

Understanding the constitutional right to protest as a tool for social justice

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1 Introduction

John Rawls views social justice as equivalent justic, and he posits it is predominantly applicable to those seeking equality and access to human rights, especially to the most marginalised members of society.¹ Protest actions played a vital role in attaining our democracy and constitutional dispensation.² The right to protest as a tool for social change is a vital mechanism to achieve social visibility and claim a seat around the table of human rights.³ It is for this reason, amongst many others, that the right to protest is considered a gateway right to social justice.⁴ The elements of democracy include equality, which encompasses social justice, and where the right to protest does not conform with the Constitution, it may result in a missed opportunity for social justice.⁵

Though the right to protest is protected under international and domestic law, it is protected to the extent that it is peaceful and the

1 J Rawls 'Social justice' <https://www.britannica.com/topic/social-justice> (accessed 9 June 2025).

2 S Mottair 'South Africa's protest tactics: evolution and expansion' (2025) 1 *South African Journal of Political Studies* 2.

3 T Madlingozi 'Social justice in a time of neoapartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stell LR* 123.

4 S Malematja 'Who guards the guardians? A poem about the role of the Independent Police Investigative Directorate in denying the gateway right to protest and to access justice' (2020) 1 *Sabinet African Journal Economic and Social Rights Review* 16.

5 J Day '14 Principles of Democracy: What makes a democracy a democracy? Here are the 14 basic principles that define and support a democratic society' <https://www.liberties.eu/en/stories/principles-of-democracy/44151> (accessed 9 June 2025).

participants are unarmed.⁶ Notwithstanding this, it has been argued that the right to protest is under threat and repression and faces multiple barriers, which include police brutality, arbitrary arrests, court interdicts, and the *mala fide* interpretation and application of the Regulation of Gatherings Act 205 of 1993.⁷ In South Africa, the right to protest is deeply rooted in social justice; the right is utilised to fight for equality about access to socio-economic rights and participation in democratic processes.⁸

2 A historical overview of the right to protest

The Native Laws Amendment Act 77 of 1957 (Native Laws) was promulgated to regulate social contact between races and, most intentionally, to ensure that the Apartheid government had unrestricted control over gatherings by Black people. Section 29(d) of the Native Laws, the Native Laws Ministry had the prerogative to direct any gathering, for church or otherwise, in an urban area to cease if, in the opinion of the Minister, such gathering caused a nuisance and undesirable for Black people to gather in numbers.⁹ Until then, churches were safe spaces for political discourse and dissent.

Paragraph B of the Native Laws was titled 'Drastic restrictions on individual freedom of assembly, movement and residential rights of urban Africans,' and section 26(c) prohibited gatherings or assemblies by Black people without the approval of the Minister. Unapproved gatherings by Black people were punishable criminal offenses, and the sentence ranged between three years imprisonment or ten lashes or both, a jail term of 3 three years and ten lashes.¹⁰

In the cold winter of June 1955, over 3000 people gathered at a dusty playfield in Kliptown Soweto 'to co-create and democratically adopt the Charter.'¹¹ It was the first time in the history of a multi-racial society that different people from all walks of life met as equals to draw up a living document advocating for, *inter alia*, equality amongst all races.¹² The

6 Section 17 of the Constitution of South Africa, 1996.

7 J Duncan *Protest Nation the right to protest in South Africa* UKZN Press 2 (2016).

8 As above, at 3. Also, see Madlingozi (n 3) 128.

9 Section 29(d) Native Laws Amendment Act 77 of 1957.

10 Section 1 Criminal Law Amendment Act 8 1953.

11 Department of Education 'History of the Freedom Charter' (2005) 2.

12 As above.

participants of the well-presentative gathering rejoiced, sang songs, and had lunch together.¹³ It was indeed a remarkable atmosphere and partly unbelievable that a multi-racial nation governed by oppressive laws could meet as equals and discuss the future of a country.¹⁴

The gathering was preceded by several strikes and protests against oppressive laws; in 1950, residents of Alexandra township in the North of Johannesburg protested against discriminatory laws; in that same year, people protested in defense of free speech, and later in that year, there was a national protest to mourn those killed in protests.¹⁵ The call for an equal society and abolishing oppressive laws was getting louder.

On 16 June 1976, the Action Committee of the South African Students, supported by the Black Consciousness Movement, peacefully protested against the Apartheid government's decision to make Afrikaans the primary mode of instruction in the education system.¹⁶ On their way to gather at the Orlando Stadium, the group of peaceful protesters were intercepted by heavily armed police who opened fire by shooting the protesting students with teargas and live ammunition.¹⁷ The uprising *inter alia* highlighted that the Apartheid government was not prepared for a South African that embraced social justice, equality, human dignity, and self-actualisation of the marginalised members of society. The Apartheid government was under no obligation to show that the protest was intercepted because it interfered with public tranquility.¹⁸ En route to the place of gathering, the protesters encountered a destructive cloud of tears, which was succeeded by live ammunition.¹⁹ The South African Police took a similar approach in the Sharpsville massacre.²⁰

13 Department of Education (n 11).

14 S Zubane 'Unpacking the legacy of the freedom charter coming into democracy: A review of literature' (2021) *Adri Journal of Arts and Social Sciences* 2.

15 Department of Education (n 11).

16 <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 24 February 2025). Also, see the Bantu Education Act 74 of 1953.

17 <https://www.sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 24 February 2025).

18 South African History Online <https://sahistory.org.za/article/june-16-soweto-youth-uprising> (accessed 9 June 2025).

19 As above.

20 Canadian Museum for Human Rights 'The Sharpsville Massacre' <https://humanrights.ca/story/sharpsville-massacre> (accessed 9 June 2025).

3 An analysis of the applicable legal framework

3.1 International law

The right to peaceful protest is recognised at the international level. The right in question was first recognised in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, the same year in which the Afrikaner Nationalist Party legalised the Apartheid system.²¹ Article 20 (1) of the Universal Declaration of Human Rights states that ‘everyone has the right to freedom of assembly and association.’ It is important to underscore that the Universal Declaration of Human Rights is not a treaty and, therefore, lacks binding effects. Nevertheless, it is persuasive and guides in relation to fundamental human rights, including the right to peaceful assembly. In 1998, the government of South Africa ratified the International Covenant on Civil and Political Rights (ICCPR), which came into force on 23 March 1976.²² Article 21 of the ICCPR provides that;

‘The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.’

As a member state, South Africa has a legally binding obligation to recognise the right of peaceful protest and ensure that it does not impose arbitrary restrictions on the right. Whilst restrictions may be imposed on the right of peaceful protest, such restrictions must be aimed at maintaining public tranquility and ensuring that those participating in a protest do not infringe on the rights of other members of society, including their property. Moreover, the State is required to ensure the protection of the participants of a protest and a tolerance of the fact that protest actions often disrupt vehicular and pedestrian movement, including economic activities.²³ The International Convention on the Elimination

21 Universal Declaration of Human Rights 1948.

22 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 23 February 2025).

23 Human Rights Committee International Covenant on Civil and Political Rights, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 7.

of All Forms of Racial (CERD), which South Africa ratified in 1998, places a legal obligation on member states to ensure the enjoyment of the right to freedom of peaceful assembly and association.²⁴ The right to peaceful protest is espoused to the right to freedom of association and freedom of expression, which are vital for the proper functioning of any democratic society.

The African Charter on Human and People's Rights (the Charter) also recognises the right to protest. Article 11 of the Charter provides that 'every individual shall have the right to assemble freely with others.' The exercise of this right shall be subject only to necessary restrictions provided for by the law enacted in the interest of national security, the safety, health, ethics, and the rights and freedoms of others. Restrictions on the right to protest must be in conformity with the law and permissible to the extent that they serve a legitimate purpose.²⁵

Article 11 of the European Convention on Human Rights (Convention) confers protection on the right to protest, provided that it is within the confines of the law. It provides as follows:

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary for a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police, or of the administration of the State.'

It is a well-appreciated practice that peaceful protests are organised in advance to allow law enforcement officials to put measures in place to protect the participants. This does not imply that spontaneous protests *de facto* lose the protection of the law.

24 Article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965. Also see <https://indicators.ohchr.org/> (accessed 23 February 2025).

25 Section 5 of the Regulation of Gatherings Act 205 of 1993.

3.2 Domestic law: The Constitution of South Africa, 1996, and The Regulation of Gatherings Act 205 of 1993

Section 17 of the Constitution goes beyond the above-discussed international law treaties to the extent that in requiring participants of a protest action must be unarmed during a peaceful protest action. The right to protest is regulated by the Regulations of Gatherings Act 205 of 1993 (the Regulation of Gatherings Act). It places a duty on the State to protect the participants.²⁶ Furthermore, the Regulation Gatherings Act requires participants of a gathering to conduct themselves peacefully and have due consideration of the rights of other members of society.²⁷ It is important to note that interference with this fundamental human right by the State is permissible to the extent that a protest degenerates into violence, thus posing a risk of harm to the participants and the surrounding society.²⁸

Section 3 of the Regulation of Gatherings Act provides the notification process to be followed before convening a protest. It places an obligation on the convener to give a written notice of the intended protest and to do so seven (7) days before the intended day of the protest.²⁹ Where the convener cannot comply with the seven (7) days notification period, he or she must give notice no later than forty-eight (48) hours before the intended date of the protest.³⁰ Where the requisite notice is given less than forty-eight (48) before the commencement of the protest, the responsible officer may prohibit the protest.³¹ Section 3 of the Regulation of Gatherings Act further provides a notification form, which must include the convener's identification and contact details, the duration of the protest, place, date, and time, and an anticipated number of participants.³²

According to the provisions of section 4 of the Regulations Gatherings Act, a responsible officer has the discretion to call for a meeting between him or herself, the convener, the chief marshal, and

26 Preamble of the Regulation of Gatherings Act 205 of 1993.

27 Section 8 of the Regulation of Gatherings Act 205 of 1993.

28 Section 9 of the Regulation of Gatherings Act 205 of 1993.

29 Section 3(1) of the Regulation of Gatherings Act 205 of 1993.

30 Section 3(2) of the Regulation of Gatherings Act 205 of 1993.

31 Section 3(2) of the Regulation of Gatherings Act 205 of 1993.

32 Section 3(3) of the Regulation of Gatherings Act 205 of 1993.

an authorised member.³³ The purpose of the meeting is to discuss any amendments to the notice and to impose conditions to the protest where necessary.³⁴ During the meeting, the responsible officer must ensure that discussions occur in good faith, and where consensus is not reached on any aspect, conditions may be imposed to safeguard against uncontrollable impediments of vehicular and pedestrian traffic or injury to property and persons or access to property and workplaces.³⁵

A protest may be prohibited if credible information made under oath has been received by the responsible officer, indicating that the intended protest will result in severe traffic disruption and harm to persons and that law enforcement will not be able to contain the risk of harm.³⁶ It is clear that the right to peaceful protest is legally protected, and its limitation is guided by the law, including the internal qualifiers enshrined in section 17 of the Constitution.

4 The scope of the right of peaceful protest

The United Nations Human Rights Committee on ICCPR provided a two-pronged conceptual approach to the right to protest.³⁷ Firstly, it must be determined whether the conduct falls within the scope of protection accorded under Article 21 of the ICCPR to the extent that it amounts to a peaceful protest.³⁸ Secondly, it must be established whether any restrictions applied to the right serve a legitimate purpose.³⁹ Section 17 of the Constitution provides that; ‘everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’⁴⁰

33 Section 4(2)(b) of the Regulation of Gatherings Act 205 of 1993.

34 Section 4(2) of the Regulation of Gatherings Act 205 of 1993.

35 Section 4(2)(d) and 4(4)(b) of the Regulation of Gatherings Act 205 of 1993. Also see S Malematja & T Simelani ‘EMPD Strike: A case of double standards?’ <https://www.news24.com/opinions/analysis/analysis-empd-strike-a-case-of-double-standards-20250429> (accessed 9 June 2025).

36 Section 5(1) of the Regulation of Gatherings Act 205 of 1993.

37 International Covenant on Civil and Political Rights Human Rights Committee General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 2020 11.

38 As above.

39 International Covenant on Civil and Political Rights Human Rights Committee General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 2020 11.

40 Section 17 of the Constitution of South Africa, 1996.

The drafters of the South African Constitution did not miss the opportunity to domesticate the right to peaceful assembly. It is important to note that a protest that is not peaceful loses the protection of the Constitution. Firstly, a protest is non-peaceful if there are threats or acts of physical violence against a person or property.⁴¹ Additionally, even a peaceful protest that interferes with the rights of members of society can sustain a criminal charge of the common law offence of public violence.⁴² This assertion is elaborated later in this chapter with particular reference to *Ndela & Others v The State Case No. SH187/2019*.

In *South African Transport and Allied Workers Union and Another v Garvas and Others*, Mogoeng CJ, as he was then, penned as follows:

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

Under apartheid, the State took numerous legislative steps to regulate strictly and ban public assembly and protest. Despite these measures, total repression of freedom of expression through protest and demonstration was not achieved. Spontaneous and organized protest and demonstration were important ways in which the excluded and marginalised majority of this country expressed themselves against the apartheid system, and was part and parcel of the fabric of the participatory democracy to which they aspired and for which they fought.⁴³

It has been accepted that protest actions are disruptive in nature; therefore, questions have been raised about the level of peace required

41 S Woolman 'Assembly, demonstration and petition' In I Currie & J De Waal (sixth edition) *The Bill of Rights Handbook* (2013) 384.

42 *Ndela & Others v The State Case No. SH187/2019*; Stanley Malematja 'The fine legal line between legitimate protest and criminality' <https://www.dailymaverick.co.za/article/2021-05-20-the-fine-legal-line-between-legitimate-protest-and-criminality/> (accessed 17 February 2025).

43 *South African Transport and Allied Workers Union and Another v Garvas and Others* (CCT 112/11) [2012] ZACC 13 paras 61 and 121.

to retain constitutional protection.⁴⁴ On the other hand, conveners and participants have raised concerns that engaging in peaceful protest actions has often not yielded fruitful results or obtained the appropriate attention.⁴⁵ Consequently, when people engage in non-peaceful conduct during protests, their grievances are often given the necessary attention. However, such conduct exposes them to the harsh consequences of the criminal justice system, resulting in unresolved grievances.⁴⁶

In the case of *Fourways Mall (Pty) Ltd v South African Commercial Catering*, Judge Claassen found that any form of action during a protest that leads to assault, intimidation, and blocking of entrances and exits, thus preventing members of the public from enjoying freedom of movement loses the protection of the Constitution.⁴⁷ As a result, such conduct is considered to be violent as opposed to being peaceful.⁴⁸ Peaceful protest actions are pivotal because they enable the most marginalised members of society to express their views and participate in democratic processes.⁴⁹ Essentially, a non-peaceful protest loses the Constitution's and international law's protection. A violent protest is one in which the participants use physical force with the likelihood of causing death, injury, or damage to property.⁵⁰ According to the United Nations Committee on the ICESCR, 'mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to violence.'⁵¹

In the case of *Ziliberberg v Moldova ECHR*, the European Court of Human Right found that *although* the unauthorised assembly became violent, there was no evidence that the applicant had engaged in any

44 Woolman (n 40) 384.

45 Duncan (n 8) 2.

46 Abu (n 2) El-Haj 963.

47 *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 (3) SA 752 (W).

48 Woolman (n 40) 384. Also see W Hoffmann-Riem *Reihe Alternativkommentare Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (1984) 753.

49 Human Rights Committee International Covenant on Civil and Political Rights, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 1.

50 Human Rights Committee International Covenant on Civil and Political Rights, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 16. Also see Woolman (n 40)

51 Human Rights Committee International Covenant on Civil and Political Rights, General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 15.

violent act.⁵² In light of that, the Court noted that '[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour.'⁵³ What transpired was that a peaceful protest degenerated into violence after certain participants pelted stones and eggs at a municipal building, and law enforcement officers intervened and arrested the applicant.⁵⁴ The applicant argued that his arrest, prosecution, and conviction violated his right to peaceful assembly and that his participation in the protest did not pose a risk to public order.⁵⁵

Secondly, participants must be unarmed. In the unreportable judgment of *Sasol Mining (Pty) Ltd v Amcu obo Buthelezi and 9 Other and Commission for Conciliation, Mediation and Arbitration and Commissioner R Diben N.O. Case no: JRI468/18* an interdict was obtained against striking workers for carrying 'dangerous weapons' during a strike against the employer.⁵⁶ Despite the interdict and picketing rules, some of the striking workers were found in possession of sticks, sjamboks, and knobkerries during the strike and were instructed by the police to cease carrying such objects.⁵⁷ The Commission for Conciliation Mediation and Arbitration found that the mere carrying of the above-listed objects was not conclusive evidence that the striking workers conducted themselves in an unlawful manner.⁵⁸ Consequently, the lack of intimidation and the threat of harm, as well as the knobkerries, sticks, and sjamboks-carrying striking workers, survived the test for an unarmed protest.

Davey AJ penned the Labour Court judgment and categorically stated as follows:

52 *Ziliberg v Moldova* ECHR (Application No 61821/00) (4 May 2004) para 2.

53 As above.

54 As above.

55 *Ziliberg v Moldova* (n 51) at para 1 and 2. Article 11(1) of the European Convention on Human Rights provides that Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions to protect his interests.

56 *Ziliberg v Moldova* (n 51) at para 30.

57 *Ziliberg v Moldova* (n 51) para 31.

58 As above.

I would like to record that this judgment should not be viewed as authority for the proposition that striking employees who carry sticks, knobkerries, and sjamboks, among other objects, that may be used as weapons in a picket, are not guilty of misconduct or intimidation. It is a serious concern that many strikes in South Africa are marred by acts of violence and intimidation (including carrying weapons that could be used as weapons in a picket). This conduct undermines the purpose of a picket and strike action and constitutes misconduct.

The carrying of the listed objects, including the wearing of protective gear by protesters, arguably indicates readiness to engage in violence, thus may lead to the protest falling short of the protection under section 17 of the Constitution.⁵⁹

5 Barriers against the right to protest: a case study approach

Whilst there is an acceptance that protest actions are disruptive, particularly in relation to forceful but non-violent actions such as blockage of roads with stones and tyres, a peaceful protest may still sustain a charge of public violence.⁶⁰ Consequently, the common law offence of public violence has often led to the stifling of non-violent protest actions. Public violence is defined as ‘the unlawful and intentional commission, together with a number of people, of an act/s which assume serious dimensions and which are intended forcibly to disturb public peace and tranquility or to invade the rights of others.’⁶¹ In the Supreme Court of Appeal judgment of *Le Roux v The State*, the Appellants 2, 3, 4 and 7 successfully appealed against their conviction and sentence on charges of public violence.⁶²

The appellants were part of patrons enjoying themselves during a public holiday at a restaurant in Haartebeespoort in Gauteng.⁶³ In the turn of events, a fight ensued, and the restaurant furniture and some patrons suffered injuries and the appellants were alleged to have been some of the perpetrators.⁶⁴ In the appeal court, the appellants submitted that their

59 Woolman (n 40) 384.

60 S Malematja ‘The fine legal line between legitimate protest and criminality’ *Dailey Maverick* (2021) <https://www.dailymaverick.co.za/article/2021-05-20-the-fine-legal-line-between-legitimate-protest-and-criminality/> (accessed 9 June 2025).

61 J Burchell *Principles of Criminal Law* (2005) 3 867; *S v Mati* 2002 (1) SACR 323 (C) at 328D-E.

62 *Le Roux v The State* [2010] ZACC 7 para 1 and 5.

63 As above para 3.

64 As above para 3.

actions did not sustain a conviction on the charge of the common law offence of public violence. The State failed to adduce evidence that the appellants were active participants acting with a common purpose.⁶⁵ The Court noted the definition of public violence as preferred by *Snyman*. It highlighted that there must be proof that the appellants acted in one mind to disrupt public peace and security.⁶⁶

In the case of *S v Mgedezi*, the Appellate Division, as it was then, was faced with a conundrum where there was prior agreement and intention to commit the common law offence of public violence.⁶⁷ The Court held that the test is to determine whether there is sufficient evidence to conclude that a person can be held criminally liable on the grounds of active participation in common purpose for a conduct which developed at the scene.⁶⁸ The Court further noted that the concept of active agreement requires that there must have been a prior agreement to commit public violence.⁶⁹ This requirement is pivotal in relation to participants of a protest action who genuinely partake in a protest action with the intention to express their views and seek accountability and social justice.

Furthermore, it protects peaceful actions from being hijacked by external forces to undermine the plight of the participants and suppress their views of a peaceful protest. It is noteworthy that the provisions of section 9 of the Regulation of Gatherings Act empower a law enforcement officer to order an individual interfering with a protest action to cease such conduct.⁷⁰ Where such an order is disobeyed, the perpetrator may be arrested, and the protest may be observed to continue peacefully.⁷¹

The fight for social justice and the lack thereof affects everyone, but some members of society, particularly women and children, are impacted in a greater proportion. In the case of *Ndela & Others v The State*, 29 women were charged with public violence after they requested and caused a truck driver to block a road with his truck during a service delivery protest they had convened, thus making it impossible for people to use

65 As above para 3.

66 As above para 5.

67 *S v Mgedezi* 1989 (1) SA 687 (A) at page 703B.

68 *S v Mgedezi* 1989 (1) SA 687 (A) at page 705G.

69 *S v Mgedezi* 1989 (1) SA 687 (A) at page 706B.

70 Section 9(1)(d) of the Regulation of Gatherings Act 38 of 1993.

71 As above.

the public road.⁷² It was on 29 October 2018 when the *Right2Protest Project* received a call pertaining to the arrest and detention of women and mothers of minor children who convened and participated in a protest for lack of service delivery, particularly access to water and electricity.⁷³ All the women entered a plea of guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1997 and were all denied bail.⁷⁴ This ultimately led to their conviction.⁷⁵

It was common cause that weeks before the protest, the community's plight fell on the proverbial deaf ears as their local municipality, which is responsible for ensuring service delivery, turned the proverbial blind eye.⁷⁶ Local municipalities across the country have mastered the art of ignoring the plight of society with the appreciation that a protest is inevitable and often results in law enforcement taking action against protesters. This allows local municipalities to escape accountability and, consequently, protesters being criminalised and falling victim to police brutality.⁷⁷ A significant proportion of the women (Appellants) were unemployed mothers and were detained for approximately two months; thus, their children were denied parental and family care.⁷⁸

Our law is crystal clear on pre-trial detention to the extent that it impacts several fundamental rights, including the right to freedom of liberty, human dignity, and the child's best interests.⁷⁹ The question before the High Court was whether there was a nexus between non-violent disruptive protest actions and the common law offence of public

72 Case No. SH187/2019; Appeal No. AR252/2019 at para 2 and 9.

73 S Malematja & B Zasekhaya 'The State of Protest Report: *Right2Protest Project* report on the state of protest in South Africa' (2019-2020) <https://www.r2p.org.za/wp-content/uploads/2020/06/State-of-Protest-Report2016-2017.pdf> 23 (accessed 12 March 2025).

74 Case No. SH187/2019; Appeal No. AR252/2019 at para 2.

75 Case No. SH187/2019; Appeal No. AR252/2019 at para 2.

76 Case No. SH187/2019; Appeal No. AR252/2019 at para 8; Section 152(1) (a) and (b) of the Constitution, 1996 provides that objects of local government are, respectively, to provide a democratic and accountable government for local communities and to ensure the provision of services to communities in a sustainable manner.

77 S Malematja 'The fine legal line between legitimate protest and criminality' <https://www.dailymaverick.co.za/article/2021-05-20-the-fine-legal-line-between-legitimate-protest-and-criminality/> (accessed 17 February 2025).

78 Case No. SH187/2019; Appeal No. AR252/2019 at para 22; *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) 232 (CC) at para 29; *S v M* 2008 (3) SA 232 (CC).

79 Section 35(1)(f) of the Constitution of South Africa, 1996.

violence.⁸⁰ Put differently, the Court was asked to determine if a protest that complies with section 17 of the Constitution to the extent that it is peaceful (non-violent) and participants are unarmed states a charge of public violence. The Court noted the judgment of *S v Mei* wherein the definition of 'violence' was unpacked to include acts by a group of people that seriously encroach on the rights of others and disturb public tranquility.⁸¹

The High Court found that whilst there was no act of violence, 'the use of force or, as an alternative, the invasion of the rights of others meets the criteria if the commission of the act assumes serious dimensions.'⁸² Furthermore, it was noted that when the truck driver was instructed to park his truck in a manner that obstructs traffic, there was a clear intention on the part of the protesters to infringe on the rights of others.⁸³ Notwithstanding that, the Court High noted that it was dealing with disgruntled and most marginalised members of society, who, in the quest for social justice, conducted themselves in a manner that encroached on the rights of others.

The Magistrate's Court lacked the legroom to properly consider the socio-economic status of the women and the factors that contributed to the peaceful but rather disruptive protest action. The Magistrate Court confined its findings to the admission of guilt statements made by the *Appellants*. It was for this reason that *Gorven J* upheld the appeal against the sentences imposed by the Magistrate's Court and replaced the sentences with a one-year imprisonment sentence wholly suspended for a period of three years.⁸⁴

The misapplication of the Regulations of Gatherings Act in local municipalities and metros across the country has created a hurdle in relation to the right to protest. There is a concern about the notification process in section 3 of the Regulations of Gatherings Act being treated as an application. The impact is that the convener must await approval from the responsible officer prior to embarking on a protest action. It must be clarified that a protest is conditional to an application and subsequent

80 Case No. SH187/2019; Appeal No. AR252/2019 at para 6.

81 As above, para 10.

82 As above, para 11.

83 As above, para 12.

84 As above, para 25.

approval provided to the extent that it is intended to take place in the vicinity of court buildings, Parliament, or the Union Buildings.⁸⁵

In Vaal, a convener gave notice on behalf of the *Vaal Environmental Justice Association* with the intention to march to a Sasol Power Plant to hand over a memorandum of demands.⁸⁶ The responsible officer instructed and demanded that the convener produce a confirmation letter from the prospective recipient of the memorandum of demands that he or she be available to receive the same.⁸⁷ Put differently; the responsible officer subjected the exercise of a fundamental gateway right to the availability of an individual and permission-seeking process.

A High Court judgment in the matter of *Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another* found that the imposition of a fee against a convener was *ultra vires* the Regulation of Gatherings Act and ultimately unconstitutional.⁸⁸ It was common cause that the conveners who gave notice of protest action within Johannesburg in terms of section 3 of the Regulation of Gatherings Act were called for a meeting in terms of the provisions of section 4 of the same piece of legislation. During such meetings, it was brought to the attention of the respective convener that there was a payable fee.⁸⁹ It was clear that failure to pay the fee would not result in a prohibition of the protest but rather that no State protection would be offered to the protest participants. *Victor J* ultimately ruled that the exercise of the right to protest is not subject to a fee and that the protesting enables members of the society to hold the government accountable.⁹⁰

In the landmark judgment of *Mlungwana and Others v State and Another*, the apex Court had to decide on whether section 12 (1) (a) of the Regulation of Gatherings Act limits the right entrenched in section 17 of the Constitution and if so, whether the limitation is

85 Section 7 of the Regulation of Gatherings Act 205 of 1993.

86 S Malematja, O Ntshingila, V Yokwe & B Zasekhaya 'The State of Protest Report: Right2Protest Project report on the state of protest in South Africa South Africa' (2020-2021) 11 <http://www.r2p.org.za/wp-content/uploads/2021/12/State-of-Protest-Report-2021.pdf> (accessed 12 March 2025).

87 As above.

88 *Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another* (49197/2021) [2022] ZAGPJHC 388 at para 22.

89 Malematja et al (n 85).

90 *Right to Know Campaign* (n 87) at para 47, 48 and 62.

reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.⁹¹ The *Applicants* contended that the criminalisation of a convener for failure to give notice was unconstitutional because it negated the fact that a notification is not a prerequisite for the constitutional protection of a protest.⁹² On the other hand, the *Respondent* argued that the impugned provision does not limit the right to protest as it serves as a mere regulatory measure.⁹³

The Constitutional Court noted that ‘everyone’ in section 17 must be interpreted to include every person or group of persons – young or old, poor or rich, educated or illiterate, powerful or voiceless. Whatever their situation in life, everyone is entitled to exercise the right in section 17 to express their frustrations, aspirations, or demands.⁹⁴ Furthermore, the State must be tolerant, especially regarding the right in question, as it enables people to attain social justice. It was further noted that a legislative provision that would otherwise subject a convener to the criminal justice system for the mere failure to give notice does not resemble tolerance by the State.⁹⁵

Petse AJ noted that:

Section 17 provides for a solemn undertaking to citizens and non-citizens alike that everyone has a right, peacefully and unarmed, to assemble, demonstrate, picket, and present petitions.⁹⁶ The language in section 17 is unambiguous: Everyone has a right to engage in any of the activities that it spells out. ‘Everyone’ is a word of wide import. In its ordinary sense, it is all-inclusive. The only internal qualifier contained in this constitutional provision is that anyone exercising this fundamental right must do so peacefully and unarmed.

The right to protest is deserving of the constitutional protection it enjoys. The right question is interlinked with the right to freedom of association, freedom of expression, and political participation, and it is accessible to everyone.⁹⁷ Whilst the right to be subject to restrictions must be legitimate and imposed without any form of discrimination,

91 *Mlungwana and Others v The State and Another* [2018] ZACC 45 para 1.

92 As above para 4.

93 As above para 5.

94 As above para 43.

95 As above para 54.

96 As above 62.

97 Sections 16, 18, and 19 of the Constitution, 1996; International Covenant on Civil and Political Rights Human Rights Committee General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 2020 9.

there must be some level of leniency to the extent that the safety of the participants is guaranteed and the rights of others are protected.⁹⁸

6 Conclusion

The right to protest is undeniably important for social justice and participatory democracy. Whilst the right is protected at both an international and domestic level, it is nevertheless exposed to a number of barriers, as explained above. The judicial approach to matters involving the right to protest has been meticulous in mapping out the scope of the right and its significance to democracy. As a young and fragile democracy riddled with inequalities and a lack of social justice in relation to fundamental rights on an equitable basis, South Africa needs to ensure the complete protection of the right to protest and that the restrictions imposed are aimed at facilitating the right in a peaceful manner.⁹⁹

Lastly, it is prudent to acknowledge that how court judgments are written influences how protest actions are perceived. Where the cause of the protest is outlined correctly, it helps identify and determine the causes of social injustice and solutions thereof. Furthermore, it enables discourse that encourages peaceful protests as a tool for social justice and collectively holding the government accountable for the realisation of other rights in the Bill of Rights, through but not limited to service delivery.

98 International Covenant on Civil and Political Rights Human Rights Committee General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 2020 9.

99 International Covenant on Civil and Political Rights Human Rights Committee General Comment No. 37 (2020) on the right of peaceful assembly (article 21) 2020 36.