

Chapter 43

Freedom of Assembly

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43.1 Introduction*

Protests, assemblies and mass demonstrations played a central role in South African liberation politics. Now that the battle for liberation has been won, and all possess the franchise, there might be a sense that demonstrations have diminished in pitch and frequency. They have.

Still, mass protests continue to be an important form of political engagement. Organized labour, landless people, anti-privatisation movements, students, squatters, and even the police, have used demonstrations to press their demands.

The continued vitality of assembly in the newish South Africa bespeaks its essential role in any liberal democracy.¹

Freedom of assembly creates the space both to speak and to be heard. A single voice is likely to be drowned out in our polity. A choir is far more likely to get its message across.² Moreover, power in modern nation states invariably concentrates in and around large social formations: meaningful dialogue between these large social formations often requires the collective efforts of demonstrators, picketers and protestors.³

Consider, for a moment, the nature of this particular species of communicative action: dialogue. The genus speech — and by that I mean all forms of symbolic representation — makes us human. Dialogue raises us above the primitive. For it is only in dialogue with competent speakers that we are able to assert truth claims about the physical, and moral claims about the social. Only dialogue enables us to wring out of our shared endowment of working assumptions and half-truths the agreements that define the ends of our polity. This is a windy way of saying that dialogue, not the franchise, is the sine qua non of democracy. Some confuse this indispensability with instrumentality. That gets things back to front. Without

* I would like to thank Simon Deloneg for helping me to better understand how assembly law in South Africa works — and doesn't — in practice.

dialogue, there are no human subjects, no citizens. The relationship between democracy and dialogue is thus best understood in terms of reciprocal effect: dialogue is a necessary, but not sufficient, condition of democracy; democracy deepens our capacity for dialogue.

By foregrounding dialogue, I want to shift our attention, albeit briefly, away from the standard account, and that chestnut of democratic theory which tells us that

1 *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) at para 50 ('That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, *assembly*, association and political participation protected by ss 15 - 19 of the Bill of Rights.' (Emphasis added).) See also *Handyside v United Kingdom* (1976) 1 EHRR 737 (European Court describes assembly as an ineradicable feature of democratic politics); *Johnson v Cincinnati* 310 F 3d 484 (6th Cir 2002) citing *Shapiro v Thompson* 394 US 618, 643 (1969)(Court recognizes that the constitution's commitment to liberty — freedom *simpliciter* — must protect rights to travel through public spaces and on roadways and rights to protest in those same spaces. Such rights are 'virtually unconditional.')

2 See *S v Turrell and Others* 1973 (1) SA 248 (C), 256 ('Free assembly is a most important right for it is generally only organized opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.')

3 See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('SANDU') at para 8 ('[F]reedom of expression [FC s 16]. . . freedom of religion, belief and opinion [FC s 15], the right to dignity [FC s 10], as well as the right to freedom of association [FC s 18], the right to vote and to stand for public office [FC s 19] and *the right to assembly* [FC 17] . . . taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where these views are controversial.' (Emphasis added).) See also *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T); *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC); *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC).

although 45 million South Africans can get it wrong, the more we discuss the ideas we seek to put into practice, the better our decisions are likely to be. ⁴ Assemblies and demonstrations, on the standard account, generate debate and thereby improve our deliberative processes. That they *may* do. But they only do so because dialogue, and a commitment to reasoned discourse about the ends of life, has already made agreement and disagreement possible. What assemblies and demonstrations really force us to do is attend to situations where power — inequality in power, or abuse of power — has distorted our capacity to engage in reasoned discourse, and has valourized the interests of one segment of the polity over another.

This last observation suggests why freedom of assembly provides an effective means of communication for those who feel that their demands are not being given serious consideration by the state. Discrete and insular minorities – or so-called 'out-groups' — find it difficult to present their concerns within the confines of representative politics. ⁵ As we have already seen, size matters. For these 'out-groups', the freedom to assemble makes democracy visible and counters feelings of helplessness and isolation. ⁶ One of the primary consequences of minorities'

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subjective experience of empowerment is that majority rule is stabilized. By allowing minorities to express their disenchantment with the majority's decisions, the state's general exercise of power becomes more legitimate. ⁷

In addition to providing an alternative mode of democracy for marginal groups, freedom of assembly also ensures the continuation of communication between voters and representatives. Assemblies enable the government to identify pressing

4 See *SANDU* (supra) at para 7 (Freedom of expression — and related guarantees of assembly, association, belief, and the franchise — lie 'at the heart of a democracy.' Freedom of expression 'is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.') See also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 608 citing R Dworkin 'The Coming Battles over Free Speech' *New York Review of Books* (11 June 1992) 55, 56 ('A second kind of justification for [expressive conduct] . . . supposes that [such] freedom is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members, except those who are incompetent, as responsible moral agents.')

5 Put another way, marginal viewpoints, beliefs and practices may not command the attention they deserve because their proponents lack adequate political representation in Parliament. Freedom of assembly thereby provides a corrective to simple majoritarian rule. See, for example, *Seeiso v Minister of Home Affairs & Others* 1998 (6) BCLR 765 (LesCA). While the formal features of freedom of assembly analysis differ somewhat under the Lesotho Constitution, the substantive considerations remain the same. The Lesotho Court of Appeal in *Seeiso* found that the State's assertion that the 'security of the state', the 'protection of the public interest' and 'the maintenance of law and order' required the curtailment of a such a core constitutional right as freedom of assembly could not be vindicated without clear and convincing evidence. The *Seeiso* Court held that such overwhelming proof was presented neither to the High Court nor to the Court of Appeal. In granting the applicant the desired relief — permission to hold the assembly — the Court of Appeal held that the freedom of assembly was far too essential for the formation of public opinion in a free, open and democratic society to permit the courts to simply accept the State's contention that speech alone constitutes a serious threat to the commonweal.

6 *Brokdorf* 69 Bverf GE 315, 345 (1985)('The unrestricted exercise of this freedom . . . has the effect of preventing a feeling of impotence and dangerous tendencies of general dissatisfaction with the state.')

problems that arise in the time between elections. Freedom of assembly thereby furthers accountability and responsiveness.

These rather arid, academic arguments miss much of that which makes assemblies, demonstrates, pickets, processions and marches truly dynamic and powerful. And that is the nature of the crowd. The crowd draws its power, as Cannetti notes, from its erasure of borders between individuals, the gravitational pull that an expanding, living, moving group has on those around it, and the incipient threat of violence that causes all around to sit up and take notice.⁸

Cannetti's observations about crowds suggest why, in South Africa, assemblies remain a potent tool. In the advanced western democracies, most communication is electronically disseminated. Citizens withdraw into private spaces and watch. Assembly has, consequently, a greatly diminished role to play with respect to political mobilization. In South Africa, many citizens lack meaningful access to such goods as computers, televisions and newspapers. Connections stay corporeal; television is no synecdoche for community. Assembly, the poor person's media, remains the best means for making the needs and the will of the majority heard. Pickets, marches, demonstrations and processions are fires that cannot be so easily put out — or turned off.

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Crowd action — loud, noisy, disruptive, and sometimes dangerous — ought to be viewed, as Kraemer persuasively argues, as a direct expression of popular sovereignty.⁹ By creating space for crowd action, FC s 17 vouchsafes a commitment to a form of democracy in which the will of the people is not always mediated by political parties and the elites that run them.

So much for the arguments from democracy. The philosophical justifications for freedom of assembly are not, however, exhausted by the freedom's political utility. All individuals develop their personality and unique talents in the context of groups.

7 The claim is descriptive, not normative. See JN Pandey *Constitutional Law of India* (29th Edition, 1996) 118 (Expressive rights enable a political system to negotiate social change and forestall revolution.) Habermas calls this 'grant' of political space for protest 'compensatory legitimation', because by abdicating power over 'mere' expression, the state enhances its own stability. J Habermas *Legitimation Crisis* (1975).

8 E Cannetti *Crowds and Power* (1962) 22:

[E]ruption . . . the sudden transition from a closed into an open crowd . . . is a frequent occurrence. . . . A crowd quite often seems to overflow from some well-guarded space into the squares and streets of a town where it can move about freely, exposed to everything and attracting everyone. But more important than this external event is the corresponding inner movement: the dissatisfaction with the limitation of the number of participants, the sudden will to attract, the passionate determination to reach all men.

See *In Re Munhumeso and Others* 1995 (1) SA 551 (ZS), 557, 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC) ('*Munhumeso*') (The *Munhumeso* Court dryly observes that: 'A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion expressed. The public is brought into direct contact with those expressing the opinion'); *Ezelin v France* [1991] EHRR 362 at para 32 (Right of assembly often exercised through public procession); *H v Austria* [1989] EHRR 70. But see *Fourways Mall (Pty) Ltd v South African Commercial Catering* 1999 (3) SA 752 (W), 759 (Neither LRA nor FC s 17 provides protection for pickets that violate conditions of court order and proceed in a manner that interferes with the rights of the public and other tenants of a shopping mall. Assault and intimidation are not acceptable forms of expressive conduct.)

¹⁰ Goods such as companionship and recreation are as important as any other ¹¹ and are worthy of constitutional protection. ¹²

43.2 The history and the regulation of assembly

(a) Apartheid and the old statutory framework

While assemblies may have played a central role in anti-apartheid politics, they played that role almost entirely without legal sanction. From the 1920s onward, the government enacted repressive law after repressive law in a largely successful

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effort to stifle dissent. ¹³ The promulgation of anti-assembly legislation accelerated dramatically after the National Party took power in 1948.

The National Party launched its campaign to eviscerate the freedom to assemble with the Suppression of Communism Act ('SCA'). ¹⁴ SCA s 9 allowed the Minister of Justice to prohibit a gathering or an assembly whenever there was, in his opinion, reason to believe that the objects of communism would be furthered at such a gathering. ¹⁵ A few years later the government — in response to the ANC's 1952

9 See L Kraemer *The People Themselves: Popular Constitutionalism and Judicial Review* (2005). Michael Dorf & Barry Friedman have argued that the co-ordinate branches of government — the legislature, the executive and the judiciary — actually share the responsibility for constitutional interpretation. See M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct R* 61. See also S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3(b)(vi); S Woolman & L Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* — Kraemer's view is that such ecstatic expressions of the will of the people transform constitutional interpretation into an enterprise shared with the people themselves. See also B Ackermann *We the People* (1991).

10 The notion that associations — of which assemblies are a subset — are constitutive of the self is developed at length elsewhere in this work. See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, §§ 44.1(b)(i)-(ii).

11 See, eg, *Coates v Cincinnati* (1961) 402 US 611, 615 (US Supreme Court notes that the freedom to assemble protects the 'right to gather' for purely social aims. Moreover, that such aims may serve no meaningful political end and may annoy non-participants is not a legitimate basis for restricting a gathering.) See also *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* [2001] ECHR 563 at para 86 ('Freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or give offence to persons'); *Plattform 'Ärzte für das Leben' v Austria* [1988] ECHR 15; AE Schilder *Het recht tot vergadering en betoging* (1989) 120 (On the relationship between assembly and personality development); T Mauntz & G Durig *Grundgesetz Kommentar* 8 (1991) 88. As always, I am indebted to Johan De Waal for his patient explanation of German jurisprudence.

12 It is, of course, another question as to whether assemblies that promote individual flourishing ought to trigger the protection afforded by FC s 17. There are good reasons to hesitate before we extend the ambit of FC s 17 to cover assemblies that lack even the most attenuated connection to the political process. As I note below, § 43.3(a) *infra*, extending the protection of FC s 17 to gatherings without any political dimension means that FC s 17 might, at least notionally, protect any meeting of 2 or more persons. We can rely on other constitutional guarantees as well as non-constitutional bodies of law to protect such recreational, religious, cultural or commercial gatherings. See, eg, FC ss 15, 18, 30, 31. Too broadly construed a right to assemble has the potential to weaken our commitment to assembly as a form of political participation.

defiance campaign — passed the Criminal Law Amendment Act ('CLAA').¹⁶ The CLAA increased penalties for crimes committed in the context of political protest.¹⁷ More serious limitations followed the enactment of a new

Riotous Assemblies Act in 1956.¹⁸

Open opposition to the government met with further restrictions in the 1960s and 1970s.¹⁹ By the late 1970s it became almost impossible to obtain permission to assemble.²⁰ Attempts at reform in the early 1980s failed.²¹ In the mid-1980s, as South Africa's political crisis deepened and it appeared that assembly law could get no worse, the government responded by issuing extremely restrictive 'emergency' regulations under the Public Safety Act.²²

13 Before 1950 assembly was, to some extent, permissively regulated by common law. At common law, the individual was entitled to all rights not expressly prohibited or limited by statute or by the common law itself. The crime of public violence served as the primary limitation on the freedom to assemble. See L Ackermann *Die Reg insake Openbare en Staatsveiligheid* (1984) 153 (Section 52 of the Internal Security Act 74 of 1982 repealed the common law with regard to open-air assemblies.) The law of assembly, even prior to 1950, was not so permissive with respect to black South Africans. See Black Administration Act 38 of 1927, ss 25 and 27 (Allowed the President to promulgate regulations with reference to 'the prohibition, control or regulation of gatherings or assemblies of Blacks' and 'the observance by Blacks of decency'); Black (Urban Areas) Consolidation Act 25 of 1945, s 38(3)(r) (Conferred power to the Bantu administration boards, under the supervision of magistrates, to control and restrict the meetings of 'Bantus'); Development Trust and Land Act 18 of 1936. See also A Mathews *Law, Order and Liberty in South Africa* (1971) 240-2, 249-50; J Dugard *Human Rights and the South African Legal Order* (1978) 186-91. Incidentally, the first regulatory framework for assembly after the Union was formed — the provisions of the original Riotous Assemblies Act 27 of 1914 — was adopted to enable the government to deal with white labour unrest.

14 Act 44 of 1950. The Act was later incorporated into the Internal Security Act 74 of 1982.

15 The Minister could, in terms of SCA ss 9 and 5, (which applied to listed persons), give notice to a person prohibiting him from attending any gathering. The provisions gave rise to a number of court cases that turned on the definition of the word 'gathering'. See, eg, *S v Meer En 'N Ander* 1981 (4) SA 604 (A), 606 (Court accepts premise of the statute — namely that the threat of communism, breakdowns in the security of the State, and the maintenance of public order were real enough to justify radical restrictions on gatherings. Having accepted the premise, the court then articulates a taxonomy of gatherings in which prohibited 'social gatherings' does not 'include the family . . . activities of the restricted person.') See also C Forsyth *In Danger for Their Talents* (1985) 148-67; Dugard (supra) at 162-3. The bench's blinkered world-view and its efforts to compartmentalize law and politics meant apartheid-era judges could, with a straight face, state that:

freedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic, and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly.

S v Turrel 1973 (1) SA 248 (C), 256 (Magistrate's prohibition of a meeting in terms of Riotous Assemblies Acts s 2(1) reversed on grounds that the order did not identify the meeting at issue with sufficient clarity.) See also *S v Budlender & Another* 1973 (1) SA 264 (C); E Kahn 'Freedom of Assembly' (1973) 90 *SALJ* 18. Not until the late seventies did academic lawyers begin to criticize, ever so tentatively, both assembly legislation and the manner in which such legislation was construed by the courts. See, eg, J Van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* (1975); J Van der Vyver *Seven Lectures on Human Rights* (1976).

16 Act 8 of 1953.

Real change began only in February of 1990, with the agreement of most political parties to the National Peace Accord ('NPA'). The NPA marked South Africa's first successful attempt to reconcile the rights of assemblers with the state's interest in public order.

(b) Democracy and the new statutory framework

(i) Provenance of the Regulation of Gatherings Act

The next two attempts to bring South African assembly jurisprudence into the twentieth century took place under the auspices of the Commission of Inquiry

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Regarding the Prevention of Public Violence and Intimidation ('Goldstone Commission'). The Goldstone Commission's first endeavour was to convene a

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- 17 The Internal Security Act was designed to achieve a similar result. Act 74 of 1982, ss 58 and 59. See Ackermann (supra) at 164-8. The judiciary, on occasion, saw a political motive as an aggravating factor in sentencing. See E Cameron 'Civil Disobedience and Passive Resistance' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 219, 231.
 - 18 Act 17 of 1956. Initially, the Act allowed the Minister of Justice to prohibit any public gathering in order to maintain public peace or to prevent the engendering of racial hostility. However, the 1974 amendments to the Act extended the Minister's prohibitory powers to private gatherings. See Riotous Assemblies Amendment Act 30 of 1974, s 2(1). The Riotous Assemblies Act, s 17, states that a person commits the crime of incitement to public violence if the natural and probable consequences of his act, conduct, speech or publication would be the commission of public violence by others. At the time of writing, the Act was still in force. Demonstrations near Parliament were outlawed by the Gatherings and Demonstrations Act 52 of 1973.
 - 19 The General Law Further Amendment Act required that assemblies receive both the local authority's consent and the approval of a magistrate in the district in which the assembly was to take place. Act 92 of 1970, s 15. See Dugard (supra) at 187. Under the Internal Security Acts of 1976 and 1982, the Minister issued annually a notice that declared outdoor gatherings illegal — save for *bona fide* sporting and religious purposes — unless permission was obtained from a magistrate. Demonstrators often ignored the permission requirement, despite the fact that the requirement featured quite prominently in the state's strategy to suppress political protest.
 - 20 See H Corder & D Davis 'A Long March — Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281, 289.
 - 21 Not only did the Rabie Commission fail to deliver the hoped for reform, it could be argued that it led to an even more repressive regime of laws. See, eg, Internal Security Act 74 of 1982; Demonstrations in or near Court Buildings Act 71 of 1982. For a comprehensive analysis of the statutes, see Mathews (supra) 52-6, 139-47; Ackermann (supra) at 149-68.
 - 22 Act 3 of 1953. Regulation 7(1), Proclamation 109 of 1986 issued in terms of the Public Safety Act, held that '[t]he . . . Commissioner may for the purpose of the safety of the public . . . issue orders . . . (bA) whereby any particular gathering, or any gathering of a particular nature, class or kind, is prohibited at any place or in any area specified in the order.' A few challenges to the assembly regulations were successful. See, eg, *Natal Newspapers (Pty) Ltd v State President of the Republic of South Africa* 1986 (4) SA 1109 (N)(Court struck down Regulation 7(1)(d)). The majority were not. See, eg, *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A)(Court upheld regulation 7(1)(bA).) See E Mureinik 'Pursuing Principle: the Appellate Division and Review under the State of Emergency' (1989) 5 *SAJHR* 60; D Basson 'Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts' (1987) 3 *SAJHR* 28; M Kidd 'Meetings and the Emergency Regulations' (1989) 5 *SAJHR* 471. See also J Dugard, N Haysom & G Marcus *The Last Years of Apartheid: Civil Liberties in South Africa* (1992).

multinational panel of experts to thrash out a new approach to assembly.²³ The Commission and its multinational panel then drafted new legislation intended to give effect to the principles enunciated in the panel's testimony. The result was the Goldstone Commission's greatest achievement: the Regulation of Gatherings Act ('RGA').²⁴

(ii) Analysis of the Regulation of Gatherings Act

To Parliament's credit, the legislation retains the most interesting aspect of the panel's report: namely, the notion of 'demonstration as of right'. Demonstration as of right means that the ability to hold a public gathering, assembly or demonstration is not contingent upon approval by the state. Unfortunately, the RGA qualifies this 'right' in a manner that largely vitiates its significance.²⁵ Several other

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- 23 See P Heymann (ed) *Towards Peaceful Protest in South Africa: Testimony of a Multinational Panel Regarding the Lawful Control of Demonstrations in the Republic of South Africa before The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation* (1993) ('Heymann Report'). The panel's conclusions flowed from a single basic axiom: the right to assemble, demonstrate, protest and petition is a necessary condition for making good a democratic society's commitment to universal political participation. The Heymann Report should be viewed as part of the drafting history of the Regulation of Gatherings Act and as a corrective to errant readings of the Act by a variety of state actors.
- 24 Act 205 of 1993. The RGA repeals the following statutes and sections of statutes dealing with assembly: Gatherings and Demonstrations in the Vicinity of Parliament Act 52 of 1973 (as amended in 1992); Demonstrations in or near Court Buildings Prohibition Act 71 of 1982; ss 46(1) and (2), 47, 48, 49, 51, 53, 57, 62 Internal Security Act 74 of 1982; Gatherings and Demonstrations in or near the Union Buildings Act 103 of 1992. Despite the manifest need for the repeal of these laws in order for the right to assemble to be meaningfully exercised in the run-up to the 1994 elections, the RGA was not enacted until 1996. See J Rauch & D Storey 'The Policing of Public Gatherings and Demonstrations in South Africa 1960–1994' *Truth Commission Research Unit* (May 1998) available at <http://www.csvr.org.za/wits/papers/papjrd.htm>, (accessed on 9 March 2009). The RGA states that it should not be understood to repeal any part of the following statutes: Arms and Ammunition Act 75 of 1969 (Section 38A sets out the requirements for carrying a gun in public); Dangerous Weapons Act 71 of 1968 (Section 2 permits the Minister to prohibit a person or class of persons from bearing arms in public); Control of Access to Public Premises and Vehicles Act 53 of 1985 (Allows the state to control — and completely restrict — access to public property); Civil Protection Act 67 of 1977; Public Safety Act 3 of 1953; Intimidation Act 72 of 1982; and Prevention of Public Violence and Intimidation Act 139 of 1991.
- 25 Under the RGA, demonstrations require no notification at all. But do not be misled. Demonstrations consist of 15 people or less. See RGA s 1 ('[D]emonstration' includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action; . . . 'gathering' means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 [Act 29 of 1989], or any other public place or premises wholly or partly open to the air.') Gatherings, however, are subject to more onerous conditions. RGA s 4(3) reads, in relevant part: 'If a convener has been notified in terms of subsection (2) (a) or has not, within 24 hours after giving notice in terms of section 3(2), been called to a meeting in terms of subsection (2)(b) of this section, the gathering may take place in accordance with the contents of the notice and in accordance with the provisions of section 8, but subject to the provisions of sections 5 and 6.' The notice of gathering must be given either seven days in advance or 48 hours in advance. If the latter, the authorities have the right to prohibit the gathering. The ability of the drafters to assert that the legislation protects 'demonstration as of right' has as much to do with a definitional exercise that limits the scope of demonstrations as it does with any principled commitments. See § 43.3(a)(iii) *infra* (On the constitutionality, under FC s 17, of the RGA's construction of the term 'demonstration'). Put more bluntly, the intention of the legislature was to limit the *number* of people who could assemble freely, without requiring prior notice to the authorities.

provisions blunt, in a similar fashion, the potentially revolutionary vision of mass action envisaged by the RGA, and reflect the difficulty that present political actors have had in making a complete break with the past.²⁶

The RGA requires that notice for gatherings be provided to local authorities and police seven days in advance.²⁷ This notice period creates doctrinal problems and practical difficulties.

Assembly doctrine must take account of the fact that assemblies are often an immediate response to actions — by the state or by private parties — that touch a raw nerve in some segment of the body politic.²⁸ Recall that we protect assemblies because of their capacity to communicate (some part of) the public will to the state, and in so doing, prevent the government from undertaking or continuing a particular course of action which lacks either public support or some other form

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The motivation for the distinction is laid bare in the penalties that attach to non-compliance with the notification requirements. Ask yourself, for example, whether 150 protesters, with the same grievance, assembled in groups of 15, say, 50 metres apart, constitute a *demonstration* or a *gathering*. Assume not one person in any of the 10 groups of 15 attempted to give notice. After all, a group of 15 is not required to provide notice. Should, however, this scenario be deemed a *gathering*, then each protester, if convicted, could receive a fine of up to R20 000 and/or a sentence of up to one year in prison. (The fines and sentences actually imposed under the act are not insignificant. Ten persons accused of failing to provide proper notice for a protest of over 100 persons were each — after a plea bargain — fined R3000 or sentenced to 3 months, suspended wholly for 5 years. Correspondence with S Delaney, Staff Attorney, Freedom of Expression Institute ('FXI')(25 February 2005)(On file with author).) The law thereby creates an incentive for 'guerilla'-type protests, consisting of small units of mobile, vociferous protesters. But perhaps the state is willing to take its chances with groups of 15, even if such groups are actually more difficult to control by law and by the exercise of police power.

- 26 J Duncan 'Where is the Debate on Civil and Political Rights? The State of Censorship in South Africa' (Paper Presented on World Press Freedom Day, University of the Witwatersrand)(May 3, 2003) available at www.fxj.org.za, (accessed on 31 January 2005)(Even though the Landless Peoples Movement had scrupulously complied with the requirements of the RGA, the police used the RGA to censor expression rather than enable it. Having given notice of a peaceful demonstration in Ermelo, and having not received a reply from the police within 24 hours, the convener exercised his right to proceed with the march. On the day of the march, the police arrested half of the marchers for 'failing to disperse'. The arrests occurred after the demonstration had ended.) See also *Freedom of Expression Institute Newsletter* 'Landless Peoples Movement's ('LPM') Leaders Arrested' (2004)(Overzealous enforcement of the RGA is often exacerbated by police abuse subsequent to arrest.) It is difficult not to conclude that the security forces are intent on scaring the protest out of the LPM. The police have also used s 18(b) of the Electoral Act to prevent any gatherings of any kind on election-day.
- 27 RGA s 3(2) reads, in relevant part: 'The convener shall not later than seven days before the date on which the gathering is to be held, give notice of the gathering to the responsible officer concerned: Provided that if it is not reasonably possible for the convener to give such notice earlier than seven days before such date, he shall give such notice at the earliest opportunity: Provided further that if such notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the convener prohibit the gathering.'
- 28 According to Article 8(1) of Germany's Basic Law, no permission from the state is necessary for using public streets for protests. See T Feldmeier *Politische Meinungsäusserung auf Öffentlichen Strassen* (1982) 164. More importantly for the purposes of our analysis of the RGA's notice requirements, the German Constitutional Court has held that the administrative procedures surrounding the right to assemble must be assembly-friendly. See *Brokdorf* 69 BVerfGE 315, 355 (1985). The German Constitutional Court has even derived duties to co-operate and to facilitate from statutory notification requirements.

of legitimacy. The seven day notice period not only works to suppress dissent, it grants the government a grace period within which the government can turn intention into action before the public can register its collective ire.²⁹ The manner in which the RGA seven-day notice period frames our nascent assembly jurisprudence is difficult to square with how our courts have, heretofore, construed the Final Constitution's commitment to expression, in particular, and an open and democratic society, in general.³⁰

In terms of practice, the RGA thwarts many a convener who, in fact, complies with the 7-day notice period. Take the recent experiences of the Thembelihle Crisis Committee ('TCC'). The TCC has adopted the practice of filing a notice — on a Friday — 10 days in advance of an assembly scheduled for two Mondays hence. On Monday, the local authorities set up a meeting for Tuesday. On Thursday, the TCC conveners receive notice that their assembly has been prohibited. On Friday, the TCC files an urgent application in Magistrate's Court to have the prohibition set aside. The Magistrate summarily dismisses the application, and rules as follows: (a) Rule 55(1) of the Magistrate's Court Rules requires that an application shall be delivered on 10 day's notice; (b) Rule 9 (14) states that this 10-day notice period may be reduced if an application shows 'good cause' and thereby satisfies the requirements for urgency; (c) since the applicants could not demonstrate the requisite risk to life or liberty, the application does meet the conditions for reduced notice; (d) no other remedy is contemplated in the rules; (e) the date of the proposed gathering possesses no particular significance;³¹ and

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29 But see RGA s 12(2): 'It shall be a defence to a charge of convening a gathering in contravention of subsection (1)(a) that the gathering concerned took place spontaneously.' While the defence of spontaneity creates some breathing room, it is a decidedly narrow exception to the notice provisions and the penalties for non-compliance.

30 Our courts have recognized the need to create rules that simultaneously encourage expression and protect those who interests might otherwise be prejudiced. See, eg, *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at para 25 citing *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), 1210; 1999 (1) BCLR 1 (SCA)(Court finds that damages in defamation cases do not always strike the proper balance between expression and reputation, that 'nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error' and that a public apology provides a remedy that will 'set the record straight, restore the reputation of the victim, give the victim the necessary satisfaction, avoid serious financial harm to the culprit and encourage rather than inhibit freedom of expression.'). For a somewhat more sanguine view of the legal framework created by the RGA, although uninformed by the actual practice of local authorities, see 'Politics in Public: Freedom of Assembly and the Right to Protest in South Africa' Democratic Dialogue Working Paper (1998) available at www.democraticdialogue.org, (accessed on 25 December 2004)('[P]erhaps the most interesting facet is the recognition of the inherent political nature of such public gatherings. This is acknowledged through the interlocking structure of the decision-making process which links the organisers, the police and the civil authorities as mutually responsible participants in the democratic process. In so doing it demands that each party recognise their role in maintaining the balance between human rights and social responsibilities.')

31 It may be trivially true that the march date selected has no historic significance. But that does not mean that the local authorities are entitled to prohibit a protest, a picket, or a procession as it suits them. The default position ought to be that the time selected by conveners is meaningful — from the perspective of both effective communication and logistics. Only overridingly important government interests — an imminent threat to life and public order — ought to trump the right to demonstrate in public forums. Anything short of such a demonstrably significant interest requires that the state make every effort to vindicate both the expressive interests of the demonstrators and the interests of third parties in going about their normal, everyday business. See § 43.3(b)(iv) *infra* (Discussion of the appropriate conditions for time, place and manner restrictions.)

(f) future applications must observe the Magistrate's Court Rules with respect to proper notice periods.

The local authorities have, as the above account suggests, found themselves the unintended beneficiaries of a number of provisions in the RGA, the Magistrate's Court Rules and the Uniform Rules of Court. RGA s 4(3) requires local authorities to set up a meeting with the conveners and other interested parties within 24 hours of receipt of notification. Once the meeting takes place, the local authorities are, under RGA s 5(2), given a significant degree of discretion in deciding whether or not to prohibit the gathering.³² Although the authorities are required, under RGA s 5(3), to give reasons for the prohibition, local authorities tend to generate form letter refusals; the RGA's provisions for judicial review conspire, along with the Magistrate's Court Rules, to prevent proper ventilation of the assembly issues raised by these form letter refusals. How do these procedures prevent proper review? RGA s 6(3)(c) bars magistrates from awarding costs when a convener seeks to have an order prohibiting a gathering set aside. The High Court can, under the RGA, still award such costs. So although the High Courts may be better suited to assess competing expressive and public order interests, the RGA channels the impecunious conveners toward the Magistrates Court.³³ The Magistrate, unfamiliar with the RGA, and taking the Magistrate's Court Rules on 'urgent' applications at their word, turns down the convener's application to have the prohibition set aside.³⁴ All the parties — from convener, to local authority, to magistrate — have complied with the required procedures and yet no

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gathering, and no meaningful assessment of the grounds for prohibition, takes place.

32 See RGA s 2(d): 'The responsible officer shall endeavour to ensure that such discussions take place in good faith.'

33 In some respects, the RGA's attempt to channel cases into the Magistrate's Court may be less of a barrier to litigation in the High Court than the drafters of the RGA anticipated. Costs are generally not awarded in cases in which the litigant seeks to vindicate a constitutional right. To the extent that an applicant has a bona fide constitutional claim, and has not engaged in an abuse of the legal process, she should not have costs awarded against her. As a result, the RGA does not create a meaningful set of disincentives with respect to the launching of *constitutional* challenges in the High Court. See *Motsepe v Commissioner For Inland Revenue* 1997 (2) SA 898 (CC), 1997 (6) BCLR 692 (CC) at para 30 (Holds that general rule is that caution must be exercised 'in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or 'chilling' effect on other potential litigants in this category.'). See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 43-44 (No order as to costs should have been made against applicant in the High Court even though 'resort to the Constitution had failed.' Therefore, 'the appellant is entitled to a reversal of that part of the order in the High Court condemning him to pay . . . costs and [he] should not have to bear the costs in this Court.'). But see *Ingladew v Financial Services Board: In Re Financial Services Board v Van Der Merwe & Another* 2003 (4) SA 584 (CC)(Submission of record that failed to comply with Rules would warrant an order of costs.) However, it is not clear that an applicant who seeks to have a prohibition order made in terms of the RGA set aside in terms of the RGA itself, and not in terms of some provision of the Final Constitution, is similarly entitled to be immunized from an order of costs in the High Court.

34 I am indebted to Simon Delaney — of the Freedom of Expression Institute ('FXI') — for his patient explanation of the procedural problems created by the interaction of the RGA, Magistrate's Court Rules and the Uniform Rules of Court when conveners attempt to secure prompt and adequate judicial review of a responsible officer's prohibition of a gathering. See *Juta's Supreme Court Act and the Magistrates' Courts Act and Rules* (3rd Edition, 2003).

I have, in the above account, assumed 'good faith' efforts by all parties in order to illustrate the procedural problems created by the interaction between the RGA and the rules of court. However, the recent record of local authorities with respect to their statutory and constitutional obligations to facilitate assemblies suggests an attitude malign.

Local authorities often take more than a week to reply to a properly filed notice. This practice violates the 24-hour response requirements of RGA s 4 (3). Similarly, meetings with responsible officers and members of the South African Police Services (SAPS) — as required by RGA s 4(2)(b) — do not appear to be designed 'to discuss any amendment of the contents of the notice and such conditions regarding the conduct of the gathering as he may deem necessary.' In more than one instance, TCC conveners have proffered a variety of conditions, pursuant to RGA s 4(4)(b), that would allow for a peaceful demonstration that does not compromise the interests of third parties.³⁵ Responsible officers have demonstrated little inclination to meet their statutory obligation to facilitate these events and have refused to negotiate conditions with TCC conveners. Instead, requests to demonstrate peaceably are met with blanket prohibitions. The TCC received the following letter from a responsible officer:

You are hereby advised that your notice for a gathering on Monday, 29 November 2004 is prohibited because of the following reasons: . . . 1. The proposed times for the gathering from 06:00 until 09:00 will result in serious vehicular traffic because it is peak hour period. 2. There is also reasonable suspicion that your gathering will result in lawlessness and damage to property. Your gathering on Monday November 29, 2004 is thus prohibited.³⁶

This prohibition is noteworthy in several respects. First, RGA s 4(4)(b) actually acknowledges that gatherings will, inevitably, disrupt traffic and contemplates an agreement between the responsible officer, the convener and the police that will ensure that 'vehicular or pedestrian traffic, especially during traffic rush hours, is

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least impeded.' Second, reasonable suspicion 'of lawlessness and damage to property' is not the standard set out in the RGA for the prohibition of a gathering.

35 The TCC volunteered to submit itself to the following constraints: Restricting the picket to a designated area; limiting the number of picketers to 60 persons, the majority of whom are over 50; cordoning off the picket; requiring picketers to stand in a straight line behind the cordon; designating 20 marshals, by name, and by identifiable marks such as armbands, to ensure that the picket complies with all stipulated conditions and statutory requirements. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author.) The responsible officers neither agreed to nor engaged with these proposals — as RGA s 4(2)(b) would appear to require — during the meeting to discuss the proposed march.

36 An application by the Anti-Privatization Forum to demonstrate on a weekend elicited a similarly spurious set of reasons for prohibition. The Chief of Police of the Johannesburg Metropolitan Police Department, Chris Ngcobo, justified the ban on the following grounds:

1. Your proposed gathering will result in serious disruption of vehicular traffic because of . . . the *tendency* of your participants, who deliberately stop while marching, to obstruct traffic.

. . .

3. The making of fire in a public place with the intention of burning . . . account statements.

Reply to Application for a Gathering, Sunday, March 21 2004, at the Constitutional Court in Johannesburg (18 March 2004)(On file with author).

RGA s 5(1) demands 'credible information on oath . . . brought to the attention of a responsible officer.'³⁷ Third, the timing of the picket is, in fact, one of its essential features. Only by timing the picket for the morning rush hour are the picketers in any position to communicate to their fellow citizens — through banners with various slogans printed thereon — their concern about the lack of delivery of basic services in Thembelihle. A picket or demonstration at another time has no audience and serves no purpose.³⁸

The RGA imposes more onerous provisions on gatherings scheduled with less

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than 48 hours notice.³⁹ Failure to meet the 48-hours-in-advance deadline for notice gives the local authorities almost unfettered discretion to issue prohibitions.⁴⁰ This extraordinary power to silence opposition places an unnecessarily blunt cudgel in

37 US assembly jurisprudence sets a similarly high threshold for the state. US courts recognize the state's substantial interest in safeguarding its citizens against violence. See *Hill v Colorado* 530 US 703, 715 (2000)('It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens') quoting *Medtronic, Inc v Lohr* 518 US 470, 475 (1996). This substantial interest in public safety does not end the inquiry. The state must provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety. See *Bay Area Peace Navy v United States* 914 F 2d 1224, 1227 (9th Cir 1990). Generalizations about groups or kinds of groups are insufficient. See *City of Chicago v Mosley* 408 US 92, 100-1 (1972)(Court rejects state's 'argument that . . . it may prohibit all non-labour picketing because, as a class, non-labour picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications.') See also *Project 80's Inc v City of Pocatello* 942 F 2d 635, 638 (9th Cir 1991)(Court rejects city's public safety argument after finding 'little evidence' in the record that the ordinances banning door- to-door solicitation actually protected citizens from crime); *Hodgkins v Goldsmith* 2000 WL 892964 (SD Indiana 2000)(Court finds unconstitutional a curfew restricting minors' constitutional rights to assemble in public streets, parks and other traditional public fora. The mere 'common sense' justifications of the city council — married to its apparent lack of interest in providing the court with evidence linking security concerns and the behaviour of minors — elicited a withering critique.) But see *Griider v Abramson* 180 F 3d 739 (6th Cir 1999)(Court states that interests of security — and the high probability of violence — warrants upholding the following limits on two cotemporaneous demonstrations: (1) mandatory magnetometer searches as prerequisite to admission either to KKK rally or counter-demonstration, (2) physical segregation of KKK rally and counter-demonstration (which prevented attendees' simultaneous discourse with other attendees at both events), (3) exclusion of all private citizens from restricted police-occupied buffer zone, and (4) prohibition of all unscheduled oration within restricted area.)

38 This account is based upon a founding affidavit drafted by the Freedom of Expression Institute on behalf of the TCC. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author.) The TCC — with assistance from the Freedom of Expression Institute — is revising its litigation strategy in order to demonstrate how responsible officers, metropolitan police and local authorities abuse the discretion afforded them by the RGA. If convenors initiate the notice procedures well in advance of the scheduled date for the assembly, the state cannot so easily exploit the manner in which the RGA, the Magistrate's Court Rules and the Uniform Rules prevent the Magistrates Courts' — or High Courts — from reviewing the merits of the prohibition order. Either the local authority renders its decision within several days of a timeously called meeting or it delays issuance of the order for several weeks. If the local authority acts reasonably expeditiously and still prohibits the gathering, the Magistrates Court will have sufficient time to hear the merits of the application to have the prohibition set aside. If the local authority delays issuance of the prohibition until the very last minute, then it will be difficult to hide its facile reasons for the prohibition behind the RGA's procedures or the Magistrates' Court Rules. At a minimum, an established pattern of delay and dissembling will become part of the record of any application to a Magistrate's Court or a High Court.

39 RGA s 3(2).

the hands of individuals unlikely to place expressive interests on par with public order concerns.⁴¹

The 48-hour notice provisions bode ill for freedom of assembly.⁴² Even expedited judicial review — which, as we have seen, is almost impossible to secure —

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is no match for local authorities bent on stamping out the spread of dissent through the use of blanket prohibitions.⁴³

40 Ibid.

41 Prior to the enactment of the RGA in 1996, several courts found unconstitutional the exercise by authorities of relatively unfettered powers to prohibit public assemblies. See, eg, *ANC (Border Branch) v Chairman, Council of State, Ciskei* 1992 (4) SA 434 (Ck), 1994 (1) BCLR 145, 165 (Ck) (Unfettered powers of prohibition of public assemblies given to magistrates and police found to be unjustifiable restriction of freedom of assembly) quoting *Dillon v Municipal Court for Monterey-Carmel* 49 P 2d 945 (1971) ('Any procedure which allows licensing officials wide or unbounded discretion in granting or denying permits is constitutionally infirm because it permits them to base their determination on the content of the ideas sought to be expressed.') See also *In re Munhumeso & Others* 1995 (2) BCLR 125 (ZS) (Impugned legislation clearly at variance with freedom of assembly; regulating authority had uncontrolled power to impose conditions which may amount to an absolute ban, irrespective of traffic flow or likelihood of a breach of the peace or public disorder); § 43.3(b)(iv) *infra* (On the constitutionality of statutory provisions that grant state officials untrammelled discretion with respect to time, place and manner restrictions.)

42 The RGA does, however, have gaps with respect to adherence to the notice requirements that can be exploited by savvy protestors. According to RGA s 12(2): 'It shall be a defence to a charge of convening a gathering in contravention of subsection (1) (a) that the gathering concerned took place *spontaneously*.' See Affidavit of Na'eem Jeenah, Palestinian Solidarity Committee (3 November 2004) (On file with author) ('On Wednesday, 20th October 2004 I was present at a protest outside the Sandton Convention Centre in Sandton. The protest was against the imminent arrival at the Convention Centre of Israeli Deputy Prime Minister Ehud Olmert and his signing of a protection of investment treaty with South Africa's Minister of Trade and Industry, Mandisi Mpahlwa. The protest was organised *spontaneously* in the morning of the 20th October 2004, when we confirmed that we would exercise our constitutional right to hold a peaceful protest.' (Emphasis added).) It seems clear — therefore — that a failure to notify the authorities in advance of a (planned) gathering can serve as a 'get out of jail free' card. A savvy protest organizer will leave no paper-trail. She will neither advertise the event with posters nor circulate e-mails that might ultimately contradict the defence of spontaneity. Of course, too many 'spontaneous' gatherings may lead both prosecutors and the courts to view the defence of 'spontaneity' with a healthy degree of scepticism. See *US v Mase!* 54 F Supp 2d 903 (WD Wisconsin 1999) (US Courts will not allow demonstrators to escape time, place and manner restrictions on the grounds that the protestors are not, ostensibly, part of a formal association. Just as the absence of formal structures does not deny assemblers the protection of the First Amendment, the absence of formal structures does not absolve the demonstrators of the responsibility for complying with notice requirements and other facially neutral regulations. The *Mase!* Court refused to allow demonstrators to hide behind the 'fiction' of non-association when they were, on the facts, clearly engaged in collective action.)

Or consider another way of complying with the notice requirements that avoids the possibility of both prohibition and conviction. Assume a group of 20 persons plan a march at 06h00 on Monday. At 15h30 on the preceding Friday, the convener faxes an RGA s 3 notice to the responsible officer. These offices have already closed at the appointed hour of 15h00. The offices only re-open at 07h00 the following Monday. By the time the responsible officer reads the timeously filed fax, the gathering is in full swing. The convener has complied fully with RGA s 8. The police proceed to arrest the marchers under RGA s 12(1)(a). But since RGA s 12(1) has not, in fact, been breached, the accused must be acquitted. Correspondence with S Delaney, Staff Attorney, FXI, (25 February 2005) (On file with author.)

Another powerful set of mechanisms for chilling assembly are the provisions made in Chapter 4 of the RGA for the imposition of civil liability.⁴⁴ If riot damage occurs as a result of a demonstration, each member of the demonstration is jointly and severally liable for the damage caused. Joint and several liability for riot damage creates the potential for significant personal liability. How many members of the public are willing to risk personal bankruptcy to challenge some undesirable state of affairs? Only those, I suppose, who have little or nothing left to lose. However, the freedoms guaranteed in the Final Constitution

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are intended to protect the expressive interests of all, not just those on the margin. The official response to this concern that civil liability requirements chill assembly is that demonstration organizers can take out demonstration damage insurance prior to a march. That line of argument appears reasonable until one asks whether

43 The Constitutional Court has recognized that the use of expedited procedures poses a unique threat to the exercise of fundamental rights. See, eg, *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) (Court holds that while the protection of reputation justifies placing limits on speech that scandalises a court, the protection of reputation does not justify expedited procedures that fail to take account of the expressive interests at stake.) As I have noted above, several Magistrates Courts have refused to hear the statutorily guaranteed expedited appeal of a prohibition because the urgent applications made by conveners failed to satisfy the criteria for urgent applications established by the rules of court. Interview with J Duncan, Director, FXI, (3 February 2005). Interview with S Delaney, Staff Attorney, FXI, (10 February 2005). The absence, practically speaking, of a meaningful avenue of appeal, both where that gathering has and has not met the 7-day notice requirement, creates a regulatory framework inimical to the right to assemble.

44 RGA ss 11(1) and (2) read, in relevant part: '(1) If any riot damage occurs as a result of (a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener; (b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection. (2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves- (a) that he or it did not permit or connive at the act or omission which caused the damage in question; and (b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and (c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.' See Freedom of Expression Institute 'Annual Report for 2004' (2004) available at www.fx.org.za, (accessed on 28 January 2005) (Suggests, without argument, that RGA s 11(1) and (2) are constitutionally suspect); R La Grange 'Opinion for the Freedom of Expression Institute on the Regulation of Gathering Act (12 July 2004) at para 117 ('[T]he provisions of section 11(1) and (2) extend ordinary civil liability on grounds that would not normally be recognised in a delictual action and also place the onus on the defendant to disprove liability. . . [T]his latter effect reverses the traditional onus for civil liability and constitutes a serious infringement of the common law rights of a defendant in an action for damages.')

The US Supreme Court has rejected the imposition of joint and several liability on participants in an otherwise lawful boycott simply because some participants engaged in acts of violence. See *NAACP v Claiborne Hardware Co* 458 US 886, 915-920 (1982) (Claiborne Court wrote that '[c]ivil liability may not be imposed merely because an individual belonged to a group,' a gathering, an assembly or an association. *Claiborne* Court held that 'only those individuals who participated in violent or unlawful activities that proximately caused the damages could be held liable.')

See also *US v Mase* 54 F Supp 2d 903 (WD Wisconsin 1999) N Jarman & D Bryan 'General Principles Governing Freedom of Assembly and Public Events Institute for Conflict Research: Comparative Assessment of Assembly Law in England, Scotland, Republic of Ireland, France, Italy, Israel, Palestine, USA, Canada and South Africa' *Institute for Conflict Research Working Paper* (2000) available at www.conflictresearch.org.uk, (accessed on 25 January 2005).

controversial groups will be able to secure insurance, or whether even a mainstream political group can convince their insurers that they will not attract a violent response for which they may ultimately be held liable. In many instances both controversial and mainstream groups will find insurance either unavailable or too costly.⁴⁵ These groups may decide to take their chances.⁴⁶ If they do, however, they run the risk that the police will incite a violent response and that any subsequent damage will both discredit and bankrupt the organization and its membership. Civil liability makes assembly a high-stakes game that most assemblers either are bound to lose or not permitted to play.⁴⁷

At first glance, the RGA gives every indication that Parliament had solved problems associated with the use of deadly force to disperse demonstrators. RGA s 9(2)(e) provides that the force necessary to prevent the killing or serious injury of persons or the destruction or serious damage to immovable property or valuable movable property must be 'necessary', 'moderated' and 'proportionate to the circumstances'.⁴⁸ It thereby places some philosophical limits on deadly force. However, RGA s 9(2)(d) expressly allows the use of 'firearms and other weapons' for crowd control and permits the use of force where there are apparently 'manifest intentions' to kill or to seriously injure persons, or to destroy or seriously damage property.⁴⁹ RGA ss 9(3) and 13(1)(b) insulate the common-law defences

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of self-defence, necessity and protection of property from the effect of RGA s 9(2)(e).⁵⁰ Read together, these provisions create innumerable opportunities for the police to use deadly force to curb 'potentially violent' or 'potentially destructive' demonstrations.⁵¹ After the Constitutional Court's judgment in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters & Another*⁵² and the Supreme Court of Appeal's decision in *Govender v Minister of Safety and Security*,⁵³ it is hard to imagine that our appellate courts would not find these RGA provisions

45 See V Blasi 'Prior Restraints on Demonstrations' (1970) 68 *Mich LR* 1481 (Blasi argues that a municipality's use of large fees for policing and sanitation constitute unconstitutional prior restraints on public assemblies. Civil liability provisions function in a comparable manner.)

46 So taken is Parliament with the potential efficacy of civil liability as a form of social control with respect to assemblies and demonstrations that the Security and Constitutional Affairs Select Committee, has recommended that the South African Law Reform Commission investigate the possibility of a specific civil action in respect of consequential damages arising from 'terrorist' hoaxes. See Protection of Constitutional Democracy Against Terrorist and Related Activities Bill [B 12B-2003].

47 B Rutinwa 'Freedom of Association and Assembly: Unions, NGOs and Political Freedom in Sub-Saharan Africa' *Article 19 Working Paper* (March 2001) available at <http://www.article19.org/pdfs/publications/sub-saharan-africa-freedom-of-association-and-assembly.pdf>, (accessed on 10 March 2009). Rutinwa accepts the thrust of my criticism but suggests that the appropriate response is to reform the RGA along the lines of Ghanaian Law. Under Ghanaian law, he says 'responsibility for any damage occurring in the course of demonstrations is borne not by all demonstrators jointly and severally, but by those individuals proved to have caused it.' See Public Order Act 491 of 1994. I may be mistaken, but on my reading of the Ghanaian Public Order Act, ss 3(1) and 3(2) hold both organizers *and* any other person responsible for the property damage liable for that damage.

48 See, eg, *Barney v Eugene* 20 Fed Appx 683, 2001 WL 1153441 (9th Cir 2001)(Court holds that use of tear-gas constituted a permissible use of force after violence erupted and that the use of tear-gas on non-violent demonstrators — after several hours of peaceful protest — did not violate the rights to free speech and assembly of the non-violent demonstrators.)

constitutionally infirm. The *Walters* Court held that s 49(2) of Criminal Procedure Act⁵⁴ was unconstitutional to the extent that it authorized the use of deadly force where there was no threat of serious bodily harm.⁵⁵ In light of *Walters*, RGA s 9(2)(d)'s authorization to use firearms where there is merely an intention to 'destroy . . . or damage property' must be viewed as constitutionally suspect. RGA s 9(3)'s insulation of common law doctrines that sanction the use of deadly force in order to protect private property should likewise fail the *Walters* test. As for the other provisions in the RGA that permit the use of deadly force for the purposes of crowd control, both *Govender* and *Walters* suggest that, at a minimum, such provisions must be read down so as to 'exclude the use of firearm or similar weapon' unless a law enforcement officer has 'reasonable grounds for believing (a) that the

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- 49 RGA s 9(2)(d) reads: 'If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration- (i) kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or (ii) destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (i) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons. (e) The degree of force which may be so used shall not be greater than is necessary for the prevention of the actions contemplated in subparagraphs (d)(i) and (ii), and the force shall be moderated and be proportionate to the circumstances of the case and the object to be attained. The power to use such deadly force has the potential to create a duty to use to it.' See *Mpongwana v Minister of Safety and Security* 1999 (2) SA 794 (C), 805 (High Court found that a duty imposed on the police by RGA s 9(1)(f) to take all reasonable steps to protect persons and property might well be a factor in deciding whether police had duty of care, for the purpose of proving a cause of action in delict, where use of deadly force results in harm.) See also *Rail Commuter Action Group v Transnet Ltd T/A Metrorail* (No 1) 2003 (5) SA 518 (C), 573 (Court imposed legal duty on state-owned railway, in terms of FC ss 11 and 12(1), to minimise the extent of violent crime and lack of safety on a public commuter rail service.)
- 50 RGA s 9(3) reads, in relevant part: 'No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.'
- 51 The Independent Complaints Directorate ('ICD') has recommended that police officers who fired into a crowd of demonstrators and killed one person be charged with murder. The ICD report states that the use of birdshot and buckshot is unlawful. Correspondence with J Duncan, Director, FXI (15 May 2005).
- 52 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('*Walters*').
- 53 2001 (4) SA 273 (SCA), 2001 (2) SACR 197 (SCA), 2001 (11) BCLR 1197 (SCA) ('*Govender*').
- 54 Act 51 of 1977.
- 55 *Walters* (supra) at paras 40, 41, 45, 46. The conditions for exercise of this license also stand in direct conflict with international instruments on the subject. The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, s 9, reads, in relevant part: 'Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life . . . In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.' Proceedings of the United Nations 8th Congress on the Prevention of Crime and the Treatment of Offenders (1990) available at www.uncjin.org/Documents/8comm/index.html, or www.asc41.com/8th%20UN%20Congress%20on%20the%20Prevention%20of%20Crime/8th_congress.htm (accessed on 28 February 2005).

suspect poses an immediate threat of serious bodily harm to him or her, or a threat of harm to members of the public; or (b) that the suspect has committed a crime involving infliction or threatened infliction of serious bodily harm.⁵⁶ To the extent that they cannot be read down, these provisions violate the right to dignity, FC s 10, the right to life, FC s 11, and the right to freedom and security of the person, FC s 12.⁵⁷

The RGA provides for summary intervention by a judicial officer.⁵⁸ While summary judicial interventions *per se* are not constitutionally infirm, the Constitutional Court in *Mamabelo* found 'broadly similar procedures' — in the context of expressive conduct and contempt of court — unconstitutional.⁵⁹

43.3 Assembly analysis

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.⁶⁰

(a) The content of the right

The approach to assembly analysis adumbrated in this chapter tracks the Constitutional Court's preferred approach.⁶¹ This two-stage process requires that we first establish the categories of assembly, demonstration, picket and petition that

serve the values which animate the freedom and those categories of assembly, demonstration, picket and petition that fall without the freedom's protective ambit. The second step, if necessary, requires a demonstration that a protected FC s 17

56 *Govender* (supra) at paras 21 and 24. See also *Walters* (supra) at paras 38-39.

57 *Walters* (supra) at paras 3-7, 40-41, 45-46.

58 See RGA ss 4(4) and 6 (1). RGA s 4(4) reads, in relevant part: 'If a local authority does not exist or is not functioning in the area where a gathering is to be held, the convener shall give notice as contemplated in this section to the magistrate of the district within which that gathering is to be held or to commence, and such magistrate shall thereafter fulfil the functions, exercise the powers and discharge the duties conferred or imposed by this Act on a responsible officer in respect of such gathering.' RGA, s 6(1)(b) reads, in relevant part: 'Whenever an authorized member in terms of section 4(4)(b) requests that a particular condition be imposed and the request is refused, or whenever information contemplated in section 5(1) is brought to the attention of a responsible officer and the gathering in question is not prohibited, an authorized member may, if instructed thereto by the Commissioner or the district commissioner of the South African Police for the area where the gathering is to be held, apply to an appropriate magistrate to set aside such refusal or to prohibit such gathering, as the case may be, and the magistrate may refuse or grant the application.'

59 *S v Mamabolo (E TV and others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) at paras 53-58 (Court finds summary procedures for contempt of court committed *in facie curiae* inquisitorial, inherently punitive, unfair, and not reconcilable with the basic standards of fairness called for by FC s 35(3)).

60 Section 17 of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). Section 16 of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution') read: 'Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.'

activity has been impaired. Only then may we assess the merit of arguments in support of laws that limit the exercise of this right.⁶² A good example of the consequences of failing to distinguish between the distinct requirement of rights analysis and limitations analysis in the context of the right to assemble is *Acting Superintendent-General of Education of KwaZulu-Natal v Ngubo*.⁶³ In deciding that the freedom of assembly — IC s 16 — 'implicitly extends no further than is necessary "to convey the [demonstrator's] message",' the *Ngubo* court collapses the determination of the scope of the right with what ought to be the subsequent analysis of the conditions under which that right may be justifiably restricted.⁶⁴

(i) Internal modifiers

Much is made of the violence implicit in every act of state and every rule of law.⁶⁵ It would be churlish, however, to deny that crowds of demonstrators, protestors and picketers are not moved by violence, do not communicate through violence or do not use violence to seduce. The internal modifiers in FC s 17 recognize 'violence' as an intrinsic element of assembly and seek not to suppress it, but to channel it, to make it a part of the cut and thrust of democratic politics.

(aa) Peacefully

One readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those that are not peaceful. So, for example, the High Court in *Fourways Mall (Pty) Ltd v South African Commercial Catering* found that neither the LRA nor FC s 17 countenance assault and that picketers may not

61 That approach is a value-based or purposive approach. A value-based approach to rights interpretation is profitably compared to a notional approach to rights interpretation. A notional approach to rights interpretation holds that any activity or status falling 'notionally' within the ambit of a right is protected. The applicant would then merely have to demonstrate a restriction of the protected activity before the analysis moved on to the limitation clause. See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) (Court assumes violation of FC ss 15 and 31); *Benaish v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC)(FC s 34, access to court, means 'access to court'); *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(Ackermann J assumes that 'freedom' in IC s 11 means freedom in its broadest possible sense). For more on the conceptual confusion associated with a notional approach, see S Woolman 'The Right Consistency: *Benaish v Ernst & Young* (1999) 15 SAJHR 166; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34. On the other hand, a value-based approach: (a) takes seriously FC s 39(2)'s admonition that the provisions of Chapter 2 be interpreted in light of the 'values which underlie an open and democratic society based upon human dignity, freedom and equality'; (b) permits us to screen out those forms of behaviour that clearly do not merit constitutional protection; (c) ensures that only genuine and serious violations of a constitutional right make it through to limitation clause analysis; (d) possesses the virtue of having both rights analysis and limitations analysis driven by service to the same five fundamental values; and (e) demands that courts provide an adequate explanation for rules it derives from the rights enshrined in the Final Constitution. See also L Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Sup Ct LR* 469, 477; E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31, 32-33.

62 Indeed, it is now trite law that one must first establish the scope of the right and its contravention, before one proceeds to the justificatory stage of the analysis. See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401, 414 (CC)(Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') See also *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665, 707 (CC).

63 1996 (3) BCLR 369 (N).

employ tactics that intimidate the general public and thereby interfere with the rights of other tenants of a shopping mall.⁶⁶

German assembly jurisprudence offers additional guidance. In Germany, an assembly is deemed non-peaceful only if acts of physical violence against person or property are committed or threatened.⁶⁷ Consistent with concerns regarding out-groups and intra-election voter-representative communication, Hoffmann-Riem argues that it should be kept in mind that assembly is primarily used by those who are dissatisfied with the status quo.⁶⁸ A generous interpretation of the 'peaceful' proviso is therefore necessary to prevent the state from exploiting this

- 64 Ibid at 375. Canadian expressive conduct jurisprudence sounds a similar cautionary note with respect to the proper allocation of tasks in a Bill of Rights that bifurcates fundamental rights analysis. See *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 ('CCC') (For an extended discussion and critique of *Committee for the Commonwealth of Canada*, see S Woolman & J De Waal (supra) at 292.) At issue in CCC was the plaintiffs' freedom to distribute handbills and carry placards promoting their political positions in a public airport terminal concourse. An airport regulation prohibited all expressive activity and made no distinction between commercial solicitation and political advocacy. Lamer CJ's opinion ignores the structural imperatives of the Charter and analyses both the expressive interests and governmental interests within the freedom alone. Part of the reason, if not the entire reason, that Lamer locates his test for expressive conduct in public spaces solely within Charter s 2(b) is that he decides that the regulation in question is not a 'law' within the meaning of s 1, the limitation clause. He is, therefore, unable to do the necessary assessment of the government's justification in the context of s 1. Our jurisprudence on the meaning of law of general application, though under-developed, would appear to contemplate treating published government regulations as laws of general application. L'Heureux-Dubé J's opinion — and her notional approach to rights analysis — contradicts her stated belief that *not* all public property is appropriate for expressive activity and results in the use of two overlapping balancing tests in the context of her s 1 analysis. L'Heureux-Dubé's judgment suffers not so much from incoherence as a lack of elegance. Her 'balancing' tests do, ultimately, address the central question of the case: whether the expressive activity in question is compatible with the property's purpose and whether other 'public arenas' in the vicinity are available and adequate for the expressive activities.
- 65 See, eg, R Cover 'The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role' (1986) 20 *Georgia LR* 815, 818 ('Violence is so intrinsic a characteristic of the structure of [law] that it need not be mentioned: Read the Constitution. Nowhere does it state the obvious: that the government thereby ordained has the power to practice violence over its people.')
- 66 1999 (3) SA 752 (W), 759.
- 67 In German assembly jurisprudence, not every unlawful disturbance of law and order or infringement of the rights of others is understood to be 'violent'. An assembly is deemed non-peaceful only if acts of physical violence against person or property are committed or threatened. See *Brokdorf* 69 *BVerfGE* 315, 360 (1985); *Mutlangen* 73 *BVerfGE* 206, 248 (1986). ECHR jurisprudence is somewhat more restrictive — if only because the margin of appreciation requires the ECHR Court to defer, where appropriate, to the understanding of a domestic court. See *Stankov* (supra) at para 90 ('Where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.') See also *Incal v Turkey* [1998] ECHR 48 at para 48; *Sürek v Turkey (No 1)* [1999] ECHR 51 at para 61. However, recent ECHR decisions have found that authorities may restrict or prohibit assemblies only where the state can demonstrate violent intent. The mere assertion that a dissident group may destroy property, disturb the peace, or propagate separatist ideas are insufficient grounds for limiting the right. See *Stankov* (supra) at paras 77-112 ('Article 11 of the Convention only protects the right to 'peaceful assembly'. That notion — according to the Commission's case-law — does not cover a demonstration where the organisers and participants have violent intentions.' However the Commission found no evidence of such intent in the instant case and rejected alleged past incidents as grounds for prohibition.) See also *Christians against Racism and Fascism v The United Kingdom* (1980) 21 DR 138; *G v Germany* (1989) 60 DR 256.

requirement in order to suppress unpopular positions.⁶⁹ This generous interpretation ensures that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the assembly remains protected. This result is necessary to prevent a peaceful assembly from being hijacked by violent supporters, opponents or agents provocateurs. When such a hijacking does occur, the police must attempt to act solely against the violent minority and to avoid depriving the rest of the assembly of FC s 17's protection.⁷⁰

(bb) Unarmed

Another readily identifiable class of assemblies, demonstrations and pickets excluded from the protection of the right are those in which the participants are armed. Once again, German assembly jurisprudence enhances our understanding of this internal modifier.⁷¹

In Germany, the use of protective devices by demonstrators (such as shields) has been prohibited by the Assembly Act on the grounds that they stimulate aggression among participants and onlookers by showing a readiness to engage in violence.⁷² The carrying of defensive devices by demonstrators, however, may be grounds for police action against the whole assembly — as opposed to acting solely against the individuals carrying the defensive devices — only when it can be shown that the majority of demonstrators intend to provoke a response and are gearing themselves up for a reaction from counter-demonstrators or the police.⁷³ So understood, the modifier 'unarmed' might even be read to prohibit the use of masks. Certainly anyone familiar with the history of the Ku Klux Klan in the United States would understand that the wearing of masks can be read as an explicit threat.⁷⁴

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(ii) Assembly

Courts accord different kinds of expressive activity different levels of protection. Comparative constitutional analysis suggests that of all the expressive rights —

68 See W Hoffmann-Riem *Reihe Alternativkommentare Kommentar zum Grundgesetz für die Bundesrepublik Deutschland* (1984) 753.

69 The use of sit-ins to blockade entrances, roads, and railway lines — initially characterized as 'violent' by ordinary German courts — are now constitutionally protected. See S Woolman and J de Waal 'Voting with Your Feet' in D van Wyk, B de Villiers, J Dugard & D Davis (eds) *Rights and Constitutionalism* (1994) 292 citing *BGH* (1969) *NJW* 1770, 1773 (In upholding convictions of students who disrupted lectures, a German administrative court found that while pressure to listen was constitutionally protected, outright coercion is not.)

70 See *Brokdorf* (supra) at 361.

71 See Article 2.3 *VersammIG* (Prohibits the transportation, provision, or distribution of weapons to assemblies.) The definition of 'arms' obviously embraces guns and knives. But bottles and sticks may — depending on the intention of the carrier — also qualify as arms. Rotten eggs, tomatoes, or paint — when used to embarrass opponents — ought to fall outside the definition. See *Schilder* (supra) at 150.

72 Article 17a *VersammIG*.

73 See Maunz and Dürig (supra) at 26.

speech, voting, political participation, religion, association — assembly may receive the least amount of judicial solicitude. Part of the explanation for this diminished protection is that assembly — like other forms of *conduct* — is often viewed merely as a condition for freedom of speech, and that it is the *content* of the speech itself that is thought to be of paramount importance. Stated another way, the courts have tended to view a political or social gathering as important for what is said at the gathering rather than for the fact of the gathering itself.⁷⁵ This tendency in rights discourse towards (artificially) separating the speech act from the surrounding conduct reflects a widespread and deeply embedded bias against extending constitutional protections to groups.⁷⁶

History is, of course, no argument. The introduction to this chapter sets out various independent grounds for a right to assemble: (a) to create space for large, vocal social formations that service representative democracies; (b) to act as a catalyst for debate; (c) to supplement representative democracy through a form of

74 Not all masks are veiled threats. Any law that treats all masks as such ought to be viewed as void for overbreadth. See *South African Defence Union v Minister of Defence and Another* 1999 (2) SA 735 (T), 746 (A 255 word definition of 'act of public protest' covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or any event of national or public concern.' The long but still non-exhaustive definition of public protest could capture complaints made by a defense force member to her husband in relation to absolutely any 'an event of national or public concern.' Such a complaint could never be accurately described as a public protest. Section 126B(4) of Defence Act 44 of 1957 was therefore deemed void for overbreadth. Although the court did not make this point expressly, the breadth of the definition of public protest would extinguish the entire range of expressive and political rights of each and every member of the military.) See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 643, 1995 (10) BCLR 1382 (CC) (Court held a statutory provision providing for imprisonment for non-payment of civil debts to be unconstitutional because it was overbroad); *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (1) SACR 587 (CC), 1996 (5) BCLR 609 (CC) at para 49 ('Overbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad'); *Reitser Pharmaceuticals (Pty) Ltd v Registrar of Medicines & Another* 1998 (4) SA 660 (T), 669 (On the nature of overbreadth for the purposes of constitutional analysis.) See, further, 'FXI Supports the Right of Gay and Lesbian People to March in Their Outfits' *FXI Newsletter* (17 September 2004). The FXI report noted that the Johannesburg Metropolitan Police Department threatened to arrest drag queens wearing any form of disguise that obscures their facial features. The police asserted that their authority to make such arrests flowed from the RGA. RGA s 8(7) reads: 'No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.' The construction of this section by the police suggests that RGA s 8(7) may be void for overbreadth. The section does not appear to lend itself to reading down.

75 Cf *De Jonge v Oregon* 299 US 353 (1937)(Court recognizes the right of free assembly as separate and distinct from those of free speech and free press, and 'equally fundamental'); *Thomas v Collins* 323 US 516 (1945)(Court not only recognizes the right of free assembly as a separate and distinct right but also extends its protection to any peaceable assembly, be it public, private, political, economic, or social.) See also CE Baker 'Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations' (1983) 78 *Northwestern U LR* 937 (Argues that there are strong and independent grounds for protecting assembly and that it should not be treated as an adjunct of speech.)

76 For a set of arguments designed as a corrective for such methodological individualism, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, §§ 44.1(b)(i)-(ii). See also *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 39 CRR 193, 229 (SCC)('[I]f the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee.')

direct democracy; (d) to empower out-groups; (e) to enhance the stability and the legitimacy of the political processes by allowing for the articulation of minority

views; (f) to improve government accountability and responsiveness between elections; (g) to channel the violence inherent in mass action into a less dangerous form; and (h) to facilitate self-actualisation. None of these grounds is, I think, entirely reducible to or exhausted by their service to expressive ends. All of these grounds, read together, establish the protective ambit of the freedom of assembly.

A freedom to assemble defined in terms of the aforementioned goods — and one that includes ground (h) — is open to the critique that there is very little by way of collective activity that FC s 17 does not notionally protect. As a result, I am inclined towards a view of FC s 17 that emphasizes its broadly political dimensions.⁷⁷ Ground (h) may well warrant the extension of the protection of FC s 17 to gatherings that serve purely recreational, developmental, spiritual, cultural, commercial or academic ends. But a court should do so advisedly.⁷⁸

(iii) Demonstrations

What is the difference between an assembly and a demonstration? Resort to dictionary definitions has always struck me as rather jejune. However, in the absence of any textual indication, or discussion in the *travaux préparatoires*, as to the meaning of each word, common sense understandings supplemented by their use as legal terms of art are as good a place as any to start.

Demonstrations are associated with some form of support or opposition for a moral or political position. Assemblies are gatherings that may or may not have political content. South African case law offers no gloss or variation on this distinction.

The only definition of 'demonstration' in South African law appears in the Regulation of Gatherings Act ('RGA'). RGA s 1 defines 'demonstration' as 'any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.' RGA s 1 defines 'gathering' as 'any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act . . . , or any other public place or premises wholly or partly open to the air.' The RGA distinguishes demonstrations from gatherings solely in terms of size. As a purely abstract matter, there is no reason to limit the extension of the term 'demonstration' to groups of 15 or less. The purpose of the RGA's construction of 'demonstration' is to differentiate the conditions under which a group must subject itself to the advance notification requirements of the Act from the conditions under which groups are not so subject. Demonstrations — 15 people or less — are not

77 Even if the right is limited to assemblies with political dimensions, it will still protect an array of practices in public and in private. See, eg, *Djavit An v Turkey* [2003] ECHR 91 at para 56 ('Freedom of assembly . . . should not be interpreted restrictively. As such this right covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly.')

78 The contraction of assembly's ambit to serve political ends suggests that a whole host of activities do not fall under the aegis of FC s 17. The point is not that these activities do not deserve protection, but rather that they are best protected by other rights or well-established non-constitutional bodies of law.

perceived to be threats to public order. Convenors are therefore not required to provide advance notification. Gatherings of any greater size, whatever their purpose, are.

Contrary to the Goldstone Commission's recommendations, this numerical definition of demonstration does not protect 'demonstration as of right'.⁷⁹ The apparent intention of the legislature was to limit the number of people who could assemble freely without providing prior notice. The RGA offers no insight into this distinction between demonstrations and gatherings. The RGA does not engage the different *types* of assembly nor does it attempt to craft regulatory regimes that actually fit the varying aims of such assemblies. Given the absence of any explanation in the RGA for the distinction made between demonstrations and gatherings, the 15-person threshold for demonstrations must be viewed as arbitrary. The consequences of the distinction between demonstrations and gatherings under the RGA, however, are quite real. Persons convicted of participating in a gathering without giving proper notification may receive a fine of up to R20 000 and/or a term of imprisonment of up to one year.⁸⁰

Given the history of this country, and, in particular, the prominence of demonstrations as a mode of mass political action, the drafters of the Final Constitution would have been unlikely to invest 'demonstration' with a narrow numerical extension. Even if we accept the proposition that the state may legitimately restrict demonstrations as of right, the definitions of 'demonstration' and 'gathering' under the RGA not only inhibit the exercise of assembly but criminalize gatherings that pose no absolutely threat at all to order, property or other public goods. So while the definition of demonstration is constitutionally suspect because it is radically under-inclusive, the definition of gatherings may well be found void for vagueness and overbreadth.⁸¹

79 See § 43.2(b)(ii) *supra*.

80 See RGA s 12(1).

81 The definition of 'gathering' under the RGA subjects to notice requirements every public congregation larger than 15 persons intended 'to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution.' Did Parliament mean to require every convenor of a church convocation in a public park — during which issues of moment may be debated and the considered opinion of the community canvassed — to apprise local authorities of the meeting in advance or risk the imposition of a banning order or the dispersal of the persons assembled? The RGA, as I noted above, makes no attempt to distinguish between that different kinds of social gatherings in which beliefs and practices — social, economic, spiritual or political — are engaged (and sometimes contested.) The RGA's potential threat of criminal sanctions in the context of a church convocation ought to be sufficient for a court to find the applicable provisions of the RGA void for overbreadth. Similar considerations support invalidating the applicable provisions of the RGA on the grounds of vagueness. The definition of 'gathering' in the RGA would seem to be 'so vague, wide and subject to subjective or arbitrary interpretation that it is impossible to read the wording down to a constitutionally acceptable definition.' *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W), 2002 (12) BCLR 1285 (W) at para 72 (On vagueness.) See also *Dawood & Another v Minister of Home Affairs & Others, Shalabi & Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47 ('It is an important principle of the rule of law that rules be stated in a clear and accessible manner.') No reasonable person could determine — on the basis of the RGA's definition alone — whether the RGA's requirements applied solely to party political protests or to such events as a church convocation.

(iv) Picketing

The right to picket is a noteworthy addition to our assembly jurisprudence.⁸² Primary and secondary picketing are often used by organized labour to bring management to heel.⁸³ One might have expected, therefore, that the right to picket

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would have been placed within FC s 23. However, for reasons that remain unclear, the right to picket wound up in FC s 17.⁸⁴

82 Canada recognizes picketing as one of many expressive and political rights that serve a range of political, social and economic ends. See *Retail Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR 174, 183, [1986] 2 SCR 573 (Explains the Canadian Charter's commitment to picketing as follows: 'It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy as we know it today . . . depends upon its maintenance and protection.')

83 The Labour Relations Act ('LRA') affords trade unions and their members significant statutory protection with respect to the right to picket in and about the private property of an employer. Act 66 of 1995. LRA s 69 reads, in relevant part: (1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating- (a) in support of any protected *strike*; or (b) in opposition to any *lock-out*. (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- (a) in any place to which the public has access but outside the premises of an employer; or (b) with the permission of the employer, inside the employer's premises. [Sub-s. (2) amended by s. 20 of Act 42 of 1996.] (3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.'

However, the LRA does not permit pickets that employ physical intimidation unrelated to a given labour dispute. See *Minister Of Correctional Services v Ngubo* 2000 (2) SA 668 (N), 673 (LRA protection of strikes and picketing does not extend to forms of physical intimidation intended not to communicate opposition to a labour practice but to coerce others into action — say the resignation of a member of management — that does not fall within 'the purview of the LRA'); *Modise v Steve's Spar, Blackheath* 2001 (2) SA 406 (LAC) at paras 118–119. (Although 'strikers' conduct is mitigated by the fact that 'they abided by the terms of the interdict prohibiting picketing within a defined distance of the trading premises, but they did not, despite the interdict, stop striking. . . . Obedience to a court order is foundational to a State based on the rule of law'); *Jacot-Guillarmod v Provincial Government, Gauteng, & Another* 1999 (3) SA 594 (T), 599 quoting from *Mondi Paper v Paper Printing Wood & Allied Workers Union & Others* (1997) 18 ILJ 84, 90 (D)(LRA permits 'a registered trade union to authorise a picket by its members and supporters for the purposes of peacefully demonstrating in support of any protected strike.' However, 'the incidents relating to the intimidation of non-striking employees at home are . . . examples of improper demonstrating in support of a strike.')

Distinguishing those conditions of assembly which compel others to reconsider their positions from those conditions of assembly that employ coercion to effect the actual desired outcome is difficult to do. It is also difficult, ex post facto, for courts to assess competing accounts of strike actions. In *South African Commercial Catering And Allied Workers Union & Others v Irvin & Johnson Ltd*, the Labour Appeals Court concluded that conduct of the demonstrators was intimidatory and 'carried out with a disregard for the economic rights of the employer and the right to security and tranquility of its employees.' 2002 (3) SA 250 (LAC) at paras 25, 27–28. The court reached this conclusion based on testimony that suggested that 'the demonstrators had . . . breached just about every condition of the 'picketing' agreement with the Cape Town City Council. They did not picket in the street in which they had permission to do so; they were many more than the 46 demonstrators for whom permission had been requested; they did not remain on the pedestrian walkways; they did not stand five metres apart (in fact, they did not stand still at all, but surged from one gate of the factory to another).' Ibid at para 21. It is impossible to gainsay the court's conclusions on the merits. But a reasonable scepticism — born of experience — must attach to measuring the 'lawfulness' of a demonstration in terms of its compliance with conditions established by a responsible local authority. The primary interest of the local authority will always be order. The facilitation of a potentially destructive demonstration courts entropy — and no officer of the peace has an interest in that.

One obvious explanation for the placement is that the drafters wanted the right to picket extended beyond the sphere of employer-employee relations. FC s 17 invites us to move from the particular — picketing in labour disputes — to the general — picketing as a form of social protest directed by one private party against another.⁸⁵ The private character of this form of social protest also suggests why both the state and the courts will tolerate primary picketing but not sanction secondary picketing.⁸⁶

(v) Petitions

FC s 17 protects the right to petition.⁸⁷ As Du Plessis and Corder note:

While some might regard the right to petition as somewhat archaic, its importance historically as a means of registering grievances seems to have diminished little in present circumstances.⁸⁸

Many of our fellow citizens lack access to the capital necessary to exploit electronic forms of communication, to employ lobbyists or to make campaign contributions that will secure an audience with the right government official. Petitions remain the most cost-effective means for tabling their concerns.

Of course, neither Parliament nor a provincial legislature nor a municipal council can be expected to respond in detail to each and every petition. The administrative burden would be too great. However, for the right to retain any purchase, government ought to acknowledge receipt of the petition and offer a

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- 84 In their motivation for including the right to picket in FC s 17, Theme Committee Four wrote: 'Picketing in labour disputes is not dealt with in s 27 of the Interim Constitution. If it were not included in a new section dealing with labour relations, it would be covered by the horizontal application of the proposed right which is a non-contentious issue.' Theme Committee Four 'Schematic Report on Freedom of Assembly, Demonstration and Petition' (9 October 1995). What the Theme Committee probably meant to say was that if the right to picket were not included in the labour rights provision of the Final Constitution, FC s 17's right to picket would afford constitutional protection to workers in private disputes with their employers. FC s 17 would provide such protection because — according to the theme committee members — the right to picket will be understood to apply horizontally.
- 85 Unlike the Interim Constitution, the Final Constitution does apply to some private disputes governed by common law. See *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC); S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. However, the Bill of Rights' provisions are not infinitely elastic and the Bill will not apply directly to all private disputes that might notionally fall within the ambit of a right. For some general background on the subject of pickets, see JR Midgley 'Boycotts and Similar Action: A Comparison of German and South African Law' (2002) 119 *SALJ* 352; AA Landman 'The New Right to Picket' (1999) 6 *Contemporary Labour Law* 41.
- 86 See *Retail, Wholesale and Department Store Union v Dolphin Delivery Limited* (1986) 33 DLR (4th) 174, [1986] 2 SCR 573 (Since Charter found not to engage private conduct governed by common law, secondary picketing not protected by Charter.)
- 87 FC ss 56 and 105 oblige the National Assembly and each provincial legislature, respectively, 'to receive petitions, representations or submissions from any interested persons or institutions.'
- 88 H Corder & L Du Plessis *Understanding South Africa's Transitional Bill of Rights* (1994) 160. See D Davis 'Assembly' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2002) 239, 242 (Identifies petitions as a distinctly South African form of political participation.)

considered, if abbreviated, response.⁸⁹

(b) Limitations on the right

Once the applicant can demonstrate that a gathering is entitled to the protection of FC s 17 and that some rule of law impairs the exercise of the right, the analysis shifts to FC s 36. This section breaks the justificatory analysis down into categories that engage particular constellations of public order, private property and expressive interests.

(i) Private property

Assemblies on private property ought to be the easiest for the government to regulate. In such circumstances, privacy and property interests compete on a rather equal constitutional footing with assembly and other expressive rights. For example, a local ordinance may legitimately require a private homeowner's consent before commercial solicitation is permitted.⁹⁰

Shopping centres — or malls — with their open spaces, mock boulevards and strolling crowds challenge this public-private divide. In *Amalgamated Food Employers v Logan Valley*, the US Supreme Court held that given the 'public' nature and function of shopping malls, such malls were subject to the same First

89 The restrictive approach to 'petition' in the KwaZulu-Natal Legislature Rules — 141 and 148(2)(f) — permits submission of a petition only when all other legal avenues for relief have been exhausted by a petitioner and thus looks to be constitutionally infirm. The Gauteng Petitions Act is substantially more generous. Act 14 of 1998. It defines 'petitioner' as a natural or juristic person acting: (a) on his or her or its interests; or (b) in the interest of another person who is not in position to seek relief in his or her or its own name; or (c) as a member of or in the interest of a group or class of persons; or (d) acting in the public interests. The Act also provides for a Public Participation and Petitions Committee to deal with petitions and a Public Participation Office to enable under-resourced communities to participate in the legislative process. Gauteng Petitions Act s 8. The German Federal Constitutional Court has held that 'the right to petition . . . implies a corresponding obligation of the state to accept the petition, to consider it, and to inform the petitioner of its decision — but (in order to avoid undue burdens) not to give reasons.' D Currie *The Constitution of the Federal Republic of Germany* (1994) 174 citing 2 BVerfGE 225, 230 (1953).

90 See *Breard v City of Alexandria* 341 US 622 (1951); *Wisconsin Action Coalition v City of Kenosha* 767 F 2d 1248, 1258 (7th Cir 1985)(Court holds that municipality may lawfully act to protect the peaceful enjoyment of local homes by its citizens.) However, while the US Supreme Court has let stand ordinances which bar picketing or demonstration in front of private residences, it has taken a very different tact with respect to prohibitions on non-commercial forms of communication by groups who lack other, adequate means of expression. See, eg, *Watchtower Bible and Tract Society of New York, Inc v Village of Stratton* 536 US 150 (2002)(After noting that for over 50 years unduly burdensome restrictions on door-to-door canvassing and pamphleteering have been deemed unconstitutional, Supreme Court concludes that with respect to groups such as Jehovah's Witnesses, who lack significant financial resources, the ability to communicate effectively and meaningfully requires the kind of personal contact at issue and that such contact is protected by the freedom of assembly. No other form of communication would be adequate to the task); *Heffron International Society for Krishna Consciousness* 452 US 640 (1981)(Solicitation is protected form of expressive conduct.) See also *Ohio Citizen Action v City of Seven Hills* 35 F Supp 2d 575 (ND Ohio 1999)(Court invalidated local ordinance imposing a 5:00 pm curfew on canvassing); *National People's Action v Village of Wilmette* 914 F 2d 1008, 1012 (7th Cir 1990)(Court holds time restrictions on canvassing — limiting them to particular hours — are constitutionally infirm because '[e]ven a temporary deprivation of a First Amendment [freedom] is generally sufficient to prove irreparable harm.')

Court found that picketing, within a mall, of a store charged with unfair labour practices fell within the protection of the First Amendment. Four years later the US Supreme Court severely curbed the application of the 'public function' doctrine to commercial property. In *Lloyd v Tanner*, the Court found that the handing out of anti-war leaflets in a shopping mall did not warrant constitutional protection.⁹² Whereas the *Logan Valley* labour protest had targeted a specific store, the *Lloyd* Court felt that the aims of a more general protest could just as easily have been accomplished in an alternative public location such as the street in front of the mall.⁹³

In South Africa, the privatisation of public space — and our shopping malls are good examples of such privatisation — suggests that our courts ought not to allow property rights to trump automatically assembly rights.⁹⁴ Malls offer only the illusion of privacy. Where a protest is directed at a particular vendor, and not a state actor, the protest must take place within reasonable proximity of the place of business in order for the protest to have any purchase. The Labour Relations Act ('LRA'), for example, recognizes the right of trade unions and their members — in support of a strike — to picket in and about the private property of an employer. LRA s 69 reads, in relevant part:

(2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- (a) in any place to which the public has access but outside the premises of an employer; or (b) with the permission of the employer, inside the employer's premises . . . (3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.⁹⁵

Note that the LRA does not limit such pickets to public property. Members of trade unions may picket 'in any place to which the public has access.' This

91 391 US 308 (1968). The *Logan Valley* Court was effectively applying and extending the 'public function' doctrine developed in *Marsh v Alabama*. 326 US 501 (1946). The *Marsh* court, however, was concerned with expanding the judiciary's understanding of the state action doctrine in order to protect speech, not assembly.

92 407 US 551 (1972).

93 See also *Hudgens v NLRB* 424 US 507 (1976)(Striking labourers do not have First Amendment right to picket in front of store in mall.) But see *Pruneyard Shopping Center v Robins* 447 US 74 (1979) (US state constitutions may grant more expansive protections to speech and assembly than the US Constitution, and thus permit and protect political solicitation in a private shopping centre, as long as the restrictions on the use of the private property do not amount to a taking of property without compensation or contravene some other federal constitutional provision); JC Harrington 'Free Speech, Press and Assembly Liberties under the Texas Bill of Rights' (1990) 68 *Texas LR* 1435.

94 The Constitutional Court has expanded the notion of what constitutes a 'public purpose' with respect to its analysis of deprivations and expropriations of property under FC s 25. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)('FNB') at para 50 (Constitutional Court holds that overriding purpose of the constitutional property clause is to strike 'a proportionate balance' between existing property rights and the promotion of the public interest.) See also T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. Extending the definition of 'public purpose' under FC s 25 to matters that fall within the purview of FC s 17 is, admittedly, a stretch.

language clearly embraces such 'private' venues as shopping malls. The right to picket on private property is further reinforced by the language of the next two subsections: namely, that employers may not unreasonably withhold permission to picket *within* their business premises. To the extent that provision for non-labour related protests is not made manifest in other pieces of legislation, our courts are well placed to craft rules that permit such protests to take place at the same time as they secure the rights of a business to carry out its commercial activity with limited interference. Businesses are not entitled to monopolize the use of places that function as 'public' spaces.⁹⁶ The LRA provides initial, if not ample, support for this thesis.

(ii) Security and order

Where assemblies and demonstrations pose an imminent and a direct threat to public security, the government is well within its rights to ban them.⁹⁷ The catch, of course, is not to allow the mere assertion that such a threat exists to censor unpopular or unconventional views.⁹⁸ The relative ease with which government's claim to be under siege explains why courts — from Zimbabwe to the US to Germany — take a dim view of banning.⁹⁹ They generally require the state to demonstrate that no other means of dealing with a threat to public order — say, relocation to another venue — is available.¹⁰⁰

95 Labour Relations Act 66 of 1995. LRA s 69 reads: '(1) A registered *trade union* may authorise a picket by its members and supporters for the purposes of peacefully demonstrating- (a) in support of any protected *strike*; or (b) in opposition to any *lock-out*. (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1), may be held- (a) in any place to which the public has access but outside the premises of an employer; or (b) with the permission of the employer, inside the employer's premises. [Sub-s. (2) amended by s. 20 of Act 42 of 1996.] (3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.'

96 The horizontal application of the right to picket reinforces the conclusion that FC s 17 does engage private disputes on private property. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31. The doctrines of 'public purpose' and 'public function' also appear in FC s 238 'organ of state' analysis.

97 See RGA s 5(1). See also Article 15.1 *VersammlG*.

98 See *Cisse v France* [2002] ECHR 400 at para 52 (ECHR recognizes that public order concerns alone do not justify state intervention with respect to a peaceful sit-in by undocumented persons who sought and received sanctuary within a church. However, the Court concluded that after two-months the applicants had made their point — literally and symbolically — and that the deterioration of sanitary conditions gave the state sufficient reason to bring the demonstration to a halt.)

99 See *In Re Munhumeso & Others* 1995 (1) SA 551 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC) ('*Munhumeso*'). Section 6(2) of Law and Order (Maintenance) Act makes official conduct the measure of the constitutional right, and not the constitutional right the measure of official conduct — thus reversing the accepted hierarchy of legal authority in a constitutional order: 'Its effect is to deny such rights unless a certain condition is satisfied, namely that the public procession it is sought to form is unlikely to cause or lead to a breach of the peace or public disorder. If there is the slightest possibility of it doing so, permission is refused.' The default position for assembly analysis under the Law and Order Act was banning. Only proof that a march would, in fact, be peaceable could overcome that presumption. Such a showing is logically impossible to make. The Zimbabwe Supreme Court held s 6(2) to be an unjustifiable infringement of the right to assemble.

(iii) Content neutrality

At various points in this discussion, I have alluded to the fact that assembly jurisprudence is primarily concerned with conduct. This emphasis on form, however, should not be understood to mean that assembly concerns do not engage matters of substance.

Where government restrictions on assembly go to the point of view, or the political ends, of the participants, courts ought to be loath to accept any restrictions, let alone prohibitions.¹⁰¹ For starters, the only acceptable content-specific restrictions on assemblies held in public streets and parks ought to be on forms of expression left unprotected by FC s 16(2).¹⁰² However, content-based restrictions on assembly may also pass constitutional muster (a) where the purpose of the public space is inconsistent with the subject matter of the speech¹⁰³ or

100 US courts recognize the state's substantial interest in safeguarding its citizens against violence. See *Hill v Colorado* 530 US 703, 715 (2000). The substantial interest in public safety does not end the inquiry. The state must provide 'tangible evidence' that speech-restrictive regulations are 'necessary' to advance the proffered interest in public safety. See *Bay Area Peace Navy v United States* 914 F 2d 1224, 1227 (9th Cir 1990). Generalizations about groups or kinds of groups are insufficient. See *City of Chicago v Mosley* 408 US 92, 100-1 (1972)('Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications.') See also *Project 80's Inc. v City of Pocatello* 942 F2d 635, 638 (9th Cir 1991)(Court rejects city's proffered interest in public safety after finding 'little evidence' in the record that the ordinances banning door- to-door solicitation actually protected citizens from crime); *Hodgkins v Goldsmith* 2000 WL 892964 (SD Indiana 2000)(Court finds unconstitutional a curfew restricting minors' rights to assemble in public streets, parks and other traditional public fora because the state produced no evidence demonstrating link between security concerns (read crime) and the behaviour of minors.)

German courts take a very similar line. See *Brokdorf* (supra) at 352. See also *Woolman & De Waal* (supra) at 329 citing *BVerw* (1982) *NJW* 1008, 1009 (Federal Administrative Court held that banning is not permitted where resort may be had to measures that will avert the alleged danger. Where participants carried banners with inscriptions that insulted members of the Chilean government, and in so doing committed a criminal offence, the court held that the confiscation of banners was the appropriate and proportional response. The court also noted, as a general matter, that where the objective of the assemblers is to obstruct the flow of traffic the assembly is not protected. Where, however, the hindrance of traffic is an unavoidable and an incidental effect of the exercise of the freedom to assemble, then it must be tolerated.)

101 See *Ward v Rock Against Racism* 491 US 781, 791 (1989)('The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys'); *Clark v Community for Creative Non-Violence*, 468 US 288, 293 (1984)(An ordinance is content-neutral if it can be 'justified without reference to the content of the regulated speech'); *Deboer v Village of Oak Park* 267 F 3d 558 (7th Cir 2001)(Court declared village ordinance unconstitutional because it created the conditions for viewpoint discrimination by vesting in village clerk unbridled discretion to decide whether an assembly in village hall would benefit the public as a whole or some sectarian (read religious), interest.) See also *Stankov* (supra) at para 86 (Article 11 of the ECHR does not permit state prohibit or restrict 'an assembly or an association . . . [solely because of] the views held or statements made by participants or members.') So while the RGA, for example, is content-neutral with respect to the kinds of political demonstrations and gatherings it governs, the State's application of the RGA suggests that it engages in view-point based discrimination. Marches and protests organized by COSATU are generally permitted and even facilitated. The official response to groups on the margin, such as the APF or the LPM, is often desultory compliance with notice requirements and a pro forma letter of prohibition.

(b) where the subject matter of the speech — or the mere fact of political speech — is inconsistent with employment in the public service.¹⁰⁴

The Constitutional Court in *South African National Defence Union v Minister of Defence* provides a coherent account of the relationship between the general commitment to content-neutrality and the appropriate conditions under which the content of speech by public servants may be restricted.¹⁰⁵ The *SANDU* Court states that the purpose of the mutually supporting expressive rights found in Chapter 2 — FC ss 15, 16, 17, 18, 19 — is to enable:

groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.¹⁰⁶

Public servants, especially those in the security services, have obligations and duties that may legitimately restrict their expressive conduct. FC s 199(7) states that:

Neither the security services, nor any of their members, may, in the performance of their functions — (a) prejudice a political party interest that is legitimate in terms of the Constitution; or (b) further, in a partisan manner, any interest of a political party.¹⁰⁷

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The *SANDU* Court concludes that 'members of the Defence Force may not, in the performance of their functions, act in a partisan political fashion.'¹⁰⁸ However, the 255 word definition of 'act of public protest' found in Defence Act, s 126B(2) read with Defence Act, s 126B(4) covered conduct ranging from 'holding or attendance of a meeting which is calculated to support or oppose any policy or conduct of the government or of a foreign government' to any indication of 'private or public support or opposition regarding any policy, conduct or principle' or any event of

102 See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)(Court explains relationship between protected speech under FC s 16(1) and unprotected speech under FC s 16(2) in order to demonstrate how legislation — Clause 2(a) of the Code of Conduct for Broadcasting Services (Schedule 1 to Independent Broadcasting Authority Act 153 of 1993) — that presumes to restrict unprotected speech, in fact, trenches on protected speech.) For more on content neutrality and content-based restrictions on speech, see D Milo, G Penfold & A Stein 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42; G Marcus & D Spitz 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 20.

103 *McCook v Springer School District* 44 Fed Appx 896, 168 Ed Law Rep 710, 2002 WL 1788529 (10th Cir 2002)(Right to assemble and to associate does not entitle parent to have access to school property without limitation.)

104 See *Bethel School District v Fraser* 478 US 675 (1986)(Since public-schools are not public forums, schools can control the content of assemblies or gatherings for legitimate pedagogical reasons.)

105 See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('SANDU').

106 *Ibid* at para 8.

national or public concern.¹⁰⁹ The long but still non-exhaustive definition of public protest could capture complaints made by a defence force member to her husband in relation to absolutely any 'event of national or public concern.' Such a complaint could never be accurately described as public protest or partisan political conduct. As a result, the Constitutional Court held that the Defence Act's gloss on the term 'public protest' in s 126B(2) and the extension of its definition of 'act of public protest' in s 126B(4) were unconstitutional. It then severed both subsections from the Defence Act.¹¹⁰

(iv) Time, place and manner restrictions

For the most part government restrictions on assembly will appear neutral with respect to the content of the expression. Facially content-neutral regulations may still impair the right to assemble in a variety of ways.

Foreign and international assembly jurisprudence make it clear that citizens ought to have 'guaranteed access' to public streets and parks.¹¹¹ A universal or

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107 For a recent case that engages directly the limits of expressive conduct by members of the security services, see *Van Dyk v Minister van Veiligheid en Sekuriteit* Case No 4268/2002 (TPD 29 April 2003, Du Plessis J) ('*Van Dyk*'). The High Court held that a police officer was legitimately terminated from his employment because he stood for election as a member of the Democratic Alliance. For a more detailed discussion of this case and limits of political expression by members of the security services, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.3(c)(vii). The officer argued that because his position in the police force — that of a budget analyst — did not require him to engage the public directly, the officer's candidacy could not prejudice the administration of justice or give the appearance of impropriety. The High Court found that the purpose of the South African Police Service Act was to eliminate any perception on the part of the public that the administration and the enforcement of the law advanced the fortunes of any given political party. Act 68 of 1995, s 46. The elimination of the perception of bias in the police force in order to instil greater public confidence in government justified the limitation of the rights of the particular officer in question. *Van Dyk* (supra) at 10 ('The need for a police force that is seen to be impartial speaks for itself.') See *Ahmed v United Kingdom* [1998] ECHR 76 at paras 52–53 (ECHR concludes that state is entitled to restrict the partisan political activities of local government officers — including the right to assemble — in order to strengthen the tradition of bureaucratic neutrality, to enhance the appearance of impartiality and to diminish potential for abuse of political power); *Civil Service* 39 BVerfGE 334, 349, 359 (German Constitutional Court holds that loyalty requirements for civil servants found in the Basic Law, Articles 33(4) and 33(5), permit state to exclude from public service persons 'who reject and oppose the free democratic order, the rule of law and the social state. Moreover, the rights of expression, association and assembly do not, necessarily, entitle a civil servant to be a 'member of a political party pursuing goals inimical to the Constitution.') See also D Currie (supra) at 221–224.

108 *SANDU* (supra) at para 11.

109 Act 44 of 1957.

110 See *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T), 29 (High Court finds that Regulation 8(b) in Chapter 20 of the General Regulations of the South African National Defence Force and Reserve — which provided that the right of members to assemble, to demonstrate, to picket and to petition was subject to the limitation that such right could not be exercised 'in respect of any matter concerning either the employment relationship with the Department of Defence or any matter related to the Department of Defence' — failed to satisfy the test for expressive conduct by members of the security services set out by the Constitutional Court in *SANDU*. The regulation was, therefore, an unjustifiable 'limitation of the right of assembly.')

blanket prohibition on such access — though facially neutral — would constitute an unjustifiable infringement of FC s 17.¹¹²

That said, the government is entitled to place time, place, and manner restrictions on assemblies in an attempt to mediate conflicting interests in safety, privacy, property and expression. US courts employ a three-part test for restrictions on assemblies in a public forum:¹¹³ (1) the restriction must be content-neutral;¹¹⁴ (2) the restriction must not burden the expressive conduct more than is absolutely necessary to further a 'significant government interest';¹¹⁵ (3) any restriction must provide for 'alternative channels for communication' — that is, they must permit the assembly to take place elsewhere, or at another time, or allow the

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message to be conveyed in a comparable form.¹¹⁶ All laws purporting to regulate the time, place and manner of assemblies are subject to two further provisos: (1) they must provide clear guidelines for the conduct being regulated;¹¹⁷ (2) they cannot give a public official unfettered discretion to decide what kinds of expressive conduct are and are not permissible.¹¹⁸

111 South African legislation on the subject seems rather outré. The Control of Access to Public Premises and Vehicles Act does not guarantee such access. Act 53 of 1985. Indeed, it would seem to give the state untrammelled authority to control ingress and egress. Section 2 reads, in relevant part:

Notwithstanding any rights or obligations to the contrary and irrespective of how those rights or obligations arose or were granted or imposed, the owner of any public premises or any public vehicle may- (a) take such steps as he may consider necessary for the safeguarding of those premises or that vehicle and the contents thereof, as well as for the protection of the people therein or thereon; (b) direct that those premises or that vehicle may only be entered or entered upon in accordance with the provisions of subsection (2). (2) No person shall without the permission of an authorized officer enter or enter upon any public premises or any public vehicle in respect of which a direction has been issued under subsection (1) (b), and for the purpose of the granting of that permission an authorized officer may require of the person concerned that he — (a) furnish his name, address and any other relevant information required by the authorized officer; (b) produce proof of his identity to the satisfaction of the authorized officer; (c) declare whether he has any dangerous object in his possession or custody or under his control; (d) declare what the contents are of any vehicle, suitcase, attaché case, bag, handbag, folder, envelope, parcel or container of any nature which he has in his possession or custody or under his control, and show those contents to him; (e) subject himself and anything which he has in his possession or custody or under his control to an examination by an electronic or other apparatus in order to determine the presence of any dangerous object; (f) hand to an authorized officer anything which he has in his possession or custody or under his control for examination or custody until he leaves the premises or vehicle; (g) in the case of premises or a vehicle or a class of premises or vehicles determined by the Minister by notice in the *Gazette*, be searched by an authorized officer.

Despite the apparant desuetude of the Act, s 2 remains constitutionally infirm.

112 See *Hague v CIO*, 307 US 496, 515-16 (1939)('Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such a use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege to use the streets and parks for communication on national questions may be regulated in the interest of all: it must not, in the guise of regulation, be abridged or denied.')

113 *Frisby v Schultz* 487 US 474, 481 (1988)(Court holds that while reasonable time, place and manner restrictions may be necessary to further significant governmental interests, an ordinance that fails to satisfy any leg of the three-part test will be declared unconstitutional.)

The Zimbabwe Supreme Court, in *In Re Munhumeso & Others*, was confronted with a piece of legislation that contravened each of these five accepted standards for the regulation of assemblies and demonstrations.¹¹⁹ Section 6 of the Law and Order (Maintenance) Act read, in relevant part, as follows:

(1) A regulating authority may issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass.

(2) Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority is satisfied that such procession is unlikely to cause or lead to a

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- 114 See *Chicago Police Department v Mosely* 408 US 92 (1972)(Ordinance allowing labour picketing near schools, but barring other grounds for picketing, is declared invalid as a content-based restriction); *Boos v Barry* 485 US 312 (1988)(Law forbidding display of banners or signs critical of a foreign government within 500 feet of said government's embassy is constitutionally invalid as a content-based restriction.) See also *Collin v Smith* 578 F 2d 1197, 1206 (7th Cir 1978) quoting *Street v New York* 394 US 576, 592 (1969)(Court finds ordinances designed to prevent demonstrations by neo-Nazis unconstitutional, despite the potential 'infliction of psychic trauma on the resident Holocaust survivors', because 'public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'); *Terminiello v Chicago* 337 US 1 (1949)(Words that simply make the listeners angry insufficient ground to bar speech; words must be sufficient to incite violence.)
- 115 See *Ward v Rock Against Racism* 491 US 781 (1989)(Ordinance requiring performers appearing at city theatre to use city-owned sound equipment is a regulation narrowly tailored to effect the city's significant interest in preventing excessive noise); *Clark v Community for Creative Non-Violence* 468 US 288 (1984)(Significant government interests include traffic safety, sanitation, public peace and order, noise control, and personal privacy.) But see *Edwards v South Carolina* 372 US 229 (1963)(Supreme Court reverses convictions because protest took place in an historically recognized public forum — in front of the state legislature — and that there had been no threat of violence by the demonstrators nor evidence of the use of 'fighting words'); *Brown v Louisiana* 383 US 131 (1966)(Court overturns breach of peace convictions of African-American students who had peaceably assembled in a public library to protest silently against whites-only policy); *National People's Action v Village of Wilmette* 914 F 2d 1008, 1012 (7th Cir 1990)(Court holds time restrictions on canvassing — limiting them to particular hours — are constitutionally infirm because '[e]ven a temporary deprivation of a First Amendment [right] is generally sufficient to prove irreparable harm.')
- 116 See *Edwards v City of Coeur d'Alene* (9th Cir 2001) 262 F 3d 856, 867 (Court declared unconstitutional an ordinance banning the attachment of 'any wooden, plastic or other type of support' to signs carried during parades and public assemblies on city streets because they could, according to the ordinance, be used as weapons. Court rejected the city's contention that the ability to 'hand out, leaflets, carry signs (without supports and made of non-rigid materials), sing, shout, chant, perform dramatic presentations, solicit signatures for petitions and appeal to passersby' constituted adequate alternatives); *Metromedia, Inc v San Diego* 453 US 490 (1981) (Ban on all billboards eliminated a well-established means of communication used to convey a broad range of different kinds of messages, and a means of communication for which there was no surrogate.)
- 117 See *Lakewood v Plain Dealer Publishing Co* 486 US 750, 758-59 (1988)(Court finds that standardless discretion on the part of government officials is dangerous for two reasons: (1) affected parties will censor their own speech to avoid potential, if uncertain, punishment; (2) absence of criteria for exercise of official discretion makes it impossible for the court to review meaningfully the official's decision. Moreover, standardless discretion increases the likelihood that a government official will be able to discriminate against demonstrators 'by suppressing disfavored speech or disliked speakers.')
- 118 See *Cox v Louisiana* 379 US 536, 554, 557 (1965)(US Supreme Court holds that 'the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that

breach of the peace or public disorder, he shall, subject to the provisions of s 10, issue a permit in writing authorizing such procession and specifying the name of the person to whom it is issued and

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such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.

(3) Without prejudice to the generality of the provisions of sub-s (2), the conditions which may be imposed under the provisions of that subsection may relate to — (a) the date upon which and the place and time at which the procession is authorised to take place; (b) the maximum duration of the procession; and to any other matter designed to preserve public order.

The Supreme Court distils from this language three elemental infirmities. First, the Act does not assume that the public may, as a matter right, demonstrate or assemble in public streets and parks. The Act instead 'imposes a prohibition on the right to take part in a public procession *unless* permission is first applied for and obtained from a regulating authority.'¹²⁰ In short, the Act makes an absolute ban on 'public processions' in 'public places' the departure point for assembly analysis.¹²¹ Second, the regulating authority may issue a banning order on just about any grounds whatsoever: 'the discretionary power of [the] regulating authority is uncontrolled.'¹²² The absence of any criteria to be used by the regulating authorities in the exercise of their discretion turns the Act into an 'instrument for the arbitrary suppression of the free expression of views.'¹²³ Third, the Act makes no effort to burden the expressive conduct only as much as is absolutely necessary to further a significant government interest: 'the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be

everyone with opinions or beliefs may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy . . . [However,] it is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.' See also *Gregory v Chicago* 394 US 111 (1969)(Convictions for disorderly conduct of a group of peaceful demonstrators pressing for school desegregation overturned because statute gave the police almost unlimited discretion to decide what constituted a 'diversion tending to a breach of the peace'); *Shuttlesworth v Birmingham* 394 US 147, 149 (1969)(US Supreme Court invalidates ordinance for lack of specificity — permits could be refused on such vague grounds as 'public welfare, safety, health, decency and public morals' — and for granting city commission unbridled power to prohibit assemblies); *Khademi v South Orange County Community College District* 194 F Supp 2d 1011 (CD California 1999)(Court held that requiring prior approval of president to hold of meetings in specified areas unconstitutional due to absolute discretion given to president to allow or disallow meetings.)

119 1995 (1) SA 551 (ZS), 1995 (2) BCLR 130 (ZS), 1994 (1) ZLR 49 (SC).

120 See *Munhumeso* (supra) at 561 (Emphasis added).

121 Ibid at 563 ('Although the rights to freedom of expression and assembly are primary and the limitations thereon secondary, s 6(2) of Chap 65 reverses the order.')

122 Ibid at 562.

123 Ibid at 562.

averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating, for instance, to time, duration and route . . . rather than an outright ban.¹²⁴ The *Munhumeso* Court concludes that while 'the power to control . . . a public procession [in a public place may be] necessary in the interests of public safety or public order', such power had to be exercised in a manner far 'less restrictive and authoritarian' than provided for in the Act.¹²⁵

Government may legitimately claim greater latitude with respect to the restrictions imposed on public or state-owned venues not normally associated with, or conducive to, assemblies or demonstrations.¹²⁶ However, South African courts

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should take care not to base assembly doctrines primarily on place. Too great an emphasis on the nature of the forum — public, non-public, private — tends to result in 'tests' that are both over-inclusive and under-inclusive with respect to the vindication of assembly interests.¹²⁷

124 Ibid.

125 Ibid at 563. See *Maestri v Italy* [2004] ECHR 76 (Unfettered discretion granted authorities to prohibit Freemasons from associating or assembling violates Article 11); *Djavit An v Turkey* (supra) at paras 64–69 (Exercise of administrative authority — without reference to any law or regulation — that prevents Turkish Cypriot from meeting with Greek Cypriots violates Article 11 because it is not an exercise of power prescribed by law.)

126 For example, while the Constitutional Court accepts the proposition that many forms of political protest by members of the security services are constitutionally protected, it is likely to view partisan political protests by members of the security services on a military base as justifiably restricted by the provisions of the Defence Act. See *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC). See also *Adderly v Florida* 385 US 39, 41 (1966)(US Supreme Court held that demonstrators, however peaceful, did not have the right to gather on jail grounds: 'Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not.' The Court noted, however, that had the sheriff ordered the crowd's dispersal based upon the content of the speech, the order would not have been content-neutral and would have been a violation of the right to free speech); *Greer v Spock* 424 US 828, 838 (1976)(Court upheld two regulations barring political activities on a military base. The Court wrote that the purpose of a military base is 'to train soldiers, not to provide a public forum . . . The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is historically and constitutionally false.') But see *United States v Grace* 461 US 171 (1983) (Petitioners challenged a statutory provision that barred display of organizational banners on Supreme Court grounds and sidewalks. The Court did not address the constitutionality of the actual statutory provision, but only its effect on the right of the petitioners and public to use the surrounding sidewalk to carry out their expressive activities. The Court held that public property that abuts government property does not lose its character as 'public forum property'.)

The preoccupation with place in US assembly jurisprudence distorts the courts' treatment of content based restrictions. Speech in non-public forums need only be 'viewpoint-neutral'. See *Widmar v Vincent* 454 US 263 (1981)(Court holds that since state college allows various student groups to use classrooms for meetings, it cannot restrict use based on the view-point of a group's speech, and therefore cannot prohibit religious groups from using the classroom.) The doctrine of view-point neutrality operates as a surrogate for the two-fold proposition that not all state-owned spaces are equally appropriate for assemblies, and that the primary purpose of a state-owned property may justify a significant narrowing of both the conditions under which an assembly may take place and subject matter engaged at an assembly. See *Bethel School District v Fraser* 478 US 675 (1986)(Since public-schools are not public forums, schools can control the content of assemblies or gatherings for legitimate pedagogical reasons); *Courtemanche v General Services Administration* 172 F Supp 2d 251(DMass 2001)(Court upholds denial of organization's permit application because demonstration would both interfere with primary purpose of the federal building and compromise the security of other members of the public.)

How then might a court best approach time, place and manner restrictions on assemblies so as to avoid definitional traps? It might begin by asking whether the

public is ordinarily admitted to the property in question as a matter of right. A negative response tilts the analysis in favour of the governmental or private interest asserted. An affirmative answer prompts a further enquiry as to whether the property in question is traditionally open to expressive activity. If this follow-up question is answered in the affirmative, then the assembly interests are to be privileged. It may be, however, that the place in question is open to the public, but is not normally associated with expressive activity. Since not all publicly accessible places are easily transformed into assembly or demonstration grounds, the next question might assess the compatibility of the property's purpose with such expressive activity. If the property is government-owned, the court might ask to what extent the restriction on gatherings simply ensures that the property can be effectively used by the government and other members of the public for its intended purpose, and to what extent the restriction effectively suppresses expression.¹²⁸ This functional approach suggests that FC s 17 ought to afford protection to demonstrations on privately owned property. Not only does the Final Constitution contemplate the extension of the guarantees in the Bill of Rights to relationships between private parties, the privatisation of public space in South Africa demands that courts interrogate both the extent to which a piece of private property serves a public function and the extent to which the expressive conduct in question actually impairs the property rights and the privacy rights of the owner.¹²⁹

Authorities often attempt to relocate assemblies and demonstrations to 'more suitable' venues, at 'more suitable' times. With respect to restrictions on place, a court might first ask whether, in fact, other forums in the vicinity are available for expressive activities. If such alternative forums are not available, then one might ask

127 The 'geographical' analysis reflected in public forum and non-public forum doctrines diverts attention from the real interests at stake: the value of the expressive activity and the countervailing interests in privacy, property or public order. Two cases reflect this subordination of substance to form. In *Brown v Louisiana*, the court employed the public forum test in finding unconstitutional the breach of peace convictions of African-American students who had engaged in peaceful silent protest within a public (whites-only) library. 383 US 131 (1966). In *Adderly v Florida*, on the other hand, the court employed the non-public forum doctrine and held that protesting African-American students did not have the right to gather on a jail driveway. 385 US 39 (1966). It is hard to understand why the inside of a library — a place for quiet contemplation — is declared a public forum and thus a potentially appropriate venue for public protest, while a government driveway fronting a jail is a non-public forum and a more easily restricted venue. Given the nature of the two locations, one might be forgiven for thinking that the assignments 'public' and 'non-public' should have been reversed. These two cases suggest that '[c]lassifying a medium of communication as a public forum' will weight the analysis heavily in favour of the speaker and 'may cause legitimate governmental interests to be thoughtlessly brushed aside.' See DA Farber & JE Nowak 'The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Analysis' (1984) 70 *Virginia LR* 1219, 1224. Conversely, identification of a venue as a non-public forum may tilt the analysis too heavily in favour of the government's interest in the protection of property and public order and often leads 'courts to ignore the incompatibility of challenged regulations' with constitutional commitments to an open and democratic society. *Ibid*.

128 For further discussion of time, place and manner restrictions on assembly in the United States, see WE Lee 'Lonely Pamphleteers, Little People and the Supreme Court: Time, Place and Manner Regulations of Expression' (1986) 54 *Geo Wash LR* 757.

129 See *Marsh v Alabama* 326 US 501 (1946) (Company town — though privately owned — possesses all the *indicia* of municipality and thus is subject to constitutional norms.) See § 43.3(b)(i) *supra* (Discussion of the relationship between private property and its public function.)

more generally whether adequate alternative media, forms or manner of expression can be meaningfully exploited by the demonstrators.¹³⁰ Of course, it must be remembered that sites for demonstrations are often selected because of the nexus between the place and the issue. Alternative sites or forms of expression may diminish significantly the impact of the protest.¹³¹ The court must, therefore, inquire into the symbolic significance of the property for the message being

conveyed as well as the medium being used to convey that message.¹³² The more closely related the property is to the message, the greater the weight to be given to the expressive interests sought to be exercised there. It must also be remembered that many South Africans will not, in fact, have access to other 'adequate' forms of communication. The means of the demonstrators are just as important as the means of demonstration.

Similar considerations attach to time. The inconvenience a demonstration may cause to others during rush hour traffic is a legitimate concern. Assemblies cannot be used to coerce others into listening by obstructing their passage. However, assemblies are, at bottom, meant to convey the political position of one set of citizens to their fellow citizens and to those who govern. This conversation requires the presence of believer and non-believer alike. The selection of time is, therefore, a relevant consideration in the planning of an assembly or a demonstration. The right of the public to use the streets — married to the functional significance of time — demands that authorities compromise with conveners on the place and the time at which a demonstration takes place.

Various provisions of the Regulation of Gatherings Act ('RGA') have already had their constitutionality appraised in this chapter.¹³³ However, the questions set out in

130 It is all well and good to speak of alternative media, but that media must be a real alternative. Most alternative forms of mass communication are prohibitively expensive. See, eg, *Metromedia, Inc v San Diego* 453 US 490 (1981)(Ban on all billboards eliminated a cost-effective formal communication for which there was no meaningful alternative.)

131 US Courts have made it quite clear that not all alternatives are equal and that the alternative must be capable of reaching the same audience as the prohibited medium. See *Edwards v City of Coeur d'Alene* (supra) at 867. In *Edwards*, the Seventh Circuit declared unconstitutional an ordinance banning certain kinds of signs carried during parades and public assemblies and rejected the city's contention that the ability to 'hand out, leaflets, carry signs (without supports and made of non-rigid materials), sing, shout, chant, perform dramatic presentations, solicit signatures for petitions and appeal to passersby' constituted adequate alternatives. It wrote:

As a general rule, parades and public assemblies involve large crowds and significant noise. While some of these mass gatherings are less populated and more orderly than others, it is often difficult to see more than a few feet in any direction, or to hear anyone who isn't standing nearby. These circumstances make it difficult for individual protestors or participants to convey their messages to the broad audience they seek to attract. . . . [Only] signs attached to supports such as poles or sticks are effective tools by which to overcome the communication problems endemic to these types of situations. A sign that can be hoisted high in the air projects a message above the heads of the crowd to reach spectators, passersby, and television cameras stationed a good distance away.

132 See *Adderly v Florida* 385 US 39, 49 (1966)('The jailhouse . . . is one of the seats of government, whether it be the Tower of London, the Bastille or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious centre for protest.')

133 For a section by section analysis of the Regulation of Gatherings Act 205 of 1993, see § 43.2(b) supra.

the previous two paragraphs throw into somewhat sharper relief several of the RGA's many fault-lines. Neither the 7-day notice provision nor the 48-hour notice provision privilege assembly rights in public streets. Like Zimbabwe's Law and Order (Maintenance) Act, the RGA generally allows regulating authorities to prohibit a gathering *unless* permission is first applied for and obtained. While regulating authorities may be required to act in 'good faith' and to limit banning orders to a relatively identifiable set of circumstances under the 7-day notice period, the forty-eight hour notice provision grants the authorities almost unfettered discretion to ban an assembly:

if . . . notice is given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the convener prohibit the gathering.¹³⁴

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Local authorities have also discovered that the RGA can be manipulated in such a manner as to thwart the best intentions of a convener who, in fact, complies with the 7-day notice period.¹³⁵ Because conveners rarely have the opportunity to plan a demonstration more than a week in advance, and because the notice period for urgent applications that do not meet the requirements for expedited review is 10 days, local authorities have been able to issue banning orders without having to concern themselves with the possibility that a court of law might reverse their decisions. More importantly, the reflexive use of banning orders by local authorities hardly comports with the dictates of FC s 17. FC s 17 demands that local authorities be willing to engage in nuanced assessments of the symbolic significance of the property for the message being conveyed, the relationship of the time of a gathering to the ability to convey a political position, and the extent to which the expressive conduct in question impairs the property rights and the privacy rights of others.¹³⁶

134 RGA s 3(2). Prior to the enactment of the RGA in 1996, several courts found unconstitutional the exercise by the authorities of relatively unfettered powers to prohibit public assemblies. See, eg, *ANC (Border Branch) v Chairman, Council of State, Ciskei* 1992 (4) SA 434 (Ck), 1994 (1) BCLR 145, 165 (Ck)(Unfettered powers of prohibition of public assemblies given to magistrates and police found to be unjustifiable restriction of freedom of assembly.)

135 See § 43.2(b) supra (For an account of how local authorities have learned to exploit the judicial review provisions of the RGA and the manner in which these provisions interact with the Magistrates' Court Rules and the Uniform Rules of Court. In short, the local authorities understand that neither Magistrates Courts nor the High Courts are apt to act on urgent applications prior to the date of the planned assembly.)

136 See § 43.2(b) supra (Explanation of how local authorities violate, with impunity, the 24-hour response requirements of RGA s 4(3), the good faith requirements of RGA s 4(2)(b), the objective conditions for prohibition requirement of RGA, s 4(4)(b) and RGA s 5(1)'s insistence that a prohibition be based upon 'credible information on oath . . . brought to the attention of a responsible officer.')

The authorities are keenly aware of the significance of time. Only a picket at rush hour allows demonstrators to communicate with their fellow citizens. Because a picket or a demonstration at another time often has no audience and serves no purpose, local authorities regularly ban peaceful protests during rush hour. See Founding Affidavit, *Segodi, Miya and Thembelihle Crisis Committee v City Of Johannesburg & Minister of Safety and Security* (High Court, Witwatersrand Local Division, 26 November 2005)(Document on file with author).