

# A legal analysis in context

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

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

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

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

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

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

The importance of the right to protest in South Africa mirrors the global perspective that the right deserves state protection. Section 17 gives effect to South Africa's international obligations, including the right to peaceful protest, which is protected under Article 21 of the International Covenant on Civil and Political Rights<sup>5</sup> and Article 11 of the African Charter on Human and Peoples' Rights<sup>6</sup> – both of which have been ratified by South Africa. But this remains unsettled terrain in South Africa and beyond. In 2011 the Human Rights Council appointed a special rapporteur on the rights to freedom of peaceful assembly and of association, in acknowledgment of the importance of the right to protest and the need to monitor its protection globally.<sup>7</sup> Current Special Rapporteur Maina Kiai has recently issued a request for an invitation to conduct a country visit to South Africa. This provides a unique opportunity to re-evaluate the South African legal framework for the protection of protests in terms of the Constitution, and to evaluate whether it falls in line with international trends. To that end, this article focuses on the Act's compliance within the national framework.

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

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

## **Protest in South Africa**

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

This is illustrative of the importance of protest in the make-up of South African society. The role of protest in the anti-apartheid struggle was indisputable as a mechanism for applying pressure on the state. The anti-apartheid strategy involved the use of mass protest to challenge the apartheid government and the social and legal relations that underpinned its existence. Post-apartheid, since 1990, new social movements have emerged, for example the Concerned Citizens Forum, the Treatment Action Campaign (TAC), and the Landless People's Movement. This can be explained by the fact that many of the social movements that played key roles in opposition to apartheid were absorbed into government structures post-1994.<sup>12</sup> More recently, new movements have formed, such as Reclaim the City, the Social Justice Coalition, and Ndifuna Ukwazi. A number of well-publicised protests are attributable to these new and emerging social movements. A recent example is the

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

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

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

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

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

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

## **Legal authority for protest in South Africa**

### **The constitutional right to protest**

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

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

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

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

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

property) are violated or threatened by violent or riotous action to such an extent that the limitation of the right, by prohibiting that particular action would in any case have been justified in terms of section 36.<sup>33</sup>

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

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

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

### **The role of the Regulation of Gatherings Act**

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

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

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

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

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

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

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

### **The procedure for lawful protest in the Act**

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

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

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

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

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

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

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

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

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

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

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

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

## Challenging the Act

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

## Conclusion

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

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

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

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

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



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## Notes

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

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

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