

South African CRIME QUARTERLY

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- > The Regulation of Gatherings Act – a hindrance to the right to protest?
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- > Attitudes towards different forms of protest action in contemporary South Africa
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Editorial policy

South African Crime Quarterly (SACQ) is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus of the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including academics. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.

Policy on the use of racial classifications in articles published in *South African Crime Quarterly*

Racial classifications have continued to be widely used in South Africa post-apartheid. Justifications for the use of racial descriptors usually relate to the need to ensure and monitor societal transformation. However, in the research and policy community racial descriptors are often used because they are believed to enable readers and peers to understand the phenomenon they are considering. We seem unable to make sense of our society, and discussions about our society, without reference to race.

South African Crime Quarterly seeks to challenge the use of race to make meaning, because this reinforces a racialised understanding of our society. We also seek to resist the lazy use of racial categories and descriptors that lock us into categories of identity that we have rejected and yet continue to use without critical engagement post-apartheid.

Through adopting this policy SACQ seeks to signal its commitment to challenging the racialisation of our society, and racism in all its forms.

We are aware that in some instances using racial categories is necessary, appropriate and relevant; for example, in an article that assesses and addresses racial transformation policies, such as affirmative action. In this case, the subject of the article is directly related to race. However, when race or racial inequality or injustice is not the subject of the article, SACQ will not allow the use of racial categories. We are aware that some readers might find this confusing at first and may request information about the race of research subjects or participants. However, we deliberately seek to foster such a response in order to disrupt racialised thinking and meaning-making.

Protest protections, protest problems? Reflections from across the spectrum

<http://dx.doi.org/10.17159/2413-3108/2017/v0n62a3459>

This issue of South African Crime Quarterly is a special issue focusing on protest. It is guest edited by Kelley Mouton of the Centre for Law and Society at the University of Cape Town.

Protest is central to citizens' exercise of their rights the world over. A quick scan of this week's news alone (mid-November 2017) shows that residents barricaded roads in Steenberg, Bapong, Walmer, and the Trans-Kalahari Corridor against social housing evictions, unpaid wages, lack of services and other social ills. A newspaper in India ran blank editorial pages to protest the murder of a journalist. Zimbabweans took to the streets to demand that the University of Zimbabwe rescind Grace Mugabe's PhD, to call for Robert Mugabe's resignation, and to celebrate the end of his 37-year authoritarian rule. So-called 'Dreamers' sat down in the parade route during the Macy's Thanksgiving Parade against immigration policy in the United States. Bayern Munich fans threw fake money onto the football pitch to protest against high Champion's League ticket prices.

In South Africa, protest is woven through our history and politics – so much so that the right to protest is a protected right under the country's Constitution. And while post-apartheid democracy should arguably have reduced the impetus for protest, we have instead seen a proliferation of civil disobedience: against service delivery failures, against fees for tertiary education, against corruption, farm murders, fracking and even against our president. These protests have provided a vivid illustration of the clash between institutions and the state on the one hand, and their respective communities on the other. Protesters have been arrested and criminalised, some have been injured and killed at the hands of state police and private security forces. Institutions have turned to the courts for relief against protesters, pushing for orders and prohibitions that many view as increasingly draconian. While activists view protest as an important tactic to agitate for change, and have engaged more creative and visible ways to push their agendas, its moral justification has been widely criticised in public discourse, given its often violent nature.

Andrew Faull's editorial of a year ago notes that 'South Africans' tertiary education, prosecutorial and political landscapes have been shaken, perhaps irrevocably. And while we cannot predict how it will all turn out, change is certainly afoot.' His words remain true, and the articles in this bumper issue of SACQ illustrate the ways that academics, activists, lawyers and practitioners are engaging with questions of protest and response.

Two articles in the collection address the law on protest, and raise questions about the ways in which this right is being obstructed and suppressed, and protesters criminalised. Lisa Chamberlain and Gina Snyman survey the protest landscape through the lens of the public interest legal sector,

and question, through the experience of Right2Protest, the ways in which court processes are being used as tools with which to quash protest activities. They argue that the law has in itself become a site of contestation, and focus on punitive use of process requirements, the use of interdicts, the abuse of bail procedures, and heavy-handed state responses as evidence of their experience. Extending the focus on one of these themes, Jameelah Omar uses the Social Justice Coalition's challenge to the Regulation of Gatherings Act (RGA) to highlight the controversies around the Act's regulatory provisions. She argues that the case is an important litmus test of the courts' appetite for protecting or constraining the right to protest, and concludes that the Act requires scrutiny and revision in respect of its scope, definitions and processes.

The education sector has seen three years of rolling protest action, arguably the most visible being the #FeesMustFall campaign that played out at universities across the country, but which has stretched into high schools and primary schools too. Two articles focus on protest related to the right to education – both looking at the right to basic education. Nurina Ally argues that the current legal framework on protest fails to protect and enable children's right to protest, and uses the case of *Mlungwana and Others v State and Others* to show how the criminalisation of peaceful protest not only violates the state's responsibility to respect, protect and fulfil the right to protest but also specifically fails to take into account the best interests of children – a 'special interest group with particular needs'. She argues that, in addition to removing criminal sanctions for protest, a proper response by the state requires training police in managing protests involving children, and revising administrative requirements that are directed to facilitating the right to protest, rather than scuppering it. Focusing on the South African Schools Act, Ann Skelton and Martin Nsibirwa show how the constitutionally protected rights to protest and to basic education are in tension with each other. They illustrate the complexities of implementing provisions that create criminal accountability in the context of protest, referring to parents' decisions to keep children out of school. These authors argue that while the focus on holding protesters accountable under criminal law may be desirable, the proposed amendments to the Schools Act do not resolve the practical tensions that exist in balancing the rights to protest and to education.

Tsangadzaome Mukumba and Imraan Abdullah turn their attention to the administrative aspects of protecting the right to protest. These authors, from the Legal Resources Centre and the South African History Archive respectively, teamed up to submit a series of Promotion of Access to Information Act (PAIA) requests to municipalities across the country to test how easily accessible information is on where and how to submit a notice of gathering, as required by the Regulation of Gatherings Act. They followed this initial wave of PAIA applications with another set of requests for records relating to public order policing regulations and training. Not only do their results show how difficult it is to access the relevant information, and how uneven compliance is across the country, but they also argue that the government's unwillingness to provide easy access to the information required by protesters to ensure compliance amounts to active resistance to enabling the right to protest. They conclude with a series of recommendations based on international best practices that they hope will foster proactive disclosure of information by municipalities, and suggest statutory reforms to both the RGA and PAIA to this end.

The collection then turns to questions of public opinion on protest. A pair of articles by researchers at the Human Sciences Research Council and the University of Johannesburg focus on the public's views on the policing of protest, and on their attitudes to different forms of protest. Both based

on nationally representative survey data, the first article, by Roberts et al., asks questions about the public's evaluation of police performance in dealing with protests, and whether the police's use of force in these situations is justifiable. The article argues that the public's perceptions of the policing of protest are negative on the whole. People who are more supportive of police use of force in maintaining public order are more likely to approve of the police's response to protest, although roughly a third of South Africans feel that the police are never justified in using force in these situations. These findings are important, given the levels of protest experienced in the last 10 years, and the mounting tensions with the police and other state institutions that are tasked with regulating and responding to protest. The second article, by Bohler-Muller et al., focuses on patterns of support for different forms of protest action across various socio-demographic and geographic variables. Surprisingly, the authors find no considerable differences across age, gender, race and class in the public's support for protest, although people are more likely to support protest if they think it will be successful. Their data also suggest that people have become more supportive of violent protest over time. The authors raise important policy questions based on this finding: more support for more violent protest, based on its perceived efficacy, has important consequences for the job that law enforcement agencies have in responding appropriately.

Our case note in this issue turns again to the tertiary education protest space and to #FeesMustFall specifically. Safura Abdool Karim and Catherine Kruyer undertake a deft analysis of *Rhodes University v Student Representative Council of Rhodes University*, and focus on the ways in which litigation seeking to interdict protest actions had a chilling effect on students' rights to protest. The authors illustrate the challenges experienced at Rhodes University, and problematise the use of over-broad provisions of the interdict that, among other things, prevented two individuals from disrupting lectures and tutorials.

Finally, our issue comes full circle with a review by Patrick Bond of Jane Duncan's work on protest – material that provides a theoretical foundation for many of the authors in the collection. Tracing the arc of increasing paranoia and securitisation by the state, beginning in the early 2000s, and increasingly repressive policing tactics in response to protest, Bond turns to Duncan's most recent book, *Protest nation*. Based on an impressive data set of protests across South Africa, Duncan's work explores the diverse examples of protest, and interrogates the idea of the 'popcorn protest' as seemingly sporadic flare-ups, arguing instead that this characterisation belies much deeper levels of organisation. Bond finds that Duncan's analysis 'fails to grapple fully with the dangers of localism' and provides, in his view, a limited perspective on state failure.

The collection presents, we hope, a varied and nuanced take on the plethora of ways that protest remains both settled and contested, protected and stymied, across the spectrum of issues.

Thanks

Andrew Faull noted in his editorial in our last issue that the September edition of SACQ would be his last as editor. The Centre for Law and Society is delighted to have taken over the reins of SACQ. We recognise the enormous value of the journal – to the academy and to the field of practitioners, and in bridging the gap between those two constituencies. We are proud to continue in the footsteps of our predecessors, Andrew Faull and Chandré Gould, whose commitment to building the journal, to publishing excellent scholarship and developing new voices makes it easy for our team to continue their efforts.

Our team is profoundly grateful to Andrew for his thorough, skilful and (perhaps most importantly) patient guidance during the production of this edition. Learning the ropes of peer review processes, back-end production schedules and navigating the foibles of submission portals have certainly been a steep learning curve for us, but Andrew's support has ensured that we feel prepared for the task ahead, and – indeed – that this December edition comes out on time.

Introducing the new editorial team at SACQ

Finally, I would like to introduce the Centre for Law and Society (CLS) and the team.

The Centre is an innovative and multi-disciplinary hub located in the Law Faculty at the University of Cape Town. It strives to be a place where scholars, students and activists engage critically with, and work together on, the challenges facing contemporary South Africa and Africa at the intersection of law and society. Through socio-legal research, teaching, and critical exchange, the Centre aims to shape a new generation of scholars, practitioners and activists working at the law and society interface, and to build the field of responsive and relevant legal theory, scholarship and practice.

CLS is founded on a culture of inclusivity and team work that we think makes the fit with SACQ especially good. Diversity – of people and viewpoints – is a priority, as we seek to foster collaborative learning and encourage new ways of thinking and doing. We view the editorship of SACQ as an extension of this ethos, and welcome the challenge of working with authors and reviewers to develop excellent scholarship and to encourage engagement across the academia/practice divide. The core members of our team are as follows:

Kelley Moul is the CLS Director. Kelley has 15 years' experience of working on gender, law reform and implementation. Her recent research includes regionally-focused projects on child marriage, sexual health and reproductive rights in Southern Africa, as well as the intersection of Western and traditional justice systems in terms of gender-based violence. Kelley's teaching in the faculty is strongly focused on bringing current research into the classroom, and on fostering new generations of socio-legal scholars.

Diane Jefthas is Deputy Director of CLS. Her research focus over the past few years has been investigating the 'pathways' that rural citizens utilise to access justice after being a victim of crime, and the roles played by families, traditional leaders and state structures in assisting complainants in finding resolution. Diane has a particular interest in transformative pedagogies and the transition from resource-constrained school environments to university.

Nolundi Luwaya is a researcher at CLS. She has worked extensively with rural community-based organisations and NGOs on issues connected to citizenship rights, land rights and nuanced understandings of customary law within our constitutional democracy. Nolundi has a particular interest in the struggles and strategies of women living in rural South Africa, and what these strategies for transforming their particular circumstances can teach us about transformation and change on a societal level.

Vitima Jere is the Hub assistant for CLS. Her work in the Centre focuses on creating supportive spaces in the faculty for debates around critical socio-legal issues and where scholars and activists can engage in critical thinking and writing. Her research interests include international trade law and its impact on how national environmental policies are shaped.

Lawyering protest: critique and creativity

Where to from here in the public interest legal sector?

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Frequent protests, arising from a diversity of motivations, are a feature of the South African landscape. Despite the right to protest being entrenched in section 17 of the Constitution, it is under threat, and communities seeking to protest increasingly risk criminalisation. This article identifies some of the emerging themes in the protest landscape and the way the right to protest is being suppressed. Four dominant themes are highlighted through the lens of the experiences of the public interest legal sector: the conflation of notification and permission; heavy-handed state responses to protests; the abuse of bail procedures; and the use of interdicts. Law has become at least one of the sites of contestation in the protest arena. The political space held open by the existence of the right to protest is thus closing as a result of violations of this right. It is therefore both useful and necessary to interrogate the role of lawyers in such contestation. This article also examines the context and nature of the public interest legal sector's response to these emerging themes.

There should be little need for protest in a functioning participatory democracy.¹ Yet protest is an entrenched part of the South African psyche, and a core tactic of activists pushing for change of all kinds. In South Africa, protest is not just a tactic of

revolution, but a protected human right. Nevertheless, protesters often risk arrest and criminalisation, given that protest is frequently a means of last resort, used when frustrated communities can no longer justify continued fruitless attempts at engagement.² Part one of this article touches briefly on the drivers of protest, while part two sets the scene with an outline of the regulatory system applicable to protest. Part three examines various ways in which the right to protest is being suppressed. Lastly, part four discusses the role of the public interest legal sector in responding to these attempts at suppression.

* Lisa Chamberlain is the deputy director of the Centre for Applied Legal Studies and a senior lecturer at the School of Law, University of the Witwatersrand (Wits). Lisa holds a BA LLB (Wits) and an LLM (University of Michigan). Gina Snyman is a member of the Johannesburg Bar and the in-house counsel for the Centre for Applied Legal Studies, School of Law, Wits. Gina holds an LLB (UPE) and an LLM in Human Rights and Democratisation in Africa (UP). The authors are indebted to Tarin Page and Rudo Mhiribidi, who provided valuable research assistance in the preparation of this article.

Part one: Drivers of protest

South Africa has a rich history of organised civil disobedience and social mobilisation, which were used as a tool against the apartheid regime.³ Today's protesters thus tap into a protest culture that dates back to the struggles against exploitation and oppression under apartheid.⁴ Much has been written about the causes of protests in South Africa. While initially the dominant narrative was that of service delivery protests, fuelled largely by the way in which protests were reported by the mainstream media, our understanding of the drivers of protest activity has now deepened. Today we understand that in addition to dissatisfaction with inadequate provision of services, people in South Africa protest because of discontent with the ineffectiveness of the available channels of participatory democracy⁵ and because of community alienation stemming from a neglect of 'bottom-up' planning and consultative processes.⁶ Protests are also the result of billing issues,⁷ labour matters such as salaries and improvement of working conditions,⁸ community members seeking out alleged criminals, attempts to highlight causes such as environmental injustice or homophobia, or to express solidarity with pro-democracy protests in places like Egypt.⁹ More recently, there have also been controversial protests calling for the removal of the president. The South African picture of frequent protests arising from a diversity of motivations is clear. How then does this reality interact with the legal protection of protest?

Part two: What the law says

Section 17 of the Constitution provides that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions'. The legislative accompaniment to section 17 is the Regulation of Gatherings Act 203 of 1995 (the Gatherings Act), which came into operation at the dawn

of South Africa's democracy following the Goldstone Commission of Inquiry's attempt to bring South Africa's assembly jurisprudence in line with international practice.¹⁰ Reflecting the language of section 17, the preamble to the Gatherings Act recognises that 'every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so'. However, this right is qualified by the duty to protest 'peacefully and with due regard to the rights of others'.¹¹

In one of the leading cases on protest – *South African Transport and Allied Workers Union and Another v Garvas and Others*¹² (*Garvas*) – the Constitutional Court acknowledged that the right to protest is central to South Africa's constitutional democracy, as it exists primarily to give a voice to groups that do not have political or economic power. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. In the minority judgment in *Garvas*, Justice Chris Jafta held that '[i]t is through the exercise of the section 17 rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery'.¹³

Similarly, in *S v Mamabolo*, the court reaffirmed the position that freedom of expression is now 'an inherent quality' of an open and democratic society, including freedom of assembly as provided for in the Bill of Rights.¹⁴ In *South African National Defence Union v Minister of Defence and Others*, the court captured the value of the right to protest as including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society, and its facilitation of the search for truth by individuals and society generally.¹⁵ The right to protest is thus firmly entrenched in South Africa's democratic dispensation, at least in terms of legal regulation.

Part three: Emerging themes in the protest landscape

Despite this legal protection, communities and the civil society organisations that support them routinely face obstruction from municipalities seeking to deny 'permission' for protest – notwithstanding the fact that the Gatherings Act only requires communities to notify the local authorities, not to ask their permission. In addition, when protests do go ahead, police response is often disproportionately violent, and protesters and innocent bystanders alike risk arrest for spurious reasons. As one author has put it, the 'right to peacefully protest is being swallowed by manipulative bureaucratic practices and violent policing practices'.¹⁶ The political space held open by the existence of the right to protest is thus closing as a result of violations of this right.

In the next section we discuss some of the ways in which the right to protest is being suppressed, so as to identify emerging themes in the protest landscape. While this article does not seek to provide a comprehensive account of the tools of repression used by different state actors to quash protest, four dominant themes are highlighted through the lens of the experiences of the public interest legal sector. These are: the conflation of notification and permission; heavy-handed state responses to protests; the abuse of bail procedures; and the use of interdicts.

Notification versus permission

One of the key challenges facing protesters in South Africa is that the municipal officials tasked with administering the Gatherings Act frequently misunderstand its provisions, or deliberately apply them improperly. Municipal officials routinely operate on the basis that the conveners of a protest are required by the Gatherings Act to ask for *permission* to protest when this is in fact not the case. The

requirement is notification, not consent. The Gatherings Act requires municipalities to be involved in the *administration* of the right to protest but does not require them to provide consent for such protests. Local officials thus substitute an obligation to facilitate protest with a right to veto.¹⁷ As emphasised in the Local Government Briefing Note, '[t]he notice of a gathering should not be seen as an "application". Municipalities may, in principle, not refuse gatherings to take place.'¹⁸ Furthermore, in *Garvas*¹⁹ the Constitutional Court seems also to indicate that the Gatherings Act envisages a process of notification and administration of logistics, rather than permission-seeking.²⁰

The provisions of the Gatherings Act specify that the only grounds on which a protest can lawfully be prevented by the municipality before the protest has commenced is if less than 48 hours' notice is given,²¹ or if the gathering poses a threat of injury to participants or others, or a threat of extensive damage to property or of serious disruption of traffic, *and* the South African Police Service (SAPS) is not equipped to contain that threat.²² Even then, a reasonable suspicion of violence is not enough. There must be credible information, submitted under oath in an affidavit. Importantly, neither the purpose of the protest nor past indiscretions by the group organising it are relevant considerations. The validity of a prohibition thus stands or falls on the ability of the SAPS to provide security. In addition, if the municipality suspects that a gathering may need to be prohibited, the prescribed meeting between the conveners, the SAPS and the municipality²³ must still occur in good faith in order to explore whether any solutions exist. If, after all that, there is still no way to ensure adequate containment of the credible threat supported by evidence on oath, reasons must be provided for prohibition.²⁴

Notwithstanding this extremely high threshold outlined in the law, the current situation is that a

community seeking to protest lawfully by going through the process set out in the Gatherings Act should steel themselves for the likelihood that they will be rebuffed and obstructed by either the municipality, the SAPS, or both.²⁵ Whether this is due to a lack of training, or a more sinister deliberate ‘misinterpretation’,²⁶ the effect is the same. In fact, this misguided imposition of a permission-seeking process by municipalities has led to many aspirant protesters seeking instead to fall outside the bureaucratic bounds of the Gatherings Act by protesting in groups of fewer than 15 people (which does not require prior notice), a strategy also employed during apartheid.

Heavy-handed state response to protest

Although the right to protest remains protected as long as those who engage in protest do so peacefully and are unarmed, a further challenge facing protesters is the repressive and hostile response from state authorities, primarily the police, once a protest goes ahead. In the previous section we discussed attempts by municipal officials, and sometimes also by the SAPS, to prevent protests from happening. Here we turn to attempts to disperse protests when they occur, and to impose severe penalties for participating in protest activity.

This is well-illustrated by the arrest (and regional court conviction) of a group of 94 community healthcare workers in the Free State for their attendance at a night vigil outside the headquarters of the Department of Health. The workers had gathered at Bophelo House in protest against their dismissal and the generally unsatisfactory conditions in the provincial health care system.²⁷ The community healthcare workers were convicted of contravening section 12(1)(e) of the Gatherings Act, i.e. ‘convening a gathering, or attending a gathering or demonstration prohibited in terms of the Act’.

In November 2016 the appellants were acquitted on appeal, in an important judgment

that makes it clear that it is not a crime to attend a gathering simply because notice was not provided. It expressly states that a gathering in regard to which notice was not provided is not ‘illegal’ or ‘prohibited’ and it also confirms that the Gatherings Act, while requiring notice, does not require ‘consent’.²⁸ Among the several practical consequences of the court’s decision is that police who arrive at an un-notified gathering are now duty-bound to liaise with and protect attendees, as well as the public, and to facilitate the exercise of the right rather than to simply disperse the crowd or make arrests. In recognising that the Gatherings Act ‘replaced a host of statutes promulgated in the apartheid era, (which) were widely regarded as being of a draconian nature’²⁹ the judgment may impact positively on a move away from the criminalisation of protesters and pave the way for an important shift from the past (and current) ‘iron-fist approach toward protest action’.³⁰

Another important protest court case heard in 2017 was the appeal against the conviction of 21 activists who were arrested at a peaceful protest outside the offices of Cape Town Mayor Patricia de Lille in September 2013 while demonstrating against the state of sanitation in the city.³¹ In February 2015, 10 of the activists involved in the protest were convicted of convening and attending an illegal gathering. The activists had decided that 15 people would protest, and accordingly it would not be necessary to issue notification in terms of the Gatherings Act. They chained themselves to the railings on the steps at one entrance to the Civic Centre. There was no intention to block access to the building, and people were able to pass under the chains. The situation was thus described:

There were 15 of us chained when the picket started, but the number grew when people arrived and started singing along

with us. Then there were also members who were carrying placards and some had brought us water. [There were about 20 to 30 police members at the scene at different times,] who came with tools used to cut padlocks and chains and they started cutting aggressively and pushed us in a group towards the police van. Other people were arrested as well who were not part of the chain.³²

The Social Justice Coalition argued that section 12(1)(a) of the Gatherings Act criminalises a gathering of more than 15 people just because no notice was given and therefore unjustifiably limits the right to protest and is unconstitutional.³³ The appeal was heard in the Western Cape High Court in June 2017 and judgment was pending at the time of writing.

These examples are demonstrative of the routine police response of quashing peaceful protests where they may be, at worst, merely disruptive. Research by the University of Johannesburg's Social Change Research Unit distinguishes between peaceful, disruptive and violent protests.³⁴ Jane Duncan's research, published in *Protest nation*, reveals that the vast majority of protests are in fact peaceful and take place without incident.³⁵ The state response to protests – whether peaceful protests or those that may turn violent – is similar, characterised by heavy-handed actions that include violence perpetrated against protesters. In the experience of the Centre for Applied Legal Studies (CALS), police response to protest is often disproportionately violent and protesters and innocent bystanders alike risk arrest on spurious grounds. This kind of excessive force used against protesters in order to repress disruptive protest is also often then misrepresented as public violence.³⁶

Apart from at a protest itself, heavy-handed and violent police responses are also a feature in 'protest hotspot areas'. The Thembelihle

informal settlement, adjacent to Lenasia in Johannesburg, is one such site where there have been unyielding struggles for basic services over the last 15 years, in the face of little meaningful government response.³⁷ This has increasingly led to police quashing protest, and even the imposition of de facto, if unofficial, states of emergency. During February 2015 scores of residents were arrested following spontaneous protests. The SAPS and other security agents placed the township on lock-down, patrolling the streets, breaking up gatherings of more than three people, and harassing individual activists.³⁸

As in many areas, the Thembelihle experience demonstrates that rather than being responsive to the needs and rights of its residents, government is prepared to use repression and police brutality to stamp out protest. The heavy-handed police response included the arrest of community leaders (not during protests but following raids in the settlement after the fact), notwithstanding the important role those leaders played in advocating for and restoring calm to a community desperate to be heard. The SAPS actions in making those arrests amounted to a display of power unconducive to restoring calm and responding to the eminently reasonable needs of the community. It is telling that some of the community leaders of the Thembelihle Crisis Committee who were arrested were the same leaders intervening to organise anti-xenophobia public meetings and stop such attacks just days before. They had even attempted to involve the SAPS in these responses and prevention.³⁹

Defending the constitutionally protected right to protest against heavy-handed state actions aimed at quelling protest is not just about defending the right to protest. It is also about upholding the rule of law and holding government to account in a constitutional democracy. In this context, trends such as those highlighted above must be viewed extremely seriously.

When law is used as an instrument of repression

The third way in which the right to protest is being suppressed is through the law itself – where the law is used as a weapon to stifle and demobilise, and is claimed by conservative powers in order to protect the status quo that protest is challenging. The two systemic examples of this in the protest context are the abuse of bail processes and the use of interdicts.

Abuse of bail processes

State officials routinely abuse the bail process to ‘punish’ protesters or quash ongoing protests, and these tactics are used as an extension of arbitrary arrests of protesters. The state officials implicated here include the police, prosecutors and magistrates. Arrested protesters require assistance in procuring bail to avoid remaining in remand detention awaiting trial – stretches that can last potentially for many months and very often ultimately result in the withdrawal of the protest-related charges on the grounds that these charges could not be sustained. Arrestees require this assistance because the bail process is abused at various stages following arrest. These abuses include the unjustified denial of police or prosecutorial bail before a first appearance (which, if protesters are arrested just before a weekend, means they then spend a few days in custody); unreasonable delays and unjustifiable postponements before bail hearings; stringent conditions attached to bail aimed at quashing further (lawful) protest; and bail set in excessively high and unattainable amounts.

All these tactics have been features of recent student protests, and are also well demonstrated in the case of a group of 17 residents of Marapong, Lephalale, who were charged with public violence and arson. The reasons for delays in the hearing of bail applications included postponements for ‘verification of address’ without proper explanation of why investigating

officers had not yet done so, refusing to accept oral evidence of family members present in court as to the address of the accused, the unavailability of a magistrate, already overcrowded court rolls, and an investigating officer not being present to provide evidence for a prosecutor in opposing bail. CALS’s representation of the Lephalale residents documents systemic abuse of arrestees in places that are considered ‘protest hotspots’.⁴⁰

While section 50(6)(d) of the Criminal Procedure Act 55 of 1977 allows a court to postpone any bail proceedings ‘for a period *not exceeding* seven days at a time’,⁴¹ this provision is routinely used to frustrate bail applications at a first appearance, and even in subsequent weeks, without good grounds. Unless detained protesters are represented, repeated week-long postponements are not always interrogated by the court – perhaps because court rolls are extremely full, or due to a level of cynicism from the bench that may have developed in our criminal courts.⁴² These delays are often an abuse of process by prosecutors and investigating officers who are seeking to punish or remove perceived ‘trouble makers’ from active protests.

Once a bail application is argued, it is a two-part inquiry – firstly into whether or not the interests of justice favour the release of an accused on bail, and secondly, if they do, what amount would be appropriate, taking all the circumstances of the matter into account, including what the individual can afford.⁴³ The attitude of the court in *Lephalale* ran contrary to this legal position: before hearing any evidence or argument on behalf of the arrested people, the court demanded that they come with a serious proposal about the amount of bail they could afford because of the damage caused. Bail was set in the amount of R4 000 per person, which was shockingly inappropriate, given that the people concerned were mostly

unemployed and surviving on meagre child support grants. Ultimately bail was reduced through further application to the court, but this meant a further delay.⁴⁴

Even in 1972, in *S v Budlender*,⁴⁵ which concerned an appeal against both the amount and conditions of bail for two students charged under the draconian Riotous Assemblies Act, the Cape Provincial Division held as follows:

[T]here is the very important thing: The courts do not like ever to deprive a man of his freedom while awaiting trial. He may be innocent, and then it would be very wrong. Also, even if he is guilty, we try not to deprive a man of his freedom until he has been convicted. After all, even if you are sitting in gaol awaiting trial under the most favourable conditions in the gaol you are nevertheless deprived of your freedom. Therefore, when fixing the bail amount, we feel that this amount must be put within reach of the accused.⁴⁶

A recurring theme in hotspots in magisterial districts is also the requests by prosecutors to magistrates to set conditions of bail that preclude accused individuals from taking part in any protests whatsoever upon their release, pending the outcome of their trials. We would argue, as CALS did in *Lephalale*, that such a limitation on the constitutional right to protest is unlawful and cannot stand. However, when arrested protesters do not have access to legal representation, the likelihood of onerous and arguably unlawful bail conditions increases.

One of the most high-profile recent cases that illustrate such practices is that of Bonginkosi Khanyile, a #FeesMustFall activist from the Durban University of Technology (DUT), who was arrested in September 2016 during protest action at his university. He faced eight charges, including inciting violence, participating in an illegal gathering and public violence.⁴⁷ Both the magistrates' court and the high court denied

him bail, at least partly on the basis that he had violated previous bail conditions by participating in protest action. He subsequently spent several months in detention at Durban's Westville Prison. The Supreme Court of Appeal refused to hear his case⁴⁸ and it eventually ended up in the Constitutional Court in March 2017.

Interrogating why he had been in custody for so long, Chief Justice Mogoeng Mogoeng asked: '[P]eople who are accused of rape get bail. People who are accused of murder get bail. What is it about this one?' The chief justice further noted that thousands of people who perhaps should get bail are awaiting trial in remand.⁴⁹ During the Constitutional Court hearing, the state finally agreed to release Khanyile on R250 bail – a welcome result, but one which should not have required legal intervention all the way to the Constitutional Court. This case is another clear illustration of the abuse of bail processes to make an example of a leader who is considered problematic by those in power. It also evidences how justice is so often ultimately only accessible for those with resources.

Use of interdicts

The use of interdicts to quash and prevent protest is a feature of the recent university protests, and is also gaining popularity as a tactic used by multinational corporations operating in South Africa against communities affected by mining. A prohibitory interdict is a court order instructing a party not to do something.⁵⁰ Interdicts ought to prohibit unlawful conduct, and/or protect an established right of the applicant. The use of interdicts to quell lawful protest arguably does neither, and they are accordingly being used inappropriately by conservative forces.

The use of interdicts by mining companies is well illustrated by an *ex parte rule nisi*⁵¹ that Platreef Resources obtained against the Kgobudi Traditional Community in May 2012.

The *rule nisi* was granted against the Kgobudi Community as 'a clan within the broader Mokopane Community, [who] live on farms in respect of which the applicant [Platreef] holds a prospecting right [...] the applicant alleges that a mob of some 150 angry and violent members of Kgobudi Community marched on the drill-rigs and threatened violence if operations were not stopped.'⁵² In discharging the *rule nisi*, the court considered whether it was permissible for the mine to seek and obtain an interdict against an entire community, which in this case consisted of upwards of 15 000 people.⁵³ Additionally, community members were interdicted in the *rule nisi* from going within 200 m of drilling equipment, despite such drilling sites and equipment being within 200 m of their homes. This ruling had the effect of a back-door eviction order against some residents from their communal land without any court-sanctioned eviction or compensation.

The *rule nisi* was opposed on the return date by a group of affected community members represented by Lawyers for Human Rights. The court ultimately discharged the interim interdict, relying on what arguably ought to be settled law by now, namely that:

A notification to persons in general or to a group of individuals by way of Rule Nisi that the Court is about to pronounce a suit between parties is of course permissible. It is a procedure frequently adopted in order to give interested parties an opportunity of joining litigation. But it does not by itself, make them parties to the litigation and they do not merely, by virtue of being notified of the litigation become liable to be punished for contempt of Court, for failure to comply with any order which is eventually made. A failure to identify defendants, or respondents would seem to me to be destructive of the notion that a Court's order operates only inter-

parties, not to mention questions of *locus standi in jure iudicio*. An order against respondents, not identified by name or perhaps by individualised description, in the process commencing action or in very urgent cases, brought orally on the record, would have the generalised effect typical of legislation. It would be a decree and not a Court order at all.⁵⁴

Notwithstanding these clear parameters in law, the universities of the Witwatersrand, Cape Town, Pretoria, Port Elizabeth, Rhodes and the Free State all sought and obtained interdicts against broad descriptions of unnamed students to prevent them from protesting during the recent student protests. These interdicts are problematic, for two reasons. Firstly, they often include orders that are so broad that it is not easy to discern conduct that is lawful from conduct that is not. Secondly, these interdicts arguably breach the principle of legality in that they seek to include vague, unnamed respondents who are not sufficiently described. It is difficult to understand how courts are willing to grant interim interdicts with broad descriptions that are unopposed, because it follows that because no one is named, they will be unopposed – for, in order to oppose such interdicts, some individuals would have to 'volunteer' themselves as engaged in 'unlawful' activity to enter the proceedings as respondents.⁵⁵

One of these interdicts – obtained by 'the University Currently Known as Rhodes' on 20 April 2016 – was challenged in the Grahamstown High Court by the Socio-Economic Rights Institute (SERI), representing both students and a group of concerned staff.⁵⁶ The interim interdict initially restrained a wide variety of persons from 'encouraging, facilitating and/or promoting any unlawful activities' at Rhodes University. This interim interdict applied to three named students, to the Student Representative Council of Rhodes University, and to a broad and amorphous mass

of people identified as ‘students of Rhodes University engaging in unlawful activities on the applicant’s campus’ or ‘those persons engaging in or associating themselves with unlawful activities on the applicant’s campus’.

The interim interdict was granted after the court heard oral evidence from five members of Rhodes University’s management and administrative staff concerning protest action that was led and organised by women students at the university, against what the students believe is an organisational culture that condones and perpetuates rape and sexual violence against women.⁵⁷ SERI and its clients argued that the requirements for interim or final interdicts were not met; that interdicts may not unjustifiably infringe on constitutional rights (which by their definition protect lawful conduct); and that court orders should be clear and unambiguous as a fundamental principle of the rule of law.

The matter was heard in the Eastern Cape High Court on 3 November 2016. The high court discharged the interim interdict that had been granted in Rhodes University’s favour against all of the unnamed respondents, and was critical of the overbroad relief sought and the citing of unidentifiable groups.⁵⁸ A narrower interdict was granted against three of the original respondents, who the court held acted unlawfully in some respects.⁵⁹ SERI’s application for leave to appeal against that portion of the judgment was dismissed with costs, as was its petition to the Supreme Court of Appeal.⁶⁰

This meant that students who had participated in protests against rape culture stood to be held liable for a considerable sum of legal fees incurred by the university that had sought to prevent them from protesting. The matter was subsequently appealed to the Constitutional Court. In a judgment handed down on 7 November 2017, the Constitutional Court dismissed the appeal on the merits, but upheld

the appeal against the costs order. In dismissing the costs order against the students, the court pointed out that ‘one needs to be careful not to create a perception that the applicants were being admonished for seeking leave to appeal’.⁶¹

The granting of overly broad interdicts seems to be on the rise. However, in at least some of the instances where that overbreadth in interim interdicts is challenged – as in the *Mokopane* and *Rhodes* cases discussed above – the resulting final interdict is more appropriately narrowly fashioned. What is clear is that considerably more scrutiny of the relationship between interdicts and the right to protest is required.

Part four: The role of public interest lawyers

The discussion above has highlighted a number of the challenges facing those seeking to exercise the right to protest in South Africa today, despite the constitutional protection of this right. We have also highlighted how sometimes the law and legal instruments are used as the very tools to suppress protest. Law has therefore become at least one of the sites of contestation in the protest arena. It is consequently both useful and necessary to interrogate the role of lawyers in such contestation. A full discussion of this is beyond the scope of this article, but we offer some reflections on the role played by the public interest legal sector in relation to protest.

In the honeymoon period immediately following the transition to democracy, protest died down significantly and at that time little attention was paid to the Gatherings Act.⁶² But gradually the shine on the rainbow began to dim, and activists began to turn once again to protest as a strategy to challenge power. By the early 2000s there was a widespread perception among civil society that opportunities for participation in structures like policy forums and public participation processes were in decline.⁶³ As the prevalence of protest began to increase, so too did calls

from protesting communities for assistance from lawyers in the public interest legal sector.

In spite of the fact that protests are so central to South Africa's politics, there has not been a coordinated system in place to support protesters. In the struggle against apartheid, human rights lawyers were well versed in criminal law; providing representation for their activist comrades in criminal proceedings was an everyday part of their work. However, after the transition to democracy, criminal justice work ceased to be a focus of many organisations practising public interest law, as the need for this kind of legal work died down in that honeymoon phase. This shift can also be attributed to donor funding that emphasises strategic litigation (where precedent-setting cases are likely to have an impact beyond the parties to the case) rather than direct legal services (the day-to-day business of legal support to those who cannot afford a private sector lawyer, such as conducting a bail application).⁶⁴

However, in the past few years there has been a resurgence of the need for this kind of direct legal service support to communities across South Africa. Law-focused civil society organisations are increasingly requested to assist with negotiations around section 4 meetings,⁶⁵ bail applications for arrested protesters, subsequent criminal trials, and even damages claims pertaining to malicious prosecution and police brutality. While many civil society organisations have recently begun working on protest-related issues again, this work has not always been coordinated, and the capacity of these organisations is often outstripped by the demand. In many cases, requests for help are met with the response that organisations do not do criminal work (both because this expertise has largely been lost and because their funding streams do not support this kind of work). This has led to increasing anger from communities across the country,

perhaps most acutely in communities affected by mining, directed towards their colleagues in human rights-focused organisations. Gradually, there have been shifts in the sector, in part for reasons of strategic value, but also because there is an overwhelming need. More and more non-governmental organisations have resuscitated their expertise in criminal law – for example, Lawyers for Human Rights, the Legal Resources Centre, the Socio-Economic Rights Institute, Section27, Equal Education Law Centre, ProBono.org and CALS have all started engaging in more protest-related and criminal work.⁶⁶

The #FeesMustFall protests in 2015 were also a powerful catalyst for this shift. Within two weeks of #FeesMustFall becoming a national movement, lawyers in the social justice sector had banded together to run a coordinated hotline for arrested students seeking legal assistance. Through the development of relationships with the National Association of Democratic Lawyers (NADEL), Legal Aid and many lawyers in the private sector who were keen to contribute their expertise in support of the movement, legal assistance was deployed to support protesting students across the country. While this started out as a crisis response, it has proved enormously valuable in highlighting gaps. For example, many human rights lawyers had to learn how to conduct bail applications on the trot, with the sector mobilising to ensure skills transfer and training across organisations where necessary. Experienced social justice lawyers conducted training for private attorneys who wanted to assist but who were not well-versed in bail processes or representing large, politicised groups of clients. The effect of this kind of legal mobilisation was that by the time the second wave of #FeesMustFall protests broke out in 2016, the public interest legal sector was far better equipped to provide effective support to protesting students.

In addition, these events gave rise to a coalition called the Right2Protest Project (R2P), by catapulting the collaboration between various civil society organisations into the formal establishment of an organisation aimed at advancing the constitutional right to protest.⁶⁷ R2P has a full-time attorney on hand to provide legal representation to protesters – whether in bail applications, section 4 meetings, reviews of municipal decisions to ‘refuse permission’ to protest, student disciplinary enquiries resulting from protest, or any other relevant legal proceedings. The organisation also runs a national toll-free hotline⁶⁸ through which the project provides legal support to protesting communities.⁶⁹ In addition to the direct legal assistance, R2P provides a platform for collaboration and information-sharing. R2P is one of many welcome developments in the protest space: the coalition’s significance lies in the fact that it is borne out of both the recognition of the right to protest and the growing need to protect that right. The coalition also responds to critical gaps in the work of the public interest law sector.

Conclusion

Protest is embedded in the fabric of South Africa and the contemporary political climate. It is also intricately linked to South Africa’s history of civil disobedience and social mobilisation. Although protest is a constitutionally protected right, its realisation is impeded by the use of law for repressive purposes when protesters are erroneously required to apply for permission to protest, when bail processes are abused, when interdicts are captured, and when the state responds to protests in a heavy-handed manner.

Progressive lawyers therefore have a responsibility to claim back the law. Bad law must be challenged, and cases such as *Tsoaeli*, *Mlungwana* and the *Rhodes* interdict are examples of welcome interventions. It is

critical that we abandon a ‘business as usual’ approach in favour of finding more creative ways of lawyering, including collaboration with partners outside of the legal sector. Furthermore, given that many of the abuses highlighted in cases such as *Lephalale* and *Mokopane* are taking place in magistrates’ courts, the sector needs to work in these spaces rather than always focusing on more glamorous Constitutional Court cases. While the need for strategic litigation remains, these legal interventions must be complemented by a return to the pre-constitutional approaches of being responsive to community requests for direct legal assistance in remote police stations and rural magistrates’ courts.

Organisations such as R2P cannot be the sole solution to the issues raised above. The organisation’s establishment does, however, signal a shift in civil society responses to community needs. R2P is an experimental project, which will require constant reflection, self-critique and guidance from protesters themselves. It will also hopefully aid the project of claiming back the law and putting the law to use in advancing the right to protest.



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Notes

- 1 See the discussion of the nature of South Africa’s democracy in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 CC.
- 2 Karl von Holdt et al., *The smoke that calls: insurgent citizenship, collective violence and the struggle for a place in the new South Africa*, Cape Town, Johannesburg: Centre for the Study of Violence and Reconciliation and Society, Work and Development Institute, University of the Witwatersrand, 2011, 33.
- 3 See Richard Ballard, Social movements in post-apartheid South Africa: an introduction, in Peris Jones and Kristian Stokke (eds), *Democratising development: the politics of socio-economic rights in South Africa*, Leiden: Martinus Nijhoff, 2005, 77.
- 4 Christopher Mbazira, Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: parallels and divergences, *South African Journal of Human Rights*, 2013, 251–275, 272. While much has stayed the same, much is also different. In the apartheid era, because the government was illegitimate and unrepresentative, all protests against the state could be rationalised on moral, human rights and democratic grounds. This rationalisation

- included violent protest. Today, the moral authority of protest is a lot more complicated and justification of protests that may become violent is controversial. Despite these shades of grey, from a legal perspective, peaceful protest activity is now grounded in a right to do so.
- 5 See Luke Sinwell et al., Service delivery protests: findings from quick response research on four 'hotspots' – Piet Retief, Balfour, Thokoza, Diepsloot, Centre for Sociological Research, University of Johannesburg, September 2009.
 - 6 Lilian Chenwi and Kate Tissington, Engaging meaningfully with government on socio-economic rights: a focus on the right to housing, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, March 2010, 7.
 - 7 Bilkis Omar, *SAPS costly restructuring: a review of public order policing capacity*, Institute for Security Studies (ISS), Monograph 138, 2007, 18, as discussed in Shauna Mottiar and Patrick Bond, The politics of discontent and social protest in Durban, *Politikon*, 39, 2012, 309–330, 311.
 - 8 Mokoko Piet Sebola, The community policing philosophy and the right to public protest in South Africa: are there positive developments after two decades of democracy?, *Journal of Public Administration*, 49, 2001, 300–313, 307.
 - 9 Mottiar and Bond, The politics of discontent and social protest in Durban, 312.
 - 10 Mzi Memeza, A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993: a local government and civil society perspective, Freedom of Expression Institute, 2006, 12. Interestingly, there is some suggestion that the Gatherings Act was only ever intended to be used during the difficult transition into democracy around the time of the first democratic elections, and that the drafters of the Act understood that it was flawed but saw it as a stopgap measure compiled in a bit of a rush. See Freedom of Expression Institute, *The right to protest: a handbook for protestors and police*, Johannesburg: Freedom of Expression Institute, 2007, 5.
 - 11 See Shannonbrooke Murphy, Unique in international human rights law: Article 20(2) and the right to resist in the African Charter on Human and Peoples' Rights, *African Human Rights Law Journal*, 11, 2011, 475–494, 474 for a discussion of the right to resist in the African Charter, which has a broader formulation. For a critique of the Gatherings Act, see, among others, Qhuba Dlamini, Mass action and the law: can South Africa do without the regulation of the Gatherings Act?, *AFR. J. RHETOR*, 27, 2009, 86–107, 86.
 - 12 *South African Transport and Allied Workers Union & Another v Garvas & Others* 2013 (1) SA 83 (CC).
 - 13 *Ibid.*, 120. See also Stu Woolman, My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion in *Garvas v SATAWU (Minister for Safety & Security, third party)* 2010 (6) SA 280 (WCC), *South African Journal of Human Rights*, 24:2, 2011, 346–353; Khulekani Khumalo, Developing the crime of public violence as a remedy to the rights of non-protesters during violent protests and strikes: a critical analysis of the South African jurisprudence, *Obiter*, 36:3, 2015, 578–599.
 - 14 *S v Mamabolo* 2001 (3) SA 409, para 50.
 - 15 *South African National Defence Union v Minister of Defence and Others* 1999 (4) SA 469 (CC), para 6–8. The right to protest is also protected under international law. Article 20 of the Universal Declaration of Human Rights (UDHR), which was unanimously adopted in 1948 by the General Assembly of the United Nations, provides for the right to freedom of peaceful assembly and association. Likewise, Article 11 of the African Charter on Human and Peoples' Rights provides that '[e]very individual shall have the right to assemble freely with others'. See, for example, *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009), in which the African Commission found that Article 11 of the African Charter was violated when demonstrations were suppressed using force against demonstrators, as well as by their detention.
 - 16 Stuart Thembisile Lewis, The Marikana aftermath: the right to peaceful protest is dying in South Africa, *RGR*, 33, 2013, 116–117, commenting on the work of Jane Duncan. See also Sebola, The community policing philosophy and the right to public protest in South Africa, 300, 307, where he talks about the 'unsafe conditions in public gatherings', and the discussion of invited and invented spaces of participation in Faranak MirafTAB and Shana Wills, Insurgency and spaces of active citizenship: the story of Western Cape anti-eviction campaign in South Africa, *Journal of Planning Education and Research*, 25:2, 2005, 200–217. The threat to the right to protest is also discussed in Mottiar and Bond, The politics of discontent and social protest in Durban, 323; Jane Duncan, *Protest nation: the right to protest in South Africa*, Durban: University of KwaZulu-Natal Press, 2016, 11.
 - 17 See Lisa Chamberlain, Assessing enabling rights: striking similarities in troubling implementation of the rights to protest and access to information in South Africa, *AHRLJ*, 16, 2016, 365–384.
 - 18 Local Government Briefing Note 2012, 1, 3, A municipality's role in the Regulation of Gatherings Act.
 - 19 *South African Transport and Allied Workers Union & Another v Garvas & Others*.
 - 20 This reading of the judgment is supported by Johnson and Griffiths. See M Johnson and J Griffiths, The Regulation of Gatherings Act 205 of 1993, *Legal City*, 27 July 2012, <http://www.legalcity.net/Index.cfm?fuseaction=magazine.article&ArticleID=4493411> (accessed 7 June 2016).
 - 21 Even then, prohibition is discretionary, not mandatory – see the language of 'may' used in section 3(2) of the Gatherings Act.
 - 22 Gatherings Act, section 5(2). Note that there are further sections that allow police officers to disperse a gathering once it is already in progress, but these are beyond the scope of this discussion.
 - 23 See Gatherings Act, section 4.
 - 24 Local Government Briefing Note, 3.
 - 25 See further Mzi Memeza, A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993: a local government and civil society perspective 2006, <http://publicationdesign.co.za/wdb1/wp-content/uploads/RGARReport-Mzi.pdf> (accessed 9 November 2017); M Johnson and J Griffiths, Controlling gatherings – great in theory, *Without Prejudice*, 12, 2012, 77–78, 77; R2K Activists Guide, *Protesting your rights: the Regulation of Gatherings Act, arrests and court processes*, Right to Know, 2015, <http://www.r2k.org.za/wp-content/uploads/R2K-Protest-Guide-2015-final-web.pdf> (accessed 9 November 2017); Woolman, My tea party, your mob, our social contract, 349; and various publications by Jane Duncan, who has written extensively on the subject – see for example Jane Duncan, *The rise of the securocrats: the case of South Africa*, Johannesburg: Jacana Media, 2014.
 - 26 Or both, as a single motivation cannot be ascribed to all municipal officials en masse.
 - 27 Judgment of JP Mollemela, ADJP Moloi and J Lekale in *Patricia Tsoaeli and Others v The State* FSHC Appeal No A222/2015

- dated 17 November 2016, para 3. The appellants were represented by Section27.
- 28 *Ibid.*, para 43.
- 29 *Ibid.*
- 30 *Ibid.*, 26.
- 31 The protesters include members of the Social Justice Coalition and Ndifuna Ukwazi, represented by the Legal Resources Centre during their trial and in their appeal in *Phumeza Mlungwana v the State* A431/15. Equal Education (represented by the Equal Education Law Centre), the Open Society Justice Initiative and the UN Special Rapporteur on the Right to Freedom of Assembly and of Association (represented by the Socio-Economic Rights Institute, or SERI) all intervened as *amicus curiae* in the case.
- 32 Mary-Anne Gontsana and Lea Bork, SJC members defend civic centre protest, *GroundUp*, 7 October 2014, http://www.groundup.org.za/article/sjc-members-defend-chaining-themselves-civic-centre_2327/ (accessed 6 September 2017).
- 33 See Social Justice Coalition, Joint press statement: the #SJC10 case and protecting the right to protest, 13 June 2017, http://www.sjc.org.za/joint_press_statement (accessed 6 September 2017).
- 34 Social Change Research Unit, University of Johannesburg, Community protests 2004–2013: some research findings, Media Briefing, 12 February 2013, <http://www.uj.ac.za/en/newsroom/news/Pages/UJ-researchers-release-service-delivery-protest-findings.aspx>, discussed in Lizette Lancaster, At the heart of discontent: measuring public violence in South Africa, ISS, Research Paper 292, 2016, 2, <https://www.uj.ac.za/faculties/humanities/Centre%20for%20Sociological%20Research/Documents/Quick%20response%20research%20into%20Service%20Delivery%20Protest%20Hotspots.pdf> (accessed 6 September 2017).
- 35 Duncan, *Protest nation*, 11. We do not deal with it here, but challenging assumptions that disruption is outside the scope of the constitutionally protected right to protest is an area for further research. 'Because they are inherently disruptive, protests can wake society up out of its complacent slumber, make it realise that there are problems that need to be addressed urgently, and so hasten social change', *ibid.*, 1. Given the context of South Africa's history and pervasive ongoing inequality, it is arguably only through disruption to the comfortable lives of the 'haves' that awareness can be awakened as a precursor to change. See Lancaster, At the heart of discontent, 2: '[M]any acts that form part of the South African protest repertoire, such as tyre burning, are disruptive but not violent.' The act of burning tyres, though, frequently leads to the criminal charge of public violence, including with the use of the draconian 'common purpose' doctrine to criminalise protests.
- 36 The crime of public violence is defined by Jonathan M Burchell and J Milton, *Principles of criminal law*, 3rd edition, Cape Town: Juta Academic, 2005, 867, as consisting of 'the unlawful and intentional commission by a number of people acting in concert of acts sufficiently of serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others'. The position taken by R2P is that the law does not prohibit or criminalise disruptive protest.
- 37 The Thembelihle Crisis Committee (TCC) is a community-based organisation in the area that focuses on socio-economic issues such as water, electricity and housing, raising awareness through rights campaigns, petitions, engaging local authorities and, very often, through protest action.
- 38 The majority of the arrested activists and protesters were represented during their bail applications by SERI. The Centre for Applied Legal Studies (CALS) also provided assistance approaching trial and in making representations – some of the protesters accepted diversion programmes under threat of jail terms if convicted on charges of public violence, and eventually the charges were withdrawn against the remaining protesters. The Right2Know Campaign (R2K) was instrumental in ensuring legal representation for everyone, and in raising and posting bail money. The support and on-the-ground involvement of R2K, the legal assistance of SERI and CALS and the ongoing collaboration and support for this community demonstrate the benefit of these partnerships, as well as the need for ongoing responsiveness to affected communities.
- 39 R2K, Gauteng statement on situation in Thembelihle, 26 February 2015, <http://www.r2k.org.za/2015/02/26/thembelihle/> (accessed 6 September 2017).
- 40 The township of Marapong, in Lephalale, near the Medupi power station, is another area like Thembelihle that has seen numerous protests over the last few years. During September 2015 CALS received a request for assistance from the Marapong Community Forum through an established civil society network via the Centre for Environmental Rights and Earthlife Africa.
- 41 Emphasis added. A prosecutor ought to justify the necessity of the length of postponement to the minimum period necessary in favour of liberty, but in practice postponements are routinely granted for the maximum period the section permits.
- 42 While the Criminal Procedure Act provides for some discretion of the court, in the magistrates' court such discretion is always a narrow one, and must be applied with the Criminal Procedure Act, for reasons including if: (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation that a person will be charged with a schedule 5 or 6 offence; (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to- (aa) procure material evidence that may be lost if bail is granted; or (bb) perform functions such as taking fingerprints or DNA; or (v) it appears to the court that it is necessary in the interests of justice to do so. This would all require a reason being provided by the prosecutor for seeking a postponement of up to seven days, a justification of why seven days is required and not less time for the postponement sought, and a consideration by the court on the merits in granting such a postponement. In practice, however, courts routinely grant seven-day postponements without interrogating the reasons or time, with merely a cursory appearance of the detained person in the stand.
- 43 Criminal Procedure Act 1977 (Act 51 of 1977), section 60, contains numerous factors a court must consider in weighing up whether the interests of justice favour an accused person's release on bail. The prime consideration and which ought to be brought into reckoning is whether an accused will stand trial. If a court determines that the interests of justice favour the granting of bail, the court must then consider appropriate conditions. Fixing the amount of bail serves as one of these conditions.
- 44 CALS represented this group. We had to weigh up bringing an urgent review application in the Polokwane High Court, against bringing an application for variation (and reduction) of the bail amount at the next appearance for those remaining in detention who could not raise the amount. Ultimately it was in

- the clients' interest to opt for the latter, to ensure their quicker release, notwithstanding that the settled law favoured their success on review and could have sent a strong message to that magistrates' court. A successful application for a reduction of bail was brought before the same magistrate during their next appearance. We are still of the view that persisting with these arguments before the same magistrate goes some way to challenging the preconceptions around protests in 'protest hotspots', in particular magistrates' courts where cogent defences are argued.
- 45 *S v Budlender and Another* 1973 (1) SA 264 (C).
- 46 *Ibid.*, para 269 E–F.
- 47 *Mail & Guardian*, Bonginkosi Khanyile determined to carry on with struggle for free education, 2 March 2017, <https://mg.co.za/article/2017-03-02-bonginkosi-khanyile-determined-to-carry-on-with-struggle-for-free-education> (accessed 6 September 2017).
- 48 Constitutional Court of South Africa, Order of the SCA dated 17 January 2017, <http://www.constitutionalcourt.org.za/Archimages/26986.PDF>.<http://collections.concourt.org.za/bitstream/handle/123456789/3887/Answering%20Affidavit-26989.pdf?sequence=8&isAllowed=y> (accessed 6 September 2017).
- 49 Greg Nicolson, Bonginkosi Khanyile: free, in an unfree system, *Daily Maverick*, 1 March 2017, <https://www.dailymaverick.co.za/article/2017-03-01-bonginkosi-khanyile-free-in-an-unfree-system/#.WZ6unYSGPIU> (accessed 6 September 2017).
- 50 The requirements for both interdicts are the same, but there are significant differences between final interdicts and temporary (or interim) interdicts. As its name implies, a final interdict resolves the matter between the parties. A temporary or interim interdict merely preserves or restores the status quo until such time that the dispute between the parties is finally determined. The interim interdict does not entail that the dispute is finally resolved – the final resolution of the matter may still be some way off in the future.
- 51 An *ex parte* application is one brought without service of the papers on the respondent or without giving the respondent the opportunity to argue before the judge. This is often a feature in *rule nisi* applications, which are essentially applications for interim relief, in which respondents are then notified of a return date on which they have an opportunity to argue before the court why the interim order should not be made final.
- 52 Unreported judgment of J Kollapen in *Platreef Resources (Pty) Limited v Kgobudi Traditional Community* SGHA 29218/10 dated 28 January 2013, 3–4.
- 53 *Ibid.*, 9.
- 54 *Ibid.*, quoting J Conradie in *Kayamandi Town Committee v Mkhwaso & Others* 1991 (2) SA 630 C; see also *City of Cape Town v Yawa & Others* 2004 (2) All SA 281 (C); *Illegal Occupiers of Various Erven, Phillip v Monwood Investment Trust Company (Pty) Limited* 2002 (1) All SA 115 (C).
- 55 For example, the Rhodes University interim interdict restrains –
- i. [interfering with] access to, egress from and the free movement on the Applicant's campus of all members of the Rhodes University community and all others who have lawful reason to move on to, off and upon said campus;
 - ii. Kidnapping, assaulting, threatening, intimidating or otherwise interfering in any manner with the free movement, bodily integrity and psychological and mental wellbeing of any members of the Rhodes University on the Applicant's campus;
 - iii. Disrupting, obstructing or in any other manner interfering with the academic process of the Applicant, which shall include but not be limited to lectures, tutorials, practicals, tests and use of the Applicant's library facilities and laboratory;
 - iv. In any manner interfering with the academic and/or administrative staff of the Applicants while on the Applicant's campus;
 - v. Disrupting, obstructing or in any other manner interfering with the ordinary function of the Applicant's residents system;
 - vi. Causing any damage to the Applicant's property.'
- 56 *Rhodes University v Student Representative Council of Rhodes University* [2017] 1 All SA 617 (ECG).
- 57 According to the preparatory notes shared with the authors by SERI, the protesters believe that this culture has been created and perpetuated by the university administration's on-going failure to punish rape and sexual assault against women at the university, and by its failure to put in place policies and procedures that discourage rape and sexual violence, and encourage and support victims of rape and sexual violence to report it when it happens.
- 58 *Rhodes University v Student Representative Council of Rhodes University and Others* [2017] 1 All SA 617 (ECG), para 141, 142, 144, 145, 158(e).
- 59 *Ibid.*, para 146, 147, 158 (a)–(d).
- 60 See SERI, *Rhodes University v Student Representative Council of Rhodes University and Others* ('Rhodes'), <http://www.seri-sa.org/index.php/litigation/participation-protest-and-political-space/19-litigation/case-entries/530-rhodes-university-v-student-representative-council-of-rhodes-university-and-others-rhodes> (accessed 6 September 2017).
- 61 *Ferguson and other v Rhodes University* CCT 187/17, para 28.
- 62 *Ibid.*, 13.
- 63 Susan Booysen, Public participation in democratic South Africa: from popular mobilisation to structure co-operation and protest, *Politeia*, 28, 2009, 1–27, 12.
- 64 In this context, credit must go to the Open Society Foundation – South Africa, which has supported R2P since its inception.
- 65 The section 4 meeting, held in terms of the Regulation of Gatherings Act, is a negotiation between all the parties on the terms of the protest, including dates, times, routes, number of expected participants and required marshals, etc.
- 66 R2K, established in 2010 to challenge the 'Secrecy Bill', has been at the forefront of defending the right to protest. R2K's close relationship with many of the legal organisations working in the social justice sector has been pivotal in driving the resurgence of protest and criminal work in those organisations. For more information see R2K, <http://www.r2k.org.za/>.
- 67 The coalition is staffed by an attorney and a coordinator, both housed at CALS, guided by a steering committee consisting of FXI, R2K, Lawyers for Human Rights and CALS, and propelled by a broader membership base of organisations working on protest. Currently this broader membership base consists of SERI, Section27, Probono.org, Ndifuna Ukwazi, Equal Education Law Centre, the Centre for Environmental Rights, the Centre for Child Law and the Social Justice Coalition, although the coalition is designed as an inclusive one with a view to growing its membership.
- 68 The number for this hotline is 0800 212 111.
- 69 The hotline is also a tool that is used for data collection to track emerging trends. R2P also runs training on a range of protest-related issues.

A legal analysis in context

The Regulation of Gatherings Act – a hindrance to the right to protest?

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South Africa has seen a groundswell of protests in the past few years. The number of arrests during protest action has likewise increased. In June 2017 the Social Justice Coalition (SJC) challenged the constitutionality of the Regulation of Gatherings Act 205 of 1993 in the Western Cape High Court. This was an appeal from the magistrates' court in which 21 members of the SJC were convicted of contravening the Regulation of Gatherings Act for failing to provide notice. This is the first court challenge to the constitutionality of the Regulation of Gatherings Act. Although the challenge was brought on restricted grounds, it highlights the Regulation of Gatherings Act as a sharp point of controversy. This article will consider the regulatory provisions and the extent to which they restrict the constitutional right to protest, particularly in light of the important role played by protest in South Africa's constitutional democracy.

Protest continues to be a subject of much-heated debate.¹ This is no less the case in legal circles, where the focus is on finding a balance between the right to protest contained in section 17 of the Constitution,² and respecting the other rights in the Bill of Rights. This balance is meant to be embraced in the Regulation of Gatherings Act,³ a piece of legislation intended to give effect to section 17 in more detail. But the Act has been the subject of much criticism for going too far in its regulation because it constrains the rights of those wanting to protest. Protest is a tool of communication for those who lack access to alternative avenues

of dissent. The important role that protest has played in delivering a constitutional democracy must continue to be at the forefront when the Act is analysed. In this vein, the Constitutional Court noted as follows:

So the lessons of our history which inform the right to peaceful assembly and demonstration in the Constitution, are at least twofold. First, they remind us that ours is a 'never again' Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away. Second, they tell us something about the inherent power and value of freedom of assembly and demonstration, as a tool of democracy

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often used by people who do not necessarily have other means of making their democratic rights count. Both these historical considerations emphasise the importance of the right.⁴

The importance of the right to protest in South Africa mirrors the global perspective that the right deserves state protection. Section 17 gives effect to South Africa's international obligations, including the right to peaceful protest, which is protected under Article 21 of the International Covenant on Civil and Political Rights⁵ and Article 11 of the African Charter on Human and Peoples' Rights⁶ – both of which have been ratified by South Africa. But this remains unsettled terrain in South Africa and beyond. In 2011 the Human Rights Council appointed a special rapporteur on the rights to freedom of peaceful assembly and of association, in acknowledgment of the importance of the right to protest and the need to monitor its protection globally.⁷ Current Special Rapporteur Maina Kiai has recently issued a request for an invitation to conduct a country visit to South Africa. This provides a unique opportunity to re-evaluate the South African legal framework for the protection of protests in terms of the Constitution, and to evaluate whether it falls in line with international trends. To that end, this article focuses on the Act's compliance within the national framework.

Regulation for regulation's sake should be avoided, unless it can be shown that the purpose for the regulation and the minutiae of the regulation are justifiably linked in a way that does not substantially erode the right to protest. This article will evaluate some of these minutiae in the context of assessing the legal framework required to facilitate the right to protest. It will do so by providing some background to protest in South Africa, the legal framework for protest in the Constitution

and the Act, and raising some of the potential challenges to the Act.

Protest in South Africa

South Africa has seen a marked increase in the number of protests in the past few years.⁸ The most obvious explanation is that the immense social problems present in South Africa, inherited from apartheid, pose a threat to the social order.⁹ Protest never completely stopped, even in the honeymoon period immediately post-1994, but there was a clear increase in the number of protests in the late 1990s. This has been explained as the effects of an increased neo-liberal economic policy that ignored the realities of poor people, seeing a marked rise in unemployment and poverty.¹⁰ Although commentators have tried to chart a timeline for the increased number of protests, there is no single moment in time when protests visibly increased, nor is there only one reason that explains why protests may have increased.¹¹

This is illustrative of the importance of protest in the make-up of South African society. The role of protest in the anti-apartheid struggle was indisputable as a mechanism for applying pressure on the state. The anti-apartheid strategy involved the use of mass protest to challenge the apartheid government and the social and legal relations that underpinned its existence. Post-apartheid, since 1990, new social movements have emerged, for example the Concerned Citizens Forum, the Treatment Action Campaign (TAC), and the Landless People's Movement. This can be explained by the fact that many of the social movements that played key roles in opposition to apartheid were absorbed into government structures post-1994.¹² More recently, new movements have formed, such as Reclaim the City, the Social Justice Coalition, and Ndifuna Ukwazi. A number of well-publicised protests are attributable to these new and emerging social movements. A recent example is the

series of protests in Sea Point, Cape Town, challenging the sale of the Tafelberg Remedial School Building to a private school.¹³

This sale is taking place despite previous engagements on the use of the property for the development of affordable housing closer to the central business district (CBD). The issues central to various social movements are varied, spanning land, housing, policing, education, sanitation, and economic policy, among others. The upsurge in social movements and protest is symptomatic of the lack of genuine structural change, specifically socio-economic transformation.¹⁴

Increasingly, social movements are formed to target issues related to government politics, including government structures and state corruption.¹⁵ Political protests tend to occur in swells, for example, in and around election times,¹⁶ or before an important parliamentary vote or court case. The most recent example is the Unite Behind Coalition protest that brought together various actors in civil society to pressurise the ANC to vote in favour of the no-confidence vote tabled in Parliament against President Jacob Zuma on 8 August 2017.

The activism employed by social movements, even where it involves protest, has clear strategies and leadership and has some middle-class support. Social movements are therefore distinguishable from grassroots or community-based groups that tend to be more organic and temporary, often without clear leadership or targeted strategies.¹⁷ Habib describes these organic groups as 'a survivalist response of poor and marginalised people who have no alternatives in the face of a retreating state that has refused to meet its socio-economic obligations to its citizens'.¹⁸ These loose groupings are responsible for the bulk of protests that are referred to as 'service delivery protests'. This 'service delivery' descriptor has been described as a misnomer that incorrectly

focuses the protest on services rather than the fact that 'protest often has more to do with citizens attempting to exert their rights to participate and have their voices heard rather than simply demanding "service delivery" as passive recipients'.¹⁹ Bond and Mottiar describe these protests as 'popcorn protests', referring to the phenomenon in which protest action spontaneously flares up temporarily and then disperses soon thereafter.²⁰

Protests are therefore important as the only, or at least primary, means that some groups have of social sanction to hold the state accountable.²¹ Particularly for those who have historically been excluded from mainstream party politics, protest is a tool through which political rights may be reclaimed.²² Without substantial socio-economic reform, including addressing unemployment, the number of protests, and the issues that will be targeted through protest strategies, are likely to continue to increase.

Legal authority for protest in South Africa

The constitutional right to protest

Section 17 of the Constitution effectively enshrines the national right to protest, and distinguishes between three such forms, namely assemblies, demonstrations and pickets. Section 17 reads, 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'

Section 17 has been described as a right that 'vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them'.²³ This was a right hard-fought for in the constitutional negotiations, and its importance must be understood in the context of the previous criminalisation and prohibition of protest under apartheid. The court in *SATAWU v Garvas* said:

The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences following therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.²⁴

Like other rights in the Bill of Rights, section 17 must be balanced against other rights and interests, particularly the right to life,²⁵ dignity,²⁶ freedom and security of the person,²⁷ and property.²⁸ While section 17 is automatically subject to the limitations clause contained in section 36 of the Constitution,²⁹ the construction of the right includes internal qualifiers to the right to protest: in order to be lawful, a protest must be peaceful and unarmed. This has been confirmed by case law such as *Fourways Mall (Pty) Ltd v SACCAWU*,³⁰ and the Constitutional Court case of *SATAWU v Garvas*.³¹ Davis has said that there is no constitutional protection for 'armed assemblies' because of the potential for assemblies to become violent when participants are armed.³² The requirement of 'peaceful' has been described as:

In practice a gathering will be considered non-peaceful if the public and private interests (the public order, persons and

property) are violated or threatened by violent or riotous action to such an extent that the limitation of the right, by prohibiting that particular action would in any case have been justified in terms of section 36.³³

There are differing opinions about what constitutes 'weapons' and is considered 'violence' that violates the requirement for protests to be peaceful and unarmed. This is because it is not sufficient to reduce violence to 'legal categories' without an understanding of violence 'as social construction[s]'.³⁴ The World Health Organization defines violence as:

[t]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation.³⁵

This definition comprehends a broad scope of violence, which includes the use of threats and power. More importantly, by including social deprivation, this definition implies that structural violence also forms part of a wider understanding of the concept.³⁶ Although a more thorough discussion of the differences across definitions of violence falls outside the ambit of this article, it is important to note that a wider definition may be relevant to the proper interpretation of the scope of the right in section 17.

The role of the Regulation of Gatherings Act

The implementation of section 17 is also qualified externally through the Regulation of Gatherings Act. The preamble to the Act emulates some of the language of section 17, stating that:

[E]very person has the right to assemble with other persons and to express his views on any matter freely in public and

to enjoy the protection of the State while doing so; and the exercise of such right shall take place peacefully and with due regard to the rights of others.³⁷

The Act therefore protects not only the right to protest but also the right to state intervention that facilitates the right to protest. The Act is intended to provide the practical guidelines for persons who seek to enjoy the constitutional right to protest, and also sets out the responsibilities of the state in managing protests. The function of the Act is therefore a regulatory one.³⁸

The state facilitation of protests is a marked departure from the Riotous Assemblies Act,³⁹ which previously governed the area of protest. The Riotous Assemblies Act in section 2(1) permitted the Minister of Law and Order (hereafter the Minister) to authorise a magistrate to prohibit a public gathering if, in the opinion of the minister, there was a serious threat to public order.⁴⁰ The Minister was also permitted to prohibit certain persons from attending or addressing public gatherings in defined areas for periods at a time.⁴¹ Protest was considered a severe challenge tantamount to war by the apartheid state.⁴² For this reason many gatherings were banned.

The promulgation of the Regulation of Gatherings Act was a process that began with the Goldstone Commission on the Prevention of Public Violence and Intimidation.⁴³ The commission's mandate was to investigate public violence and make recommendations to prevent public violence, a focus that became ingrained in the operation of the Act.⁴⁴ For instance, the still present definition of 'Minister' in the Act is a reference to the Minister of Law and Order (a name changed to the Minister of Justice post-1994). This may be viewed as a simple example, but it is one that provides a metaphor for the focus in the Act on 'order' rather than 'regulation'. The Goldstone Commission,

besides publishing numerous reports on various types of public violence, produced the draft Act that was promulgated in 1993. This timeline is important for understanding that the Act is the product of a particular context, where a democratic government had not yet been elected. The Act was recommended and passed through Parliament via the same institutions that were part of the machinery to enforce apartheid. This, at least to some extent, taints the authority of the Act, as it casts doubt that it is truly aimed at facilitating the right to protest.

The procedure for lawful protest in the Act

There are three primary components to the Act. The first component involves the provisions that ought to apply prior to a protest taking place. These include the role of the convener (section 2), the notice procedure (section 3), consultations, negotiations and conditions (section 4), how protests can be prohibited (section 5) and the procedures for appeal or review of such prohibition (section 6). The second component concerns conduct during a gathering (section 8) and the powers of the police during a protest (section 9). The third component addresses the post-protest phase, namely liability for damages (section 11) and offences and penalties (section 12).

The terms for protest used in the Act differ from those used in section 17 of 'assembly' and 'picket'. The Act makes use of two terms, namely 'demonstration' (which is used in section 17) and 'gathering'.⁴⁵ The primary distinction in the Act is that a demonstration involves more than one but fewer than 15 persons and does not require prior notice,⁴⁶ while a gathering is an assembly, concourse or procession of more than 15 persons in a public space and does require prior notice.⁴⁷ Neither of the terms is properly defined in the Act, except by the use of additional terms in relation

to gatherings (namely assembly, concourse or procession), which are equally undefined. This definitional confusion is a direct result of the Act's enactment pre-Constitution, and provides grounds for re-evaluation and clarification of terms.

There are various parties that are given specific roles in relation to a lawful protest. The participants mentioned in the Act are the South African Police Service (SAPS), a local authority (ordinarily a municipality), and the convener of the gathering, who is the formal point of contact for the protesting group. These parties are known as the 'golden triangle' and are the primary parties involved in communications related to a gathering.⁴⁸ Chamberlain succinctly describes the process that must be followed prior to a protest:

A convener must send a notification to the municipality of an intended gathering, using a standard form supposed to be available from all municipal offices. Notice must be given at least seven days before the planned gathering. On receipt of the notification, the municipality must, within 24 hours, call the convener to a meeting at which the logistics of the gathering are discussed with the South African Police Services (SAPS) and any other required service providers, such as paramedics.⁴⁹

Many of the problems with implementation involve this organising meeting. This is discussed further under the challenges to the Act below.

Notice must be provided *at least* 48 hours prior to the intended protest in terms of section 3(2), failing which, the requirements for a lawful protest have not been met. There are also other means by which a gathering can be prevented. Section 9 deals with police powers in relation to a gathering. A gathering can be averted under section 9(2) after it has commenced, on the grounds that the gathering poses a danger to

persons or property. The discretion to determine if such grounds exist lies with a member of the SAPS of, or above, the rank of a warrant officer.

Section 5 is concerned with the powers of a responsible officer, defined in section 1(xiv) as 'a person appointed in terms of section 2(4) (a) as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2(4) (b) to be a responsible officer'.⁵⁰ Section 5(2) gives a responsible officer the discretion to allow or disallow a gathering on reasons relating to public safety. This discretion is somewhat constrained, as it requires the responsible officer to form a reasonable belief that it is not possible to amend the conditions of the gathering, or that the SAPS or traffic services will not be able to prevent the gathering from resulting 'in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property', on the basis of information supplied under oath.

Thus, the Act permits substantial discretion to state authorities in their determination of whether a gathering may proceed. Where an authorised officer or court exercises the discretion to prohibit the gathering, those convening a gathering (section 12(1)(a)) and those participating in such a gathering (section 12(1)(e)) are at risk of criminal sanction in terms of the Act. The punishment for these offences could be a fine not exceeding R20 000, or imprisonment not exceeding one year, or both a fine and imprisonment.⁵¹

Beyond the requirement for prior notice, the Act is vague as to what constitutes a lawful protest. It has been criticised for stating the requirements for conduct at a gathering in the negative because it clearly states what conduct is unacceptable, while it implies or requires deduction that the reverse conduct is acceptable.⁵² An example that illustrates this is section 8(7), which prohibits the wearing of a

‘disguise or mask or any other apparel or item which obscures his facial features and prevents his identification’.⁵³ On the other hand, there are other subsections that are clearer in stating desirable conduct, for example, section 8(2), which requires that the convener ensure that all marshals and participants are informed of the conditions attached to that particular protest.⁵⁴

Challenging the Act

The most well-publicised critique of the Act relates to the requirement that notice must be given to the local authority no less than seven days before the planned gathering, and at minimum 48 hours prior to the protest.⁵⁵ Where notice is not given within the stipulated time, the responsible officer has the discretion to prohibit the protest.⁵⁶ The responsible officer enjoys the discretion to prohibit without qualification. In other words, the mere fact that notice was not given timeously is grounds for prohibition. There is no further requirement that the planned protest should lack relevant logistical planning, is likely to affect traffic flows or pose any harm to those who will participate, other persons, or property, before the discretion to prohibit can be invoked. It seems that the responsible officer need not have actually considered the information supplied through the notice before prohibiting the protest.

The core of the SJC’s constitutional challenge to the Act centred on the notice requirement, and specifically the criminalisation of the convener for the failure to provide such notice. This was an appeal from the magistrates’ court in which 21 members of the SJC were convicted of contravention of section 12(1) (a) of the Gatherings Act.⁵⁷ The facts suggest that the SJC planned a demonstration which by definition includes fewer than 15 people and carries no notice requirement. On the facts, it appears that the number fluctuated throughout the period of the protest and eventually exceeded 15, rendering it a gathering

as defined in the Act – specifically a gathering for which notice was not provided. Interestingly, the SJC did not argue that the gathering was spontaneous, which is a defence specifically included in section 12(2).

There was seemingly agreement between the appellants (members of the SJC) and the respondents (the state and the minister of police) that the objectives of providing notice, namely to allow for planning of logistics, including route, number of marshals, water supplies, health services etc., are important. This is obvious from the Heads of Arguments from the legal counsel of both parties.⁵⁸ The point of contention was the necessity to criminalise the convener for failing to provide notice.

The second respondent argues that gatherings in which no notice has been given ‘bear a higher risk of not being peaceful’.⁵⁹ In my view, the state has conflated a peaceful protest with the risk of chaos that may result if logistical planning is lacking. It is logical to assume that a protest where sufficient marshals are present, for example, will generally facilitate a gathering that is better ordered. But a lack of order at a protest does not automatically render the protest itself a non-peaceful one.

If the true purpose of the notice period is to afford the opportunity for negotiation on logistical matters, the criminalisation of the convener for failing to give notice is not directly related to the stated objective. The second respondent argues that criminalisation has a deterrent effect, and failing to criminalise may incentivise deliberate decisions not to provide notice.⁶⁰ One of the considerations under a limitations analysis under section 36 of the Constitution is whether there are any less restrictive means of achieving the purpose behind the limitation of rights.⁶¹ While criminal law is useful in setting social norms, there are other ways of doing this. One such option would be to impose a civil fine. It seems clear, though, that prohibiting a protest for failure

to provide notice goes much further than section 17's internal limitations, in so far as it criminalises the convening or attending of a gathering even where it is peaceful and unarmed.⁶²

The failure to give notice criminalises the convener but it is not clear whether the protest itself is criminalised. Section 12(1)(e) states that a person who 'attends a gathering or demonstration prohibited in terms of this Act' is guilty of an offence with the same punishment applicable to a convener under section 12(1)(a). As a protest for which timeous notice has not been given may be prohibited, the Act does appear to criminalise attending such a gathering. The fact that the Act does not explicitly criminalise the protest is a fiction if anyone attending can be arrested at a prohibited gathering. The SAPS seems to consider a protest without notice to be unlawful.⁶³

The Act has been criticised publicly and widely on the basis of its implementation. The notice requirement in the Act is not intended to require permission from the local authority or SAPS. In fact, section 4 sets out procedures for further negotiation or the setting of conditions that may resolve any logistical issues that would render the protest prohibited. However, civil society organisations have routinely reported that local authorities have interpreted the requirement as affording them the discretion to veto the protest, often without effective negotiation on aspects of planning that could be improved.⁶⁴ While an argument in response is that this is an issue of implementation rather than the legislation itself, as the Act invokes the use of the SAPS and other local authorities, such as municipalities, the machinery imagined by the Act needs to be reconsidered. It should take into account that the SAPS and municipalities lack the capacity

and understanding to implement the Act in a manner that respects the right to protest.⁶⁵ These institutions have failed to transform their institutional culture, which previously had a narrow focus on law and order.⁶⁶ This affects the Act's ability to meet the constitutional obligation on the state to respect the right to protest.

To find that a constitutional right has been unjustifiably limited, it must be determined whether an infringement of a right is justified under the limitations clause.⁶⁷ While this article will not perform the full limitations analysis, there are a few points that must be mentioned. In assessing whether the purpose of the limitation is important,⁶⁸ that the limitation has limited scope,⁶⁹ and that there is a clear correlation between the limitation and its purpose, the limitation must make the least amount of inroad into the right, and serve a compelling purpose.⁷⁰

The Constitutional Court, in considering the ambit of section 17, has said that the fact that gatherings are regulated beyond section 17 is not in itself a limitation of the constitutional right.⁷¹ On the other hand, the court held that compelling reasons would have to be shown to justify an interpretation of the right to assembly that is more restrictive than the provision permits.⁷²

To properly give effect to the constitutional right in section 17, the Act should make it easier for ordinary persons to navigate the procedures for themselves. Challenging a condition imposed on, or the prohibition of a gathering requires an urgent application to be made to a high court for appeal or review (section 6). This will require in almost all cases the assistance of a legal representative. Chamberlain describes the difficulties faced by the Women of Marikana to hold a peaceful protest, succeeding only through the intervention of lawyers.⁷³ If we agree with Alexander's description of the groundswell of protests as a 'rebellion of the poor',⁷⁴ then we have to appreciate the need for a right to

protest where those marginalised from political, social and economic power are able to access the right for themselves. If lawyers are necessary to the effective implementation of the Act, then the legal framework is failing to give effect to the right to protest.

As the analysis in this article shows, there are a number of aspects of the Act that have no clear correlation to the purpose of the limitation, or that go too far in regulating for the sake of law and order, rather than to facilitate protest.

Conclusion

The increase in the number of protests has been accompanied by a clear increase in the number of people arrested at protests.⁷⁵ This is a continuation of the apartheid trend of state resistance to dissent. In a context where protest has become the only means for certain groups to communicate their marginalisation, strong-arm tactics by the SAPS are likely to further reduce trust in the police,⁷⁶ and create the impetus for further protest:

A state that obstructs or prevents peaceful protests, deems them unlawful, or uses force to disperse or deter them, is not only violating the right to freedom of assembly but also creating conditions that invite violence. It is in the state's own interest to ensure that protests can occur, and that they can occur peacefully.⁷⁷

The challenge by the SJC of criminalisation for the failure to give notice under the Act is a test of the appetite of the courts to find that the Act fails to meet constitutional standards. While the judgment is eagerly awaited, there are a number of other aspects of the Act that require scrutiny. The fact that the Act was conceived during apartheid is reason enough to re-consider its definitions, processes and scope.

This article has argued that the Act's regulation beyond section 17's internal limitations goes too far, thereby potentially unjustifiably limiting the

right to protest. The over-regulation described in this article includes the criminalisation of any participant to a prohibited protest, the failure of the legal framework to anticipate implementation problems as a result of the powers given to institutions that have remained untransformed, and the obvious need for lawyers to navigate the procedures. These issues point to the Act's failure to give effect to the constitutional right to protest.



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Notes

- 1 The term 'protest' used in this article is meant as a generic descriptor for group challenges to policy, law or action (state or private).
- 2 Constitution of the Republic of South Africa 1996 (Act 108 of 1996).
- 3 Regulation of Gatherings Act 1993 (Act 205 of 1993).
- 4 *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 63.
- 5 The International Covenant on Civil and Political Rights states at Article 21: 'The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national society or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.'
- 6 The African Charter on Human and Peoples' Rights provides at Article 11 that '[e]very individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to the necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethics, rights and freedom of others.'
- 7 Human Rights Council, Resolution 15/21 (2010), 30 September 2010.
- 8 Patrick Bond and Shauna Mottiar, Movements, protests and a massacre in South Africa, *Journal of Contemporary African Studies*, 31:2, 2013, 283–302, 289. During the early 2000s the number of reported 'social unrest' marches ranged between 55–578 incidents per year. This number increased to 994 in 2010. In 2013, 1 882 social unrest incidents were reported.
- 9 Jo Beall, Stephen Gelb and Shireen Hassim, Fragile stability: state and society in democratic South Africa, *Journal of Southern African Studies*, 31:4, 2005, 681–700, 681.
- 10 Richard Ballard et al., Introduction: from anti-apartheid to post-apartheid social movements, in Richard Ballard, Adam Habib and Imraan Valodia (eds), *Voices of protest: social movements in post-apartheid South Africa*, Pietermaritzburg: University of KwaZulu-Natal Press, 2006, 2.
- 11 'There is no single breakpoint where protest on a vast scale "began" and the repertoire of protest activities including

- cultural connections to pre-1994 anti-apartheid activism are present.' Bond and Mottiar, *Movements, protests and a massacre in South Africa*, 289.
- 12 Ballard, Habib and Valodia, *From anti-apartheid to post-apartheid social movements*, 15.
 - 13 Reclaim the City, *Affordable housing on inner-city state land*, <http://reclaimthecity.org.za/stopthesale-of-tafelberg/> (accessed 6 September 2017).
 - 14 Bond and Mottiar, *Movements, protests and a massacre in South Africa*, 284.
 - 15 Beall, Gelb and Hassim, *Fragile stability*, 288.
 - 16 For example, the protests in the City of Tshwane before the local government elections in 2016. See Karabo Ngoepe, *Infighting as parties finalise election lists*, *News 24*, 2 June 2016, <http://www.news24.com/elections/infighting-as-parties-finalise-election-lists-20160602> (accessed 7 September 2017).
 - 17 Ashwin Desai, *Neoliberalism and resistance in South Africa*, *Monthly Review*, 54:8, 2003, 16–28, 21. Desai uses the phrase 'community movements' as distinguished from political parties, non-governmental organisations, trade unions and other pressure groups.
 - 18 Adam Habib, *South Africa's suspended revolution: hopes and prospects*, Johannesburg: Wits University Press, 2013, 152.
 - 19 Steven Friedman, *People are demanding public service, not service delivery*, *Business Day*, 29 July 2009, <http://www.businessday.co.za/article/Content.aspx?id=77115> (accessed 5 September 2017).
 - 20 Shauna Mottiar and Patrick Bond, *Discontent and social protest in Durban*, *Politikon*, 39:3, 2012, 23.
 - 21 Desai, *Neoliberalism and resistance in South Africa*, 21.
 - 22 J du Pisani, M Broodryk and P Coetzer, *Protest marches in South Africa*, *The Journal of Modern African Studies*, 28:4, 1990, 573, 602.
 - 23 Stu Woolman, *My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion*, in *Garvas v SATAWU (Minister for Safety and Security, Third Party)* 2010 (6) SA 280 (WCC), *South African Journal on Human Rights*, 27, 2011, 348.
 - 24 *SATAWU v Garvas*, para 61.
 - 25 1996 Constitution, section 11.
 - 26 *Ibid.*, section 10.
 - 27 *Ibid.*, section 12.
 - 28 *Ibid.*, section 25.
 - 29 See further discussion in *ibid.*, section 3.
 - 30 *Fourways Mall (Pty) Ltd v SACCAWU* 1999 (3) SA 752 (W).
 - 31 *SATAWU v Garvas* 2013 (1) SA 83 (CC).
 - 32 Dennis Davis, *Assembly*, in Halton Cheadle, Dennis Davis and Nicholas Hayson, *South African constitutional law: the Bill of Rights*, London: Butterworths, 2002, 12:2.
 - 33 I Rautenbach, *Introduction to the Bill of Rights*, in *Bill of Rights compendium*, LexisNexis South Africa/Butterworths (online), 1998, 1A–154.
 - 34 Suren Pillay, *Crime, community and the governance of violence in post-apartheid South Africa*, *Politikon*, 35:2, 2008, 141–158, 142.
 - 35 World Health Organization (WHO), *Definition and typology of violence*, 2008, <http://www.who.int/violenceprevention/approach/definition/en/index.html> (accessed 6 September 2017).
 - 36 Johan Galtung and Tord Höivik, *Structural and direct violence: a note on operationalisation*, *Journal of Peace Research*, 1971, 73, 73–74.
 - 37 Regulation of Gatherings Act, Preamble.
 - 38 The regulations focus on three aspects, namely: '(a) all public open air gatherings; (b) certain activities containing less than 15 people where those activities fall broadly within the scope of protest action; and (c) the presence of persons within 100 metres of court-buildings, Parliament and the Union Building'. Paul Hjul, *Restricting freedom of speech or regulating gatherings?*, *De Jure*, 2013, 451–469, 455.
 - 39 Riotous Assemblies Act 1956 (Act 17 of 1956).
 - 40 *Ibid.*, section 2(1).
 - 41 Du Pisani, Broodryk and Coetzer, *Protest marches in South Africa*, 581.
 - 42 Janine Rauch and David Storey, *The policing of public gatherings and demonstrations in South Africa 1960–1994*, Truth and Reconciliation Commission (TRC), 1998, 3.
 - 43 The Goldstone Commission was authorised by the Prevention of Public Violence and Intimidation Act 1991 (Act 139 of 1991).
 - 44 Hjul, *Restricting freedom of speech or regulating gatherings?*, 458.
 - 45 It is clear that events other than protests are covered by the Act. The regulation of protests by the Act is the particular focus of this article.
 - 46 Section 1 defines a demonstration that 'includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action'.
 - 47 In terms of section 1, 'gathering' means any assembly, concourse or procession of more than 15 persons in or on any public road, as defined in the Road Traffic Act 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air: (a) at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticised, promoted or propagated; or (b) held to form pressure groups, to hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution; including any government, administration or governmental institution.
 - 48 Lisa Chamberlain, *Assessing enabling rights: striking similarities in troubling implementation of the rights to protest and access to information in South Africa*, *AHRLJ*, 2016, 371.
 - 49 *Ibid.*, 371.
 - 50 Regulation of Gatherings Act, section 1.
 - 51 *Ibid.*, section 12(1).
 - 52 Hjul, *Restricting freedom of speech or regulating gatherings?*, 454.
 - 53 Regulation of Gatherings Act, section 8(7).

- 54 Ibid., section 8(2).
- 55 Ibid., section 12(1): Any person who: (a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; shall be guilty of an offence and on conviction liable
- (i) in the case of a contravention referred to in paragraphs (a) to (j), to a fine or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; and
- (ii) in the case of a contravention referred to in paragraph (k), to a fine or to imprisonment for a period not exceeding three years.
- 56 Ibid., section 3(2).
- 57 *State v Phumeza Mlungwana and 20 others* 14/985/2013.
- 58 The accused's Heads of Argument can be found at Social Justice Coalition, Resources, <http://www.sjc.org.za/resources> (accessed 1 August 2017). The author was fortunate to view a copy for the minister of police.
- 59 Heads of Argument for the Minister of Police, para 3.
- 60 Ibid., para 65.3.
- 61 Section 36 of the Constitution reads as follows: (1) The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.
- 62 Iain Currie and Johan de Waal, section 17 assembly, demonstration and petition, *The Bill of Rights handbook*, Cape Town: Juta, 2013, 387: 'Even if we accept the proposition that the State may legitimately restrict demonstrations as of right, the definitions of demonstration and gathering under the RGA not only inhibit the exercise of assembly but criminalise gatherings that pose absolutely no threat at all to order, property or other public goods.'
- 63 Peter Alexander, Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis, *Review of African Political Economy*, 37:123, 2010, 25–40, 26.
- 64 This has been reported at every panel on protest at the Public Interest Law Gathering since 2013 where the author has been in attendance.
- 65 Hjul, Restricting freedom of speech or regulating gatherings?, 452, 463; Sean Tait and Monique Marks, You strike a gathering you strike a rock: current debates in the policing of public order in South Africa, *SACQ*, 38, 2011, 15.
- 66 Monique Marks, *Transforming robocops: changing police in South Africa*, Pietermaritzburg: University of KwaZulu-Natal Press, 2005, 241.
- 67 *Ferreira v Levin* 1996 (1) SA 984 (CC), para 44: '[F]irst an enquiry as to whether there has been an infringement of the s11(1) or 13 guaranteed right; if so, a further enquiry as to whether such infringement is justified under s33(1), the limitation clause.'
- 68 1996 Constitution, section 36(1)(b).
- 69 Ibid., section 36(1)(c).
- 70 Ibid., section 36(1)(d).
- 71 *SATAWU v Garvas*, para 55.
- 72 Ibid., para 52. See Denise Meyersen, *Rights limited*, Cape Town: Juta & Company, 1997, 36–43. A limitation must serve a compelling purpose, and it must be shown that the limitation will actually serve that purpose.
- 73 Chamberlain, Assessing enabling rights, 376.
- 74 Alexander, Rebellion of the poor, 37.
- 75 Patrick Bond, South Africa's bubble meets boiling urban social protest, *Monthly Review*, 62:2, 2011.
- 76 Tait and Marks, You strike a gathering you strike a rock, 20.
- 77 Geneva Academy of International Humanitarian Law and Human Rights, Facilitating peaceful protests, Academy Briefing 5, 2014, 3, <https://www.geneva-academy.ch/joomlatools-files/docman-files/Facilitating%20Peaceful%20Protests%20.pdf> (accessed 28 October 2017).

Failing to respect and fulfil

South African law and the right to protest for children

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Despite the historical and ongoing importance of protest as a vehicle for children to express themselves, current laws fail to protect and enable children's participation in protest. More than two decades after the formal end of apartheid, a child may be subject to criminal processes for convening a peaceful, unarmed protest. This article highlights the importance of the right to protest for children and the obligation on the state to respect, protect and fulfil the right to protest, specifically taking into account children's interests. Through a description of the Mlungwana & Others vs The State and Others case, the article highlights the manner in which the criminalisation of peaceful protest by the Regulation of Gatherings Act fails to take into account the best interests of children and violates the right to protest.

A crucial feature in the history of anti-colonial and anti-apartheid struggles in South Africa was the role of youth-led movements and protests. Organised youth protests against government policies date as far back as the early 1920s.¹ At its height, waves of iconic student protests in the mid-70s highlighted the role of young people in opposing apartheid policies.² By the same token, the repressive response of the state to youth protests, including mass arrests of children, laid bare the violence of the apartheid regime and became the focus of international condemnation.³

More than two decades after the formal end of apartheid, youth-led protests and youth participation in protests continue to play an important role in South Africa's political landscape. Young people have engaged in protest as a vehicle of expression over the past two decades in various contexts and through multiple modes. Whether spontaneous or organised, children use protest as a means to raise awareness and call attention to issues impacting their daily life. These can range from marches in urban centres⁴ and pickets outside legislatures,⁵ to creative forms of demonstration, including art and film.⁶ Indeed, albeit contested, the national imagination has at times been captured by the symbolism of youth-led demonstrations. In 2016 iconic images were shared across the country of young women in school uniforms, arms crossed and held up,

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facing off against school officials and carrying slogans such as 'Fists Up, Fros Out'.⁷ Through protests such as these, young people have given expression to broader sentiments around, among others, racial injustice and economic exclusion. While cautious of romanticisation, it is indisputable that children have shaped South Africa's political landscape through protest in profound ways, and continue to do so.

Despite the historical and current importance of protest as a vehicle for children to express themselves, the legal framework regulating protest fails to sufficiently respect, protect and enable children's participation in protest. Indeed, as will be argued here, the current legal framework unduly limits and chills the exercise of free assembly and political expression through draconian and inflexible measures, which are particularly burdensome for children. Before turning to the national legislation regulating protest, it is necessary to outline the importance of the right to protest for children and how it is recognised in the South African Constitution, as well as in international law.

Importance of protecting the right to protest for children

Freedom of assembly is vital in democratic societies. The right to protest has been described – alongside the right to vote – as a route 'by which ideas can be promoted and debated'.⁸ The Constitutional Court has specifically emphasised the role of freedom of assembly in enhancing the voice of the most vulnerable and powerless:

[T]he right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism

available to them to express their legitimate concerns.⁹

For children, who are a particularly vulnerable group and not legally entitled to vote, protest becomes an even more significant avenue through which to participate and be heard in social and political life. It is thus important to emphasise that constitutional and international law protections of the right to protest and free expression are not the preserve of adults, but also extend to children.¹⁰ Indeed, the paramountcy of the 'best interests of the child' in all matters concerning children is specifically required by the Constitution.¹¹ As explained by the Constitutional Court, the best interests of the child standard must be used to test laws or conduct that affect children.¹² In *S v M*,¹³ Justice Albie Sachs put it such:

The comprehensive and emphatic language of section 28 indicates that **just as law enforcement must always be gender-sensitive, so must it always be child-sensitive**; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children.¹⁴ (Emphasis added)

Consequently, laws or conduct that regulate the right to protest must also be child-sensitive and developed in a manner that protects and advances the interests of children. Furthermore, an important component of the best interests of the child principle is the recognition of the need to protect children's participation rights. In this regard, international law frameworks have highlighted the special obligation on states to ensure that the right of a child to be heard is respected, protected and fulfilled.¹⁵ National legislation has also recognised the right of children to participate in matters concerning them.¹⁶ As Daly notes, the evolution of children's participation rights has developed alongside broadened conceptions of citizenship, where

children are increasingly recognised as ‘the human beings they are in the present’ and not simply as ‘future adults’.¹⁷ In relation to the right to protest, Daly argues that this necessitates that children ‘should be seen as a group with as much interest in protest as adults, but one with particular needs that must be met to allow them to exercise the right’.¹⁸

Despite the robust constitutional and international law protections for children’s right to participation, expression and protest, current laws in South Africa fail to adequately protect and enable the right to protest for children. As explained below, children holding an entirely peaceful protest may – under the current regulatory framework – be subject to criminal sanction.

South African law fails to respect and fulfil the right to protest of children

The state has an obligation to respect, protect, promote and fulfil the exercise of the right to protest by all persons – including children.¹⁹ This entails negative and positive obligations. The current legislative framework fails on both fronts.

The Regulation of Gatherings Act²⁰ regulates the exercise of the right to protest in South Africa. The Act affirms the right of everyone to peaceful assembly and protest, and puts in place procedures and mechanisms that are arguably aimed at facilitating the exercise of the right. These procedures are far from child-friendly. Navigating the difficult and intimidating bureaucracy of, among others, notification procedures²¹ and meetings with officials²² is straining for adults, let alone for children. Yet, there are no specific child-friendly provisions within the Gatherings Act that require officials to take into account the needs and best interests of children.

Moreover, not only does the legislative framework fail to provide for special measures in order

to positively protect the right to protest of children, but it is arguable that the overly broad provisions of the Gatherings Act, which criminalise peaceful protest unreasonably and unjustifiably, infringe the right to protest. In this regard, section 12 of the Gatherings Act creates an array of offences for breaching administrative requirements of the Act. These include, among others, criminal liability for failure to provide notice of a gathering;²³ failure to attend a meeting called by an official to negotiate the terms of a proposed protest;²⁴ and failure to notify relevant officials of the postponement or cancellation of a protest.²⁵ It bears emphasis that criminal liability is not only applicable when harm or the reasonable apprehension of harm has occurred. Rather, the pain of criminal sanction can attach for mere failure to comply with bureaucratic procedures, even where a gathering has taken place peacefully and without incident. This applies to adults and children. Consequently, more than two decades after the formal end of apartheid, a child may be subject to criminal processes for leading an entirely peaceful, unarmed protest.

The constitutionality of criminalising protest for the mere failure to meet administrative requirements is now being tested in South African courts. *Mlungwana & Others vs The State and Others* (case no. A431/15) (‘the SJC10 case’), which was heard by the Cape High Court in June 2017, is one such case. The appellants – members of the Cape Town based Social Justice Coalition (SJC) – convened a protest outside the offices of the mayor of Cape Town in 2013. The protest, which included activists chaining themselves to the railings outside the offices, was a deliberate act of civil disobedience.²⁶ It was common cause that the activists had chosen not to notify relevant officials of the intended protest and had initially intended for the protest to remain under 15 people.²⁷ It was also common cause that the protest remained non-violent.²⁸

Nevertheless, during the course of the assembly the total number of participants increased to more than 15 persons, and consequently the activists were arrested. Ten individuals were ultimately convicted under section 12(1)(a) of the Gatherings Act, which stipulates that it is a criminal offence to convene a protest of more than 15 people without having given prior notice of the intended protest.²⁹ The appellants challenged the constitutionality of the offence, arguing that to the extent that compliance with the notification procedure is sought, less restrictive measures can be applied before resorting to criminalisation. The appellants noted that there are existing sanctions imposed by the Gatherings Act and common law that impose liability when actual harm is caused as a result of protest action. In addition, the appellants pointed to measures such as enhanced civil liability and administrative fines that could be imposed as an alternative to criminalisation.

In submissions made as a friend of the court, Equal Education (EE), a social movement composed primarily of high school learners called 'Equalisers', argued that the impact of criminalisation on children should be considered when testing the constitutionality of the relevant provisions.³⁰ EE emphasised that the offence created by the Act also makes children vulnerable to criminal justice processes when exercising their right to protest. Such a harsh approach, EE submitted, does not adequately take into account the position of children. As submitted by EE:

Understandably, children, such as the Equaliser members of EE, are unlikely to – by themselves – have access to resources and practical means to fulfil the written notice requirement. It is not unsurprising then for gatherings organised by or amongst children to fail to meet the notice requirement. These children face the threat of their conduct being criminalised

under the impugned provision and could be subjected to the criminal justice system.³¹

EE further noted that even though the Child Justice Act³² does aim to establish a more child-sensitive regime for children in conflict with the law, this does not sufficiently counter the chilling effect of peaceful protest action being criminalised.³³ Categorised as a Schedule 2 offence under the Child Justice Act, alongside arson, housebreaking and assault with intent to do grievous bodily harm, a child is susceptible to arrest for contravening section 12(1)(a) of the Gatherings Act. Even though there is a possibility of diversion under the Act, this falls within prosecutorial discretion and is not guaranteed.³⁴ Where a diversion order is made, a register of the child's offence and the diversion order is maintained.³⁵ In cases where diversion is not granted, a criminal record may apply. Thus, even with the protections of the Child Justice Act, a child may be arrested, exposed to criminal justice processes, and obtain a criminal or diversion record for the mere failure to provide notice of a protest. As expressed in EE's submission:

It is striking that in our constitutional democracy, political expression of children in the form of a peaceful gathering can, for mere failure of meeting a procedural requirement, be considered as a criminal offence at all, let alone an offence within the same category of seriousness as arson and housebreaking.³⁶

EE went on to highlight that the harsh penalty of criminalisation for exercising the right to protest sits uncomfortably with international law, which indicates that subjecting children to criminal justice processes should be a measure of last resort.³⁷ The Constitutional Court has confirmed that detention of children should be a measure of last resort³⁸ and has emphasised that children should be protected against avoidable trauma.³⁹ This is not merely academic. Reports of children threatened with arrest and forceful measures

while engaged in peaceful protest action are not uncommon.⁴⁰ Authorised by legislation to use the threat of criminal sanction when seeking to disperse a protest, officials and police who have not been trained otherwise rely on it – even when children are involved.

At the time of writing, judgment had yet to be handed down in the SJC10 case. The matter will ultimately require the attention of the Constitutional Court. The court's pronouncement will have significant implications for the exercise of the right to protest for all persons, including children.

Conclusion

In light of the history of youth protest and struggle in South Africa, it is concerning that the protection of the right to protest for children, as a special interest group with particular needs, has not received considered attention. While the removal of criminal sanctions is an important step, further measures are required to properly protect and fulfil children's exercise of their right to protest. Such measures may include training officials and police in managing protests led by or involving children, so as to be respectful of their autonomy and rights but also protective of their particular needs and vulnerabilities. It may also include revised administrative requirements that are aimed at facilitating the right to protest for children, rather than serving as a barrier. For children's rights advocates, academics and legal practitioners, current challenges to legislation and practices present an important opportunity to highlight the perspective of children and to develop models for child-friendly frameworks, which may better serve our children – the future of our democracy.



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Notes

- 1 South African History Online, Youth and the national liberation struggle, [http://www.sahistory.org.za/topic/youth-](http://www.sahistory.org.za/topic/youth-and-national-liberation-struggle-1894-1994)

[and-national-liberation-struggle-1894-1994](http://www.sahistory.org.za/topic/youth-and-national-liberation-struggle-1894-1994) (accessed 2 September 2017).

- 2 Ibid.
- 3 Ibid.
- 4 Ashraf Hendricks, Philippi High students demand promised new schools, *News24*, 6 March 2017, <http://www.news24.com/SouthAfrica/News/philippi-high-students-demand-promised-new-school-20170306> (accessed 25 September 2017).
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- 6 Equal Education, KZN Education MEC and security officials embarrassed by EE members peacefully calling for scholar transport, Press Statement, 12 July 2017, <https://equaleducation.org.za/2017/07/12/media-statement-kzn-mec-security-officials-embarrassed-call-police-to-disperse-lawful-gathering/> (accessed 25 September 2017).
- 7 Greg Nicholson, Pretoria Girls High: a protest against sacrificed cultures and identities, *Daily Maverick*, 30 August 2016, <https://www.dailymaverick.co.za/article/2016-08-30-pretoria-girls-high-a-protest-against-sacrificed-cultures-and-identities/#.WcyEsmiCy00> (accessed 27 September 2017); *Mail & Guardian*, Sans Souci Girls High School pupils protest against discriminatory code of conduct, 1 September 2016, <https://mg.co.za/article/2016-09-01-sans-souci-girls-high-school-pupils-protest-against-discriminatory-code-of-conduct> (accessed 27 September 2017).
- 8 Aoife Daly, Demonstrating positive obligations: children's rights and peaceful protest in international law, *The George Washington International Law Review*, 45:4, 2013, 763–813, 770.
- 9 *South African Transport and Allied Workers Union and Another v Garvas and Others* (Freedom of Expression Institute as Amicus Curiae) [2012] ZACC 13, para 61.
- 10 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 17 provides that '[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions', while section 16 provides that '[e]veryone has the right to freedom of expression'. section 19(1) protects the freedom of all citizens to 'make political choices', including the right to join or form a political party. These protections extend to all persons, including children. The right of children to freedom of assembly and association is specifically recognised in Office of the High Commissioner (OHCHR), Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989 (UNCRC), Article 15, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 27 September 2017); African Commission on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (African Charter), Article 8, <http://www.achpr.org/instruments/child/> (accessed 17 September 2017); and African Union Commission, African Youth Charter, Article 5, http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf (accessed 28 October 2017). Similarly, the right of children to freedom of expression is specifically recognised under Article

- 13 of the UNCRC; Article 7 of the African Charter, and Article 4 of the African Youth Charter.
- 11 Section 28(2) of the Constitution provides: 'A child's best interests are of paramount importance in every matter concerning the child.' Under international law, Article 3(1) of the United Nations Committee on the Rights of the Child (UNCRC) provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' See also UNCRC, General Comment 14, Right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14 29 May 2013.
- 12 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, para 69.
- 13 *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18.
- 14 *Ibid.*, para 15.
- 15 Article 12 of the UNCRC provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' The UNCRC has explained the evolution of the concept of children's participation rights as follows: 'A widespread practice has emerged in recent years, which has been broadly conceptualized as "participation", although this term itself does not appear in the text of Article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.' See UNCRC, General Comment 12, Right of the child to be heard, CRC/C/GC/12 1 July 2009, para 3, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> (accessed 27 September 2017).
- 16 The Children's Act 2005 (Act 38 of 2005), section 10 provides 'every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'. For more on the right of children to participation, see Lucy Jamieson, Children's rights to participate in social dialogue, in Lucy Jamieson et al. (eds), *South African child gauge 2010/2011*, Cape Town: Children's Institute, University of Cape Town, 30.
- 17 Daly, Demonstrating positive obligations, 775. See also Jeremy Roche, Children: rights, participation and citizenship, *Childhood*, 6:4, 1999, 475.
- 18 *Ibid.*
- 19 Section 7(2) of the Constitution provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
- 20 Regulation of Gatherings Act 1993 (Act 205 of 1993).
- 21 *Ibid.*, section 3 prescribes that a convener of a gathering give notice of an intended gathering within particular timeframes.
- 22 *Ibid.*, section 4 provides for meetings to be held with the convener of a protest, along with relevant officials, to negotiate the conditions under which a protest may be held.
- 23 *Ibid.*, section 12(1)(a).
- 24 *Ibid.*, section 12(1)(b).
- 25 *Ibid.*, section 12(1)(h).
- 26 Social Justice Coalition, The 'SJC10': civil disobedience and challenging apartheid laws, <http://www.sjc.org.za/sjc10> (accessed 25 September 2017).
- 27 *Mlungwana & Others vs The State and Others* (case no. A431/15), Appellant's Heads of Argument, 9–10, https://d3n8a8pro7vnm.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1497432388/2016-12-13_SJC_Heads_%28FINAL%29.pdf?1497432388 (accessed 27 September 2017).
- 28 *Ibid.*, 11.
- 29 Gatherings Act, section 12(1)(a), read together with section 3 and the definition of 'gathering' in section 1.
- 30 *Mlungwana & Others vs The State and Others* (case no. A431/15), Equal Education's Heads of Argument, https://eelawcentre.org.za/wp-content/uploads/2017/04/equal_education_heads-of-argument_final.pdf (accessed 27 September 2017).
- 31 *Ibid.*, para 32.
- 32 Child Justice Act 2008 (Act 75 of 2008).
- 33 *Mlungwana & Others*, Equal Education's Heads of Argument, para 35–56.
- 34 Child Justice Act, section 52(2) provides that a prosecutor may in the case of a Schedule 2 offence indicate that a matter may be diverted. The Constitutional Court has emphasised that 'the mere existence of a prosecutorial discretion creates the spectre of prosecution, which undermines adolescents' rights' (See *Mlungwana & Others*, Equal Education's Heads of Argument, para 94, citing *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, para 76).
- 35 Child Justice Act, section 60. Section 60(3) does provide that '[a]ccess to the register must be limited, as prescribed, to persons or organisations requiring the information for the purposes set out in [section 60(2)]'.
- 36 *Mlungwana & Others*, Equal Education's Heads of Argument, para 41.
- 37 *Ibid.*, para 90. Article 37(b) of the UNCRC provides: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'
- 38 *Mpofu and Others* (CCT 124/11) [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC) (6 June 2013), para 1.
- 39 *S v M* [2007] ZACC 18, para 19.
- 40 *Mlungwana & Others vs The State and Others* (case no. A431/15), Equal Education's Heads of Argument, https://eelawcentre.org.za/wp-content/uploads/2017/04/equal_education_heads-of-argument_final.pdf (accessed 27 September 2017).

Criminal justice responses to protests that impede the right to basic education

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In recent years, schools have borne the brunt of protesters' frustrations with the lack of access to services in South Africa. A 2016 investigative hearing by the South African Human Rights Commission (SAHRC) explored the causes of the protests and examined the failure to prevent the destruction of school property. It found that no one was held accountable for the protest-related damage. This article explores the competing constitutionally protected rights of protest and education. Although the right to protest is central in a democracy, it must be exercised peacefully with minimal disruptions to the right to education. Protest action that causes destruction should be criminally sanctioned; however, action that impedes access to education through threats and intimidation is difficult to deal with in the criminal justice system. This article questions the applicability of section 3(6) of the South African Schools Act, which makes it an offence to stop children attending school, and considers the proposed amendments to the Act in light of these critiques. The article explores possible prosecution relying on the Intimidation Act, and finds that the Act is under constitutional challenge. The article concludes that the focus on prevention as contained in the SAHRC report is not misplaced, given the challenges in holding protesters accountable under criminal law.

In 2016 South Africa experienced a crisis of protest-related actions that affected tens of thousands of schoolgoing children, the majority of whom resided in Limpopo province. In the affected area of Vuwani, children were unable to attend school for several months. A total of 34 schools were badly damaged or

destroyed through acts of arson, leaving 42 000 children out of school.¹ The root cause of this predicament was a long-standing municipal boundary demarcation dispute.²

The impact of protest-related actions was most severe in Vuwani. However, many other schools in Limpopo, even though not physically damaged, were unable to function due to threats against learners and educators. Besides impeding access to education, this protest action impacted school feeding programmes, which provide meals for many needy schoolgoing children. The estimated losses suffered

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by the education sector were assessed to be in the tens of millions of rands.³ Although the scale of the events in Vuwani was unprecedented, protest-related actions negatively affecting schools were not a new phenomenon. In 2014 similar events had taken place in Malamulele, in another area of Limpopo province.

The Vuwani crisis gave rise to a South African Human Rights Commission (SAHRC) national investigative hearing (2016 SAHRC hearing) into the impact of protest-related actions on the right to a basic education in South Africa.⁴ In addition to the problems in Limpopo province, the SAHRC had identified other incidents across the country that were also of concern. Threats to education were widespread across the country, with school principals, learners and educators often being intimidated when protest action was planned or underway.

According to the 2016 SAHRC hearing report, the large majority of protests impacting schools had nothing to do with the education sector and were instead related to border disputes and lack of basic services.⁵ Nevertheless, the interruption of schooling was considered fair game by protesters seeking immediate attention and faster resolution of their grievances.

The 2016 SAHRC hearing found that no individuals or groups had been held accountable for infringing the right to a basic education. However, the report did not delve into why protesters who contravened the criminal law through their protest-related actions were not held criminally liable. The report also did not examine what kinds of offences they might have been charged with, beyond considering in a cursory manner whether section 3 of the South African Schools Act (SASA), which makes it an offence to prevent a child from attending school, could be utilised in protest situations.⁶ This latter question is one to which this article returns below.

It is fairly clear that damage to property through arson or other destructive acts falls into the category of actions that must be dealt with under criminal law. However, other protest-related actions that do not result in physical damage but nevertheless impede or violate access to basic education are more difficult to categorise as actions warranting the attention of the criminal justice system. This article firstly considers why schools are being targeted for protest action. Secondly, in determining what the legal response to this should be, the article examines the legal underpinnings of the competing constitutionally protected rights that are brought into tension when protest action results in children being denied their right to basic education. Thirdly, the article asserts that acts of destruction or damage to property exceed the bounds of constitutionally protected protest and should result in prosecution. The article goes on to explore whether certain protest-related actions that impede access to basic education through threats and intimidation can and should be dealt with in the criminal justice system, and discusses the problems that are likely to be encountered. It concludes that these cases will be difficult to prosecute, and that the 2016 SAHRC investigative hearing's focus on prevention is therefore not entirely misplaced.

Protests related to basic education in South Africa

South Africa has an evocative history of protests related to education. The iconic image of the slain child, Hector Pieteron, being carried in the street during the 1976 Soweto uprising is etched on the national psyche. Following the establishment of a new order and the inclusion of the right to basic education in section 29(1)(a) of the South African Constitution,⁷ there was a period in which citizens waited patiently for their socio-economic rights to be delivered. However, after more than 10 years of the new order, service delivery protests began to erupt.

Higher education was at the centre of the protests that erupted on South African university campuses during 2015 and 2016. While these protests were largely peaceful, there were incidents of damage to and destruction of property, and classes were cancelled for lengthy periods of time.⁸ The protests did at times impede the right of access to education. Using the Twitter hashtag '#FeesMustFall' as their slogan, these protests were directed at addressing the issue of accessing free higher education.⁹ While it is important to acknowledge the impact of these protests on access to higher education, further discussion is beyond the scope of this article, which focuses on basic education. These protests are mentioned here to make the point that they are different from the school-related protests examined in the 2016 SAHRC investigative hearing, because the higher education protests were, unlike the school protests, directly related to accessing higher education for free.

In contrast, the SAHRC found that the majority of protests that affected access to basic education were in actual fact unrelated to education.¹⁰ For example, the protests in Limpopo mentioned above were as a result of residents' disapproval of decisions related to municipal demarcation.¹¹ Reasons for protests at schools in other provinces included service delivery protests relating to lack of access to water, or to demand tarred roads. There are a myriad reasons why there are so many protests every year in South Africa; however, 'poverty', 'structural inequality', and 'inadequate access to basic services' have been identified as the underlying causes of such protest actions.¹² This leads to the question why schools are so often the site of protests that have nothing to do with basic education.

The 2016 SAHRC hearing report found that 'some protest actions deliberately target schools with the intention of drawing attention

to a cause that may be unrelated to basic education'.¹³ Actions that cause disruption of schools appear to be the fastest route to obtain a high-level government response. Public reaction to burning or damaging schools is one of incredulity. To some it is inconceivable why communities cut their own children off from education. The 2016 SAHRC hearing report shed some light on this phenomenon of communities burning or damaging their schools. The report noted that '[s]chools are seen as state property rather than an integral part of the community. The absence of a sense of ownership of schools by the communities in which they are situated makes it easy for schools to become a target'.¹⁴ The 2016 SAHRC hearing report also noted that 'disregard for the right to a basic education may also be based on a view that education is not necessarily a guarantee of a better life'.¹⁵

In 2017 there have been incidents of protests at schools that are, at least tangentially, linked to education issues.¹⁶ These protests have been initiated by parents or school governing bodies and are about the appointment of school principals who do not have the approval of some of the parents in the school.¹⁷ For example, in September 2017 the KwaZulu-Natal High Court ordered police to intervene if parents continued to 'lock down' the premises of Assegai School.¹⁸

It is, in fact, rather surprising that parents have not protested about the state of basic education. The South African public education system is bifurcated, with better schools for the rich and worse schools for the poor.¹⁹ This is a country in which, in an effort to improve standards, non-governmental organisations have litigated on issues such as the existence of mud schools,²⁰ admissions policies that favour wealthy schools,²¹ non-delivery of textbooks,²² failure to deliver school furniture,²³ problems of scholar transport in rural areas,²⁴

provision of teachers,²⁵ and the policy of some schools to offer tuition only in the Afrikaans language.²⁶ Yet these issues have not been the subject of protests on any significant scale.

It is an interesting question whether targeting schools to drive home frustrations about education would be more justifiable than targeting them for other service delivery failures. Such protests would be more rationally connected to their purpose, and would certainly be more understandable. A definitive answer to this question is beyond the scope of this article, which focuses instead on real-life situations where schools get burned, or children and educators are denied access to schools through threats and intimidation because of boundary demarcation or service delivery protests.

Whatever the reasons for schools being the target of protest action unrelated to education, the phenomenon is increasing.²⁷ According to the South African Police Service (SAPS), South Africa experiences about 13 500 protests every year.²⁸ Something needs to be done to ensure that the disadvantages South African children are already experiencing in the basic education system are not compounded by their access to schools being impeded. Before considering the applicability of criminal sanctions, the legal basis of the competing rights will be examined in the next part of the article.

Legal basis of the right to protest

The right to protest is regarded as a major catalyst for much-needed social transformation in South Africa, particularly with respect to the poor and marginalised.²⁹ Besides the constitutional guarantee of the right to protest,³⁰ the right is further elaborated upon in the Regulation of Gatherings Act, addressing matters such as how to convene lawful gatherings, conduct protests, and procedures on provision of notices.³¹

In *SATAWU and Another v Garvas and Others* the Constitutional Court pronounced on the centrality and relevance of the right to safeguarding democracy in South African society, emphasising that:³²

It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms.

The right to protest can be relied upon to advance other human rights.³³ However, the right to protest, like all other rights, is not absolute and must be exercised with due regard to other rights. Organisers of protests should be mindful of ‘the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering’.³⁴

The Constitutional Court noted that ordinary people may use the right to ‘advance human rights and freedoms’ and, furthermore, that it has ‘foundational relevance to the exercise and achievement of all other rights’. At a fundamental level, therefore, the right to protest should ideally not undermine other rights but rather contribute to their realisation. The Constitutional Court has underscored that the cornerstone to the enjoyment of the right to protest is its peaceful exercise, and has indicated that ‘it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection.’³⁵

The right is guaranteed in a number of international and regional human rights

instruments to which South Africa is a state party. Among these are the Universal Declaration of Human Rights (UDHR),³⁶ the International Covenant on Civil and Political Rights (ICCPR),³⁷ and the African Charter on Human and Peoples' Rights (ACHPR).³⁸

In international and regional human rights instruments the right to protest is recognised as a key component of democracy.³⁹ Protest plays a crucial role in ensuring the realisation of economic, social, cultural, civil and political rights.⁴⁰ Through protest, exchange of ideas becomes possible and unity of purpose in pursuit of common goals is promoted.⁴¹

The right to protest is thus central to social cohesion, especially in a society such as South Africa that has a fractured past. The state is under an obligation not to unreasonably curtail the right to protest.

Basic education as a guaranteed right

Education is central to the full development of the individual, and as such is a crucially important right.⁴² The right to education, particularly in the formative years of a person, is considered so critical that international and regional human rights treaties encourage states to ensure that it is free, compulsory and widely accessible.⁴³ In General Comment 13 of the Committee on Economic, Social and Cultural Rights (CESCR), the importance of the right to basic education is explained as 'an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'⁴⁴

The CESCR, in its General Comment 13, also requires states to protect the enjoyment of the right to education by ensuring that third parties do not interfere. States should also take 'positive measures to enable and assist individuals and communities to enjoy the right

to a basic education'.⁴⁵ This is an important international law impetus that holds that the state has a role to play in preventing and responding to interference with the right to education that occurs through protest.

General Comment 13 also provides guidance through the 4A framework: availability, accessibility, acceptability and adaptability. The right to protest, if exercised at schools or in preventing children from attending schools, interferes with the fulfilment of the 4A framework, particularly availability and accessibility. Where there is destruction or damage to schools, the impacts will be broader and will last longer.

The framing of section 29(1)(a) in the Constitution has clearly been influenced by international law, because it places emphasis on the right to basic education as an immediately realisable right. Education is a socio-economic right, and in the South African constitutional scheme such rights are generally progressively realisable. What this means in practice is that when it comes to rights such as housing or healthcare the government cannot be held to an unreasonable standard and be expected to realise these immediately. Progressive realisation requires the government to work consistently towards the fulfilment of rights for all persons, and it must not regress in its task. It must plan and budget in a reasonable manner. The clues in the Constitution to how socio-economic rights are to be delivered are provided in the phrases embedded in the relevant sections, such as 'to be progressively realised' and 'within available resources'.

It is of great significance, then, that section 29(1)(a), which embodies the right of basic education for all, does not contain such qualifying phrases. The subsection was interpreted in the case of *Governing Body of the Juma Masjid Primary School and others v Essay NO & Others*,⁴⁶ where the Constitutional Court pointed out that '[u]nlike some of the other socio-economic rights, this right is immediately realisable. There is

no internal limitation requiring that the right be “progressively realised” within “available resources” and subject to “reasonable legislative measures.” Van der Vyver is of the view that ‘basic education is furthermore a fundamental right that must prevail over other conflicting constitutional rights and freedoms’.⁴⁷ This must be considered within a constitutional framework which the Constitutional Court has repeatedly stressed is non-hierarchical – in other words, no right is placed on a higher plane than others; all are treated alike.⁴⁸ Nevertheless, when rights have to be balanced, one right may prevail over another; judged contextually.

The Constitutional Court also found, in the same case, that children’s best interests must be considered where decisions will affect them. The case concerned a public school that was located on private property. The property owner had decided to sell the land and successfully sought a high court order for eviction of the school from the premises. The Constitutional Court found that the children’s best interests should have been considered. Although the Constitutional Court ultimately allowed the eviction to go ahead, it only did so after requiring meaningful engagement between the parties, and when that failed, the court required a clear plan to be put in place to ensure that all affected learners were transferred to other suitable public schools.

The Constitution guarantees everyone the right to a basic education.⁴⁹ While adult basic education is guaranteed, in reality children are the majority of recipients of basic education. The Constitution also includes, at section 28(2), the right to have children’s best interests considered paramount in all matters that concern them. This brings into play an additional powerful constitutional protection in situations where children are prevented from attending school.⁵⁰

Section 6(3) of SASA places an obligation on parents and guardians to ensure that children attend schools.⁵¹ It is an offence to interfere with children’s attendance at school, although there are no known cases of prosecution for this offence. This section featured prominently in the 2016 SAHRC hearing report as a possible avenue to prosecute those preventing children from attending school. The avenues for the prosecution of offences committed in the context of protest are examined in the next part of this article.

Criminal justice responses to protest action that impedes basic education

The special recognition given to the right to basic education by the Constitution, and the fact that those affected by impediments to education are children, whose best interests must be considered in all matters affecting them, are factors that may tip the scales when weighing the competing rights at play. As mentioned above, the South African constitutional framework is one that values all rights as indivisible and does not envisage a hierarchy of rights. Each case where there are competing rights at play requires those rights to be weighed.

It is not argued here that the right to education, even when coupled with best interest considerations, should always trump the right to protest. Rather, it is submitted that the right to protest can be justifiably limited if it interferes with the right to education. In fact, the law already envisages this – because not all forms of protest are protected. It is only lawful, non-violent protest that enjoys constitutional protection.

In dealing with the question of whether protesters who obstruct the right to education should be prosecuted, South African authorities may want to draw inspiration from the European Court of Human Rights (ECHR), which has addressed the issue of the limits of protest, especially when obstruction or violence may ensue.

According to the ECHR, peaceful assembly does not mean that no obstruction should occur during a demonstration. On the contrary, as a general rule, reasonable obstruction caused by assembly should in fact be protected by the law.⁵² However, the ECHR has also held the view that 'physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom'.⁵³

According to the ECHR, protest action is only protected and guaranteed as long as it is peaceful. The moment the peaceful nature of protest ceases, the protesters can be subjected to prosecution. What would need to be demonstrated to avoid prosecution is that the protester at all times intended to and did remain peaceful. Those individuals who fail to adhere to peaceful intent and action, and who resort to obstruction of basic education would in principle open themselves to potential prosecution.⁵⁴ During protest action, tolerance is expected from authorities as long as the activities are peaceful, and even when some level of damage is caused, authorities should still exercise restraint.⁵⁵

Protest action that affects access to basic education in South Africa sometimes results in serious damage to property, far beyond what may be regarded as 'reasonable' damage that may have been anticipated by the ECHR in its interpretation of the right. In the South African context, damage to property that occurs as a result of violent protest should attract criminal prosecution, applying the common law offences such as malicious damage to property and arson.

Furthermore, protest action in South Africa, even when schools have not been damaged, may also attract liability if it is targeted at keeping schools closed or if it prevents scholars (or teachers) from attending school through threats or intimidation. This is particularly the

case where children's access to education has been impacted for unreasonably long periods of time. Limiting the right to protest so that it does not undermine the right to education for extended periods would be a justifiable limitation, especially considering the principle of considering the best interests of the child.

The 2016 SAHRC hearing report recommends that section 3(6) of SASA, which makes it a crime to prevent children from attending school, be utilised as a basis for prosecution.⁵⁶ The subsection states that parents who fail to ensure that their children attend school are guilty of an offence, and further, that any other person who, without just cause, prevents a learner from attending school, is guilty of an offence. In both cases, the person is liable on conviction to a fine or imprisonment not exceeding six months.

The 2016 SAHRC hearing report led to the Department of Basic Education's proposing an amendment to section 6(3) of SASA. The amendment clause appears in the Education Laws Amendment Bill issued for comment on 13 October 2017.⁵⁷ Clause 2 of the Amendment Bill seeks to amend section 3(6) of SASA to increase the penalty provision from six months to six years in the case where the parent of a learner, or any other person, prevents a learner who is subject to compulsory school attendance from attending school. The Amendment Bill also creates a new statutory offence, which will be inserted as subsection 3(7), criminalising any person who wilfully interrupts or disrupts any school activity, or who wilfully hinders or obstructs any school in the performance of the school's activities, and sets a penalty clause of up to six months' imprisonment. The memorandum supporting the Amendment Bill explains that the amendment 'is necessitated by recent incidents, in several provinces, in which communities, or portions of communities, prevented learners from attending school in an attempt at making a political or other point'.⁵⁸

It is clear, therefore, that the Department of Basic Education is intent on using this as the primary route for the prosecution of protest action that impedes education through threats and intimidation. Some complications are foreseen in taking this route. The original section was clearly aimed at parents who do not send their children to school owing to neglect, poverty, religious belief or other such reason. The section has not been used in the past, and some difficulties are anticipated in using it in the context of violent protest. It is apparent that parents should not be targeted for prosecution if their reason for not sending their children to school is the fear that they or their children may become victims of protest-related violence. It may be more appropriate to prosecute parents who are protesters themselves, who, it might be said, are 'using' interference with their children's schooling as a means to pressure authorities to accede to their demands. However, it may be difficult for the prosecution to prove motive and to distinguish between the different reasons why parents are keeping their children out of school – to protest, or to protect?

Prosecuting other persons, such as protest leaders who are not parents, under the clause that allows for 'any other person' who prevents a learner from attending school, may prove difficult in practice. The reason for this is that the parental responsibility to send children to school is an intervening factor. In other words, it may be difficult to prove that a call by a protest leader to 'stay away' from school was the cause for a child's non-attendance, when an intervening cause is the fact that the parents said, 'You had better stay at home today'. The legislation, even in its current form, is broadly worded to include 'any other person' who prevents children from attending school, but this was probably not intended to draw in third parties as remote as protesters. That is likely the reason why the Department of Basic Education, fuelled by the events of Vuwani and the findings of the 2016

SAHRC hearing report, has opted to broaden the scope of the section in a more express manner by adding the new statutory offence.⁵⁹ The consequences of reading the section so widely is that it might draw other persons, such as striking teachers, into the cross hairs of possible prosecution, which is something to be considered before the amendment is made law. Increasing the penalties for such offences is an empty vessel – there is no penalty until there is a conviction, and for the reasons mentioned above, successful prosecutions appear to have relatively poor prospects. With regard to parents, the increase in penalty is objectionable, because to imprison caregivers is almost always going to run contrary to the best interests of the child, a fact which our Constitutional Court drove home firmly in the case of *S v M (Centre for Child Law as Amicus Curiae)*.⁶⁰

Threats that prevent children (and teachers) from attending school should not be addressed solely through SASA. Direct threats, if identified, could be dealt with under the Intimidation Act.⁶¹ The Intimidation Act provides that any person who, without lawful reason and with intent to compel another person from doing an act or to take or abandon a particular standpoint in any manner and by so doing threatens to kill, assault or injure a person or people, will be guilty of an offence.⁶²

The offence contemplated under the Intimidation Act includes acts, utterances or publications that have the effect (or could reasonably cause the effect) that the affected person (or any other person) fears for their life, personal safety and safety of property or livelihood. Persons convicted under the Intimidation Act are liable to a fine not exceeding R40 000 or to imprisonment not longer than 10 years, or to both such a fine and imprisonment. The Intimidation Act is controversial because it was enacted during the apartheid era and has not been repealed. Furthermore, it was the subject of a legal challenge in *Moyo and Another v Minister of*

Justice and Correctional Services.⁶³ Part of the challenge was that the definition of 'intimidation' was too broad and as such unconstitutional, on the basis that it effectively passes the onus to the accused to show that his or her acts had a lawful reason. In December 2016 the high court rejected the application and, at the time of writing, the matter is on appeal before the Supreme Court of Appeal.

Prosecution of protesters for the crime of intimidation may be justifiable, rational and proportionate where protest actions have resulted in children being kept out of school for long periods through threats or intimidation. However, there may be further hurdles in holding those responsible for such actions accountable under the criminal law. Firstly, it may be difficult to identify who should be charged with intimidation. Secondly, it may be difficult to prove that the threats actually amount to intimidation, especially as education does not amount to a 'livelihood' as required by the definition of intimidation, which falls short of threats to personal safety or property. The word 'livelihood' is a shorthand for protecting workers whose jobs may be threatened by protest or strike, but it does not expressly extend to school attendance. Finally, pursuing successful prosecutions, already difficult, may become more so if the constitutional challenge to the Intimidation Act is successful on appeal.

The 2016 SAHRC hearing found that '[m]any situations that escalate to the point where schools are targeted by protesters could be avoided'. The report recommends more prevention – in particular through engagement with communities that are expressing frustrations. Given the difficulties that may arise in prosecuting protesters who impede the right to education, government should heed this call to ensure prevention rather than waiting until during or after the protest. Furthermore, it is not only the Department of Basic Education

that should be undertaking preventive action. Departments responsible for service delivery problems or demarcation disputes need to be more proactive and more communicative, and strive to engage meaningfully with communities to stave off protest. Engagement should also be targeted at building a sense of community ownership of public schools, which the 2016 SAHRC hearing report found to be lacking.

Conclusion

South Africa has a repressive history, which in itself is a good reason to be wary about restrictions of the right to protest. In the current environment of inequality, and the inadequacies in the delivery of services for the poor, it is clear that protest remains an important catalytic instrument for marginalised people. The Constitutional Court, while upholding the right and recognising its importance in giving a voice to the powerless and as a gateway to achieving other rights, has clearly stated that protest has to be exercised lawfully and must not negatively affect the rights of others.

The article has described protests that have affected schools in recent years. Although they are education-related in that they affect schooling, the article has shown that the vast majority of such protests are not about the right to education. Rather, schools are a site of struggle for other issues that communities are frustrated about, such as border demarcation and service delivery failures. The findings of the 2016 SAHRC hearing show that protesters are locating their battles in and around schools because schools are instrumentalised for the strategic advantage that such actions bring – namely swift, high-level attention from government. Protesters and even broader communities do not feel a sense of ownership over the public schools in their area, rather, they are seen merely as government property and therefore appear to be legitimate targets.

The right to basic education is a crucially important right, which also provides a gateway to the fulfilment of other rights. The article argues that, coupled with the best interests of the child principle, the balancing of the right to protest on the one side and the right of children to attend school on the other means that the right to protest can be outweighed by the right to education where it impedes the latter, particularly over an extended period of time.

Although the authors acknowledge that the state should not be repressive in relation to protest action, it is quite clear that there are a number of protest-related actions that impact the right to education to a disproportionate degree. Acts of violence and arson that result in damage or destruction are criminal acts, which go beyond constitutional protection of the right to protest. The normal common law crimes clearly apply in such cases.

Far more difficult to bring within the criminal law ambit are threats that prevent children (and teachers) from attending school, sometimes for several months. The authors are of the view that the use of section 3(6) of SASA is a problematic avenue for criminal accountability, because it raises the concern that, ultimately, parents (who may or may not be involved in the protests) decide if their children should attend school – and where parents can raise a defence that their reason for not sending children to school was as a result of fear for their safety, criminal charges are unlikely to stick. The proposed amendments to SASA do not really provide answers to these problems of intention and causality. Although the amendments would expressly apply to third persons who interfere with the right to education, the causation problem remains because parents make the decision about whether to send their children to school. Increased penalties have no effect if there are few or no prosecutions, and when it comes to prosecuting parents,

imprisonment of caregivers will simply raise another constitutionally untenable situation. The Intimidation Act, which at first glance appears to hold promise in responding to the problems, is in fact controversial and is, at the time of writing, under constitutional challenge.

Holding people who prevent children from realising their right to education through unlawful protest-related actions criminally liable is likely to remain difficult to achieve. The rumble of protest is a smoke signal indicating that trouble may be coming. To ensure that education is allowed to proceed unhindered, government should heed the 2016 SAHRC report's recommendations, and prevent unlawful protest through engagement at the earliest opportunity.



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Notes

- 1 Media reports stated that the figure was 59 000 affected learners, while the Limpopo Provincial Department of Education reported to the 2016 South African Human Rights Commission (SAHRC) hearing that 42 000 learners were unable to attend school. See Poloko Tau, 60 000 pupils affected as schools continue to be set alight in Vuwani, *City Press*, 6 May 2016, <http://city-press.news24.com/News/60-000-pupils-affected-as-schools-continue-to-be-set-alight-in-vuwani-20160506> (accessed 28 October 2017); Greg Nicholson, Vuwani: after the ashes there is hope, *Daily Maverick*, 5 May 2017, <https://www.dailymaverick.co.za/article/2017-05-05-vuwani-after-the-ashes-theres-hope/#.WfVXSVuCzX4> (accessed 28 October 2017); Kate Paterson and Tina Power (section 27), Report: A journey through the Vuwani schools' ashes, *Daily Maverick*, 11 May 2016, <https://www.dailymaverick.co.za/article/2016-05-11-report-raking-through-the-vuwani-schools-ashes/#.WfVYhFuCzX4> (accessed 28 October 2017); Parliamentary Monitoring Group (PMG), Vuwani school destruction: update by Department of Basic Education, 24 May 2016, <https://pmg.org.za/committee-meeting/22594/> (accessed 28 October 2017); Bekezela Phakathi, Pupils return to school in Vuwani as protests subside, *Business Day*, 31 August 2016, <https://www.businesslive.co.za/bd/national/education/2016-08-31-pupils-return-to-school-in-vuwani-as-protests-subside/> (accessed 28 October 2017).
- 2 For a full explanation of the issues relating to municipal demarcation, see Southern African Legal Information Institute (SALII), *Masia Traditional Authority and others v Municipal Demarcation Board and Others ZALMPPHC* (29 April 2016), <http://www.saflii.org/za/cases/ZALMPPHC/2016/1.html> (accessed 29 August 2017). See also Lufuno Norman Makungo, Vuwani protest: Blaming the victim & ignoring the causes, *Ujuh*, 11 May 2016, <https://www.ujuh.co.za/>

- vuwani-protest-blaming-the-victims-ignoring-the-causes/ (accessed 28 October 2017); Piet Rampedi, Tribalism is the root cause of Vuwani and Malamulele uprisings and President Jacob Zuma fuelled it, writes Dr Thivhilaeli Simon Nedohe, *African Times*, 12 May 2016, <https://www.africantimesnews.co.za/2016/05/12/tribalism-is-the-root-cause-of-vuwani-and-malamulele-uprisings-and-president-jacob-zuma-fuelled-it-writes-dr-thivhilaeli-simon-nedohe/> (accessed 28 October 2017).
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 - 4 The SAHRC is empowered to hold such meetings by sections 13 and 15 of the South African Human Rights Commission Act 2013 (Act 40 of 2013).
 - 5 SAHRC, Report on national investigative hearing into the impact of protest-related action on the right to a basic education in South Africa, 37, <https://www.sahrc.org.za/home/21/files/WEBSITE%20Impact%20of%20protest%20on%20edu.pdf> (accessed 29 August 2017).
 - 6 South African Schools Act 1996 (Act 84 of 1996, SASA).
 - 7 Constitution of the Republic of South Africa 1996 (Act 108 of 1996).
 - 8 Kalisha Naicker, Students troubled as 'fees must fall' continues, *News24*, 4 October 2016, <http://www.news24.com/SouthAfrica/Local/Hillcrest-Fever/students-troubled-as-fees-must-fall-continues-20161003> (accessed 28 October 2017); Steven Tau and Rorisang Kgosana, Live report: Wits student protest turns violent, *The Citizen*, 11 October 2016, <https://citizen.co.za/news/south-africa/1310641/live-report-most-entrances-to-wits-reopened/> (accessed 28 October 2017); Jane Duncan, Opinion: Why student protests in SA have turned violent, *Eyewitness News*, 30 May 2016, <http://ewn.co.za/2016/09/30/OPINION-Why-student-protests-in-South-Africa-have-turned-violent> (accessed 28 October 2017); Ashleigh Furlong, Thousands in fees must fall march on Parliament, *GroundUp*, 26 October 2016, <https://www.groundup.org.za/article/fees-must-fall-almost-ends-without-incident-violence-breaks-out/> (accessed 28 October 2017); Greg Nicholson, #FeesMustFall: another day of violence as the state kicks issues forward, *Daily Maverick*, 12 October 2016, <https://www.dailymaverick.co.za/article/2016-10-12-feesmustfall-another-day-of-violence-as-the-state-kicks-issues-forward/#.WfVr-FuCzX4> (accessed 28 October 2017).
 - 9 See Olwethu Mhaga, Universal education: 'a dream deferred'?, *Pretoria Student Law Review*, 2016, 10; Alan Straton, A short history of the #FeesMustFall protest action, *Mype News*, 21 October 2015, <http://mype.co.za/new/short-history-of-the-feesmustfall-protest-action-2/55011/2015/10> (accessed 28 October 2017).
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 - 11 *Masia Traditional Authority and others v Municipal Demarcation Board and others* ZALMPPHC (29 April 2016).
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 - 21 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC).
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 - 23 *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).
 - 24 *Tripartite Steering Committee and Another v Minister of Basic Education and Others* (1830/2015) [2015] 3 All SA 718 (ECG).
 - 25 *The Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG); *Linkside and Others v Minister of Basic Education and Others* (3844/2013) [2015] ZAECGHC.
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 - 29 SAHRC, Report on national investigative hearing, 5.
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 - 31 Regulation of Gatherings Act 1993 (Act 203 of 1993).
 - 32 *SATAWU and Another v Garvas and Others* 2012 (ZACC) 13, 61.
 - 33 *Ibid.*
 - 34 *Ibid.*, 68.
 - 35 *Ibid.*, 53.
 - 36 Universal Declaration of Human Rights (UDHR), Articles 19 and 20.

- 37 International Covenant on Civil and Political Rights, Articles 19(2), 21 and 22.
- 38 African Charter on Human and Peoples' Rights (ACHPR), Articles 9, 10 and 11.
- 39 Joint Report of Special Rapporteurs, Practical recommendations for the proper management of assemblies A/HRC/31/66, 2016 at [5]. See also Pierre de Vos, A problematic limitation on the right to freedom of assembly, Constitutionally Speaking blog, 6 October 2011, <http://constitutionallyspeaking.co.za/a-problematic-limitation-on-the-right-to-freedom-of-assembly/> (accessed 11 July 2016). De Vos notes with reference to South Africa that '[t]he right "peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions" was also enshrined in section 17 of South Africa's 1996 Constitution. This right is pivotal for the proper functioning of a democracy. If political organisations, civil society groups and members of the public are not free to demonstrate and to take part in protest marches, the participatory aspect of our democracy would be fatally weakened.'
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- 42 UDHR, Article 26(2).
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- 45 General Comment No 13, para 47.
- 46 *Governing Body of the Juma Masjid Primary School and Others v Essay NO & Others* 2011(8) BCLR 761 (CC) para 37.
- 47 *Ibid.*, para 30.
- 48 See, for example, *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC), in which the Constitutional Court made it clear that although a child's best interests are of paramount consideration, this does not create a hierarchy of rights. It simply means that the right weighs heavily where rights are in tension with one another.
- 49 1996 Constitution, section 21(1)(a).
- 50 In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), while the Constitutional Court found that the paramouncy principle is not a trump, it nevertheless endorsed the best interests principle as a powerful consideration in the weighing of competing interests.
- 51 SASA, section 3.
- 52 See *Karpyuk and Others v Ukraine* ECHR judgment of 6 October 2015, para 207.
- 53 See *Kudrevicius and Others v Lithuania* ECHR judgment of 15 October 2015, para 93–98.
- 54 *Ziliberberg v. Moldova* ECHR decision of 4 May 2004, para 2.
- 55 *Gün and others v Turkey* ECHR judgment of 18 June 2013, para 74.
- 56 SAHRC, Report on national investigative hearing, 9.
- 57 Published in Government Gazette 41178/1101 on 13 October 2017.
- 58 Para 2.2 of the Memorandum published in the Government Gazette 41178/1101 on 13 October 2017.
- 59 Clause 2(b) of the Amendment Bill, which creates a new subsection 3(7) to be inserted into SASA.
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Using access to information to ensure the right to peaceful protest

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The Regulation of Gatherings Act (RGA) places strict guidelines on how to exercise the right to protest, with particular emphasis on the submission of a notice of gathering to the responsible person within a municipality in terms of sections 2(4) and 3 of the Act. However, municipalities do not proactively make the notice of gathering templates available for public use (or may not have these at all), and often do not publicise the details of the designated responsible person. To test municipalities' compliance with the RGA, the Legal Resources Centre (LRC) enlisted the help of the South African History Archive (SAHA) to submit a series of Promotion of Access to Information Act (PAIA) requests to every municipality in South Africa. PAIA requests were also submitted to the South African Police Service (SAPS) for records relating to public order policing. The initiative aimed to provide these templates and related documents to interested parties as an open source resource on the protestinfo.org.za website. The results of these efforts show that compliance with the RGA is uneven. This article explores the flaws in the regulatory environment that have led to this level of apathy within government, despite the crucial role of the right to protest and the right of access to information as enabling rights in our constitutional democracy. An analysis of the full PAIA request dataset shows the extent of government's resistance to facilitating these enabling rights, and provides insights into remedial interventions. The article concludes with a series of recommendations, which centre on statutory reforms to the RGA and PAIA to ensure appropriate sanction for non-compliance by government, proactive disclosure of relevant information, and emergency provisions allowing curtailed procedural requirements. The intention of the proposed amendments is to minimise the possibility that these fundamental, enabling rights might be frustrated.

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'If your only tool is a hammer then every problem looks like a nail' – Abraham Maslow

The 'hammer' of the apartheid regime was secrecy and brute force, applied liberally to every uprising against the state. The use of this 'hammer' was enabled through laws such as the notorious Riotous Assemblies Act 17 of

1956,¹ which has yet to be repealed.² Despite the existence of suppressive laws, protest was used very effectively as a liberation tool during the apartheid era.³ Today, protest is not only a tool for addressing ongoing social struggles but also an empowering constitutional right that is used for a variety of causes, such as political engagement, demands for free education, and simply as a form of political expression.⁴ It has therefore been referred to as an enabling right.⁵ It is not the only one; for example, the right of access to information is another enabling right.⁶ An implication of recognising these enabling rights in the Constitution is that people in South Africa are empowered to pursue fundamental and socio-economic rights through participation in an active citizenry. In other words, those political rights are there to enable people to demand the realisation of other rights.

What happens, though, in a situation where the right to protest is heavily dependent on being sufficiently enabled by the state, as is required by section 7(2) of the Constitution?⁷ The Regulation of Gatherings Act 205 of 1993 (RGA) imposes strict procedural requirements on how to exercise the right to protest. Emphasis is placed on the submission of a notice of gathering in terms of section 3(2) of the RGA to the responsible officer in the jurisdiction of the municipality in which a gathering is planned.⁸ Fulfilling this requirement is predicated on being able to access the information necessary to enable one to do so. Unfortunately, this information – the notice templates and the details of the responsible officers – is not proactively made available by municipalities, which results in protesters' having to struggle to obtain the necessary information.⁹ By not making the information accessible to the public, the state is arguably *de facto* limiting the right to protest.

Where a protest does go ahead, protesters should be subject to reasonable and

proportionate policing responses, which take cognisance of the constitutional legitimacy of this form of political expression.¹⁰ Unfortunately this has not been the case, as protests that are viewed by the South African Police Service's (SAPS) public order policing (POP) unit as disruptive or involving violent elements, are often met with heavy-handed dispersal techniques.¹¹ Furthermore, municipal metropolitan police departments have become increasingly involved in crowd management and dispersal functions during protests, leading to questions about the lawfulness of the metropolitan police's involvement in policing protest, and the appropriateness of their training. There are no statutory or regulatory provisions that allow for the metropolitan police to be involved in public order policing beyond an initial, ancillary role. Despite this fact, the metropolitan police have become increasingly involved in actual public order policing.¹²

In addition, little is known about the make and model of crowd control weapons used by the SAPS POP, or about the training manuals that determine how the POP use crowd control weapons in assembly management situations.¹³ This information is important, because depending on the type and calibre of rounds used, severe injury can be caused. Consequently, protesters cannot anticipate the likely response when protests turn violent, and are unable to hold the police to their own operational standards.

Given that the state has not proactively provided the kinds of important information outlined above, it could be argued that our constitutional democracy has inherited the 'hammer' of secrecy and force. In light of this perceived culture of police abuse of power, the Legal Resources Centre sought to interrogate the extent of the state's fulfilment of its constitutional obligation to respect, protect and promote the rights contained in section 17

of the Constitution. To this end it approached the South African History Archive to assist with requests for information, to be submitted under the Promotion of Access to Information Act 2 of 2000 (PAIA). PAIA requests were submitted in two phases, during the latter half of 2016 and the first quarter of 2017.¹⁴

In the first phase, PAIA requests were submitted to the SAPS and to eight metropolitan municipalities (metros). Requests that were submitted to the SAPS related primarily to the POP unit's equipment, training and standard operating procedures. Requests submitted to the metros focused on the increasing presence of the various metropolitan police departments in crowd management operations, as mentioned above, and sought to explore whether they were lawfully authorised to participate in crowd management operations beyond ancillary support, based on the provisions contained in the RGA and National Instruction 4 of 2014.¹⁵ Phase one requests therefore sought information about the existence of regulations that allowed metro police departments to engage in public order policing, and about the kind of equipment they used and the training they received.

In the second phase, PAIA requests were submitted to every municipality in South Africa where an information officer's contact details could be found. For a protest to be legally convened in South Africa, the RGA requires the convener of the gathering to give written notice to the relevant responsible officer.¹⁶ Many municipalities require that this notice be provided via a template form, yet do not proactively make the templates available for public use. In practice, the convener of a protest must often jump through hoops to obtain a template, ascertain what information is required by the municipality in question, and find the details of the responsible officer. While the RGA does not require the completion

of a specific form, expediency and good relationships with the responsible officer are improved by providing notice via the template, if one exists. The phase two PAIA requests therefore sought the contact details of the responsible officers and templates for notice in order to provide as many of these as possible as an open source resource on the protestinfo.org.za website for use by members of the public wanting to convene a gathering or protest.

The state's response to these requests was generally underwhelming and indicative of non-compliance with either or both the RGA and PAIA. There is a correlation between people's ability to access the information necessary to comply with the procedure for lawful protest, and their realisation of the right to protest itself. Without access to information enabling the right to peaceful protest, the promise of protest as a means to catalyse the realisation of social justice is frustrated.

Given these considerations, this article explores the flaws in the regulatory environment that have allowed this level of apathy to exist within government, despite the crucial role of the right to protest and the right of access to information as enabling rights in our constitutional democracy. An analysis of the full PAIA request dataset shows the extent of government's resistance to facilitating these enabling rights, and provides insights into remedial interventions. This article contains a series of recommendations, drawn from practical experience and centred on statutory reforms to the RGA (specifically) and PAIA (incidentally). These proposed reforms are geared to ensuring appropriate sanction for non-compliance by government and holders of the rights so as to provide measures to enable proactive disclosure of relevant information and emergency provisions. The proposed reforms would also create a more streamlined procedure, and

minimise the possibility that these fundamental, enabling rights might be frustrated.

Protest and access to information as enabling rights

The right to peaceful protest and the right of access to information are important enabling rights in South Africa's constitutional democracy. Protest provides politically marginalised people with a means to express their dissatisfaction and apply pressure on governments to respond to their concerns. This is well demonstrated by South Africa's struggle against apartheid, where mass mobilisation was a crucial element in the matrix of forces that led to the realisation of democracy and the protection of fundamental rights through the Bill of Rights.

Peaceful assembly, demonstration, picketing, and the presentation of petitions are viewed by many in South Africa today as the most readily accessible means to ensure an accountable and responsive government during inter-election periods.¹⁷ This is due to the fact that section 17 of the Constitution guarantees ordinary people the right to protest, and enables them to communicate their dissatisfaction to the public and to apply collective pressure on government to provide more immediate access to fundamental rights.¹⁸

The enabling potential of the various rights contained in section 17 is explicitly recognised by the Constitutional Court in *South African Transport and Allied Workers' Union and Another v Garvas and Others*.¹⁹ The court was called upon to determine the constitutionality of section 11(2) of the RGA, which imposes liability on the conveners of a gathering where reasonably foreseeable damage to or destruction of property is not adequately prevented. The majority per Chief Justice Mogoeng Mogoeng held that 'in assessing the nature and importance of the right [to protest], we cannot ... ignore its foundational relevance to the exercise and achievement of all

other rights'.²⁰ These sentiments were echoed by the minority per Justice Chris Jafta, who held that '[it] is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery'.²¹

Positioning the right to protest at the core of our democracy and the realisation of other rights in the Bill of Rights creates a strong presumption against unwarranted derogation, and provides a strong impetus on the state to actively facilitate peaceful protest.²² Government's regulation of protest and levels of assistance to potential protesters or conveners must therefore be judged in this light.

The RGA sets out the requirements for lawful protest. These requirements include the submission of a notice of gathering in terms of section 3 of the Act to the responsible officer, who is designated under section 2(4) (a). Even though section 3 does not require that the notice be placed on a specific form, in practice municipalities frequently require that these notices be lodged on their own template. Municipalities are therefore arguably acting unlawfully and unconstitutionally, as this requirement is neither justified in terms of a law of general application nor defended under section 36 of the Constitution. In the absence of access to information about how and where to give notice, and details of who the responsible officer is, potential protesters find it difficult to comply with these requirements. *Tsoaeli and Others v S (Bophelo House)* held that the conveners of gatherings bear the responsibility of notifying the local authority.²³ The fact that this information is not made proactively and easily accessible, hampers conveners' ability to exercise their constitutional rights within the parameters of the current legal framework.

The Constitutional Court, in *Brümmer v Minister for Social Development and Others*, held that

‘access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights’.²⁴ Without access to the information that can enable lawful protest, further constitutional rights, including the right to bodily integrity and the right to life, are in turn imperilled. The provision of notice by the conveners of a protest serves several purposes, but mainly facilitates a response by organs of state. The post-notice meetings, which may be called under section 4(2)(b) of the RGA, help ensure that the state responds to the protest action in an appropriate manner. This ranges from ensuring adequate traffic control to a sufficient police presence. Where protesters are unable to provide notice, there is a greater likelihood that they will face a state response that is ill-considered or fails to implement measures such as traffic control, meant to ensure that the disruption does not cause undue harm.²⁵

The right of access to information held by the state, as enshrined in section 32(1)(a) of the Constitution, must therefore be treated as equally crucial to the full realisation of rights in the Bill of Rights, as is the right to protest. Unfortunately, evidence gathered through the PAIA requests indicates a complete disregard

by the state of the role of easily accessible information in enabling and regulating peaceful protest.

The PAIA requests²⁶

The PAIA requests were submitted in two phases, and the results of these requests are presented below in tables 1 and 2. Table 1 shows the number of initial requests that were submitted (35 in the initial phase, and 202 in the follow-up phase). The remaining columns set out the outcomes of these requests. Table 2 follows the same format, but depicts the results of internal appeals that were lodged in response to the outcomes from Table 1. Overall, the data presented in the tables show poor compliance with the statutory requirements of PAIA, which not only has a negative direct impact on the right to protest but also has an ancillary impact on the right of access to information. The nuances of these results are discussed in further detail below.

Understanding the PAIA request statistics

A striking feature of the outcome of the PAIA requests submitted as part of this project was

Table 1: Requests submitted and their results

	No. of requests submitted	No. of transfers in full to more than one body	Requests denied (excluding deemed refusals)	Requests denied through deemed refusals	No. requests access granted in full	No. requests access granted in part
Phase 1	35	0	8	9	12	6
Phase 2	202	27	1	128	4	42

Table 2: Internal appeals lodged and their results

	No. of internal appeals lodged	No. of transfers in full to more than one body	No. of confirmed decisions	No. of substituted new decisions for full or part release	No. of deemed refusals of appeals
Phase 1	12	0	1	2	9
Phase 2	135	6	1	15	113

the number of deemed refusals, both at the initial stage and at the appeal stage. A deemed refusal occurs when a requestee body does not respond to a PAIA request within the statutory time frame of 30 days.²⁷ Deemed refusals were recorded in both phase one and phase two of the request processes, and these findings are consistent with general trends in PAIA request statistics, as highlighted yearly by the Access to Information Network in its shadow reports.²⁸ The Access to Information Network's Shadow Report for 2017 indicates that this trend continues, particularly among municipalities, with only 171 of 216 requests being responded to within the timeframe set out in the statute.²⁹ This suggests that the right of access to information is not being effectively facilitated by municipalities, likely owing to inadequate levels of training or capacity in the lower spheres of government responsible for enabling the right of access to information.³⁰

Where responses were received, they were often inadequate. In some cases, these responses were so inadequate that they resulted in internal appeals being lodged. An internal appeal is a process set out in PAIA, in terms of which a requester can submit an appeal against the decision or deemed decision of the information officer of certain state requestee bodies.³¹ The political head of that body (for example, the mayor or the Speaker in the case of a municipality) then reviews the decision of the information officer, who is the administrative head of the body, and, in the case of a municipality, its municipal manager. The relevant authority can either confirm or reverse the decision of the information officer. In cases where the decision is reversed, the relevant authority must indicate whether the new decision either grants or denies access, with reasons for denial based on provisions in PAIA.³²

Responses received under phase one of the project were often contradictory. In some

instances, one municipality would deny access to the records by relying on the mandatory protection of safety of individuals and the protection of property,³³ whereas another municipality would release the same records. For example, our phase one requests to the Ekurhuleni Metropolitan Municipality and the City of Tshwane Metropolitan Municipality (COT) were refused, relying on the justification that their release would endanger the public. On the other hand, the City of Cape Town (COCT), and the City of Johannesburg (COJ) metropolitan municipalities as well as the SAPS, all released the records without any reservation. When this inconsistency was pointed out to the COT on internal appeal it revised its original decision, and released the requested records.

The requests for training manuals revealed that some metro police were receiving formal training in public order policing from the SAPS. None of the released records showed authorisation for this training in terms of any statutory or regulatory provisions. This implies that the metro police are receiving training from the SAPS to act beyond their legislated purview, as metro police are only mandated by National Instruction 4 to be first responders to a spontaneous protest. While we recognise that the POP's resources may be limited, which circumscribes its ability to respond to all spontaneous protests, there ought to be a legislative or regulatory provision guiding interventions by metro police at gatherings. Without this mandate, there is no way to guide expectations as to the extent of involvement of metro police officers in policing gatherings. This is critical, as National Instruction 4 does not sanction metro police to use force at gatherings and assemblies, yet they possess and carry crowd control weapons.³⁴

Even though PAIA does not expressly require record creation, only decisions on access to existing records, phase one saw several useful documents being created by requestee bodies

in response to our requests. For example, the SAPS created a spreadsheet containing all the authorised members' contact details throughout the country.³⁵ This is an incredibly useful tool for potential protest conveners and the provision of this information is in keeping with the spirit of PAIA, which requires an open and transparent approach to the management of state affairs. Another example was the COJ's creation of records that detail the make and model of the weapons used by the Johannesburg Metropolitan Police Department, which allows experts to analyse the type of weapons being used to police protests, and potentially challenge their use should they lead to disproportionate harm.³⁶ The fact that these requestee bodies went the extra mile in facilitating access to information is commendable and should be an example of how to be proactive and facilitate a culture of transparency.

Phase two was extremely laborious and entailed SAHA's Freedom of Information Programme (FOIP) team manually sourcing the contact details of information officers for almost all of the municipalities in the country. This was owing to the fact that only a handful of municipalities have complied with the statutory requirement to create a PAIA Manual, which contains (among other things) the contact details of the information officer for the public body, and to make this manual accessible from a website.³⁷ This laborious activity did, however, have a positive spin-off: once details were obtained for a municipality, a profile was created on SAHA's requestee database, which is publicly accessible on FOIP's website. This makes the submission of future PAIA requests much easier for the public.³⁸ However, despite the project's efforts to collect up-to-date contact details and submitting PAIA requests to these officials, in the end close to 80% of those municipalities simply ignored the requests. If a request is not responded to within 30 days PAIA automatically

deems it to have been refused by the requestee body. Where requests are deemed refused, or are simply ignored, requesters can challenge the failure to respond, either through court process or, where applicable, through internal appeal.

The FOIP submitted internal appeals against these deemed refusals. A small minority of municipalities quickly reverted and released the records, but the majority failed to respond in any way to these appeals. This is particularly concerning, as the requests were not only an exercise of the right of access to information but were also specifically related to the exercise of the right to protest – both of which are constitutionally enshrined fundamental human rights.³⁹ In some instances, even where records were released, these were non-compliant in terms of the Act. For example, instead of a blank template, some municipalities released completed notices of gatherings, riddled with personal information which they had an obligation to redact in terms of sections 34 and 28 of PAIA. Not only are these records unusable as templates but their release also demonstrates a complete disregard of the mandatory duty to protect the information of third parties.⁴⁰ Municipalities that were made aware of these errors rectified their mistakes by subsequently releasing blank copies of the notice of gathering templates to FOIP instead.

Another notable issue that came to the fore because of the request process was that an anomaly was observed in terms of the applicability of the RGA. District municipalities, as oversight offices, have no responsibilities in terms of the RGA. This came to light when the FOIP team submitted PAIA requests to every district municipality, and the information officers of several of those district municipalities responded that they did not have the records we had requested, as the RGA did not apply to them.⁴¹ This raises questions around the scope of the oversight role of district municipalities.

These municipalities arguably have oversight of all key issues and functions, and such oversight requires access to records related to those key issues and functions. It is therefore puzzling that district municipalities do not have copies of important documents related to key issues and functions of local municipalities within their districts in their own archives. Fortunately, PAIA makes provision for these kinds of circumstances. The Act provides that the information officer who determines that a particular record is not in the possession of the public body to which the request was made, but with another public body, must transfer the PAIA request to such other public body.⁴² Information officers of the district municipalities were largely responsive to the PAIA requests. However, this remains a deficiency in the RGA, and ought to be addressed by giving district municipalities clear overarching responsibility to ensure that the local municipalities within their jurisdiction are RGA compliant. This could be done both in terms of having notice templates available and through their involvement in the actual RGA notice procedure – potentially in the form of a review of the involvement of local municipalities' responsible officers in section 4 RGA consultative meetings, or by including those municipalities in the meetings.

Recommendations

While the PAIA request project has yielded some victories in terms of the right to protest and the right of access to information, the project's activities have exposed serious deficiencies in the relevant laws and the state's implementation of these laws. The primary finding was that organs of state have indeed inherited the ethos of secrecy from the apartheid regime, and portray a similar resistance to the expression of participatory democracy through protest. There ought, therefore, to be a push to close any legislative gaps that allow the state to avoid its obligations

to respect, protect and promote the rights in sections 17 and 32 of the Constitution.

We propose the following recommendations to enable the realisation of these rights.

Regulation of Gatherings Act

The primary object of the RGA is to facilitate the section 17 rights in the Constitution; and with the positive obligation on the state to take steps to promote and fulfil rights in the Bill of Rights as per section 7(2) of the Constitution, there is a clear duty on the state to proactively facilitate protest. However, the only provision within the RGA that requires the state to act proactively is section 3(1), which requires responsible officers to assist conveners to reduce their notices to writing if the conveners are unable to do so. Considering the legislative scheme of the RGA, which includes notice requirements and potential civil and criminal liability, this does little to meet the constitutional obligations described above. What is missing from the RGA is a clear, positive duty on organs of state to be available to assist with the notification procedure and to respect the legitimate expression of democratic participation during the protest itself.

The spectre of both civil and criminal prosecution looms over conveners of protests where the protest involves the destruction of property, as in *Tsoaeli*, or where failing to satisfy the notice requirements may result in a criminal conviction. While the potential for civil liability may be a justifiable limitation on the rights in section 17, where a protest results in destruction of property, it is unlikely that being held criminally liable for the mere failure to give notice of a peaceful protest will be regarded by a court of law as a constitutionally justifiable limitation of those rights. This is currently under review in a case involving the Social Justice Coalition (SJC). In 2015, following a protest outside the Cape Town Civic Centre, 10 protest conveners representing this organisation were convicted for contravening section 12(1)(a) of

the RGA for having convened a protest, which was peaceful and unarmed, without complying with the notice requirements contained in section 3.⁴³ This conviction is currently on appeal and it has been argued by the appellants that section 12(1)(a) is unconstitutional.⁴⁴ The crux of the argument lies in the fact that the state needs to be able to demonstrate that a limitation of a right (such as the need to give notice prior to the exercise of the right to protest) is reasonable and justifiable.

Given that there are means available to the state to achieve the purpose of the notice provisions – namely that there is an appropriate state response that will ensure the safety of protesters, the general public and the officials involved – that are less restrictive, it is unlikely that these provisions will stand up to constitutional scrutiny. The depth of the limitation of the right is clear; the possibility of being jailed for exercising a constitutional right is both a deterrent to and grievous consequence of legitimate democratic expression, particularly where the protest is peaceful.⁴⁵

This SJC case highlights a fundamental concern that the PAIA requests brought to light with respect to the RGA, namely that the notice procedure has become an unjustifiable obstacle to legitimate democratic expression of discontent. This must be remedied.

How to do so is perhaps less clear, as the notice requirement does serve a legitimate administrative coordination purpose, and it ought not to be done away with completely. At a minimum, therefore, the information required to comply with notice requirements, such as contact details for responsible officers, should proactively be made available to the public. The RGA should therefore be amended to require that this information be recorded and displayed at municipal offices and on municipal websites. It is further submitted that, along with the removal of criminal sanction for non-compliance

with notice requirements by protesters, provision should be made for some form of sanction to be applied to officials responsible for facilitating protest, in the event that they fail to take reasonable steps do so or are obstructive to the process (negligently or intentionally). This will ensure that the positive duty to respect, protect and promote the enjoyment of section 17 is duly fulfilled by the functionaries of the state.

Promotion of Access to Information Act

The intersection between the right to protest and the right of access to information has brought to light the need for emergency access to information provisions to be included in PAIA. This is because, as noted above, protests, to be effective, often take place at short notice. The timeframes within PAIA for the processing of requests for information would effectively stifle the exercise of the right to protest, if information required to protest lawfully needs to be accessed using PAIA. There are numerous circumstances that may give rise to the need to access information at short notice to avoid limiting the exercise of a constitutional right. Access to medical records to ensure appropriate emergency medical care is one such example. Parliament should therefore consider making provision within PAIA for processing requests at shorter notice, where such emergency requirements can be demonstrated.

The poor compliance with PAIA by local authorities has highlighted the need for the Information Regulator's Office to be sufficiently resourced to provide comprehensive training at a local government level. Training needs to be focused not only on compliant processing of PAIA requests but also on the importance of PAIA as legislation giving effect to a right that enables the exercise of other rights, be they constitutionally enshrined or not.

In relation to the PAIA requests referred to in this article, adequate reasons for refusal of access were never provided to SAHA, as is required

by section 25 of PAIA. Such adequate reasons ought to, in line with section 25 of PAIA, include a demonstration as to why grounds for refusal provided for in PAIA are applicable to the relevant record/s to which access is denied. Given the large number of refusals (including deemed refusals) of both SAHA's requests and appeals, the only further avenue open to SAHA –approaching the courts to obtain relief – was too resource intensive to be viable. Another available option is to approach the Information Regulator, who has the authority to decide on this kind of dispute. Currently, however, this office functions with only five commissioners and no support staff. We therefore recommend that Parliament allocate sufficient budget to make this office fully functional.



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Notes

- 1 It is important to note that there were other oppressive laws enacted, such as the Suppression of Communism Act, which became part of the Internal Security Act 1982. The Public Safety Act 1953 (Act 3 of 1953) also contained provisions that allowed the government to declare states of emergency in various parts of the country.
- 2 See Kevin Brandt, Motlanthe: Riotous Assemblies Act is outdated, should be reviewed, *EWN*, <http://ewn.co.za/2016/12/06/motlanthe-riotous-assemblies-act-is-outdated-should-be-reviewed> (accessed 24 November 2017), where the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change, chaired by former president Kgalema Motlanthe, stated that the law does not belong in a constitutional democracy.
- 3 Stu Woolman, Freedom of assembly, in Stu Woolman and Michael Bishop (eds), *Constitutional law of South Africa*, Cape Town: Juta, 2008, ch 43, 4–6.
- 4 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 17, guarantees the right to assemble, demonstrate, picket, and present petitions. See also Woolman, Freedom of assembly, ch 43, 7–9.
- 5 *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13, para 63. See also Lisa Chamberlain, Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and access to information in South Africa, *African Human Rights Law Journal*, 16, 2016, 365, 368.
- 6 1996 Constitution, section 32 guarantees the right of access to information. See also *Brümmer v Minister for Social Development & Others* (CCT 25/09) [2009] ZACC 21, para 63; Fola Adeleke and Rachel Ward, The interrelation between human rights norms and the right of access to information, *ESR Review: Economic and Social Rights in South Africa*, 6:3, January 2015, 7.
- 7 The duty to enable is drawn from the positive obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights under section 7(2) of the Constitution.
- 8 A gathering is defined in section 1 (iv) of the Regulation of Gatherings Act 1993 essentially as an assembly of more than 15 people in a public space for a political or popular mobilisation purpose.
- 9 It is beyond the scope of this article to delve into the fact that municipalities can refuse to allow the protest to take place and actively do so in conjunction with metro police departments. Jane Duncan, *Protest nation: the right to protest in South Africa*, Durban: University of KwaZulu-Natal Press, 2016, 11–12, 15–18.
- 10 The right to peaceful assembly, demonstration, picketing and presentation of petitions is enshrined in section 17 of the Constitution.
- 11 Sean Tait and Monique Marks, You strike a gathering, you strike a rock, *SACQ*, 38, 2011, 15, 17–19.
- 12 Section 14 of the National Instruction 4 of 2014 clearly states that the metro police should engage in crowd management operations as first responders until the trained POP members arrive. The metro police are not allowed to use force or disperse the crowd; they are only mandated to contain the situation. It is thus surprising to see that they are armed with equipment that is intended to exert force.
- 13 See Physicians for Human Rights and International Network of Civil Liberties Organizations (INCLIO), Lethal in disguise: the health consequences of crowd control weapons, American Civil Liberties Union (ACLU), <https://www.aclu.org/report/lethal-disguise-health-consequences-crowd-control-weapons> (accessed 15 August 2017).
- 14 These requests can be viewed, filtered and analysed at South African History Archive (SAHA), PAIA Tracker, http://foip.saha.org.za/request_tracker/search (accessed 24 November 2017).
- 15 National Instruction 4 of 2014, section 14.
- 16 Regulation of Gatherings Act 1993 (Act 205 of 1993), section 3.
- 17 Ian Currie and Johan de Waal, *The Bill of Rights handbook*, 6th edition, Cape Town: Juta, 2013, 379; Stu Woolman, My tea party, your mob, our social contract: freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU* (Minister for Safety & Security, third party) 2010 (6) SA 280 (WCC), *South African Journal on Human Rights*, 27, 2011, 346, 347–349.
- 18 *Ibid.*
- 19 *South African Transport and Allied Workers' Union and Another v Garvas and Others* [2012] 10 BLLR 959 (CC).
- 20 *Ibid.*, para 61.
- 21 *Ibid.*, para 120.
- 22 1996 Constitution, section 7(2).
- 23 *Tsoaeli and Others v S (Bophello House)* (A222/2015) [2016] ZAFSHC 217.
- 24 *Brümmer v Minister for Social Development and Others* 2009 (11) BCLR 1075 (CC), para 63.
- 25 Tait and Marks, You strike a gathering, 17.

- 26 A more detailed version of the statistics can be accessed upon request to SAHA's Freedom of Information Programme. The tables herein represent a summarised version of the statistics.
- 27 Promotion of Access to Information Act 2002 (Act 2 of 2002), section 27.
- 28 See Shadow Reports for 2009–2016 at SAHA, PAIA reports and submissions, <http://foip.saha.org.za/static/paia-reports-and-submissions> (accessed 8 November 2017).
- 29 Imraan Abdullah, Shadow Report 2017: access to information, SAHA, 2017, 4, <http://foip.saha.org.za/uploads/images/Shadow%20report%20Booklet%20corrected%20final.pdf> (accessed 28 October 2017).
- 30 Approximately 600 public officials from various departments participated in the training workshops conducted by the South African Human Rights Commission (SAHRC) during the reporting period, with only one municipality approaching the SAHRC for training on PAIA. This is concerning because local government consistently remains the least compliant with PAIA of all spheres of government, despite being the sphere with the most direct contact with members of the public. During the reporting period almost 80% of municipalities failed to comply with PAIA. SAHRC, SAHRC PAIA report 2014/2015, 14, <https://www.sahrc.org.za/home/21/files/Final%20annual-report%20.pdf> (accessed 28 October 2017).
- 31 "information officer" of, or in relation to, a public body ...
(b) in the case of a municipality, means the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998), or the person who is acting as such'.
- 32 Promotion of Access to Information Act, section 77(2).
- 33 *Ibid.*, section 38(a) and (b).
- 34 National Instruction 4 of 2014, section 14.
- 35 See SAHA, Designated 'authorized members', http://foip.saha.org.za/request_tracker/entry/sah-2016-sap-0012 (accessed 24 November 2017) for further information as well as access to the record.
- 36 See SAHA, Crowd management equipment, weapons and ammunition, http://foip.saha.org.za/request_tracker/entry/sah-2016-jhb-0002 (accessed 24 November 2017) for further information as well as access to the record.
- 37 Promotion of Access to Information Act, section 14; Municipal Systems Act 2000 (Act 32 of 2000), section 21.
- 38 See SAHA, Requestees search, <http://foip.saha.org.za/requestee/search> (accessed 24 November 2017).
- 39 1996 Constitution, section 32 and 17.
- 40 Promotion of Access to Information Act, section 34.
- 41 The Regulation of Gatherings Act defines 'local authority' as: 'Any local authority as defined in section I of the Promotion of Local Government Affairs Act. 1983 (Act No. 91 of 1983), within whose area of jurisdiction a gathering takes place or is to take place, but does not include a regional services council or a joint services board in respect of the area of jurisdiction of another local authority.' The Act specifically excludes the regional services council – in which capacity district municipalities currently serve.
- 42 Promotion of Access to Information Act, section 20(a).
- 43 Cape Town Magistrates' Court Case No. 14/985/2013.
- 44 The Appellants' Heads of Argument are available at Social Justice Coalition, The 'SJC10': civil disobedience and challenging apartheid laws, <http://www.sjc.org.za/sjc10> (accessed 24 November 2017).
- 45 See para 73–132 of the Heads of Argument filed on behalf of appellants in Case No: A431/15 Western Cape High Court.

Protest Blues

Public opinion on the policing of protest in South Africa

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The policing response to rising protest action in the country has received increased attention in the last decade. This is particularly owing to concerns over confrontations during which protesters have been arrested, injured and in some instances killed by the police. Despite the criticism voiced by various stakeholders about the manner in which the police manage crowd gatherings, relatively little is known about the views of South African adults on the policing of protest action and the factors that shape such attitudes. To provide some insight, this article draws on data from a specialised module on protest-related attitudes and behaviour that was fielded as part of the 2016 round of the Human Sciences Research Council's South African Social Attitudes Survey (SASAS) series. This nationally representative survey included specific questions probing the public's overall evaluation of the performance of the police in dealing with protests, and the justifiability of the use of force in policing protest action. The article will present a national picture of people's views on the policing of protest, based on these measures, and then determine the extent to which there are distinct underlying socio-demographic cleavages in these data. A combination of bivariate and multivariate analysis is undertaken in order to understand how perceptions of effectiveness, acceptability and reported participation in protest (especially disruptive and violent actions) shape people's views regarding policing of protest. The article concludes with a discussion that reflects on the implications of the research for the policing of protest action in future, given the appreciable rise in the incidence of protest since the mid-2000s and the mounting tensions between state institutions and communities over the political, moral and constitutional arguments for and against such actions.

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The media and commentators have often referred to South Africa as ‘the protest capital of the world’.¹ Indeed, the country has experienced a considerable increase in protest activity in the last 10 years, some of which has been quite violent.² The manner in which these protests have been handled from a policing perspective has placed law enforcement in South Africa under appreciable public scrutiny.³ Crowd control of these protests by police and in particular the Public Order Police (POP) units has been called into question by academics as well as civil society.⁴ The death of Andries Tatane, who subsequently became a symbol of inadequate policing during protests, has regularly been cited as an example of police failure in this area. The August 2012 Marikana massacre also highlights the failure of policing during protests, and the lack of response from government.⁵ Despite the criticism voiced by civil society and other stakeholders about the manner in which the police control crowd gatherings, relatively little is known about South Africans’ views on the policing of protest action and the factors that shape such attitudes. To provide some insight, this article draws on recent nationally representative public opinion data to examine attitudes about the policing of protest action.

The violent treatment of protesters at the hands of police officers is not a recent aberration but dates back to the apartheid era.⁶ The General Law Amendment Act 37 of 1963 and the Criminal Procedure Amendment Act 96 (180-Day Detention Law) of 1965 gave the South African Police (SAP) the power to arrest anyone suspected of acting against the state and hold them without charge for 90 days.⁷ These laws were used to suppress protests and arrest protesters. SAP officers often lacked proper crowd control training and were deployed to suppress public protests armed with shotguns, bullwhips and batons.⁸ The result was brutal and violent. Perhaps the most tragic example

is the 1960 Sharpeville massacre, when police fired live rounds into a crowd of between 5 000 and 7 000 protesters, killing 69 and injuring hundreds. Similar incidents occurred in 1976 during the Soweto uprising as well as in Uitenhage in 1985, when 20 people were killed.⁹ During the apartheid period, the policing of protest action ‘ensured that sustained brutality’ was a dominant feature of a ‘black South African experience’.¹⁰ One notable outcome of this history of authoritarian policing is a deep-seated lack of public confidence in the legitimacy of the police.¹¹

With the transition to democracy in the early 1990s, the new government sought to restore public confidence in the authorities’ ability to manage protests. Legislation, including the South African Police Service Act of 1995 and the Regulation of Gatherings Act of 1993, was introduced to reform how the police handled crowd control. The fragmented policing service that apartheid spatial planning had produced was swept away and a single, centralised South African Police Service (SAPS) was created. A new organisational transformation agenda aimed to alter ‘police cultures, structure and symbols’, and brought new emphasis on a community policing model.¹² Unlike the former SAP, the new SAPS would no longer suppress popular will, but would work with communities to maintain order and law.¹³ POP units were created in 1996 to ensure prudent and judicious crowd control.¹⁴ In keeping with these commitments, the country became a member of the Peace and Security Council, which is an African Union organ concerned with stability and the resolution of conflict in Africa.¹⁵

In 2002, POP units were restructured into Area Crime Combating Units (ACCUs), reflecting a strategic shift in focus from crowd management policing to crime reduction.¹⁶ POP units were further restructured in 2006 with the number of units cut from 43 in 2002 to 23; thereby

significantly reducing the number of dedicated POP members.¹⁷ The restructuring of public order policing functions coincided with an increase in the number of crowd management incidents the ACCUs/POP units had to respond to, and the restructuring thus had a negative impact on the police's ability to deal with protest.¹⁸ This has placed a considerable burden on existing police resources and there has been an attempt to strengthen POP units by increasing the number of dedicated, trained POP officers and the number of POP units. In 2014 the SAPS reported that POP had 28 units and 4 175 officers, and requested R3.3 billion for further expansion.¹⁹ The government aims to employ 11 800 POP officers by 2020.²⁰

The capacity of the SAPS to perform its crowd management duties is undermined by negative public sentiment towards the police. A small body of scholarship has attempted to understand antipathy towards the police in spite of the considerable policy change and experimentation post-1994. International scholarship on legitimacy and procedural justice has tended to demonstrate that public judgments about police fairness and effectiveness have a considerable influence on an individual's overall evaluations of police legitimacy.²¹ A number of recent studies have raised concern about the fairness with which the police treat ordinary South Africans.²² Existing research suggests that trust in the police is low, which undermines the legitimacy of this important institution.²³

Despite the widespread policing reforms since 1994, many challenges exist in relation to police legitimacy in present-day South Africa. The police's role during apartheid likely weighs heavily in evaluations of present-day policing for many people, and the resurgence of paramilitarism in policing practices, such as the deployment of Tactical Response Team (TRT) units at Marikana, likely produces ambivalent

public responses. The use of excessive and lethal force, mounting issues of police corruption, lingering concerns over fair and equal treatment, as well as the perception of police incompetence in the face of high crime rates, further complicate the picture. This has resulted in a remarkable turn towards various forms of non-state policing,²⁴ including vigilantism, which in turn is likely to inform perceptions of police legitimacy. These factors have resulted in increasing calls for a form of minimalist policing in which police activity focuses on more effectively performing core functions such as criminal investigation and emergency response, with non-state actors taking strong roles in everyday policing and crime prevention.²⁵

From an international perspective, it was not until the late 1980s and 1990s that the policing of protest became a subject of substantive interest within the social sciences, with early survey-based and qualitative research focusing on the repression of protest and on police actions in maintaining public order.²⁶ In 1998 the concept of 'protest policing' was formally introduced through the influential volume edited by Donatella della Porta and Herbert Reiter titled *Policing protest: the control of demonstrations in Western democracies*. Defined simply as 'the police handling of protest events', protest policing within democratic societies was portrayed as involving a fine balance between protecting public law and order and defending individual freedoms and the citizen right to political participation and demonstration.²⁷ The latter rights are regarded as quintessential elements of liberal democracy; consequently, the style of policing adopted in controlling protest, which has the potential to either polarise or win the favour of majoritarian public opinion, has come to receive much academic and policy scrutiny. The public order literature has charted how approaches to protest policing have evolved over the

decades, from what was characteristically referred to as an 'escalated force' model, which predominated in the 1960s, to a 'negotiated management' approach in the 1980s and 1990s. The former involved a general disregard for the constitutional right to demonstrate and a failure to issue protest permits, tolerance only of 'comfortable' (most peaceful) forms of protest, nominal police–protester communication, a predisposition for forceful arrest of perceived agitators, and the use of force as a standard protest control method.²⁸ By contrast, negotiated management entails respect for civic rights, tolerance of a certain level of disruptive behaviour, a strong emphasis on communication, reliance on arrests as a last resort, and adherence to minimum necessary force.²⁹ Although there is recognition that the policing of protest has become less violent in Western democracies in recent decades with the rise of a softer, more tolerant and flexible approach, there are rising concerns that the pendulum may have begun to swing again towards repressive tendencies in the face of transnational, anti-globalisation protests and as a mounting response to terrorist threats.³⁰ This, in turn, has led to renewed attention to the style of and explanations for protest policing.

In what remains the most widely applied theoretical model explaining styles of protest policing, Della Porter and Reiter argue that the prevailing approach to police handling of protest is informed by a two-tiered set of factors.³¹ At the first level, these determinants include: (1) the organisational structure and culture of policing, including the extent of police discretionary powers and the protest-related stereotypes they hold; (2) the political context and culture of a country, including dominant norms about the role of the state and citizen rights; (3) public opinion and interests expressed by various collective actors, including government, social movements, political parties, trade unions, interest groups,

civil society organisations and the media; and (4) the actual experiences of interaction between police and protesters.³² The extent and nature of the impact of these factors on protest policing approaches is ultimately mediated by their level of influence, at the second tier, on 'police knowledge'. This refers to the police's perceptions of external reality, both at the individual officer level and collectively. What is of particular theoretical relevance for this article is that public opinion is acknowledged as having a potential influence on trends in protest policing practice. However, this influence is conditional on such public preferences reaching and changing the way the police view the context into which they are sent to maintain public order. People's understanding of and response to protest dynamics are also likely to be informed by the media, which publishes and popularises the preferences of influential opinion leaders such as government, political parties and lobby groups. This, taken together with broader contextual events, may lead to a demand for either tougher or softer interventions in policing protest.

The next section of the article provides an outline of the survey data and measures used in our study. This leads into a presentation of our findings, which is structured in three parts. Firstly, we examine the extent to which the public on average expresses confidence in the way protest is being policed, and determine the extent to which distinct socio-demographic differences in perspective exist. Secondly, we cast attention on the use of force by police in managing protests in the country, focusing in particular on the perceived justifiability of such behaviour. Finally, we conduct multivariate regression analysis to discern which factors influence individual evaluations of the policing of protest. This analysis aims to provide an understanding of how various elements shape

opinions regarding the policing of protest: the role of basic socio-demographic factors, the perceived effectiveness and acceptability of protest, reported participation in protest, as well as views on use of force and general trust in the police. The article concludes with a discussion that reflects on the implications of the survey results for the policing of protest action in future.

Methodology

Data

This study employs quantitative data from the 2016 round of the SASAS, a repeat cross-sectional survey series that has been conducted annually since 2003 by the Human Sciences Research Council (HSRC). Each SASAS round has been designed to yield a nationally representative sample of adults aged 16 and older living in private residences. Statistics South Africa's 2011 Population Census Small Area Layers (SALs) were used as primary sampling units (PSUs). For each round of SASAS, 500 PSUs are drawn, with probability proportional to size, from a sampling frame containing all of the 2011 SALs.³³

In each of these drawn PSUs, 21 dwelling units were selected and systematically grouped into three sub-samples of seven, each corresponding to the three SASAS questionnaire versions that are fielded. The relevant protest action questions were included in only one of the three instruments, and thus administered to seven visiting points in each PSU.³⁴ The sample size of the study consisted of 3 079 interviews, which is equivalent to an 88% response rate.

The English base version of the research instruments was translated into the country's major official languages and the surveys were administered in the preferred language of the respondent. This was to ensure that all

respondents in different provinces understood the questionnaire and that it was culturally equivalent and consistent across all languages. Pilot testing was conducted in an attempt to ensure the validity of the research instrument. Interviews were conducted by means of face-to-face interviewing, using print questionnaires.³⁵

Measures on the policing of protest

The 2016 SASAS round included a specialised module on protest-related attitudes and behaviour. This was designed in conjunction with the University of Johannesburg's Centre for Social Change. The module included two items that address the policing of protest action in the country. The first measure addresses the perceived effectiveness with which the police are dealing with protest action. Specifically, respondents were asked: 'In your opinion, how well are the police dealing with protests in South Africa?' Responses were captured using a four-point scale, with the coded options labelled as 'very well', 'fairly well', 'not very well', and 'not at all well'. The second survey measure deals with the perceived legitimacy of the use of force by the police in responding to protests. The question was introduced with an explanation of use of force, followed by an example aimed to elicit a clear response by the public on whether they regard such police action as justifiable or not. The specific phrasing of the question is as follows: 'There are different views on the use of force by police during protest action. By force we mean the use of rubber bullets, stun grenades, tear gas and water cannons by the police. Please say whether the use of force by the police against protesters who throw stones at them is justified in all cases, is justified in some cases, or is never justified.'

Police performance in handling protest action

From Figure 1 it is apparent that barely a third (37%) of South Africans consider the police to be performing 'very' or 'fairly' well in handling

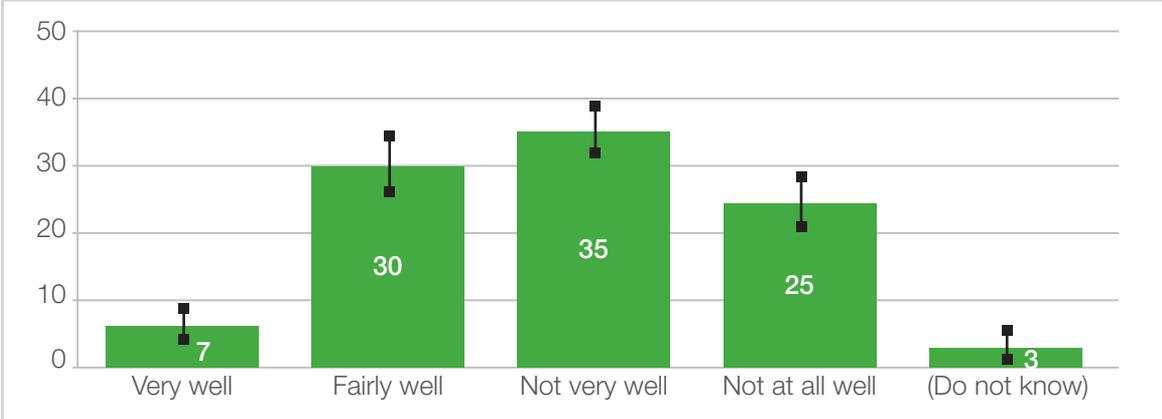
protests in the country.³⁶ By contrast, a majority (60%) believe that the police are faring poorly in their response to protest, with 35% stating they are not performing very well and a further 25% saying they are not performing well at all. The remaining 3% were uncertain as to how to evaluate this form of policing.

To better understand whether the South African public holds relatively uniform or discrepant views in relation to the policing of protest action, we examined the nature and extent of variance in perspective, based on various socio-demographic attributes. The findings show that there were no statistically significant differences in evaluation based on age, gender, race, marital status, educational attainment, employment status or standard of living level. Employment status has a modest effect, with unemployed adults providing more critical views than pensioners and others who were labour inactive.³⁷ This suggests that demographic variables do not exert much influence over how the public views the way in which protest action is being policed in the country, and points to a fairly broad level of consistency in attitude.

There is, however, notable spatial variation underlying the national average. In terms of type of geographic location, we find that those residing in informal urban settlements tend to

offer harsher views on police performance in handling protests than those based in formal urban areas, rural traditional authority areas and on rural farms. Provincially, those in Limpopo and the Northern Cape provide less critical assessments of the effectiveness of the policing of protest, although even in these instances the public remains quite ambivalent, with virtually equal shares adopting favourable and unfavourable positions. At the other extreme, the most negative evaluation comes from residents in the North West province, where approximately three-quarters (74%) indicated that the police were faring poorly in dealing with protest action. Unfortunately, given the absence of trend data on the measure, we cannot determine the extent to which this has been informed by events in Marikana five years ago, or as a result of other deaths that have occurred during protest in the North West, such as the water protests in Mothutlung that resulted in the death of four people. It is, however, plausible that these tragic events may have had an indelible effect on attitudes towards public order policing and the police more generally in the province. Bivariate testing reveals that those living in the North West, Gauteng and KwaZulu-Natal are more negative in outlook than those in Limpopo and the Northern Cape.³⁸

Figure 1: Evaluation of the effectiveness of the policing of protest, 2016 (% , n=2989)



Source: HSRC South African Social Attitudes Survey (SASAS) 2016.
 Note: The vertical lines represent the 95% confidence intervals for each point estimate.

Table 1: Spatial differences in the evaluations of how the police are handling protest action, 2016
(percentages and mean scores)

	Percentage: 'very' or 'fairly' well	Percentage: 'not very well' or 'not at all well'	Mean score (0–3 scale)	Unweighted base N with/without 'don't know' values
National average	37	60	1.19	2 989 / 2 871
Geographic type				
Urban formal	36	60	1.20	2 068 / 1 978
Informal settlements	26	68	0.91	206 / 196
Rural traditional authority areas	41	58	1.29	555 / 544
Rural farms	47	44	1.39	160 / 153
Province				
Western Cape	35	61	1.17	393 / 373
Eastern Cape	44	56	1.24	424 / 422
Northern Cape	47	48	1.44	219 / 214
Free State	38	57	1.29	207 / 192
KwaZulu-Natal	32	66	1.13	561 / 551
North West	20	74	0.99	214 / 204
Gauteng	37	62	1.13	449 / 431
Mpumalanga	35	51	1.19	242 / 208
Limpopo	48	51	1.49	280 / 276

Source: HSRC South African Social Attitudes Survey (SASAS) 2016.

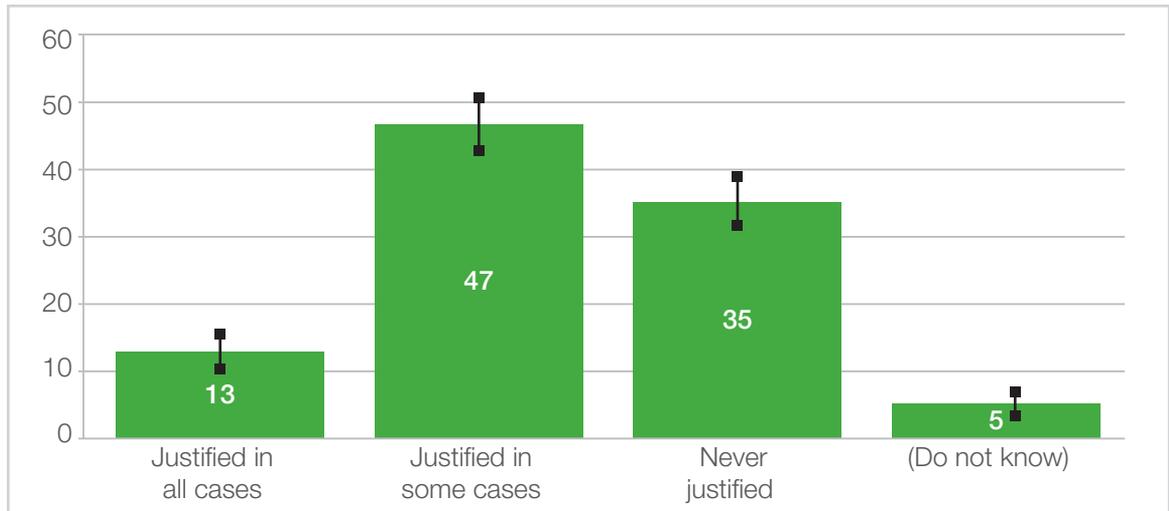
Note: The mean scores are based on a reversed scale, where 0='not at all well' and 3='very well'. 'Do not know' responses are not presented in the table. The unweighted base number of observations are included in the final column based on the distributions with and without 'don't know' responses included. The percentages in the table are based on the former, and the mean scores the latter.

The justifiability of using force in policing protest

The use of force in the context of policing protest in the country has received increased attention over the last decade. This has been prompted in particular by specific high-profile events, including the killing of Andries Tatane and the Marikana massacre, as well as the manner in which the #FeesMustFall protests were handled. This raises the question as to whether the public favours or rejects the kinds of displays of force that have become

an increasingly common response by public order police in cases of violent protest. In Figure 2 we present the national distribution, based on the measure regarding public views on the use of force in policing protest. Slightly more than a tenth (13%) regard a forceful policing response as unequivocally justifiable, with close to half of South Africans seeing such action as acceptable in certain instances. Only around a third (35%) expressly rejected the use of force in responding to protests, with a nominal share remaining uncertain in their views on this

Figure 2: Views on the use of force in policing protest action, 2016 (% , n=2989)



Source: HSRC South African Social Attitudes Survey (SASAS) 2016.

Note: The vertical lines represent the 95% confidence intervals for each point estimate.

matter. This is quite a disconcerting finding, as it seems to suggest that the public has an appetite for a strong policing response (at least in certain contextual circumstances) in dealing with more violent forms of protest. It does nonetheless resonate with the public preferences about how criminality ought to be dealt with in general, which tends towards a demand for punitive actions.³⁹ It is again important to understand how widely this general predisposition is shared among the adult public before we return to the issue of how this and other factors inform confidence in the policing of protest more broadly.

At the subgroup level, we find no significant differences in views on the use of force based on age, gender, educational attainment, employment status, marital status, or standard of living level. There are, however, notable population group and geographic differences that are apparent, as presented in Table 2. The findings show that white adults and, to a lesser extent, coloured adults are more inclined to favour the use of force than black African and Indian adults. The main basis of this distinction is due to a greater tendency among white and coloured adults to respond that the use of

force is 'sometimes justifiable', while the opposite pattern is true in relation to the 'never justifiable' category. There is no significant variation in the shares responding 'always justifiable', though Indian adults were more likely to voice uncertainty (15% compared to 5–8% for the rest). Despite these differences, the predominant response in all cases is that police use of force is viewed as warranted in certain circumstances, even if the degree of support for this option varies.

The observed differences with respect to type of geographic location are only barely statistically significant. Those residing in informal urban settlements were less likely than formal urban dwellers to respond that the use of force is 'sometimes justifiable', while conversely, those in informal settlements were more likely to respond that it is 'never justifiable' than were those in formal urban areas. Those living on rural farms displayed greater uncertainty than those in informal settlements and rural traditional authority areas.

What factors influence evaluations of the policing of protest?

Apart from the descriptive analysis outlined above, we also conducted regression analysis

Table 2: Significant differences in views on the use of force in policing protest, 2016 (percentages)

	Always justifiable	Sometimes justifiable	Never justifiable	(Do not know)	Total	Unweighted base N	% Always / sometimes
National average	13	47	35	5	100	2 989	60
Population group							
Black African	13	45	38	5	100	1 795	57
Coloured	11	53	28	8	100	468	64
Indian / Asian	10	45	31	14	100	353	55
White	17	59	19	5	100	373	76
Geographic type							
Urban formal	13	48	32	7	100	2 067	61
Informal settlements	14	38	45	3	100	207	52
Rural traditional authority areas	13	47	37	2	100	554	60
Rural farms	7	50	33	10	100	161	57
Province							
Western Cape	7	57	30	7	100	393	63
Eastern Cape	11	59	31	0	100	422	69
Northern Cape	18	50	25	7	100	220	68
Free State	21	41	24	14	100	206	62
KwaZulu-Natal	11	51	35	3	100	568	62
North West	9	44	37	9	100	211	54
Gauteng	14	42	40	4	100	447	56
Mpumalanga	21	31	32	16	100	242	52
Limpopo	14	40	44	2	100	280	54

Source: HSRC South African Social Attitudes Survey (SASAS) 2016.

to provide a clearer sense of the significant predictors of public evaluations of the effectiveness of the policing of protest. In so doing, we aimed to ascertain whether the statistically significant findings identified earlier remained when we combined the variables into the multivariate models. Given that the dependent variable is an ordered categorical measure, we used ordered logistic regression

techniques. For ease of interpretation, we reversed the scaling of the variable, so that a value of '0' was assigned to those reporting that the police are faring 'not at all well' in dealing with protest, a score of '1' to those answering 'not very well', '2' to those 'fairly well', and lastly a value of '3' to those responding that the police are doing 'very well'. A series of models was then generated, as presented in Table 3.

We begin with a base model containing only the socio-demographic attributes of respondents (Model 0). This is followed by five models that test the effect of including specific attitudinal or behavioural measures to the base model (Models I-V). Finally, we run a fully specified model that includes the socio-demographic and all the additional indicators (Model VI). In each of these ordered logistic models, we present the proportional Odds Ratios (OR).⁴⁰

Our base model (Model 0) confirms the earlier result that virtually none of the socio-demographic attributes is a statistically significant predictor of the way South Africans assess the policing of protest. Specifically, the model indicates that there is no evidence of an age, gender, race, marital status, employment status, or educational effect informing such evaluations. Political party identification was also included in the model. Using support for the ruling party as the reference group, supporting an opposition party was not found to be a significant determinant in this model. This finding holds true even after other variables are added in subsequent models in the table. Geography matters to some degree, with residents of informal settlements more inclined than those in formal urban areas to report lower policing effectiveness scores. This may partly be owing to a greater likelihood that respondents have participated in protest action, and by extension that they have more exposure on average to public order policing. Provincially, those living in Limpopo and the Northern Cape were significantly more likely to offer more favourable views of the manner in which protests are being policed. The Odds Ratio is lowest among residents of North West province, but this narrowly misses out on being a statistically significant finding when controlling for other variables. The findings observed in the base model remain largely unchanged once other attitudinal and behavioural measures are included in models I – VI.

In Model I, recent participation in disruptive or violent protest is added as a variable together with the socio-demographic attributes. This behavioural measure is based on whether South Africans report having engaged in one, both or neither of the two types of protest in the five years prior to being interviewed, and is accordingly scaled on a 0 to 2 scale. The results show that protest participation does not have a significant influence on how respondents rate the performance of the police in policing incidents of protest. Alternate formulations of the protest participation indicators, such as accommodating more distant protest behaviour, peaceful actions, and testing out separate disruptive and violent protest behaviour measures in the model, also failed to produce statistically significant results. This is an important finding, since one might have assumed that exposure to public order policing through direct participation in disruptive or violent protest might lend itself towards more critical views on the policing of protest. It nonetheless appears that engagement in such forms of protest does not predispose individuals to adopt a particular outlook in their views of the police that is characteristically distinct from that held by the rest of the public.

We were also interested in determining whether respondents' views of the general image and perceived effectiveness of disruptive and violent protest action had any bearing on their evaluations of the policing of protest. These measures are more fully examined in their own right in the article by Bohler-Muller and colleagues in this special issue. The survey included separate measures on whether respondents tend to regard peaceful, disruptive and violent protest action in a positive or negative light, with responses captured on a 7-point scale ranging between 'extremely negative' and 'extremely positive'. For analytical purposes, we created an index focusing on the image of disruptive and violent action, which

was constructed by averaging together the scores for the two indicators, which retains the original 1–7 negative to positive scaling. Similarly, the survey fielded questions on the effectiveness of the three types of protest, using a 7-point scale ranging from ‘extremely unsuccessful’ to ‘extremely successful’. We constructed an index of the effectiveness of disruptive and violent actions by again averaging the two constituent items, with higher scores continuing to represent greater perceived effectiveness of these actions. The testing of these attitudinal measures as predictors of evaluations of public order policing is presented in models II and III respectively. Both the image and perceived effectiveness of disruptive and violent protest action are not significant factors in explaining public assessments of performance in policing protest, as was also observed with participation in protest action.

In Model IV, we concentrate on the relationship between views of the policing of protest and the perceived acceptability of the use of force by police in responding to protests. In this instance, we find that the justifiability of the use of force in policing protest emerges as a significant predictor. Those who view the use of force as never or only sometimes justifiable tend to provide the SAPS with lower performance scores in terms of their handling of protests, compared to those who view the use of force as always justifiable. Even those respondents who were unsure about their position on the use of force tended to offer significantly lower evaluative scores relative to those viewing such force as always permissible when responding to protest. This remains the strongest single effect based on the various indicators that we tested in our analysis.

Table 3: Ordered logistic regression of the effectiveness of the policing of protest, 2016

	Model 0	Model I	Model II	Model III	Model IV	Model V	Model VI
	OR	OR	OR	OR	OR	OR	OR
Age	1.010	1.011	1.013	1.012	1.005	1.012	1.006
Age squared	1.000	1.000	1.000	1.000	1.000	1.000	1.000
Female	1.157	1.168	1.152	1.151	1.115	1.185	1.134
Race (ref=Black African)							
Coloured	1.141	1.150	1.143	1.001	1.087	1.072	0.949
Indian / Asian	0.863	0.878	0.791	0.800	0.891	0.906	0.792
White	1.557*	1.573*	1.537*	1.451	1.255	1.504*	1.173
Employment status							
Unemployed	0.913	0.906	0.897	0.909	0.920	0.839	0.849
Pensioner	1.491	1.489	1.500	1.456	1.457	1.258	1.203
Student/learner	0.770	0.760	0.797	0.781	0.758	0.714	0.709
Labour inactive	1.187	1.182	1.223	1.201	1.048	0.999	0.920
Other	0.514*	0.515*	0.513*	0.520*	0.425**	0.392**	0.347***
Marital status							
Separated, divorced or widowed	0.936	0.936	0.947	0.940	0.970	0.963	0.983
Never married	0.939	0.936	0.943	0.954	0.876	0.973	0.908

Continued on page 74

	Model 0	Model I	Model II	Model III	Model IV	Model V	Model VI
Years of schooling	0.988	0.987	0.985	0.987	0.976	0.983	0.974
Province (ref=Western Cape)							
Eastern Cape	1.308	1.304	1.330	1.172	1.100	1.136	0.945
Northern Cape	1.935**	1.929**	1.942**	1.775**	1.622*	1.799**	1.501
Free State	1.438	1.442	1.439	1.213	1.187	1.166	0.919
KwaZulu-Natal	1.068	1.053	1.104	0.961	0.996	0.919	0.844
North West	0.673	0.671	0.672	0.569*	0.682	0.679	0.615
Gauteng	1.128	1.112	1.150	1.025	1.129	1.118	1.080
Mpumalanga	1.105	1.104	1.102	0.958	0.945	0.894	0.789
Limpopo	2.064**	2.067**	2.059**	1.794*	2.279**	1.735*	1.812*
Geographic location (ref=formal urban)							
Urban informal	0.572*	0.567	0.590	0.560*	0.590	0.557*	0.539*
Rural traditional authority areas	1.181	1.191	1.187	1.170	1.158	1.048	1.059
Rural farms	1.540*	1.542*	1.442	1.471	1.715**	1.437	1.455
Party identification (ref=ANC)							
Democratic Alliance	0.937	0.935	0.920	0.875	0.807	0.946	0.820
Other political parties	0.781	0.784	0.781	0.763	0.691	0.960	0.819
No party	1.227	1.194	1.124	1.106	1.118	1.325	1.158
Undeclared / undecided	1.557*	1.566*	1.561*	1.540*	1.346	1.661*	1.451*
Participation in protest in last 5 years	...	1.022	...	...	...	...	0.897
Image of disruptive & violent action	...	...	0.938	...	...	...	1.045
Effectiveness of disruptive & violent action	...	...	...	0.912	...	...	0.918
Use of force in policing protest (ref=always justified)							
Justified in some cases	...	...	...	...	0.498**	...	0.539**
This is never justified	...	...	...	...	0.107***	...	0.133***
(Do not know)	...	...	...	...	0.236***	...	0.276***
Overall confidence in the police	...	...	...	...	...	1.853***	1.672***
/cut1	-0.922	-0.917	-1.095	-1.379	-2.759	0.570	-1.654
/cut2	0.687	0.698	0.526	0.246	-0.919	2.352	0.331
/cut3	2.859	2.859	2.680	2.406	1.459	4.669	2.806
Pseudo R ²	0.0214	0.0220	0.0227	0.0234	0.0893	0.0708	0.1251
Number of observations	2789	2783	2756	2728	2776	2758	2687

Note: OR = odds ratio. The dependent variable is a reversed scaled version of the performance of the policing of protest measures, with 0='not at all well', 1='not very well', 2='fairly well' and 3='very well'. 'Don't know' responses were omitted. Statistical significance is represented as follows: *p<0.05, **p<0.01, ***p<0.001.

In approaching the study, we were keen to examine the extent to which one's general confidence in the police as an authority has a bearing on appraisals of specific areas of performance, such as public order policing. Our hypothesis was that those who exhibit distrust of the police would on average tend to voice more critical views on performance, and vice versa. Indeed, this proves to be the case, as demonstrated in Model V. Our measure of overall police confidence was initially designed as part of a European Social Survey module on confidence in the criminal justice system, which has been fielded in the SASAS series in recent years. The question is phrased as follows: 'Taking into account all the things the police are expected to do, would you say they are doing a good job or a bad job?', with responses captured using a five-point scale ranging from a 'very good job' to a 'very bad job'. For modelling purposes, we reversed the scale, so that higher values indicate greater confidence levels. The appeal of this item is that it is phrased in a similar way to our policing of protest item. We also tested the effect of an alternate police confidence measure that explicitly asks about levels of trust in police, using a standard five-point trust scale. Based on this specification, the finding remains the same.

Lastly, Model VI runs the analysis with all the different indicators included. The findings from the preceding models remain largely unchanged. The socio-demographic measures continue to be insignificant factors, with only minor geographic effects present. Limpopo residents continue to express higher than average performance ratings, although a similar pattern in the Northern Cape loses its salience once other attitudinal and behavioural variables are controlled for. South Africans living in informal settlements continue to exhibit a more disapproving stance than those in other geographic locales on how protests are being policed. The perceived justifiability of the use

of force, in addressing protest, in addition to overall levels of confidence in the police retain their positive association with protest policing evaluations. Past participation in violent and disruptive protest actions, together with the image and perceived effectiveness of such protest, continues to register no discernible influence in appraising SAPS performance.

Discussion

Our examination of public attitudes towards protest policing has shown that, on the whole, performance evaluations tend to be fairly negative. This perspective is commonly shared across various demographic and class traits, though appreciable geographic variation is nonetheless apparent. These results confound expectations of lower levels of confidence in police crowd management activities among more vulnerable and marginalised segments of society, which indicates that the so-called 'rebellion of the poor' in protest behaviour is not resolutely manifest in the mind of the public.⁴¹ This is an interesting finding that will require further testing, using data on a broader set of concepts and constructs.

In considering other factors beyond socio-demographic markers that might help explain the way citizens appraise protest policing, the lack of statistical significance in relation to measures such as recent participation in protest action as well as support for and the perceived effectiveness of disruptive and violent protest actions, is particularly striking. It signifies that one's experience of engaging in protest action – and by extension first-hand exposure to the manner in which the police approach crowd management – does not exert a sizable influence on one's view of police performance in undertaking such duties. Furthermore, one's general predisposition towards disruptive and violent actions also does not play a role in structuring expressed levels of confidence in the policing of protest action. So, an aversion

to more disruptive and violent forms of protest does not automatically translate into a more sanguine view of public order policing.

What clearly seems to matter, though, is the public's position in relation to the acceptability of the use of force in maintaining public order. The more one deems it justifiable for officers to use violence in particular situations, the more inclined one is to provide a positive evaluation of the policing of protest. For approximately a third of South Africans, the use of force by the police in the context of protest is deemed to be wholly unacceptable. This is associated with acutely diminished confidence in the police's handling of protest. It may be that for this segment of society, the unfairness and brutality that have characterised the policing of protests have violated their notion of 'good' policing and the values of fair treatment, appropriate conduct and respect that maintain a sense of legitimacy, trust and confidence.⁴² By contrast, for the smaller minority (one in eight, or 13%) that considers the use of non-lethal physical force as always justifiable, levels of confidence in public order policing is more than four times higher. This suggests, somewhat controversially, that the use of force to control protesters may serve to promote or reinforce police legitimacy for some South Africans. This would imply that, for this group, a less aggressive or violent approach to public order policing might bring into question the legitimacy of, and confidence in, the police. Although our study does not provide a comprehensive account of the attitudes towards police use of force in protest situations, international evidence points to aggressive personality traits, a tendency towards right-wing authoritarianism, and a stronger social dominance orientation as possible factors associated with a more accepting stance on the excessive use of force.⁴³ This may be due to a desire to control social threats, promote security and help maintain current power hierarchies.⁴⁴

The dominant public response to the use of force question remains one that regards the violent policing of protest as justifiable in certain circumstances. Accounting for slightly less than half of the adult population, this position is associated with a more ambiguous position in respect of confidence in protest policing, with virtually equivalent shares expressing favourable and unfavourable views. The circumstances under which such tactics might be tolerable cannot be ascertained from our data, but the calculus is likely to involve a range of factors, from the behavioural repertoires of the protesters to whether the police response has firstly exhausted negotiation and all other options involving a minimal amount of force. The ambiguity in public order policing confidence ratings might also partially reflect a sense of unease about whether the police response in managing protests falls within the ambit of reasonable or justifiable use of force, or not. The former group is likely to view force as a constituent element of effective policing, but regard the application of force in crowd management incidents as highly conditional and contextual. In relation to the preceding points, it is worth noting that the definition and accepted normative limits of 'police violence' may tend to vary over time, context and ideological outlook.

Conclusion

The processes of transformation in public order policing in South Africa since the early 1990s have been complex and non-linear. An initial political commitment to professional, democratic public order policing was subsequently followed by a period of organisational degradation and leadership problems. Together with the prioritisation afforded to the fight against crime, this led to the relative neglect of public order policing for a number of years. However, in response to the rising incidence of public protest in the country, the tide has turned and public order policing

has received renewed attention. Concerns have nonetheless been expressed about whether this recent development has been accompanied by an ethos emphasising a 'hard-edged' approach involving more forceful policing practices, rather than the application of minimum force.⁴⁵ The subsequent rise in reported cases involving excessive use of force and police fatalities during acts of demonstration, together with the events in Marikana, have raised fundamental questions about the manner in which protest is being policed in our constitutional democracy. From a public opinion perspective, it has also led to questions about the implications of such developments on the perceived legitimacy of the police.

As a response to the policing failures in dealing with public protest, including the escalation in the number of protesters killed by police over the 2010-2014 period,⁴⁶ there have since 2014 been signs of a distinct retreat at the senior political and police level from the strong-arm public order policing approach that typified the early 2010s.⁴⁷ This has involved something of a cyclical return to the priorities of the mid-to-late 1990s, a period characterised by deliberate attempts to move public order policing away from the apartheid state's repression of demonstration through brutally forceful policing. Developments include the return in name of the Public Order Policing (POP) unit with a primary emphasis on crowd management, a commitment to reinvesting in public order capacity in terms of both training and numbers of police members, and the introduction of a National Instruction on Crowd Management during public gatherings and demonstrations. The latter restates the importance of a well-trained, resourced and command-driven unit that displays utmost restraint, and adheres to strict guidelines governing the use of force as a tactic of last resort and in compliance with legislative and constitutional imperatives.⁴⁸

The apparent political will that currently exists for a new organisational model of public order policing represents an opportune moment to critically engage with and shape the future approach to this specialised form of policing.⁴⁹ The choices that are made in this regard will indelibly influence the next generation of police-citizen relations. Based on our survey results, we contend that a continued reliance by the police on disproportionate and excessive force, and a tendency to resort quickly to the use of rubber bullets and teargas as controlling tactics in dealing with protest, may provoke a further withdrawal of support for the use of force. This, in turn, would further diminish overall confidence in the ability to police protest actions. This is of concern, since public trust and confidence are generally recognised as a key component of ensuring effective, democratic policing.⁵⁰ Organisational transformation is a necessary but insufficient part of promoting positive and enduring change. It also requires an appreciation of the socio-economic and political context in which protest action and public order policing are occurring.⁵¹ Rather than constraining the right to protest and demonstrate by means of repressive and controlling actions, the policing approach to crowd management should aim to assist and facilitate peaceful protest that enables those taking to the streets to effectively convey their message to the elites. As Tait and Marks eloquently stated several years ago in this journal, '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 we can hope for is a contextually and situationally appropriate South African model of public order policing.'⁵²

Study limitations

This article has contributed to our knowledge of South African public opinion on police performance in handling protest action.

However, the analysis is not without limitations. There is currently no available trend data on attitudes to the issues under discussion. As a result, we do not know how stable or variant such attitudes are, and how sensitive these attitudes are to contextual events. In addition, we only have single-item measures of satisfaction with protest policing performance and the acceptability of use of force by the police. The use of single-item measures may fail to capture important nuances in public opinion on protest action. Consequently, it is not possible to say with confidence what motivates the observed link between attitudes towards the use of force during protests and evaluations of police performance in controlling protest. Other important questions also remain unresolved. For example, what types of force used by the police to control protests would the public be comfortable with? Moreover, public attitudes towards the use of force by police may vary, depending on the type of protesters under consideration, for instance students versus workers. Our use of force measure focused only on retaliatory responses to violent protest (i.e. protesters throwing stones at police) and we might arrive at a different or more nuanced set of results if a range of examples of excessive and reasonable use of force are provided.⁵³ The role of the media in informing the understanding and preferences that the public has in relation to protest and the policing of such events has also not been examined in the article, owing again to the absence of relevant questions in the survey instrument. To address these limitations, future public opinion research needs to utilise a more comprehensive set of questions on police performance in handling protest action, as well as on other relevant contextual factors.



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 - 34 Interviewees called at each visiting point selected and listed all those eligible for inclusion in the sample in terms of age and residential status criteria. The interviewer then selected one respondent using a random selection procedure based on a Kish grid.
 - 35 The HSRC's Research Ethics Committee granted ethical approval for the instrumentation and research protocols for each round.
 - 36 The lower and upper 95% confidence intervals for this estimate are 33.4% and 40.3% respectively.
 - 37 This effect is present based on One-Way Analysis of Variance (ANOVA) post hoc testing, but it falls away when one combines the percentages opting for the two positive categories and compares this with the combined two negative categories.
 - 38 Residents in the Western Cape also provide on average less favourable ratings of the handling of protest compared to those in Limpopo, but this is not true of comparisons between the Western and Northern Cape.
 - 39 For instance, the SASAS series has found a strong demand for the reinstatement of the death penalty in cases of murder and broad-based tolerance of vigilantism, coupled with a positive response to the paramilitaristic turn in policing that characterised former police commissioner Bheki Cele's term of office.
 - 40 For continuous variables in the models (e.g. age), an OR of greater than 1 signifies that for every unit increase in these

predictors is associated with greater odds of rating the policing of protest as effective in character. Conversely, an OR of less than 1 denotes that for every one-unit increase, the likelihood of the policing of protest being regarded as effective diminishes. Odds ratios that are equal to (or approximate) 1 imply that the variable has no discernible effect on the effectiveness evaluations. For categorical or dichotomous variables in the models (e.g. gender, race), the odds are relative to the specified reference category. So, in the case of gender, we are comparing the proportional odds ratio of females to males on the effectiveness of the policing of protest, with all other variables in the model held constant.

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Minding the Protest

Attitudes towards different forms of protest action in contemporary South Africa

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This article focuses on providing new insights into the nature of public opinion about protest action in South Africa. Since the mid-2000s the country has experienced one of the world's highest levels of popular protest and strike action, combined with the recent resurgence of an active student protest movement. Sociological research into these protests has suggested that they represent distinct phenomena and that local protests have assumed plural forms that cut across simple violent/non-violent and orderly/disorderly binary distinctions. Despite the rapid growth of literature on South African protests, surprisingly little is known about public opinion relating to various forms of protest. Consequently, this article aims to examine differences with regard to the acceptability, perceived effectiveness and participation in respect of three categories of protest action, namely orderly, disruptive and violent protests. The article uses data from a protest module included as part of the 2016 round of the South African Social Attitudes Survey, a nationally representative series conducted annually by the Human Sciences Research Council. Apart from determining the nature and extent of variation in opinion regarding the three types of protest action on aggregate, the article explores patterns of similarity and differentiation across societal groups, based on class, age, race, gender and geography. Finally, we analyse how and for whom perspectives on the three forms of protest have changed over the course of a generation by drawing on functionally equivalent data collected in 1995. The article concludes by reflecting on whether the evidence supports key hypotheses regarding the 'rebellion of the poor'¹ in the country.

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South Africa has experienced a remarkable rise in local protest activities since 2004, a development that has occurred on such a scale and with such intensity that it has been referred to as insurrection or insurgency.² Students, workers and a range of other actors increasingly employ protest tactics in their attempts at achieving social, political and economic change. These actions have been largely peaceful in character, while at other times protesters have tended to adopt more violent strategies.³ Sociological research into protests has suggested that they represent distinct phenomena and that local protests have assumed plural forms that defy straightforward classification. As such, there remains appreciable contestation regarding the nature, prevalence and determinants of these contemporary forms of protest. But despite the importance of this phenomenon for academics and policymakers, public opinion scholars have not examined how the general population views protest actions in South Africa. A growing literature exists on the likelihood of participation by and experiences of the protesters,⁴ but existing empirical evidence is not able to answer important questions about public attitudes towards protest action in the country. This article aims to address this knowledge gap by utilising nationally representative public opinion data to examine attitudes towards protest action in the country.

Public attitudes towards protest activity are likely to be influenced by historical context.⁵ At the start of the post-apartheid period, South Africa had just emerged from a long struggle for democratic freedom that was characterised by protest actions. Using local and international newspaper reports, the Global Database of Events, Language and Tone,⁶ for example, documented 3.8 million protest events in 1979. Most of these protests, particularly in the 1980s, employed peaceful tactics. But violent protests were also utilised to bring about social

and economic change.⁷ The level of protest dropped sharply in the 1990s but increased in 2004 and then escalated again after 2008. The Social Conflict in Africa Database (SCAD)⁸ has recently noted a sustained increase in the number of protests in South Africa between 2016 and 2017. The SCAD warned that violent protests were becoming more common, with communities increasingly employing protest tactics to draw attention to their grievances.

Most protest actions, particularly after 2004, seem to originate from South Africa's economically disadvantaged communities. The source of people's grievances seems to be economic in character, with protesters tending to cite the poor state of wages, labour market opportunities, municipal services and other material issues as predominant factors. Given that most protests share strong similarities in forms of contention, geographical space, organisation and demographics, it would appear that we are dealing with a broad process of protest, rather than merely a set of discrete events. Alexander has referred to this broad process as the 'rebellion of the poor'.⁹ Other scholars have ascribed the majority of protest actions to contestations over the full benefits of 'citizenship'.¹⁰ Given the modern trajectory of protest, we may expect to observe distinct socio-economic differences in how people view protest action in the country. A plausible hypothesis would therefore be that those in the upper echelons of South Africa's socio-economic class structure, as beneficiaries of the status quo, would be more inclined to favour social order and disapprove of protest actions as opposed to those in more vulnerable material circumstances.

The reaction of government to local protests has ranged from contrition and negotiation to autocratic obstinacy. How government responds to a specific protest action can determine how *effective* that action is. This, in

turn, can have a significant effect on how the general population thinks about that action. Government's response to a specific protest can be (and should be) mediated by public opinion. The responsiveness of government policies to the preferences of citizens is an essential element of most normative and empirical theories of democracy.¹¹ In practice, however, the policy–attitude relationship is not perfectly linear and government can enact policies that defy the popular opinion. Nonetheless, the correlation between public opinion and public policy is considered to be a moral good, a crucial characteristic of successful democratic governance.

The reaction of law enforcement to protest action in South Africa has ranged from hostility to patient observance. A number of scholars are concerned that the former is more common than the latter. Royeppen contends that the state responses to protest today are in many ways a reflection of the state response to protest during the apartheid era.¹² Indeed, as the number of protests in South Africa has grown, we have seen the emergence of a highly securitised policing response. Research by Newham and Faull has shown that the police in South Africa use paramilitary tactics that disregard human rights, much to the detriment of police–community relations.¹³ Such heavy-handed policing can additionally lead to (or worsen) confrontations between police and protesters. Some critics have argued that the aggressive crowd control methods of the police have in many instances provoked protesters into responding with violence.¹⁴ Indeed, the manner in which the police dealt with protesters during the recent #FeesMustFall protests raised serious concerns among commentators.

When covering the growth in protest actions, the media has often made simple violent/non-violent and orderly/disorderly binary distinctions about these actions. Such subdivisions are

reductive, biasing audiences against certain social movements and presenting a false dichotomy between 'good' and 'bad' protesters. Given the limiting nature of these dichotomies for analytical research, we adopt a more nuanced approach to categorising different types of protest action in this article. More specifically, we employ the typology proposed by Runciman et al. as the basis for our approach to understanding public attitudes towards protest action.¹⁵ Runciman and her colleagues use 'order' and 'violence' as dividing lines. Because all peaceful protests are orderly and all violent protests are disorderly, it is possible to discern a three-way categorisation: (1) peaceful; (2) disruptive (i.e. disorderly but not violent); and (3) violent. Although in practice these three forms of protest are not always mutually exclusive, we have adopted these discrete categories for the purpose of quantitative analysis and monitoring social change.¹⁶ Sociological research into these protests has suggested that these three categories represent distinct, meaningful phenomena. We believe that adopting this typology will allow us to gain a more comprehensive understanding of public attitudes towards these forms of political action.

In this article, we primarily aim to examine differences with regard to the acceptability and perceived effectiveness of peaceful, disruptive and violent protest action. We begin by outlining the methodology of our study, which is followed by a presentation of findings. Apart from determining the nature and extent of variation in opinion regarding the three types of protest action on aggregate, the results section explores patterns of similarity and differentiation across societal groups, based on class, age, race, gender and geography. This leads into an analysis of the determinants of public approval for each of the three types of protest action. This will provide a sense of the nature of the differences between the three forms of protest, and whether a hierarchy of protest exists in

the minds of South Africans. The article concludes by reflecting on possible avenues for future research.

Methodology

The data used for this study derives from two national surveys conducted by the Human Sciences Research Council (HSRC), the first in 1995 and the second in early 2017. Each survey was designed to be nationally representative of the adult population living in private households across the country's nine provinces. Participation in each survey was voluntary and the data was collected by means of face-to-face interviewing. Strict ethical guidelines were adhered to, including review and approval of instruments and protocols by a Research Ethics Committee, and the use of consent forms to provide respondents with the assurance of the confidentiality of their interview responses. The 1995 survey formed part of the HSRC's Omnibus Survey series and was conducted in February and March 1995. It was administered by MarkData, which at the time was the HSRC's survey and opinion research centre.¹⁷ The survey had a realised sample size of 2 238 adults aged 18 years and older. The 2016 protest data derive from a specialised module included as part of the 14th annual round of the South African Social Attitudes Survey (SASAS), which was conducted between January and March 2017.¹⁸ The SASAS 2016 dataset had a realised sample of 3 079 people aged 16 years and older. The sample sizes of both the SASAS and Omnibus series are in line with international best practices on public opinion sampling.¹⁹ Weights were designed for both datasets and all analytical results presented in this article have been weighted to be nationally representative.

The 1995 and 2016 surveys were selected for use in this article because they are the only representative surveys in the country that distinguish between the three different types of

protest action outlined by Runciman et al.²⁰ In both surveys, respondents were told that they would be questioned about three different kinds of protest actions. The fieldworker then read out a description of a specific type of protest action and then asked how the respondent felt about that type of action. The exact phrasing of the descriptions is as follows:

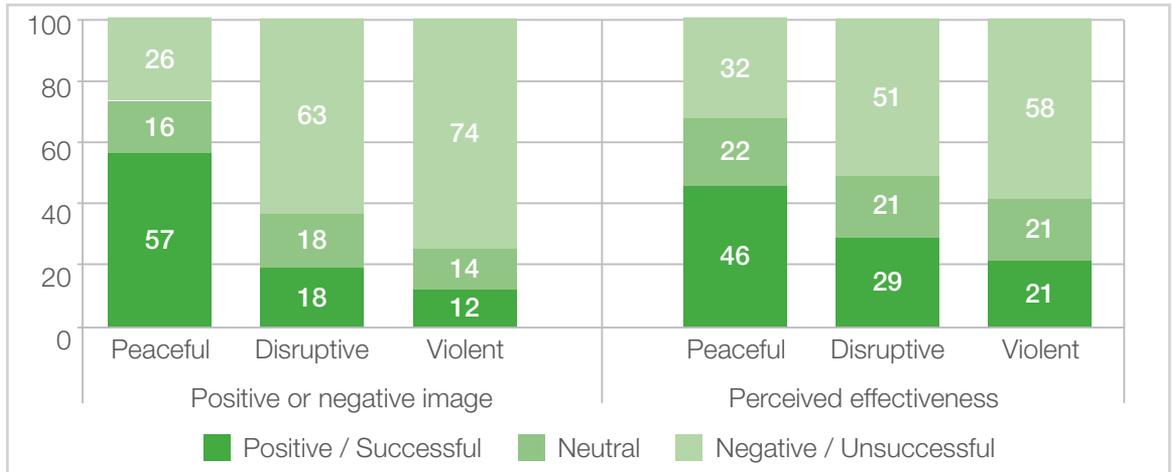
- Peaceful actions: *'I mean non-violent things like worker strikes as well as attending rallies and joining marches that have been agreed to by the authorities.'*
- Disruptive actions: *'I mean things that are more forceful but still non-violent, like blocking traffic with tyres, stones or other objects, as well as occupying buildings or offices.'*
- Violent actions: *'I mean injuring people or destroying other people's property.'*

Respondents were asked close-ended questions on how positive or negative they felt about the different types of protest action and then how successful or not they thought such actions were. Responses to each question were captured using a seven-point scale. In the case of the positive–negative questions, the scale ranged from extremely negative to extremely positive, while for the effectiveness questions, the scale ranged from extremely unsuccessful to extremely successful.

A hierarchy in protest-related attitudes?

The national distribution in responses to the questions on the image and perceived effectiveness of the three types of protest action in 2016 is presented in Figure 1. For interpretive ease, the original seven-point scaling has been collapsed into a three-point scale. The bar chart points to the existence of clear differences in the way in which the adult public perceives these forms of protest action. Peaceful action on average tends to be viewed as more positive

Figure 1: Image and perceived effectiveness of peaceful, disruptive and violent protest action in South Africa, 2016 (%)



Source: HSRC SASAS R14 2016.

and effective than disruptive and violent protest action. While close to six in 10 South Africans regard peaceful protest favourably, this level of approval falls appreciably to around a fifth in the case of disruptive actions and barely a tenth in respect of violent protest actions. A similar, though marginally less acute, gradient exists in relation to perceptions of the effectiveness of these behaviours.

The comparison between image and effectiveness ratings for each of the types of protest leads to an interesting observation. For peaceful actions, the share of the population viewing it as effective (46%) is lower than the share reporting that they view such action favourably (57%), which indicates that a certain proportion of adults support peaceful action but remain ambivalent or sceptical about its efficacy as a form of political behaviour. By contrast, for both disruptive and violent protest actions, the share considering such actions as effective (29% and 21% respectively) exceeds the share reporting a positive view (18% and 12%). This implies that notable subsets of the adult population hold a negative image of such actions but do nonetheless admit that it is politically effective. Despite this, the overarching view on both the image and effectiveness of

disruptive and violent protests remains largely negative in character. The question remains as to whether and how such attitudes have changed over time, especially given the rising incidence of protest-related actions since the mid-2000s.

The changing nature of protest attitudes

The responses to the attitudinal questions about the three types of protest action in both 1995 and 2016 are compared in Table 1. The top half of the table presents the distributional patterns as well as percentage point and mean score changes in terms of the image of the different types of protest, while the lower half of the table depicts equivalent statistics on the perceived success of these actions. The results suggest that even though the majority of the adult public views peaceful protest action in a positive light, public attitudes towards such actions have become less favourable over the period. In 1995 close to two-thirds (64%) of the general public viewed peaceful action positively, while fewer (57%) held a similar view in 2016. It is worth noting that this change has not translated into an increase in the share who hold a negative view of peaceful actions,

Table 1: Changes in the image and perceived effectiveness of peaceful, disruptive and violent protest action between 1995 and 2016 (Col %)

	Peaceful			Disruptive			Violent		
	1995	2016	Diff.	1995	2016	Diff.	1995	2016	Diff.
Positive or negative image									
Positive	64	57	-7	11	18	+7	6	12	+6
Neutral	9	16	+7	8	18	+10	6	14	+8
Negative	26	26	0	81	63	-17	88	74	-14
Total	100	100	...	100	100	...	100	100	...
Mean based on 7-point scale	4.50	4.47	-0.03	2.59	3.13	+0.54	2.19	2.63	+0.44
Perceived effectiveness									
Successful	61	46	-15	14	29	+15	8	21	+13
Neutral	15	22	+7	15	21	+6	11	21	+10
Unsuccessful	25	32	+8	71	51	-21	81	58	-23
Total	100	100	...	100	100	...	100	100	...
Mean based on 7-point scale	4.49	4.14	-0.35	2.81	3.52	+0.71	2.43	3.16	+0.73

Note: The mean scores are based on the original 7-point scales, with higher values representing a more positive image or greater perceived effectiveness.

Source: HSRC Omnibus Feb 1995; HSRC SASAS Round 14 2016.

but rather a greater tendency towards a neutral or ambivalent position. In contrast to peaceful actions, the share of the population viewing disruptive protest actions negatively showed a distinct decline over the past 22 years from 81% in 1995 to 62% in 2016. The shares reporting positive or neutral views showed corresponding increases. We also find a softening in the manner in which violent protest actions are viewed over time, with the share of the population who classify this type of action as negative declining from 88% to 74% between the two survey rounds. Although the predominant image of both disruptive and violent protests is still a disapproving one, there appears to be a growing acceptance among the adult public of disorderly forms of protest actions.

As for observable changes in evaluations of the success of different types of protest actions, we find the pattern largely mirrors what was described in relation to the image

of such behaviours. A growing share of South Africans are ambivalent or sceptical about the efficacy of this form of political behaviour, with the share who stated that peaceful actions were successful decreasing from 61% in 1995 to 46% in 2016. With respect to disruptive and violent protest actions, despite generally negative assessments, the group viewing such actions as successful in 1995 grew proportionally during the period under review. The percentage of respondents rating disruptive protests as unsuccessful fell from 71% in 1995 to 51% in 2016, while the share regarding violent actions as unsuccessful fell from 81% in 1995 to 58% in 2016. This suggests that disruptive and violent actions are increasingly being seen as effective political tools, while peaceful actions are regarded with mounting scepticism. The scale of change is larger in relation to the perceived effectiveness of protest actions, relative to overall levels of approval.

Cleavages underlying the attitudinal hierarchy

The pattern of results described above raises questions about the extent to which this national picture and trend is consistent throughout South African society. Is there broad consensus across socio-economic and demographic lines regarding how protest action is perceived, and have such attitudes been changing in a fairly uniform way for most citizens between 1995 and 2016? We examined whether such a consensus exists or, alternatively, whether fundamental attitudinal cleavages characterise mass opinion on this topic in the country. Table 2 presents mean evaluations and change in the perceived image of three types of protest over the period, based on two important attributes in the South African context, namely population group and educational attainment.

The racial patterns in protest attitudes are particularly interesting. For white adults, attitudes towards all three types of protest actions have become more favourable over

the period. By contrast, black African adults have become more negative towards peaceful actions, but more positive in respect of disruptive and violent actions. This pattern also applies to Indian adults, while coloured adults became appreciably more positive about peaceful protest and slightly more partial to disruptive protest, but their image of violence showed a modest decline. Taken together, these shifts suggest subtle racial variations, particularly regarding peaceful protest, while for disruptive and violent protests there is a more common perspective, with the image either improving or remaining stable. Again, it is important to emphasise that the improvements in the image of disruptive and violent actions that were observed still fall within an overwhelmingly negative overall position, but these do represent emerging signs of a notable change in predisposition among the public.

When looking at differences based on educational attainment, it is clear that in 2016 better-educated people were more favourably

Table 2: Subgroup changes in the image of peaceful, disruptive and violent protest action between 1995 and 2016 (mean scores)

	Peaceful			Disruptive			Violent		
	1995	2016	Diff.	1995	2016	Diff.	1995	2016	Diff.
Population group									
Black African	4.80	4.47	-0.34	2.79	3.22	+0.43	2.41	2.76	+0.35
Coloured	4.03	4.74	+0.71	2.58	2.90	+0.32	2.11	2.00	-0.11
Indian/Asian	4.18	4.12	-0.06	2.61	2.89	+0.28	1.94	2.62	+0.68
White	3.60	4.33	+0.73	1.80	2.70	+0.90	1.40	2.15	+0.75
Educational attainment									
No schooling	4.40	4.46	+0.05	2.55	2.99	+0.44	2.36	2.41	+0.06
Primary	4.56	4.41	-0.16	2.84	3.20	+0.35	2.32	2.43	+0.11
Incomplete secondary	4.69	4.45	-0.23	2.58	3.25	+0.67	2.24	2.75	+0.51
Completed secondary	4.21	4.46	+0.24	2.39	3.13	+0.73	1.88	2.70	+0.82
Tertiary	4.09	4.60	+0.51	2.17	2.76	+0.60	1.53	2.29	+0.76

Note: The mean scores are based on the original 7-point scales, with higher values representing a more positive image or greater perceived effectiveness.
Source: HSRC Omnibus Feb 1995; HSRC SASAS Round 14 2016.

disposed towards peaceful protest action than those with low levels of education. This difference was not evident in 1995. In both surveys, the observed effect of educational attainment appears less linear when looking at disruptive and violent action. Further testing will have to be undertaken to accurately discern how exposure to formal education is influencing attitudes towards these two types of protest action in South Africa.

The pattern that is described above may be related to changes in the perceived effectiveness of a particular type of protest over time. We argue that the perceived effectiveness of a protest action could reinforce the positive or negative image of that action. To provide an indication of whether a cognitive belief in the effectiveness of protest does in fact influence one's general predisposition to such actions, controlling for other socio-demographic characteristics, we conducted multivariate analysis. We opted to use an ordered logistic regression approach, since the dependent variables are ordered categorical protest image measures. In Table 3, we present three models that were generated, each corresponding to the general image of peaceful, disruptive and violent protest actions respectively. In the models, we include the perceived effectiveness measures alongside a set of socio-demographic characteristics as independent variables. Odd ratios are presented for ease of interpretation.

With regard to evidence on the socio-demographic determinants of assessments of the image of protest, we find firstly that many of the demographic attributes in the models were statistically insignificant. Neither population group nor age emerged as a significant predictor of the image associated with each type of protest. Furthermore, we find that there is no clear or consistent gender effect. While women on average hold lower peaceful protest approval scores compared to

men, there is no significant effect present in the case of the image of disruptive or violent protest actions. These findings are surprising, given the importance attributed to these characteristics in media representations of protest action in South Africa. There was also no effect based on marital status. A second notable finding is that the indicators of socio-economic status included in the models did not produce an especially strong or common effect on attitudes towards the different types of protest action. Employment status was not a significant predictor in any of the models, though educational attainment does exert an influence in two of the three models. In the case of public support for peaceful protest, the association is a positive one, implying that more favourable views of this type of protest are apparent as years of education increase (O.R. = 1.040). Education has an inverse effect on support for disruptive protest action, with approval waning as years of education rise (O.R. = 0.905). No statistically significant effect was observed in the third model.

Geography seems to matter, though its effect varies across the three types of protest. Compared to residents in formal urban areas, those living in informal urban settlements tend to hold a more positive view of violent protest actions (O.R. = 1.582), even when holding all other independent variables constant. A similar relationship was not observed for peaceful or disruptive protests. Those residing in rural traditional authority areas tend to offer more positive views of disruptive protest compared to residents in formal urban areas, while no significant geographic effect is observed in the peaceful protest model. At the provincial level, and using the Western Cape as the reference category, we found that living in any of the other provinces (the only exception being the Eastern Cape) is associated with lower levels of support for peaceful protest actions. The largest difference is between the Western Cape and KwaZulu-Natal (O.R. = 0.371). The provincial

differences observed in the model may be related to the unique history of protest and the prevailing political context in the Western Cape, and warrants further study. Such distinctive provincial differences were not detected in the

other models. Appraisals of disruptive protests are significantly lower in Limpopo and the Northern Cape,²¹ while violent actions are more strongly favoured than average in the Free State.

Table 3: Ordered logistic regression models examining the predictors of the perceived approval of peaceful, disruptive and violent protest action, 2016

	Model I Peaceful protest		Model II Disruptive protest		Model III Violent protest	
	Odds ratio	Sig.	Odds ratio	Sig.	Odds ratio	Sig.
Background variables						
Female (ref. male)	0.780	*	0.816		0.888	
Age	1.008		0.994		0.994	
Marital status (ref. married)						
Widowed, separated or divorced	1.141		0.806		1.067	
Never married	1.285		0.901		0.838	
Population group (ref. Black African)						
Coloured	1.051		1.305		0.774	
Indian	0.777		1.336		1.395	
White	0.738		1.149		0.878	
Years of schooling	1.040	*	0.905	**	0.990	
Employment status (ref. employed)						
Retired	0.894		0.755		0.903	
Unemployed	1.021		0.797		0.892	
Student	0.913		1.150		1.178	
Other labour inactive	1.056		1.000		1.075	
Geographic type (ref. urban formal)						
Urban informal	0.848		1.465		1.582	*
Traditional authority areas	0.892		1.402	*	1.169	
Commercial farms	0.959		0.899		1.199	
Province (ref. Western Cape)						
Eastern Cape	0.797		0.843		1.361	
Northern Cape	0.603	*	0.606	*	1.340	
Free State	0.604	**	0.784		1.669	*
KwaZulu-Natal	0.371	***	1.012		1.410	
North West	0.452	***	1.082		1.370	
Gauteng	0.501	***	1.018		1.233	

Continued on page 90

	Model I Peaceful protest		Model II Disruptive protest		Model III Violent protest	
	Odds ratio	Sig.	Odds ratio	Sig.	Odds ratio	Sig.
Mpumalanga	0.469	***	0.735		1.371	
Limpopo	0.541	**	0.315	***	0.735	
Political party identification (ref. ANC)						
Democratic Alliance	0.808		0.619	*	0.920	
Unaffiliated	0.739		0.741		0.774	
Other opposition parties	0.668	*	0.710		0.938	
Undeclared	0.942		0.735		0.731	
Perceived effectiveness of protest						
Peaceful protests	2.518	***				
Disruptive protests			2.107	***		
Violent protests					2.215	***
Number of obs.	2815		2795		2821	
Wald chi ² (28)	359		263		265	
Prob>chi ²	0.000		0.000		0.000	
Pseudo R ²	0.125		0.108		0.124	

Note: * p<0.05, **p<0.01, *** p<0.001
Source: HSRC SASAS Round 14 2016.

Concluding discussion

Moving beyond simple violent/non-violent binary distinctions, we presented data on public attitudes towards three types of protest action in this study. We found that peaceful protest action was viewed more favourably than either disruptive or violent action. The extent of this hierarchy was then explored across different socio-demographic and geographic groupings. No considerable differences were observed between age, gender and race groups. In addition, and perhaps more surprisingly, no significant differences were observed between different class groupings. Noteworthy geographical differences were observed, and these patterns point to how ecological effects shape attitudes towards different types of protest action. Understanding these ecological effects is critical and, we believe, is a key area for follow-up research. This is likely to require

exploratory qualitative research, including ethnographies and in-depth interviews, to capture specific geographic realities.

Attitudinal variables were found to be more powerful predictors of whether an individual approved of a specific type of protest action than socio-economic conditions. The perceived success of a specific type of protest action was shown to have a considerable influence on public support. This finding raises the question: when and why does protest action appear successful? We must remember that protest tactics – whether they are peaceful, disruptive or violent – are strategies utilised by certain groups in order to increase their bargaining ability with a specific institution(s). Protest tactics will appear successful to the extent that the institution(s) can be motivated to end the conflict in ways favourable to the protesters' goals. How the institution(s) responds to the tactics of protest

movements is, therefore, very important to how different types of protest action are viewed. If, for example, the authorities ignore peaceful protest tactics, then such tactics will be seen as ineffective by the general population and public approval for peaceful protest action will decline.

The link between attitudes and behaviour is well known, and the findings showcased in this study are therefore important. Although this relationship is indirect and is mediated by a range of different factors, research has shown that attitudes have a consistently dynamic influence on individual behaviour.²² Consider, for instance, if public confidence in violent protest action grew significantly. If more people see violent protest action as effective and approve of it, we would expect to see greater public participation in violent protest activities. A considerable increase in the number and intensity of violent protests would place a substantial strain on law enforcement agencies that are already struggling to cope with existing levels of protest activity. Moreover, an adult population who favoured violent protest tactics would be unlikely to cooperate with the authorities in containing such tactics and arresting the perpetrators.

The study has used two time points (1995 and 2016) to comment on how attitudes towards protest action have changed during the post-apartheid period. The data suggests that the general population has become more negative towards peaceful protest actions and more supportive of violent and disruptive actions, even though the predominant view of the latter two types of protest remains negative on average. Although this article contributes to the understanding of mass opinion towards various forms of protest, there are clearly important questions that remain unanswered. The data used for this article contain certain limitations that make it difficult for the authors to be more conclusive about the changing nature of protest

beliefs. The absence of more time points in our data series prevents us from providing more detailed commentary on the nature of the observed attitudinal change and how gradual it has been. Furthermore, we cannot be sure how sensitive protest attitudes are to period effects (such as a worker strike or student protest), and public opinion on protest tactics may be quite volatile. Further public opinion work should therefore aim to (1) identify other attitudinal and contextual correlates of protest beliefs, (2) more systematically monitor changes over time to gain a more accurate sense of the dynamism or stability of such attitudes, and (3) explore the relative influence of period effects. In so doing, we would greatly enrich our understanding of what must certainly be considered one of the most distinctive social and political phenomena in contemporary South Africa.



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Notes

- 1 Peter Alexander and Peter Pfaffe, Social relationships to the means and ends of protest in South Africa's ongoing rebellion of the poor: the Balfour insurrections, *Social Movement Studies*, 13:2, 2013, 204–221.
- 2 Peter Alexander, Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis, *Review of African Political Economy*, 37:123, 2010, 25–40.
- 3 Carin Runciman et al., *Counting police recorded protests: based on South African Police Service Data*, Johannesburg: Social Change Research Unit, University of Johannesburg, 2016.
- 4 The literature on protest participation suggests a large number of triggers to explain large-scale protest movements. Influential triggers are discussed by Sidney Tarrow, *Power in movement: social movements, collective action and politics*, Cambridge: Cambridge University Press, 1994; Charles Tilly, *From mobilization to revolution*, London: Random House, 1978. For a South African perspective, see Biniam E Bedasso and Nonso Obikili, A dream deferred: the microfoundations of direct political action in pre- and post-democratisation South Africa, *The Journal of Development Studies*, 52:1, 2016, 130–146; Patrick Bond, South African people power since the mid-1980s: two steps forward, one back, *Third World Quarterly*, 33:2, 2012, 243–264.
- 5 Research has shown that the experience of national events can have an effect on individual memories, attitudes and actions. This is particularly true if the events occur during a 'critical period' of one's life, such as later childhood, adolescence and early adulthood. See Howard Schuman

- and Amy Corning, Generational memory and the critical period: evidence for national and world events, *Public Opinion Quarterly*, 76:1, 2012, 1–31.
- 6 Data is available from the Global Database of Events, Language and Tone Project Database, <http://gdeltproject.org>.
 - 7 For example, thousands of people died between 1990 and 1994 in Gauteng and KwaZulu-Natal as a result of political contestations. For a detailed review of this violence, see Adrian Guelke, Interpretations of political violence during South Africa's transition, *Politikon*, 27:2, 2000, 239–254; Karl von Holdt, South Africa: the transition to violent democracy, *Review of African Political Economy*, 40:138, 2013, 589–604.
 - 8 Data is available from the Social Conflict in Africa Database, www.scaddata.org.
 - 9 Alexander, Rebellion of the poor. For further discussion of the 'rebellion of the poor' thesis, see Alexander and Pfaffe, Social Relationships to the means and ends of protest in South Africa's ongoing rebellion of the poor; Richard Ballard et al., Globalization, marginalization and contemporary social movements in South Africa, *African Affairs*, 104:417, 2005, 615–634.
 - 10 Richard Pithouse, A politics of the poor: shack dwellers' struggles in Durban, *Journal of Asian and African Studies*, 43:1, 2008, 63–94; Doreen Atkinson, Taking to the streets: has developmental local government failed in South Africa?, in Sakhela Buhlungu, John Daniel and Roger Southall (eds), *The state of the nation 2007*, Cape Town: Human Sciences Research Council Press, 2007, 53–77.
 - 11 Robert A Dahl, *Polyarchy: participation and opposition*, New Haven: Yale University Press, 1973; Francis Graham Wilson, *A theory of public opinion*, Chicago: Regnery, 2013.
 - 12 Andrea Royeppen, How does state security limit the right to protest? State response to popular participation in South Africa, *African Security Review*, 25:4, 2016, 340–355.
 - 13 Gareth Newham and Andrew Faull, *Protector or predator? Tackling police corruption in South Africa*, Institute for Security Studies (ISS), Monograph 182, 2011, 65.
 - 14 Karl von Holdt et al., *The smoke that calls: insurgent citizenship, collective violence and the struggle for a place in the new South Africa*, Johannesburg: Centre for the Study of Violence and Reconciliation and Society, Work and Development Institute, 2011.
 - 15 Carin Runciman et al., *Counting police-recorded protests*, 25.
 - 16 As described by Runciman et al., *Counting police recorded protests*, 30–31, the issue of how to handle instances where the three forms of protest are *not* mutually exclusive has had to be considered in developing a database to monitor changing patterns of protest action in the country. This was achieved by means of a classificatory principle that stipulates that if there is any evidence of violence within the context of a particular protest event (even if it began as a peaceful demonstration), then it is recorded as a violent protest. If there is evidence of disorder, the event is not recorded as orderly, but instead as either disruptive or violent depending on the circumstances. In instances where the coding of protests into the categories is more ambiguous owing to the complexity of real-life situations, this is ultimately resolved through a group review and adjudication process.
 - 17 MarkData was established as a branch of the HSRC in 1981 and remained as such until 1996, when it became an independent private marketing and strategic research company.
 - 18 Throughout the article, we refer to this as the 2016 survey round, even though the fieldwork occurred during 2017. This is because the survey occurred during the HSRC's 2016/17 financial year, which ended on 21 March 2017.
 - 19 Relative to our national population size, the South African HSRC survey samples compare favourably. It is helpful to look to other highly respected national and cross-national survey infrastructures. For instance, in the latest round of the European Social Survey, the sample was 2 852 for Germany, 2 430 for Russia, 1 959 for the United Kingdom and 2 070 for France. These countries all have population sizes larger than that of South Africa and yet the samples are in a similar range or smaller.
 - 20 Carin Runciman et al., *Counting police-recorded protests*.
 - 21 The Odds Ratio for the disruptive action is highest in North West province, although this effect does not achieve statistical significance. In the violent protest model, the Odds Ratio is also lowest in Limpopo, although again this provincial effect is not strong enough to be statistically significant.
 - 22 The Theory of Planned Behaviour hypothesises that individuals' attitudes are major determinants of their behavioural intentions. Although this theory emphasises the effect attitudes have on behaviour, it concedes that situational, normative and individual characteristics also have effects on behaviour. For a comprehensive discussion, see Martin Fishbein and Icek Ajzen, *Predicting and changing behavior: the reasoned action approach*, New York: Taylor & Francis, 2011.

Rhodes University v Student Representative Council of Rhodes University

The constitutionality of interdicting non-violent disruptive protest

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Section 17 of the Constitution of the Republic of South Africa, 1996 enshrines the right to assemble, peacefully and unarmed, and the Regulation of Gatherings Act 205 of 1993 enables the exercise of this right peacefully and with due regard to the rights of others. The recent student protests across South Africa have occasioned litigation seeking to interdict protest action, which the universities claim is unlawful. Overly broad interdicts, which interdict lawful protest action, violate the constitutional right to assembly and have a chilling effect on protests. In a decision of the High Court of South Africa, Eastern Cape Division, Grahamstown, a final interdict was granted interdicting two individuals from, among other things, disrupting lectures and tutorials at Rhodes University and from inciting such disruption. In this note, the constitutionality of interdicting non-violent disruptive protest is discussed and analysed, using Rhodes University v Student Representative Council of Rhodes University and Others (1937/2016) [2016] ZAECGHC 141.

In recent years, student protests – related to #FeesMustFall and others – have become commonplace on university campuses across South Africa. These protests, while generally peaceful, have sometimes involved serious unlawful activity and acts of violence, including arson, intimidation and damage to property.¹ As a result, many universities have obtained

interdicts to restrain unlawful protest action.² Although criminal charges may be brought against those who commit crimes in the course of a protest, interdicts are often seen as being more effective, because the application procedure for an interdict is far speedier. The *Rhodes*³ case began with student protests against gender-based violence at Rhodes University and the publication, on Facebook, of the '#RU Reference List' (the List) that named certain students as rapists.⁴ Student protesters at Rhodes University engaged in a number of non-violent disruptive acts, ranging from blockading roads and access to the university

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to interrupting lectures, along with more definitively unlawful acts such as intimidation and assault.⁵ The university responded by interdicting a range of protest activity, including the disruption of lectures and ‘academic progress’. Consequently, the *Rhodes* case presents a unique opportunity to consider what protection should be afforded to non-violent disruptive protest action that does not rise to the level of clearly unlawful activity.

Legal background

Although a number of rights are implicated in protest action, including the rights to freedom of assembly, expression and association as well as political rights, this discussion will largely focus on the right to freedom of assembly. Section 17 of the Constitution⁶ affords everyone the right to assemble, demonstrate, picket and present petitions, provided they do so peacefully and unarmed. When interpreting section 17, the Constitutional Court has given the right broad and generous application to afford everyone a right to assemble or gather for any lawful purpose, provided they do so unarmed.⁷ This right and protection is only lost if those gathering do not intend to be peaceful.⁸

While violent protest is not protected under section 17, the Constitutional Court has nonetheless found that a protester should be afforded constitutional protection even if there is sporadic violence at the gathering, provided that the individual concerned remains peaceful.⁹ This means that violent protesters may lose constitutional protection without impugning the protection afforded to peaceful protesters who are also present. This generous interpretation of the right to freedom of assembly extends the protection of section 17 to a wide range of protest action, arguably including non-violent disruptive protest. However, as with the other rights contained in the Bill of Rights, section 17 can be justifiably limited in terms of section 36 of the Constitution. It is important to note

that while violent protesters do not impugn the constitutional protection afforded to others, violent protesters themselves lose protection and may be subject to prosecution if their actions rise to the level of criminal activity.

The enabling legislation for the right to freedom of assembly, the Regulation of Gatherings Act¹⁰ (RGA), regulates how assemblies and gatherings may take place. The RGA applies to demonstrations (defined as the assembly of fewer than 15 people) and gatherings (defined as the assembly of 15 or more people on a public road or in a public place). Consequently, the RGA often does not apply to protests that take place on university property. However, the RGA can still provide guidance about lawful protest action since it outlines what conduct is prohibited and permissible at gatherings.¹¹ Specifically, the RGA prohibits possessing weapons, inciting violence, and attempting to compel people to join a gathering or demonstration; thereby delineating what constitutes ‘armed and non-peaceful’ protest.¹² While the RGA does not prohibit barring entrances to buildings or access to premises, it places an obligation upon marshals to take reasonable steps to prevent protesters from denying access.¹³ Notably, the RGA does not prohibit protesters from disrupting business and other activities.

Beyond legislative restrictions, the right to protest is not absolute and must be exercised with ‘due regard for the rights of others’.¹⁴ This was confirmed and developed in *Hotz*,¹⁵ a case related to the #FeesMustFall protests and which involved non-violent disruptive and violent protest action. The University of Cape Town applied for an interdict when students, during a protest that has come to be known as ‘Shackville’, erected a structure that blocked a university road and obstructed traffic, engaged in acts that damaged university property, and assaulted staff.¹⁶ The law provides that a party

may be granted a final interdict if they have a clear right that has been injured or a reasonable apprehension of such injury being committed and there is no other suitable alternative remedy available.¹⁷ Here, the university's rights to, among others, ensure the safety of its staff and control access to its property had been infringed by the student protest.¹⁸ While the students conceded the unlawfulness of their actions, they argued that their conduct was justifiable and not wrongful.¹⁹ The Supreme Court of Appeal recognised the historical importance of 'civil disobedience' in combatting unjust regimes, but did not decide whether protest akin to this would be justifiable and lawful.²⁰ Consequently, the legal protection afforded to protest action that is not violent, but still disrupts or prevents normal activity, remains murky. This issue arose repeatedly during the #FeesMustFall student protests and, specifically, in the *Rhodes* case.

Non-violent disruptive protest is not a new phenomenon, nor is it unique to the student protests. Disruptive protest tactics were used to resist the apartheid government, despite its attempts to ban and suppress any forms of protest.²¹ In a democratic South Africa the status of this form of disruptive protest is unclear, since protest is now afforded constitutional protection.²² The student protests, which were litigated through numerous interdicts, provide an opportunity to examine how the law treats disruptive protest action. Though some action during the student protests was clearly unlawful (such as damage to property, intimidation and violence), this note will focus on the non-violent disruptive protest activities that took place, such as interrupting lectures and tutorials, barricading university buildings, and otherwise hindering academic activities. These activities fall into a grey area that is not presumptively unlawful and the *Rhodes* case may be the first opportunity the Constitutional Court has to clarify the issue.

The facts

In April 2016, the List, which named a number of past and present students who had allegedly sexually assaulted or raped other students, was published.²³ The List quickly became a symbol of rape culture to students at Rhodes University, sparking a number of protests.²⁴ These protests culminated in a large group of students converging on student residences on 17 April 2016, and kidnapping and assaulting some of the individuals identified in the List.²⁵ Following this, students barricaded entrances to the campus, comprising two public roads and a private road.²⁶ The Student Representative Council of Rhodes University (SRC) called for an 'academic shutdown'.²⁷ This 'shutdown' was effected by protesters physically chaining doors as well as interrupting lectures and being disruptive in test venues and libraries.²⁸

On 29 April 2016 Rhodes University administration responded by obtaining an interim interdict that prevented students at the university from participating in, facilitating or encouraging unlawful activities on campus.²⁹ The interdict applied to three named individuals, Sian Ferguson, Yolanda Dyantyi and Simamkhele Heleni (the named students), and to the broad classes of 'students and persons associating themselves with or engaging in unlawful activities' on campus (emphasis added).³⁰ This meant the interdict not only applied to specified people who were previously involved in the protests but could also be used against future protesters. The interdict prohibited a number of listed activities that the university considered 'unlawful', including hindering access to campus, disrupting lectures and tutorials, and damaging the university's property and reputation.³¹ The interdict also prevented protest action that would interfere with the academic progress of the university. The interim interdict thus prohibited both protest action that was clearly unlawful (causing

damage to property, assault and intimidation) and protest action that was merely disruptive (the disruption of lectures and tutorials), the legal status of which is less clear.

The named students opposed the finalisation of the interdict. In addition, 37 academic staff members of Rhodes University applied to intervene and also opposed the finalisation of the interdict. Both groups chose to focus on the ambit of the interdict.

Both the intervening staff and named students focused on the parts of the interdict that applied to activity that was not clearly unlawful, and challenged the constitutionality of the interdict in this regard.³² The named students argued that the interdict was overly broad and vague and, as a result, interdicted lawful and protected protest action. The intervening staff argued that the class of persons the interdict applied to was overly broad and had been used to threaten staff who encouraged students to disrupt, thus infringing the staff's right to freedom of expression and academic freedom.³³ Specifically, Rhodes University threatened to prosecute a staff member for telling her students to 'put up your hand and ask about rape culture, disrupt'.³⁴ The case thus turned on whether the interdict had unjustifiably infringed the parties' rights to freedom of expression, right to freedom of assembly and, in the case of lecturers, their academic freedom. It was further contended that the university's failure to meaningfully engage with the protesters also rendered the interdict unconstitutional.³⁵

In addition, the named students disputed the allegations that they had engaged in or associated with unlawful activities. These students all confirmed that they had been involved in some protest action, but contended that this involvement was lawful. The named students did concede, however, that where protest action had amounted to criminal conduct, it should not be protected.³⁶

The judgment

Judge Lowe had to consider two issues when deciding the case: firstly, whether the conduct being interdicted was constitutionally protected, and, secondly, whether there was a valid basis for granting an interdict.

In deciding whether the interdict should stand, the court considered whether the requirements for a final interdict had been met, namely that the university had a clear right that had been injured or was reasonably apprehended to be injured, and that there was no alternative remedy available.³⁷ The court applied the precedent set in *Hotz*, which meant that the unlawfulness of the protest action and the likelihood of the protest action being repeated was also considered.³⁸

The court found that the university did have certain rights that warranted the protection of an interdict, including its rights to control access to and prevent unlawful conduct on its property, as well as to ensure that staff are able to perform work.³⁹ Though the students and staff suggested remedies which they considered to be suitable alternatives to an interdict, for instance criminal charges or disciplinary proceedings, the court found that none of the alternatives was a proper or effective alternative to an interdict.⁴⁰ Consequently, the court found the university had a clear right, and that an interdict was the only suitable remedy available.⁴¹ As a result, the case turned on the injury caused by the interdicted parties and the lawfulness of their actions.

The court found that there had been an injury to the university's rights in a general sense, where the protest action had involved unlawful and unprotected activities such as kidnapping.⁴² The court also held that section 17 did not protect protest action that interfered with the rights of other students, and found that such action could be interdicted.⁴³ The determinative consideration was whether the party being interdicted had engaged in protest action that was not

protected. Since each party had engaged in different actions, the court had to consider each individually.

The Student Representative Council (SRC) had elected not to oppose the interdict. The court held that the SRC's call for an 'academic shutdown' was protected under section 17, provided that it did not incite violent protest action.⁴⁴ The interim interdict against the SRC was discharged.

It was alleged that the named students had participated in the protests and engaged in unlawful activity. None denied participating in the protests, but all denied involvement in unlawful activity. The court found that all the named students had associated with the unlawful activities of kidnapping, assault and inciting violence. The court further found that Ferguson and Dyantyi had participated in the disruption of lectures at the university.⁴⁵ Ferguson had posted on Facebook, calling for a certain lecture to be disrupted peacefully, while Dyantyi was part of a group of students that disrupted a lecture and prevented its continuation.⁴⁶ Ferguson and Dyantyi argued that disruption of lectures is not unlawful, but rather falls within constitutional protection, provided that it is peaceful.⁴⁷ The court assumed that disruption of lectures was unlawful and held that disrupting lectures was not a form of constitutionally protected protest action.⁴⁸ The court confirmed the interdict against the students but reduced the scope significantly.

Including the classes of students and others 'engaging in unlawful protest activity' under the interim interdict was arguably the most tenuous part of the order, and the reason why staff members sought to intervene in the application.⁴⁹ The court found that the interdict applied to individuals who had not acted unlawfully or associated themselves with unlawfulness, and thus were still entitled to constitutional protection.⁵⁰ The court therefore

held that the interdict infringed their rights and that the classes referred to were vaguely and broadly defined.⁵¹ The interdict against both classes was discharged.

The court ultimately decided to reduce the scope of the interdict quite drastically and restricted its application to only Ferguson, Dyantyi and Heleni.⁵² All three students were interdicted from clearly unlawful activities such as kidnapping, assault and inciting violence. Heleni was also interdicted from interfering with access to the university. Most notably, Ferguson and Dyantyi were also interdicted from disrupting, and inciting disruption of, lectures and tutorials at Rhodes University.

Appeal to the Constitutional Court

Following the high court decision, the named students unsuccessfully applied to the Supreme Court of Appeal for leave to appeal.⁵³ The students have since approached the Constitutional Court for leave to appeal the final interdict.⁵⁴

In their application, the named students raised important issues relating to whether Lowe's interpretation of the law and his findings might infringe the right to protest. They contend that they should not have been interdicted from specific unlawful acts, including kidnapping and assault.⁵⁵ The high court had granted the interdict on the basis that the students had associated themselves with unlawful conduct during the protests. However, the students contend no connection was established between themselves and these unlawful acts, and that their mere participation in the protests (or even taking a leadership role in the protests) does not imply association with any unlawful acts committed by others during the protests.⁵⁶

Ferguson and Dyantyi also contend that they should not have been interdicted from disrupting lectures and tutorials because such conduct is not unlawful.⁵⁷ Instead, they argue, temporary

disruption of a class to express a grievance or view is an exercise of their constitutionally protected rights to freedom of assembly and expression.⁵⁸ They submit that disruption of a class is not unlawful unless it completely breaks up the class.⁵⁹ The high court had assumed that disruption of lectures and tutorials was unlawful without meaningfully considering the issue.⁶⁰

At time of writing, the Constitutional Court has not yet heard the application.

Comment

The high court decision is something of a mixed bag, which leaves important issues ripe for consideration by the Constitutional Court, if the appeal is heard. Before discussing these issues, however, it is worth noting the significance of the *Rhodes* judgment as precedent for future protest cases, particularly those concerning academic environments and participants.

Recognition of academic freedom

A noteworthy aspect of the judgment is the reliance that the intervening staff placed on their right to academic freedom in challenging the interim interdict. Academic freedom, at the core of which is the right of individuals to carry out research and teaching without interference, is protected as part of the right to freedom of expression in our Constitution.⁶¹ This protection recognises our recent past under which academic freedom was severely restricted, and any academic thought, speech and writing that criticised the unjust system of apartheid was suppressed.⁶² Academic freedom acts as a defence against forced conformity, ensuring that we achieve the kind of open and democratic society envisioned by our Constitution.⁶³ It benefits not merely the individuals involved in academia but also our society as a whole, since academia plays an important role in our society through knowledge creation and dissemination.⁶⁴

Despite its importance, the right to academic freedom has not yet been given much content by our courts. This case marks the first time that the right to academic freedom has been considered within the context of interdicts against protest action. The interim interdict not only limited the rights of students to freedom of assembly and expression but also limited the right of academic staff to academic freedom, in that the university had used the interdict to threaten a lecturer who sought to engage students on rape culture with contempt proceedings.⁶⁵

In its decision, the court demonstrated an understanding of the importance of academic freedom:

[A]cademia has in the history of our country, first pre- and then post-1994, a proud tradition of academic excellence and academic freedom, and have, at least amongst the enlightened, always jealously guarded the entitlement to express their academic views in the best traditions thereof.⁶⁶

Although the court did not explicitly find that the interim interdict infringed academic freedom, it was highly critical of how the interdict had been used against a lecturer.⁶⁷ The court refused to finalise the interim interdict against the class of 'others engaging in unlawful protest activity', which included academic staff.

Restrictions on interdicting classes

At a more general level, the *Rhodes* decision sets important parameters as to whom an interdict may apply to. The overly broad and vaguely defined classes named in the interdict left room for potential abuse and resulted in a chilling effect on protest action throughout Rhodes University.⁶⁸ This chilling effect was not restricted to protests concerning the List, but ended up also impacting later protest action.⁶⁹ In framing the respondents in the interdict so broadly, Rhodes University relied, in part, on

a growing trend to grant interdicts against unnamed classes and groups of protesters.⁷⁰ This framing attempts to address the difficulty in identifying and naming all individuals who have engaged in unlawful protest, particularly when protests are protracted and diffuse across university campuses. Other universities have similarly relied on this difficulty to justify broad interim interdicts.⁷¹

In *Rhodes*, however, Lowe clearly delineated the grounds on which an interdict may be granted against unnamed individuals. Previous cases had allowed interdicts to apply to unnamed individuals by interdicting a class, provided that the members of that class were ascertainable.⁷² The decision in *Rhodes* limits the potential abuse of this allowance by excluding future conduct as a determining factor.⁷³ This restricts the university's ability to use the interdict as a pre-emptive measure to prevent and sanction future protesters through contempt of court proceedings.⁷⁴ Instead, the interdict may only apply to individuals who belong in a class *prior* to the granting of the interdict.⁷⁵ This means that, in the *Rhodes* case, the students or staff who disrupted lectures after the granting of the interdict would not violate it.

The lawfulness of non-violent disruptive protest

One of the judgment's greatest shortcomings is that it assumes that certain forms of non-violent disruptive protest are unlawful and incompatible with peaceful protest, without meaningfully engaging with the constitutional protection afforded to such acts. While case law on violent protest action is plentiful and discussed at length in the *Rhodes* case, precedent around disruptive protest action is sparse. This is perhaps because, in previous cases, disruptive protest action has been accompanied by violence and the interdicts have applied to individuals who participated in or aligned themselves with violent protest.⁷⁶ However, *Rhodes* was entirely

unique in interdicting lawful – albeit disruptive – protest action and applying it to individuals who were not involved in violent protest action. By assuming that disrupting lectures and tutorials was unlawful, the court missed an opportunity to recognise the importance of non-violent disruptive protest action and develop the law to protect this action.

Disruptive but non-violent protest action has a long and proud history in South Africa, dating back to peaceful resistance during apartheid.⁷⁷ These forms of resistance were often outlawed by the government in an attempt to stymie the anti-apartheid struggle.⁷⁸ It is against this backdrop that the right to assemble and demonstrate was recognised and included in both the interim Constitution⁷⁹ and the final Constitution.⁸⁰ However, the right, in both iterations, only applied to peaceful and unarmed action. Fortunately, in interpreting it, the courts have given the wording a generous interpretation which, at a minimum, protects 'non-violent' protest action.⁸¹ Beyond this, *Garvas* hints at a positive content of the right that protects protest action, even where there has been sporadic violence.⁸² Furthermore, in the RGA the legislature elected to permit certain acts of disruption, such as barricading streets, indicating a level of permissiveness towards non-violent disruptive protest. Arguably, the definition of peaceful protest under section 17 is broad enough to include a range of legitimate protest action, including non-violent disruptive protest. The court in *Rhodes* seemed to acknowledge this when it stated:

M]ass protest continues to be an important form of political engagement and is an essential role player in any liberal democracy. Meaningful dialogue may well require the collective efforts of demonstrators, picketers and protesters. Crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion.⁸³

However, despite this dicta, the court went on to refer to a call for ‘peaceful disruption’ of a lecture as oxymoronic and to assume that disrupting lectures and tutorials was unlawful.⁸⁴ Although it was agreed by both sides that the disruption of lectures and tutorials was a non-violent protest action and the participants were unarmed, the court nonetheless classified it as ‘unlawful’ protest action and interdicted it. This finding and assumption of unlawfulness is inconsistent with the generous interpretation afforded the section 17 right and its historical context. Furthermore, there does not appear to be any basis, in case law or legislation, that classifies such conduct as unlawful. When measured against section 17, the non-violent disruptive protest action in the *Rhodes* case was constitutionally protected and the infringement of this right ought to have been considered in the judgment. This is not to say that all disruptive protest action is permitted and cannot be subjected to an interdict, but merely that the court ought to take cognisance of the constitutional protection it is afforded.

The question is then, how should the court have dealt with interdicting constitutionally protected protest action? At the high court level, Lowe interpreted *Hotz* to have developed the criteria for an interdict to include the constitutional protection.⁸⁵ To do this, the court developed the criteria of ‘injury’ to the university’s rights and held that, because the students had engaged in violent protest action that was not constitutionally protected, they had injured the university’s rights.⁸⁶ Unfortunately, framing the criteria in this manner does not provide a mechanism to deal with a situation where students might engage in protest action that is protected but also injures the university’s rights and may possibly justify the granting of an interdict. As a result, the approach adopted in *Rhodes* lacks the sophistication needed to deal with the involvement and possible limitation of constitutional rights in the context of interdicts.

The right to assembly is not absolute and can be limited under certain circumstances. In the context of interdicts, judges are empowered to develop the common law in a manner that limits the right to assembly, provided the limitation is in line with section 36 of the Constitution.⁸⁷ This enables the judge to strike an appropriate balance between the rights of the various parties. As shown above, an interdict that restrains individuals from disrupting lectures and tutorials clearly limits the right to freedom of assembly, the scope of which extends to disruptive protest.

The court in *Rhodes* would have needed to carefully examine whether the limitation was in accordance with section 36 of the Constitution, which requires that any limitations placed on rights must be reasonable and justifiable in an open and democratic society.⁸⁸ The degree of the limitation of the right must be proportional to the purpose sought by the limitation, as well as its importance and effect, while also considering whether there are less restrictive means to achieve the same purpose.⁸⁹

The Constitutional Court has already stressed the importance of the right to assembly in *Garvas*.⁹⁰ Freedom of assembly enables vulnerable and marginalised people to express their grievances and to protect and advance their rights.⁹¹ Disruptive protest is a particularly effective way to draw attention to shared grievances and exercise the right to freedom of assembly. Indeed, the effective exercise of the right to freedom of assembly necessitates some level of disruption to everyday life.⁹² To this end, Rhodes University has a constitutional obligation to tolerate protest on its campus and with it, tolerate some disruption of its operations and activities. An interdict that restrains individuals from any disruption in a lecture or tutorial would be exceedingly invasive of the right to freedom of assembly. The Constitutional Court has urged that the exercise of this right may not be limited ‘without good reason’.⁹³

In granting the interdict, the court sought to protect the legitimate interests of the university, particularly the common law rights of a property owner, but it did not give adequate consideration to the constitutional protection afforded to non-violent disruptive protest. Consequently, the court's development of the common law, which appears to make any disruption unlawful and subject to be interdicted, cannot be justifiable under section 36. In order to balance the competing rights, the court would have needed to adjust the relief it granted to the university to be the least restrictive formulation needed to protect the university's interests. This could have been achieved through a narrower interdict that, for example, set out to curtail the level of disruption without restricting all disruption. By limiting the scope of the interdict to allow for some disruption, the interdict would have been less invasive of the right to freedom of assembly while effectively protecting the university's interests, and thus a proportional and justifiable limitation of the right to freedom of assembly.

In determining the scope of the interdict, the court would have had to consider the extent of disruption that the university is obliged to tolerate. A useful suggestion in this regard is made by the named students in their application for leave to appeal to the Constitutional Court. Relying on *DA v Speaker, National Assembly*,⁹⁴ the students suggest that the court distinguish between permanent disruption (which 'incapacitates' the lecture or tutorial) and temporary disruption (which allows for the expression of a grievance).⁹⁵ This strikes a more appropriate balance between the rights of the parties, enabling the exercise of the right to freedom of assembly with due respect and care for the rights of others.

Conclusion

The *Rhodes* case and the #FeesMustFall protests more generally have raised important

questions around the right to freedom of assembly and protected forms of protest action. While the *Rhodes* decision attempted to grapple with these issues, there remains much uncertainty. We wait to see whether the Constitutional Court will weigh in on the issue and bring clarity to the legal status of non-violent disruptive protest.

Postscript

After this article was accepted, the Constitutional Court handed down a judgment on the appeal and we wish to highlight the salient points of the judgment in this postscript. Although the court granted the students leave to appeal, the court only upheld the appeal in respect of costs.⁹⁶ Acting Justice Kollapen, writing for the majority, agreed with the named students that the case raised novel constitutional issues but dismissed their appeal on the grounds that the case did not 'justify a ventilation and consideration of such issues'.⁹⁷ As a result, the Constitutional Court judgment did not deal with the substantive constitutional issues outlined in the named students' appeal and leaves us without much-needed clarity on the legality of disruptive protest.



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Notes

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Book review

Securocrat repression and 'Protest nation' resistance

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Review of:

Jane Duncan, *The rise of the securocrats*, Johannesburg, Jacana Media, 2014

ISBN-10: 1431410756

Jane Duncan, *Protest nation: The right to protest in South Africa*, Pietermaritzburg, University of KwaZulu-Natal Press, 2016

ISBN-10: 186914323X

Jane Duncan is a national treasure, and for at least two decades – initially at the Freedom of Expression Institute, then Rhodes University and now University of Johannesburg (UJ), as well as within the Right2Know movement – she has played a leading public intellectual role in questioning society's direction. She is a trusted and sincere analyst, and although her academic and research focus has mostly removed her from the media commentary circuit (to the regret of so many who relied on her sound, eloquent articulation of dissident views), it nevertheless gave her the space and scope to think and write well beyond the terrain of journalism. Duncan's two recent books on repression and resistance – *The rise of the securocrats* (2014) and what she terms the sequel, *Protest nation* (2016)¹ – allow her to grapple with the richest contemporary cases of social conflict and state malevolence. Today, the latter book

remains the finest overview of the nature and scale of dissent – although her colleagues Peter Alexander, Trevor Ngwane, Carin Runciman and Luke Sinwell at UJ's Centre for Social Change are doing updates based upon tens of thousands of even more detailed protest cases – while the first is now joined by Ronnie Kasrils's 2017 book, *A simple man* and Jacques Pauw's *The president's keepers*.

Duncan was way ahead of her time in linking the crony-capitalist state to the growing security apparatus. Examples from the early 2000s showed clearly that protests could beat repression. In 2001, at the United Nations World Conference Against Racism in Durban, there were the first inklings of mass protest against Thabo Mbeki's regime and against mega-events. As Duncan points out, a year later, at the Johannesburg World Summit on Sustainable Development, the paranoia came into full view with repressive policing tactics. In late 2003 ANC leaders sided with the Treatment Action Campaign (TAC) and instructed Mbeki to stand down on his claims that the United

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States' Central Intelligence Agency was working alongside Big Pharma multinational corporations to manipulate the TAC against the South African government – thereby forcefully reversing AIDS-denialist policies and increasing life expectancy from 52 then to 64 today.

Paranoia was also evident when in May 2008, four months before his forced departure, Mbeki and even Kasrils (then minister of intelligence) announced that xenophobic attacks that had left hundreds of thousands of immigrants displaced were the result of an artificial 'Third Force'; Mbeki had openly denied the possibility of xenophobia six months earlier when the African Peer Review Mechanism pointed out the dangers. In mid-2010, state paranoia about mass unrest, inherited and amplified by Jacob Zuma, led to an initial ban on protest anywhere near the main soccer stadiums. As Duncan recalls in *The rise of the securocrats*, 'The fact that a number of marches were subsequently allowed during the World Cup period could be attributed to the negative publicity generated by the ban on the quality public education march [led by the NGO Equal Education]; what is not known is the extent to which the ban remained in effect in other parts of the country, and how many gatherings were affected.' Still, anti-Fifa protests prior to the World Cup gave the government a scare: informal traders facing restrictions, displaced Durban fisherfolk, forcibly removed Cape Town residents of the N2 Gateway project, construction workers, AIDS activists prevented from distributing condoms, environmentalists concerned about the World Cup's offset 'greenwashing', Mbombela students who had lost access to schools, disability rights advocates, poor towns' residents demanding provincial rezoning, SA Transport and Allied Workers and Numsa members at Eskom who won major wage struggles just before the Cup began, and, on the first days of play, Stallion Security workers protesting against labour broking and opaque payments.

Paranoia was by now hard-wired into the securocrat mentality, and by August 2012, when 34 miners were murdered by police at Lonmin's Marikana platinum mine while on a wildcat strike – as Duncan notes, 'some allegedly in a much more premeditated fashion than the official account suggested' – proof existed; not only in the now-notorious email from Cyril Ramaphosa describing the strikers as 'dastardly criminal' and requesting 'concomitant action' from the cops (in 2017 he apologised for the wording but the stain of complicity remains). In addition, as one police general finally revealed, the main concern was the sudden surge in the popularity of Julius Malema, who had just been expelled as ANC Youth League leader (by a committee Ramaphosa led) and who would soon launch a political party to the ANC's left, resulting in the 2016 ouster of the ANC from its rule in the Johannesburg and Tshwane municipalities.

By 2014, Duncan could argue with plenty of evidence in *The rise of the securocrats* that the new securocrats had wormed their way deep into the state, in 'a growing and unhealthy bureaucratisation' of repression. Duncan was at the time studying, more carefully than nearly anyone, how police were mischaracterising protests and 'Gatherings Act Incidents'. At the time, mid-2013, Police Minister Nathi Mthethwa announced that there had been 46 180 'protests' (his word) from 2009–13, and 'all were successfully stabilised, with 14 843 arrests effected'. (Does 'successfully stabilised' also apply to Marikana?)

More worrying than police mangling of information concerning protests is the extent of overkill tactics when repressing demonstrators. As Duncan points out in *The rise of the securocrats*, the Public Order Policing division desired 'an armoured fleet of 200 Nyalas (the infantry mobility vehicle); pyrotechnic weaponry, including tear gas and stun grenades; more

water cannons, equipped with red and blue dye; video cameras for recording protests and other surveillance equipment; and Long-Range Acoustic Devices (LRADs). Commonly known as “sound cannons”, LRADs emit sounds that are painful to the human ear and can even cause deafness.’ With appropriate cynicism she comments, ‘In making their arguments for more resources, the police pointed to the spike in violent service delivery protests in the 2013/14 financial year.’

Bearing in mind this context, Duncan focuses her more recent book – *Protest nation* – on ‘one facet of protest in South Africa: namely, the right to do so’, including municipal bureaucratic reactions, the national policy and legislative milieu, and national-to-local dissent management by the police and politicians. Some of these top-down strategies leave Duncan bemused and outraged, such as Johannesburg’s pay-to-protest systems and Rustenburg’s protest prohibition instincts. Some relate to specific turf battles within the ruling party. Some are based on petty corruption, such as councillors’ ability to profit from housing waiting lists and sales. The list of micro-grievances appears endless, and it will take a much wider scan to allot tendencies to the protests. Still, using several databases, including media reports, Duncan skilfully recalls the diverse representations of many of the higher-profile protests during 2009–13. One of her concerns is how journalists flit from one to the other in search of drama; her penultimate chapter on ‘riot porn’ reporting is a vital antidote to what passes for news coverage of these grievances.

Protest nation considers thousands of protests in a dozen sites: the Eastern Cape’s Nelson Mandela Bay (Port Elizabeth), Lukhanji, Makana and Blue Crane Route municipalities, the Western Cape Winelands (in part because of impressive farmworker protests in early 2013),

Mpumalanga’s capital of Mbombela (Nelspruit), KwaZulu-Natal’s eThekweni (Durban) metro, and Johannesburg. Duncan’s *Protest nation* research teams at Rhodes and UJ pored over rationales, strategies and tactics adopted by protesters, and agreed on a typology of ‘non-violent, disruptive and violent’. This requires a further disaggregation of data, since the South African Police Service’s Incident Registration Information System (IRIS) database is much clumsier and inconsistent in identifying protests only as ‘peaceful’ or ‘unrest-related’. It transpires that both municipal and national police have quirky modes of data collection, undermining those of us who have argued for an interpretation of IRIS Big Data to reflect South Africa as ‘protest capital of the world’. That may be the case, but we will need a more critical approach when citing IRIS as evidence, Duncan warns in *Protest nation*.

Duncan’s *Protest nation* literature review is cursory, but in search of a new theoretical frame for South African protest, she not only explores a fusion of ‘Tarrow, McAdam and Tilly’s typology of political opportunities and Della Porta and Reiter’s categories affecting policing styles’ but also makes a case for much wider thinking: ‘Applying traditional social movement theorising to the South African case is difficult as this body of theory typically displays a Northern bias. This is because it is often synthesised from the study of Northern-based movements, which have often been conceptualised as large unitary structures.’

The large South African social movements that did emerge during the early 2000s have been analysed at length (e.g. in the well-known 2006 edited collection *Voices of protest* by Ballard, Habib and Valodia), in part because many drew directly upon prior (anti-apartheid era) community or sectoral organising traditions: the TAC (founded in late 1998), Durban’s Concerned Citizens Forum (1999), the Johannesburg Anti-Privatisation Forum (2000), and the Landless People’s Movement (LPM, 2001). In two

cases – Durban’s activists and the LPM – their brief rise and subsequent decline reflect processes observed elsewhere (e.g. in *The city and the grassroots* by Manuel Castells, the major scholar of 20th century urban social movements), in which movements are either successful and dissolve, or fail, leaving a major void.

In *Protest nation* Duncan offers these conclusions:

If protestors have the knowledge to defend their rights, are located in areas where the intensity of struggle is low and media knowledge of protests is high, are known entities whose grievances are understood and even shared by state actors, and the state regulates protests administratively rather than politically and embraces more democratic policing models, then protests are more likely to be facilitated. Conversely, if protestors lack the knowledge to defend their rights, are located in areas where struggles are intense and media knowledge of protest rights is also low, are considered to be unknown entities by state actors who do not share their grievances and engage in political decision making while embracing authoritarian police models, then protests are more likely to be repressed. However, if repression weakens support for the ruling hegemonic bloc and hastens support for subaltern groups, then state actors will avoid using overt violence against protestors, shifting instead to risk-based pre-emptive measures designed to reduce the transformative potential of protests.

These aside, what Duncan’s book confirms is the difficulty of generalisation about South African community protests. The dozen municipalities she examines over the 2009–13 period in *Protest nation* suffered a litany of

unique, ‘localistic’ problems, and only a few processes can be termed universal. The latter included the replacement of politicians and bureaucrats close to the old Mbeki order with those aligned to the new order, the onset of recession in 2009, and the rise of two new parties – the Congress of the People’s centre-right breakaway from the ANC in 2008 (taking 9% of the national vote in 2009 before melting down in internecine conflict) and the leftist Economic Freedom Fighters breakaway in 2013 (taking 6% of the vote in 2014 elections, rising to 8% in 2016). There was also a sense that under Zuma, municipalities might be caught in greater patrimonial politics, procurement fraud and illiberal populism than under Mbeki – although it must be acknowledged that Transparency International’s records of South African corruption perceptions indicate much more rapid worsening during two prior periods: 1996–99 (from 23rd least corrupt to 35th) under Nelson Mandela, and 2003–2008 under Mbeki (from 35th to 55th). Both Mbeki and Mandela adopted national economic policies considered exceedingly friendly to business, e.g., dropping crucial exchange controls, casualising the labour market and lowering the corporate tax rate from 56% to 28%.

The fine-toothed comb Duncan and her *Protest nation* research team use to explore reasons for protests in the dozen case sites – drawing on local municipal data – reveals extremely diverse causes. In just one case, the 1990s decision to cut back the national-to-local subsidies (what was later termed the ‘Equitable Share’ grant), does Duncan resort to a national-level explanation. Yet unmentioned is the dilemma of electricity protesters everywhere, whether to get their first connections to the grid, or to prevent disconnections, or to get a larger lifeline (the norm is a merely tokenistic 50 kWh/household/month), or to lower prices. From 2008–13, the 350% increase in electricity prices imposed by Eskom on both its direct customers and

municipalities would surely have amplified the desperation of electricity protesters?

Electricity price hikes by Eskom are just one of several national considerations when theorising protest in a Polanyian manner, i.e. following Karl Polanyi's 'double movement' in which stresses caused by excessive 'market' expansion in turn create resistance. In *Protest nation*, Duncan cites parallel national concerns of the 'National Intelligence Coordinating Committee, which coordinates the work of the various intelligence agencies and interprets intelligence for use by the state and cabinet. NICOC identified labour issues, political intolerance, service delivery protests and anti-foreigner sentiment.' In the same vein, Duncan looks for a universal process:

the 'micro-mobilisations' that protests represent are not isolated phenomena: they can be related to broader processes of social change. More specifically, in expansionary periods, when political and economic elites can afford democracy, they will tolerate higher levels of dissent, including protests. In such periods, they are likely to promote a negotiated management of protests, where protesting is recognised as a right within clearly circumscribed legal and institutional frameworks ...

But since 1994 – especially since 2011, at the peak moment of the commodity super-cycle – the macroeconomic conditions have degenerated, she observes in *Protest nation*:

In recessionary periods, when profits decline, these elites are more likely to resort to coercion than negotiation, and to circumscribe the right to protest. At the same time, protests are likely to increase in frequency and intensity, as it is less possible for society to be held in equilibrium through consensus, and as a result social relations become more

conflictual. South Africa is in just such a recessionary period.

And South Africa is not alone, Duncan argues in *Protest nation*: '[T]he neoliberal phase of capitalism precipitated a wave of protests reacting to the massive inequalities it produced, either explicitly or implicitly, around the world. While this wave has ebbed and flowed, it has been sustained for over three decades.'

It is here, indeed, that the next layer of correlation research might be directed. The Polanyian challenge in South Africa is not just in tracking the myriad of grievances and, where appropriate, correlating these to political-economic processes so as to promote more linkage in analysis. More profoundly, analytical and strategic lacunae are obvious, correlating to Frantz Fanon's critique of protests elsewhere on the continent: 'For my part the deeper I enter into the cultures and the political circles, the surer I am that the great danger that threatens Africa is the absence of ideology.' Admits Duncan in *Protest nation*, 'The ideological character of many of the protests remains unclear from the data.'

That absence is the main reason that the term 'popcorn protest' is valuable, in my view, i.e., (what I've defined as) the 'tendency to flare up and settle down immediately; indeed, while "up in the air", protesters were often subject to the prevailing winds, and if these were from the right the protests could – and often did – become xenophobic.' Duncan disagrees, worrying that if 'popcorn protests' are 'used to describe seemingly sporadic, spontaneous protests', this 'ignores the extent of organisation that actually exists'. True, courageous and often sustained community organising is often undertaken prior to these service delivery protests (what Ngwane terms 'all protocol observed'), but still: if there is no analysis, strategy and intra-protester alliance, then popcorn is still an appropriate concept, I'm afraid. Duncan's hope in concluding

Protest nation is that, '[w]hile there is little evidence of these protests coalescing into more generalised political demands, they have the potential to do so if a national political movement comes into being that links together these different struggles'.

Nevertheless, Duncan does not fully grapple with the dangers of localism, when far too many activists and analysts discuss grievances in a way that begins and ends with the municipal councillor, city manager or mayor. This limited perspective on state failure partly reflects how too many turf-conscious leaders look inward, failing to grasp golden opportunities to link labour, community and environmental grievances and protests, and to think globally while acting locally. They see solutions mainly through 'quadruple-C' demands: ending municipal corruption, improving delivery capacity, restoring competence and raising the level of consultation. Ignored in such demands are the over-determining national neoliberal policies (such as outsourcing and cost-recovery) and the inadequate national-to-local financing provisions.

Duncan is straightforward in her *Protest nation* objective: 'My practical and research work on the right to protest has convinced me that there needs to be a mass movement against police violence and state repression and in the defence of democratic space more generally', to which one should obviously add, *and in pursuit of economic, social and environmental justice*. But she is cautious about the period ahead: 'The question of whether protests, including those in South Africa, are part of a revolutionary wave, rather than being isolated, single-country protest cycles, is an important one, as it speaks to whether the protests will fizzle out in time or escalate into fundamental and transformative challenges to the system on a worldwide scale.'



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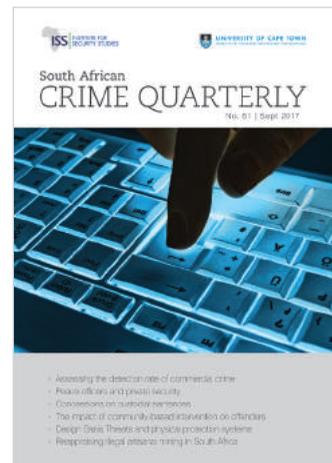
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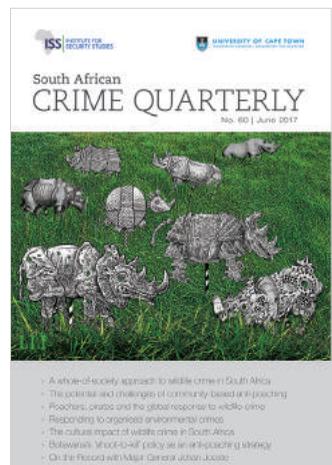
- 1 The two books were reviewed pre-publication; consequently the quotes and extracts from the books are not given page references in this review.

Previous issues

Issue 61 looks at a range of issues: SAPS's performance in minor commercial crimes; the role of private security officers in supporting the SAPS crime prevention mandate; South African and New Zealand courts' decisions on custodial sentences; the obstacles faced by young ex-offenders in reintegrating into their communities; and Design Basis Threat (DBT) statements and nuclear security. Finally, Mkhize offers commentary and analysis on illegal artisanal mining in South Africa.



Once considered peripheral and a green matter, wildlife crimes have moved up global security and policy agendas. This special issue on organised environmental crime, guest edited by Annette Hübschle, explores the phenomenon from a range of perspectives. These include 'whole of society' and collaborative governances, community-focused anti-poaching interventions, trans-national anti-piracy collaborations, the 'cultural impact' of wildlife crime, and a controversial 'shoot-to-kill' anti-poaching policy in Botswana.



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