Restricting freedom of speech or regulating gatherings?

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OPSOMMING

Beperking van Vryheid van Spraak of Regulering van Byeenkomste?

Hierde bydrae is 'n kritise oorsig oor Suid Afrikaanse wetgewing met betrekking tot optogte en betogings naamlik die *Regulation of Gatherings Act 205 of 1993*. In hierdie kritise oorsig word openbare geweld en die gevolge daarvan bevraeteken, die waarde van openbare optogte in verband met die opbou van demokrasie bespreek en die funksie en rol van die howe in die bevordering van vryheid van uitdrukking en assosiasie word vasgestel. Die gevolgtrekking is dat die *Regulation of Gatherings Act 205 of 1993* gewysig word moet om vryheid van uitdrukking en assosiasie te beter te beskerm.

1 Introduction

The state transformation that occurred in South Africa in the 1990s was (and resulted in) a shift in the manner of thinking on many political and jurisprudential issues. Included in this transformation was a change in the legal position of political demonstrations which ceased being viewed as an assault on the state – and as such liable to suppression by the police force. This shift occurred within a backdrop of extensive public violence and intimidation which undeniably influenced the nature of the transformation of South African law on political demonstrations. Political thinking, however, is inherently fluid and ever changing; therefore legislation which is crafted within a particular jurisprudence frequently finds itself improperly implemented and grossly misunderstood in a context where a different polity has gained dominance.

An excellent example of progressive legislation and jurisprudence being out of touch with the implementation regime can be found in South African law on political gatherings and demonstrations, which are statutorily "regulated"[1] by the Regulation of Gatherings Act[2] (RGA). This Act was drafted on the recommendations of the Goldstone Commission (discussed later) during the transition period[3] and unfortunately all

1 The extent to which legislation, as opposed to human nature (or crowd psychology), can ever regulate gatherings is a concept which needs to be critically considered. For the purposes of this article however the presumption is that legislation can both legitimately and effectively regulate crowds if properly implemented.

2 205 of 1993.

3 For the purposes of this article I am assigning the term "transition period" to refer to the period between 1990-02-02 (the announcement by then President FW de Klerk of the unbanning of the ANC and release of Nelson
3 Mandela) until 1997-02-04 (when the majority of clauses in the 1996-Constitution came into effect).

evidence on the implementation of the Act suggests that the attitudes and understandings of municipal authorities (despite their importance under the Act) have not enjoyed the same changes as the legal framework – resulting in many gatherings being unlawfully obstructed by local government.[4]

Additionally, since the inception of the *South African Police Service Act*[5] in 1995 the police have undergone such turmoil and policy inconsistency from senior management that endemic institutionalised police corruption has been allowed to fester.[6] The greatest casualty of these various conflicts in South African political engagement,[7] and institutional schizophrenia,[8] is the Police Service and its members. The implications of impaired policing on the implementation of the RGA cannot be overstated particularly because of the constitutional responsibility held by the police for the maintenance of public order.[9]

Despite its title the RGA regulates more than just gatherings[10] and it prescribes various aspects of conduct regarding all political demonstrations as well as certain gatherings that are not politically inclined. To this end the RGA fundamentally operates as a limitation on the constitutional rights to peaceful assembly and expression and simply imposes certain presumptions about the behaviour of crowds. Further the RGA grants powers to the police in gatherings regardless of whether those gatherings occur within compliance of the RGA.[11]

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4 The principal misunderstanding which municipalities appear to harbour is that they are "empowered" by the RGA to determine whether "applications" brought under the RGA should be given "permission".

5 Act 68 of 1995.

Faull and Newham *Protector or Predator?: Tackling Police Corruption in South Africa* (2011) 20 *et seq*

7 Nathi Mthethwa (the minister responsible for policing) has before the National Assembly made the curious statement "I have instituted a task team, led by the state law adviser, to investigate such allegations, because they are so serious as to suggest the meddling of policing functions in politics", the implications of a culture wherein political authority is subject to police meddling cannot be overstated. Business Day "Mdluli faces probe, shifted sideways" 2012-05-10 (online http://www.businessday.co.za/Articles/Content.aspx?id = 171370 (accessed 2012-08-04).

8 Burger "Institutional Schizophrenia and Police Militarisation" 2010-09-14 *ISS Today* (online http://issafrica.org/iss-today/institutional-schizophrenia-and-police-militarisation (accessed 20131025).

9 S 205(3) SA Constitution provides: "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

10 Defined in the RGA to cover most forms of assembly and procession in public roads and public places in open air where more than 15 people are present.

11 S 9(1) RGA provides: "If a gathering is to take place, whether or not in compliance with the provisions of this Act a member of the police – ... (f) shall take such steps, including negotiations with the relevant persons, as

11 are in the circumstances reasonable and appropriate to protect persons and property, whether or not they are participating in the gathering or demonstration."

This article will give attention to sections 6, 7 and 8 of the RGA and questions the value of the provisions (or absence of provisions) relating to: (a) demonstrations outside of court buildings, Parliament and the Union Buildings; (b) the prohibition of the wearing of masks; (c) the prohibition of the blockading of access to any building or premises; (d) the utilisation of violent behaviour in demonstrations; and (e) the continued unlawfulness of contravention of other law during a gathering or demonstration.

For this article an evaluation of section 11 is omitted in its entirety because it, together with the potential alleged "chill effect", is a subject warranting separate attention.[12] This article is focused on organised intended peaceful gatherings as opposed to spontaneous (or allegedly spontaneous) gatherings and riotous violent assemblies.[13]

It is the absence of provisions permitting extra-ordinary demonstrations on application to the appropriate court which will form the focus of this article's critique. The argument that I present and sustain is that rather than attempting to protect the Courts from demonstrators, South Africa's constitutional dispensation requires the creation of a framework in which courts are able to be – and are seen to be – the guardians of free expression. This is something which the RGA fails to do. I therefore propose an amendment to the RGA to give the district magistrates courts power to authorise proscribed conduct in order to promote free expression.

2 Overview of the Act and its Underlying Assumptions

The RGA is divided into several sections each of which addresses a different aspect of the regulatory framework: sections 1 and 2 provide definitions and related matters; sections 3, 4 and 5 regulate gatherings, setting out conditions of notification for gatherings, the consultative process and the prohibition of gatherings; section 6 creates the structures by which the decisions taken under sections 4 and 5 may be set aside by a magistrate utilising an urgent procedure; section 7 proscribes both gatherings and demonstrations within 100 meters of court-buildings, Parliament and the Union Buildings other than with the written

12 The Constitutional Court ruled in *South African Transport and Allied Workers Union and Another v Garvas* [2012] ZACC 13 that this section of the RGA is constitutional. The Court in essence followed the Supreme Court of Appeal in *South African Transport & Allied Workers Union v Garvis* [2011] ZASCA 152. It is my opinion that the challenge by SATAWU was misconceived and a constitutional challenge would have been better placed at the definition of "riot damage" in the RGA. Sadly the effect of the decision of the Constitutional Court and surrounding discussions and literature may have a "chill effect" on gatherings and demonstrations.

13 To which end the incidents of rioting by the SANDF in 2009 are specifically excluded.

permission of the relevant magistrate (or director-general in respect of the Union Buildings); section 8 prescribes conduct for both gatherings and demonstrations; section 9 provides additional powers to the Police (the Act specifically does not remove any powers from the Police); section 10 makes provisions for the promulgation of regulations; section 11 imposes liability for riot damage on organisers of demonstrations and gatherings; section 12 creates various offences resulting from contravening the RGA; section 13 directs the interpretation of the RGA; and the remaining sections provide for miscellaneous matters.

As indicated in the introduction this article will place its focus on sections 7 and 8 and to a lesser extent sections 6, 9, 12 and 13.

2 1 Focused Sections

In addition to planned demonstrations, section 7 of the RGA, as written, effectively proscribes groupings of more than 15 people outside of court buildings regardless of the purpose for which they are gathering and proscribes all political demonstrations outside of Courts without prior written permission. This is because the definition of gathering incorporates "any assembly, concourse or procession". Therefore should the media form a gathering outside of the Johannesburg, Pretoria or Pietermaritzburg high court in which more than 15 persons are acting in concert they fall foul of the provisions of the RGA. It is unlikely that any attempted prosecution of this contravention will ever take place and, should adherence to the letter of the law actually occur, I suspect that the courts will be even more overwhelmed with work than they presently are. Authorising[14] the magistrate's court to *suo moto* grant permission, provide exemptions, or to designate a space for demonstrations would eliminate this potential for difficulty.[15] The amendments proposed in this article eliminate the need entirely.

Sections 8 and 9 of the RGA apply to all functions (that is gatherings and demonstrations) that fall within the ambit of the RGA and it is therefore these sections that warrant attention to discussions on political protests generally. The first aspect of section 8 that is apparent is the obligatory rather than recommendatory nature of its terms – in actual fact the RGA at no point establishes a system of devising recommendations for organisers such as to remain within the ambit of the RGA – meaning that rather than aiding in the regulation of demonstration it proscribes specific "undesirable" conduct. When section 8 is read together with section 12 the purpose is clear: the RGA

14 As this authorisation is essentially an administrative issue I believe it can and should be provided for by amendment to the (R 361 of 1993-03-11); the provisions of reg 13, relating to media access are an apt starting point for the proposed amendment.

15 The issue is largely a matter *de minimis*, however, problems will occur if the state prosecutes grass-roots organisations protesting outside a magistrate's office while allowing a political party to conduct a press conference in the same space.

renders it a criminal offence to conduct gatherings and demonstrations in a particular manner.

2 2 Missing Provisions and Structural Bias

The RGA holds a bias towards the organisation of mass gatherings in the stead of small demonstrations. This is attested to by the joint effect of the provisions of sections 6 and 9. Whereas decisions taken by the responsible officer in connection with restricting or prohibiting gatherings are subject to judicial oversight, no process of automatic intervention by the courts apply where a police officer utilises the powers afforded under section 9 of the RGA. This places excessive responsibility, and power, in the hands of police officers with varied levels of training and specialisation. Therefore, a legitimately organised demonstration may find itself dispersed as a result of over-cautious policing even if the organisers act in good faith simply because the police have not had the opportunity to engage with the organisers in a meeting called by the responsible officer. This is because demonstrators are not afforded an opportunity to acquire any form of approval,[16] and it may well occur that a police officer may believe, in good faith, the demonstration to be illegal – a situation aggravated by repeated incorrect and/or problematic media reports and quotes from municipal and political party spokespersons.[17] Further, as will be argued in the duration of this article, the "disruptive" requirement for a successful demonstration coupled with civic complacency makes the mass march of unthinking participants a far less challenging initiative than imagining and executing a well thought out and expressive demonstration.

2 3 Function Performed by the RGA

In essence the RGA performs a triple regulatory function. It regulates (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 meters of court-buildings, Parliament and the Union Building. Fundamentally the act merely upholds freedom of assembly and does little with respect to Freedom of Expression. It is my submission that it is really only the first of these functions that is done in a satisfactory manner. Furthermore, this failure results in a climate in which the mass march is the sole means of peaceful non electoral political expression holding dominance in South Africa – and that this contributes to a general disenfranchisement and ultimate disengagement at a grass-roots level with peaceful protest action.

16 Glasner *Mbeki and after: reflections on the legacy of Thabo Mbeki* (2010) 114, 122. While the RGA operates on a jurisprudence of giving notice rather than seeking approval, the general question of "who approved this", "who gave you permission" permeates human thinking particularly amongst police officials.

17 Glasner 120.

3 The Focus of Public Violence

Violence is seldom, if ever, spontaneous, but arises from a conviction that fundamental rights are denied.[18]

3 1 Delegitimising the Legitimate Rebellion of the Poor

Service delivery protests, which are often accompanied by violence – and generally contravene the RGA – are an ingrained feature of grass-roots resistance against public corruption, ineptitude and a disregard for the poor by those in power. Unfortunately all accounts suggest that the South African government will only take cognisance of certain communities when those communities resort to violent protest in a phenomenon described as a "rebellion of the poor".[19] However by resorting to violent protests the communities expose themselves to further violent suppression by the police and are further maligned by political authorities as "violent" and "criminal".

The fact is that protesters are able to resort to violent means of ensuring success in garnering support or understanding for their particular cause. Therefore in addition to the political and social implications legal literature should not ignore the interactions between defiance and compliance in moulding the legal system.[20] A preoccupation with preventing public violence and preserving "the peace" as part of law and order readily overtakes the constitutional imperative of establishing a framework in which free expression and exercise of political rights can take place. It simply does not suffice to uncritically regard transgressors of a non-violence ethic as delinquent or to assume that the violence is an inevitable consequence of "class warfare" – whatever that may mean. The RGA falls short in that, while it prevents intimidative demonstrations, it does not encourage or support innovative demonstrations. In the South African context our laws relating to public gatherings are rooted in escaping a legacy of public violence, but it is the same South African context that demands an innovative approach to demonstrations as an instrument of democracy. In spite of Devenish's proclamation that the maxim of *salus republica suprema lex* is dead [21] the nature of the state results in an ingrained aversion to violence by any non-state actor, a fact that is manipulated by political authorities while trampling the dignity of "violent" opponents.

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18 Herman "Injunctive Control of Disruptive Student Demonstrations" 1970 *Virginia LR* 215, 218 quoting the Commission on Industrial Relations (1916).

19 Alexander "Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis" 2010 *Review of African Political Economy* 25.

20 While there are comparatively few publications in journals dedicated to law, the American student protests during the civil rights movement of the United States have received coverage: Herman 1970 *Virginia LR* 215; Anon "Regulation of Demonstrations" 1967 *Harvard Law Review* 1773.

21 Devenish, "The Demise of *salus reipublicae suprema lex* in South Africa: Emergency Rule in terms of the 1996 Constitution" 1998 *CILSA* 142.

Ultimately the political authorities are placed in the most unjust position by having at their disposal the capacity to infringe on the fundamental *dignas* and *fama* of those who oppose them. A trade off, between violent confrontation accompanied with "unconstitutional", "violent" and "irresponsible" behaviour and accepting the terrible status quo, is presented to grass-roots movements without any accountability attaching to the failed political authorities.[22] Coupled with this is the fact that the divisions between the interests of the State and the interests of the ruling party, or a faction thereof, are frequently blurred.

3 2 Strengthening State Instruments to Keep the Peace

The RGA has not replaced various other pieces of legislation or the common law regarding the preserving of the peace. Fundamentally magistrates and law enforcement remain charged with keeping the peace and our Criminal Procedure Act[23] is peppered with discourse arising from this charge. As is the fairly simple Justices of the Peace and Commissioners of Oaths Act[24] which is a cornerstone in our legal system which remains un-amended in our constitutional discourse. Section 13(1)[25] also makes it clear that the RGA does nothing to interfere with the provisions of existing law regarding the prevention of public violence – or anything other than traffic laws and municipal ordinances controlling public space[26] for that matter.

Section 9(3) enhances police powers to use the State's monopoly of force even though no form of state of emergency exists. Thus, whilst the rights to assemble, march, and protest may be upheld in the RGA, it is the right of the police to use force to control those who exercise these rights that is really achieved.

3 3 Goldstone Commission

Earlier in the article it was said that the genesis of the RGA was found in the Goldstone Commission. This Commission was formed in 1991 as part of the process of establishing a climate in which a constitutional transition was possible. The Commission was not a Commission of Inquiry convened by the President in terms the Commissions of Inquiry

22 A comprehensive account of oppression of dissent during the Mbeki presidency is provided by Duncan "Thabo Mbeki and Dissent" in *Mbeki and after: reflections on the legacy of Thabo Mbeki* (ed Glasner) (2010) 105-127.

23 51 of 1977.

24 16 of 1963.

25 In some respects my argument relies quite heavily on s 13(1)(c) RGA. I have not, however, specifically evaluated it due to the fact that its importance is seen in the absence of other provisions rather than by its presence.

26 No case law appears to have been developed on the interaction of the RGA on other laws not specifically mentioned in s 13(1). I submit that if a gathering is planned and in the notice specific mention is made of actions which infringe local by-laws or policy pertaining to the usage of public space the operation of the RGA would render the by-law inoperative. However the proposal in this article would address the issue definitively.

Act [27]– such as the Hefer and King Commissions – but rather was mandated by the unrepealed[28] Prevention of Public Violence and Intimidation Act[29] which created in statute a Commission intended for more than the three year life span of the Goldstone Commission. The Commission ceased to exist due to the fact that no Judge was appointed to replace Judge Goldstone at the end of the three year term. I firmly believe that this failure to retain the Commission played a significantly detrimental role in the resurfacing of incidents of public violence including the security guard labour action violence, the xenophobic attacks in 2008, and the SANDF rioting in 2009.

The work of the Commission was extensive and the amount of material it covered is remarkable. However it must be borne in mind that the Commission was established to investigate public violence in a particular context – which has changed – and to recommend on methods of preventing and curtailing public violence. A bias of focusing on the prevention of public violence and preserving the peace is thus evident in the multitude of reports produced by the Commission.[30] The RGA, and all legislation relating to curtailing public violence, when it breaks out, is entirely unrelated to the root causes of public violence, which principally is inequitable social conditions and a political culture which ignores those in desperate need of political space.

3 4 Incomplete Transition

The rise of public violence in South Africa ten years after the conclusion of the Goldstone Commission is testimony to the fact that the transition from an apartheid era of violence into a human dignity based society is fundamentally incomplete. The fact that the current government in so many respect mimics and has returned to the policies of the apartheid era government bears further witness to the incomplete transition. Further it is indubitable that a resurgence of public violence is related to, and aggravates, an erosion of the Rule of Law.

The importance of providing a framework in which public engagement in non-harmful demonstrations occurs is not limited to the importance such engagement plays in democracy but extends into the realm of serving as a valve against more harmful forms of demonstrative behaviour (culminating in riots).[31]

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27 Act 8 of 1947.

28 This act has fallen into disuse as a result of a failure by the Office of the President to appoint a successor to Goldstone J at the termination of the three year lifespan of office. I submit that it may be argued that the President has in fact failed in fulfilling a constitutional obligation to give the legislation effect but in reality the decision was taken on broad consensus at the time and it may equally be argued that the decision of *South African Association of Personal Injury Lawyers* v *Heath and Others* 2001 1 SA 883 (CC) requires a statutory reconsideration of the empowering act.

29 Act 139 of 1991.

30 The documents of the Commission are preserved by the Human Rights Institute of South Africa.

4 Value of Demonstrations in the Political Process – Consensus Building

The *Harvard Law Review,* in analysing the regulation of demonstrations in the United States as at 1967, poignantly stated that:

> Often a demonstration has significant publicity advantages over more conventional media of expression since it can attract extensive news coverage and widespread public interest; and for persons unpopular or unknown to the general public, or without financial resources, a demonstration may be the only effective means to publicise a message or reach a desired audience.[32]

Now whilst the term "demonstration" in the American usage is "gathering" in the RGA[33] the message is applicable, namely that unconventional or alternative expression channels are an invaluable tool in making democracy democratic. In the South African context the abundance of poverty is of specific significance – as evidenced by the growth in grass-roots service delivery protest actions. While the South African legislative process creates an array of public involvement opportunities many of these opportunities provide little help to individuals alienated from the government. It is for this reason that the strength of the RGA in its present form lies in its general holding of a right to participate in gatherings.[34]

4 1 The Peculiarity of those United States of America

The United States of America is a federal state employing as its basis for state law a notion of common law imported and modified (frequently by statute) from England.[35] The United States Supreme Court is charged with ensuring that all states uphold the Constitution of the United States. The Bill of Rights (the first ten amendments to the US Constitution) has effectively established a process by which the various idiosyncratic laws and practices of individual states in the United States are evaluated and

31 The RGA defines "riot damage" in a manner which I submit loses sight of the essence of what rioting is and has the unfortunate effect of failing to differentiate between an unruly crowd and a riotous assembly. Consider *South African Transport and Allied Workers Union and Another v Garvas* [2012] ZACC 13 particularly paragraph 95.

32 1967 *HLR* 1773.

33 In both American and British usage a demonstration containing few people is referred to as a "picket" regardless of whether conducted in a labour context or not.

34 This in my view is the saving grace of the RGA if not its implementation.

35 Louisiana is generally an exception to this rule. However Louisiana has adopted the English concept of breach of peace. Thus for the purposes of this article the rule can be held.

often struck for falling short of the provisions of that Constitution.[36] Thus, a multitude of legislative authorities enact laws regulating gatherings – usually proscribing political demonstration through statutes for trespass[37] or keeping of the peace.

The South African Constitution is different to the US Constitution in many respects however, key concepts can be extracted from US Jurisprudence. *The Harvard Law Review* analysis provides a starting point on extensive coverage of different situations and legislation – in this regard the federal nature of the United States is a help in furnishing comparative literature, as it provides a broad range of challenges to the US Courts. Furthermore the worry that, due to the resource imbalance in South Africa, a minority[38] is able to exert a disproportionate amount of political power is not unique to the South African context and is an invariable feature of any constitutional democracy.

Therefore the sentiments expressed in the *Harvard Law Review* that:

> Whenever the demonstrators are complaining of a bona fide wrong, society interests will be advanced if their grievance is brought to the public attention and relief granted; and the danger that demonstrating minorities may possess disproportionate political power would seem to be outweighed by the desirability of keeping the majority informed of minority complaints.[39]

are of great value to our fledgling democracy.

The present legal and political situation in South Africa does not prevent a militant mobile and unimaginative minority from exerting the same undue influence – on an art gallery for example. A gathering of 10,000 South African's still represent a fraction of a per cent of the population.

5 Should Demonstrations be Disruptive?

The legitimacy of regulating gatherings and demonstrations such as to prevent violence does not however automatically justify regulating gatherings and demonstrations such that they are not disruptive – what is the purpose of a demonstration other than to, in one manner or another, disrupt the intended audience such that they engage with the demonstration and its message? This is not to suggest that unduly disruptive behaviour should be permitted but rather that an evaluation of the purpose of the demonstration and the extent of disruption should be evaluated. More significantly, there is a pressing need to formulate a nuanced and critical understanding of what constitutes an actual threat to peace and safety in substitution of a superficial "peaceful gathering"

36 Within US jurisprudence the courts – particularly the federal courts "enjoin" state authorities against giving effect to unconstitutional law.
37 *Adderley v Florida* 385 US 39.
38 In the South African context the "white minority".
39 1967 *HLR* 1773.

approach. Is the expression of hate speech and the advocacy of causing harm against individuals or a section of society by a politically influential person not more riotous than the blockading of a road by marginalised people? The politically connected person will be afforded full protection by the state and may be held accountable by protracted legal proceedings whereas the grass-roots movement which blocks a road may be afforded the use of rubber bullets and water cannons on their persons.

Furthermore if we accept the view that:

> Functionally, disruptive demonstrations can be viewed as part of the process of social bargaining – a means of influence by groups who lack more positive methods of persuasion.[40]

It stands that the extent to which positive remedies are unavailable or felt to be unavailable will directly influence the extent to which violence will be resorted to. Thus enabling demonstrators to have the ability to feel that they are heard is valuable.

It is fortunate that the RGA does not give cause to prohibit any particular gathering or demonstration on the grounds of mere disruption but rather requires "serious disruption", furthermore the possibility of damage to some property is similarly not a definitive ground for prohibition.[41] This has not however prevented political authorities from seeking to suppress demonstrators and movements which challenge the cartel relationship currently enjoyed by political actors in South Africa.

6 The Value of (Injunctions) Interdicts and Judicial Sanction

Todd[42] places focus on the fact that the RGA provides rights to private persons who are negatively affected by gatherings – particularly riot damage – however, these rights are, in essence, not highly accessible. At the inception of the RGA a person (other than the authorised member of the police) was required to approach the high court (in terms of section 6(5) of the RGA) in order to have a condition imposed on a gathering.[43] The shift in the powers and procedures of the magistrates' courts – including the replacement of the old application rules (rule 55) with

40 Herman 1970 *Virginia LR* 215 216.
41 S 5(1), S 4(b) RGA.
42 Todd "Reading the Riot Act" 1994 *Juta Business LR* 93.
43 The RGA merely requires that an application must be brought to an "appropriate court". However read together with the prescription of making the application as "an urgent application in accordance with the Uniform Rules of the several Provincial and Local Divisions of the Supreme Court of South Africa" as well as the performance nature of such an order, the jurisdiction of the magistrates court would be difficult to establish and the clear purpose of "appropriate court" is to empower the labour courts.

provisions which mirror[44] the Uniform Rules applicable in the high court suggests that the magistrates' courts have definite jurisdiction to grant applications imposing conditions on gatherings. In reality however ordinary people suffer from the Ritz nature of the courts – particularly the High Court.[45]

This provision ties in to the American experience with disruptive gatherings. Certain demonstrations resulted in various resourced institutions approaching the courts for an injunction. Such injunctions were sought even where the conduct they were aimed at preventing was already illegal.[46] The reason for such applications lay in the various advantages of such an approach, most significantly the fact that "the actions of the police are cloaked with the court's prestige"[47] and the inadequacies (particularly in enforcement) of the existing laws and regulations proscribing the conduct. Ultimately if a gathering is placed under interdict and proceeds nevertheless, it being viewed as riotous (consequent upon being in contempt of court) should give affected persons greater rights.[48]

It is also possible to argue that the provisions of the RGA empowering the responsible officer to prohibit a gathering amount to bestowing the quasi-judicial power of injuncting an otherwise legal gathering.[49] However the grounds for prohibition available to the responsible officer are significantly more restrained than the available conditions for an interdict.

However, the cloak of judicial prestige is one that must systematically and periodically be lengthened. In the present South African context assaults on the judiciary have reached epidemic proportions. With regard to regulating demonstrations, the courts should be afforded an opportunity to be seen to be the guardians of freedom of expression. And in the same manner as they should be able to interdict gatherings and demonstrations they should be able to interdict and aide in preventing

44 To a large degree, again this is a subject warranting discussion. A particular possible problem arises in the extent to which magistrates' courts are able to operate outside of the rules and practice directive in contrast the High Court.

45 "Justice is open to all – like the Ritz hotel" Sir James Matthew (the exact origin of the amorphism is a subject of debate but the scope of attribution to the judge includes the *Collins English Dictionary* online http://www.collinsdictionary.com/dictionary/english/justice (accessed 2013-10-25)).

46 Herman 1970 *Virginia LR* 215 222.

47 *Idem* 223.

48 Consider *South African Transport and Allied Workers Union and Another v Garvas* [2012] ZACC 13 par 95 this may become illusionary, with the court arguably having upheld the constitutionality of the definition of riotous.

49 Consider s 5(1) RGA which specifically requires credible information brought under oath to exercise the power in essence the bringer of such credible information is an applicant for injunction. Somewhat perversely an applicant approaching the "appropriate court" does not have to satisfy the same standard as set out in s 5(1) "that the Police and traffic officers in question will not be able to contain this threat".

disruptions and threats against disruptions. It is perhaps a pity that none of the grass-roots movements who have found themselves in the firing range have visibly and successfully utilised judicial proceedings to secure an interdict against aggression from municipal law enforcement, private security firms or partisan groupings who introduce violence into gatherings.

Finally, problems for the cloak of judicial prestige arise from the fact that the RGA performs the function of ensuring the designation of a person as responsible for a particular gathering and thrusting onto them a particular liability framework. In this way a court is able to hold individuals accountable for civil wrongs – even with riot damage – but ignores the conduct of state actors.[50]

7 Transformation of Policing of Gatherings

The continuous institutional transformation, retransformation and reform imposed on the SAPS, together with the high turnover of national commissioners, makes evaluating how the SAPS police gatherings a complex exercise which warrants separate extensive coverage. However the fundamental question to consider is whether the SAPS have the capacity and nature to enforce the RGA and what policies and approaches towards the issues relating to public protest best align with a police service in a constitutional republic.

Commentators cautioned about the weakening of the capacity of the SAPS in public order policing as a result of various "costly" restructurings[51] during the reign of Jackie Selebi as national commissioner, and for this reason it was of even greater significance that the nature of demonstrations that take place be light on policing resources. With the rebellion of the poor starting in 2004 the weakening of SAPS capacity should have been accompanied by an increase in avenues and fora to promote non-violent actual engagement, this did not happen. 2008 witnessed the horrendous xenophobia related violence which required the deployment of the SANDF in order to maintain public order.[52]

In 2009 a politically mandated shift brought a return to militarism within the SAPS – which is particularly marked by the reintroduction of

50 COSATU in argument for *South African Transport and Allied Workers Union and Another v Garvas* [2012] ZACC 13 brought attention to the deficiency or perceived deficiency of state organs, particularly the SAPS, in preventing damages from occurring.

51 Oma *SAPS Costly Restructuring: A review of public order policing capacity* (2007).

52 On 2008-05-21 then President Thabo Mbeki authorised the deployment of SANDF to assist the police in quelling the violence. A comprehensive report on the violence was prepared by the Human Sciences Research Council *Citizenship, Violence and Xenophobia in South Africa* (2008) http://www.hsrc.ac.za/Document-2807.phtml (accessed 2012-08-04).

military ranks to the police service and the increased references to a police force. Further in 2010 the SAPS successfully discharged a massive exercise of public order and control in the form of the 2010 FIFA World Cup. These developments have however made no contribution towards aligning the SAPS with the protection of protestors or the promotion of free expression. Ultimately the prestige of the SAPS has been severely dented by successive scandals involving maladministration, brutality and corruption.

Establishing a framework in which free expression and political activity is promoted is not only possible but desirable for the prestige of the SAPS and its staff - the enhancement of the professional image of police officers (including metropolitan police and traffic police) as more than mere pedantic enforces of petty statutes is important. If the SAPS is to recover from the current taint that has been thrust upon it by the political climate of South Africa this should be the primary objective of senior management within the SAPS.[53]

8 Transformation of Local Government and the Problem of Municipalities

The Makana Municipality has structured an "application" form such as to approve gatherings; the Kouga Muncipality insist that a rather stringent 'Memorandum of Agreement" be entered into with the municipality; and the Mangaung Metropolitan Municipality require organisers to sign an indemnity for the municipality when seeking to hold a gathering. The attitude that the local political authorities determine who may protest appears to be the case across municipalities[54] and largely accounts for why certain grass-roots movements, on being wrongfully suppressed, resort to violent protest. Urgent intervention to capacitate municipalities to perform their mediatory function under the RGA is desperately required. Alternatively the RGA should be removed from the purview of municipalities entirely.[55]

53 Commissioner Nhlanhla Mkhwanazi who acted as National Commissioner during the suspension of Bheki Cele and before the appointment of Commissioner Riah Phiyega is the divisional commissioner responsible for public order policing. The commendable service of Commissioner Mkhwanazi gives some hope that with the support of the new National Commissioner will be able to establish a truly effective public order policing culture free of political interference.

54 The selection of these three municipalities simply emerges because each of the three represents the first instance of an approach to the RGA which I have encountered. Comprehensive research on municipal implementation of the RGA is a long overdue project of massive scope; see also Glasner 125.

55 For example in the United Kingdom notification must be given to the applicable police force and it may be questioned whether notification should be a requirement at all, for the purposes of this article I assume notification in itself not to be an infringement on free expression.

9 Improving the Provisions Pertaining to Demonstrations Outside Court Buildings

The provisions of Section 7 are not exceptionally onerous – although they have been made more onerous by the change in the application procedure applicable in the magistrates' courts[56] – but they do create problems: firstly the permission sought to demonstrate at a court-building is granted by the same court;[57] secondly the application process makes it difficult for a lay person to organise a demonstration or gathering (it must be added that there is no reason to assume assistance from court officials); thirdly the provisions effectively restrict access to the courts by the ordinary public wishing to express their views. Furthermore the courts (particularly superior courts) and their presiding officers should within the scope of regulating and upholding the integrity of their judicial process have the power to interdict conduct that undermines the judicial process, however, the holding of a demonstration outside of the physical premises of the court poses such a negligible threat to the judicial process and on the contrary promotes public engagement with the courts. Further a court can take judicial notice of the presence of demonstrators attending for a particular hearing without allowing such demonstrators to influence their decision. South African judges who have had the misfortune of having to preside at a high profile case have succeeded in balancing the interests of democratic engagement and the rule of law. I therefore submit that the present restriction system (rather than the provisions in the RGA) is unsatisfactory and is in fact almost unenforceable – many demonstrations and gatherings in contravention of the RGA do in fact take place.

10 Proposed Amendments

My proposed amendment are relatively simple: (a) insert the restriction pertaining to court buildings into Section 8 (as 8(11)); and (b) compose a new Section 7 in which an application to the district magistrate's court may be made such as to permit an allowance against the proscriptions in section 8 and/or the suspension of any particular "petty" laws or regulations in a particular public space provided that the applicant return the public space to the condition in which it was prior to the demonstration after its conclusion, and further provide that an official at the court must be designated to provide assistance in framing an application.

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56 Rule 55 has been reworked in its entirety by Notice 740 GG 33487 of 2010-08-23 to resemble the motion court rules of the high court. The subject of the extent to which the change in rules has unintended consequences is warrants its own discussion.

57 As a technical matter I submit that the permission is not actually granted by the court but rather by the district magistrate in a quasi-judicial capacity.

This would mean that a magistrate's approval would be required for all demonstrations or gatherings in which demonstrators cover their faces or wear certain uniforms or re-enact scenes that involve the utterance of words of hatred or which take place within the confines of 100 meters of a court-building.

An additional consideration that may be made is to empower magistrates to authorise the service of a petition on some person or representative of an organisation. Presently demonstrators and gatherers have no legal right to having their petition received by any person and there is no method of compelling an official to take any cognisance of demonstrator's demands. While it could be highly problematic to compel a private person (or organisation for that matter) to accept a petition, it seems entirely in accordance with our constitutional democracy to empower the courts to enforce acceptance of petitions by officers of state on behalf of some or other organ of state or government. Such enforcement can take a formalised and ceremonious form – for example the relevant high ranking public official may be required to grant a short (less than 5 minutes) audience to a delegation of the gathering or demonstration of no more than 2 persons accompanied by a Police Officer or the Sheriff, in which the petition is formally served on the official.

11 Effect of Proposed Amendments

The proposed amendment establishes a procedure by which demonstrations can be organised in a manner that would otherwise be in contravention of some or another petty[58] law after being sanctioned by the Courts in advance on application. Therefore organisers of a demonstration would be able to apply to the Court to sanction a demonstration in which the intended message is of some importance (to the applicants in the very least) but which causes some form of disruption or contravention.

The Courts in determining whether to grant an application for an extra-ordinary demonstration will have to perform a balancing exercise. I believe that South African jurisprudence is sufficiently equipped to judiciously perform this task and the abundance of international experience should not be underestimated. In particular whilst jurisprudence on the First Amendment to the United States Constitution cannot be uncritically transposed to the South African context, the complexity of the United States experience, and the fact that the process of balancing freedom of expression and political activity against the keeping of the peace by the State, means that there is ample relevant lessons to draw. In preparing this article I have drawn heavily from the

58 This is not to suggest that the ordinary operation of such a law is unimportant but rather that the law can be suspended without causing serious harm to the functioning of the state. Most petty laws will be of the nature of municipal by-laws and regulations.

Regulation of Demonstrations a note appearing in *The Harvard Law Review* in 1967; it is clear therefore that more than 40 years of American experience is available. Furthermore there exists an abundance of American legal literature – rather than simply tomes of social science material.[59]

Furthermore the courts can not sanction any unilateral conduct which deprives people of their rights. Thus vandalism of property cannot possibly be permitted – whereas the covering of a particular wall or object in a manner that makes it appear vandalised would be.

The decision to locate this power in the magistrate's courts may create problems and complications, however if consideration is given to the various empowerments already bestowed onto magistrates by statutes enacted in the last 15 years. This particular extension is not particularly significant – it may be appropriate however to require that the applications be heard by a specific pool of Magistrates.[60] The reason for entrusting the matter to the magistrate's courts lie in desiring to make the process accessible to people and cost-effective, furthermore magistrates are entrusted with a certain responsibility regarding the upholding of the peace.[61]

The underlying principles of the proposal mean that it has application beyond what is ordinarily considered to be a "political demonstration".

12 Innovative Demonstrations

A group of students forming an environmental society at Rhodes University embarked in 2008 on a gathering concerning the failings of Makana environmental policy (and policy implementation) in so far as the requirements of the ideal of Environmental Justice are concerned. The gathering was a street clean up march, in which gatherers collected refuse along a path in the under-catered eastern portion of central Grahamstown before placing the sealed refuse bags in front of City Hall, Grahamstown – in a manner that did not block any entrances. This particular gathering was perfectly licit due to the fact that the Municipal by-laws pertaining to dumping created the necessary lee-way by stipulating that any person who dumped any material in the area of the municipality would be required to remove such material within 7 days. Should the Municipality rectify this loop-hole or demonstrators in other municipalities find themselves with municipal by-laws that are less

59 In contrast to the South African situation in which there appears, on a preliminary search, to be no legal literature whatsoever – the Todd article cited is a very short informational piece.

60 The simplest approach would be to require the application be heard by regional civil magistrates and to impose the fairly burdensome application procedures set out in the *Civil Practice Directives for the Regional Courts in South Africa* (2010).

61 As justices of the peace; the nature of this charge within our constitutional dispensation is yet to be tested and certainly warrants attention.

forgiving this demonstration would not be possible. The efficacy of the demonstration was undeniable – the demonstrators had plans to remove the sealed bags from the outside of City Hall four days after the gathering, however the next morning (a Saturday) the refuse was removed by the Municipality – presumably they found the presence of refuse bags unsightly.[62]

Demonstrations demanding the removal of dictators and tyrants (such as Robert Mugabe) frequently possess an element of "stirring language" and may even be interpreted, quite reasonably, as inciting hatred for the dictator. However such demonstrations are far removed from any possibility of effecting violence – on the contrary demonstrators are more likely to be accosted violently, for their expression of opposition to such a tyrant than the tyrant is to be – regardless of how peaceful the demonstration is.

Artistic representations and historic re-enactments of episodes of violence similarly do not enjoy any protection under the RGA. It is my belief that provided the correct setting is established by applicants the expression and re-enactment of mankind's darker side is an important part of reconciling our shared humanity.

Finally it would presently not be possible to arrange a nudist gathering to march down High street (of Grahamstown or any other settlement with a High street) and whilst it may be perfectly sensible to ordinarily restrict such a gathering (on grounds of public morality and aesthetics) the present blanket prohibition undeniably restricts the freedom of expression of persons desiring to express their solidarity with the nudist cause. Furthermore a decadal nudist procession along High street may afford new life into the settlement where it is held – it may also serve the valuable social function of discouraging unorganised and illicit nude processions, by various persons in different degrees of intoxication, that occur on the odd occasion. What is significant however, is that the organisers of such a procession should be required to take satisfactory measures before making application to the court for such permission – a notice in the newspapers forewarning the community at the very least.

13 Conclusion

I have argued that whilst the RGA – but not necessarily its implementation – performs an admirable function in regulating gatherings in so far as the prevention of disruptions to the peace, the RGA fails to make any real headway in the progressive realisation of a truly democratic constitutional state. I have proposed that sections 7 and 8 of

62 As an aside the only disturbance during the gathering was the fact that a municipal official attempted to order the demonstrators not to place the bags at the location they had elected. A complaint was laid with the SAPS and after investigation referred to the Control Prosecutor who has declined to prosecute.

the RGA be amended, as whilst the dignity of the courts is of paramount importance, the present provisions of the RGA are not in sync with our constitutional jurisprudence. Amending the RGA such as to give courts greater powers to facilitate free expression and participation would, I submit, be highly beneficial to South Africa.