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Law Association of Zambia v. the Attorney General (Appeal No. 8/2014) [2016] ZMSC 243

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Law Association of Zambia v. the Attorney General
(Appeal No. 8/2014) [2016] ZMSC 243.
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The Facts
This appeal concerned the constitutionality of Sections 5 and 6 of the Public Order Act. The Law Association of Zambia had unsuccessfully argued in the High Court that these Sections violated Articles 20 and 21 of the Constitution of Zambia, which provide for the protection of freedom of expression and the protection of freedom of assembly and association. The appeal sought to overturn the decision of the High Court.

The Holding
The Supreme Court agreed with the High Court that the Public Order Act, as amended by Act No. 36 of 1996 is constitutional. The Court opined that the amendment had addressed the concerns expressed in the *Mulundika* judgment – namely, that the police cannot deny permits to people who apply to hold a public demonstration. The Court however found that Section 5 (6) of the Act fell short of the constitutional threshold, as it does not give the police an obligation to suggest a "reasonable alternative date in the very near future", and that the police had used this loophole to constructively deny people their right to protest.

Significance
In this commentary, we argue that this judgment does not effectively protect the rights of peaceful assembly and expression. First, it suffers from the same weaknesses as the *Mulundika* judgment, in that it does not fully appreciate the nature of the right of assembly and the freedom of expression. Secondly, it does not adequately capture all aspects of constructive denial of freedom of expression that are brought about by the 1996 amendment to the Public Order Act, specifically by Section 5(6), and its lack of guidelines for the police. This makes Section 5(6) fundamentally unconstitutional. The Court fails to realize that Section 5 (6) fundamentally operates as a limitation on the constitutional rights to peaceful assembly and expression.

Weakness of the Mulundika Judgment Replicated
The 1996 amendment to the Public Order Act did much to enhance the protection of the freedom of peaceful assembly and expression. The previous language in the Public Order Act empowered the police to control

who can talk at an assembly, the duration of the assembly, and the content that can be discussed at the assembly.[1] These requirements were replaced under the 1996 amendment with new ones: all that is required is a notification to the police of the date, duration and location of the assembly, whether it be a static one or a demonstration/protest that follows a path.[2] However, there remained an undertone that the rights of peaceful assembly must be policed – that they are subject to the police's ability to police them and that the police can deny or cancel a permit on the grounds that the police cannot police the assembly.[3] This detracts from the fundamental nature of the right.

The right of peaceful assembly is recognized as a fundamental right worldwide. Article 21 of the International Covenant on Civil and Political Rights (ICCPR) specifies that no restrictions may be placed on the right, except those that are "necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."[4]

Similarly, Article 11 of the African Charter on Human and People's Rights provides that:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.[5]

As we demonstrate, there is consensus worldwide that the right to peaceful assembly and expression are fundamental to political speech. This is why they are viewed as fundamental in a democratic society, where views that may only be held by a minority may not find expression in other fora, leading to the necessity of peaceful assembly and expression within the

1 Previous Section 5 (5) of the Public Order Act.
2 Section 5 (5) as amended.
3 This is the import of Section 5 (6) of the Public Order Act, which allows police to prohibit a public meeting because they are unable to police it.
4 Article 21, International Covenant on Civil and Political Rights.
5 African Charter on Human and People's Rights, 1979.

assembly. Legal restrictions or 'clawbacks'[6] are allowed in the interests of keeping the peace, protecting private property, or respecting the rights, and not merely the sensibilities, of other people.

It is immediately noticeable that Section 5 of the Public Order Act, as amended, does not meet this threshold set out by the ICCPR. The language of Section 5 does not limit the restrictions to the freedom of assembly to only those "necessary" for national security or public safety, public order, health or morality. It is even more telling that the right of assembly in Article 21 (2) of the Constitution conforms to the ICCPR:

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

Section 5 (6) of the Act simply states: "Where it is not possible for the Police to adequately police any particular public meeting," the police may inform the conveners of their inability and suggest an alternative date. What is conspicuously missing from this Act is a provision that ensures that any restrictions to the freedom of assembly satisfy the conditions set out in Article 21 of the Constitution. The inability to police a public meeting is not one such restriction, in and of itself. It should be shown that should the meeting go on without police presence, there is a probability, more than a mere possibility, that there would be a breach of the peace as a result. The test is not subjective, nor one entirely for the police. It must be based on objective criteria. This is the tenor of the United Kingdom's Public Order Act, which despite being similar to the Zambian Act in the requirement of notices to the police for public processions and assemblies, takes a more

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6 R. Goodrick, *The Right of Peaceful Protest in International Law and Australian Obligations under the International Covenant on Civil and Political Rights,* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiqjcSUrMbNAhWHKsAKHVIeC-cQFggcMAA&url=https%3A%2F%2Fwww.humanrights.gov.au%2Fsites%2Fdefault%2Ffiles%2FHRC_assembly_Goodrick.doc&usg=AFQjCNHysp6f_ekqmHyT_qAUNMEcwqLQ8g&sig2=9YmMhfi91FqIvpQZLkC4Kw&bvm=bv.125596728,d.ZGg

serious view of the power of the police to stop a procession. Consider section 12 which provides:

(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that –

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do, he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions.[7]

This provision is grounded in the understanding that the right to peaceful assembly is indeed a fundamental right; and one that does not need the midwifery of the police. The police are allowed to step in where the assembly is, for serious reasons, suspected of not being peaceful. The police cannot prohibit an assembly solely on the ground that no permit was issued for the assembly. The assumption of the automatic need for a permit for assembly in the Public Order Act is therefore unwarranted and unconstitutionally abrogates the right to peaceful assembly.

The mistake here is not just one for the legislature, though. The Supreme Court, both in the *Mulundika* case and in this case, has shown a somewhat short-sighted view of the fundamental nature of the right to peaceful assembly. In *Mulundika,* the provisions being subjected to constitutional scrutiny were egregious, and the Court was largely cognizant of this. However, it failed to recognize that the power to issue directions must be constrained by the conditions in the Constitution, namely, public peace, morality and the protection of the property and rights of other people. The Court proceeded on the assumption that police oversight into the exercise of this right was necessary.

7 Public Order Act (UK), 1986, S. 12.

Although not guided by concern for the administrative consequences, we readily accept and acknowledge that there are many regulatory features in the Public Order Act which are perfectly constitutional and very necessary for the sake of public peace and order. This is common cause. For instance, there are subsections authorizing the issuing of directions and conditions for the purpose of regulating the route of a procession; the date, place and time of an assembly or a procession; their duration and any other matter designed to preserve public peace and order.

However it appears that in the Court's mind, peaceful assembly cannot be peaceful without police presence. The Court rightly upheld the requirement to give notice to the police of a public meeting, but wrongly attributed it to the need for the police to exercise a "regulatory function" over assemblies, stating that: "In this regard, we hold the view that the requirement for notice is necessary, as this is the only way that the police can perform their regulatory function and maintain law and order in our society".[8] The flaw in the conception of the fundamental nature of the right is revealed; the Court does not place the evidentiary burden on the police to show that they *must* regulate a public assembly. Regulation is seen as a foregone conclusion, a necessity for the enjoyment of the fundamental right. This therefore explains why the power granted to the police to cancel a public meeting and suggest a date in the near future because they (the police) cannot "regulate" it adequately, without necessarily showing that the inability to regulate would result in a breach of the peace, has gone unchecked.

This question of whether the police should regulate at all in the interests of peace is seen in the EU case of *Éva Molnár v Hungary*.[9] In interpreting Article 21 of the Convention for the Protection of Human Rights and Freedoms, which is identical to Article 21 of the Zambian Constitution, the Court held that there was no assumption that the policing of a peaceful assembly was required by the Constitution. Thus, the breaking up of a spontaneous peaceful assembly, for which notice could not be given, would be an unnecessary abrogation of the right to peaceful assembly: the Court stated:

[8] *Law Society of Zambia v the Attorney General,* Appeal No. SCZ/8/333/2013.
[9] *Law Society of Zambia v the Attorney General,* Appeal No. SCZ/8/333/2013.

> [I]n special circumstances when an immediate response might be justified, for example in relation to a political event, in the form of a spontaneous demonstration, to disperse the ensuing demonstration solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, may amount to a disproportionate restriction on freedom of peaceful assembly...It is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.[10]

The failure of the Supreme Court to appreciate the fundamental nature of the right to peaceful assembly further blinds it to another flaw in Section 5 (5) (e) of the Public Order Act. This section outlines one of the conditions that the conveners of the public meeting have to meet, and which the police may rely upon to justify the cancellation of a planned public meeting. That section states that the "public meeting, procession or demonstration shall not create a risk to security or public safety, a breach of the peace or **disaffection amongst the inhabitants of that neighbourhood** [emphasis added]." The emphasized portion of the provision in effect gives the police the power to regulate the content of the opinions to be expressed at a public meeting. Had the Court appreciated the fundamental nature of the freedom of expression, it would have made it clear that such power is incompatible with the inalienable stature of a fundamental right. While a Constitution can limit the kinds of expression that are not protected – for example, libel and defamation[11] – no such restrictions can be given for unpopular views. The freedom to air unpopular views is the very essence of the freedom of speech and assembly. Two American cases illustrate this. In *Edwards v South Carolina*,[12] the US Supreme Court held that a State could not criminalize "the peaceful expression of unpopular views." In *National Socialist Party v Village of Skokie,*[13] the Supreme Court upheld an Illinois Supreme Court decision that would not ban the Nazi Party from organising a peaceful protest because of the content of their message. Closer to home, the Kenyan High Court, in a recent case, underscored the important part that the freedom of assembly plays in the ventilation of unpopular views:

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10 Application no. 10346/05, ECHR (7 January 2009).
11 Article 21 (3) (b), Constitution of Zambia.
12 372 US 229 (1963).
13 473 US 43 (1977).

> It may very well be that the opinion or view is an unpopular one with others but yet again, freedom of assembly merely provides an alternative form of participating in democracy to those who may be disenchanted and uninspired in one way or another. A minority may, for example, feel disappointed by their own failure to convince the majority. The alternative avenue for expressing their view would simply then be through demonstrations and picketing, even though the minority may still not have their way.[14]

As has been argued elsewhere:

> Often a demonstration has significant publicity advantages over more conventional media of expression since it can attract extensive news coverage and widespread public interest; and for persons unpopular or unknown to the general public, or without financial resources, a demonstration may be the only effective means to publicize a message or reach a desired audience.[15]

These views are in sharp contrast with the position in the Act and the position of the Zambian Supreme Court's judgment in that the "disaffection" of locals in the locale of a planned protest is not grounds enough for the abrogation of a right, no matter how odious the opinion that causes the disaffection. The thrust of the *Skokie* decision is that freedom of expression and assembly are cornerstones of democracy, as they ensure that minority, unpopular views are not drowned by the hum of the majority. The police have an obligation to protect people expressing unpopular views.

Unfettered Discretion of Police

Section 5 of the Public Order Act outlines numerous conditions for the holding of an assembly, for instance, the applicants have to wait for police authorization before they can proceed to hold an assembly. Section 5 gives the police the absolute power of determining whether or not an assembly, meeting or procession should take place. The Supreme Court rightly stated that the right to assembly cannot be denied. However, the Court fails to identify that the right can still be abrogated if the police are allowed to cancel a public assembly without proper guidelines. The Court seems to

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[14] *Hon. Ferdinand Ndung'u Waititu & 4 others v The Attorney General & 9 Others*, Petition No. 169 of 2016, as per Onguto J.

[15] 1967 HLR 1773.

think that it is clear from the Act that the reasons to be given for the cancellation of a peaceful assembly must comply with the Constitution. However, as already illustrated, the language of Section 5 of the Public Order Act expands the reasons for cancelling an assembly to beyond those given in the Constitution, namely, maintaining public peace and protecting the rights and properties of other people. In fact, the language of the Act does not even limit the reasons why the police can cancel a planned assembly – it only states that they can cancel an assembly out of an inability to police it. Apart from the foundational arguments already made, this scenario is clearly not envisaged by the Constitution – that an individual, whoever that might be, should be made the sole and unquestionable determinant of what is reasonably justifiable for the entire citizenry of Zambia. The Constitution does not in any way intend that the enjoyment of rights and freedoms enshrined by it in Articles 20, 21 and 28 be conditioned or contingent on the opinion of an official of the executive arm of government. A law which confers discretion on a public official, without indicating with sufficient precision the limits of that discretion, does not satisfy the quality of the 'law' contemplated in Article 21.

This same view obtains in the Ghanaian Supreme Court. It held in *New Patriotic Party vs. Attorney-General* that "restrictions as are provided by Article 21(4) of the 1992 Constitution may be necessary from time to time and upon proper occasion. But the right to assemble, protest or demonstrate cannot be denied."[16] The Ghana Supreme Court nullified section 12 (a) of the Public Order Decree[17] which gave police officers unfettered discretion to stop and cause to be dispensed with, any meetings or processions in any public place in contravention of Sections 7 and 8. It also nullified Section 13(a) which made it an offence to hold such processions, meetings and public celebrations without permission. Similarly, the Court of Appeal in Nigeria, in *Inspector-General of Police v. All Nigerian Peoples Party and Others*, after holding the permit system under the Nigerian Public Order Act unconstitutional stated: "constitutions should be interpreted in such a manner as to satisfy the yearnings of the Nigerian Society." The court observed:

> [The] Public Order Act should be promulgated to compliment section 39 and 40 of the Constitution in context and not to stifle or cripple it. A rally or placard-carrying demonstration has become a form of

[16] 1992-93 GBR 585-(2000) 2HBLRA, 1.
[17] Public Order Decree, 1972(NRCD)

> expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognized and deeply entrenched in the system of governance in civilized countries. It will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividend of their experience.[18]

In re *Munhumeso,*[19] the Zimbabwe Supreme Court held that powers placed in the hands of the police are arbitrary where (a) there is no criterion to be used to regulate the authority in the exercise of its discretion, (b) the regulating authority is not obliged to take into account whether the likelihood of a breach of peace could be averted by attaching conditions such as time, duration and route, and (c) it allows refusal of a permit even on the slightest possibility of breach of peace. This approach is supported by case law elsewhere in the world. In the US case of *Shuttleworth v. Birmingham,*[20] the City Commission had been granted power by legislation, to refuse permission for a procession on such vague criteria as "public welfare, safety, health, decency and public morals." The Court held that such power created an avenue for arbitrariness. It struck down the legislation. Similarly, in *Gregory v. Florida*[21], a statute which gave the police almost unlimited discretion to decide whether or not demonstrators had committed a "diversion tending to a breach of peace" was declared an unconstitutional interference with the freedom of assembly. In *Shuttleworth*[22], the Court stated that the test required for the restricting law is an objective one and should not depend on the subjective view or opinion of a police officer.

The lack of a precise standard which the police must abide by when considering whether to abridge the right to peaceful assembly is therefore particularly damning. It makes Section 5 (6) of the Public Order Act open to arbitrary enforcement, as the police are not required explicitly by the Act to justify that their "inability to police" a planned public meeting or demonstration will lead to a breach of peace, should the planned meeting go

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18 (2) 18 NWLR 457 C.A.
19 1994(1) ZLR 49(s).
20 (1969) 394 US 147.
21 (1969) 394 US 111.
22 Supra note 17.

on without police supervision. This is contrary to Article 21 of the Constitution, and is not justifiable in an open and democratic country.

The Supreme Court erred in finding that the only way Section 5 (6) of the Act offended the Constitution is by not providing a strict timeline for the police's postponement of a planned meeting. In doing so, the Court validated the untenable situation where the police, in conforming to the Act, do not have to prove that a lack of police supervision of an event would probably lead to a breach of the peace. In addition, the police are empowered to cancel a planned meeting because of the potential that the planned protests may offend the sensibilities of the local residents – which in essence empowers the police to license the content of the message of the protest. The gravest error, however, lies in the Court's misapprehension of the inalienable and fundamental nature of a fundamental human right. In the Court's view, the midwifery of the right to peaceful assembly by the police is a foregone conclusion.