constitutional rights is translated by the Supreme Court in an order to intervene for the legislative branch.[50]

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[45] ZACC, Case CCT 36/01, para. 27.

[46] Human Rights Committee, CCPR/C/GC/34 of 12 September 2011.

[47] See communication n. 1173/2003, *Benhadj v. Algeria*, Views of the Human Right Committee adopted on 20 July 2007.

[48] At this point, see C. MOULAND, *Remedying the Remedy: Bedford's Suspended Declaration of Invalidity*, in *Manitoba Law Journal*, vol. 41, n. 4, 2018, pp. 286 ss; A. NIBLETT, *Delaying declarations of constitutional invalidity*, in F. FAGAN & S. LEVMORE (eds.), *The Timing of Lawmaking*, Edward Elgar Publishing, 2017, pp. 299 ss.

[49] In *Mlungwana*, 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.* ZACC, CCT32/18, *Mlungwana and Others v S and Another,* decided on 19 November 2018, para. 105.

[50] See, K. ROACH, *Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity*, in *University of British Columbia Law Review*, vol. 35, n. 2, 2002, pp. 219 ss.

In other words, suspended declarations of invalidity are meant to accomplish the need to protect fundamental freedoms, while upholding the respect of the rule of law, engaging the parliament and the government.

A sort of "collaborative constitutionalism" able to contribute to the creation of legislative solutions which are compatible with the Constitution.[51] In this respect, the ZACC demonstrated its willingness to engage in a positive dialogic process with the legislature in the (re)definition of constitutional guarantees.

However, the South African Constitutional Court went beyond. In fact, it issued an "*interpretative"* delayed declaration of invalidity, thus further developing this judicial technique. Indeed, while giving the legislature 24 months from the publication of the judgment to intervene, the ZACC clearly indicated what it is needed to make the *Riotous Assembly Act* constitutional, that is, the use of "*serious offence*" instead of "*any offence*".

Hence, although a delayed declaration of invalidity should leave the legislature a margin of discretion, the use of an "*interpretative"* delayed declaration—indicating precisely what is needed—seems to drastically reduce its possible choices. In conclusion, the ZACC could have directly issued an interpretative judgement, indicating how to apply Section 18(2)(b) of the *Riotous Assembly Act* correctly.

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[51] 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, pp. 188 ss.