

The right to freedom of
assembly,
demonstration, picket
and petition within the
parameters of South
African law

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1. Introduction

The right to freedom of peaceful assembly is among the most important human rights we possess. Simply put, this right protects peoples' ability to come together and work 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 pursuits, engage in religious observances, form and join trade unions, elect leaders to represent their interests and hold them accountable.

Today, the right to freedom of peaceful assembly is enshrined in international law as a fundamental freedom. People have struggled across time and space for the right to assembly and this demand is a universal feature of progressive and democratic politics around the world.

Since the demise of apartheid, South Africa has made impressive strides in securing a legal framework for the exercise of civil and political rights, including constitutional recognition of the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.² In the South African context, the right to protest lies at the heart of the political and legal contestation of the right to assembly. Accordingly, the focus of this paper will be more on the right to protest, and less on apolitical assembly activities, such as those for social, educational, religious and other purposes.

In spite of the fact that the right to protest is the bedrock of democratic society, increasingly the right is being compromised, even in countries that have long considered themselves democracies. South Africa is no exception. The country's high levels of poverty and inequality, combined with violence and creeping authoritarianism make the country's politics particularly volatile, which has placed these rights under pressure.

There is also growing evidence that the police are becoming increasingly violent, and that they and local

authorities are violating the right to protest more frequently. In the past decade, evidence has emerged of the intelligence services being politicised and abused to advantage political cliques. The reduction in transparency in the military, coupled with their increasing deployment in civilian life, suggest a creeping militarisation of society.

The second section of this paper sets out the international legal framework for the rights to engage in peaceful protest and political assembly. It explains the basis for the protections in international law, why the rights are foundational to democracy and outlines specific protected protest and assembly activities.

Section 3 sets out the domestic legal framework for the rights to freedom of assembly, demonstration, picket and petition. It explains step-by-step how the Regulation of Gatherings Act (RGA) works to give effect to these rights and summarises the only Constitutional Court case to date on the RGA.

Section 4 provides an overview of protest and examines the reasons for the upsurge in protest in South Africa. It attempts to quantify the scale of protests and asks why people are protesting; whether their protests are simply about frustration regarding the lack of services that they receive or whether there is something more fundamental about our democracy that they are protesting about.

Section 5 describes how the state censors protest in South Africa, through abuse of the law and the application of increasingly brutal means to suppress dissent.

The final section of this paper sketches recommendations for policy-makers and civil society actors engaged in the right to protest.

2. International Law

Because of their essential role in securing democracy and positive social change, the exercise of freedom of assembly rights through peaceful protests are provided broad protection in international human rights law.

International law recognises the right to freedom of peaceful assembly as the right to gather publicly or privately in order to collectively express, promote, pursue and defend common interests. This right includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose. States not only have an obligation to protect peaceful assemblies, but should also take measures to facilitate them. Everyone has the right to peaceful assembly. States may not limit this right for certain groups based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.³ However, the right to freedom of peaceful assembly is not absolute under international law. Assemblies may be subject to certain restrictions, but such measures must be prescribed by law and '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 Any restrictions must meet a strict test of necessity and proportionality. Freedom must be the rule and not the exception. Restrictions should never impair the essence of the right. International law only protects assemblies that are peaceful, and the peaceful intentions of those assembling should be presumed.⁵ The rights of those engaging in peaceful protest and political assembly are protected through an interconnected set of universally recognised human rights and fundamental freedoms. The freedom to protest is guaranteed by the twin pillars of freedom of assembly⁶ and freedom of expression.⁷ Peaceful protest and political assembly are also protected by the freedoms of opinion⁸ and of association,⁹ the rights to participate in the conduct of public affairs,¹⁰ to promote and protect human rights,¹¹ to liberty and security, and to be free from arbitrary detention¹² and torture or cruel, inhuman or degrading treatment or punishment.¹³

These core rights and freedoms are recognised in all the major international and regional human rights treaties,¹⁴ including the International Covenant on Civil and Political Rights (ICCPR), which South Africa has ratified.¹⁵ As a state party, the South African Government has binding international legal obligations to respect, protect, promote and fulfil these rights. In addition, international law requires South African courts to interpret domestic law in line with the ICCPR. Under South African law, courts are required to consider international law in the interpretation of the Bill of Rights.¹⁶ Furthermore, as recognised by the African Commission on Human and Peoples' Rights, South Africa, as an African Union (AU) member that has ratified the AU Charter, is bound to respect the rights protected under the African Charter of Human and Peoples Rights.

The jurisprudence and reports of officials and bodies tasked with interpreting and applying human rights law provide persuasive authority on the content and interpretation of protest and assembly rights under international law.¹⁷ These precedents include the work of international committees,¹⁸ intergovernmental organisations,¹⁹ regional human rights courts and commissions,²⁰ experts appointed by international and regional intergovernmental organisations,²¹ and domestic courts applying international law.²²

3. South African Law

3.1 Regulation of Gatherings Act

Apartheid South Africa employed a wide range of laws to suppress the right to protest.²³ With the advent of democracy pending, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ('Goldstone Commission') drafted the Regulation of Gatherings Act (RGA), which departed significantly from the repressive practices of the past. The Commission argued that rather than seeing gatherings as threats to national security, the State should recognise them as essential forms of democratic expression. The State should also have a positive obligation to facilitate gatherings. Municipalities would play this facilitative role, ensuring that negotiations took place between them-

selves, South African Police Services (SAPS)²⁴ and the convenors of the gathering. The Commission also argued for a radically different approach towards policing of gatherings, which were to be handled with tolerance and sympathy so as not to provoke a confrontation that may result in violence. Furthermore, gatherings were meant largely to be self-policing, with protestors being responsible for controlling participants through measures such as the delegation of marshals.

The political transformation that followed resulted in the adoption of the Interim Constitution – and eventually the Final Constitution – that guaranteed the right to freedom of assembly: ‘Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’²⁵

Immediately after enacting the Interim Constitution, Parliament passed the Regulation of Gatherings Act of 1993²⁶ that transformed the law on assembly in South Africa.

The RGA ostensibly protects ‘demonstration as of right’, meaning that the ability to hold a public gathering, assembly or demonstration is not necessarily contingent upon approval by the State. The Act accordingly removes the requirement of permits before holding gatherings and assemblies.²⁷

A ‘demonstration’ consists of fifteen people or fewer by definition and requires no notification at all.²⁸ A ‘gathering’ by definition consists of more than fifteen people.²⁹ Gatherings, however, are subject to more onerous conditions. Unlike a demonstration, the notice of gathering must be given seven days in advance.³⁰ If less than seven days’ notice is given, reasons must be provided for the late notice.³¹ If less than 48 hours’ notice is given, the authorities have the right to prohibit the gathering.³²

An organisation intending to hold a gathering must appoint a ‘convener’, who is responsible for arranging the gathering and liaising with the State actors.³³ Notice of the intended gathering must be given to a ‘responsible officer’, who is delegated by the local authority to oversee arrangements for the gathering.³⁴ After notice is given, the responsible officer must consult with an ‘authorised member’ of the SAPS³⁵ regarding the necessity for nego-

tiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.³⁶

If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been agreed upon by him and the convener, he notifies the convener accordingly.³⁷

If a convener has been so notified or has not, within 24 hours after giving notice of the gathering, been called to a meeting, the gathering may take place in accordance with the contents of the notice.³⁸

If such negotiations are necessary, the responsible officer calls the convener and authorised member to a meeting.³⁹ The responsible officer is required to ensure that such discussions take place in good faith.⁴⁰

The RGA acknowledges that gatherings will, inevitably, disrupt traffic and contemplates an agreement between the responsible officer, the convener and the police that will ensure that ‘vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded’.⁴¹

However, if credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the police and the traffic officers in question will not be able to contain this threat, the police are required to meet again in order to consider the prohibition of the gathering.⁴²

If, after this meeting the responsible officer is on reasonable grounds convinced that no amendment of the notice and no condition attached to the gathering would prevent the occurrence of any of the circumstances referred to above, he may prohibit the proposed gathering.⁴³ He is required to notify the convener of the prohibition and provide reasons for the prohibition.⁴⁴ Any decision reached during the negotiations or conditions imposed on a proposed gathering, including the prohibition of a gathering, may be challenged in a Magistrate’s Court or High Court.⁴⁵

Special permission is required to hold a gathering outside courts, Parliament and the Union Buildings.⁴⁶

If a gathering turns violent, or if there is serious risk of injury to persons or property, police may disperse the gathering within a reasonable time. In all cases police must use ‘reasonable force’ to disperse the demonstrators.⁴⁷

A material contravention of the Act is an offence carrying a maximum penalty of R20 000 and/or imprisonment for a period not exceeding one year.⁴⁸ If the gathering was spontaneous, rather than premeditated, this can be used as a defence against a charge of holding an illegal gathering, as the Act contemplates situations where people gather spontaneously in reaction to unforeseen events.⁴⁹

The RGA imposes joint and several civil liability on each member of the gathering for any damage caused by a gathering they have participated in.⁵⁰ This provision is aimed at deterring those enjoying the right to assembly from infringing proprietary rights of other individuals and, where they do, to make appropriate amends. This section was upheld in the *Garvas* case discussed below.

Finally, the Act addresses the issue of the use of deadly force by the police to disperse demonstrations. While the RGA permits the use of firearms and other weapons for crowd control and permits the use of force where there are apparently ‘manifest intentions’ to kill or to seriously injure persons, or to destroy or seriously damage property, the RGA provides that such use of firearms or force must be necessary, moderate and proportionate to the circumstances.⁵¹

3.2 The *Garvas* case

The sole judgment of the Constitutional Court dealing squarely with assembly to date is in the case of *SATAWU and Others v Garvas and Others*.⁵² The case clarified the legal position relating to liability for damage at a gathering. The judgment dealt with a protest march organised by the South African Transport and Allied Workers Union (SATAWU), which turned violent, causing extensive damage to vehicles and shops in the Cape Town city centre. The court ruled that members of the public who suffer damages from protestors have the right to recoup their losses from whoever hosted the protest – whether the damages were caused by members of the organisation or not. There is no onus on the person suing the

organisation to prove that the damages were caused by members of the protesting organisation – the mere fact that the damage happened during the march is enough in the way of proof for anyone to be able to claim damages from the organisers.⁵³ The facts of the case are described in the judgment as follows: SATAWU organised a protest march as part of a national strike. The march constituted a gathering as defined in the RGA. The march descended into chaos, resulting in extensive damage to vehicles and shops along the route. Small business owners along the route of the march who had suffered the brunt of the damage claimed that they sustained loss as a result of the riot and claimed damages from SATAWU in terms of section 11 of the Act in the High Court. SATAWU challenged the constitutionality of section 11(2)(b) of the Act on the basis that it was inconsistent with the constitutional right to assemble, demonstrate and picket.

The Constitutional Court rejected the argument presented by SATAWU and COSATU to the effect that section 11(2) of the Act was irrational because any reasonable organiser who took reasonable steps to guard against an act or omission materialising could never prove that it was not reasonably foreseeable and would automatically be found liable in terms of this section. The Court found that section 11(2) requires the organiser to determine whether an act or omission causing harm or damage is reasonably foreseeable and to ensure that reasonable steps are continuously taken to ensure that the act or omission that could become reasonably foreseeable is prevented. If the steps taken at the time of planning the gathering are indeed reasonable to prevent what was foreseeable, the taking of these preventive steps would render that act or omission that subsequently caused riot damage reasonably unforeseeable. On this basis section 11(2) was not irrational.

The Constitutional Court was careful to re-emphasise in its judgment that the constitutional right to assemble and demonstrate is constitutionally protected and guaranteed so long as it is exercised peacefully. In the event that an organisation reasonably foresees the possibility of damage or mayhem resulting from the gathering, it has a choice to proceed with the gathering or cancel it. Accordingly, the decision to assemble resides with the organisation and hence it should be responsible for any

reasonably foreseeable damage arising from such assembly.

The Court pointed out that the effect of section 11 was to enable victims of riot damage to look no further than the organisers for compensation without having to prove negligence. SATAWU and COSATU's argument that this was an unjustifiable limitation on the right to assemble and demonstrate as it placed the onus on organisers to prove the statutory defence set out in the section, was rejected on the basis that it would otherwise be very difficult for innocent victims of riot damage to succeed with their claims for compensation.

The Constitutional Court concluded that the purpose of section 11(2) was to protect the safety and property of the public from the reasonably foreseeable possibility of riots arising from a gathering and the balance between the limitation of section 11(2) on the right to assemble and demonstrate and its purpose, was established. SATAWU and COSATU's appeal to the Constitutional Court was accordingly dismissed.

The judgment means that in future the organisers of protest marches will not always be able to wash their hands of the violence and destruction flowing from a march. When a march turns violent, the organisers can be sued for the damage that ensues and unless they can show that they did not reasonably foresee that damage would ensue or that they foresaw it but took all reasonable steps to prevent it, they would be held liable for any damage caused. Only time will tell whether this will alter the behaviour of organisations holding large gatherings.⁵⁴

4. An Overview of Protest in South Africa

A literature review of the right to protest in South Africa reveals, on the one hand, a surprising paucity of analysis of the RGA and its application, and even less on violations of the right to protest. On the other hand there are confusing accounts of the numbers of protests in South Africa and even more so the numbers of violent protests and banned protests.

There are two research barometers tracking protests in South Africa. Both rely on media reports to develop

their barometers, which also track the number of protests that have turned violent.

The Service Delivery Protest Barometer was established in 2007 by the Local Government Project, Community Law Centre, University of the Western Cape.⁵⁵ The Service Delivery Protest Barometer presents trends in service delivery protests in South Africa. The Barometer focuses on trends in four areas, namely overall frequency, geographical spread, violence and nature of grievance. The project is based on statistical data of protest incidents collected from media reports and aims to provide an accurate, verifiable and objective understanding of protest activity in South Africa. The findings should be considered with an awareness of the methodological limitations of the research, most notably a reliance on outside media sources instead of original data collection. Municipal IQ is a web-based data and intelligence service specialising in the monitoring and assessment of South Africa's municipalities.⁵⁶ Municipal IQ's Hotspots Monitor monitors the occurrence of 'major service delivery protests' across South Africa.⁵⁷ Both the Service Delivery Protest Barometer and the Municipal IQ Hotspots Monitor suffer from inherent deficiencies, most notably a reliance on outside media sources instead of original data collection. They also fail to account for the myriad other protests that are either (or both) peaceful or unreported. This, significantly, contributes to an over-counting of 'violent' protests and an undercounting of peaceful protests, leading inevitably to skewed analysis.

The Municipal IQ Hotspots Monitor recorded an average of 105 'major service delivery protests' per year from 2009 to 2012.⁵⁸ The Service Delivery Protest Barometer of the University of the Western Cape and the Multi-level Government Initiative recorded some 180 protests over the same period.⁵⁹

Hirsh Jain and Jelani Karamoko from Harvard Law School extracted data from media reports of community protests contained in the South African Local Government Briefings Report⁶⁰ and the SA Media News Database.⁶¹ Jain and Karamoko found that South Africa experienced an average of 104 community protests in 2010, 213 protests in 2009, and 118 protests per year in 2007 and 2008.⁶²

Data supplied by the Minister of Police in response to parliamentary questions appears to reveal an entirely different picture of the numbers of protests in South Africa.⁶³ According to the Minister's 2010 statement, the average number of gatherings defined as 'crowd management incidents' was 8000 in 2004/5, rising to 11 003 in 2011/12. The University of Johannesburg's Professor Peter Alexander, who holds the NRF/DST Research Chair in Social Change, proclaims the statistics to be proof that South Africa is in the midst of a 'rebellion of the poor'. Alexander acknowledges that 'crowd management incidents' as defined by the Minister may be sporting activities, for example, but holds that 'the majority are related to protests of some kind'. Boring deeper into the statistics, during 2007/08 to 2009/10 'the most common reason for conducting crowd management (peaceful) gatherings was labour-related demands for increases in salary/wages'. For the same period, the most common reason for 'crowd management (unrest) was related to service delivery issues'.⁶⁴

A professor of journalism, Jane Duncan, at the University of Johannesburg, has attempted to make sense of these puzzling discrepancies in the numbers of protests recorded annually. Duncan notes that the data supplied by the Minister of Police includes both (political) protests and (non-political) gatherings, but some commentators have been too quick to assume that it refers to protests only, which leads to the number of protests being overstated. There is no empirical basis to assert this because no common measure exists across countries. In a veiled critique of Alexander's 'rebellion of the poor' conclusions, Duncan asserts that many on the political left would like to read a pre-revolutionary environment into the protests, which increases the temptation to talk them up. She notes, too, that the security cluster has a vested interest in talking up the protests to justify more resources and greater repression. Indeed, recent reports that SAPS plans to double its Public Order Police numbers and upgrade and expand their existing physical resources appears to give credence to Duncan's warnings.⁶⁵ There is much debate in the media and academic commentary about the underlying causes of protests in South Africa. There is, however, a paucity of in-depth research on the causes of contemporary community

protests in South Africa, particularly attempts to link this phenomenon to the crisis of local government. The research that does exist indicates that service delivery issues are at the heart of many protests, but other factors are also at play, such as unemployment and lack of information.⁶⁶ There are other protests relating to laws and policies that are considered undemocratic such as the Protection of State Information Act and e-tolls in Johannesburg instituted by the South Africa National Road Agency (SANRAL).

A clear reason for many protests is dissatisfaction with the delivery of basic municipal services such as running water, electricity and toilets, especially in informal settlements. Unemployment, high levels of poverty, poor infrastructure, and the lack of houses add to the growing dissatisfaction in these and other poor communities.⁶⁷

Bhayiza Miya, a Thembelihle community leader, says that what they experience under an unresponsive and uncaring government leaves them no option but to face such targeted arrests:

'The conditions that we find ourselves living under, the toilets, the smell ... during summer it is unbearable,' Miya says. 'I don't know if this government wants us to fold our arms and wait for them to deliver.'⁶⁸

Other reasons for protests include allegations of corruption and nepotism within local government structures. Some protesters blame poor service delivery on the deployment of ANC cadres to positions for which they are not qualified.

Many problems can be traced back to post-apartheid government policies that can be described as 'neoliberal'. Privatisation of local services and inadequate investment in public goods has produced a shortage of skills necessary to administer local government and maintain municipal services, and ultimately neoliberalism has sustained massive inequality.⁶⁹ While in practice, local councillors are often at the receiving end of problems that began elsewhere, people are unhappy with local government representation, with the way their public representatives are putting forward their case, from ward councillors, mayors, provincial officials right through to the president. This is a 'democracy deficit', in the sense that voting every five years and electing someone to speak on their behalf is not resulting in a substantial

improvement of the economic wellbeing of many people.⁷⁰

Another cause of protests is the poor communication between local government representatives and communities, essentially the task of ward councillors and local officials. A lack of access to information regarding the delivery of housing and basic services often leads to the rapid spread of rumours of favouritism, corruption, and mismanagement, which is not always true. Added to this, the need for services in informal settlements is not only greater than formal areas but indeed in most cases absolutely desperate.⁷¹

5. Repression of Protest by the Criminal Justice System

In practice the RGA has been manipulated in various ways to censor protests. The fact that many protests have taken place against the very municipalities that have the task of administering the Act has raised questions of conflicts of interest. Municipalities repeatedly conflate notification with permission seeking, treating the application process as a permission-seeking exercise. This has led to the police breaking up gatherings if the convenor cannot produce a permit proving that the march 'has permission' to proceed. Protesters must overcome a range of obstacles to enjoying their right to protest, most of which are plainly set up by intransigent officials and bear no resemblance to the actual legal requirements.

However even if protesters manage to navigate their way through the RGA processes, both the conduct of the police during protests and the criminal justice system after the arrest of protesters also act as powerful tools for the repression of protest.

5.1 Abuse of the RGA

Professor Duncan has published media summaries of research she conducted with Andrea Royeppen into the abuse of the right to protest in South Africa during 2011 to 2012, focusing in particular on the Rustenburg Municipality.⁷² The statistics used in the research were sourced from the Rustenburg Municipality's own records as well as the SAPS's Incident Registration Information System

(IRIS). In Rustenburg, the overall number of gatherings increased from 162 in 2011 to 226 in 2012. Roughly 19 per cent of both these figures were classified as protests, forming the minority of applied-for gatherings over the time period.

In 2011, only 32 per cent of protests were approved⁷³ while another 39% fell into the murky category of not being specified as approved or not. In 2012, the number of approved protests remained steady at 33 per cent while those not approved spiked dramatically from 29 per cent to 53 per cent. The unspecified protests shrunk to only 14 per cent. Duncan attributes this massive change in percentages to the municipality becoming 'more categorical in their decisions... [and] more prone to prohibiting protests'. The unspecified protests may very well be indicative of the common complaint among activists that municipalities often notify protesters of a prohibition verbally so as not to leave a paper trail, says Duncan. This means that the number of prohibitions could well include the entire 'not-specified' figure.

Whether or not this is true, the prohibited figures in Rustenburg far outstrip the 'unrest-related' incidents in the IRIS database for the same period. IRIS records all violent and peaceful marches in the country. 'Unrest-related' incidents make up around 10 per cent of the annual national total number of gatherings. These incidents are ones that the SAPS noted as becoming violent and the ones that the media tend to focus on.

Duncan blames the municipality for these radically-skewed figures, saying that they have illegally set the bar for lawful gatherings far too high.

What is clear from the research of Duncan and others is that local authorities tasked with regulating gatherings have conspired to abuse the RGA in several ways.

Permission-seeking

The RGA requires a convenor to complete the simple administrative task of filling out a notification form in order to render a gathering legal.⁷⁴ In the absence of a response from the responsible officer, the gathering is automatically legal. This default position is often subverted by the erroneous belief that, in the absence of a written permit from the authorities, the gathering is illegal. The notification process in the RGA is thus perverted

into a permission-seeking exercise, making the legality of a gathering subject to the whim of a responsible officer and making nonsense of the constitutional promise of ‘assembly as of right’. This misconception has the practical effect of frustrating many a convener who waits in vain for a superfluous ‘permit to march’. This has also led to the police breaking up gatherings if the convener cannot produce a permit proving that the march has ‘permission’ to proceed.

Section four meetings

If, within 24 hours of notification, a convener is not called to a meeting in terms of section 4 of the RGA (colloquially known as a ‘section four meeting’), the gathering may take place as planned.⁷⁵ The purpose of this provision is clearly to ensure that there is enough time between notification and the gathering itself for the parties to come to terms on the arrangements for the gathering. The legislature may well also have foreshadowed the prospect of last-minute negotiations on gatherings. Unfortunately, responsible officers often flout this ‘24-hour rule’. Section four meetings are seldom called within 24 hours of notification. When a section four meeting is called on the eve of a gathering and that gathering is prohibited, this effectively deprives a convener of recourse, because it may be too late or practically impossible to approach a court on such short notice to overturn the prohibition and obtain permission to gather.

The RGA requires that a responsible officer consults with the authorised member regarding the necessity for negotiations with the convener on any aspect of the gathering.⁷⁶ Should such negotiations be necessary, a meeting with the convener is called – the section four meeting – to discuss amendments to or conditions on a proposed gathering.⁷⁷ The responsible officer is required to ensure that the section four meeting takes place in good faith.⁷⁸ However, in practice section four negotiations often do not take place in good faith and in a spirit of negotiation. Municipalities and the police have been known to impose conditions that may compromise the purpose of the protest and alter its message, thereby reducing the meaningfulness of the protest.

Municipalities also have been known to invite individuals into the section four meeting who have a vested

interest in the protest, such as councillors, who in turn have been known to influence decisions about whether to allow gatherings or not, especially if the gatherings are protests against their own performance.

In the event of a responsible officer receiving warning that a gathering may be dangerous, the responsible officer is required to convene a second, ‘section five meeting’ with the convener and authorised member to consider the prohibition of a gathering. Accordingly the RGA requires the responsible officer to consult and negotiate with the convener at two separate meetings before considering prohibition. However, many gatherings have been prohibited without any meeting at all. Besides violating the RGA, this attitude betrays the bad faith of the responsible officer who fails to consider alternative options short of outright prohibition.

Checklists and fees

Some municipalities unlawfully levy fees on protesters as a prerequisite for obtaining ‘permission’ to protest. For example, the Emfuleni Local Municipality charges protestors R165.00 per traffic officer per hour or part thereof as a condition for allowing a gathering. The Johannesburg Metropolitan Police Department (JMPD) charges a fee of R129.34 as a ‘planning cost’.⁷⁹ Such practices are discriminatory and unconstitutional as they make the exercise of a right subject to financial means.

Even more prevalent appears to be the use of a checklist of documentation to be supplied by the convener before permission is granted for a protest. For example, the JMPD hands a pro forma letter to every convener requiring that the following be obtained prior to ‘permission’ for a protest being granted: 1) confirmation letter from the recipient, 2) permission letter from the ward councillor, 3) permission letter for the place of gathering, 4) copies of identity documents for the conveners, 5) copies of the proof of residential/work addresses for conveners, 6) names of the marshals. Of the items on this checklist, the RGA only requires the names of the marshals ‘where possible’.⁸⁰ There is no requirement to supply any other information or documents from the convener. Moreover, imposing a requirement to collect elusive ‘permission letters’ would appear to defeat the

very constitutional mandate of ‘assembly as of right’ that the RGA seeks to implement.

Grounds of prohibition

A responsible officer may only prohibit a gathering in limited circumstances, namely where a proposed gathering will result in a serious disruption of traffic, injury to people or damage to property.⁸¹ However, municipalities have prohibited gatherings on grounds that are not recognised by the RGA, such as requiring that grievances are first formally presented to government before resorting to protest.⁸²

Other gatherings have been prohibited on the grounds that there is no one to accept the memorandum.⁸³ This makes the right to protest subject to the veto of the target of the protestors’ ire, who can then frustrate the gathering by simply not making themselves available to accept the memorandum.

Another popular reason for prohibiting gatherings is that other gatherings are taking place on the same day, and the police do not have the resources to police more than one gathering. This reason has been manipulated in the past to allow gatherings that are more politically palatable to the ruling party, while disallowing gatherings that are more critical.⁸⁴

Only where an affidavit with credible information on uncontrollable threats to safety of person and property is brought to the attention of a responsible officer, may a gathering be prohibited. Such an affidavit is necessarily subjective, based on dangers that the deponent – typically a police officer – foresees. Nevertheless the RGA provides no option for a convener to challenge, or even receive, these affidavits, much less provide alternative affidavits, before the responsible officer makes a decision. The absence of a competing narrative makes this an inherently one-sided process, capable of manipulation by municipalities and the police. The fact that many protests have taken place against the very municipalities that have the task of administering the RGA has raised questions of conflicts of interest.⁸⁵

Blanket bans

The Act does not contemplate a situation where blanket bans of protests can be instituted, except under a state of

emergency when the right to assembly can be suspended. Nevertheless there have been several cases where municipalities have instituted a ban on all gatherings in a particular place for a particular period of time.⁸⁶

5.2 Abuse of the Criminal Justice System

Even if protesters manage to navigate their way through the RGA processes, the criminal justice system often conspires to make their lives difficult during and after the protest. Many protesters are subject to abuse by the police in the form of assaults and/or gratuitous arrest, typically on charges of alleged public violence or damage to property.⁸⁷ This, in turn, results in many protesters spending lengthy periods in prison awaiting trial. In most instances, there is simply no case to answer and the case is withdrawn for lack of evidence.

Even in cases where protestors are awarded bail, bail conditions often restrict basic political rights by requiring protestors to withdraw from political activities or move out of an area pending the conclusion of their criminal proceedings. The issue of affordability of bail is also a concern to poor protestors, who are often unable to afford the bail requested.⁸⁸ For women-headed households in particular, this has harsh consequences for children of incarcerated women, left at home with no caregiver.

It seems no coincidence that community leaders and conveners of protests who are labelled ‘troublemakers’ by police appear to be targeted for arrest and detention disproportionately.

According to Bhayiza Miya, a Thembelihle community leader arrested in 2011:

‘When protests turn violent the police just shoot and arrest randomly. Sometimes, like in my case, they come for community leaders. Other times they just snatch anyone who they can get their hands on. It is just done to intimidate and silence people.’⁸⁹

The unavoidable conclusion to be drawn is that the police conspire with prosecutors to criminalise legitimate protest action and silence dissent.⁹⁰ By criminalising popular dissent in this way, the State is capable

of silencing arguably the most effective tool at the disposal of marginalised and ignored communities.⁹¹ Formal mechanisms of participation have often failed these communities and consequently protest is usually the last resort to highlight their grievances to those in power.⁹²

5.3 Increased police brutality

In recent years the police have been criticised for their increased brutality, heavy-handedness and use of wholly inappropriate lethal force, particularly in the context of protests.⁹³ The systemic and widespread nature of this problem has been highlighted by various prominent instances of police brutality in recent years.

In August 2012, the police shot and killed 34 striking mineworkers in Marikana, which was the single most lethal use of force by South African security forces against civilians since the Sharpeville massacre during the apartheid era. Since 2000, almost 50 people have been killed during protests.⁹⁴ The high profile case of the brutal beating and killing of community activist Andries Tatane in April 2011, during a protest for access to water in Ficksburg, Free State, has also become emblematic of the often brutal force used by the police to suppress the expression of popular dissent.⁹⁵

Cases of police brutality in South Africa leapt from 416 during 2001–2002 to 1722 by 2011–2012.⁹⁶ Closely tracking the upward curve of cases of brutality is the almost complete absence of police accountability. While there was a net increase of 313 per cent in cases in a decade, only one in 100 cases against police officers results in a conviction. There are no prosecutions on the horizon for the perpetrators of the Marikana massacre, while in the Tatane case all six accused were found not guilty on the basis that the identities of the officers could not be confirmed.⁹⁷ There is, however, no absence of clear and unequivocal policy on the use of force in the RGA and the Public Order Policing (POP) Policy, which both provide that the use of force should be reasonable and proportional to the threat encountered. In terms of the RGA the police are required to call on protesters to disperse, failing which force may be used, excluding the use of weapons likely to cause serious bodily injury or death. The degree of force which may be used cannot be greater than is necessary for dispersing the persons gath-

ered and must be 'proportionate to the circumstances of the case and the object to be attained',⁹⁸ namely the peaceful dispersal of protesters. Both the Act and the Policy make it clear that lethal force and the use of live ammunition may only be used where life or property are threatened and where less harsh methods have proved unsuccessful.

A further concern is that the presence of POP units and the unsympathetic attitude of the police may aggravate the violence that sometimes occurs during protests. This seems to be a frequent complaint of protesters. Thus protests tend to turn violent in reaction to police violence usually directed at a largely peaceful protest.⁹⁹

6. Recommendations

At a Right to Protest Workshop in 2013, many activists argued that the RGA was being used as a political and ideological tool to manipulate the right to dissent.¹⁰⁰ The Act, they said, is either deliberately misused by the authorities to deprive people of their constitutional rights, or is misapplied by police due to their own ignorance or incapacity. This evidence from communities on the ground is supported by much of the academic writing captured in this paper.

Participants proposed a number of strategies and actions to carry forward from the workshop. First, more research is needed into where the problematic municipalities are as well as the correlation between banned protests and violent protests. Second, awareness-raising around problematic municipalities through publicity such as 'naming and shaming' in the media. Third, trying to bring cases to court that challenge checklists and other unlawful prohibitions of protest by municipalities. Finally, establishing a platform for information and knowledge-sharing between organisations and creating activities that bring organisations together on the right to protest.

What is also clear, however, from a literature review of the right to protest in South Africa, is that there is relatively little data on the RGA and its application, and even less on violations of the right to protest. There is not even a common understanding of the number of protests

occurring annually in South Africa. There is insufficient research on why protests occur, and if many are violent, or many are banned, why this should be so. This absence of a common factual baseline presents an obvious difficulty in making recommendations to policy-makers for remedying whatever flaws there may be in the architecture of the RGA and the implementation and enforcement of the law by the authorities.

Complicating the issue further is that the existing protest barometers and academic analysis examine the regulation of gatherings from a top down basis; that is, they examine the legislative, policy and institutional environment for the regulation of protest.

What is clearly required is a 'ground up' account of the right to assembly, prioritising activist accounts while providing activists with assistance in their peaceful and unarmed protests. This ground up approach is important as research strongly suggests that there is a huge discrepancy between the official policy position on the regulation of gatherings and the actual reality as experienced by those who attempt to exercise their right to assemble.

Professor Duncan's research project attempts to fill this gap by documenting examples of violation of the right to protest. She has already conducted a case study of the application of the RGA in Rustenburg and is rolling out the project in other towns. This project has already provided evidence of widespread abuses of the right to protest, especially in the areas falling within the Rustenburg Municipality, under whose jurisdiction the Marikana massacre occurred.

However, what is still absent from protest research and barometer activities is a project that records, in real-time, attempts to get grievances heard through protests and official responses to these attempts, and non-responsiveness and even the repression that appears to be a common trigger for violent protests. There is no system currently in place to track protests in real-time. Unless there is a service which provides protesters with an opportunity to obtain assistance on their particular protest, as well as creating an outlet for their stories to be transmitted to the public domain, the impunity will continue: police violence against protestors, on the pretext that they are prone to criminal behaviour and criminals are legitimate targets for the unofficial policing doctrine

of 'maximum force', as opposed to the public order policing doctrine of 'minimum force'.

Allied to this lacuna in data collection and record-keeping, there is also no system in place to support protesters. Evidence suggests that the State is drifting towards greater intolerance of protests, with softer forms of policing being replaced by harder and even lethal policing, and municipalities routinely censoring protests that are critical of their own performance. There is a pressing need for a service to provide both material and legal support to protesters, as well as providing strategic advice, by understanding their concerns, mediating conflicts with authorities and, ultimately, facilitating peaceful protest.

One solution has been suggested by a nascent project called 'Right2Protest', recently created by a coalition of NGOs¹⁰¹ and community-based organisations.¹⁰² The project aims to provide support to protesters who encounter problems in exercising their right to protest in three discreet ways: first, providing a telephonic advice service for victims of violations of the right to protest; secondly, a protest alert service for the media, civil society and others to obtain real-time information about protests and their underlying issues; thirdly, research on protest to inform advocacy efforts.

The information collected by the telephonic hotline would be used to provide information and analysis and supporting documentation to key stakeholders, including those who are directly affected by the problem as well as Parliament and government, the police, journalists and civil society, to publicise the findings and conduct advocacy in support of the right to protest.

Ultimately, this project aims to facilitate the holding of peaceful and unarmed protests in order that the voices of disempowered communities are heard by those in power. The project aims to change the behaviour of those who are violating the right to protest, be it the police or the protesters themselves, and to intervene to stop the cycle of violations and violence, moving the dominant culture towards respecting the right to protest. It aims to provide immediate information on protests before they happen, to ensure that problems can be resolved before protests are banned or violence ensues. Data collected from the project would be analysed to show trends

around protest: where the protest hotspots are in the country, what problems are experienced by protesters and whether interventions made from the hotline succeed. This is especially so with regards to protests that have resulted in violence, and particularly where media access has been limited, heightening the potential for violations of rights.

Growing incidents of violent protests imply that lawful avenues for protest may have been closed down, forcing protestors to make their voices heard 'by any means necessary'. The project needs to assess whether this is in fact the case. Where it is the case, then the project could, for example, 'name and shame' municipalities and the police by issuing press releases, to discourage others from following suit. Furthermore the project aims to build the capacity of journalists and civil society to report on and defend the right to protest, by exposing problems when they emerge in their proper context, and to provide the knowledge resources necessary to defend these rights. This project would tie in neatly with the recommendations made at the 2013 Right to Protest Workshop.

Broader research and deeper analysis of the application of the RGA will determine whether, and how, it needs to be amended. The conclusion of research by Mzi Memeza, Freedom of Expression Institute (FXI) researcher, is that protester organisations and regulatory local authorities support the architecture of the RGA, albeit for different reasons.¹⁰³ In that study, civil society organisations and social movements indicated that the scheme of the RGA is progressive and provides a viable institutional space for the presentation of community and socio-economic-related demands.

On the other hand, Memeza notes that local authorities suggest that while the RGA is a good piece of legislation, it is not clear and authoritative enough about its powers. The most glaring difficulty is the discretion vesting in the responsible officer to prohibit a gathering, given less than 48 hours' notice, without providing reasons.¹⁰⁴ Other legal commentators have noted that this section of the RGA, if tested in court, may well be struck down as unconstitutional because it violates the basic tenets of administrative justice that require reasons for decisions by government.¹⁰⁵

Duncan has noted that the RGA was passed in 1993, and therefore needs to be reviewed and re-negotiated. She suggests that an independent ombudsman may need to be established to regulate the RGA on a provincial or district level.¹⁰⁶ Others have suggested that there should be a legislative review process to look into those aspects of the implementation of the RGA that have evolved over the years with a view to codifying them, for instance the 'requirement' that marshals comprise 10 per cent of the total number of participants in a gathering.¹⁰⁷

Commentators have long stressed the need for training on the RGA for protesters, local authorities and police.¹⁰⁸ They point out that there seem to be wide-ranging misunderstandings about what the RGA actually provides for, i.e., the *de jure* position, as opposed to what has evolved over time through practice, i.e., the *de facto* position. The latter has in many instances been mistaken to mean what the RGA actually provides for in law. A case in point is the unlawful requirement of confirmation letters and compliance with various checklists before 'permission' to gather is granted.

According to Shaun Tait and Monique Marks of the University of KwaZulu-Natal, appropriate training of the relevant police is essential, as are ways of shifting the mindset of police with regard to the right to protest and demonstrate. Heavy-handed responses to gatherings and protest need to be carefully monitored. In order for there to be a positive shift, police members and units involved in public order policing need to feel safe and secure. This requires an effective management and accountability structure, and action to ensure that all members engaged in such policing are appropriately equipped. During the actual protest, a preoccupation with law and order should, as far as possible, give way to the narrower focus of preserving the peace, and protecting people and property against harm.

In making choices about how public order policing is structured, we need to take heed of the warnings given by Duncan and Tait and Marks.¹⁰⁹ Paramilitary solutions do not assist with dealing with 'security gaps'. Moreover they warn, in post-conflict and newly democratising countries, the presence of paramilitary forces may be seen as reminders of political repression, thus creating more problems than they solve. It would be wise, they

note, for the police's political masters and managers to engage in public discussions about the relative merits of the different models and techniques that are available to them.¹¹⁰

Ultimately what we want are public order police officers who are deeply conscious of citizens' constitutional and other rights, are firm and impartial, and operate in ways that are professional. The best that we can hope for is a contextually and situationally appropriate South African model of public order policing.

Tait and Marks suggest that training should inform police about the motivation behind protests and why they are – at times – violent in nature. Such an understanding would assist in making police members sympathetic representatives of a democratic state. In so doing, police may become advocates for social justice who are concerned with creating a society based on the principles of equality and solidarity, underpinned by the values of human rights, and recognising the dignity of all human beings. This in turn is likely to reduce the potential for violent protest, thus rendering the job of the police less delicate and controversial. Such an approach fits well with a more community-oriented approach to policing and it provides police commanders with a framework for devising a range of tactical options available to them in developing operational plans.¹¹¹

The police cannot 'fix' the underlying problems that result in protest. But the police can put in place a set of routines intended to produce a degree of certainty in managing fundamentally problematic yet recurrent situations. At the very least, in a democracy, the strategies and techniques of the police need to be in line with the Constitution and with legislation that upholds basic rights to protest and demonstrate without infringing on the rights of those who are not involved. Police engaged in public order policing must adhere to the 'rules' of democratic policing, which include embodying values respectful of human dignity, adhering to due process, intervening in the life of citizens only under limited and carefully controlled circumstances, operating in equitable ways, and being publicly accountable.¹¹²

There is a need to engage local municipalities about the underlying philosophy of the RGA, as well as the day-to-day application of the law. Opportunities should be

created for a dispassionate discussion with authorities on what the law is, as well as how to come to a common understanding of how best to implement the law and engage with communities to ensure peaceful gatherings. The ideal fora for this discussion would be nationwide workshops and training sessions, attended by all three members of the 'golden triangle/security triumvirate', namely protesters, local authorities and police. The Right2Know campaign has also produced a simple and plain-language pocket-sized guidebook to the RGA¹¹³ that should be made available to – and used by – everyone involved.

At the same time, a national campaign is needed to inform citizens about the legal framework and acceptable procedures for conducting protests and demonstrations. Citizens and civil society groupings need to be aware of their own rights and responsibilities with regard to protest and demonstration, as well as the rights, mandate and responsibilities of the police in public order situations.

The last resort for protesters frustrated by official intransigence is of course, the courts. There have been several successful court challenges to unlawful prohibitions of gatherings.¹¹⁴ Several legal NGOs have legal capacity – albeit limited – to deal with violations of the RGA by the authorities.¹¹⁵ The perennial challenge is to provide legal assistance to protesters outside the major metropolitan areas, especially small towns where there is limited, if non-existent, legal assistance available.

7. Conclusion

South Africa faces increasing threats to its fragile right of assembly. There is a growing awareness in civil society about problems with protest and much hand-wringing about police brutality on the one hand, and the increasing tide of protests on the other. However, there has been no proper discussion about where the locus of the problem lies: whether it is with the implementation and enforcement of the RGA or whether the Act itself is a problem because it lends itself to misinterpretation and abuse. A review of the RGA may well be needed, to see whether it is in fact meeting its stated objectives. This

is not without risk, because any review of the Act may result in a much worse act than the one that is in place. Research, training and legal intervention on the RGA is certainly required, but so too is a system or systems to support and empower protesters themselves. As this paper has outlined, there is much to be done to arrest, and ultimately reverse, the increasing hostility between protesters and police, and the slide towards increasing repression and away from the rule of law.

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Glossary

ACCESS	Alliance for Children's Entitlement to Social Security
ACHPR	African Charter on Human and Peoples' Rights
ADSL	asymmetric digital subscriber line
ANC	African National Congress
ARV	Anti-retroviral
ASIDI	Accelerated schools infrastructure delivery initiative
BCCSA	Broadcasting Complaints Commission of South Africa
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies
CCC	Complaints and Compliance Committee
CCL	Centre for Child Law
CDE	Centre for Development and Enterprise
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
CFO	chief financial officer
CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)
Comtask	Communications Task Group
COO	chief operating officer
COSATU	Congress of South African Trade Unions
CRC	Convention on the Rights of the Child
CSIR	Council for Scientific and Industrial Research

CSSR	Centre for Social Science Research	GDE	Gauteng Department of Education
DA	Democratic Alliance	GEC	General Education Certificate
DBE	National Department of Basic Education	GG	Government Gazette
DHS	Department of Human Settlements (previously National Department of Housing or NDoH)	HDA	Housing Development Agency
DMA	Disaster Management Act 57 of 2002	HOD	head of department
DMMA	Digital Media and Marketing Association	HSDG	Human Settlements Development Grant
DORA	Division of Revenue Act (renewed annually)	IBA	Independent Broadcasting Authority
DPLG	Department of Provincial and Local Government (now CoGTA)	ICASA	Independent Communications Authority of South Africa
DPME	Department of Planning, Monitoring and Evaluation	ICCPR	International Covenant on Civil and Political Rights
DWA	Department of Water Affairs (previously DWAF)	ICERD	International Convention on the Elimination of all forms of Racial Discrimination
DWAF	Department of Water Affairs and Forestry (now DWA)	ICESCR	International Covenant on Economic, Social and Cultural Rights
ECA	Electronic Communications Act	ICTs	information and communications technologies
ECDoE	Eastern Cape Department of Education	IDP	Integrated Development Plan
ECS	electronic communications service	IEC	Independent Electoral Commission
ECT	electronic communications and transactions	IP	Internet protocol
EEA	Employment of Educators Act 76 of 1998	IPTV	Internet protocol television
EFF	Economic Freedom Fighters	IRDP	Integrated Residential Development Programme
EHP	Emergency Housing Programme	ISP	Internet service provider
ES	equitable share	ISPA	Internet Service Providers' Association
ESTA	Extension of Security of Tenure Act 62 of 1997	LDoE	Limpopo Department of Education
FBSan	free basic sanitation	LRC	Legal Resources Centre
FBW	free basic water	LSM	Living Standards Measurement
FICA	Financial Intelligence Centre Act 38 of 2001	LTSM	Learning and Teaching Support Materials
FHR	Foundation for Human Rights	MAT	Media Appeals Tribunal
FLISP	Finance Linked Individual Subsidy Programme	MDDA	Media Development and Diversity Agency
FXI	Freedom of Expression Institute	MEC	Member of the Executive Council (provincial 'cabinet minister')
GCEO	group chief executive officer	MIG	Municipal Infrastructure Grant
GCIS	Government Communication and Information System	NDoH	National Department of Housing (now called Department of Human Settlements or DHS)
		NDP	National Development Plan
		NERSA	National Energy Regulator of South Africa

NGO	non-governmental organisation	Saarf	South African Advertising Research Foundation
NHFC	National Housing Finance Corporation	SABC	South African Broadcasting Corporation
NHSDB	National Housing Subsidy Database	SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
NHSS	National Housing Subsidy Scheme	SADF	South African Defence Force
NIA	National Intelligence Agency	SADTU	South African Democratic Teachers' Union
NPC	National Planning Commission	SAHRC	South African Human Rights Commission
NSC	National Senior Certificate	SAICE	South African Institution of Civil Engineering
Nurcha	National Urban Reconstruction and Housing Agency	SANDU	South African National Defence Union
NUSP	National Upgrading Support Programme	Sanef	South African National Editors' Forum
NWSRS	National Water Services Regulation Strategy	SAPS	South African Police Service
OBE	Outcomes Based Education	SASA	South African Schools Act 84 of 1996
OECD	Organisation for Economic Co-operation and Development	SATRA	South African Telecommunications Regulatory Authority
PAJA	Promotion of Administrative Justice Act 3 of 2000	SCA	Supreme Court of Appeal
PCSA	Press Council of South Africa	SCOPA	Standing Committee on Public Accounts
PDMSA	Print and Digital Media South Africa	SERI	Socio-Economic Rights Institute of South Africa
PDMTTT	Print and Digital Media Transformation Task Team	SERs	social and economic rights
PED	Provincial Education Department	SGB	school governing body
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	SHF	Social Housing Foundation
PMSA	Print Media South Africa	SHI	Social Housing Institution
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004	SHP	Social Housing Programme
R2K	Right to Know Campaign	SHRA	Social Housing Regulatory Authority
RDP	Reconstruction and Development Programme	SIU	Special Investigating Unit
RGA	Regulation of Gatherings Act 205 of 1993	SSA	State Security Agency
RHIG	Rural Household Infrastructure Grant	TIMSS	Trends in International Mathematics and Science Study
RHLF	Rural Housing Loan Fund	TRU	temporary residential unit
RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act	TV	television
SA	South Africa	UISP	Upgrading of Informal Settlements Programme
		UKZN	University of KwaZulu-Natal
		UN	United Nations
		UPM	Unemployed Peoples' Movement
		UPR	Universal Periodic Review

USAASA	Universal Service and Access Agency of South Africa	15 of American Convention on Human Rights, Article 11 of European Convention for the Protection of Human Rights, Article 28 of the Arab Charter on Human Rights (2004).
USDG	Urban Settlements Development Grant	
VIP	ventilated improved pit latrine	
Waspa	Wireless Applications Service Providers' Association	15. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsgno=IV-4&chapter=4&lang=en .
WSA	water services authority	16. Constitution section 39(1)(b).
WSDP	water services development plan	17. For a detailed analysis see The Global Justice Clinic (NYU School of Law) et al <i>Suppressing Protest: Human Rights Violations in the US Response to Occupy Wall Street</i> (2012) http://chrgj.org/wp-content/uploads/2012/10/suppressingprotest.pdf , 47.
WSP	water services provider	

Notes

1. Thanks go to Maureen Isaacson, Dale McKinley and Richard Pithouse for very useful comments on earlier drafts of this paper, which was completed in May 2015.
2. Section 17, Constitution of the Republic of South Africa.
3. R Burnett 'The Right of Peaceful Protest in International Law' (1986), a paper presented at a Seminar on the Right of Peaceful Protest 3–4 July 1986; B Rutinwa 'Freedom of Association and Assembly: Unions, NGOs and Political Freedom in Sub-Saharan Africa' (2001).
4. *Ibid.* The basis for some of the restrictions on freedom of assembly, such as the 'the protection of public ... morals', appear vague and too broad. However, it is beyond the scope of this paper to discuss the shortcomings of the relevant international law in detail.
5. *Ibid.*
6. E.g. International Covenant on Civil and Political Rights art. 21.
7. E.g. ICCPR, art. 19(2).
8. E.g. ICCPR, art. 19(1).
9. E.g. ICCPR, art. 22.
10. E.g. ICCPR, art. 25.
11. E.g. G.A. Res. 53/144, 4 (arts. 1, 5).
12. E.g. ICCPR, art. 9.
13. E.g. ICCPR, art. 7.
14. Major international and regional human rights treaties: these include Article 5 of the UN Declaration on Human Rights Defenders, Article 20 of Universal Declaration of Human Rights, Article 21 of the International Covenant on Civil and Political Rights; and regional standards: Article 11 of African Charter on Human and Peoples' Rights, Article 18. E.g. the UN Human Rights Committee, the body charged with interpreting authoritatively the ICCPR.
19. E.g. the organisation for Security and Cooperation in Europe (OSCE), an organisation of 56 states.
20. E.g. the European Court of Human Rights, the Inter-American Court and Commission of Human Rights, the African Commission on Human and Peoples' Rights
21. E.g. UN Special Rapporteurs and Special Representatives, and Inter-American Commission and African Commission Special Rapporteurs.
22. For a detailed analysis see The Global Justice Clinic (NYU School of Law) et al *Suppressing Protest: Human Rights Violations in the US Response to Occupy Wall Street* (2012) <http://chrgj.org/wp-content/uploads/2012/10/suppressingprotest.pdf>, 47
23. Chief among these were the Suppression of Communism Act 44 of 1950, the Criminal Law Amendment Act 8 of 1953 and the Riotous Assemblies Act 17 of 1956 quoted in Woolman S *Constitutional Law of South Africa*, Chapter 43 Freedom of Assembly.
24. Until 1994, the SAPS was called the South African Police (SAP).
25. Section 16 of the Interim Constitution of 1993 and section 17 of the Final Constitution of 1996 contain identical wording of the right to freedom of assembly.
26. Act 205 of 1993.
27. Section 4 (3).
28. Section 1 (v) 'Demonstration' includes any demonstration by one or more persons, but not more than fifteen persons, for or against any person, cause, action or failure to take action.

29. Section 1 (vi) 'Gathering' means any assembly, concourse or procession of more than 15 persons in or on any public road ... or any other public place or premises wholly or partly open to the air.
30. Section 3(2).
31. Section 3(3)(I).
32. Section 3(2).
33. Section 2(1).
34. Section 2(4)(a).
35. Section 2(2)(a).
36. Section 4(1).
37. Section 4(2)(a).
38. Section 4(3).
39. Sections 4(2) and (3).
40. Section 2(d).
41. Section 4(4)(b).
42. Section 5(1).
43. Section 5(2).
44. Section 5(3).
45. Section 6.
46. Section 7.
47. Section 9.
48. Section 12(1).
49. Section 12(2).
50. Section 11.
51. Section 9(2).
52. CCT 112/11/2012 ZACC 13.
53. I Rautenbach 'The Liability Of Organisers For Damage Caused In The Course Of Violent Demonstrations As A Limitation Of The Right To Freedom Of Assembly' (2013) 1 *TSAR*.
54. P de Vos 'Protests may just have become more expensive' (14 June 2012): <http://constitutionallyspeaking.co.za/protests-may-just-have-become-more-expensive/#disqusthread>.
55. DM Powell, M O'Donovan and J De Visser 'Civic Protests Barometer 2007-2014' (2014) Dullah Omar Institute (Ford Foundation and Charles Arthur Mott Foundation).
56. Municipal IQ press release, <http://www.municipaliq.co.za/index.php>.
57. K Allan and K Heese 'Understanding why service delivery protests take place and who is to blame' (2011) *Municipal IQ* <http://www.municipaliq.co.za>. Municipal IQ identifies 'major' municipal service delivery protests as those protests where communities oppose the pace or quality of service delivery by their municipalities.
58. http://www.municipaliq.co.za/index.php?site_page=hotspots.php.
59. <http://www.mlgi.org.za/barometers/service-delivery-protest-barometer/service-delivery-protests-barometer-1-frequency-and-fluctuation-by-year-and-season>.
60. The SA Local Government Research Centre publishes the South African Local Government Briefing monthly. A range of issues affecting local government is discussed, including the outbreak of community protests in its Community Protest Monitor.
61. The SA Media News Database covers more than 120 South African newspapers and periodicals, with full text articles available from 1997 to the present. This report compiles figures based on articles published in the following newspapers: *Cape Argus*, *Citizen*, *Daily Dispatch*, *Diamond Fields Advertiser*, *Eastern Province Herald*, *Pretoria News*, *Star*, *Sunday Times*, *The New Age*.
62. H Jain *Community Protests in South Africa: Trends, Analysis and Explanations* Community Law Centre (CLC) Local Government Working Paper Series No. 1 (2010). 2011 report by Jelani Karamoko. 2010 report by Hirsh Jain.
63. With the exception of 2004/05, where the statistics come directly from the South African Police Service's IRIS.
64. See Natasha Vally (2009) 'National trends around protest action: mapping protest action in South Africa' (Centre for Sociological Research and Development Studies Seminar, University of Johannesburg); Peter Alexander (2010), 'Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis' *Review of African Political Economy* 37(123), 26–27; National Assembly (2010), 36/1/4/1/201000030, Question No. 194, 19 April.
65. Rebecca Davis 'Public Order Policing: SAPS demands more muscle' *Daily Maverick* (3 September 2014): <http://www.dailymaverick.co.za/article/2014-09-03-public-order-policing-saps-demands-more-muscle/#.VA6vAEtCPwK>.
66. See, for example, K Allan and K Heese 'Understanding why service delivery protests take place and who is to blame' (2011) *Municipal IQ* <http://www.municipaliq.co.za>; F Cronje 'Behind the rise of protest action in South Africa' *PoliticsWeb* (19 February 2014): <http://www.politicsweb.co.za/>

- politicsweb/view/politicsweb/en/page71619?oid=547431&sn=Detail.
67. F Farouk 'Protest Nation': What's Driving the Demonstrations on the Streets of South Africa?' *The South African Civil Society Information Service (SACSIS)* (27 February 2014): <http://sacsis.org.za/site/article/1930?frommailing=1>.
 68. P de Wet 'Law used to 'clamp down' on dissent' *Mail & Guardian* (18 September 2014): <http://mg.co.za/article/2014-09-18-law-used-to-clamp-down-on-dissent>.
 69. P Alexander 'Rebellion of the Poor: South Africa's Service Delivery Protests – A Preliminary Analysis' (2010) 37(123) *Review of African Political Economy* 37.
 70. Ibid.
 71. Cronje (note above).
 72. J Duncan and A Royeppen 'Death by a thousand pinpricks – South Africa's ever-vanishing right to protest' *Daily Maverick* (8 March 2013): <http://www.dailymaverick.co.za/article/2013-03-08-death-by-a-thousand-pinpricks-south-africas-ever-vanishing-right-to-protest/#.U-JsMVZCPwJ>; J Duncan and A Royeppen 'Inside Rustenburg's banned protests' *Daily Maverick* (7 March 2013): <http://www.dailymaverick.co.za/article/2013-03-07-inside-rustenbergs-banned-protests/#.U-JuRiZCPwI>.
 73. The word 'approved' is misleading, because it denotes the giving of permission which, as the author points out earlier, is not what the RGA requires. Since the RGA only requires notification for a gathering there should be no such thing as a generic 'approval'. Rather, what may have been recorded – and incorrectly labelled by Prof Duncan – are those instances where the authorities did not react to the notification by subsequently prohibiting the planned gathering.
 74. Section 3.
 75. Section 4(3).
 76. Section 4(1).
 77. Section 4(2)(b).
 78. Section 4(2)(d).
 79. This is official policy, no aberrant instance of corruption. An official in the JMPD's legal department justified the policy to this writer by pointing to a City Council Resolution authorising the tariff, read with Section 4(1)(c) of the Municipal Systems Act that gives a Municipal Council 'the right to finance affairs of the Municipality by ... charging fees for services'.
 80. Section 3(3)(g). The same official justified the checklist by quoting Section 3(3) of the RGA: 'The notice [of the gathering]...shall contain *at least* the following information ...' According to her, the JMPD is therefore entitled to ask for any other information or documents from the convener.
 81. Section 5(1).
 82. The Mogalakwena Municipality in Limpopo banned a march by the GaPila community on the basis that their grievances were not taken to the ward committee first. The Act does not specify any particular route for grievances to follow before they can form the basis of a gathering.
 83. According to the Emfuleni Municipality's traffic department, the organisation wishing to hold a march must secure a written undertaking from the institution they are marching against confirming that a representative will be available to accept the memorandum. The Rustenburg Municipality also has this requirement.
 84. The Tshwane Municipality prohibited a picket of 80 people by the Right2Know Campaign outside the Arms Procurement Commission of Inquiry (where former President Mbeki was due to testify) on the grounds that there was another gathering on the same day in Tshwane. Right2Know took the decision on judicial review and on 12 June 2013 the North Gauteng High Court overturned the prohibition and the picket went ahead.
 85. In the wake of the police killing of striking mineworkers in Marikana, several protests have been prohibited by the Rustenburg Municipality under whose jurisdiction Marikana falls. Two of these were planned by the Wonderkop Community Womens' Association and were prohibited by the Municipality on spurious grounds. The prohibition was overturned by the North West High Court and the march went ahead, although stringent conditions were applied.
 86. The City of Tshwane issued a directive in 2010, presumably for the Soccer World Cup, that there would be 'no marching through the City'. The eThekweni Municipality also imposed a blanket ban on protests during the 2013 African Cup of Nations.
 87. R Pithouse 'On State Violence' *South African Civil Society Information Service (SACSIS)* (10 May 2011); D Bruce 'The Road to Marikana: Abuses of Force During Public Order

- Policing Operations' SACSIS (12 October 2012); J Duncan 'The Criminal Injustice System' SACSIS (18 February 2013).
88. Ibid.
89. D Knoetze 'Criminalising protest and dissent in South Africa' *Mail & Guardian* (18 September 2014): <http://mg.co.za/article/2014-09-18-criminalising-protest-and-dissent-in-south-africa>.
90. J Duncan 'The Criminal Injustice System' SACSIS (18 February 2013); M Clark 'An Anatomy Of Dissent and Repression: The Criminal Justice System And The 2011 Thembelihle Protest' (2014) at 33.
91. See Madlingozi 'Post-Apartheid Social Movements' in Langford et al *Socio-Economic Rights* 109–112; Dugard 'Urban Basic Services' in Langford et al *Socio-Economic Rights* 286–291; D McKinley and A Veriava *Arresting Dissent: State Repression and Post-Apartheid Social Movements* Centre for the Study of Violence and Reconciliation Research Report (2005) 43–60.
92. Clark (note above) illustrates that this criminalisation of protest is clearly evident from the police conduct during and after the Thembelihle protest in September 2011.
93. See Dawson 'Resistance and Repression' in *Mobilising Social Justice in South Africa* 101–136; Pithouse 'On State Violence' SACSIS (10 May 2011); Bruce 'The Road to Marikana: Abuses of Force During Public Order Policing Operations' SACSIS (12 October 2012).
94. http://en.wikipedia.org/wiki/Political_repression_in_post_apartheid_South_Africa#People_killed_by_police_during_protests. Another disturbing development is the rise of political assassinations. For more detail, see Gareth van Onselen 'Political assassinations are on the rise' *Rand Daily Mail* (29 February 2016): <http://www.webcitation.org/6j5qmoxya>.
95. Clark (note above) at 55.
96. D Smith 'South Africa: reports of police brutality more than tripled in the last decade' *The Guardian* (22 August 2013).
97. The State bodies responsible for investigating and prosecuting police misconduct have much to answer for. However, an analysis of the role of the Independent Police Investigative Directorate (IPID) and the NPA in what appears to be a pattern of impunity is beyond the scope of this paper.
98. Section 9(2)(b) and (c).
99. J Hornberger 'We Need Complicit Police! Political Policing Then and Now' (April 2014), a paper presented at a panel discussion on Police against the People as part of the Public Positions Series hosted by the Wits Institute for Social and Economic Research (WISER).
100. Workshop on the right to protest, 11–12 March 2013 at Stay City, Johannesburg. Organised and funded by the Foundation for Human Rights.
101. Right2Know Campaign, Freedom of Expression Institute, Lawyers for Human Rights, Centre for Applied Legal Studies, Socio-Economic Rights Institute, amaBhungane.
102. Members of the steering committee elected at the Right to Protest Workshop in 2013.
103. M Memeza *A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993 – a Local Government and Civil Society Perspective* (July 2006) 41.
104. Section 3(2) of the RGA.
105. Woolman S *Freedom of Assembly* in Woolman S et al, *Constitutional Law of South Africa* (2nd ed). Original Service, Butterworths; R La Grange *Constitutional and statutory analysis of the Regulation of Gatherings Act* Legal Opinion for the Freedom of Expression Institute (2004).
106. Remarks made at the workshop on the right to protest (2013) (ibid).
107. Memeza (ibid), S Tait and M Marks (ibid).
108. Memeza (ibid), S Tait and M Marks (ibid), J Duncan and A Royeppen (ibid).
109. S Tait and M Marks (ibid), J Duncan and A Royeppen (ibid).
110. Arguably, however, these political masters are ultimately responsible for the repression and abuse and thus should be the main 'target' of advocacy efforts and demands for reform.
111. S Tait and M Marks (ibid).
112. Although the cynic would argue that there is no meaningful chance of this being the case when many of the police's political masters do not embody these values or follow these rules.
113. Right2Know Campaign *Protesting: Your Rights. The Regulation of Gatherings Act: Arrests and Court Processes* (2013) <http://www.r2k.org.za>.
114. See earlier reference to the Right2Know Campaign court order obtained on 12 June 2014 against the City of

Tshwane, granting permission to gather after the City had unlawfully prohibited the gathering.

115. In Gauteng, the leading NGOs involved in this area of work are the Freedom of Expression Institute, Lawyers for

Human Rights, Centre for Applied Legal Studies, Socio-Economic Rights Institute and the Legal Resources Centre.

There is also pro bono assistance available from the corporate legal sector available through probono.org.