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South Africa's Doctrinal Decline on the Right to Protest: Notification Requirements and the Shift from Fundamental Right to National Security Threat

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ABSTRACT: In this article, I take the Constitutional Court cases of *Garvis* and *Mlungwana* as departure points to explore whether these judgments have set the South African government on the right path when it comes to freedom of assembly, and particularly the right to protest. Focussing specifically on the notification requirement in the Regulation of Gatherings Act, I look at whether actual municipal practices on the ground are opening or closing spaces for expressive conduct by the poorest and most marginalised in society, and whether the Constitutional Court has gone far enough to ensure a more open democratic system. I present empirical evidence that local governments use the notification process to produce pacified, unthreatening and undisruptive protests that they can simply ignore. As much of a victory as *Mlungwana* was for civil society, it is unlikely to change the existing problems with the way in which the state regulates and polices protests. Municipal over-regulation of protests, coupled with over-policing, suggests a doctrinal shift in how protests are viewed by the government. Instead of recognising protest as a democratic right and legitimate form of expression, increasingly protests have been framed as threats to domestic stability and, consequently, national security. This doctrinal shift has provided the framework for municipal overreach around gatherings, and specifically protests, and over-policing of public order situations. *Mlungwana* has taken an important step towards reforming the problematic notification process; but, unless the judgment is followed by a deeper and more consistent ideological and doctrinal commitment to respecting the right to protest and ensuring a more genuine incorporation of the masses into the political system — including by the Constitutional Court itself — then the changes are likely to be limited.

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I INTRODUCTION

In a significant judgment affirming freedom of assembly generally, and the right to protest more specifically, the South African Constitutional Court in *Mlungwana*[1] found that a convener's mere failure to give notice of an intention to hold a gathering should not be criminalised. Section 12(1)(a) of the Regulation of Gatherings Act[2] (referred to hereafter as 'the RGA') — which gives effect to the constitutional right to freedom of assembly — requires the conveners of a gathering to notify municipalities of their intention to stage a gathering; before the Court judgment, failure to do so was a criminal offence for the convener.[3]

The applicants in this case, the civil society movement, the Social Justice Coalition (SJC), challenged the constitutionality of this section of the RGA on the basis that it deterred the exercise of the right to assembly. The Court found that criminalisation was an unjustifiable limitation on freedom of assembly, and less restrictive means could be used to incentivise notification, which it recognised served important public purposes. In making this finding, the Court confirmed the finding of the Cape High Court, and rejected the respondent's arguments (the state and the Minister of Police), that the failure to give notice would undermine the police's ability to undertake effective monitoring of assemblies to prevent violence.[4] The Court reasoned that while the notice requirement was a limitation on the right, the state had failed to establish the link between the administrative measure (giving notice) and the reduction of violent protests. It argued that the provision could lead to conveners of innocuous assemblies that posed no public safety risks, being criminalised, which could have calamitous effects on their lives and deter assemblies in future, and potentially catch child conveners in its wide net.[5] However, in striking down the constitutionality of the section in the Act, the Court did not suggest alternative remedies, rather leaving it to the legislature to decide. The Court did note, though, that while administrative fines may be a less restrictive option, this option may prove to be unconstitutional, too, depending on the finer details of the administrative fining system.[6] This ruling is particularly significant for the right to protest, as protests are more susceptible to government repression than ordinary gatherings. This is because protests are a particular species of gathering that are intended to voice dissent, often (but not exclusively) at government policies and/ or conduct; hence they are more likely to elicit defensive responses from government entities when they are criticised. As direct expressions of dissent, protests can bring matters to the attention of the authorities that they may not want to hear. Protests are popular and unmediated expressive acts, offering forms of communication to poor and marginalised people who may not otherwise have access to more conventional channels such as the media: a reality that the Court affirmed in its judgment.[7] Hence, in a highly unequal country such as South Africa, where inequality truncates the public sphere and makes it susceptible to elite capture, protecting the right to protest is closely related to protecting the right to freedom of expression. Consequently, in dealing with assembly law, the Constitutional

1 *Mlungwana & Others v S & Another* [2018] ZACC 45; 2019 (1) SACR (429) CC ('*Mlungwana*').
2 Regulation of Gatherings Act (RGA) 205 of 1993.
3 RGA s 21(1)(a)
4 Ibid at para 74.
5 Ibid at paras 82–89.
6 Ibid at para 106
7 Ibid at para 69.

Court has, in fact, focused on the constitutional dilemmas around the regulation of protests and as a result, this article will focus mainly on protests, too.

The facts that gave rise to the *Mlungwana* case underline the expressive importance of protests for poor communities. The SJC seeks to advance constitutional rights, particularly those of informal settlement dwellers.[8] South Africa has a massive formal housing shortage, and the SJC aims to give informal settlement dwellers an organised voice in how government determines and implements development priorities, given the often transitory and peripheral nature of these communities. One method they use to attain an organised voice is to protest. Thus, in 2013, the SJC members and supporters engaged in an act of civil disobedience by chaining themselves to the railings outside the offices of the-then Mayor of the City of Cape Town, Patricia de Lille. Ten people were arrested and later found criminally liable for failing to notify the municipality of the protest. The SJC claimed in heads of argument to have attempted to engage the Mayor for over two years on services for informal settlements, but to no avail. Protests may not be the means of expressing grievances of first resort, with protesters often exhausting more conventional communication channels before taking to the streets, and as is evident from *Mlungwana*, the SJC attempted to do just that, resorting to the protest after they were ignored repeatedly.[9]

There can be little doubt that *Mlungwana* advanced freedom of assembly in South Africa, and the judgment contrasts sharply with an assembly judgment the Court made eight years earlier. The *Garvis*[10] case involved the constitutionality of s 11(2) of the RGA that dealt with liability for damages in the event of gatherings and demonstrations turning violent. Protests are more likely to turn violent than gatherings, as they generally mobilise people around contentious issues, and this case revolved around a trade union protest in the context of a strike that had, in fact, turned violent. *Garvis* affirmed the constitutionality of the civil liability provisions in the Act, finding that organisers of gatherings would be liable for damages caused during gatherings, while providing a very onerous defence including requirements that organisers show they took all reasonable steps to avoid the damage and they did not reasonably foresee the damage.[11] In the majority judgment, the Court found that holding organisers responsible for riot damage without having to prove their negligence, coupled with very tightly drafted defences — which amounted to a form of strict liability[12] — imposes a limitation on the right to freedom of assembly. While this limitation increased the costs of holding assemblies significantly, it was justifiable as it provided victims of riot damage with meaningful redress. The Court argued that the fact that the organisation could transfer the costs of the riot damage onto the responsible individuals, dampened the severity of the limitation somewhat.[13]

Despite claiming to recognise the importance of protests as an expressive vehicle of the poor, *Garvis* is out of touch with the real world of large-scale gatherings, which are by their very nature unpredictable, and characterised by power imbalances between protesters on the one hand, and police and government officials on the other. The judgment betrays a poor

[8] Social Justice Coalition 'About Us' (undated), available at https://sjc.org.za/about

[9] J Brown *South Africa's Insurgent Citizens: On Dissent and the Possibility of Politics* (2015) 88, 114–115.

[10] *South African Transport and Allied Workers Union & Another v Jacqueline Garvis & Others* [2012] ZACC 13, 2013 (1) SA 83 (CC) ('*Garvis*').

[11] Ibid at para 84.

[12] Ibid at para 70.

[13] Ibid at para 72.

historical understanding of the circumstances in which protests descend into violent riots.[14] According to Donatella della Porta, escalating policing is a well-recognised trigger of violent riots, often as spontaneous expressions of outrage.[15]. Organisers can reasonably foresee that riot damage may result if the police become violent; yet short of staying at home, there is little that they can do by way of reasonable steps to prevent it. Another well-recognised trigger is when authorities that are the target of the protest fail to respond, or fail to accept the memorandum: again, that is a trigger that can be reasonably foreseen, but again the only reasonable step to prevent anger brimming over into riot damage would be to cancel the protest. Officials have been known to refuse to accept memoranda to collapse protests.[16] Even more concerning is the Court's endorsement of riot damage becoming the responsibility of the organisers, and not the individuals responsible for the riot damage. This requirement transfers the onus for tracking down the perpetrators of the riot damage to the organisers, and not the state. This would require organisers to have access to superior investigatory powers, which are more appropriately within the realm of the state. Furthermore, the definition of riot damage is extremely broad, including damage that occurred even before or after the actual protest.[17] As the Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies, have argued:

> While organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights.[18]

It is difficult to discern the doctrinal principles underlying *Garvis* and *Mlungwana*, but what is clear is that both cases provided very different visions about protests and their purpose in democratic societies. Elements of judicial conservatism, even moral panic about protests, are evident in *Garvis*, whereas *Mlungwana* is much more alive to the need to protect assemblies as one of the few expressive vehicles available to poor and marginalised people. This is not to say that *Mlungwana* represented a complete break with *Garvis,* though. A flash of conservatism is evident in the Court's conclusion, which states that '[i]n balancing the above factors, it becomes clear that section 12(1)(a) is not "appropriately tailored" to facilitate peaceful protests and prevent disruptive assemblies.'[19] This statement conflates disruptive and violent protests, in spite of the fact that protests by their very nature are meant to be disruptive, and in any event, the RGA protects disruptive protests, drawing the line at serious disruption.[20]

[14] Consider, for instance, some of the real-life and hypothetical examples provided by Anna Weekes in 'Penalising Protest Action' *South African Civil Society Information Service* (19 June 2012), available at https://sacsis.org.za/site/article/1338. Also S Woolman '"You Break it, You Own it": Freedom of Assembly Jurisprudence after *Garvis*' (2015) 9 *International Journal of Constitutional Law* 548.

[15] D della Porta *Clandestine Political Violence* (2013) 32–69.

[16] J Duncan *Protest Nation: The Right to Protest in South Africa* (2016) 51.

[17] RGA s 11(3)

[18] M Kiai & C Heyns, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies, United Nations General Assembly* (4 February 2016), available at https://digitallibrary.un.org/record/831673?ln=en 6.

[19] *Mlungwana* (note 1 above) at para 101.

[20] RGA s 5(1).

The judgment also refers to the rising number of violent protests, failing to acknowledge the government and media tendency to overstate violence in protests, and the fact that protests remain overwhelmingly peaceful and orderly (although violent community protests have been on the increase).[21]

The conservatism in *Garvis* aligns uncomfortably with the Justice, Crime Prevention and Security (JCPS) Cluster's concerns about protests. The cluster has expressed concern about the growing number of violent protests, to the point of declaring them priority crimes. In doing so, it took the lead from the Medium Term Strategic Framework (MTEF) of 2014–2019, which included ensuring domestic stability as an objective. This objective included the sub-objective of 'contributing to domestic stability through the successful prosecution of criminal and violent conduct in public protests'.[22] The National Prosecuting Authority (NPA) had also identified violent protests as one of the crimes for prioritised prosecution.[23] These shifts in the cluster's thinking pointed towards the government and state framing violent protests increasingly as national security threats. Clearly, there are sharp differences between the government and civil society about the exercise of this right, and the mixed signals from the Constitutional Court are not helping to clarify matters either.

The *Garvis* and *Mlungwana* cases raise the following questions. With specific reference to protests, in which direction is the doctrine around the right to assembly, and consequently the practice of regulating protests, going: the more conservative and truncated direction of *Garvis* or the more progressive and expansive direction of *Mlungwana*? The main focus of *Mlungwana* is on notification requirements for conveners. By using notification as a lens through which to view doctrine on protests, are actual municipal practices on the ground opening or closing spaces for expressive conduct by the poorest and most marginalised in society? Has the Constitutional Court set the government and state on the most appropriate path? Can and should it do more? This article addresses these questions.

II A NOTE ON METHODOLOGY

In order to assess municipal enablers or barriers to exercising the right to protest using the notification procedures, the author analysed documents sourced from various municipalities around the country. Two sets of documents were used for this analysis. The first dataset was collected from twelve municipalities around the country by a team of researchers under the author's direction. During research visits, which were conducted between 2012 and 2013, the researchers obtained direct access to municipal records, which allowed them to record all gatherings over a five-year period. They recorded the names of the conveners, the dates and purposes of the gatherings and responses of the municipalities. They also collected notification forms and checklists for conveners, interviewed responsible officers and conducted focus groups with protest conveners. The research visits were labour and cost-intensive, but all municipalities approached co-operated. Only one municipality, Cape Town, insisted that the researchers

[21] P Alexander, C Runciman, T Ngwane, B Moloto, K Mokgele & N van Staden 'Frequency and Turmoil: South Africa's Community Protests 2005–2017' (2018) 63 *South African Crime Quarterly* 27, available at https://journals.assaf.org.za/sacq/article/view/3057

[22] South African Police Service *Annual Report 2016/17* (2017) 14, available at https://nationalgovernment.co.za/department_annual/201/2017-south-african-police-service-(saps)-annual-report.pdf

[23] Personal correspondence with Bulelwa Makeke, Head of Communication, National Prosecuting Authority, 8 February 2019 (on file with author).

put in a request for the information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA); and the format in which they provided the records was not informative enough to be of much use. Another municipality, Phumelela, kept such poor records that they proved to be unusable. On the whole, though, the information the researchers were able to glean provided a sufficiently comprehensive picture of the regulation of gatherings at municipal level.[24]

The second dataset was sourced from the South African History Archives (SAHA), which assisted the public interest law clinic, the Legal Resources Centre (LRC), to lodge PAIA requests to all municipalities in the country where an information officer's contact details could be found. SAHA requested copies of notice of gathering templates in terms of s 3 of the Act; the contact details of all responsible officers; the number of gatherings in the municipal area since 2015; the number of convenors' meetings; the number of prohibited gatherings and the reasons for the prohibitions; and any training manuals used by these municipalities.[25] SAHA's PAIA requests were largely met with mute refusals. According to the LRC, when responses were received, they were largely inadequate and triggered the need for extensive engagement with these municipalities. Of the 202 requests that were submitted, there were 26 transfers to other government bodies, five outright refusals, 214 deemed refusals, 43 requests granted in part, and a mere three requests granted in full. Of the 12 appeals that were lodged by SAHA, nine were met with mute refusals.[26] These statistics painted a bleak picture of municipal non-compliance with — and even contempt for — PAIA. Nevertheless, when municipalities did accede to the requests, they provided information that was useful, revealing and often depressing.

When viewed together, these two datasets provided satisfactory detail about actual Gatherings Act practices on the ground over the past decade. They revealed that many municipalities used similar templates for their notice requirements — suggesting that these templates had been provided by a central source — and while there were some variations in the regulatory practices of their responsible officers, there were also many similarities and shared problems. These datasets were complemented by information and opinions the author sourced from conveners and legal practitioners who specialise in the right to protest, and in this regard, there are two overlapping networks. The first is the Right2Protest working group facilitated by the Right2Know Campaign, which provides a forum for convenors, right to protest advocates and legal practitioners to discuss and strategise around freedom of assembly issues. The second network is the Right2Protest Project, set up by a coalition of civil society organisations that aim to advance the right to protest and freedom of assembly more generally. This project provides legal assistance and support to all protesters, and also produces reports on the state of the right to protest in South Africa.[27]

IV NOTIFICATION VERSUS PERMISSION-SEEKING

There can be little, if any, doubt that notification of an intention to stage a gathering serves useful public purposes, as acknowledged by *Mlungwana*. Notification makes it easier for the relevant authorities to facilitate gatherings. It allows them to regulate the time, manner and place of gatherings in ways that satisfy the expressive and associational needs of participants and the safety and mobility needs of the broader public. In fact, notification is meant to

[24] Duncan (note 16 above) at 13–20.

[25] Personal correspondence with Sherilyn Naidoo, Legal Resources Centre (30 July 2019, on file with author).

[26] Ibid.

[27] Right2Protest Project 'Who We Are' (undated), available at https://www.r2p.org.za/who-we-are/

be a content-neutral process that should not be abused by the government to frustrate or deny gatherings because of their purposes. As gatherings normally obstruct traffic, there are sound reasons for forewarning municipalities to ensure that participants are given rights of way on public streets, while continuing to ensure traffic flow. Furthermore, there may also be competing gatherings at the same time and place, and in such situations, municipalities need to mediate these competing claims. The safety of participants may also need to be ensured through police escort, which would need to be organised in advance. Notification also allows the authorities to weed out those gatherings that are more likely to pose public safety risks, and to enter into negotiations with the conveners to mitigate those risks: to that extent, notification provides a before-the-fact means of preventing violent riots that require after-the-fact interventions to claim damages that was the issue in *Garvis*.

It would be difficult for a fair-minded person to argue against these abstract justifications for notification; but in the real world, notification is not ideologically neutral. Fears of dissent by the elite have also driven their obsessive need to regulate public spaces.[28] So, it is small wonder that an administrative procedure that should not be burdensome to conveners can be (and has been) used to control gatherings, render them undisruptive and unthreatening, or even prevent them from taking place at all. In an era of growing social polarisation and resistance to austerity, governments around the world are suffering from what the International Centre for Not-for-Profit Law has termed agoraphobia, or fear of assemblies in public places, and this — they claim — is what really underpins their attempts to regulate protests overzealously.[29]

In an extended analysis of the US system — where permits have been required for moving parades or processions, and where their constitutional validity has been upheld since 1941,[30] Edwin Baker argues that not only are permits an unjustifiable limitation on assembly and expression rights, but the objectives the authorities seek to achieve could be achieved through less restrictive voluntary notifications. Permits have been justified by the authorities on the basis that they need to provide adequate policing, ensure the safety of assemblies and regulate traffic flow. Baker argues that, in theory, while permits are meant to regulate the time, manner and place of assemblies in a non-discriminatory fashion, in real-world situations, permits serve to suppress unpopular groups, assuage elite fears about mob rule and routinise public life in censorious ways. In fact, Baker states bluntly, 'historically, the primary function of mandatory permit requirements was probably their overtly unconstitutional use to harass, control, or suppress expressive activities of unpopular groups'.[31]

Baker points out that permits are based on a doctrinal shift in government thinking in favour of public order and against mass public displays of support or opposition to the issues of the day. That public streets should be dedicated to traffic, rather than being used for multiple purposes, including discussing, or demonstrating about, public questions, pointed to warped government priorities that prioritised transportation functions over expressive functions. He also argues that permit requirements also transfer power from paraders, and particularly dissidents, to government officials. In view of the costs of expressive conduct of the permit system, Baker advocates for a voluntary system as a less restrictive means to achieve the same

[28] J Zenn *Freedom of Assembly Procedures of Permission and Notification* (undated), available at http://www.icnl.org/research/resources/assembly/Permission-Notification%20article.pdf

[29] Ibid.

[30] *Cox v New Hampshire* 312 US 569 (1941).

[31] E Baker *Human Liberty and Freedom of Speech* (1989) 147.

ends. In a voluntary system, protesters notify the authorities of their intention to assemble in order to obtain the benefits of a forewarned police service, prioritised rights to public spaces and reduced antagonism from the public. A voluntary system would have the added benefit of acting as an incentive to make the permit system convenient, non-intimidating and open (a mandatory system, on the other hand, reduces the pressure on the government to reform its system). Any groups who are intent on causing havoc, would most likely not notify the state in any event.[32]

It is not necessary under international law for domestic legislation to require advance notice for gatherings, and in any event, in the case of some gatherings, notification serves no legitimate public purpose.[33] To this extent, *Mlungwana's* endorsement of the practice is not entirely in step with international thinking, as it takes the need for notification for granted, without examining its own premises. Countries like Ireland and some states in Australia do not even require notification: instead the provision of such notification is voluntary. However, giving notice grants participants legal protection they may not otherwise enjoy; for instance, notification makes it less likely that the participants will be charged with offences relating to the obstruction of public roads.[34]

However, if governments do require prior notification for large public assemblies, then it would be difficult to argue against this requirement. The United Nations Human Rights Committee (UNHRC) has also held that prior notification is a permissible restriction on freedom of assembly in terms of the International Covenant on Civil and Political Rights (ICCPR).[35] At the same time, they also recognise the potential for abuse, especially when official procedures turn notification into a de-facto permission-seeking process.[36]

Concerned about the growing abuses of notification for censorious purposes, various international human rights bodies have, in recent years, developed standards for notification. For instance, the UN Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions recognised the legitimacy of state authorities putting in place systems for notification, providing they do not mutate into systems of prior authorisation. However, they also warned that notification is not necessary for assemblies that do not require prior preparations by the state, such as those involving a small number of participants or where the impact on the public is likely to be minimal.[37] Notification should not be overly bureaucratic and function as a de-facto form of authorisation or as a basis for content regulation.[38] The absence of a response should be deemed as official acceptance that the gathering will proceed according to the notice. The authorities are also required to facilitate simultaneous gatherings, including counter-demonstrations.[39]

The UN Human Rights Committee has also held that contracts with municipalities as well as fines for failure to give notice are undue restrictions. In spite of the fact that these

[32] Ibid at 138–160.

[33] OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines on Freedom of Peaceful Assembly* (2nd Ed, 2010) 18.

[34] N O'Neill, S Rice & R Douglas *Retreat from Injustice: Human Rights Law in Australia* (2nd Ed, 2004) 297.

[35] UN Human Rights Committee, *Kivenmaa v Finland* (1994).

[36] UN Human Rights Committee, Morocco [1999] UN doc. CCPR/79/Add. 113, para.24.

[37] Kiai & Heyns (note 18 above) at 6

[38] Ibid at 6.

[39] Ibid at 7.

sanctions are less serious than criminalisation, they may still inhibit the freedom of assembly. The Committee has argued that a notification requirement should be limited to a substantial number of participants, or those that will disrupt traffic, and notification procedures should not be overly bureaucratic or onerous. In this regard, they expressed concern about municipalities requiring that there be more than one convener, allowing only registered organisations to stage an assembly, and requiring identity documents and the details of marshals, as well as the exact number of participants. In the Committee's view, the notice should only contain the date, time, duration and location or itinerary of the protest, and the personal details of the convenor (not the marshals). As for the length of the notice period, opinions differ as to the best practice: the OSCE Office for Democratic Institutions and Human Rights (ODIHR) suggests not more than a few days[40], while the UN Special Rapporteurs suggest a time period of not more than 48 hours.[41] Spontaneous protests should not require prior notification at all, and neither should individual protests or protests that start out as individual protests and that attract more people. Static public assemblies or open air public meetings may not even need prior notification as they present the authorities with fewer logistical challenges.[42] Publishing decisions about notifications should act as a further disincentive for authorities to abuse the process. While they may be tempted to impose sanctions (such as fines) on those who fail to notify, they must weigh up how burdensome the failure to notify has actually been for effective governance. If the breach has been non-material, then the authorities would not be able to justify the imposition of sanctions.[43]

V REGULATORY PRACTICES OF MUNICIPALITIES

The Act measures up fairly well to some of the standards discussed above, but also falls short in some important respects. In terms of the Act, a convener must give notice of an intended gathering to a local authority, such as a municipality or magistrate if a municipality is not in reach, at least seven days prior to the date of the march, which is a very long period compared to the benchmarks discussed above.[44] However, depending on the circumstances of the gathering, notice of a gathering may be given in a period of less than seven days provided this is not less than 48 hours and reasons are given for the short notice[45]; even that exception to the standard seven-day period is long. If notice is given in a period of less than 48 hours, the responsible officer may prohibit the gathering.[46] Depending on the nature of the gathering, the responsible officer of the municipality may call up a meeting between the three main role players (the municipality, or the responsible officer, police, or the authorised member, the convener and the deputy convener) to discuss matters such as the route to be taken by the participants, the number of participants, the number of marshals required, and other logistical matters.[47] At this meeting (known as the 'Section Four meeting' after the section in the RGA that regulates

[40] Zenn (note 28 above) at 8.
[41] Ibid.
[42] OSCE Office for Democratic Institutions and Human Rights (note 33 above) at 148.
[43] D Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Era* (2010) 82.
[44] RGA s 3(2)
[45] Ibid.
[46] Ibid.
[47] RGA s 4(2)(b).

this meeting), the police may request that certain conditions be imposed on the gathering. But the RGA requires that the negotiations in Section Four meetings take place in good faith.

The grounds that are recognised by the RGA for lawful prohibitions are as follows: when a responsible officer receives credible information on oath that a proposed gathering will result in serious disruption of pedestrian or vehicular traffic, or that there will be injury to participants or other persons, or that extensive damage to property will occur, and that police will not be able to deal with such threat, then s/he can consult with the convener and police with a view to prohibiting the gathering.[48] Any decision taken or given during the negotiations or conditions imposed on a proposed gathering, including the prohibition of a gathering, may be challenged in a magistrate's court within 24 hours.[49] When a gathering turns violent, or where there is serious risk of injury to persons or property, then the police may disperse the gathering after having warned it to disperse. The argument that the gathering was spontaneous, rather than premeditated, can be used as a defence against a charge of an illegal gathering, as the RGA contemplates situations where people gather spontaneously in reaction to unforeseen events.[50]

In spite of the fact that the RGA merely requires notification of a local authority for a gathering to take place, in reality many municipalities have turned notification into a permission-seeking exercise. In the wake of *Garvis*, municipalities have attempted to pre-empt widescale riot damage by placing myriad obstacles in the way of gatherers, especially protesters, showing the real-world effects of the Court's doctrinal embrace of a more public order-inclined approach towards protests. These practices have become common across municipalities.

A Requiring permission for gatherings

Many of the notification forms that municipalities provide make it clear that convenors are notifying them, not seeking permission. However, during these processes, a permission-seeking mentality creeps in. Correspondence with convenors is often peppered with references to applications for permits or permission being granted. The eThekwini Municipality, for instance, has in a prohibition letter referred to notifications as applications, and prohibitions as the denial of permission, showing that the municipality viewed the notification process as a permission-seeking process.[51] The Makana Municipality makes use of a form that makes it clear that the notification is actually about permission-seeking.[52]

This misperception about notification is shared and perpetuated by the conveners, which reinforces the perceptions of municipalities that this language is acceptable. Notification letters abound in the two datasets in which conveners have asked for permission from municipalities for a gathering. Even a branch of the largest trade union federation in the country, the Congress of South Africa Trade Unions (Cosatu) — which one would expect to know better

[48] Ibid s 5(1).

[49] Ibid s 6(3)(a).

[50] For a narrative description of the RGA, see the following publications: M Seleoane 'A Critical and Comparative Review of the Regulation of Gatherings Act' in KS Ndung'u (ed) *The Right to Dissent: Freedom of Expression, Assembly and Demonstration in South Africa* (2003) 26–49; Freedom of Expression Institute *The Right to Protest: A Handbook for Protesters and the Police* (2007); S Woolman 'Assembly' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd ed, 2008).

[51] The responsible officer, Safety and Security Cluster, Durban Metro Police Services, eThekwini Municipality 'Application for a Picket Outside Equality Court – 2 August 2011' (letter, 1 August 2011).

[52] Makana Municipality 'Application in Terms Regulation of Gathering Act [sic] No. 205 of 1003 to Hold a Gathering or Procession' (undated).

given their considerable experience in convening protests — requested 'permission' for a march, triggering a response from the Umzimkhulu Municipal Manager that 'approval is granted'.[53] The South African Communist Party (SACP) applied to the same Municipal Manager for a 'permit' to march.[54]

B Onerous conditions for gatherings

There is a persistent trend in which municipalities place onerous conditions on gatherings that are not required by, or arguably even supported by, the RGA. According to the RGA, the responsible officer may impose conditions regarding the conduct of the gathering if agreement has not been reached with the convenors and the police at the Section Four meeting.[55] Yet, municipalities are known to impose conditions even before the Section Four meeting takes place. For instance, in Johannesburg, the Johannesburg Metropolitan Police Department (JMPD) presented the Right2Know Campaign with an invitation letter to attend a Section Four meeting, which required them to provide a list of letters on attendance of the meeting. These letters included a confirmation letter from the intended recipient of the memorandum (if the intention of the protesters was to deliver a memorandum), permission letter from the ward councillor, permission letter for the place of gathering, copies of identity documents for convenors, copies of proof of residential/ work addresses for convenors, and a list of marshals (only their names). These conditions appear to be standard in the City. Convenors are told that if they cannot produce these documents, then they need to provide reasons.

However, this checklist does not form part of the contents of the notice, which may make these requirements difficult to contest if a gathering is prohibited on the grounds of non-compliance. Furthermore, this checklist makes a gathering conditional on the support of the very individual or institution that is being protested against, which is clearly inappropriate and non-compliance should not even need to be motivated. In a 2013 interview, the responsible officer for the City of Johannesburg did indicate that gatherings had been prohibited for failure to provide the confirmation letter from the recipient of the gathering, although on several occasions he had phoned recipients to check if they were willing to accept memoranda and to facilitate the process.[56] Both datasets make it clear that many protests are related to municipal service delivery, and ward committees may be deeply implicated in these problems; so subjecting a protest to the permission of a ward councillor is inappropriate and reasons for failing to do so should not be a requirement.

The Rustenburg Municipality also instituted a requirement that before a gathering could take place, the convenors had to meet a checklist of conditions. The checklist included a permit to use a public road, an authorisation letter for the venue, a permission letter from the tribal council, and an acknowledgement letter from the intended recipient of the memorandum of demands that s/he would be available to receive the memo to be served.[57] According to a record of a Section Four meeting held between the Tswelopele Municipality and the conveners of a

[53] Congress of South African Trade Unions Umzimkulu Local 'Request to March' (letter to Municipal Manager, 1 November 2016); Office of the Municipal Manager 'Re: Request to March' (letter to Congress of South African Trade Unions Umzimkulu Local, 7 November 2016).

[54] South African Communist Party 'Application for a Permit to March' (letter to Municipal Manager, 19 April 2016).

[55] RGA s 4(4)(c).

[56] Duncan (note 16 above) at 82.

[57] Rustenburg Local Municipality 'Checklist for Gatherings' (undated).

proposed protest by the Economic Freedom Fighters (EFF), the chairperson of the meeting stated that in terms of the RGA, the applicant should have confirmation before the meeting of a person who will receive a memorandum.[58] This requirement is a misreading of the RGA, which merely requires that information be provided about the place where and the person to whom the memorandum should be handed over.[59] However, the chairperson insisted on this requirement as a precondition for gatherings, on the pretext that violence could result if there was no-one to accept the memorandum.

It has been common for municipalities to require a list of marshals, although they differed in terms of how much information they require. While Johannesburg required the names of marshals but no further details; the Tswelopele Municipality required conveners to supply names and addresses of marshals; and Polokwane required the cellphone numbers.[60] The Mbombela Municipality made it clear in its notification form that gatherings would be prohibited unless the conveners supplied a list of marshals.[61] These conditions place onerous burdens on convenors and are invasive as potential marshals may be reluctant to provide such personal details to a local government, particularly if they are in conflict with it.

The more onerous the requirements, the more likely it is that participants will eschew the RGA process entirely. Records of the troubled Mandeni Municipality (where there have been ongoing protests against the municipality) show that, during the 2015–16 period, most protests labelled 'service delivery' and involving the blocking of roads and burning of tyres did not go through the formal process.[62] In the Mbombela Municipality, in an interview conducted in 2014, the responsible officer said that they had introduced a tighter screening requirement for service delivery protests, where conveners had to prove that they had attempted to resolve the grievance with the mayor's office or the ward councillor. Failure to do so would result in prohibition. The responsible officer admitted that this additional requirement had resulted in more protests that completely bypassed the RGA processes taking place, as protesters became frustrated with being thrown back onto the very officials they had found wanting in the first place.[63]

Several municipalities also require the conveners to sign indemnity forms which indemnify the municipalities against damages that may result from the gathering. For instance, the Mbombela and Inkosi Langalilbalele Municipality required convenors to sign forms that indemnified those municipalities against any claim for damages suffered by any person as a result of any event taking place during the gathering. The inference behind the forms is that failure to sign would result in 'permission' to gather being denied; yet signing is likely to instil fear in convenors as it exposes them to claims that would otherwise be brought against municipalities, and requires them to waive their rights to bring claims against municipalities that engage in wrongful acts. [64]

[58] Tswelopele Local Municipality 'Minutes of a Section 4 Meeting Held on 1 December 2015 at 10.00 in the Board Room Hoopstad Municipal Offices' (1 December 2015).

[59] RGA s 3(3)(j).

[60] Tswelopele Local Municipality 'Notice of Gatherings: Regulation of Gatherings Act 1993' (1 September 2015); Polokwane Municipality 'Submission of Internal Appeal Against Decision Relating to PAIA Request SAH-2016-POL-0001' (letter to South African History Archives, 14 November 2016).

[61] Mbombela Municipality 'Application for an Intended Gathering/Picket' (undated) 2.

[62] Mandeni Municipality 'List of Public Gatherings 2015–2016' (undated).

[63] Duncan (see note 16 above) at 62.

[64] Personal correspondence with S Malematja, attorney, Right2Protest Project, 14 August 2019 (on file with author).

C Levying of fees for gatherings

One condition related to gatherings that deserves particular attention involves the payment of fees for the right to gather. In Johannesburg, for instance, conveners are required to pay a 'planning fee' of R440.[65] No further information is provided about what the basis of the fee is, but according to the Right2Protest Project, one convener was told that if the fee was not paid, then the JMPD and the South African Police Service (SAPS) would not provide a police escort for the gathering.[66] This odious practice of levying policing fees (when policing is already paid for from the fiscus, and therefore leading to public-order policing being paid for twice over) leaves gatherers vulnerable to harassment and even attack if they proceed with their gathering without having paid the fee. This requirement also undermines a fundamental reason for notification, namely to forewarn the police so that they can provide an escort for a gathering.

Johannesburg is not the only municipality that requires the payment of a policing fee. The traffic department of the Emfuleni Municipality has required convenors to pay a policing escort fee, even in respect of protests. In contrast, the Langeberg Municipality made it clear that, for the 2016–2017 period, all events that required traffic escorts would need to pay an escort fee 'except political demonstrations, marches and picketing'.[67] In the case of the Ba-Phalaborwa Municipality, a march planned protest by an organisation called the Ba-Phalaborwa Unemployment Community was banned partly because there was no proof that they had paid an application fee.[68]

D Regulation of gatherings in ways that are not content-neutral

Ideally, the RGA should regulate gatherings in a content-neutral manner, with the narrowest prohibitions possible on harmful forms of expression. However, the RGA contains a very broad definition of hate speech, in that it prohibits participants from 'by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion'.[69] The RGA also contains an incitement to violence prohibition, which states that 'no person present at or participating in a gathering or demonstration shall perform any acts or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons'.[70] These prohibitions are broader than the constitutional definitions of hate speech and incitement of imminent violence[71]; however, they have not been tested against the Constitution, and if they were to be, they may well be found wanting. The definition of hate speech in the RGA does not include a harms test and the incitement to violence section does not require the violence to be imminent for it to be prohibited.[72]

[65] Johannesburg Metropolitan Police Department, 'Section 4 Meeting Invitation Letter': Letter to Right2Know (14 November 2018) 1

[66] B Zasekhaya & S Malematja 'Protesting in the City of Jo'burg: Pay the Planning Cost or Risk Not Having Protection' (Unpublished, Right2Protest opinion) (2 August 2019).

[67] AWJ Everson 'Request for Access to Record of Public Body in Terms of Act 2 of 2000' (letter to South African History Archives, 3 November 2016).

[68] Ba-Phalaborwa Municipality 'Application for a Strike Action at the Ba-Phalaborwa Municipality' (letter to the convenor of the Ba-Phalaborwa Unemployment Community, 9 April 2015) 1.

[69] RGA s 8(5).

[70] Ibid s 8(5–6).

[71] Constitution of the Republic of South Africa, 1996, s 16(2)(b), (c).

[72] Seleoane (note 50 above) at 44.

Some municipalities broadened these provisions even further and placed wide-ranging content restrictions on gatherings. For instance, the Kou-Kamma Municipality required convenors to commit to ensuring that no person present in the gathering utters threats of violence '[calculated] to cause, encourage or foment feelings of hostility between different groups or sections of the population of the Republic'.[73] Fomenting hostility could easily be interpreted as including speech that targets of protests could be offended by, even in cases where the speech may be legitimate criticism. For instance, municipal officials who are targets of criticism for poor service delivery could insist that this provision be invoked as a condition for protests, to shield themselves from criticism.

The George Municipality also has invasive requirements, such as the requirement that conveners have to provide information about whether placards will be displayed in gatherings, and that convenors provide the names and copies of the identity documents of people who are going to give speeches at the gathering, as well as the duration of the speeches.[74] The Senqu Local Municipality also requires convenors to provide details of whether speeches will be made at gatherings, and if so, by whom.[75] These requirements risk chilling the freedom of expression in gatherings as speakers may be unwilling to be identified in advance, out of fear that their speeches may make them targets for harassment or intimidation. The Emfuleni and Ekurhuleni Municipalities require convenors to give descriptions of the placards and slogans to be displayed, suggesting that these conditions originate from a template that has been circulated to some municipalities.[76]

E Overuse of Section Four meetings

The datasets revealed that municipalities held Section Four meetings for most gatherings they were notified about. This is in spite of the fact that in terms of the RGA, Section Four meetings are needed only if the responsible officer has concerns about the gathering. However, it is clear from the datasets that these meetings have become routine, which is hardly surprising as they provide municipalities with opportunities to impose conditions beyond the requirements of the RGA. Conveners have often complained about these meetings not being conducted in good faith, with responsible officers and authorised members dictating terms rather negotiating. For instance, over a two-year period (2015–2016), the Steve Tshwete Municipality received 56 notices, held Section Four meetings in relation to all of them, and prohibited one. All the others were 'approved' with conditions attached.[77] These statistics are fairly typical of municipal screening processes, which strongly suggest the overuse of the Section Four meeting mechanism and a reluctance to accept notification alone as sufficient grounds for gatherings.

[73] Kou-Kamma Local Municipality 'Memorandum of Agreement' (undated) 3.

[74] George Municipality 'RE: Appointment of Responsible Officer in Terms of the Regulation of Gatherings Act 132 of 1993' (1 July 2016) 6–7.

[75] Senqu Municipality 'Notice of Gathering 17/3/1/5/1' (undated) 2

[76] Emfuleni Local Municipality 'RE: Request for Information/Records Regarding the Regulation of Public Gatherings Act 205 of 1993' (15 November 2016) 9; Ekurhuleni Municipality 'Application March Gathering Procession' (undated) 6.

[77] Steve Tshwete Local Municipality 'Records to the Regulation of Gatherings Act 205 of 1993' (undated).

F Prohibitions on gatherings on grounds that are not recognised by the Act

What is noteworthy from the two datasets (which, of course, is welcome) is that outright prohibitions of gatherings are rare. However, the gatherings that came to the attention of municipalities without formal notification were routinely prohibited.[78] Between 2015 and 2016, the Setsoto Municipality prohibited gatherings when the organisers had not notified the municipality beforehand on the basis of 'procedures not being followed'; but, on the other hand, the municipality 'authorised' all the gatherings for which the convenors had duly provided notification.[79] The Polokwane Municipality did not prohibit any gatherings. Records of the Molemole Municipality revealed that they prohibited two protests in 2015. A proposed gathering by the Botlowka Activist Forum was prohibited in order to 'avoid unnecessary red tape for the community', and a proposed EFF march was prohibited on the basis that the issues had to be referred to 'a consultative meeting with SAPS, Botlokwa'.[80]

In the last days of the Jacob Zuma presidency, the JMPD prohibited a proposed 'Zuma must fall' gathering to be held by a coalition of organisations called Unite Against Corruption, on the basis that the responsible officer had not been notified in the required time frame, and on the basis that 'the gathering (would) result in serious disruption of vehicular or pedestrian traffic, as the indicated number of participants (2000) could not be accommodated on top of the Mandela Bridge in Braamfontein due to safety reasons'.[81] Yet, as the convenor pointed out at the time, the Mandela Bridge had accommodated much larger crowds during sporting events, and safety had not been used as a pretext to prohibit those events.[82] Inadequate or even no reasons are sometimes given for a prohibition, a case in point being another 'Zuma must fall' protest planned to be taken to the Union Buildings, which is the seat of government, in Tshwane in April 2017. The Tshwane Metropolitan Police Department (TMPD) prohibited the march, stating that 'due to non-compliance, note that your march for 7 April 2017 will be illegal and a case docket will be opened'. The TMPD failed to provide any details about the basis for the allegation of non-compliance, and the prohibition was challenged successfully by the organisers.[83]

In both datasets where prohibitions were recorded, there was no evidence whatsoever of credible information having been provided on oath that the gathering was likely to result in violence, and that no alternatives short of prohibition were possible (as required by the RGA). As laudable (and underutilised) as this requirement is, the RGA contains no provision for a counter-affidavit from conveners, which makes the process inherently one-sided and opens it up to abuse by the police who can make unsubstantiated allegations to ensure the prohibition

[78] Duncan (note 16 above) at 164–165.

[79] TP Masejane 'Request for Information Relating to Gatherings within Setsoto Municipality' (letter to South African History Archives, January 2017)

[80] MI Machaba, co-ordinator ward committees Molemole Municipality 'Information Related to the Regulation of Gatherings Act 205 of 1993' (letter to the South African History Archives, undated).

[81] Correspondence between JMPD and convener, Unite Against Corruption, Mark Heywood 'Prohibition of the Gathering in Terms of s 3(2) of the Regulation of Gatherings Act 1993 ("the Act")' (15 December 2015, on file with author).

[82] Correspondence between convener and JMPD, City of Joburg Mandela Bridge (14 December 2015, on file with author).

[83] HM Mohale 'Application for National Coalition Against State Capture: March from Church Square to Union Buildings is Prohibited' (correspondence between responsible officer HM Mohale, TMPD, and convenor Mark Heywood, 6 April 2017.

of a gathering. One such case occurred in 2004 when the Thembelihle Crisis Committee attempted to hold a march in November 2004 and they agreed to abide by the conditions of the RGA. However, the responsible officer allegedly refused to listen, and said that he would deny permission for the march 'because of Thembelihle's history', and 'because of that once uncontrollable behaviour of the Thembelihle community blockading streets'.[84] The JMPD then produced an affidavit to that effect, which they then used as a reason to prohibit the march. However, according to the convenor, S'phiwe Segodi, the version of events given in the affidavit was not accurate, as violence ensued after the community defended itself against unlawful evictions by private security guards. Such an abuse of process would not be possible if the RGA made provision for a counter-affidavit.

Municipalities are also known to impose blanket prohibitions on gatherings during special events, effectively suspending the right to gather in public spaces. In March 2010, shortly before South Africa's hosting of the 2010 World Cup, and after protests in Orange Farm, Sebokeng and Sharpeville, the Concerned Residents of Sharpeville notified the Emfuleni Local Municipality of their intention to march on 12 March 2010. In response, the Chief of Traffic and Security responded: 'The MEC for Gauteng Community Safety has instructed that no permission for marches in Gauteng should be granted until further notice. This instruction is given by the MEC due to the volatile situation in the townships'.[85] Then in April, a march planned by the Public and Allied Workers Union of South Africa in Vanderbijlpark for 5 May was banned on the pretext that it was too close in time to the World Cup (South Africa hosted the World Cup from 11 June to 11 July 2010). The prohibition took place in response to a directive sent on 29 April by the Sebokeng Cluster of the SAPS to the station commanders of all police stations in the Cluster, which read as follows: 'By the directive of the Sebokeng Cluster, Major General DS de Lange you are hereby informed that no authorisation must be given for marches until the end of the World Cup 2010'.[86] This directive was issued in spite of the fact that the RGA makes no provision for the SAPS to usurp decision-making powers of local authorities around gatherings. More recently, when the Congo Peace Without Borders notified the TMPD about their intention to stage a protest in the capital city on 29 July 2016 (the year of the local government elections), they were told 'Please note all Act 205 gatherings are on hold until local elections are done. All gatherings will resume on 15 August 2016'.[87]

VI NOTIFICATION IN THE WAKE OF THE CONSTITUTIONAL COURT JUDGMENT

As should be apparent from the above, there are a myriad problems surrounding the notification process that remain to be addressed. Yet, in *Mlungwana*, the Minister of Police argued that 'the giving of notice imposes modest requirements on the person(s) convening a gathering'.[88]

[84] S Segodi 'Affidavit of Sphiwe Sevright Segodi, Bhayi-Bhayi Miya & the Thembelihle Crisis Committee v The City of Johannesburg & the Minister of Safety & Security' (5 November 2004) 6

[85] Correspondence between MT Mollo, Chief Traffic and Security, Emfuleni Local Municipality and H Mosesi, concerned resident of Sharpeville' (11 March 2010).

[86] Correspondence between Major General DS de Lange and Station Commanders of Vanderbijlpark/Sebokeng/Evaton/Orange Farm/Ennerdale/Sharpeville/Boipatong/Barrage Sebokeng Cluster 'Authorisation of Marches till End of World Cup' (29 April 2010).

[87] Correspondence between Hilda Mohale of the Tshwane Metropolitan Municipality and Kelly Kropman of the Legal Resources Centre (21 July 2019).

[88] *Mlungwana* (note 1 above) at para 3.

In reality, though, the notice requirement triggers an explosion of bureaucracy that is anything but modest. As the Right2Protest Project has noted, the safety of participants in a gathering is at the heart of the RGA, therefore it is absurd for the state to take advantage of the notice procedure to impose their own arbitrary conditions or bylaws.[89] The Minister argued further that the purposes of notification were to ensure proper planning for a gathering so that they occur in an orderly manner, with minimal disruption where any risk of violence is mitigated to the greatest extent possible.[90] The inference that can be drawn from his arguments is that the removal of criminal sanction on the failure to notify would lead to chaos, as there would be no compulsion for convenors to give notice.

However, there is little evidence of actual notification practices having changed on the ground, though, and the compliance culture that existed before the Constitutional Court judgment remains largely intact. In any event, failure to give notice may not necessarily lead to the police using force to disperse protesters. According to the JMPD's Wayne Minnaar, if conveners fail to give notice, then the protest will be deemed an unprotected one, and the JMPD will 'apply discretion when monitoring it, in terms of traffic management and as far safety of the general public is concerned'.[91] Yet, in an environment where weaknesses in public order policing remain, and the threat of police violence against protesters remains ever-present, conveners may be unwilling to take the risk. In any event, despite the many ways in which municipalities have delegitimised the notification process by manipulating it to their advantage, activists who defend the right to protest still recognise the utility of notifying the authorities, and still encourage conveners to do so. As Right2Know's Thami Nkosi has noted, notification remains 'security' from harassment by law enforcement, and in view of inadequate reforms to public order policing, obtaining that security still remains important for protesters.[92]

As flawed as it is, notification procedures lock municipalities and the police into a structured process with conveners, and for those who know their rights in terms of the RGA, they can insist on genuine negotiations, force the state to observe the law, and name and shame them if they do not.[93] However, protest cultures also need to change to ensure that conveners are not inadvertently contributing to the widespread view that notification amounts to permission-seeking, which will perpetuate a compliance culture where the state maintains the upper hand. Furthermore, notification can be used by protesters to protect themselves against violent acts, whether at the hands of the state or other protesters. According to activist and writer Dale McKinley:

> …[I think] that a notification process makes sense *only* if the police themselves understand and apply the full letter of the relevant law(s) and see protests as the exercising of democratic rights as opposed to threats to 'law and order', the ruling party, the state etcetera. — such that the entire process (including things such as the Section Four meeting), is simply an administrative/practical process, not a politicised and manipulative one as is presently the case in most circumstances. It makes practical and legal sense for there to be a notification process, otherwise some will do

[89] S Malematja 'Implications of the SJC Judgment on Section 3 of the Regulation of Gatherings Act 205 of 1993' (2019) 2.

[90] *Mlungwana* (note 1 above) at para 10.

[91] Personal correspondence with Wayne Minnaar, JMPD (23 July 2019).

[92] Personal correspondence with Thami Nkosi, interim Secrecy and Securitisation Coordinator, Right2Know Campaign (24 July 2019, on file with author).

[93] Personal correspondence with Murray Hunter, researcher, Media Policy and Democracy Project (26 July 2019, on file with author).

> whatever they please (including unprovoked violence, theft, wilful destruction, attacking others etc.) and thus undermine the right to protest/gather itself … and especially for the majority. If citizens are going to demand and exercise the right then they must also accept that they must do so (unless there is a revolutionary/extraordinary situation) with the requisite political, moral and legal responsibilities.[94]

In the wake of the Constitutional Court judgment in *Mlungwana*, the government has not provided guidance on what procedures it intends to put in place as alternatives to criminalisation. In arguments during the case[95], the applicants and the *amici curiae* put forward various alternatives to incentivise the giving of notice, including assuring convenors that the police cannot restrict the protest, as well as avoiding any other criminal charges — including civil liability for damages — as a result of a failure to take reasonable steps to prevent damage (including giving notice), administrative fines or amending the definition of gathering such that notice is only required when police presence will be necessary. In the absence of a public debate about reasonable alternatives and national government guidance, there is a very real danger that municipalities and the police will intensify their now well-established practices of arbitrary rule-making.

In any event, according to the National Prosecuting Authority (NPA), there have been hardly any prosecutions under the RGA (the SJC10 case being an exception).[96] Rather, the police prefer to pursue protesters through the criminal justice system on more nebulous, often ill-conceived grounds: in the words of one Moutse-based activist and serial convener of protests, the police have learnt to 'punish before they prosecute'.[97] According to the Right2Protest Project, most of the cases they provided advice on involved public violence charges, followed by damage to property and contempt of interdicts. Right2Protest has noted a tendency of the police to target conveners as the most visible participants in protests, keeping them in jail for as long as possible, and changing charges depending on which ones had the greatest prospects of success. According to the Socio-economic Rights Institute's (SERI) Nomzamo Zondo, of the 40 protest-related cases the Institute has handled since 2014, only one of those led to a successful conviction. If protesters were legally represented, they were more likely to be released, and those who lacked representation were more likely to plead guilty.[98]

Both the Right2Protest Project and SERI observed that when the police disperse protests forcefully, they tend to arrest those fleeing the protest, whether or not there is evidence of them being involved in violence or damage to property. In one 2015 case, after a *#feesmustfall* march of university students to the Union Buildings the police arrested seven people (six students and an informal trader, who happened to be on the scene at the time) as the protest dispersed. After making representations to the Chief Prosecutor, they were released, but not before the police had taken 20 hours to charge them, and initially the prosecutor had refused them bail.[99] In other words, much more will need to change if the right to protest is to be protected from arbitrary and unjustifiable criminalisation. The Constitutional Court attacked the most visible manifestation of criminalisation, but the authorities have become adept at criminalising

[94] Personal correspondence with Dale McKinley (25 July 2019, on file with author).

[95] *Mlungwana* (note 1 above) at para 96.

[96] Personal correspondence with Bulelwa Makeke, Head of Communication, NPA (8 February 2019).

[97] Interview with Seun Mogotji (15 October 2010).

[98] Interview with Nomzamo Zondo (25 February 2019).

[99] N Zondo 'Press Statement: Sunnyside 7 Released' (2017), available at http://seri-sa.org/images/Sunnyside7Press.pdf

the right in less visible ways that are much more pernicious as they are more widespread and difficult to pin down.

Possibly the most significant contribution to increasing the protection for peaceful and unarmed protests is reducing the potential for police violence against gatherings. Much turns on efforts to reform public order policing in the wake of the Farlam Commission of Enquiry into the massacre and associated killings at the Lonmin platinum mine in Marikana in 2012. The Farlam Commission found that police militarisation was a significant contributor to the problem, and recommended the establishment of an expert panel on public order policing. Sadly, in spite of the fact that the panel has completed its work, the Minister of Police has failed to release their report; so there is no inkling of what reforms have been proposed to address the problem, which suggests that the police are dragging their feet on reforms. At the same time, there are also signs of policing having deteriorated since the Marikana massacre, with cases of alleged police misconduct not being investigated adequately, although there has been a decline since the massacre in the number of people killed in public order situations. Yet, over a period of a decade, there had been a massive increase in the number and costs of civil claims against the police. While the public order police have resorted to using less lethal crowd control weapons in response to the public outcry about deployment of lethal weapons in crowd control situations, there is considerable controversy about how non-lethal many of these weapons actually are, given the serious injuries they can inflict. In view of these problems, it does not appear that meaningful reforms to public order policing are on the horizon any time soon.[100]

VII THE ACT AND ITS APPLICATION: POSSIBLE WAYS FORWARD

Undoubtedly, the Constitutional Court judgment in the SJC10 case has lowered the cost of people engaging in peaceful and unarmed gatherings, including (and perhaps especially) protests, but it is likely that the government will continue to limit the right to protest in even more significant ways. If the gains of the SJC10 case are to be meaningful, then there needs to be a commitment from government to shift from coercing convenors into notifying municipalities, to incentivising notification. In other words, in the wake of the SJC10 judgment, the government has a responsibility to lower the costs for peaceful and unarmed protests even more, thereby rebuilding the legitimacy of the notification process. In the absence of such efforts, the government has no basis for insisting on notification as a requirement for gatherings: in this regard, it is regrettable that *Mlungwana* did not entertain the possibility of notification not being a requirement, and under what circumstances notification may be undesirable, instead taking this practice for granted. As stated already, there is recognition in important pockets of civil society that notification is important; if conveners were to reject notification, then there could be even more injuries or deaths at the hands of the police. But this shift towards a more incentivised approach is unlikely to happen if the fundamental problem of municipalities being made to preside over protests about their own performance — and with practically no functional oversight — remains unaddressed. To this end, the Department of Cooperative Governance and Traditional Affairs should provide political leadership by drafting a memorandum clarifying the responsibilities of local government to facilitate gatherings and

[100] Socio-Economic Rights Institute (SERI), the Institute for Security Studies (ISS), the African Policing Civilian Oversight Forum (APCOF), the Omega Research Foundation and the Right2Protest *Strengthening the Role of Civil Society in Holding the Police Accountable for Human Rights Violations* 17 (April 2019), available at http://apcof.org/wp-content/uploads/seriissapcofworkshopreport18and19march2019johannesburg.pdf

the limits of their powers. The Department should also withdraw from circulation all notices and checklists that conflict with the RGA and the Constitution, and circulate a standardised and compliant alternative. A political intervention of this nature may make legal challenges to arbitrary municipal decision-making less necessary.

While it will be difficult to remove the regulatory responsibilities of municipalities and assign them elsewhere, practical ways need to be found to reduce the implicit conflicts of interest in municipalities acting as the arbiters of protests that may cast them in a bad light. Again, the Department should provide guidance and identify principles in this regard, before the matter escalates to the Constitutional Court. Preferably, the role of responsible officers should not be assigned to a local government official who has a vested interest in protecting the municipality from criticism, and who is somewhat removed from the day-to-day service delivery functions of the municipality. Currently, different municipal and law enforcement officials are assigned particular roles, and each option has its advantages and disadvantages. In many municipalities, the head of traffic and protection services is designated the responsible officer. While this may remove decision-making from the hurly-burly of municipal politics, these responsible officers are likely to bring traffic management and policing biases to their decision-making, prioritising the passage of pedestrian and vehicular traffic over the claims to public spaces by gatherings. In this regard, the metropolitan police departments of the larger municipalities have become notorious amongst civil society organisations working on right to protest issues for placing some of the most restrictive conditions on gatherings, some of which are highlighted in this article. Municipal police are, at the end of the day, still police, and it is not ideal for notification systems to be administered by the police; rather, the system should be managed by civil authorities, as the police will most likely approach notification from a 'law and order' mindset, which primarily frames protests as potential security threats.[101]

In smaller municipalities such as Makana, Swartland, and Thaba Chweu, the municipal manager is designated the responsible officer. In the case of the Mandeni Municipality, the Manager: Public Safety recommends 'approvals', with the Municipal Manager making the final decision.[102] In these situations, conflicts of interest may well arise, as the person making the final decision about notices is the person who is ultimately responsible for municipal performance. In other municipalities, the Director of Corporate Services acts as the responsible officer. While the administrative arm of different municipalities should be functionally separate from the political arm for reasons of sound governance — which may insulate decisions about gatherings from overt political interference — administrative officials could still be sensitive to criticism as their livelihoods depend on the performance of their municipalities.

In other smaller municipalities, SAPS members are designated responsible officers, which removes decision-making from the municipalities, but can lead to a collapsing of the triumvirate arrangement between convener, responsible officer and authorised member, as the responsible officer is, to all intents and purposes, the authorised member. In the case of the Senqu municipality, different responsible officers were assigned to each gathering they were

[101] International Network of Civil Liberties Organisations & the University of Chicago Law School *Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest* (2018) 48, available at https://ccla.org/inclo-report-defending-dissent-state-practices-that-protect-and-promote-the-right-to-protest

[102] Makana Municipality 'Application in Terms of the Regulation of Gathering Act [sic] No. 205 of 1993 to Hold a Gathering and/or Procession' (undated); Swartland Municipality 'SAHA's PAIA Request: Records Related to the Regulation of Gatherings Act' (3 November 2016); Thaba Chweu Local Municipality 'Request for Information in Terms of PAIA' (20 September 2016).

notified of, depending on the locality where the gathering was meant to take place. Members of the Public Order Policing Unit and SAPS in different police stations acted as responsible officers at different points in time.[103] Difficulties in achieving consistent decision-making would be an obvious problem with this approach, as no single responsible officer can be held to account for decisions. At the same time, municipalities spread over large distances face practical problems in administering the RGA, as travelling to Section Four meetings may prove to be difficult. Most municipalities that responded to the SAHA information requests failed to provide further information about the training manuals they relied on, which suggested a lack of consistency in training, and which increases the potential for arbitrary decision-making.

In a series of workshops organised by the Right2Know Campaign to brainstorm ways of troubleshooting problems with the RGA process, participants (including many with considerable experience with gatherings, both as conveners and participants) suggested setting up an ombudsman who would keep the notification process under review, and handle complaints about decisions taken by municipalities. Relying on the courts only to review municipal decisions is problematic for conveners who may lack access to legal services, and furthermore, prohibitions that have been taken on review risk being rejected by courts on the basis that they are not urgent: yet at the same time, the RGA requires a review of unreasonable conditions or prohibitions to be sought within 24 hours. This conundrum has thwarted several legal attempts to take municipalities on review. An ombudsman may offer a more accessible process. They also recommended that local committees consisting of civil society monitors be set up to observe Section Four meetings and ensure greater transparency in negotiations. Another option suggested was to involve the South African Human Rights Commission in greater oversight, as they have offices around the country.[104] Municipalities should be required to publish annual statistics around gatherings notices received, gatherings held, those prohibited and the reasons why.

Additional changes to the RGA will be important, and it is better for the government to address them before these, too, are escalated to the Constitutional Court as unjustifiable limitations on the freedom of assembly. For instance, adjusting the definition of gathering in the RGA may be important to roll-back the tendency to overregulate gatherings. Some countries only start to regulate large gatherings when they threaten to disrupt public life to significant degrees. In the case of Hong Kong, for instance, gatherings smaller than 50 people do not have to be regulated. Others require notification only if there is a need for police escorts or if the assemblies are moving. The notification period of seven days is also excessively long and should be reconsidered, including the late notification period of 48 hours. In this regard, a four-day notice period for large assemblies where a certain degree of disruption is anticipated, and a 24 hour notice period in the case of urgent assemblies could be more reasonable.[105]

VIII CONCLUSION

More open political systems typically facilitate rather than repress gatherings, as the principle of open government recognises the value of providing channels for the expression of grievances.

[103] Senqu Local Municipality 'List of Gatherings' (undated).

[104] J Duncan & M Hunter 'Notes from Right2Know Protest Workshops Held by the Right2Know Campaign', unpublished report to Open Society Foundation on the Freedom of Assembly Documentation Project, 30 October 2014.

[105] Zenn (note 28 above).

However, governments may have a less noble intention for institutionalising collective action, namely to enable them to keep under surveillance those who are taking to the streets, and to channel their demands towards more predictable outcomes.[106] While protesters themselves may recognise the value of engaging in more institutionalised forms of dissent, some may also experience the negotiated management of protests as co-forming state power. This difficulty can discourage protests of a more anti-systemic nature, and such protesters are more likely to protest outside the formal channels entirely. This is especially so if the government uses the formal process to produce pacified, unthreatening and undisruptive protests that they can simply ignore.[107] Protestors in South Africa face these dilemmas. If they invoke the formal procedures of the RGA that are administered by the very institutions they may be in conflict with, they risk having their voices neutralised. If they do not make use of the RGA, they risk becoming targets of state violence.

Given that protesters are rarely prosecuted in terms of the RGA, the Constitutional Court judgment is unlikely to change the existing problems with the way in which the state regulates and polices gatherings. On the contrary, the SJC10's success may well drive the state towards using even more pre-emptive restrictions on gatherings and nebulous, ill-framed charges that are more difficult to challenge. That is why the courts need to pay more attention to the conditions for assemblies as constitutional issues, and not just as administrative or procedural issues. Municipal overregulation of gatherings, especially protests, coupled with over-policing, suggests a doctrinal shift in how gatherings are viewed by the state, and one that aligns more with *Garvis* than *Mlungwana*. Yet, as argued, *Mlungwana* is unlikely to arrest this shift. This shift is not confined to South Africa; rather it reflects a more conflictual global social order, declining respect for democracy as a political form, and consequently increasingly common framings of protests as riots and protesters as mobs. South African politics remain firmly on a centre-left axis, and key social justice principles are still deeply embedded in society, although more parties at the margins of the political centre, left and right, are gaining ground. The country is not at an imminent threat of a populist government taking over, which may threaten basic democratic rights and freedoms, including the freedom of assembly.

However, with the growing shift towards right-wing populist politics elsewhere, it cannot be assumed that the country's political character will remain unchanged. In this regard, it is important to take note of a recent development involving the Freedom Front Plus (FF+), which absorbed many of the more conservative supporters of the Democratic Alliance (DA), as the party's politics have become increasingly centrist and more inchoate. Reflecting a more conservative turn in thinking about protests, the FF+ introduced a private members Bill seeking to prohibit protests within 500 metres of schools and early childhood development centres.[108] Had this Bill found favour with Parliament, children would have been denied the right to protest. While the Bill failed to gain traction, it is an indication that should there be a shift to the right in South Africa's politics, then government tolerance of protests may decline even further.

[106] S Tarrow *Power in Movement: Social Movements and Contentious Politics* (3rd Ed., 2011) 84–87.

[107] M Kienscherf, 'Beyond Militarisation and Repression: Liberal Social Control as Pacification' (2016) 42 *Critical Sociology* 1179.

[108] J Jaftha 'The Regulation of Gatherings Act Needs an Overhaul – But Not the Reactionary Amendments of the FF+' *Daily Maverick* (18 March 2019), available at https://www.dailymaverick.co.za/opinionista/2019-03-18-the-regulation-of-gatherings-act-needs-an-overhaul-but-not-the-reactionary-amendments-of-the-ff

South Africa has a growing problem with disruptive and violent protests: however, the extent to which this is so, is often overstated by the government.[109] This overstatement allows the government to securitise responses to protests, and provides more evidence of the doctrinal shift referred to above. Instead of recognising protest as a democratic right and legitimate form of expression, increasingly protests have been framed as threats to domestic stability and, consequently, national security. This doctrinal shift has provided the framework for municipal overreach around gatherings and over-policing of public order situations. However, despite the government having declared violent protests a priority crime, the SAPS and the NPA have little to show for their efforts, as they have largely failed to raise their targets for successful convictions in these cases. Some of the grand acts of public violence remain unsolved, despite the SAPS's commitment to a targeted, intelligence-led approach. Some of the most serious acts of public violence of recent times remain unsolved, the most memorable being the burning down of 29 schools during protests in Vuwani. Despite 132 cases being opened against accused between 2016 and 2017, and despite the State Security Agency (on its own admission) having been forewarned of the potential for violence, at the time of writing, not one had led to a successful conviction.[110] Many of the prioritised prosecutions and convictions that took place as a result of the student *#feesmustfall* protests during 2015–2016 could hardly be described as serious at all, which was apparent from the fact that the NPA was open to alternatives to incarceration.[111]

The SJC10 judgment was an important step towards reforming a regulatory process for gatherings that has become increasingly problematic over the years: a process that has alienated more protesters and exacerbated state-society conflict. But, unless the judgment is followed by a deeper and more consistent ideological and doctrinal commitment to respecting the right to protest and ensuring a more genuine incorporation of the masses into the political system — including by the Constitutional Court itself — then the changes are likely to be limited.

[109] Alexander et al (note 21 above).

[110] South African Police Service 'Briefing and Status Report on Vuwani: Portfolio Committee on Basic Education' (Powerpoint presentation, 10 October 2019), available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/171010SAPS.pdf; N Shazi 'David Mahlobo Clarifies Vuwani Comments. We're Still Not Sure What it Means for State Security', *Huffington Post* (5 July 2017), available at https://www.huffingtonpost.co.za/2017/07/05/david-mahlobo-clarifies-vuwani-comments-to-huffpost-were-still_a_23016707

[111] National Prosecuting Authority *Annual Report 2016/17*, available at https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-Annual%20Report-2016-17.pdf; National Prosecuting Authority *Annual Report: 2017/18*, available at https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf