

# South African CRIME QUARTERLY

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- > The impact of police massacres on police reform in 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.

# Editorial

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## Change, continuity, challenges

### Kelley Moulton

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A lot can happen in three months. Since the December 2017 editorial we have seen the ousting of South Africa's president, Jacob Zuma, and the election of his successor, Cyril Ramaphosa, all of which took place against the backdrop of pre-dawn raids on the Guptas' Saxonwold compound. Cape Town's water crisis deepened and brought with it the threat of 'Day Zero' – the day that taps in the Mother City would literally run dry. First meant to take place in early April, but eventually pushed out to June (and now hopefully avoided completely for 2018 at least), the spectre of #DayZero brought new conversations that melded questions of safety and security and the provision of water for the city's residents. #MeToo and the 'TimesUp' movement have changed the level of awareness of and attention on sexual victimisation globally and locally. So what is the thread that hangs all of these events together? What is my point in introducing this edition of *South African Crime Quarterly* with these events?

For me, the first striking point is change. Seemingly intractable problems shift (however slightly), and 'invisible' problems (re)take their place in common discourse – or at least on social media. Things that many of us take entirely for granted, like clean water from our taps, require new attention and make us confront not only our privileges but also how we equitably and safely secure access to this kind of basic need. The second thread is the notion of 'justice', and how we fight to right injustices, and seek out and value different experiences and solutions for and from different parts of our society. Linked to this, the third point relates to how narratives are shaped, and how we draw attention to the issues that we care about. Here I think especially about questions of how we allow the media, (prominent) individuals, and the state to raise and then attend to issues, and then, perhaps more critically, what is often sacrificed through that process as narratives change, constituencies are excluded, nuance is lost or attention wanes. I think these examples also speak to the importance of political will to address, intervene, fund and innovate in terms of service delivery and system's responses – issues that are especially felt in South Africa in the criminal justice and policing sectors.

The interconnectedness of these things – change, justice, representation and response – invites us to confront how we innovate in these spaces and how we envision our own contributions in doing so. As individuals, and as practitioners and scholars, we are reminded that finding solutions to policy problems requires the proper balance between learning from others and developing our own response strategies based on our own experiences. Working towards equitable (or at least 'good') outcomes requires more than just thinking short-term, but requires problem-solving that values collaboration, uses bottom-up approaches, that is conscious of context and foregrounds sustainability.

The articles in this edition of SACQ illustrate or address a number of these considerations. The articles by Guy Lamb and Ntemi Nimilwa Kilekamajenga address the question of how systems and agencies learn from periods of crisis. Lamb examines massacres perpetrated by the police in South Africa, and asks what impact these massacres have had on changing the police organisation. Using five typologies of change from existing literature on policing, he shows how these incidents of violence have, or have not, resulted in relatively immediate reforms of public policing practices, in some cases fundamentally reforming the organisation as a whole. Kilekamajenga addresses the crisis of overburdening and overcrowding in the Tanzanian criminal justice and prison systems, and asks whether this provides a moment to consider whether restorative interventions offer promise in resolving the problem. Using evidence from other jurisdictions in Africa and New Zealand, he argues that restorative justice approaches can be adapted to suit the Tanzanian restorative approach for both child and adult offenders.

Shifting focus to questions of narratives and perceptions, and picking up on themes raised as part of the December 2017 special edition on protest, Peter Alexander, Carin Runciman, Trevor Ngwane, Boikanyo Moloto, Kgothatso Mokgele and Nicole van Staden draw our attention to the frequency and turmoil of community protests between 2005 and 2017. These authors ask us to reconsider the ways in which protest is framed as violent, disruptive and disorderly. Comparing the data collected by the Centre for Social Change's archive of media reports with other sources of protest statistics, these authors not only show that South Africa is experiencing a rising number of community protests, and that these protests are increasingly disruptive and/or violent, but also raise questions about the ways in which community protests are measured and represented in the media and elsewhere.

Linking back to the theme of 'things change', Jameelah Omar provides commentary and analysis on the Social Justice Coalition's constitutional challenge of provisions of the Regulation of Gatherings Act (RGA), which criminalises the failure to provide notice of a gathering of 15 or more protesters. Judgment was handed down in the case – colloquially known as the SJC10 case – on 24 January 2018, in which the Western Cape High Court declared section 12(1)(a) of the Act unconstitutional. This judgment has been hailed as significant in its protection of the right to protest, and for its willingness to develop the provisions of the RGA, which was enacted pre-Constitution and has therefore been criticised for holding a view on protest that is, as Omar puts it, 'tainted by its moment in time [...] when dissent was criminalised'. Both the Alexander et al. and the Omar articles raise important questions about how the prevailing narrative characterises protest as violent rather than productive, and how we push back to create spaces to use and understand these environments.

Finally, in our 'On the record' feature we asked two scholar-activists to discuss the water crisis and its impact on questions of vulnerability, risk and security. The water crisis has been a visceral illustration of the way our society's challenges increasingly touch questions about safety and security, and of how the nature of our responses (in terms of both who is able to respond effectively, and what that response looks like) brings questions about who benefits and who is left behind to the fore. Nick Simpson talked with us about how the water crisis fits into a framework of criminology in the age of the Anthropocene, and Vivienne Mentor-Lalu reminded us about the gendered impact of the drought.

'Access to ...' issues – whether access to services or access to justice – have plagued this country forever. How we tackle the challenge(s) of balancing change, justice, representation and response may well define the criminological moment of today.

# Mass killings and calculated measures

## The impact of police massacres on police reform in South Africa

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*Over the past two centuries, the police have perpetrated massacres in response to protest action in numerous countries. Available scholarly literature has typically focused on the circumstances that contributed to such mass killings, but rarely has there been consideration of the impact that such massacres subsequently may have had on the police organisation. Hence, this article will explore the relationship between massacres perpetrated by the police and police reform, with a particular focus on South Africa. The article concludes that, in the context of public order policing, massacres perpetrated by the police can contribute towards relatively immediate police reforms, particularly in terms of police strategies and tactics. In some circumstances, massacres have even led to some restructuring of the police organisation. The nature of the government and the policing environment appeared to be key determinants of the types of police reforms, post-massacre.*

In August 1819, 17 people were killed and hundreds were injured during a protest for parliamentary reform at St Peter's Fields in Manchester, England, as a result of a cavalry charge by the sabre-wielding yeomanry. This incident has commonly become known as the 'Peterloo Massacre' and, as many policing scholars have argued, was an important event in the founding of the modern police. This massacre underscored for parliamentarians as well as the ruling elite that military troops were an inappropriate mechanism for the policing of protests, and ultimately contributed to the creation of the civilian-oriented London

Metropolitan Police in 1829.<sup>1</sup> This police model was gradually adopted by numerous states and has now become one of the more prevalent police models in most democratic contexts.

Over the past two centuries the police have perpetuated massacres in response to protest action in many countries, such as Brazil, Ethiopia, France, Peru, the Philippines, South Africa, Ukraine, the United States and Yemen (to name but a few). A police massacre is in essence a specific incident that entails the indiscriminate killing of a large number of people by an official government police entity. Scholarly literature has typically focused on the circumstances that contributed to such mass killings, but rarely has there been consideration

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of the impact that such massacres may subsequently have had on police organisations. This is somewhat surprising, given the key role that a massacre played in the establishment of the modern police model. This article therefore explores the relationship between massacres perpetrated by the police and police reform, with a particular focus on South Africa.

In the policing literature reform is typically associated with the refashioning of the police with a view to forging more democratic approaches to policing.<sup>2</sup> However, this article, drawing on the work of Styles,<sup>3</sup> makes use of a broader definition of police reform, namely changes that are made to the police with the aim of improving police work and the functioning of the police organisation for all government types, not only democracies. Under this definition, police reform can, in effect, entail the adoption of more repressive policing methods and can include the acquisition of military-style equipment in the context of an authoritarian regime, as such reforms are typically geared towards improving the regime's prospects of maintaining its oppressive rule and authority.

Using this broader conceptualisation of police reform, this article will address the following research question: what types of police reforms in South Africa were implemented after major massacres perpetrated by the police, and why? The article will analyse the relationship between various prominent massacres perpetrated by the police in South Africa between 1920 and 2012, and the subsequent police reforms (or the lack thereof).

## **Massacres and police reforms**

A reading of published police histories from a variety of countries suggests that there is a conceivable relationship between massacres perpetrated and reforms implemented by the police. What is evident, however, is that the context and nature of each massacre was key

to determining whether or not police reforms would be pursued in its aftermath. In essence, five propositions can be derived from the literature, as outlined below.

Firstly, the police will adopt reforms where massacres result in significant injuries and casualties to the police, or where they realise that such forceful tactics may contribute to more large-scale protests. This was the case with the Haymarket riot in Chicago in 1886, where a bomb was hurled at the police during a militant labour demonstration. Four protestors and seven policemen were killed in the ensuing events. Thereafter the police altered their tactics and engaged in undercover operations in order to pre-empt further violent confrontations with protestors. Two years later, the Chicago police declared that the lesson they had learned from such changes to policing tactics was that 'the revolutionary movement must be carefully observed and crushed if it showed signs of growth'.<sup>4</sup> A more recent example took place in Zhanaozen, Kazakhstan, where the police reportedly adopted less lethal approaches to public order policing after their violent crackdown on striking oil workers in 2011 resulted in the death of 15 strikers. These changes were based on concerns that further police repression might lead to a surge in anti-government agitation.<sup>5</sup>

Secondly, the police will initiate a reform process following a massacre where they perceive that they were unprepared for the protest encounter and overwhelmed by the protestors. This has mainly been the case where repressive governments have changed policing strategies and tactics following a massacre in an attempt to contain and quash further protest action that could ultimately result in the demise of the authoritarian regime. For example, in 2005 the Ethiopian police, who had a history of extensive human rights abuses,<sup>6</sup> massacred close to 200 protesters and injured more than 700,

following contested election results.<sup>7</sup> Following this massacre, the Ethiopian police reportedly received considerable military-style riot control training from the South African Police Service (SAPS), and purchased significant amounts of more modern riot control equipment and weaponry.<sup>8</sup> Furthermore, the Ethiopian police sought to forge more effective relationships with communities in order to 'strengthen support for the police and to further the gathering of intelligence'.<sup>9</sup>

Thirdly, there will be no apparent police reforms after a massacre in cases where the protestors did not pose a significant threat, or did not inflict significant casualties on the police, and there was no political will to hold the police to account for their actions. A clear example was the massacre of approximately 200 protestors of North African descent by the Paris police in 1961, which was during the time of the Algerian civil war.<sup>10</sup> There were no indications that the Paris police underwent any significant changes thereafter, other than the intensification of intelligence-gathering activities in relation to dissident groups.<sup>11</sup> A further example was the 1987 Mendiola Massacre in the Philippines where the police killed 13 people who were protesting for agrarian reform. There were no police casualties, and no immediate police reform, despite a government-wide process of democratisation.<sup>12</sup> There were similar dynamics after a massacre in the Malaysian village of Memali in November 1985, where police killed 14 members of an Islamic sect.<sup>13</sup>

Fourthly, police reform will be pursued after massacres have taken place in the context of regime change such as a transition to democratic rule, where the police had previously been responsible for the excessive use of violence against civilians (including massacres). Examples here include Chile, Indonesia, Namibia and South Africa. In some instances, as with Ukraine, a massacre by police was the

catalyst for more immediate changes in policing. In this case the Ukrainian 'Berkut' riot police were disbanded because they shot unarmed demonstrators during anti-government protests in Kiev in 2014. This was part of a larger police reform process that was pursued after the ousting of the Yanukovich government.<sup>14</sup>

Fifthly, democratic police reforms towards the use of less repressive measures following a massacre are only likely where there have been concerted efforts by governments to implement a reform process. This is because the police as an institution are acutely resistant to change, and resolute external pressure is therefore often required to compel the police towards reform.<sup>15</sup> For example, in Mexico, following the massacre of 43 students in Iguala in September 2014 by an organised criminal group (these students had previously been abducted by corrupt police and then handed over to the criminal group), the government initiated a legislative police reform process, focusing in particular on the municipal level. However, to date this process has been undermined by political wrangling.<sup>16</sup>

These five propositions will be used in the following sections as the basis to further examine the nature of the relationship between massacres and police reforms in South Africa since the creation of the Union of South Africa in 1910. The focus will be on the key massacres that were perpetrated by the police in the 1920s; the Sharpeville massacre (1960); the Soweto uprising (1976); massacres that took place during the mid to late 1980s; and the Marikana massacre (2012).

## **Public order policing in South Africa: a brief historical overview**

Between 1910 and 1993 the South African Police (SAP) generally resorted to the use of force (or the threat thereof) in order to disperse and quell agitated crowds of black people. This was motivated by concerns that localised

protest action could rapidly escalate into more widespread collective disorder in other black communities, which in turn could spill over geo-racial urban boundaries and threaten the apartheid status quo. Militant strike action by white mine workers in 1921/22 also resulted in a repressive police response, fuelled by concerns that such protests would significantly undermine the mining industry, which was a key component of the South African economy.<sup>17</sup>

The SAP typically policed protests in townships at arm's length, using an arsenal of military-style vehicles and incapacitants (such as tear gas). If required, SAP members would engage in a baton charge and use *sjamboks* on protestors. Lethal force (including live ammunition) was applied on those occasions where protestors breached the SAP buffer zone, or if the crowd did not adhere to instructions from the police.<sup>18</sup> However, as will be shown below, there were a number of occasions where the SAP was unprepared for the intensity of public protests and organised defiance, which resulted in the police injudiciously using excessive lethal force in an effort to repel and disperse protestors. Frequently, large numbers of protestors died as a result.

There was a series of militarised reforms to public order policing in the 1980s and early 1990s, which will be discussed in more detail in the sections below. Substantial efforts were made to reform the police after the 1994 democratic elections, which included the restructuring of public order policing.

### **Port Elizabeth (1920) and the Bulhoek massacre (1921)**

In the early 1920s the SAP used excessive force against a series of strikes and uprisings by black South Africans so as to enforce racial and class segregation and to ensure that these incidents of protest did not result in more widespread insurrection and disruption to the economy.

In at least two such confrontations police personnel massacred black protestors in the Eastern Cape, namely in Port Elizabeth and Bulhoek.

In October 1920, in the midst of a militant strike instigated by a faction of the Port Elizabeth Industrial and Commercial Workers' (Amalgamated) Union of Africa, a combined force of police and deputised white civilians opened fire on unarmed black protestors outside a police station in Port Elizabeth. Some 24 black protestors were killed. The shooting resulted in rapid dispersal of the protestors,<sup>19</sup> and there were no police casualties. Prior to this massacre there had been general anxiety among white residents, not only in Port Elizabeth but also countrywide, that the strike would rapidly escalate into widespread violence with black mobs attacking white homes and businesses. According to the Inspector of Labour, W Ludorf:

[U]nless prompt action had been taken, Port Elizabeth would have been in the throes of something too awful to contemplate ... in my considered opinion the prompt action taken in firing is fully justified and quelled a very serious native revolt against constituted authority.<sup>20</sup>

In 1921 the SAP, in conjunction with the military, used overwhelming force to suppress an uprising in Bulhoek near Queenstown. In this instance, a contingent of around 800 policemen opened fire on members of a religious sect, the 'Israelites', who were armed with swords and *assegais* and were illegally occupying government land. Previous attempts by government authorities to disperse the squatters through negotiation and threat of force had failed.<sup>21</sup> A military-style police action was subsequently mounted, which led to the massacre of approximately 200 cult members, with more than 100 others wounded.<sup>22</sup>

In line with the third proposition (*that there will be no apparent police reforms after a massacre*

*in cases where the protestors did not pose a significant threat*) no noticeable police reforms were pursued in the aftermath of these two massacres. This was most likely because the protesting groups did not pose a significant threat to the police, who, with their superior firepower, were easily able to quash the protest actions. Furthermore, the risk of these two protests, igniting unrest in other areas of South Africa was relatively low at the time.

### **Sharpeville massacre (1960)**

In March 1960, in the township of Sharpeville near Vereeniging, approximately 300 police opened fire on a crowd of thousands of Pan Africanist Congress supporters who were protesting against the pass system, killing 69 and injuring approximately 180 people. First-hand accounts of the massacre suggest that the policemen on the scene, feeling overwhelmed and fearful, opened fire on the protestors in a state of agitation.<sup>23</sup> This incident was a wake-up call for government, who realised that black communities had become less compliant with apartheid regulations and policing techniques, and that more organised anti-apartheid opposition had developed in a number of townships.<sup>24</sup> During parliamentary debates immediately following the massacre, De Villiers Graaff, the leader of the opposition party at the time, expressed concern that in townships where there had been unrest, 'agitators were receiving more support from natives who were usually law abiding'.<sup>25</sup>

By 1961, as a direct result of the Sharpeville massacre, and in line with the second proposition (*that the police will initiate a reform process following a massacre where they perceive that they were unprepared for the protest encounter*) there were significant organisational changes within the SAP. The number of white policemen in the force was increased substantially, and the Reserve Police Force (a part-time citizen force) was created.<sup>26</sup>

Additional funds were allocated to the SAP to procure the 'most modern equipment in order to crush any threat to internal security successfully'.<sup>27</sup> There was also a reconfiguration of the SAP's territorial policing boundaries, with the SAP's administrative geographical divisions being reconfigured to allow for more effective collaboration with the South African Defence Force (SADF). A government committee was subsequently established to reform police training in order 'to ensure that police constables in the future will be better equipped for their task both physically and mentally and will have better knowledge of their exacting duties'.<sup>28</sup>

Furthermore, in the aftermath of the Sharpeville massacre, the size and budget of the security branch within the SAP increased considerably.<sup>29</sup> From the early 1960s the security branch sought to disrupt the activities of anti-apartheid groups and liberation movements by capturing or neutralising their leaders and operatives. In order to achieve this the security branch required actionable intelligence, which was generated through a large network of informers, the infiltration of anti-apartheid movements and the extensive use of detention, harsh interrogation and torture of suspected anti-government activists.<sup>30</sup> Furthermore, from the early 1960s, the security branch used interrogation and torture in order to 'turn' certain captured insurgents into informers (known as *askaris*) who could infiltrate the liberation movements.<sup>31</sup>

### **Soweto uprising (1976)**

In June 1976, approximately 10 000 school learners and adults took to the streets of Soweto outside Johannesburg to protest against the government's requirement that Afrikaans be used as a mandatory medium of instruction in schools. Confrontations between the riot police and the protestors rapidly escalated and culminated in the police fatally shooting more than 400 demonstrators and injuring

approximately 3 000.<sup>32</sup> Shortly thereafter, violent protests erupted in townships on the East Rand and in Cape Town, which the SAP, with the support of the SADF, forcefully subdued.<sup>33</sup> In total, the SAP discharged in the region of 50 000 rounds of ammunition against protestors in all areas during the various uprisings at the time.<sup>34</sup>

Providing feedback to Parliament on the Soweto violence, Jimmy Kruger, the cabinet minister responsible for the police, stated that policemen had opened fire in 'self-defence', as they felt that they were 'overwhelmed' and that 'their lives were in grave danger'.<sup>35</sup> The findings of the Cillie Commission of Inquiry<sup>36</sup> into the causes of the Soweto uprising emphasised that the police on the scene were in imminent danger, and that the lethal actions of the SAP members were justified. The reasons given were that the policemen on the scene were significantly outnumbered by the protestors, who had thrown stones at the police, and had surrounded the police after less lethal attempts to disperse the protestors had failed. There were extensive references to the written statement by Sergeant MJ Hattingh, one of the policemen who had fired on the protestors. According to the commission report:

He [Sergeant Hattingh] saw that other members of the squad had been injured, some seriously, and it was clear to him that the crowd was going to overpower them. He was hit on the leg by a stone and fell down on the ground ... he heard others firing ... He got up and drew his firearm. A black man charged at him with a brick in his left hand and a *kierie* [stick] in his right hand. To beat off the attack, he fired straight at the man. The attacker fell down dead ... he fired five more shots at the legs of the charging crowd.<sup>37</sup>

The report further recounts that Hattingh was able to retreat to his police vehicle, but was

subsequently surrounded by a group of protestors:

They [the protestors] tried to drag him out of the vehicle, grabbed his cap and ripped the badges from his uniform. His hand was injured by a sharp object and an attempt was made to take his firearm from him. Col. Kleingeld [the commanding officer on the scene] drove the attackers off with bursts from the automatic rifle, and the sergeant and his vehicle were removed from the danger area.<sup>38</sup>

Critically, the commission concluded that the hazardous situation in which the police found themselves was also largely the result of the SAP personnel on the scene being ill prepared and not sufficiently competent to effectively disperse such a large group of protestors. Hence, of direct relevance to the second proposition (*that police reforms take place after a massacre where the police are of the view that they had been unprepared or overwhelmed by the protestors*), the SAP's public order policing capability was significantly improved at station level in the years immediately after the Soweto uprising, and the riot control function of the police was centralised into a riot control unit.<sup>39</sup> Furthermore, the SADF were tasked to support the SAP in crowd control incidents, based on the view that a display of overwhelming force would prompt protesting crowds to disperse without violent confrontation.<sup>40</sup>

### **Policing under a state of emergency: 1984–1989**

There was an intensification of mass lethal violence perpetrated by the police against black communities in the latter part of the 1980s. Table 1 provides details of some of these massacres. This type of police violence followed on from the declaration of partial states of emergency in 1985 and 1986.

Additionally, as stated in the 1985/86 SAP annual report, a 'large part of the South African Police was used on a full-time basis to combat unrest ... and [there was] intensified training of members, especially with regard to unrest and crowd control'.<sup>41</sup>

**Table 1: Massacres perpetrated by the SAP, 1984–1989<sup>42</sup>**

Year	Location of public gathering	Number of casualties
1984	Vaal Triangle	26
1985	Crossroads, Cape Town	18
1985	Lange, Uitenhage	20
1985	Springs, East Rand	10
1985	Duncan Village, East London	23
1985	Queenstown	14
1985	Mamelodi, Pretoria	12
1986	Gugulethu, Cape Town	27
1986	Winterveld, Bophuthatswana	26
1986	Alexandra, Johannesburg	9
1986	Vlaklaagte, KwaNdebele	12
1986	White City, Soweto	24
1988	Natal	11
1989	Cape Town	29

This police violence was linked to an unparalleled upsurge in the levels of protest violence against apartheid rule after the African National Congress (ANC) had called for mass mobilisation to 'make townships ungovernable'.<sup>43</sup> This resulted in the destruction of government buildings and attacks on local government officials, suspected police informers and even policemen, and the ANC also called on its cadres to ambush police patrols and seize their firearms 'for future use'.<sup>44</sup> This increase in township violence was acknowledged by the police in the 1984/85 SAP annual report, which referred to the violence as 'large-scale' and

of 'serious proportions', and as having 'made heavy demands on the available manpower'.<sup>45</sup>

Although it is not possible to exclusively link specific reform processes to particular massacres perpetrated by the SAP in the mid to late 1980s, the apartheid government, in the context of numerous massacres (listed in Table 1), launched a new policing strategy, namely joint police/military crackdown operations in volatile townships with the stated objective of 'restoring normality'.<sup>46</sup> The SAP also imported more sophisticated riot control equipment, including helicopters and armoured vehicles fitted with water cannons.<sup>47</sup> In 1986 President PW Botha announced that the personnel strength of the SAP would be increased by 16% from just over 48 000 to 55 500.<sup>48</sup> The Railways Police, which had been responsible for law enforcement and security in relation to the railway infrastructure and environment and had been historically separate from the SAP, was incorporated into the SAP. The SAP was also withdrawn from its national border protection responsibilities and replaced by soldiers. The size of the SAP was further increased during the latter part of the 1980s, with both the personnel size and budget of the SAP doubling between 1985 and 1990.<sup>49</sup> This fortification of the SAP was also ultimately driven by concerns of the National Party government that its ability to contain and diminish protests by black political movements was under severe pressure.

### **The National Peace Accord and public order policing**

By 1990, violence and criminality had escalated in numerous townships and some rural areas, and threatened to overflow into the relatively serene white residential and commercial enclaves, fundamentally destabilising the efforts of the apartheid government to maintain order. In response, the apartheid government and various political groupings signed the National Peace Accord (NPA) in 1991 in an attempt

to bring an end to intense and pervasive political and criminal violence. As part of the NPA framework, the Goldstone Commission of Inquiry was established to investigate such violence.<sup>50</sup> Evidence gathered by this commission implicated some SAP members in providing clandestine support for mass killings in ANC-aligned communities, perpetrated by Inkatha-affiliated hostel dwellers, for example in Sebokeng, Swanieville and Boipatong.<sup>51</sup>

As the fourth proposition (*that police reforms will be pursued after massacres have taken place in the context of regime change*) would suggest, the NPA included a major police reform imperative in response to the repressive and violent actions of the SAP. The NPA included a code of conduct, which specifically called for effective, non-partisan (or non-political), racially inclusive and more legitimate, community-focused and accountable policing.<sup>52</sup> The Goldstone Commission proposed the Regulation of Gatherings Bill (1993), which was only enacted after the 1994 elections, and stipulated that the police may only use force when public disorder cannot be forestalled through other non-violent methods.

The SAP's public order policing component was reorganised, but in a way that ran contrary to the spirit of the NPA. The Internal Stability Division (ISD) – a specialised militarised public order policing entity – was formed, with personnel who wore military-style camouflage uniforms, were armed with military-type weapons and were transported in military vehicles.<sup>53</sup> Operational units were deployed to violence hotspots. In justifying the creation of the ISD, Hernus Kriel, the then minister of law and order, argued that: 'A man in a blue uniform must control political unrest as well as crime, and it doesn't work. That is why we believe there has to be a parting of ways.'<sup>54</sup>

These reforms were not only owing to operational considerations. The changes were

also linked to political insecurities within the National Party government with regard to its ability to exercise effective control across South Africa, which was seen as waning considerably, and fears that its position would be weakened during the negotiations for a new constitution.<sup>55</sup>

## **Post-apartheid policing and the Marikana massacre**

Since 1994 there have been various attempts to reform the public order component of the SAPS. In 1995, the SAPS public order policing unit was established, which merged personnel from the former riot units and internal stability units from the SAP and the various police forces from the self-governing Bantustan areas within South Africa, such as the Transkei and Ciskei. This merger was linked to the overall democratic policing reforms at the time, and aimed to engender a 'more soft approach than previous historical methods' to the policing of gatherings, marches and protests (including showing restraint and using force as a last resort).<sup>56</sup> Public order policing personnel were 're-selected' and underwent training by Belgian police instructors, based on international standards of crowd management.<sup>57</sup> This aimed to produce a slimmed down version of the apartheid riot control behemoth, but the public order policing unit remained a significant structure within the SAPS, totalling 7 610 members in 1997.<sup>58</sup>

The public order component was rebranded, reoriented and its members re-trained on two occasions. In 2001, following a reported decrease in incidents of public violence, these units were renamed area crime combating units (ACCUs). Informed by the principles of sector policing, the ACCUs were assigned an adjusted mandate to focus on serious and violent crimes. This was based on the SAPS assessment that incidents of violent public disorder had notably declined; moreover, there was a political imperative from cabinet for the SAPS to

prioritise efforts to reduce violent interpersonal crime, particularly in high crime areas.<sup>59</sup> Five years later the ACCUs were further rationalised into crime combating units (CCUs) with some 2 595 dedicated members. Specialised public order policing units were re-established in 2011 into 27 units with a total of 4 721 SAPS members, following an upsurge in violent protest actions.<sup>60</sup>

Despite these efforts, significant democratic reforms did not become effectively embedded within the ethos of the public order policing entities. Research undertaken in the early 2000s revealed that the leadership and members of the public order policing units were unwilling to relinquish 'established practices and symbolic representations of "discipline"', which undermined 'attempts at developing more participatory management techniques with consequences for broader transformational agendas'.<sup>61</sup> Added to this, the ACCUs and the CCUs were heavily armed, sported military-style uniforms, made use of military organisational terms, such as 'company' and 'platoon', and retained a militarised outlook. In addition, such organisational changes resulted in an aggregate dilution of specialised public order policing knowledge and expertise.<sup>62</sup> Training in this regard was also deprioritised.<sup>63</sup>

In August 2012, SAPS members opened fire on striking platinum mineworkers in Marikana (North West province), killing 34 and injuring 78 protestors. Due to mounting public pressure, an official commission of inquiry (the Farlam Commission) was established to investigate the massacre.<sup>64</sup> In its submission to the commission the SAPS stated that those police that discharged their firearms against the striking mineworkers had done so in self-defence, as the mineworkers had behaved in a threatening manner, and appeared as though they intended to attack the police on the scene. The SAPS further stated that the mineworkers had ignored

the police's instruction to lay down their weapons (which were mainly spears, *sjamboks* and sticks); that less lethal forms of crowd control, such as the use of water cannons, tear gas and rubber bullets, had failed to disperse the protestors; and that the police had been fired upon by at least one of the protestors.<sup>65</sup>

Evidence uncovered by journalists and researchers has suggested that a number of the deceased were executed by the police, some at point-blank range. Both published research and documentary films have strongly suggested that the police, acting in collusion with the affected mining companies and national government, adopted this strong-arm approach in an attempt to discourage widespread destabilisation of the mining sector labour force through additional strikes.<sup>66</sup>

The Farlam Commission found that in 17 of the deaths, the police 'had reasonable grounds to believe that their lives and those of their colleagues were under threat ... [which] justified them in defending themselves and their colleagues ... but may have exceeded the bounds of self and private defence'.<sup>67</sup> In relation to the other 17 deaths, the commission indicated that the deaths were likely the result of ineffective control by the SAPS that led to a 'chaotic free-for-all'.<sup>68</sup> In sum, the commission attributed all of the deaths to overly-militarised policing methods used by the SAPS tactical units that had been ceded command-and-control during the massacre.

In line with the second proposition (*that the police perceive that they are unprepared for the protest encounters*), the SAPS indicated in its 2012/13 annual report that its public order policing units required additional resources, and that coordination structures had been established after the Marikana massacre to improve the SAPS response to, and investigation of, incidents of public disorder, with a focus on the prosecution of those responsible for such

violence.<sup>69</sup> Furthermore, in the 2013 State of the Nation address, Zuma instructed the Justice, Crime Prevention and Security Cluster (of which the SAPS is a component) to institute measures to ensure that violent protest actions 'are acted upon, investigated and prosecuted'.<sup>70</sup>

In addition, in 2014, while the Farlam Commission was still in existence, the SAPS sought support from the Parliamentary Portfolio Committee on Police for its plans to acquire in excess of R3 billion from the National Treasury to fund its 'turnaround' public order policing strategy. This entailed plans to substantially increase the number of public order policing units (from 27 to 50) and their personnel strength (from 4 721 to 8 759); and acquire large quantities of more forceful riot control equipment, such as armoured vehicles, stun/anti-riot grenades, crowd dispersal acoustic devices and training facilities. Their motivation for the request was that violent incidents of public disorder had increased from 971 in 2010/11 to 1 882 in 2012/13, and that it was 'anticipated that this upsurge against state authority w[ould] not decline in the foreseeable future'.<sup>71</sup>

The Farlam Commission recommended in its 2015 report that public order policing in South Africa should be significantly reformed. In particular, it advocated that the use of automatic military assault firearms by police should be discontinued in the policing of protests; and that clear guidelines should be issued with regard to when the paramilitary components of the SAPS, such as the Tactical Response Team, are to be deployed in support of public order policing. It also recommended that a panel of experts should be established to determine amended rules and procedures for public order policing, based on international best practice. It also recommended that SAPS personnel should be effectively trained in relation to these rules and procedures.<sup>72</sup> There have, however, been

criticisms of the commission's findings, based on the view that it did not adequately and fairly engage with the accounts of the striking mineworkers.<sup>73</sup>

In 2016, based on the findings of the commission, the South African Treasury allocated additional budgetary resources to the SAPS for public order policing.<sup>74</sup> In the same year, the Minister of Police appointed the panel of experts recommended by the Farlam Commission, and indicated that training in public order policing for police cadets had been increased from two to three weeks.<sup>75</sup> A new national police instruction has also recently been finalised that replaces the previous public order policing standing order. This instruction declares that public order policing units are to be in control of the policing of public protests, and that authority should not be transferred to the more militarised tactical units of the SAPS. However, to date no funds have been provided to enhance independent oversight of the SAPS and to investigate abuses allegedly perpetrated by SAPS members.<sup>76</sup>

## Conclusion

By means of a historical analysis of South Africa this article has explored five propositions in terms of the relationship between massacres perpetrated by the police, and subsequent police reform. It has demonstrated that in the context of public order policing, massacres by the police can contribute towards relatively immediate police reforms, particularly in terms of police strategies and tactics. In some circumstances, massacres even led to some restructuring of the police organisation.

The nature of the government and the environment of policing appeared to be key determinants of the types of police reforms post-massacre. That is, under apartheid, in instances where the police had felt that the protest action that culminated in the massacre

was a serious threat to their ability to sustain social control, more militarised and oppressive reforms were pursued. This was the case with the Sharpeville and Soweto massacres. On the other hand, in the absence of a perceived threat to the police such police violence did not lead to noticeable police reforms, for example with the Bulhoek and Port Elizabeth massacres.

Furthermore, following a series of massacres and intense political violence, the successful negotiation of a peace agreement, the NPA, resulted in some restructuring of the SAP in the early 1990s. In addition, the events in the aftermath of the Marikana massacre, which took place under a democratic regime, show that mass lethal violence by the police has spurred initial attempts at reforming public order policing.



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# Learning from contemporary examples in Africa

## Referral mechanisms for restorative justice in Tanzania

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*Tanzania is one of the jurisdictions in Africa that follow an adversarial criminal justice system. Despite a number of problems associated with the fact that the criminal justice system over-utilises imprisonment, there is still a lack of diversionary measures to complement the system. This article investigates restorative justice as a complementary system to the Tanzanian criminal justice system, arguing that the law, including the constitution of the country, favours the application of restorative interventions. Invoking restorative justice mechanisms can, inter alia, relieve over-laden courts from the backlog of minor cases, and can help the government salvage funds by reducing the number of incarcerated offenders. It is further argued that restorative justice approaches that have been articulated in some juvenile justice systems in Africa can be adapted to suit the Tanzanian restorative approach for child and adult offenders.*

I cannot easily erase the memory of a criminal case I witnessed at one of the primary courts in Tanzania. As a lecturer at the Institute of Judicial Administration in Lushoto, Tanzania, I supervised law students who went for field attachment as primary court<sup>1</sup> magistrate trainees in Moshi. While there, I attended a session of a criminal case out of curiosity. The accused in the case was a young woman,

possibly a few months older than 18 years of age, who was being prosecuted for stealing some well-worn clothes and 10 000 Tanzania shillings (approximately \$5) from her sister's bag. The complainant, the accused's sister, had only one witness – their uncle. As is custom at the start of a trial, the charge was read to the accused, who pleaded not guilty, and the matter proceeded for hearing. As the rules of the adversarial system require, the complainant adduced the facts of the incident. Thereafter, the accused young woman got an opportunity to cross-examine the complainant. Unaware of the technicalities of the adversarial criminal justice system, she remained silent for a while, and then told the court that she

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had no questions. Then, the witness (their uncle) testified, and again, the accused did not contradict her uncle's testimony during cross-examination. The case was finally adjourned to allow the young woman to prepare her defence. Thereafter, I met one of the magistrates to enquire about diversion measures available at primary courts. She was doubtful and uncertain, and had many questions about the implementation of reconciliatory measures, despite the fact that the court's rules promote reconciliation in certain cases.<sup>2</sup> It struck me that the case that I had just witnessed was precisely the kind of case the rules envisaged in mandating the use of restorative measures.

Restorative justice has featured for over three decades in academic and professional discourses as a complementary approach in many jurisdictions where it has been adopted.<sup>3</sup> In Africa the implementation of restorative justice within or alongside criminal justice systems has been slow, despite the fact that restorative justice is similar to traditional justice.<sup>4</sup> Tanzania, which has an adversarial criminal justice system, faces many challenges, including overcrowding in prisons and a backlog of court cases.<sup>5</sup> These trends are likely to worsen if new mechanisms of justice are not put in place. A restorative justice approach holds promise as a complementary mechanism to the criminal justice process in Tanzania. This article therefore examines the definitions of restorative justice and discusses referral mechanisms in contemporary juvenile laws in South Africa, Uganda, Lesotho and Kenya. The article examines whether these jurisdictions can provide a model for the establishment of restorative justice mechanisms in Tanzania.

## **Restorative justice and its advantages**

Restorative justice seeks to knit together the victim, offender, family members, 'community of care'<sup>6</sup> and the community in the decision-

making process following an offence.<sup>7</sup> The process ensures the offender's accountability;<sup>8</sup> and is aimed at making things right,<sup>9</sup> achieving repair and reconciliation, and preventing future re-offending.<sup>10</sup> It is generally a justice paradigm that advocates for redefining crime<sup>11</sup> and giving voice to the affected parties in the justice process.<sup>12</sup> Under restorative justice, crime is more than the violation of the laws of the country; it is, rather, a violation of relationships between individuals that creates needs and obligations.<sup>13</sup> The victim is no longer the state but is recognised as an individual, family members and the community. All of these actors are appreciated as having directly or indirectly suffered harm,<sup>14</sup> and they come together to resolve the dispute in an amicable way.<sup>15</sup> The victim is given a voice in the process to speak about his or her suffering<sup>16</sup> and to talk about the effects of the crime, including financial, psychological and emotional effects, which may normally not be addressed in criminal courts.<sup>17</sup>

Restorative justice fundamentally aims at restoring shattered relationships between individuals, and initiates a healing process.<sup>18</sup> In the process, the victim's needs are addressed and the offender acknowledges responsibility<sup>19</sup> and is given an opportunity to empathise with the victim and apologise for wrongdoing.<sup>20</sup> Parties are therefore no longer observers of their own justice<sup>21</sup> but become key role players instead.<sup>22</sup> Because restorative justice is a process that involves the affected parties in a facilitated discussion about the crime and its causes,<sup>23</sup> it allows parties to empathise, reconcile, apologise, forgive,<sup>24</sup> repent and repair harms.<sup>25</sup> Even where offenders are not willing to be involved in a restorative intervention during the trial phase, they can still participate in restorative justice initiatives later on in prison, especially where jurisdictions offer these programmes as a rehabilitative process or as a process towards prisoners' early release or parole.<sup>26</sup>

Restorative justice also responds better to the needs of justice stakeholders than the contemporary criminal justice system<sup>27</sup> – even, some have suggested, in the case of serious offences.<sup>28</sup> After the offender makes amends through restorative justice, the victim is relieved of the fear of re-victimisation.<sup>29</sup> Van Ness and Strong argue that restorative justice works better in terms of offenders' rehabilitation than the prison system.<sup>30</sup> Restorative justice prepares the offender for reintegration into society or the community where he or she was initially stigmatised,<sup>31</sup> and helps to reduce recidivism.<sup>32</sup> Sharman and Strang show that restorative justice reduces revenge among victims,<sup>33</sup> and Koen argues that these processes help to achieve social harmony among members of the community by reconciling conflicts.<sup>34</sup> Studies also show greater satisfaction with the restorative justice process than pursuing justice through court processes, for both offenders and victims.<sup>35</sup> Parties can avoid court processes and the associated costs,<sup>36</sup> and the government is relieved of the costs of imprisoning offenders.<sup>37</sup> Given these advantages, using a restorative process alongside the contemporary criminal justice system appears to hold some promise.

## **Challenges of using restorative justice**

There are, however, several challenges that need to be considered if Tanzania seeks to implement restorative justice mechanisms. Limited space allows us to address only a few of these challenges here.

First, the process may need funding, either by the government or through non-governmental organisations. Judges, magistrates and police will need to be trained, and communities will need to be sensitised to the model.

Second, involving the community in justice delivery, if not monitored, may turn restorative justice processes into ones that place rights at risk.<sup>38</sup> Depending on a community's beliefs,

some offences may be treated more leniently than others.<sup>39</sup> Furthermore, inequalities based on 'wealth, gender, race, ancestry and family connections' can affect a restorative process if the community is involved.<sup>40</sup> In modern societies where communities are organised and managed by the state, the word 'community' has become contentious,<sup>41</sup> which makes restorative justice principles more difficult to implement because of weak social bonds.

Third, some offences such as serious crimes, domestic violence, sexual violence and hate crimes are difficult to manage in restorative justice processes.<sup>42</sup> While victims of sexual violence find the adversarial criminal justice process traumatising,<sup>43</sup> restorative justice processes may not fare any better.<sup>44</sup> In sexual offence cases, the re-telling of the story by the victim may be experienced as either therapeutic<sup>45</sup> or traumatic.<sup>46</sup> Community perceptions about the gendered impact of patriarchy remain a challenge. Despite promising evidence on the use of restorative justice in violent offences,<sup>47</sup> community acceptance of restorative justice alternatives for serious offences remains difficult to achieve.<sup>48</sup>

The fourth challenge relates to whether restorative justice addresses the needs of victims. Some criminologists have argued that these processes are a ploy to achieve offenders' rehabilitation and reduce criminality with scant regard for restoration or justice for victims. Strang, for example, sees victims as 'court fodder' under the conventional criminal justice system, and holds that they become 'agents' of offenders' reformation under restorative justice.<sup>49</sup> Even a victim's face-to-face encounter with his or her offender may actually only benefit the offender's rehabilitation, and it is difficult to strike a balance between maintaining the rights of each party.<sup>50</sup> While communities may like to re-integrate reformed offenders, this should not come at the cost of the victim.<sup>51</sup>

The final challenge raised here is the fact that restorative justice does not depend on the rules of evidence<sup>52</sup> or precedent.<sup>53</sup> Because the dispute is normally diverted to restorative interventions after the offender admits responsibility, witnesses may not be required to prove the offence. The offence is therefore resolved on the basis of the parties' identified needs. As a result, there are no uniform outcomes from restorative justice processes.<sup>54</sup> This flexibility makes restorative processes attractive for attending to the needs of justice stakeholders without being bound to legal rules. Also, the idea of having 'standards' for restorative justice is difficult because every community has norms; such norms may be influential in conducting restorative justice processes.<sup>55</sup> The flexibility of restorative justice also provides an opportunity to accommodate a wider range of facts, some of which may not be accepted in court. Because restorative justice has no uniform standards of dispute resolution, outcomes may vary.<sup>56</sup> Some consider this outcome disparity as latitude for 'inequality', 'inconsistency' and 'arbitrariness' in the process of justice.<sup>57</sup> Proponents of restorative justice have countered that even courtroom justice does not guarantee uniform decisions, and despite following precedent, each case is decided on its merits.

## **Referral mechanisms for juvenile justice**

Modern restorative justice allows for the diversion of criminal cases at any stage during the justice process: pre-trial, pre-sentence, at sentencing or post sentencing.<sup>58</sup> Processes such as victim offender mediation, family group conferencing and conferencing circles are mostly restorative pre-trial or pre-sentencing procedures, but this does not mean that they cannot be used at the sentencing stage or for incarcerated offenders.<sup>59</sup> The point at which restorative justice processes are applied

differs from one jurisdiction to another and also depends on the nature of the offence.<sup>60</sup> Additionally, youth justice processes make use of restorative justice in a number of jurisdictions, and these could serve as models for restorative mechanisms in adult cases.

New Zealand allows juvenile offenders to be diverted to restorative intervention at the police or court level.<sup>61</sup> Police diversion (also called police cautioning) occurs after an offender has been arrested but before prosecution, and can take various forms; from a warning not to reoffend through to arrest and being charged in court. The process therefore diverts an offender who would usually be taken through the court process. In countries such as the United Kingdom and Australia, police cautioning is generally conducted in minor offences,<sup>62</sup> but can also be applied even in serious offences.<sup>63</sup>

South Africa has a different model for restorative interventions for child offenders. The Child Justice Act gives powers to the prosecutor to divert a case to a restorative justice process,<sup>64</sup> especially when the offender has admitted responsibility and has consented to diversion.<sup>65</sup> The proposal by the prosecutor to divert the case to restorative intervention takes effect after a court order.<sup>66</sup>

Restorative justice in South Africa has been extended to cases involving adult offenders through case law.<sup>67</sup> For adult offenders, the law also provides an opportunity for the magistrate to refer the matter to restorative measures where there are good reasons to do so. Furthermore, under the South African Criminal Procedure Act, the magistrate can request, after the conviction but before sentencing, information necessary for arriving at a judicious sentence.<sup>68</sup> Between conviction and sentencing there is then time for the magistrate to allow other processes, such as restorative justice, to take place before the offender is sentenced.<sup>69</sup> If restorative justice is conducted at this stage, the agreement

reached during the meeting of parties assists the magistrate in setting a sentence.<sup>70</sup> Based on the input from the victim, the offender and the community as part of the agreement reached through the restorative justice process,<sup>71</sup> the magistrate can order a suspended sentence, community service, fine or compensation in lieu of imprisonment.

Other countries in Africa such as Uganda, South Sudan and Lesotho use diversionary measures for juvenile justice that involve customary law conflict resolution. First, the Ugandan Executive Committees (Judicial Powers) Act gives civil and criminal jurisdiction to local councils to resolve cases originating from their territorial jurisdictions.<sup>72</sup> Second, the Ugandan Children's Statute allows a case involving a juvenile offender to be diverted to village courts for determination. Such councils facilitate reconciliation, compensation, restitution, caution and other restorative remedies for the parties.<sup>73</sup> Involving the community (village courts) as a diversionary measure also aims to shame, reform and reintegrate the child back into the community.<sup>74</sup> In South Sudan, a jurisdiction that embraces traditional justice in many aspects of the criminal justice system, the law offers restorative justice interventions for child offenders.<sup>75</sup> Under the Child Act, traditional justice systems handle many minor cases involving juvenile offenders, while serious offences are tried by formal courts.<sup>76</sup>

In Kenya, though the law does not explicitly provide for restorative justice for juvenile offenders, the Children's Act has some provisions that divert a child offender from ordinary court processes to restorative remedies such as the payment of a fine, compensation, or community service. These remedies may also include that the child is placed under foster care, attends rehabilitation school or sees a qualified counsellor.<sup>77</sup> Under the Tanzanian juvenile justice system, though restorative justice

only applies as part of conditional discharge,<sup>78</sup> imprisonment of a child for whatever term is restrained.<sup>79</sup> Instead, alternative sentences are issued such as a fine, compensation,<sup>80</sup> probation order,<sup>81</sup> conditional discharge,<sup>82</sup> or committal to an approved school.<sup>83</sup> In Lesotho, with its strong system of indigenous justice,<sup>84</sup> a restorative approach has been adopted in the Children's Protection and Welfare Act of 2011.<sup>85</sup> Like the Ugandan Child Statute, the law in Lesotho allows the application of restorative approaches through village child justice committees, a model that brings together international legal norms and a traditional justice ethos in a way that is 'more promotional or protective of the rights of children'.<sup>86</sup> In these jurisdictions – Uganda, South Sudan and Lesotho – the use of restorative justice for adult offenders is still minimal, even though their youth justice frameworks provide evidence in favour of the implementation of restorative mechanisms.

### **The law in Tanzania and the possibilities for restorative justice**

Under the Constitution of the United Republic of Tanzania (the Constitution), the judiciary is mandated to dispense justice<sup>87</sup> without fear or favour.<sup>88</sup> In so doing, in both civil and criminal matters, the courts have several powers, which include awarding reasonable compensation to victims of crimes committed by offenders, and taking into account the nature of the case and the harm caused.<sup>89</sup> In practice, victim compensation in Tanzania is usually coupled with imprisonment. However, filing a compensation claim only when offenders are released after serving a prison sentence may be difficult, because of the time that has lapsed. Furthermore, it is complicated to execute a civil order against an incarcerated offender, as she or he may not be able to pay compensation because she or he is not working or earning any income in prison. The courts therefore often

award compensation alongside other orders immediately after finding the offender guilty. This may relieve the victim of the hassle of filing a second lawsuit, and saves time and money for both victim and the state. Victims view compensation orders as an acknowledgement by the court that they have been affected by the crime. These orders can include, for example, compensation for the victim's medical expenses. Although the monetary value of these compensation orders may frequently not be equivalent to the actual amount of harm suffered by the victim, their symbolic nature may suffice to make things right. Courts are also vested with constitutional powers to 'promote and enhance dispute resolution among persons involved in dispute',<sup>90</sup> and this provision envisages an amicable dispute settlement between victim and offender. The Constitution mandates that the courts should not be 'tied up with technicalities provisions that may obstruct dispensation of justice'.<sup>91</sup>

The spirit of reconciliation provided by the Tanzanian Constitution is directly reflected in the Criminal Procedure Act, which gives discretion to courts that:

[I]n the case of proceedings for common assault or for any other offence of a personal or private nature the court may, if it is of the opinion that the public interest does not demand the infliction of a penalty, promote reconciliation and encourage and facilitate the settlement, in an amicable way, of the proceeding or the terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed.<sup>92</sup>

This provision gives powers to courts to divert certain cases, especially cases of common assault and those of a personal or private nature, from the ordinary adversarial criminal justice processes to ones focused on reconciliation.<sup>93</sup> Diversion therefore seeks

to promote reconciliation in an amicable and harmonious way,<sup>94</sup> and in so doing, stay the proceedings until an agreement is reached.<sup>95</sup> In reconciling the parties, compensation to the victim may be awarded and punitive measures may be waived.<sup>96</sup> Where reconciliation fails, the court may proceed with the normal trial. Similarly, rule 4(2) of the Primary Courts Criminal Procedure Code echoes the provisions of the Criminal Procedure Act<sup>97</sup> (although reconciliation is not defined), obliging courts to promote reconciliation in criminal cases.<sup>98</sup> According to this law, where reconciliation is reached, the complainant may withdraw the charge.<sup>99</sup>

Unfortunately, though, these provisions in law have rarely been used or are implemented problematically. The first major impediment to implementing the options envisaged by the law is the lack of restorative justice programmes into which to divert cases. Second, reconciliation is normally left in the hands of the parties, without a mediator.<sup>100</sup> Although it would be preferable to have an impartial mediator to guide the restorative justice process, in practice this is normally left to family members who are also interested parties in the dispute. Third, the courts are not bound to divert a case for reconciliation – these provisions are discretionary. As a result, the law has been used in only a few cases, despite the fact that there are many offences which may be fit for reconciliation. Finally, as is alluded to in the introduction to this article, some magistrates may not be aware of the option of diversionary alternatives and hence they find it hard to order an out-of-court reconciliation.

### **Restorative justice practices under the ward tribunals in Tanzania**

Tanzania has a history of reconciliation through ward tribunals.<sup>101</sup> According to the establishing Act, every ward has a tribunal to determine civil and criminal cases through mediation.<sup>102</sup> The tribunals were specifically established to

secure peace and harmony at grassroots level through mediation.<sup>103</sup> They were also meant to relieve the primary courts from backlogs of cases by sifting cases before going to a primary court.<sup>104</sup> The tribunal is composed of four to eight members elected by the ward committee, with the chairperson and secretary appointed from the elected members.<sup>105</sup> The chairperson plays the role of a mediator, and other members act as representatives of the community. Any person, including family members of the victim and the offender, may attend and give evidence.<sup>106</sup> Of course, the rules of evidence are unlike those of the courts<sup>107</sup> – even where there is insufficient evidence, the offender may still be held accountable. Compensation, restitution, apologies, fines, corporal punishment and community service are normally awarded or imposed by the ward tribunals.<sup>108</sup> Parties who are aggrieved by the tribunal's decision can appeal to the primary court.<sup>109</sup>

The major difference between the ward tribunals and the primary courts is the procedure for dispute resolution. While mediation and reconciliation are features of the ward tribunals in both civil and criminal cases, the primary courts follow adversarial procedures.<sup>110</sup> Lawi argues that when ward tribunals were properly working as dispute resolution organs, there was evidence of true reconciliation and satisfaction between the involved parties.<sup>111</sup> Although these tribunals operate under local government authority in Tanzania, they hold promise as a prototype of restorative interventions that could ease the burden of Tanzania's laden courts. Unfortunately, in reality, the ward tribunals envisaged by the law are ineffective owing to a lack of financial support from local governments. Currently, because of the community need for accessible justice, administrative staff from the wards, especially ward executive officers, have taken over the reconciliation role that was entrusted to ward tribunals under the law,<sup>112</sup> which means that the

tribunals are no longer composed as set out in the law. For these tribunals to work properly as restorative justice programmes, it will require that they are reconstituted in accordance with the law, and that the appropriate funds are allocated to support their operation.

## Conclusion and recommendations

Despite the promising opportunities provided under the Tanzanian Constitution, the Criminal Procedure Act and the rules of the primary courts, restorative justice is not viewed as a formal complementary mechanism that can provide justice or relieve the country's over-burdened criminal justice system. Even minor offences, which could be resolved out of court, are still brought to court for prosecution. The number of prisoners in Tanzania exceeds the capacity of the prisons<sup>113</sup> and, as a result, government has continued to pardon a large number of prisoners during public anniversaries.<sup>114</sup> It is questionable how these prisoners are prepared for reintegration after prison, given that there is also a lack of restorative interventions for incarcerated offenders. Pardoned offenders face stigma from their communities because they have not had the opportunity to right their wrongs. The security of victims is also threatened by the release of offenders who have not been exposed to programmes that can help them realise the effects of their crimes.

Tanzania is not the only country experiencing these problems or high levels of reoffending by released offenders. This article points to juvenile justice models in other countries such as New Zealand, South Africa, Lesotho and South Sudan that may show how these problems might be reduced.<sup>115</sup> Based on the above discussion, the following recommendations could be adopted by the Tanzanian government, and may be instructive elsewhere on the African continent:

First, prosecutors should have the discretion to divert cases to a restorative justice process before charging the offender, especially where there are good reasons to do so. This will reduce the number of cases for prosecution and hence relieve courts from a backlog of minor cases. Implementation of this proposal may not necessarily need law reform, as directives that underscore prosecutorial discretion may be enough.

Second, police stations may be appropriate centres for diversion through cautioning, if proper training in restorative justice is provided. After cautioning, the police can keep records of the cautioned offender for future reference. This may be a national approach towards the implementation of restorative justice interventions.

Third, courts should make use of current provisions of the law by diverting offenders who have pleaded guilty into restorative interventions. This would allow the offender an opportunity to make things right with the victim and the community, and allows the magistrate to use the recommendations from restorative meetings when sentencing the offender.

Fourth, the courts can sentence an offender to a restorative justice process, provided both victim and offender voluntarily agree.

Fifth, ward tribunals can be strengthened to deliver reconciliation programmes for all wards in the country, provided that the system is properly resourced and special training is offered to ensure that the tribunals work according to the principles of restorative justice envisaged under the law



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## Notes

1 A primary court is the lowest court in the judicial hierarchy in Tanzania.

- 2 Tanzania, Primary Courts Criminal Procedure Code, Rule 4. This is the law governing criminal conduct in the primary courts.
- 3 See TF Marshall, Restorative justice: an overview, in G Johnstone (ed.), *A restorative justice reader: texts, sources, context*, Milton: Willan Publishing, 2003, 31.
- 4 Only a few African countries have adopted principles of restorative justice processes alongside the criminal justice process. These countries include South Africa, Uganda, Lesotho and Zimbabwe. See DW Van Ness and KH Strong, *Restoring justice: an introduction to restorative justice*, 4<sup>th</sup> edition, Cincinnati: Anderson Publishing, 2010, 33–8; NT Qhubu, The development of restorative justice in Lesotho, Association of Law Reform Agencies of Eastern and Southern Africa, [http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B\\_qhubu.pdf](http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s4B_qhubu.pdf) (accessed 12 July 2017).
- 5 Tanzanian prison capacity is 29 552 while it currently holds 33 000 inmates. Half of the inmates are awaiting trial. Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania human rights report 2016, 2017*, 157.
- 6 ‘Community of care’ is a term used to describe persons indirectly affected by the crime, such as teachers, colleagues, friends, neighbours, etc. See Van Ness and Strong, *Restoring justice*, 43, 44.
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- 9 *Ibid.*, 355.
- 10 Marshall, Restorative justice, 5; G Johnstone and DW Van Ness, The meaning of restorative justice, in G Johnstone (ed.), *A restorative justice reader*, 2<sup>nd</sup> edition, London: Routledge, 2013, 12.
- 11 Schmid, Restorative justice, 94.
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- 14 Van Ness and Strong, *Restoring justice*, 43.
- 15 Schmid, Restorative justice, 93.
- 16 D Roche, *Accountability in restorative justice*, New York: Oxford University Press, 2003, 2, 32.
- 17 G Pavlich, *Governing paradoxes of restorative justice*, New York: Routledge, 2005, 2; Roche, *Accountability in restorative justice*, 10.
- 18 Zehr, *Changing lenses*, 186.
- 19 *Ibid.*, 43.
- 20 Schmid, Restorative justice, 94; Wright, Restorative justice, 355.
- 21 Zehr, *Changing lenses*, 33.
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- 23 S Herman, Is restorative justice possible without a parallel system for victim?, in H Zehr and B Toews (eds), *Critical issues in restorative justice*, Collompton: Willan Publishing, 2004, 75.
- 24 L Walgrave, *Restorative justice, self-interest and responsible citizenship*, Collompton: Willan Publishing, 2008, 116.
- 25 Roche, *Accountability in restorative justice*, 2, 28.
- 26 DL Gustafson, Is restorative justice taking too few, or too many, risks?, in Zehr and Toews (eds), *Critical issues in restorative justice*, 306.

- 27 L Sherman and H Strang, *Restorative justice: The evidence*, Smith Institute, 2007, 13.
- 28 *Ibid.*, 21, 68.
- 29 J Dignan, Evaluating restorative justice from a victim perspective: empirical evidence, in C Hoyle (ed.), *Restorative justice: critical concepts in criminology*, Volume III, London: Routledge, 2010, 8.
- 30 Van Ness and Strong, *Restoring justice*, 69.
- 31 See Zehr, *Changing lenses*, 188; C Cunneen and C Hoyle, *Debating restorative justice*, Portland: Hart Publishing, 2010, 19; R Koen, The antinomies of restorative justice, in E van der Spuy, S Parmentier and A Dissel (eds), *Restorative justice: politics, policies and prospects*, Cape Town: Juta, 2007, 257.
- 32 J Latimer, C Dowden and D Muise, The effectiveness of restorative justice practices: a meta-analysis, *The Prison Journal*, 2005, 137.
- 33 Sherman and Strang, *Restorative justice*, 4, 64.
- 34 Koen, The antinomies of restorative justice, 260.
- 35 Latimer, Dowden and Muise, The effectiveness of restorative justice practices, 136; MS Umbreit, RB Coates and B Vos, Victim offender mediation: an evolving evidence-based practice, in D Sullivan and L Tift (eds), *Handbook of restorative justice*, London: Routledge, 2006, 56; Sherman and Strang, *Restorative justice*, 62; Van Ness and Strong, *Restoring justice*, 69; RA Elias, Restorative justice in domestic violence cases, *DePaul Journal for Social Justice*, 9, 2015, 78.
- 36 Sherman and Strang, *Restorative justice*, 24.
- 37 *Ibid.*, 52.
- 38 See FF Rosenblatt, Community involvement in restorative justice: lessons from an English and Welsh case study on youth offender panels, *Restorative Justice: An International Journal*, 2:3, 2014, 288; M Rossner and J Bruce, Community participation in restorative justice: rituals, reintegration and quasi-professionalization, *Victims & Offenders*, 11:1, 2016, 111.
- 39 See J Johnstone, *Restorative justice: ideas, values and debates*, 2<sup>nd</sup> edition, New York: Routledge, 2011, 25.
- 40 *Ibid.*, 25.
- 41 H Zehr, *The little book of restorative justice*, Intercourse: Good Books, 2002, 26; JG Brown, The use of mediation to resolve criminal cases: a procedural critique, in D Roche (ed.), *Restorative justice*, Dartmouth: Ashgate Publishing, 2004, 201; H Zehr and H Mika, Fundamentals of restorative justice, in Roche (ed.), *Restorative justice*, 74.
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- 45 Zehr, *Little book of restorative justice*, 13.
- 46 See MA Walters, *Hate crime and restorative justice*, Oxford: Oxford University Press, 2014, 55.
- 47 See Zehr, *Little book of restorative justice*, 9; LW Sherman and H Strang, *Restorative justice: the evidence*, Smith Institute, 2007, 21, 68. In the United States, a victim whose daughter had been violently killed by her boyfriend volunteered to meet the offender in order to understand why the offender had committed the crime. Interestingly, at the end of the mediation process, the victim’s family recommended to the court that the offender should receive a lesser sentence (5–15 years). The recommendations by the restorative conference were partly upheld by the court, which sentenced the offender to 20 years in prison. See CL Lyons, Restorative justice: can it help victims and rehabilitate offenders?, *CQ Researcher*, 26:6, 2016, 126–7.
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- 63 S Dennison, A Stewart and E Hurren, Police cautioning in Queensland: the impact of juvenile offending pathways, *Trends and Issues in Crime and Criminal Justice*, 306, 2006, 2.
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- 65 *Ibid.*, section 52.
- 66 *Ibid.*, section 42.
- 67 See *S v Shulubane* 2008 (1) SACR 295 (T); *S v Maluleke* 2008 (1) SACR (T).
- 68 South Africa, Criminal Procedure Act 1997 (Act 51 of 1977), section 274.
- 69 The same provision is also found in the Criminal Procedure Act of Tanzania, section 236, but is never used for restorative justice purposes. The practice indicates that, after the offender's conviction, the magistrate can adjourn the case until another day to deliver the sentence. Where the magistrate proceeds to sentence the offender immediately after conviction, in most cases he or she will only request that mitigating factors be included in the sentence. Countries that have realised the importance of restorative justice use this time as an opportunity for restorative intervention, and this is when other information such as victim impact statements are presented to the magistrate for sentencing purposes.
- 70 See Skelton and Batley, Charting progress, mapping the future, 44.
- 71 *Ibid.*, 44.
- 72 Ugandan Executive Committees (Judicial Powers) Act, sections 6, 28.
- 73 See Ugandan Children's Statute, section 92; Ugandan Local Council (Judicial Powers) Act, sections 19, 20; LT Ekirikubinza, Juvenile justice and the law in Uganda: operationalisation of the Children's Statute, *International Survey of Family Law*, 2005, 516.
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- 87 The Constitution of the United Republic of Tanzania, Article 107A.
- 88 *Ibid.*, Article 107B.
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- 93 *Ibid.*, section 163.
- 94 *Ibid.*, section 163.
- 95 *Ibid.*, section 163.
- 96 *Ibid.*, section 163.
- 97 In Tanzania, the Primary Courts Criminal Procedure Code only applied in primary courts. Primary courts are the lowest courts within the judicial ladder. In the District Court, the Court of Resident Magistrate and the High Court, the Criminal Procedure Act governs criminal procedures. The Court of Appeal of Tanzania is governed by the Court of Appeal Rules of 2009.
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# Frequency and turmoil

## South Africa's community protests 2005–2017

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*This article reports on the frequency and turmoil of South Africa's community protests from 2005 to 2017, which, taken together, have been called a 'rebellion'. It defines 'community protest' as protests in which collective demands are raised by a geographically defined and identified 'community' that frames its demands in support/and or defence of that community. It distinguishes between 'violence' and 'disorder', which has produced a novel three-way categorisation of turmoil, namely 'orderly', 'disruptive' and 'violent' protests. Drawing on the Centre for Social Change's archive of media reports, the largest database of its kind, and by comparing its data with details gleaned from the police's Incident Registration Information System (an unrivalled source of protest statistics), the article reveals a rising trend in frequency of community protests and a tendency towards those protests being disorderly, that is, disruptive and/or violent. In the process of advancing this position, the authors offer a critique of other attempts to measure the number and turmoil of community protests.*

Early discussions about South Africa's high level of popular unrest focused on 'service delivery protests', but in recent years the broader conception of 'community protest' has gained currency, and we use it here.<sup>1</sup> Whether

one's main interest in the phenomenon is with social dynamics or with policy, a common starting point must be assessment of scale. We present evidence for two measures: total 'frequency' of protests, and what may be called 'turmoil'. Turmoil is a loose term introduced to encourage discussion between analysts who utilise a range of concepts with different definitions (such as riots, unrest incidents and violent protests). When calculating turmoil, we

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distinguish between orderly, disruptive and violent protests, and our conclusion is that community protests have occurred with growing frequency and more disruption and violence (or 'disorder' for short). We nuance this view, though, by proposing that from a high point in 2012, the total number of these protests and the number that was disorderly has flattened off somewhat.

Our assessment is based mainly on media reports of protests archived by the University of Johannesburg's (UJ) Centre for Social Change (CSC).<sup>2</sup> We refer to these as media-reported community protests (MRCPs). Robustness of our calculations can be gauged through contrast with other accounts, of which there are two kinds. First, we look at estimates based on South African Police Service (SAPS) data, captured by its Incident Registration Information System (IRIS). We provided a review of IRIS and its statistics in *South African Crime Quarterly* 58 (2016), and that article should be regarded as a companion to the present piece.<sup>3</sup> Second, there are evaluations provided by three other monitors utilising media data. These are the Armed Conflict Location and Event Data Project (ACLED), the Civic Protests Barometer (CPB), which is based at the University of the Western Cape, and Municipal IQ (MunIQ). Our engagement with these other organisations' appraisals necessarily involves a critique and clarification of their concepts and methodologies. This contributes a further dimension to the article.

We begin with concepts, then deliberate on methodologies, and, finally, consider estimates of protest frequency and extent of turmoil.

### **Community protests: conceptualisation**

Our research, a form of protest event analysis (PEA), is quantitative, and requires definitions that can be operationalised in a consistent

fashion. The first key concept is 'protest'. Drawing on international and local literature and our own experiences and objectives, we defined this as 'a popular mobilisation in support of a collective grievance'.<sup>4</sup> 'Grievance' conveys a sense of being wronged, without this necessarily being clearly specified. 'Popular' means 'of the people' rather than 'well supported', and implies action by people who are relatively marginal. Our theorisation consciously excluded battles between taxi associations, gangs, and the like; that is, between forces with similar status.<sup>5</sup>

We use the term 'community' in reference to protests related to a geographically identified area.<sup>6</sup> This should not be taken to imply that 'communities' are homogeneous, and we are acutely aware that sometimes only a certain section of a community participates in a protest (often the unemployed). A 'community protest' is defined as a protest in which collective demands are raised by a geographically defined and identified 'community' that frames its demands in support and/or defence of that community. Community protests are distinguished from those with other foci, which we have termed 'labour-related', 'crime-related' and so forth. The notion of 'community protest' is broader than 'service delivery protest'. The latter term, frequently used by journalists in South Africa, tends to conceal the complexity of issues that communities raise, which often include criticisms of South Africa's democracy. Furthermore, the SAPS, the Department of Cooperative Governance and the South African Local Government Association (SALGA) are now using the term 'community protest'.<sup>7</sup>

Our approach differs to that of other databases. Table 1 encapsulates aspects of various measurements of community protests.<sup>8</sup> It contrasts our database of MRCPs with (a) IRIS, (b) our IRIS-derived police-recorded community protests (PRCPs), (c) ACLED,

**Table 1: Summary of indicators for South Africa's community protests**

Monitor	Unit of analysis	Scope	Extent	Perspective	Source(s)	Turmoil	Date range
South African Police Service (SAPS)	Crowd incident (peaceful and unrest)	All protests and other crowd incidents	Any size, on a specified day	Public order policing	Incident Registration Information System (IRIS)	Unrest/peaceful	1997–2013
Centre for Social Change (PRCPs)	Community protest	Local community action, not limited to municipal demands	Any size, on a specified day	Popular mobilisation, counter-hegemonic, academic	Incident Registration Information System (IRIS)	Violent/disruptive/orderly	1997–2013
Centre for Social Change (MRCPs)	Community protest	Local community action, not limited to municipal demands	Any size, on a specified day	Popular mobilisation, counter-hegemonic, academic	Media	Violent/disruptive/orderly	2005–present
Armed Conflict Location and Event Data (ACLED) project	Community protest (derived from riots and protests)	Local community action, not limited to municipal demands	Any size, on a specified day	Political violence, normative, comparative, academic	Media	Riots/protest	1997–present
Civic Protests Barometer (CPB)	Civic protest	Targets municipality (could be proxy for national government)	Any size, with open-ended temporal framing	Institutional development, normative, academic	Media	Violent/peaceful	2007–2015
Municipal IQ (MunIQ)	Service delivery protest	Limited to local government's service delivery mandate	Major, with open-ended temporal framing	Administrative efficiency, normative, policy	Media	Violent/peaceful	2004–present

(d) CPB and (e) MunIQ. It summarises methodological as well as conceptual differences, both of which have a significant impact on frequencies. The variation evident in the table is not accidental but is underpinned by divergent reasons for counting protests; that

is, different perspectives (and, implicitly, different theories of protest).

The SAPS's IRIS is an aid to public order policing (POP), and POP capture and input of the data. It records 'crowd incidents' – including social and sporting occasions – rather than

protests.<sup>9</sup> The CSC was fortunate in gaining access to information about 156 230 incidents recorded by IRIS for the years 1997 to 2013. IRIS has a number of fields for data capture, but for protest analysis the most important are open-ended notes provided for each incident (which vary in length from a few words to more than a thousand). Analysis of a large random sample of these notes revealed that, using our definitions (above), about 43% of all crowd incidents were 'protests', and that of these, about 22% were 'community protests'.<sup>10</sup> We call the latter PRCPs (as distinct from MRCPs). PRCPs are a far more comprehensive record of community protests than MRCPs (see below). However, our MRCPs are valuable for three reasons. First, they provide data that extends beyond 2013. Second, they act as a check on IRIS, which has blind spots, notably the years 2007–2009 when reliability was severely impaired by a marked reduction in the number of public order police. Third, though not considered further in this article, MRCPs are derived from the CSC's database, which includes a different range of information about protests than included on IRIS.

In contrast to the SAPS perspective, we have collected media data and interpreted police data with a view to understanding the social dynamics of protest. Ultimately, we want answers to questions like: Why do people protest? What is the impact of protest on political change? By way of further contrast, the other media monitors have normative concerns; they see protests as evidence of something wrong and are asking questions about what needs to be fixed. They are not necessarily hostile to protesters. The CPB is concerned with institutional development and MunIQ with administrative efficiency. ACLED's attention to protests is secondary to its primary interest in armed conflict and political crisis, which provides a context for considering interventions of various kinds. The significance of these

distinctions will be more apparent when we turn to 'turmoil'. For now, two points are relevant. First, overlapping perspectives and similar sources make it possible to compare frequencies. Second, assessing concepts and judging outcomes requires a sympathetic understanding of perspectives, none of which is, *a priori*, better than others.

ACLED divides conflict events into 'event types'. Two of these interest us, 'riots' and 'protests', and ACLED combines these into a single category of 'riots/protests'. According to its definition, these are 'demonstrations against a (typically) political entity, such as a government institution, although this may also include some demonstrations against businesses or other private institutions.' It adds: 'The event is coded as involving protesters when it is non-violent; and as involving rioters if the demonstrators employ violence.'<sup>11</sup> ACLED captures data in 'real time' and its files are regularly updated and publicly available. Event records are accompanied by open-ended notes, which, although less detailed than those provided by the SAPS, assist our research in two significant ways.<sup>12</sup> First, read alongside definitions for other 'event types', one can see that ACLED's 'riots/protests' approximate to the CSC definition of 'protests'. Second, they provide sufficient information for us to distinguish which 'riots/protests' qualify as 'community protests'. So, as with SAPS data, ACLED data can be compared directly with our own, and differences are reduced to sources and methodology.

CPB and MunIQ, however, do not detail the protests they record (nor do we at this stage), so we must work with their own units of analysis, both of which centre on local government. The CPB is interested in 'civic protest', which, it says, refers to 'conflict which is public and commonly oriented towards local government or, through local government, towards the state as a whole'. It adds: 'Our definition excludes forms of protest linked to private interests, such as wage disputes and contractual failures, or protests that form part

of wider civil disobedience movements.<sup>13</sup> In practice, its 'civic protests' are similar to our 'community protests', and sometimes it uses 'community protest' as an alternative to 'civic protest', clarifying that it includes 'any complaint or issue cited by protesters'.<sup>14</sup> MunIQ, however, has a much narrower orientation, one limited to protests 'staged against municipalities' and solely in relation to their 'service delivery mandate'.<sup>15</sup> This tallies with MunIQ's own remit as a local government intelligence specialist.

For CPB and MunIQ, a protest could last many days and it would still be counted as one protest. The SAPS, ACLED and we follow standard practice in protest event analysis and treat a protest as a daily event.<sup>16</sup> So, for us, a protest that lasts three days is recorded as three events (assuming it is reported on each of those days). With most of our media sources appearing daily and details of action sometimes changing (e.g. size, location, level of disorder, demands, etc.) this makes practical sense. Daily counting is also logical for police who must report an incident at the end of a shift (at the latest). MunIQ only includes 'major' protests, which it defines as constituting more than 100 people.<sup>17</sup> Along with ACLED and CPB, we refrain from imposing a limit, which, in our view, is problematic, because few media reports specify numbers. ACLED's data goes back to 1997, MunIQ's to 2003, ours to 2005 (though we have some reports for 2004), and CPB's to 2007.

### **Turmoil in community protests: conceptualisation**

Broadly speaking, there are two ways of conceptualising turmoil in community protests (and, indeed, protests in general). The first is to merely differentiate between 'peaceful' and 'violent'. We reject this simple dichotomy, and in 2014 adopted an approach that separates 'order' from 'disorder' as well as 'peaceful' from 'violent'. All violent protests are disorderly,

but not all disorderly protests are violent; some are disruptive but peaceful. This leaves us with a three-way categorisation of protests: orderly, disruptive, and violent.<sup>18</sup> By implication, our definitions of 'peaceful' and 'violent' are different from those deployed by others. For us, violent protests are those with evidence of damage to property of others and/or injury to persons. Orderly protests are tolerated by the authorities and often negotiated in advance. They include pickets, marches and public meetings. Disruptive protests are identified by tactics such as blocking a road, commonly achieved by placing rocks and/or burning tyres. In recent years, our conceptualisation has gained traction among other researchers.<sup>19</sup>

Concern to introduce 'order' into an understanding of protest turmoil relates to our social dynamics perspective, and is underpinned by historical considerations. Disruption – also known as civil disobedience – has been an integral part of movements associated with progressive social change, including the British suffragettes, Mahatma Gandhi's participation in the struggle for Indian independence, the United States' Civil Rights Movement, and the African National Congress's Defiance Campaign. It often crosses a legal boundary, but does so without contravening widely held moral sensibilities opposed to harm and destruction. A disruptive protest challenges the established order, but does so without transgressing the South African Constitution.<sup>20</sup> Treating barricades as 'violent' delegitimises the intentions of the protesters and misconstrues the dynamics of protest. A single peaceful/violent binary also has the danger of reinforcing moralism. As Bohler-Muller et al. put it: '[S]uch subdivisions are reductive, biasing audiences against certain social movements, and presenting a false dichotomy between "good" and "bad" protestors.'<sup>21</sup>

Arguably, the law, though ambiguous, includes its own distinction between violence and order.

Lt. Col. Vernon Day of the SAPS POP's policy, standards and research department explained: 'Failure to give notice [of a protest], resulting in a spontaneous incident, would not [necessarily require intervention] even if in contravention of [the Regulation of Gatherings Act (RGA)] 205 of 1993.'<sup>22</sup> Here he echoes injunctions contained in the SAPS National Instruction on Public Order Policing (2014).<sup>23</sup> These instructions were an attempt to reconcile the 1996 Constitution, which includes a right to 'unarmed and peaceful assembly', with the pre-Constitution RGA, which makes provision for police intervention in protests that are neither violent nor threaten injury or destruction of property, but involve disruption of vehicular or pedestrian traffic. That is, there is a distinction between 'disruption' (a word used in the Act) and violence.<sup>24</sup>

Our own division is essentially sociological and pragmatic, rather than legal, and we regard disruptive protest as peaceful unless there is evidence of actual violence. In our view, social scientists' primary responsibility is to understand phenomena rather than allow a *priori* judgments to cloud conceptualisations and methodologies. Disruption may be frustrating for non-participants and it might be a precursor to violent conflict, but, on its own, it does not result in injuries or damage the property of others. Our approach might be regarded as 'bottom-up', and it has been conditioned by our qualitative research, which includes interviews and interactions with police as well as protesters.<sup>25</sup> In a quantitative study using a large national sample, Bohler-Muller et al. found that people had little difficulty comprehending a three-way distinction similar to our own.<sup>26</sup>

Regarding other datasets, IRIS distinguishes between crowd (unrest) and crowd (peaceful) incidents. In addition to the common error of assuming a 'crowd' is a protest (see discussion above), there is often a second error (made, notably, by the SAPS itself), one of assuming that 'unrest' equates to violence by protesters.

In fact, for IRIS and public order police, 'unrest' is defined as 'police intervention', which could include arrests as well as, for instance, use of tear gas.<sup>27</sup> This is logical and relatively easy to operationalise. The definition does not indicate violence by protesters (even if the police are responding to violence or threat of violence), and, indeed, the incident may not involve any 'violence' in the sense we have used it. As the name implies, public order police are primarily concerned with preserving order (as they see it), rather than responding to actual violence. For consistency, in analysing IRIS data, we applied our definition of violence to what we read in its 'notes'.

ACLEd provides little detail and no justification in distinguishing between 'rioters' and 'protesters', simply stating: '[R]ioters are by definition violent, and may engage in a wide variety of violence, including in the form of property destruction ... or violence against unarmed individuals.'<sup>28</sup> While we have problems with this particular use of the loaded term 'rioter', ACLEd's definition of violence is close to our own, and, if applied literally, should include a disruptive demonstration as a 'protest' rather than a 'riot'.

The CPB's definition does the reverse; it treats disruptive protests (most of them anyway) as violent action. Asserting that violent protests are those 'where some or all of the participants have engaged in actions that create a clear and imminent threat of, or actually result in, harm to persons or damage to property', it clarifies that this includes cases 'where roads are barricaded and the passage of non-participants is impeded'.<sup>29</sup> We have seen from large numbers of IRIS and media reports that describe disruption without mention of damage or injury, that it is wrong to assume that a barricade is a 'clear and imminent threat of harm'. The CPB's definition introduces an unnecessary element of subjectivity, making it less robust.<sup>30</sup>

Moreover, we know from qualitative research that police sometimes initiate violence, although not necessarily by intention.<sup>31</sup> The CPB does in fact recognise this, commenting: '[L]abelling a protest as violent in nature fails to distinguish between those protests that were violent initially from those that became violent after aggressive responses by police.'<sup>32</sup>

Reinforcing concern about police interventions, MunIQ recently commented: '[P]olicing of protests appears to add another layer of violence, further destabilising the already vulnerable relationship between communities and authority figures.'<sup>33</sup> Unfortunately, to the best of our knowledge, MunIQ has not published its definition of 'violence'.

Operationally, our 'violent protests' are those where there is any evidence of violence. In practice, media reports mostly provide insufficient detail to know whether it was protesters or the police who initiated violence. Many merely refer to a 'violent protest'. Also, from qualitative research, we know it is quite common for police to fire rubber bullets into a peaceful gathering and for protesters to respond by throwing stones and, perhaps later, by setting fire to a building. A reporter might be unaware of the initial police action or might not regard it as violent. Our approach has two implications. First, one should not make a moral judgment about protesters on grounds that their protest has been recorded as violent.<sup>34</sup> Second, we are unlikely to undercount violent protests. Similarly, if there is any evidence of disorder we record the protest as either disruptive or violent, and, thus, are unlikely to exaggerate the number of orderly protests.<sup>35</sup>

Having clarified our conceptual approach, we now present an account of sources and methodology. Following that, we summarise findings on the frequency of, first, all community protests, and, then, 'disruptive' and 'violent' protests.

## Community protests: sources and methods

We begin by discussing the CSC database in some detail. This is the first published account of our methodology. The CSC database draws from three sources. The first of these is the South African Broadcasting Corporation's (SABC) news research. Early on, this had the distinct advantage of including information from reporters and informants in the field, most of which was never aired, giving us protests not reported elsewhere, including in small towns. In recent years, many reports have been taken from other published sources.<sup>36</sup>

The second source, SA Media, is a news clipping service that archives South African newspapers – it includes nearly all dailies and some others too, and provides full reports rather than summaries. Started in 1978, it was originally hosted by the University of the Free State, but was closed in 2014 as an austerity measure, without alternative arrangements being made. Following a campaign, it was revived in modified form by Sabinet. Unfortunately, Sabinet has not recovered cuttings from the first five months of 2015.<sup>37</sup> In 2012, SA Media covered 49 newspapers;<sup>38</sup> under Sabinet it takes in 39.<sup>39</sup> Discontinued newspapers were peripheral and made little difference to the number of protests reported. In actual fact, in 2016 and 2017 the proportion of our reports deriving from SA Media was slightly higher than in previous years. It is possible that improved technology and new protocols led to the selection of more articles, but we think the addition of *New Age* was more significant, because it carries a relatively high proportion of provincial news and hence more protests.<sup>40</sup> In our calculation of frequencies for 2015 and the end of 2014, the period affected by disruption to SA Media, we have added extra protests, based on estimates, using experience of what SA Media contributes to the total. Fortunately, most protests are recorded in more than one source.

We chose SA Media articles using keywords, and we settled on the term 'protest' (having experimented with synonyms that failed to yield additional reports).<sup>41</sup> One limitation of SA Media – indeed, of all our sources – is that it does not include African-language newspapers. Among these, the only daily paper is the isiZulu *Isolezwe*, which we checked for a month, only to discover it did not contain additional protests. Use of Lexis Nexis, another news clipping database, was trialled, but SA Media was more comprehensive.

Our third contributor is the *South African Local Government Briefing* (SALGB), an independent publication that monitors many aspects of local government, and is published a minimum of 12 times a year.<sup>42</sup> It is especially valuable because it systematically gathers and précisés online reports (as distinct from printed reports). SALGB's collection started in 2007, but a survey of online archives for protests before this date revealed very few extra protests.

Between 2005 and 2007 the SABC provided the majority of protest reports; from 2007 to 2015, SALGB contributed the most reports; and, since 2016, more reports have come from SA Media than from other sources. No one source dominates our data collection. Remember, too, that protests are usually reported by more than one source.

On receiving reports, our first task is to exclude anything that does not meet the criteria of a 'community protest'. This filter mainly affects SA Media sources, which include foreign protests and opinion pieces. Second, we archive reports, both physically and electronically. This includes the process of 'de-duplication', undertaken manually, which ensures that multiple reports of the same protest are included as only one event.<sup>43</sup> We simultaneously collate the reports, thus maximising knowledge of each protest. Third, we capture data on Microsoft Access. Thirty fields are available but 'missing data' is

common because reports often do not include required information. Fourth, data is copied into Microsoft Excel and, from there, to SPSS, which we use for analysis. Student assistants code reports, and everything is checked by Carin Runciman, one of our senior team members.<sup>44</sup> In the early stages, the whole team discussed difficult cases to ensure consistency.

The media only report a minority of protests and one should give thought to possible biases. Fortunately, because we are able to compare our MRCPs with our PRCPs we have gained valuable insights in this regard. To the best of our knowledge (and that of other experts in the field) there has never been a release of police data anywhere in the world on the scale of the IRIS records we received, and what we offer here is probably a more precise account of media bias than found elsewhere. Even so, we should insert two cautionary notes. First, we are beginning to find MRCPs that do not appear in IRIS. Overall, they are a small minority, but we have not completed our search and are unable to be more specific at this stage.<sup>45</sup> Second, because IRIS is dependent on input of data by POP, its record of protests is probably skewed by the location of POP units and the role of public order policing (though all police are supposed to report crowd incidents to locally-based IRIS controllers). This is likely to have two implications: under-reporting from small towns and rural areas distant from POP units (clearly a problem in 2007–2009), and under-reporting of orderly protests that do not require POP intervention.

Notwithstanding these caveats, comparing our MRCPs with PRCPs for the period 2005–2013, it is possible to highlight four biases in media recording of protests. First, we estimate that the media has reported less than a quarter of the number of protests recorded by the police.<sup>46</sup> It is therefore a mistake to take frequencies of MRCPs – or frequencies of any media-reported protests – as an accurate reflection of the total number of

community protests. Second, a lower proportion of PRCPs than MRCPs is 'disorderly'. The media clearly give an exaggerated impression of the extent of violence and disruption associated with protests.<sup>47</sup> We return to this below. Third, the size of protests, as reported in the media, tends to be greater than the size of protests as recorded in IRIS. That is, it is particularly smaller protests that go unreported in the media.<sup>48</sup> Fourth, a substantially higher proportion of MRCPs than PRCPs is recorded as occurring in the two provinces where most media offices are located, namely Gauteng and the Western Cape.<sup>49</sup> If we are aware of these biases, we can make good use of media data to develop an approximation of trends in numbers of protests.

How does our recording of media-reported protests compare with that of others working in the same field? ACLED is an international operation, based at Sussex University, which monitors conflict across Africa and in many Asian countries. It is well funded with a large staff, operates rigorous checking, and utilises a wide range of sources, which include print and electronic news reports, government and civil society publications, and some direct reporting to ACLED staff.<sup>50</sup> Its publicly available event records include mention of a specific source for each protest, which is a distinct advantage.<sup>51</sup> ACLED started 'real time' or 'active' coding in 2012, and then undertook 'back coding' for previous years. According to Clionadh Raleigh, ACLED's director: 'Active coding produces many more events.'<sup>52</sup>

The CPB has twice improved its methodology. From 2007 until 2011 it used Lexis Nexis and SALGB. From 2012 it shifted to use of social media and online 'news aggregators', such as the University of KwaZulu-Natal's social protest observatory. Since 2016 it has processed data in semi-automated fashion, and this 'allows for additional digital resources to be leveraged and ensure ever more comprehensive coverage'.<sup>53</sup>

The CPB searches using the keywords 'protest' and 'service delivery'. Frustratingly, MuniQ does not reveal its sources of information.

In evaluating these methodologies, the main evidence must be what they produce in practice. We turn now to findings on frequencies.

## Community protests: frequency

Figure 1 (on page 36) allows us to compare the CSC's MRCPs against its PRCPs, the closest approximation of all protests that occurred. Trends are similar: generally upwards across the period, with peaks in 2012. Without under-recording of PRCPs in 2007–2009, the shapes of the two lines would be even more alike (though the 2009 peak in PRCPs would be more distinct). Our estimated total number of recorded PRCPs for 2005–2013 is just under 8 700, and we have 2 054 MRCPs for the same period. That is, PRCPs outnumbered MRCPs by about 4.2 to 1 for the whole period, rising to 4.3 when the 2007–2009 years are excluded from the calculation.

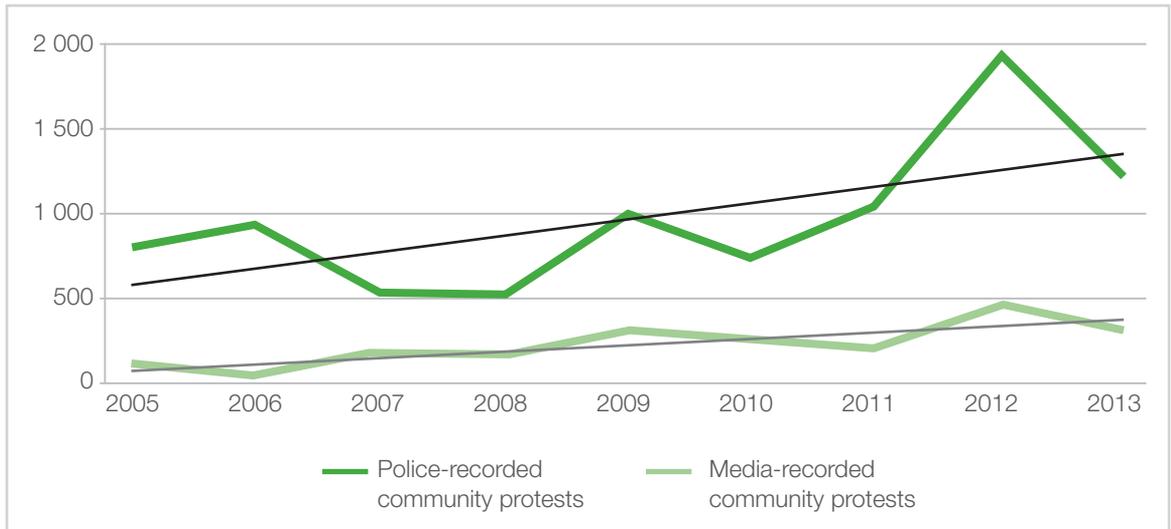
Table 2 shows the total number of community protests (MRCPs), 2005–2017, on the CSC database.

**Table 2: MRCPs 2005–2017 (2014 and 2015 include actual records and estimates)<sup>54</sup>**

Year	MRCPs
2005	106
2006	50
2007	169
2008	164
2009	314
2010	252
2011	208
2012	471
2013	322
2014	375 (377)
2015	343 (363)
2016	377
2017	375

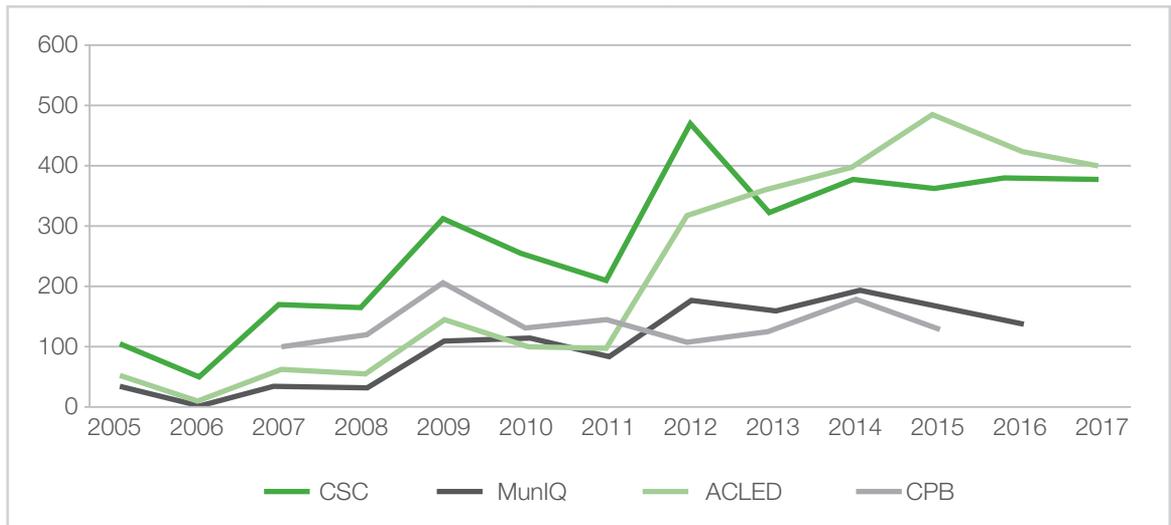
Source: CSC database.

**Figure 1: MRCPs compared with estimated PRCPs, 2005–2013 (with trend lines)<sup>55</sup>**



Source: CSC database and IRIS data analysed by authors.

**Figure 2: Protests recorded by Centre for Social Change (2005–2017), Municipal IQ (2005–2016), ACLED (community protests only) (2005–2017) and Community Protests Barometer (2005–2015)<sup>56</sup>**



Sources: CSC database, Municipal IQ, ACLED and CPB.

Figure 2 compares our MRCPs (the CSC line) with data from ACLED (our calculation of community protests), the CPB (civic protests) and MunIQ (major service delivery protests). MunIQ has recorded considerably fewer protests than the CSC, which is unsurprising, given its limited focus on service delivery, its exclusion of ‘minor’ protests and its method of counting all protests as a single event whatever

their duration. However, the shape of the CSC and MunIQ lines is similar, which probably reflects that a high proportion of community protests include service delivery issues. It may also indicate that MunIQ, like the CSC, has been consistent with sources.

Unlike the other three lines, the one that represents the CPB is rather flat, with almost no upward trend. The shapes of all graphs

are similar until 2010, but it is noticeable that, whereas the others show a marked increase in the number of protests in 2012, the CPB records a decline. Given that the CPB changed its methodology in 2012, it is difficult to avoid the conclusion that its new sources were less generous than the old ones. This, in turn, reduces the value of the CPB graph as a gauge of the trend in frequency of community protests.

The profile of the ACLED graph is the complete opposite. It shows a sudden rise in the number of protests between 2011 and 2012 that is sharper than indicated by the CSC, MunIQ and, indeed, IRIS, and from 2013 onwards ACLED recorded more protests than the CSC. From 2005–2013 our methodology produced similar trends to those derived from IRIS, and our methodology and sources have been consistent, so we are content that our graph provides a reasonable guide to the pattern of protest frequency. Given that we have applied our own definition of ‘community protest’ to ACLED data, it is reasonable to assume that the sudden increase in numbers in 2012 is associated with commencement of ‘active coding’ as explained by Raleigh.<sup>57</sup> However, ACLED is now using a wider range of sources than the CSC, and its figures currently come closer to the number of protests occurring (though, as seen from the police data, it is still a long way short of the actual frequency).

The CSC has two archives of information for South Africa’s community protests: a large sample distilled from IRIS for 1997–2013, and a collection of media reports for 2005–2017. As a record of protests, the IRIS data is peerless. Comparing our MRCPs with the IRIS protests (referred to as PRCPs) it was found that, from 2005–2013, PRCPs exceeded MRCPs by more than 4 to 1, but the two indicators provided a similar pattern of rise and fall in frequency of events. The MRCPs were then compared with data from ACLED, CPB and MunIQ. Given

the similarity in pattern between PRCPs and MRCPs and the CSC’s source consistency, the CSC’s MRCPs are probably a more reliable guide to the *pattern* of community protests from 2005 to 2017 than the other three databases. They show a peak in 2012, when 471 MRCPs were recorded, and then, from 2014, a levelling off with about 370 protests per year. We cannot explain the MunIQ and CPB peaks in 2014 or the ACLED peak in 2015, though these may have been related to definitions and sources. However, except for the CPB, we all show a much-increased level of protest across the period as a whole.

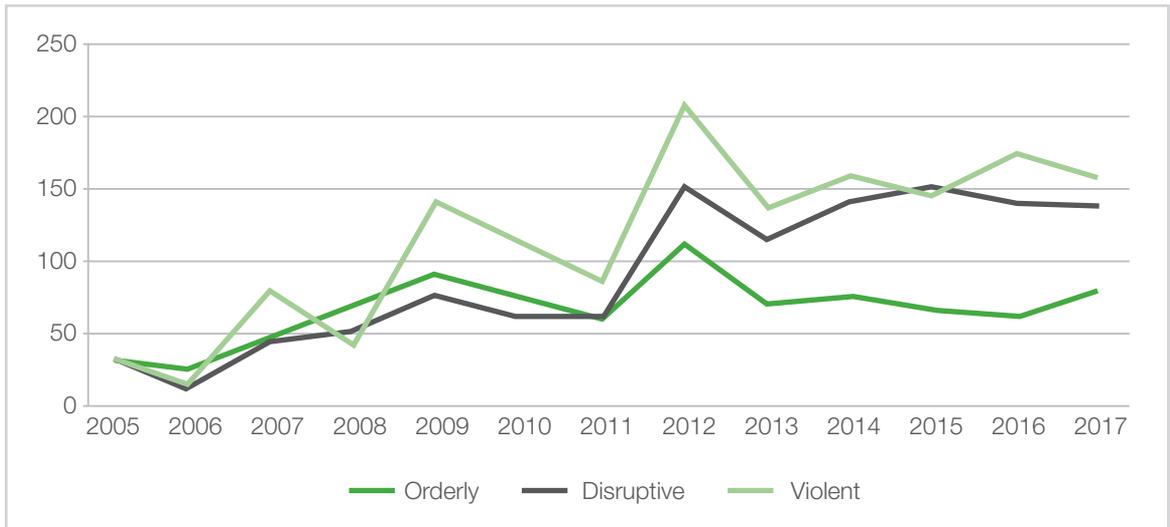
### **Turmoil in community protests: scale**

We now turn to the scale of turmoil. Figure 3 shows the number of our MRCPs that were, respectively, orderly, disruptive and violent. For the period as a whole, there has been a marked decline in the *proportion* that was orderly, with a peak of 50% in 2006 and nadir of 17% in 2016, but from 2012 the decline was slighter, and in 2017 there was a small increase in the number and proportion of MRCPs that was orderly. The upward trends of disruptive and violent protests were similar, but marginally steeper for violent protests. Once again, we remind the reader that a ‘violent protest’ was a protest that revealed some level of violence, whether initiated by the police or protesters.

Figure 4, which includes PRCPs, gives credence to the picture obtained by analysis of MRCPs. It compares disorderly MRCPs with disorderly PRCPs for 2005–2013, and shows remarkable similarity in the shape of the two graphs.

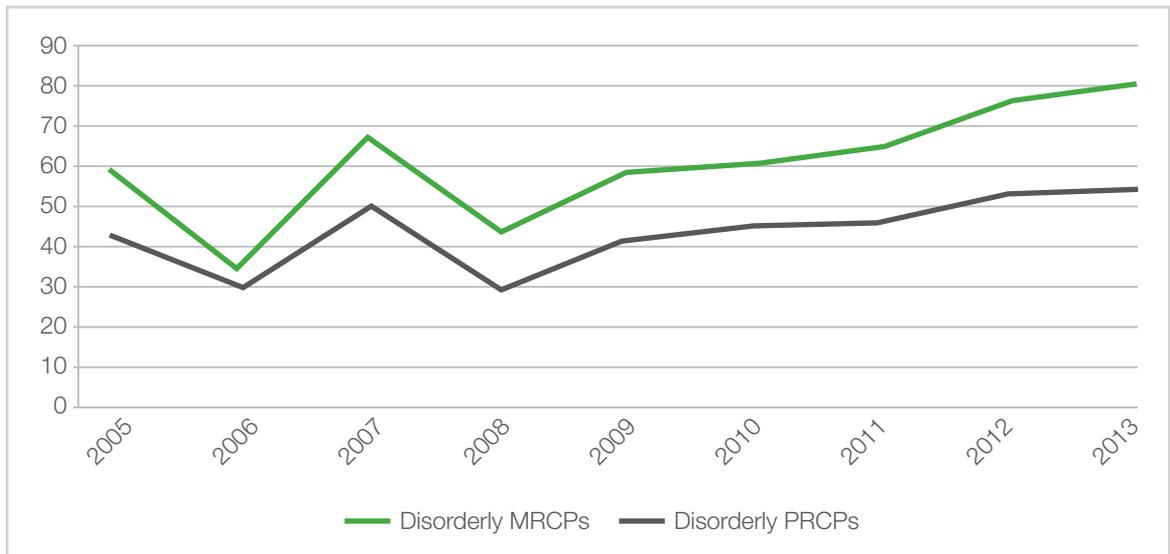
We can now compare the protests we regard as ‘violent’ with ACLED’s ‘riots’, which, by its definition, are regarded as violent. We have accomplished this in Figure 5. The ACLED data suggests that a higher proportion of all community protests was violent (riots) than indicated in the CSC (MRCP) data. However,

**Figure 3: MRCPs that were orderly, disruptive and violent, 2005–2017**



Source: CSC database.

**Figure 4: Percentage of MRCPs and PRCPs that was disorderly<sup>58</sup>**



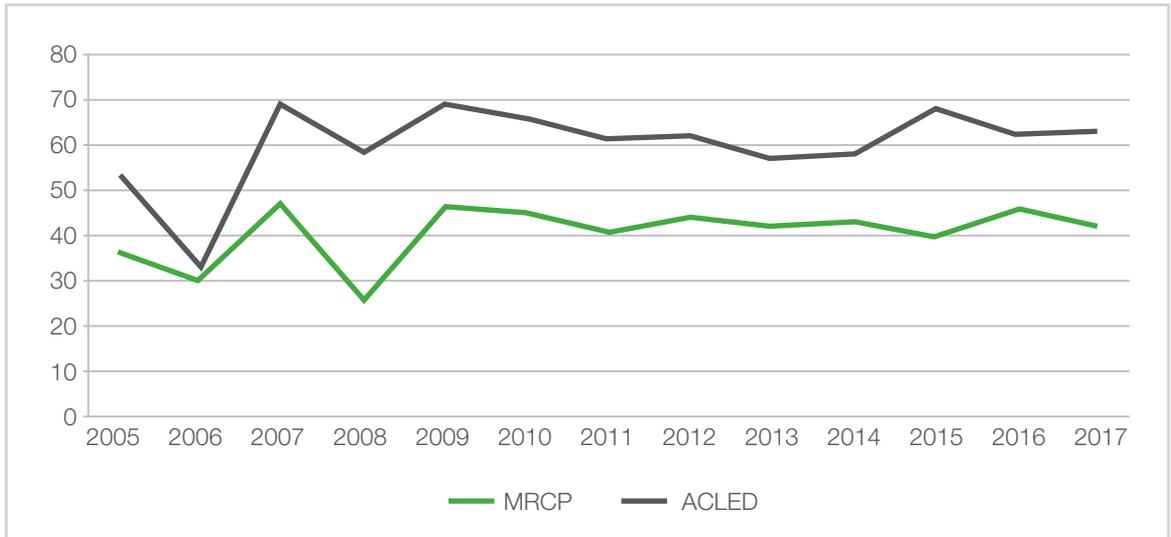
Source: CSC database.

the pattern is remarkably similar, with a levelling off in the proportion of all community protests that was violent from 2010. Differences can be accounted for in terms of definitions, selection of sources, and our reading of ACLED notes. The significance of these graphs is that while, in recent years, there has been an increase in the proportion of protests we regarded as disorderly (i.e. disruptive as well as violent), the proportion that was violent has remained

approximately constant, at about 43% using CSR data and definitions.<sup>59</sup>

With the CPB and MunIQ the comparison must be a different one, because here we must contrast our figures for disorderly protests with theirs for violent ones (see discussion of concepts for explanation). CPB data shows that between 2013 and 2016, 90% of civic protests were violent and that in the first seven months of 2016 the figure reached 95%.<sup>60</sup> With MunIQ the

**Figure 5: Comparison of MRCPs and ACLED community protests regarded as violent, percentages, 2005–2017<sup>61</sup>**



Source: CSC database and ACLED analysis by authors.

pattern was similar. They estimate that between 2004 and 2016, about 75% of service delivery protests were ‘violent’, with this ranging from a low of 67% in 2011 to a high of 86% in 2016.<sup>62</sup> Our figures for disorderly community protests as a proportion of all protests for these two years were, respectively, 69% and 82%.

So, our assessment is that, drawing on media data, while there has been an upwards trend in the number of disorderly community protests since 2006 (slightly from 2013) the proportion of all community protests that was actually violent has been relatively stable since 2010. Moreover, a similar conclusion can be reached if we base the interpretation on a careful reading of data from the other agencies.

## Conclusion

This article has provided a critical review of the main sources of community protest data for South Africa, thus enabling comparisons between them. Description and discussion of the CSC’s concepts, protocols and sources for enumerating MRCPs suggest it provides a strong guide for determining the pattern of community protests in the country. The quality

of this data is underlined by comparison with SAPS data for 2005–2013 and by detailed consideration of concepts and sources used by ACLED, CPB and MuniQ for 2005–2017. We noted that MuniQ, while measuring only major service delivery protests, produced a similar shaped frequency graph to ourselves, perhaps because it was also consistent with its sources of information and because most community protests include demands about service delivery. However, we are concerned about MuniQ’s lack of transparency. ACLED is now collecting more media reports of protests than we are and, if it is consistent with sources, could develop into a better indicator of the pattern of community protests in South Africa. Moreover, ACLED monitors a wider spectrum of events, giving it the potential to compare (a) community protests with other kinds of protest in South Africa, and (b) South African protest with protests in other countries.

In considering turmoil associated with community protests, we introduced a distinction between violence and disorder, providing a three-way categorisation of protests as orderly or disruptive or violent. We argue that this way

of understanding turmoil is more sympathetic to protesters and to the history of protest, better captures the changing dynamics of protests, and consistently applies a definition of 'violence'. Further, it is alive to the police's concern with both preventing disorder and policing violence.

Evidence revealed in the CSC's database showed there were about 3 550 MRCPs between 2005 and 2017. Assuming PRCPs outnumbered MRCPs by about 4 to 1, a ratio we explain, it would appear that more than 14 200 community protests took place between 2005 and 2017. In practice, IRIS did not manage to record all protests, thus the actual figure would have been higher, perhaps by about 25%. Moreover, MRCPs have occurred with increased frequency, rising from 50 in 2006 to a peak of 471 in 2012, then settling down to figures exceeding 320 for the next five years.

Further, whether one applies our three-way distinction, or the simple binary used by the SAPS, ACLED, CPB and MuniQ, there has been growing turmoil in community protests. Our own data shows a rise in community protests that were disorderly; from 50% in 2006 to 83% in 2016. However, we nuance this view using CSC and ACLED data to propose that the proportion of community protests that was actually violent has been relatively stable since 2010. Media reporting exaggerates the extent to which protests are disorderly, but the generally upward trend cannot be doubted and is confirmed by sources other than our own.

Since 2006, there has been considerable growth in the number and turmoil of South Africa's community protests. In 2010, Alexander described these protests as a 'rebellion', a term taken up by other writers.<sup>63</sup> If it was right to draw attention to the scale of the revolt then, it is even more appropriate today.



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## Notes

- 1 Recent additions to the literature on South Africa's community protests include N Bohler-Muller et al., Minding the protest: attitudes towards different forms of protest action in contemporary South Africa, *South African Crime Quarterly*, 62, 2017; J Duncan, *Protest nation: the right to protest in South Africa*, Pietermaritzburg: University of KwaZulu-Natal Press, 2016; L Lancaster, At the heart of discontent: measuring public violence in South Africa, Institute for Security Studies (ISS), Paper 292, May 2016; T Lodge and S Mottiar, South Africa's 'unrest' or 'rebellion': a focus on Durban, in M Paret, C Runciman and L Sinwell (eds), *Southern resistance in critical perspective*, London and New York: Routledge, 2017; S Matebesi, *Civil strife against local governance: dynamics of community protests in contemporary South Africa*, Leverkusen: Barbara Budrich, 2016; M Paret, Violence and democracy in South Africa's community protests, *Review of Political Economy*, 42:143, 2015; BJ Roberts et al., Protest blues: public opinion on the policing of protest in South Africa, *South African Crime Quarterly*, 62, 2017; C Runciman, 'The ballot and the brick': protest, voting and non-voting in post-apartheid South Africa, *Journal of Contemporary African Studies*, 115, 2016; C Runciman, South African social movements in the neo-liberal age, in Paret, Runciman and Sinwell (eds), *Southern resistance*.
- 2 Data for the years to 2014 appeared in P Alexander, C Runciman and T Ngwane, *Community protests 2004–2013: some research findings*, Johannesburg: South African Research Chair in Social Change, 2014 (Media presentation, available on Centre for Social Change [CSC]), <https://www.uj.ac.za/faculties/humanities/csc/Pages/Gallery-and-Video.aspx> (accessed 20 March 2018).
- 3 P Alexander, C Runciman and B Maruping, The use and abuse of police data in protest analysis: South Africa's Incident Registration System (IRIS), *South African Crime Quarterly*, 58, 2016. See also P Alexander, C Runciman and B Maruping, *South African Police Service (SAPS) data on crowd incidents: a preliminary analysis*, Johannesburg: Social Change Research Unit, University of Johannesburg, 2015.
- 4 See discussion in C Runciman et al., *Counting police recorded protests: based on South African Police Service data*, Johannesburg: Social Change Research Unit, University of Johannesburg, 2016, 19.
- 5 *Ibid.*, 19–20.
- 6 *Ibid.*, 23–24.
- 7 For instance, see Human Sciences Research Council and University of Johannesburg, seminar on 'Rebellion of the poor: research, politics, policing and people', Pretoria, 30 June 2016; South African Local Government Association (SALGA), seminar on 'Developing innovative approaches to address community protests in local government', SALGA Head Office, Pretoria, 21 September 2016. The former is available on YouTube. We may have contributed to popularising the term 'community protest'; see C Paton, Protests not always about municipalities' 'service deliveries', *Business Day*, 17 March 2014, 3.
- 8 Assessments contained in this table and explained below are based on information present in organisations' publications

- and on their websites. Examples include Armed Conflict Location and Event Data (ACLED), <https://www.acleddata.com> (accessed 12 September 2017); TC Chigwata, M O'Donovan and DM Powell, *Civic protests barometer 2007–2016*, Cape Town: Dullah Omar Institute, University of the Western Cape, Civic protests and local government in South Africa Working Paper Series 2, 2017, 5–7; Municipal IQ, Press release, 24 October 2017. For the South African Police Service (SAPS), see Runciman et al., *Counting police recorded protests*.
- 9 A number of researchers have confused IRIS incidents with protests. This seems to arise from a monograph by B Omar, *SAPS' costly restructuring: a review of public order policing capacity*, Pretoria: ISS, 2007. The error has been repeated by various researchers, most recently J Omar, A legal analysis in context: the Regulation of Gatherings Act – a hindrance to the right to protest?, *South African Crime Quarterly*, 62, 2017, 22, and S Matebesi and L Botes, Party identification and service delivery protests in the Eastern Cape and Northern Cape, South Africa, *African Sociological Review*, 21:2, 2017, 82.
  - 10 Runciman et al., *Counting police recorded protests*.
  - 11 ACLED, Codebook, <http://www.acleddata.com> (accessed 14 December 2017).
  - 12 ACLED, All Africa Files, <http://www.acleddata.com> (accessed 14 December 2017).
  - 13 Chigwata, O'Donovan and Powell, *Civic protests*, 5.
  - 14 Ibid., Technical Note, 4.
  - 15 Municipal IQ, Press release.
  - 16 See D Rucht, R Koopmans and F Neidhardt (eds), *Acts of dissent: new developments in the study of protest*, Oxford: Rowman and Littlefield Publishers, 1999.
  - 17 Personal communication with Ronesh Dhawraj, Research and Policy Analyst, SABC, 13 September 2015.
  - 18 Although we have developed our thinking, the essence of the distinction can be found in C Runciman, *A protest event analysis of community protests 2003–2013*, South African Research Chair in Social Change, University of Johannesburg, 12 February 2014.
  - 19 Bohler-Muller et al., Minding the protest; Duncan, *Protest nation*, 23; Lancaster, Heart of discontent.
  - 20 In this sense it is similar to an *unprotected* strike.
  - 21 Bohler-Muller et al., Minding the protest, 83.
  - 22 Vernon Day to Peter Alexander, email, 21 May 2015, in Alexander, Runciman and Maruping, Use and abuse, 11.
  - 23 SAPS, Operational Response Services, *National Instruction 4 of 2014: Public Order Police: crowd management during public gatherings and demonstrations*, issued by Consolidation Notice 7 of 2014.
  - 24 South Africa, Regulation of Gatherings Act (RGA) (Act 205 of 1993), section 5(1). Our own definition of property is broader than that in the RGA, which uses qualifying terms such as 'extensive' and 'serious' that we found impossible to apply. In practice, municipalities, universities, magistrates and the police are often less tolerant than prescribed in the RGA, and during the student revolt (2015–16) interdicts were used to ban student protests (an intrusion that was challenged). So far, the Constitutional Court has not considered conflict between the Constitution and the implementation of the RGA, but a recent Western Cape High Court judgment ruled that section 12(1) of the act was unconstitutional because it limited and criminalised peaceful protests. See J Ndita, Judgment, Case A431/15, Socio-Economic Rights Institute of South Africa, 24 January 2017, par 93, 94, [http://www.seri-sa.org/images/Mlungwana\\_High\\_Court\\_judgment.pdf](http://www.seri-sa.org/images/Mlungwana_High_Court_judgment.pdf) (accessed 11 February 2018).
  - 25 See L Sinwell et al., *Service delivery protests: findings from quick response research in four 'hotspots' – Piet Retief, Thokoza and Diepsloot, Johannesburg*: Centre for Sociological Research, University of Johannesburg, 2009; P Alexander and P 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, 2014; P Alexander, C Runciman and T Ngwane, 'Growing civil unrest shows yearning for accountability', *Business Day*, 7 March 2014; C Runciman, Why changes to South Africa's labour laws are an assault on workers' rights', *The Conversation*, 12 December 2017, <https://theconversation.com/why-changes-to-south-africaslabour-laws-are-an-assault-on-workers-rights-88330> (accessed 22 March 2018).
  - 26 Bohler-Muller et al., Minding the protest, 83.
  - 27 Alexander, Runciman and Maruping, Use and abuse, 11.
  - 28 ACLED, Definitions of political violence: agents and event types, [https://www.acleddata.com/wp-content/uploads/2015/01/Definitions-of-Political-Violence\\_2015.pdf](https://www.acleddata.com/wp-content/uploads/2015/01/Definitions-of-Political-Violence_2015.pdf) (accessed 17 December 2017).
  - 29 Chigwata, O'Donovan and Powell, *Civic protests*, 13.
  - 30 The Civic Protests Barometer (CPB) acknowledges that its 'methodology requires subjective assessments'. Ibid., Technical Note, 5.
  - 31 See also M Rayner, L Baldwin-Ragaven and S Naidoo, *A double harm: police misuse of force and barriers to necessary health care services*, Johannesburg: Socio-Economic Rights Institute of South Africa (SERI), October 2017.
  - 32 Ibid., 6.
  - 33 Municipal IQ, Press release.
  - 34 Further, given that poverty etc. entails suffering for those affected, and that the authorities frequently fail to respond to peaceful protest, we do not condemn all violence initiated by protesters.
  - 35 Because protest event analysis is quantitative, and requires clearly bounded categories, there is no scope to distinguish different levels and kinds of violence. This is a limitation. See Paret, Violence and democracy.
  - 36 Many thanks to Ronesh Dhawraj, who has kindly assisted us since 2010.
  - 37 We are grateful to staff at Sabinet, who, on 4 November 2016, explained and demonstrated their procedures to Peter Alexander, Boitumelo Maruping and Eunice Khumalo.
  - 38 'Koerante: SA Media 2012' included: *Afrikaner, Beeld, Bloemnuus, Business Day, Cape Argus, Cape Times, Citizen, Daily Dispatch, Daily News, DFA, Express, Mail & Guardian, Natal Witness, Newsweek, Ons Stad, Pretoria News, Sowetan, The Star, The Herald, The Times, Time, Volksblad, City Press, Independent on Saturday, Rapport, Saturday Argus, Saturday Star, Sunday Argus, Sunday Independent, Sunday Times, Sunday Tribune, Weekend Post, Africa Insight, African Armed Force, Farmers Weekly, Financial Mail, Finweek, Finweek Eng, Hervormer, Joernaal vir Eietydse Geskiedenis, Kerkblad, Kerkbode, Leadership, Landbouweek, Lig, Servamus, Taalgenoot, Teacher, Zuid-Afrikaan*.

- 39 Sabinet's list included: *Beeld*, *Burger*, *Business Day*, *Cape Argus*, *Cape Times*, *Citizen*, *Citizen Saturday*, *City Press*, *Daily Dispatch*, *Daily News*, *Daily Sun*, *Diamond Fields Advertiser*, *Ditsem Vrystaat*, *Financial Mail*, *Mail & Guardian*, *Pretoria News*, *Pretoria News Weekend*, *Rapport*, *Saturday Argus*, *Saturday Beeld*, *Saturday Dispatch*, *Saturday Independent*, *Saturday Star*, *Saturday Volksblad*, *Sowetan*, *The Star*, *Sunday Argus*, *Sunday Independent*, *Sunday Sun*, *Sunday Times and Time*, *Sunday Tribune*, *Sunday World*, *The EP Herald*, *The New Age*, *The Times*, *Volksblad*, *Weekend Post*, *Weekend Witness*, *Natal Witness*. From Sabinet, SA media, [http://cdn.sabinet.co.za/documents/SA\\_Media.pdf](http://cdn.sabinet.co.za/documents/SA_Media.pdf) (accessed 29 August 2017).
- 40 See also R Pointer, *From illegitimate disruption to failing state: how South African newspapers framed 'service delivery protests' in 2013*, unpublished MA dissertation, University of Cape Town, 2015, 50.
- 41 Had we been interested in all protests, including strikes, we would have required a wider range of search terms.
- 42 Many thanks to Clive Keegan for supplying us with the *South African Local Government Briefing (SALGB)* for nearly 10 years. It is an unparalleled source of information on local government, and it is a marvel that Keegan produces it single-handedly.
- 43 Some very large conflict databases, notably the largest of them, the Global Database of Events, Language and Tone (GDELT), automate this process, but we believe that manual assessment is necessary, and this is also the view of ACLED and the CPB.
- 44 The student assistants who have undertaken coding work include Dee Cohen, David Scholtz, Boitumelo Maruping, Mahlatse Rampedji, Eunice Khumalo, Zinhle Mncube, Kgothatso Mokgele and Nicole van Staden. We thank all our student assistants, past and present.
- 45 The SAPS recognised that from 2007–2009, 20–40% of crowd incidents were unreported, but that by 2014 it was only missing about 5%. Alexander, Runciman and Maruping, *Use and abuse*, 14. We think the actual numbers are probably higher.
- 46 Runciman et al., *Counting police recorded protests*, 51.
- 47 *Ibid.*, 58–59. See also J Duncan, *Below the radar, South Africa is limiting the right to protest*, *The Conversation*, 15 June 2016.
- 48 Calculations by Boikanyo Moloto and Kgothatso Mokgele.
- 49 P Alexander (with C Runciman and T Ngwane), *South Africa's rebellion of the poor: protests, triangulation and politics*, presentation to Historical Materialism conference, 2015, slide 10. This is an issue that requires further investigation.
- 50 ACLED, *Reporting sources*, Working Paper 5, 2015, [https://www.acleddata.com/wp-content/uploads/2015/04/ACLED\\_Reporting-Sources-Working-Paper-No.-5\\_2015.pdf](https://www.acleddata.com/wp-content/uploads/2015/04/ACLED_Reporting-Sources-Working-Paper-No.-5_2015.pdf) (accessed 15 December 2017). Critiquing media reporting of protests, they note, like us, the problems of urban bias and exclusion of events deemed uninteresting for readers. Also, A Carboni and J Moody, interviewed by Peter Alexander, Sussex University, Brighton, 7 April 2017.
- 51 ACLED, *All Africa Files*, <http://www.acleddata.com> (accessed 15 December 2017).
- 52 Clionadh Raleigh to Peter Alexander, email, 6 September 2016.
- 53 Chigwata, O'Donovan and Powell, *Civic protests*, Technical Note, 3.
- 54 Figures in brackets include allowance for missing SA Media reports (see text).
- 55 This figure first appeared in Runciman et al., *Counting police recorded protests*, 51.
- 56 Sources: CSC database, ACLED, <http://www.acleddata.com> (accessed 12 September); Chigwata, O'Donovan and Powell, *Civic protests*, 8; Municipal IQ, Press release. *Civic protests* only specifies figures for 2009, 2014 and 2015, and other numbers are deduced from a graph. ACLED data is drawn from its variable EVENT\_TYPE using 'protests and riots'. To allow for the absence of SA media reports from January–May 2015, we added two extra protests to the 375 CSC archived for 2014 and 20 to the 323 archived for 2015 (see text for explanation).
- 57 Clionadh Raleigh to Peter Alexander, email, 6 September 2016.
- 58 This figure first appeared in Runciman et al., *Counting police recorded protests*, 59.
- 59 Of course, bringing IRIS analysis data to the discussion, we would conclude that the actual proportion of community protests that is violent must be lower (see discussion above).
- 60 Chigwata, O'Donovan and Powell, *Civic protests*, 13–14. From 2012 to July 2016, about a third of their violent incidents involved 'intimidation', including the barricading of roads (what we regard as disruption), but the remainder involved attacks on individuals and destruction of property.
- 61 ACLED figures are for ACTOR1, which actually distinguish between 'protesters' and 'rioters'. For some years there is also a figure for 'police' (only a significant number in 2012 and, to a lesser extent, 2015) and we include these as 'rioters'. This gives totals that are the same as for EVENT\_TYPE (i.e. the variable used above).
- 62 Municipal IQ, Press releases, 29 January 2014 and 1 February 2017.
- 63 P Alexander, *Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis*, *Review of African Political Economy*, 37:123, 2010. See also Alexander and Pfaffe, *Social relationships to the means and ends of protest in South Africa's ongoing rebellion of the poor*.

# Testing the judiciary's appetite to reimagine protest law

## A case note on the SJC10 case

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*Judgment in the long-awaited SJC10 case was handed down on 24 January 2018. This case marks a victory for the collective bane on civil society – that of the criminalisation of a convener of a protest for the failure to provide notice. It goes a long way to opening the space for more serious engagement on the legitimacy of the Regulation of Gatherings Act 1993 and its possible reformulation to give effect to section 17 of the Constitution – the right to peaceful and unarmed assembly. This appeal to the high court was brought by the SJC on very limited grounds, focusing only on the requirement to provide notice – a strategy that has paid off, as the contested section of the Regulation of Gatherings Act was declared unconstitutional. This case note dissects some of the key arguments raised by the SJC and by the state, and analyses the court's reasoning in reaching this finding.*

A number of the articles in the December 2017 edition of SACQ, which focused on protest, made reference to the SJC10 case, for which judgment was pending at the time of publication. The case was important because it challenged the requirement – set out in the Regulation of Gatherings Act 1993 (RGA) – that the convener of a gathering of more than 15 people must notify the relevant

municipal authority in order to comply with the requirements for a lawful protest.<sup>1</sup> A number of authors in the edition pointed to issues with the administrative requirements of the RGA, including the one that saw the SJC10 arrested and charged.<sup>2</sup> Many in the public interest law space were watching the case carefully, because it tested the judiciary's appetite for reforming the law that regulates protest in South Africa.

On 24 January 2018, a unanimous judgment was handed down by Ndita J and Magona AJ in the Western Cape High Court, which upheld the constitutional arguments made by

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the SJC10 and declared section 12(1)(a) of the Act unconstitutional in so far as it criminalises a convener for failure to provide notice. This case note addresses the judgment and highlights its importance in terms of South Africa's jurisprudence on protest.

## The basics: understanding the case

The Social Justice Coalition (SJC) is a civil society organisation that advocates for better access to socio-economic rights, particularly for those living in informal settlements.<sup>3</sup> On 11 September 2013, members of the SJC participated in a gathering at the Civic Centre in the City of Cape Town. The SJC activists had not provided notice in terms of the RGA. During the trial, the SJC10 argued that the event was initially planned as a picket.<sup>4</sup> In terms of the Act, there is no notice requirement for a picket, and so none was served. However, section 3 of the Act requires notice for a gathering, which is defined as 'an assembly, concourse or procession of more than 15 persons' in a public space.<sup>5</sup> A group of 15 members chained themselves to each other and to the railings at the entrance to the Civic Centre. There was some disagreement between the parties during trial about whether the entrance to the Civic Centre was blocked by the human chain. In the end, the trial court appeared to accept the version of the appellants that there was no blockage, relying on photographs handed in as evidence that members of the public had made use of another stairway to gain access to the Civic Centre.<sup>6</sup>

During the course of the picket, the people who were chained to the railings switched places and, as it happened, at various points the number of protesters grew to more than 15.<sup>7</sup> This increase in number beyond the threshold of 15 meant that the event changed in definition from a picket (which requires no notice) to a gathering, which requires notice under section 3.

The police arrested 21 people on the scene. Ten SJC activists were charged in the magistrates' court in Cape Town with contravening section 12(1)(a) of the Act by unlawfully and intentionally convening a gathering without giving the required notice to the relevant municipal authority.<sup>8</sup> In the alternative, they were charged with attending a gathering where no notice had been given.<sup>9</sup> Although 21 activists were initially arrested, the court distinguished between members who had been part of organising the event, and those who had not. This is relevant because section 12(1)(a) is only applicable to *conveners* of a gathering. A convener is defined as:

- (a) any person who, of his own accord, convenes a gathering; and
- (b) in relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2(1).<sup>10</sup>

The SJC10, who had been identified as conveners of the event and charged with contravention of the RGA, pleaded not guilty. At trial they were convicted on the main charge – unlawfully and intentionally convening a gathering without giving the required notice to the relevant municipal authority. The sentence handed down was a caution, which meant that no period of imprisonment or a fine was ordered.<sup>11</sup>

The trial court (and later the appeal court) was not immune to the context surrounding the SJC protest. The appeal court factored in the significant role of SJC in Khayelitsha and its ongoing and lengthy engagement with the City of Cape Town. In this sense, there is recognition by the court that protests occur when other mechanisms or avenues of engagement have failed.<sup>12</sup>

The SJC10 were awarded leave to appeal by the trial court against their conviction for

contravention of section 12(1)(a). The appeal is based on arguments that section 12(1)(a) is unconstitutional and therefore invalid. While this challenge was a narrow one, targeting only the criminalisation of the failure to provide notice, the case provided an opportunity to test the judiciary's appetite for bringing the Act in line with the constitutional right to protest.

This is a landmark case because it is the first direct challenge to the RGA. The judgment is welcomed for upholding the constitutional challenge to the Act. This represents the judiciary's willingness to develop a statute enacted pre-Constitution, and further advances the right to protest. The case must be understood in light of the social and legal context for protest, and I turn to that issue next. The note will begin by contextualising the Act in terms of South Africa's social, political and legal history. The arguments made before the court and the reasoning of the court will be discussed, with a view to analysing the significance of this case for the right to protest.

## **The Act's legal and social context**

Part of the importance of challenging the Act stems from its legal and social context, and questions raised around the RGA's appropriateness in South Africa's constitutional democracy. The Act was enacted in 1993, during the last days of apartheid.<sup>13</sup> Although negotiations for a democratic South Africa were already underway,<sup>14</sup> it could be argued that the Act is tainted by its moment in time. This was a time when dissent was criminalised.<sup>15</sup> The intention of the legislature in 1993 may have been to restrict the right to protest.<sup>16</sup> However, the Act must now be interpreted through the prism of the Constitution. Any piece of legislation must be in line with the 'spirit, purport and objects' of the Constitution.<sup>17</sup>

Notwithstanding its contentious start, the Act is the leading piece of legislation giving

effect to section 17 of the Constitution, which provides the right to assemble peacefully.<sup>18</sup> Legislation that gives effect to a provision of the Constitution becomes the direct means of regulation of conduct, and cannot be circumvented by recourse to the Constitution as a first resort.<sup>19</sup> What this means is that conduct related to protest is bound to comply with the Act (unless the Act conflicts with the Constitution). This first direct challenge by the SJC against the Act is therefore a step in the direction of reimagining legislation to give effect to section 17.

The fact that protest is protected in both our interim and final Constitution reflects the importance of protest in our society. The preamble to the Act also recognises this, 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.<sup>20</sup>

This means that not only is the right to protest available to everyone in South Africa, but that persons who protest can expect protection from state bodies such as the police.<sup>21</sup> However, various accounts, from civil society organisations in particular, have argued that the Act fails to give effect to the right in section 17,<sup>22</sup> giving rise to the impetus to challenge the Act.

## **Principal arguments made to the court**

There are many potential grounds of challenge to the Act.<sup>23</sup> The challenges raised by the SJC10 in this case relate to the constitutionality of the criminalisation for failure to provide notice as provided for in section 12(1)(a) of the Act. This issue was the most well-publicised controversy related to the Act because of

the criminal consequences attached to the administrative requirement to provide notice, and the publicity around this case.

The fact that the SJC case raised only a limited challenge is in some ways a pity as it does not challenge the legitimacy of the Act in and of itself. On the other hand, this does create the scope for challenging the Act as a long-term project and leaves open the opportunity for further cases to be brought in the future. Judges can only decide the specific dispute before them. The SJC10 narrowed their complaint to the criminalisation for failing to provide notice (and not the notice requirement itself). It was strategic to challenge low-hanging fruit; that is, the aspect of the Act that was clearly ripe for criticism.<sup>24</sup>

The constitutional challenge raised by the SJC10 is that criminalising the act of convening a gathering without notice effectively makes it a crime to hold a peaceful gathering (if notice is not given).<sup>25</sup> This goes further than the internal limitations in section 17 of the Constitution, which only specifies that a protest should be peaceful and those participating must be unarmed.<sup>26</sup> The SJC therefore argued, in essence, that the consequence of this provision of the RGA is that ordinary people will be deterred from exercising their constitutionally-protected right to protest,<sup>27</sup> or may risk criminalisation for doing so if they are not aware of the administrative requirements under the Act.

There are a number of arguments made by the second respondent, the Minister of Police, who opposed the application for appeal (hereafter, referred to as 'the Minister'). The first respondent, the state, did not oppose the application for appeal, choosing to abide by any decision by the court. The Minister's arguments were largely two-fold: firstly, that the purpose of the notice requirement is to allow for proper police planning, including the distribution

of police resources, and secondly that the criminalisation of the failure to provide notice deterred those intending to protest from doing so without giving notice. The Minister's heads of argument for the appeal contended that:

The reason as to why convening a gathering in respect of which no notice has been given is an offence in terms of section 12(1)(a) is the deterrent effect that the criminalisation of such conduct has. Simply put, in the absence of a criminal sanction, persons would be able to convene gatherings in respect of which no notice has been given without any adverse consequence at all. The criminalisation of such conduct undoubtedly has a serious deterrent effect.<sup>28</sup>

The overarching argument by the Minister is that the rights of protesters cannot take precedence over other competing rights,<sup>29</sup> for example, the right to safety and security of other persons.

### **Analysis of the court's reasoning**

Amid much celebration from the gallery in the room, the court upheld the appeal against the conviction of the 10 appellants and declared section 12(1)(a) unconstitutional in so far as it criminalises convening a gathering where no notice was provided. This was a decided victory for the SJC and for many social organisations that have been engaged in battle with municipalities over the notorious notice requirement in section 3 because it is onerous and overly administrative.<sup>30</sup> It is also a marked move towards the possibility of further successful challenge to the Act because it shows that courts may be willing to develop the Act in line with the constitutional right to protest.

In assessing the arguments made by both the SJC10 and the Minister, the court had to balance the protection of the right to protest (essentially arguments raised by the SJC10) with the importance of the purpose of the

criminalisation for failure to provide notice, such purpose argued by the Minister to be to deter protests without notice. The right to protest in section 17 of the Constitution is a broadly-drafted provision that does not contain requirements to provide notice for logistical planning, nor the consequences for failing to give notice. The Act, by requiring notice for this purpose, serves to limit the right to protest. A court faced with such a constitutional challenge has to determine if the right to protest is unreasonably narrowed by the criminalisation for failing to give notice.

The court considered the two-part test to determine if the right is unjustifiably infringed: firstly, whether the right is limited, and secondly, whether such limitation is reasonable and justifiable in a democratic society.<sup>31</sup> A limitation of a constitutional right occurs where a law or the implementation of a law restricts the enjoyment of that right. In relation to part one, the court found that the facts of this case, where all the conveners were arrested and convicted of failing to provide notice, reflect a clear limitation of the right to protest.<sup>32</sup> The court noted here that the 'effect of section 12(1)(a) appears to be quite chilling'. This kind of strong language reflects the court's concern with the criminalisation of protest.

The second part of the test is the more important and complex one, because not every limitation of a right in the Bill of Rights will be deemed unconstitutional.<sup>33</sup> If the reason for the limitation is acceptable, the infringement may not be unconstitutional.<sup>34</sup> For example, the police are granted powers to search and seize for the purposes of a criminal investigation.<sup>35</sup> This is considered a reasonable restriction on the right to privacy.<sup>36</sup>

Section 36 of the Constitution requires that a court use five factors to determine whether a limitation is justified or not. These factors are the nature of the right,<sup>37</sup> the importance of

the purpose of the limitation,<sup>38</sup> the nature and extent of the limitation,<sup>39</sup> the relation between the limitation and its purpose,<sup>40</sup> and whether there are less restrictive means to achieve the purpose.<sup>41</sup> The court in this matter did conduct this five-pronged inquiry – although this note only highlights a few of the most salient points.

The court references the Constitutional Court case in *SATAWU v Garvas*, leaving no doubt of its understanding of the importance of the right to protest:

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.<sup>42</sup>

The court, in referencing *SATAWU v Garvas*, highlights the importance of the right and sustains the need to protect the right to protest.

The next point of inquiry is whether the reason for the limitation is compelling, and not just generally useful.<sup>43</sup> The Minister's primary arguments were that the notice requirement was included to ensure that the police could plan the allocation of resources effectively. The Minister argued that the criminalisation of the failure to provide the notice acts as a deterrent.<sup>44</sup> The

Act, however, goes further than regulating the logistical details of a protest. Section 9, which details the powers of the police during a gathering, is especially problematic. While the police would ordinarily have jurisdiction to monitor an event that involves a large group of people in a public space, section 9 gives explicit and specific authority to the police to intervene in various stages of the protest.<sup>45</sup>

The court reiterates that section 9 demonstratively gives the police powers to manage a gathering reasonably.<sup>46</sup> This would seem superfluous in light of the police's general duties and powers in the Constitution.<sup>47</sup> The need for specific police powers in the Act is perhaps a relic of its time and context, where the role of the police in protest was at the forefront of the minds of the legislative drafters and Parliament. Thus, the limitation is not necessary for the police role that is highlighted by the Minister. A more important critique is that the court accepted the Minister's assertion that the notice requirement assists the police with proper planning, seemingly without really interrogating the plausibility of this claim. The SJC10 did not dispute that providing notice was important. In fact, they agreed that giving notice was useful to provide the opportunity to engage the municipal authority on issues related to logistics, including traffic and safety.<sup>48</sup> The emphasis on proper planning is therefore misplaced as a reason to explain the importance of the limitation and misplaced as a reason accepted by the court.

The Minister's contention in respect of the deterrent effect of criminalising conveners warrants attention. As described earlier, the Minister argued that without a serious consequence, the convening of protests without notice will not be deterred.<sup>49</sup>

The issue of deterrence in the criminal justice system is an ongoing one. The court in *S v J* said, '[i]t is deterrence (including prevention)

which has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment.<sup>50</sup> In contrast, post-Constitution the court in *S v Makwanyane*,<sup>51</sup> while interpreting the right to life in relation to the death penalty, weighed up the need for deterrence with the availability of other alternatives. Mahomed J specifically clarified that '[c]rime is a multi-faceted phenomenon. It has to be assaulted on a multi-dimensional level to facilitate effective deterrence.'<sup>52</sup>

There must be a strong likelihood that the limitation will achieve its intended purpose, and that there are no means of achieving the purpose with less restriction on the right.<sup>53</sup> The Minister conflated the purpose of the notice requirement (which was not a point of contention) with the purpose of the criminalisation for failure to give notice. The court, by accepting the deterrence argument and finding that there is a legitimate purpose served by the limitation,<sup>54</sup> fell into this trap as well.

The court, in my view, did not take an holistic approach to the section 36 factors. The court could have gone further in considering the deterrence argument in light of the other factors and weighing up whether criminalisation does serve a legitimate purpose in this context.<sup>55</sup> The court should have balanced its recognition of the importance of protest against the need to deter the convening of gatherings without notice.

The court itself admits that deterrence should not be the primary factor when weighing up the importance of the limitation:

The effect of the limitation therefore is not only to punish the convenors for failing to serve a notice, it is also to deter people from exercising their right to free assembly. That much is clear from the fact that deterrence is one of the purposes of criminal punishment.

It is well established that deterrence is the use of punishment to prevent the offender from repeating his offence and to demonstrate to other potential offenders what will happen to them if they follow the wrongdoer's example.<sup>56</sup>

Following this reasoning, the court ultimately found that section 12(1)(a) was unjustifiable, but its acceptance of the deterrent effect of criminalisation placed too much emphasis on the importance of deterrence, negating some of its earlier discussion on the context of protest in South Africa.

The court makes no distinction between a crime that harms (whether it be a person, property or society), and the regulatory crime that is created by section 12(1)(a), aimed at facilitating the exercise of a constitutionally protected right.<sup>57</sup> Thus while the court reached a sound final conclusion, the reasoning skips some steps of logic in so far as it deals with deterrence as a stand-alone factor.

The appellants argued that section 12(1)(a) is arbitrary in that it treats all types of gatherings equally in terms of whether notice is required or not. Specifically, they argued that this is a false equivalence in that some gatherings require police resources, while others do not.<sup>58</sup> The appellants did not raise an issue in relation to the definition, which means that – because the judgment does not distinguish different types of gatherings – the Act in effect remains over-broad in criminalising all gatherings.<sup>59</sup> The court commendably deals with this issue by its own hand, suggesting that an alternative to criminalisation could look to defining what a 'gathering' is.<sup>60</sup> The court cautions that this will not solve all issues related to section 12(1)(a). This is something that should be done in any event, even if it is to clarify the confusion created by the differing language in section 17 and the Act.

There are a number of extremely laudable aspects to this judgment. Firstly, the judgment contains a clear recognition of and respect for the importance of protest in South Africa's history. Secondly, it shows a concerted effort to balance the often competing interests of protesters and the state. Thirdly, the judgment articulates the possible alternative consequences to criminalisation for failing to provide notice, which is beyond the scope of the court.<sup>61</sup> Finally, the judgment refers extensively to international law in so far as it relates to the arguments made in support of the appellants by the *amici curiae*.<sup>62</sup>

The court's section 36 analysis achieves what is intended by the limitations clause: a balance between competing rights.<sup>63</sup> In this case, it is the rights of those who protest and the state, particularly the police, in maintaining order. By maintaining the importance of the notice period for planning (although this was not disputed by the appellants) and simultaneously recognising the chilling effect that criminal sanctions have on those wanting to protest, the court strikes a healthier equilibrium in the Act.

## Conclusion

This judgment is a big step in the legal arena to challenge the most directly controversial aspect of the RGA, that of the criminalisation that attaches to a convener for failure to provide notice. The judgment tries to find a balance between the various competing interests, particularly the right of ordinary members of the public to protest, and the interests of the police to fulfil their constitutional mandate to maintain order and safety.

The judgment ends by quoting the phrase used in *SATAWU v Garvas* of a "never again" Constitution'.<sup>64</sup> This strong statement suggests that the court was not shying away from its duty to interpret legislation in light of the Constitution. Although this note argues that the court could have gone further in grappling with the section

36 factors, the court did what it was asked: to consider whether section 12(1)(a) goes too far in regulating protest.

This was the first court challenge to the Act. It opens the door to further strategic litigation, perhaps leading up to challenging the Act's constitutionality as a whole. The right to protest and the Act are likely to remain an interesting and evolving area of the law in the near future.



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## Notes

- 1 Regulation of Gatherings Act 1993 (Act 205 of 1993), section 12(1)(a).
- 2 N Ally, Failing to respect and fulfil: South African law and the right to protest for children, *South African Crime Quarterly*, 62, 2017; A Skelton and M Nsibirwa, #SchoolsOnFire: criminal justice responses to protests that impede the right to basic education, *South African Crime Quarterly*, 62, 2017; J Omar, A legal analysis in context: the Regulation of Gatherings Act – a hindrance to the right to protest?, *South African Crime Quarterly*, 62, 2017; L Chamberlain and G Snyman, Lawyering protest: critique and creativity – where to from here in the public interest legal sector, *South African Crime Quarterly*, 62, 2017.
- 3 Social Justice Coalition (SJC), <http://www.sjc.org.za/>, accessed 18 February 2018.
- 4 One of the idiosyncrasies of the Act is the differing language used by the Regulation of Gatherings Act compared to section 17 of the Constitution. 'Picket' is a word used in section 17, but it does not appear in the Act. The most analogous term present in the Act is 'demonstration', defined as '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'.
- 5 Regulation of Gatherings Act, section 1.
- 6 *S v Phumeza Mlungwana and 20 Others* 14/985/2013, para. 164.
- 7 *Phumeza Mlungwana and 20 Others v State and Others* A431/15, para. 11.
- 8 *S v Phumeza*, para. 164.
- 9 *Phumeza v S*, para. 3.
- 10 Regulation of Gatherings Act, section 1.
- 11 *S v Phumeza*, para. 180–181. The appeal court considered the leniency of the sentence handed down. The court correctly put more store on the criminal conviction and its negative consequences than on the type of sentence. *Phumeza v S*, para. 93.
- 12 K 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, University of the Witwatersrand, 2011, 33.
- 13 The Goldstone Commission was a judicial commission authorised by the Prevention of Public Violence and Intimidation Act 1991 (Act 139 of 1991) to consider matters related to public violence. Out of its recommendations, the Act was drafted.
- 14 The Constitution of the Republic of South Africa (Act 200 of 1993), commonly referred to as the Interim Constitution, included a provision that is substantively the same as section 17 of the Constitution.
- 15 *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC), para. 62; J Rauch and D Storey, The policing of public gatherings and demonstrations in South Africa 1960–1994, Truth and Reconciliation Commission (TRC), 1998, 3.
- 16 Omar, A legal analysis in context, 25; P Hjul, Restricting freedom of speech or regulating gatherings?, *De Jure*, 2013, 458.
- 17 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 39(2) requires that a court, in interpreting legislation, must 'promote the spirit, purport and objects of the Bill of Rights'.
- 18 Constitution, section 17. 'Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.'
- 19 *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC); 2007 5 SA 400 (CC), para. 51.
- 20 Regulation of Gatherings Act, preamble.
- 21 Omar, A legal analysis in context, 25.
- 22 S Booysen, Public participation in democratic South Africa: from popular mobilisation to structure co-operation and protest, *Politeia*, 28, 2009, 12; Chamberlain and Snyman, Lawyering protest, 15.
- 23 Omar, A legal analysis in context.
- 24 *Ibid.*, 27.
- 25 *Phumeza v S*, para. 16.1.
- 26 The internal limitations in section 17 are that the protest must be peaceful and unarmed.
- 27 *Phumeza v S*, para. 16.2.
- 28 *Phumeza v S*, Heads of Argument, Minister of Police, para. 65.3. The author was fortunate to have had sight of this document.
- 29 *Phumeza v S*, para. 21.
- 30 Chamberlain and Snyman, Lawyering protest, 16.
- 31 Constitution, section 36; *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), para. 44.
- 32 *Phumeza v S*, para. 42.
- 33 The Bill of Rights is enshrined in chapter 2 of the Constitution.
- 34 I Currie and J de Waal, *The Bill of Rights handbook*, 5<sup>th</sup> edition, Johannesburg: Juta & Co, 2005, 164.
- 35 Criminal Procedure Act 1977 (Act 51 of 1977), chapter 2.
- 36 Constitution, section 14.
- 37 *Ibid.*, section 36(a). This refers to the aim, purpose and scope of the right.
- 38 *Ibid.*, section 36(b). How important the limitation is must be considered.
- 39 *Ibid.*, section 36(c). The scope of the limitation is a factor, i.e. the right should not be too far infringed.

- 40 Ibid., section 36(d). This refers to whether the purpose behind the limitation actually achieves the purpose at which it is purportedly aimed.
- 41 Constitution, section 36(e). A court must consider whether an alternative is available that may infringe less on the right's enjoyment.
- 42 *SATAWU v Garvas*, para. 63.
- 43 D Meyerson, *Rights limited: freedom of expression, religion and the South African Constitution*, Johannesburg: Juta & Co, 1997, 36–43. This distinction is important when assessing whether there is a direct link between an expressed purpose of a limitation and the success in meeting that purpose.
- 44 *Phumeza v S*, para. 50–52.
- 45 For example, the police may prevent or move participants to a different place (section 9(1)(b)), may order the participants of a protest to disperse (section 9(2)), or use force in the case of serious damage to persons or property (section 9(2)(d) and (e)).
- 46 *Phumeza v S*, para. 33.
- 47 Section 205(3) of the Constitution articulates the police's duties to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.
- 48 The accused's Heads of Argument can be found at SJC, Resources, para. 31, <http://www.sjc.org.za/resources> (accessed 1 August 2017).
- 49 *Phumeza v S*, para. 51.
- 50 *S v J* 1989 (1) SA 669 (A), para. 682G.
- 51 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
- 52 Ibid., para. 291.
- 53 *S v Manamela* 2000 (3) SA 1 (CC), para. 32.
- 54 *Phumeza v S*, para. 56.
- 55 The court focused its discussion on the impact of criminalisation on an accused's life, including loss of employment. *Phumeza v S*, para. 81–83.
- 56 Ibid., para. 85.
- 57 The appellants make this argument strongly and it is reflected in the judgment. Ibid., para. 55.
- 58 Ibid., para. 87.
- 59 Ibid., para. 80. Counsel for the appellants provided a useful example to explain the importance of the distinction of substantively different types of gatherings: '[In] a situation where 10 people decide to protest by lying in the middle of a busy road, the police would be required to address the situation, acting in accordance with provisions of s 9 of the RGA, yet those conveners were not required to give notice under the RGA.'
- 60 Ibid., para. 94.3.
- 61 Ibid., para. 94.1–94.3.
- 62 The portion of the judgment dealing with international law can be found at para. 61–76. The arguments raised by the amici are beyond the ambit of this case note. There were three amici curiae: the Open Society Justice Initiative, the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, and Equal Education.
- 63 SA Karim and C Kruyer, *Rhodes University v Student Representative Council of Rhodes University: The constitutionality of interdicting non-violent disruptive protest*, *South African Crime Quarterly*, 62, 2017, 100.
- 64 *SATAWU v Garvas*, para. 63.



# On the record

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## Talking about Day Zero and beyond: the impact of the water crisis on questions of vulnerability, risk and security

<http://dx.doi.org/10.17159/2413-3108/2018/v0n63a4706>

*Few Capetonians would argue against the claim that the City has been rocked by the current water crisis that many have dubbed the most severe in modern history. Discussions about water saving techniques, membership of the 'Water Warriors' club, dinner party comparisons of family daily usage figures, discussion of toilet habits (to flush or not to flush?) and frenzied buying to secure 25-litre water containers have become part of daily life for those of us faced by the imminent (but previously unconscionable) threat of our taps running dry. Even the 'proudly oily' premier of the Western Cape has boasted that she only showers every three days to help beat back Day Zero. But the water crisis has not only raised important questions about residents' rights to, and responsibility for, the water they use. It has also brought to the surface interesting issues about criminality and crime control, and our individual and collective relationship to water. Stories of violence and incivility at water collection points and in supermarkets have captured attention on social media, and city dwellers have hotly debated the threat of organised crime, laws against rebottling and reselling of municipal water, and the Western Cape government's Water Disaster Plan, which gives the police and army responsibility for maintaining safety and order at water collection points.*

*Of course, while questions of water saving, risk and safety feel quite new to many Capetonians, scholars, activists and policymakers (including criminologists) have been writing about these issues for much longer. The Centre for Law and Society approached two scholars/activists to discuss the water crisis and its impact on questions of vulnerability, risk and security. Nick Simpson, an environmental and human development consultant (and post-doctoral scholar at the University of Cape Town), discussed questions of criminology in the age of the Anthropocene, and Vivienne Mentor-Lalu, a researcher/facilitator for the Women and Democracy Initiative at the Dullah Omar Institute at the University of the Western Cape, spoke to us about the gendered impact of the drought. Nolundi Luwaya, Kelley Moul, Diane Jefthas and Vitima Jere contributed to this piece.*

### **Nick Simpson interview**

**Centre for Law and Society (CLS):** You have been working, with Professor Clifford Shearing (a senior scholar with the Centre of Criminology at the University of Cape Town), on so-called 'green criminology', and in particular on questions of (in)security in the age of the

Anthropocene – an era where humans are impacted by the changes that our civilisation has wrought on the environment. Could you talk a bit about how this area of criminology, and the water crisis, illustrate these questions?

**Nick Simpson (NS):** The argument is that we are now in the Anthropocene [which means

that] we are living in an environment that is unpredictable, unknown and sometimes capricious. Our past modelling systems aren't appropriate [to deal with it]. Therefore, we need to be more aware of how to deal with new shocks and new risks *without* pulling out the guns, [in other words] with a level head. Clifford Shearing and I are currently working on an article [on the water crisis], and you can see how in May last year Patricia de Lille, Cape Town City's mayor, changed the whole framing of the drought. She started talking about it as 'the new normal', which is essentially in terms of the Anthropocene. You can't necessarily use terminology like that in media releases, but the descriptors of it are all Anthropocene. From October last year the Western Cape provincial government also picked up on [this framing] and it's starting to be the discussion from government. But if you talk to one of the engineers in water and sanitation, they are still in denial, thinking that 'it will still rain' ... that this drought is an anomaly and we'll get back to normal.

But just this week Europe is getting a huge wake-up call itself. They are in freezing temperatures, and it's very likely that this is because the polar vortex [which concentrates freezing air over the North Pole, insulating it from warmer temperatures to the south] is splitting, which has caused the North Pole to be 30 degrees warmer this month than it normally is. So I think that the new earth – and what the harms coming from the new earth are going to be – is a really big question. We're not ready to govern it, nor secure it.

**CLS:** Could you give us a sense of what some of the long- and short-term safety and security risks of the water crisis are? We seem to be seeing a lot of the language of crisis, talking about the crisis as a short-term stage of state of emergency that will pass. Like 'defeat Day Zero' – that there is this one thing that we've

got to get through. It is very much the language of the temporary, and it implies that you don't have to change everything about how you engage with resources.

**NS:** Much of the messaging speaks to the short term – to what we need to do right now, and also through to 2019, when we're hoping for some rain. And we have seen how the issue has been conceptualised in terms of types of safety and security risks, in this case a 'real' security issue [that requires a police or military response]. But if you think of the governance of harm more broadly conceptualised, which is how Clifford [Shearing] and I have been thinking, then you see that there are other obvious risks that are right in front of us. I think, for example, that the number one risk right now might be fire. If there is a fire, how do we deal with it? Do we just spray all of our precious water on the mountain? They can't use salt water for fire systems.

These things aren't hierarchical, but in my mind the next most important thing would be if home water-saving strategies – your household coping arrangements – don't adequately deal with sanitation issues. There is then a real risk of the outbreak of cholera or any number of communicable diseases. Following on from that, food security and food access across the city is already strained in a number of areas, particularly as it relates to nutrition, and if you are taking water away, it changes diets, and it changes fresh produce availability. These are much more long-term risks.

When I was flipping through the World Wide Fund for Nature's water file, they had quite an interesting piece on giving advice to people who might get laid off, addressing questions like 'what does unemployment mean for me now if my employer says we can't afford to keep you'? And they have included some advice for an employer – how do employers facilitate this arrangement [in response to the water crisis] in as appropriate a way as possible? I hadn't heard

that discussion much yet. I think a lot of people were thinking that it's going to hit the GDP, but when you tether it down to people's livelihoods and think about the fact that folks are going to very likely be laid off ... Another example would be the seasonal farm workers who should be working on the farms. This next year, there may be no work for them. To have that number of people without water and sitting on their hands without income is a potential powder keg, you could say, for crime.

**CLS:** And hasn't a lot of the information that has circulated from the city's water crisis plan been focused on securing or policing the provision of water when Day Zero arrives?

**NS:** Joellen Pretorius, a professor in political studies at the University of the Western Cape, recently wrote an op-ed in *The Conversation* saying that to treat water security as a safety and security issue is problematic and dangerous because there are ways of responding within a security frame that might not necessarily be appropriate to the humanitarian type responses that are needed. She pointed to the experience of Hurricane Katrina, in the United States. You send in the army, but it's not necessarily going to do what you need in that situation. In our context, it could possibly lead to a heightened militarisation in vulnerable areas that are already stressed. You don't know whether it is going to make the problem worse or help solve it.

**CLS:** And of course, that raises important questions about how communities will respond, given the already-strained relationships with the police.

**NS:** This speaks quite a bit to Clifford Shearing's work in Australia at the moment, where he is trying to develop the notion of 'resilience policing'. Resilience policing is where the community is working together with security or police or other public safety officials to proactively plan and analyse what risks and threats that community is facing and to work

together with the police [in solving them]. I think this is really a good idea, because it protects against some of the real rhetoric that we have seen already with [Helen] Zille's anarchy-kind of statements that drive elite panic in the city. There has been quite a lot of positive discussion out there on community drives and a discourse of good neighbourliness. People are encouraging each other to form street communities and pull together [for water sourcing and management], to have communication channels already set up in case of an emergency, reminding people not to leave it till the last minute when they have already run out [of water]. Encouraging citizens to make connections so that they can ask their neighbour [for help] if they need to. I think that this is an interesting and cool development, as it speaks to a duty of care in communities, and raises interesting ideas about strategies for resilience. It also raises interesting questions about how this impacts policing, because if we are looking out for each other in communities, this may change the police's role in responding to the crisis.

**CLS:** You raise an interesting point about a more holistic conceptualisation of communities' risks and vulnerabilities, historical and current, and how these factor into plans around the water crisis. Could you say a little more?

**NS:** There is some work being done at the moment to think about where to place water delivery pods, and whether you should map it specifically on [existing] infrastructure, and if so, how that maps against the vulnerabilities within the social geography of Cape Town. The World Health Organization says that if you are setting up a point of distribution it should be 1.6 km or less from the next available point. Because you can't expect someone to walk more than that distance for their water for the day. And 1.6 km is still a long way to go, particularly if you are a youngster, or an older person, or someone with a disability. So [these kinds of groups] are very

much at risk if we end up having to go the way of water collection points.

If we get to Day Zero and we are using water distribution points in the way that they are currently designed, they do not map geographically on to gang areas well. Which is why the Disaster Risk Management Group and Safety and Security have chosen to go with pods that are stationary pods, which you can secure in a sort of 'militarised' way more easily than if you are transporting water. The planners are concerned about gangs coming in and hijacking water tankers coming through. A situation like that would be disastrous, [and it] has happened in São Paulo, in their water stressed scenario. So, I don't think you can quantify what the heightened tension and stress across the city is, but it is definitely there, underlying things. Who knows, we might find, looking back, that road rage went up.

**CLS:** Can you talk a little bit more about the impact of the safety and security messaging around the water delivery plan?

**NS:** The city's response at the moment seems to be along the lines of 'the whole city is vulnerable right now [...] any place could flare up in any moment'. Which is a bit of an excessive, scaremongering response. The people who are supposed to be managing the situation right now are a little bit freaked out as to the scale of potential anarchy. And of course, how much that's perceived or real is debatable, but perception can become reality when it comes to safety and security issues. In our observations of the last three months, for example, if you are doing an analysis of twitter influencers on #dayzero or #watercrisis, there are emphases and shifts that ebb and flow, which do affect the way people respond ... do they freak out, or come up with technical solutions, practical solutions? Messaging actually affects the way people act. That being said, though, there is quite a bit of research

out there that shows that mass hysteria and lawlessness during disasters is surprisingly rarer than you would expect. Instead, it shows that people do work together, do get over themselves for the sake of the crisis. And so the degree of fearmongering might actually work that way round – that it is not necessarily going to cause people greater harm, but might bring people together. It just depends on how it is managed, communicated and perceived. So, obviously, we need to be careful about the framing of a security response to water scarcity because there's a good and a bad way of doing that. And if it goes wrong it could go very wrong.

**CLS:** Picking up on that point, what do you think is missing in the public response to the water crisis?

**NS:** One thing I have picked up on only in the last two weeks is 'fake news' and how that can lead to its own harms, which need to be secured, and which we are very unprepared for. People don't know what a reliable source of information for the drought is or how they should respond to the drought. If you're just flipping through Facebook for advice on that, which many people are doing, you could land on something that is really good or land on something that is useless and takes your trust away from people that are trying to help you. So I think fake news is relevant.

I also attended the *Hack the Cape Water Crisis* event that was held [in late February] hoping to find some answers. But I was actually quite disappointed. It turned into more of a community hate-the-city [government] forum than the positive behavioural change and technological solutions that it had been promoted to be. There have been hundreds and hundreds of very innovative things that people are proposing, which is fantastic. But to my knowledge, at the moment, [these innovations] are not being systematically captured, promoted or communicated in a way that actually markets

them for scale. It's more like ... cool, this person has got this little solution and that's great for him, but what about the rest of us?

As a researcher, I think one interesting thing that came out of the hack-a-thon is that one of the engineers there said that he has been doing a bit of analysis of the sales of rain tanks, not as a measure of resilience, but as a measure of how scared the more wealthy Capetonians are of the drought, because they are the only guys who can really afford these tanks. Which is an interesting take on 'how do we respond and protect', because there are folks spending R140 000 putting in a borehole for themselves, when, if they spent that amount of money on rain harvesting for all the houses on the street, they would probably collectively yield more and it would be shared well across that community. So if you want to cut across it, you can look at the private solutions that people are engaging in based on their own ability, compared to improving the public provision of water security and water goods.

There's real flux at the moment – there's a lack of trust in the public provision of the public good of water and there's a huge bun fight already happening between the local government, provincial government and national government over whether they should or can release the funds for [the water crisis]. So people are doing their own thing. But when you're talking about rainwater harvesting solutions, they are not cheap. And so again it's those that can't afford it who wouldn't have access to those types of technological solutions.

**CLS:** And of course, there have been questions raised about who benefits from the crisis. Even just looking at the price of water, there's been a lot of discussion about how in the space of that panic we went from R12 a bottle of water to R25 a bottle of water.

**NS:** The City has just set up a by-law on [selling water] because they realised, a little bit late,

that [people] are going to be like piranhas.

The by-law introduces restrictions that prevent people from going to a spring, for example, and putting [the water] in a tank and selling it. The City received 43 000 comments on this by-law in a week, most of which are not commenting on the by-law, but are using that mechanism as a way to vent [their frustrations around the water crisis]. But the City is quickly recognising that this [crisis] is going to harm a lot of folk who are possibly already spending 60% of their salary on transport to work.

**CLS:** This leads nicely into our last question, which is: how do we collectively – that is, government and communities – respond and plan and address the issues that are related to the crisis?

**NS:** I think most important is that the City of Cape Town desperately needs national government to release sufficient funds to push through the water augmentation strategies. If government, like it has been doing, relies on their green bonds to finance a couple of hundred million rand here, and if they stick within their normal funding cycles, and only do a project that operates within a three or five year cycle, the response is so short term. Their plan to build temporary desalination plants, and then return the sites to how they were after the crisis, is not a long-term solution. And all of [these strategies] are aimed at trying to get out of the environmental impact assessment regulations that would demand a fuller, longer process. If you think of the Japanese education policy shifts in 1920, they set an 80-year plan ahead of them. And that's how we have got to start thinking about water in Africa ... if we are just thinking that we're going to deal with this [problem] this year, and then we can just dismantle that infrastructure because we can't afford it ... we are mistaken. And I understand that national government's water budget is broke. There are billions of rands missing there.

And I don't know, perhaps they're hoping Cape Town can just pull itself up by its own bootstraps. But there's nowhere in the world where a local government has the financing capacity – maybe London does – to deal with what's required here. So, putting pressure on national government would be very useful.

### **Vivien Mentor-Lalu interview**

**CLS:** Vivienne, could you highlight some of the specific and particular challenges and burdens that you think the drought and the water crisis places on women? The kinds of impacts that are invisible.

**Vivien Mentor-Lalu (VML):** I remember when we were having the rolling power failures a few years ago and we had outages all the time, I saw this newspaper article from Gauteng recommending that the use of washing machines and ironing and all of those household tasks happen at midnight or the early hours of the morning. And I thought, 'Oh my God! What does that mean for women?' What does that mean for women who do that work? There is no regard for the impact on women. So it's all very 'practical'. Governance, crisis management and planning are very male, masculine and patriarchal, and sometimes even machismo kind of spaces. When they plan and when they make these recommendations, there is no regard for women's lived realities. And so these plans are made so blithely. That's the thing that has struck me, even about the water restrictions, and the adjustments that households have already had to make to save water. Water usage largely goes around cooking and cleaning, and the people who carry the burden for that already in the household are women.

When the crisis was still at its worst and we were expecting Day Zero to happen imminently, it struck me that public schools can't afford the kind of water-saving technologies and strategies that private schools can afford, like boreholes and whatever else rich parents can supply.

Which means that it is going to be *mothers* that are going to be struggling to figure out how to keep their kids going to school if there is no water at schools. And so a picture forms about how things connect – education, and the under-resourcing of public education – and where that burden falls and how women especially are affected by these multiple layers of problems.

**CLS:** And this raises additional safety and security risks – if you're a man going to stand in the queue to fetch your 25 litres of water versus if you are a woman who has additional security concerns.

**VML:** 'Intersectionality' is that word that has become like the word 'empowerment' ... it almost doesn't have a meaning anymore because it's used so much. But I think that a crisis like this unpacks vulnerabilities ... makes them real and visible. People living in urban-poor spaces are already struggling for access to basic services. Water collection points are not a new thing for poor people ... having to walk to taps, or having to have buckets in the house. Figuring out how things are going to be kept clean, how to do the cooking and laundry and all of the work of a household without water on tap. This is not a new thing. I think what is new is that the middle classes are beginning to feel those burdens.

**CLS:** So, Vivienne, do you have any thoughts on how one foregrounds this kind of gendered analysis? How do you make these kinds of conversations – thinking about these kinds of issues in these particularly gendered and intersectional ways – how do we make that the mainstream?

**VML:** Even this word, 'mainstreaming', is another one of those words that I struggle to make sense of, and rather try not to use it. It's being co-opted so much by government that it's lost all meaning. But I have recently been in spaces where women have come together to specifically talk about this issue, and talk

about it from an unashamedly feminist position. And these women brought in other layers of experience – the issue of rural poor women, the issue of land, dispossession and water rights. Encouraging us to look at these issues historically – not just looking at the drought that’s been coming on for the last couple of years, but looking at the history of colonialism and being in a post-apartheid society. Asking what it means in terms of the land issue and how that links to access to water and who has rights and ownership of water. These discussions really deepened and broadened the debate to levels that I hadn’t even thought about. I have found those spaces quite useful. But, as always, it’s very difficult to think about questions about ‘what do we do’ and ‘what is needed’? And the thinking there was that we needed two things: first, we need to push a women’s agenda in the crisis committees and water committees that are emerging. Second, women do need a women’s space, a specific space where women are coming together to talk and strategise.

**CLS:** I suppose this raises tough questions. Technically, you almost want sort of a combination between government taking the lead in a way that foregrounds these issues, but you also obviously want the bottom-up approach, where communities and the women themselves are foregrounding their lived experiences. And so it really is a bit unfair to expect this thinking to come from just the one side – from communities.

**VML:** You’re pointing to a bigger problem around the lack of political will ... another one of those words! But I am referring to the lack of political will around women and the issues that women face in the country generally. A lot of us working in this sector feel that we need to go back again to look at budgeting – trying to see where we can apply pressure to move the state to respond more decisively around issues

that affect women. Gender-based violence is an obvious example here. I think that the issue of water, and how women are affected by water, is situated in that broader debate around a lack of real political will to tackle and to shift the structural issues that face women in South Africa. The state is happy to talk about women as victims, and ‘rescuing’ women. They are happy to engage in 16 Days of Activism, and say ‘we must protect our women’. They are quite happy with that language. But when it comes to talking about structural issues that women face, and addressing women claiming power? You don’t find spaces in government where you can have those conversations.

**CLS:** Are there any sort of specific, gender-sensitive responses, or at least, responses that are sensitive to the gendered impact of the crisis with water coming from citizens or government? Perhaps women having a presence on committees, but is there anything else even in people’s neighbourhoods that they could do that responds to the crisis in a way that is cognisant of its gendered dynamics?

**VML:** How does one deal with addressing the practical ‘here-and-now’ issues while at the same time trying to fight to dismantle this patriarchal system or society? On the one hand, people have been speaking about being mindful that women can’t carry these heavy water drums, or how do you get water if you’re a single mom, for example. There is obviously a range of those kinds of practical questions. And there may well be practical solutions, but like I said, that obviously does not dismantle that this burden falls on women. It just gives you a little bit of a crutch. Someone is going to design a water drum on wheels so women can then push these things and they don’t have to lift the drums up and carry them. But it’s still women’s responsibility to have to figure out how to get the water. That innovation doesn’t shift the gendered responsibility. I think we need a

balance – yes, obviously you want to deal with the practical issues, the real concerns around safety and how women access the water. But we should not lose sight of the fact that we are also fighting and trying to create a different reality that recognises women’s contributions but also tries to shift that burden of unpaid labour that women carry.

**CLS:** I suppose that is a really tough challenge – the tension between the present and having your eye constantly cast on the future. Reflecting on the ease with which we say: the best we can do right now is make it easier...

**VML:** It is important – you can’t discount that you need to make people’s lives easier and you have to respond to women’s practical needs. These are the same tensions we face around women and violence. Women should be able to walk around at night, but we don’t because we want to be safe. And so it becomes an issue around how women constantly have to negotiate that space.

As activists we need to think about what we are doing next around the water crisis. The immediate crisis may be gone, but even if the Day Zero crisis has been pushed back and averted, that fact hasn’t changed the kind of difficulties and struggles that women face. The cost of water has now gone up significantly, and we know that these water usage devices that the City is putting in homes are largely affecting working class homes where you have extended families living in the same house. I think that for the middle classes the crisis has been averted for now and people aren’t so anxious anymore. But the reality is that for poor, working-class, black people the crisis is very much still alive. The commodification of water and the increase of the cost of water is sort of sneaking in as a result of the water crisis and I think it’s going to have a real impact on people’s quality of life.

## Note

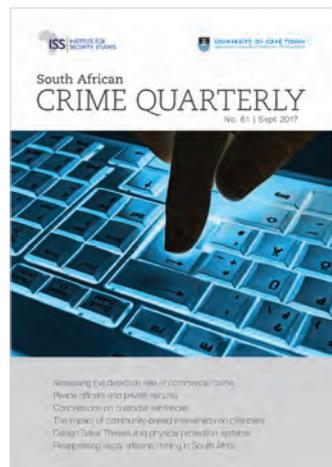
- 1 A Trench, ‘I only shower every third day’, says proudly oily Zille, *Times Live*, 20 September 2017, <https://www.timeslive.co.za/politics/2017-09-20-i-only-shower-every-third-day-says-proudly-oily-zille/> (accessed 2 March 2018).



## Previous issues

Issue 62 focuses on the ways that academics, activists, lawyers and practitioners are engaging with protest. Two articles address the law on protest: through the experience of Right2Protest and the Social Justice Coalition's challenge to the Regulation of Gatherings Act (RGA). Two further articles focus on protest related to the right to basic education, and another uses Promotion of Access to Information Act (PAIA) requests to test resistance by government to enabling the right to protest. Two research articles look at public opinion data: first on public support for protest, and for the police's handling of protests. A case note analyses *Rhodes University v Student Representative Council of Rhodes University*, and Bond reviews Jane Duncan's *The rise of the securocrats and Protest nation*.

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.



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