The right to dissent

Freedom of expression, assembly and demonstration in South Africa

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Cover photograph: Members of civil society groups plead with a police officer after being evicted from the Sandton Convention Centre
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Crucified

Thabo Lehlogwana (Aka 'Righteous the Common Man')

I heard strange voices say
solitary confinement creates
enough space for I and I to meditate
born and raised in the dungeons
the lokshin surrounded
loneliness surrounded me in darkness
darkness my only true friend
moments of sadness

I have seen giving birth to the bright light
of hope a little child cursed by midwives
thrown into the rivers and seas of blood
swam with crocodiles and sharks
escaped onto the wicked lands infested
with these poisonous snakes
who sometimes pose as friends
betrayed comrades and warriors
who aimed to lead us
to a home called freedom
crucified

I was but always came back to rise
beyond the darkest stars and skies
before I lived I had to survive
hurtful entrapments
of this womb oh! my forgotten thorny past
My name was truth A child yet to be born
But already crucified

Yes I have lived many lives
and died too many deaths before
in Rwanda, Hiroshima, Ethiopia
Soweto, Vietnam, Indonesia, Mexico,
Congo, Angola, Boipatong, Ghana, and
Tanzania, Sharpeville, Seattle and Genoa
Even the oppressor's lies
and teargas smoke
failed to keep me choked
in fear's oppression

where violence gave me hope
for solace 'n redemption
watching sad smiles rested
on the bloodline of an axe
dripping deaths of generations
born into the bloodline of hope
left to drip dry
on the surface of the cruel earth

I survived the death
of my beautiful dreams
my name became peace
A child yet to be born
But already crucified

I rose came back multiplied
to throw stones before
and after I wrote books
whose contents got stolen
stories about the wisdom of my being
stories about how they raped
my rich mother
stole her children and wealth
forced her to conceive
beasts possessed by greed
they called me a savage

I was made a slave
millions of hard lashes
left my broken back open
drippin' gallons of blood
licked by these hungering scavengers
who conspired with vultures and vampires
sucking every drop
out of my starving thirsty veins
just to gain their strength
spreading my blood like a red carpet
for the rich to walk on it
using it to build great monuments
and slave ships

makin whips 'n gunz
building prisons and shackles
shackles that bind my mind
wrists and ankles
to their greed 'n wickedness
living in the womb
of my troubled presence
my name changed
it became justice
a child yet to be born
but already crucified

they failed to keep me
buried in a shallow grave
of grief and hatred
where I lived many lives
and survived countless deaths
to rise beyond the darkest skies
but still they had me crucified
like Christ, Spartacus and Socrates
but I came back once again
and rose to throw stones
after and before I wrote books
whose stories were never told
stories about how children
of my stolen lands
are turned into cannibals
caged up in concentration camps
and filthy drains called prisons

I came back to sing along
with a sad song of freedom
a song whose melody used to be blocked
by mad bombs in Gaza
in Nagasaki and Lebanon
a song that rhymed
with beautiful names like Fanon
Guevara, Sobukwe, Trotsky,
Mumia, Biko, Lumumba,
Shabazz, Garvey, Lenin,
Tsietsi Mashinini, Dennis Brutus
Stompie and Hector Peterson

Like all of them
I got crucified
killed died to live beyond my times
in the womb of my uncertain future
my name became people's liberator
a child yet to be born
but already crucified

I have lived many lives
and died too many deaths
coz my spirit that fights
still refuses to die
before I lived I had to survive
robbin islands that colonised
the minds of freedom fighters
whom I failed to reach in time
before my siamese twins
justice and peace
started to breathe
hunger, starvation
suffocating in a can of coca cola
new age imperialism
celebrated in style

As I watch fools tryin' to mute the truth
preserving battlefield
for sheer mediocrity
hypocrites preaching
about the beauty of democracy
revolutionary thoughts arrested
in development
of reformist politics

politricks of desperation
polishing the rusty chains
of grave enslavement
while keeping the lid on
the bottle of resistance forces
exploitation and oppression ignored
by these mad, crazy, insane dogs
scheming and mating with cats
that give birth to snakes and rats
competing in a freedom race
biting each other's tails
prizes are lost no battles are won

As I see the finish line
before my swollen eyes
asking myself can I enter
this rat race
a voice from within responds
definitely not!!
so I stop and reminisce
about my previous triumphs over death
I came back

I came back this time to live forever
in the womb of the future
my name has now become freedom
a child yet to be born
but already crucified

Mandla Seleoane
Mandla Seleoane is the director of the Promotion of Access to Information and Planning at the Technikon North West. Previously he was a research specialist at the Pretoria-based Human Sciences Research Council. He served as the chairperson of the Freedom of Expression Institute (FXI) from 1998-2000 and, since 2000, has been the chairperson of the Trust Fund Board of the Media Institute of Southern Africa. He has served on a commission of inquiry into racism in the South African Police Service appointed by the Minister of Safety and Security, and was a joint winner of the Don Caldwell Unconventional Hero Award. Seleoane has written and published extensively on the subjects of democracy and governance as well as on general and topical issues relating to law and society. He is also the author of a popular column in The Herald titled "No holy Cows".

Yasmin Sooka
A lawyer by training, Yasmin Sooka is the director of the Foundation for Human Rights in South Africa. She served as the national president of the World Conference on Religion and Peace and was a member of the legal task force in the National Co-ordinating Committee for the Repatriation of South African Exiles. In 1995 she was appointed a commissioner for the Truth and Reconciliation Commission, which investigated gross violations of human rights committed by the apartheid regime, and became the head of its Human Rights Violations Committee. In May 2002 she was appointed as a commissioner for the Sierra Leonean Truth and Reconciliation Commission.

Salim Vally
An intellectual and political activist of note, Salim Vally has been researching and lecturing at the University of the Witswatersrand for the past six years. He is the acting director of the university's Education Policy Unit. Prior to that, he worked for 10 years as an education officer with the labour movement. He did his undergraduate studies at York University, Canada, after which he returned to South Africa and taught for a while at a high school in Eldorado Park, Johannesburg. His extensive involvement with the liberation struggle led to his expulsion from the school and constant harassment by the apartheid regime. Vally has an extensive publications record and has written and published several books and articles in academic journals and treatises. He is a board member of numerous organisations including the FXI, Khanya College, Soul City and the Palestinian Solidarity Committee. He holds two masters degrees and is in the process of completing a PhD on social justice and education.

Mzwandile Christopher Ngcobo
Mzwandile Christopher Ngcobo (Chris Ngcobo) has been the chief of police of

the Johannesburg Metropolitan Police Department (JMPD) since 2000. He studied at Meadowlands High School and Fort Hare University where he became a member of the Azanian Student Congress. In 1983 he was expelled from the university and was later detained by the apartheid regime in 1986. He completed his BA Law degree while in prison. In the 1980s he was active in many community initiatives and political activities, including the United Democratic Front. He has worked at the University of the Witwatersrand, the Urban Foundation and the Masakhane Campaign. Between 1996 and 2000 he worked for the Southern Metropolitan Local Council in the Greater Johannesburg Area as the Chief Executive Officer.

Johan Meyer
Johan Meyer is a graduate of the Rand Afrikaans University and an advocate of the Supreme Court of South Africa. He joined the South African Police Service in 1987 and has been the head of legal services in the Johannesburg area since 1992. He holds the rank of director.

Ann Eveleth
Ann Eveleth is a journalist and land activist, who is at present the media co-ordinator for the National Land Committee. In this capacity, she works closely with the Landless People's Movement (LPM). During the World Summit on Sustainable Development (WSSD), she was arrested because of her work in raising the media profile of the LPM and detained for seven days as the South African government tried to deport her back to the United States. Prior to her current portfolio, she worked as a journalist for 10 years in the US, Britain and South Africa. Eveleth spent the last five of these years as a reporter for the Mail & Guardian, where she was first its KwaZulu-Natal correspondent and later its land and development reporter.

Dale T McKinley
Dale McKinley was born and raised in Zimbabwe. He studied in the US in the 1980s where he obtained a PhD in African politics. During these years he was involved intensely in political activities, specifically in the international anti-apartheid movement, the anti-imperialist struggles in Central America and local anti-racist campaigns. He returned to Zimbabwe in 1990 and moved to Johannes-burg in 1991 where he ran a socialist bookshop until 1994. He was a full-time activist and employee of the South African Communist Party from 1993 until 2000, when he was expelled for being critical of the party's leadership. He has worked as an independent researcher, lecturer and journalist and is a co-founder of the Anti-Privatisation Forum. He has written a book on the history of the ANC's liberation struggle and has published numerous scholarly articles in newspapers and political journals.

Simon Kimani Ndung'u
Simon Kimani Ndung'u has been living in South Africa since 1998 when he fled from his home country Kenya due to the prevailing political climate. He has

been widely involved in human rights related activities and has volunteered for a number of organisations including Nicro Women's Support Centre, Sex Workers Education and Advocacy Task Force and the Jubilee South Movement. Between 1998 and 2000 he worked as a researcher, trainer and lobbyist with the National Association of Democratic Lawyers in Cape Town. After completing his masters degree course in international law at the University of Cape Town in June 2001, he joined the Centre for the Study of Violence and Reconciliation in Johannesburg as a reparations researcher and lobbyist. He has conducted research in the areas of refugees, South Africa's social welfare system and reparations. Kimani currently heads the Anti-Censorship Programme of FXI.

Jane Duncan

Jane Duncan comes from a visual and performing arts background and is currently the Executive Director of the FXI. She has previously worked for the African Institute of Art in Soweto and the Anti-Censorship Action Group, the forerunner of the FXI. Jane has written and published widely in the field of broadcasting in South Africa. Among her most notable publications include Broadcasting and the National Question: South African Broadcasting in the Age of Neo-liberalism, Between Speech and Silence: Hate Speech, Pornography and the new South Africa, and Media and Democracy in South Africa.

South Africa at the crossroads: dissent and the new political agenda

Simon Kimani Ndung'u

This book is the outcome of a workshop on the right to dissent in South Africa, organised by the Freedom of Expression Institute (FXI) in November 2002. The workshop was held against a backdrop of rising state intolerance towards radical and critical voices best exemplified by the massive crackdown against social movements and activists during the World Summit on Sustainable Development (WSSD) held in August/September 2002 in Johannesburg.

As some political commentators have observed, it is quite ironic that hardly a decade since South Africa made the transition from pariah state to constitutional democracy, the right of individuals to protest against state policies which they consider onerous should be constrained. But it should not come as a surprise given that the country's "miracle of transition" was the result of a negotiated settlement and many of the features that defined the social and economic relations between the different classes during apartheid have remained essentially unchanged. The political canvas arguably is tinged with acceptable shades of democratic representation, but the economic framework which underpins it has the same historically created and fundamentally entrenched facets of minority control.

What is becoming clear is that the degree of contest around the right to dissent will increase rather than diminish in South Africa, with an even greater possibility of higher and more extreme forms of state responses to public protests. Individuals and progressive organisations that stridently oppose the government's increasingly unpopular macro-economic strategy, or those who denounce the continuing impoverishment and immisseration of the masses, will find themselves isolated and targeted by the state and its law enforcement machinery.

Within the same paradigm, it is not difficult to surmise that the events of September 11 2001 in the United States have created conditions which provide many states - including South Africa - with an excuse to repress and stifle dissent under the guise of fighting the war against terror. Consequently, a plethora of security laws that criminalise many activities traditionally falling under the rubric of political activism have been quickly passed and implemented by willing, if uncritical, legislatures. South Africa in the past year

has crafted a number of security laws, ostensibly to enhance the safety and security of its citizens and to abide by its commitments to fight international terrorism.

Two of these laws deserve a brief mention here. The first is the Interception and Monitoring Act, which was passed by the National Assembly in September 2002 and approved by the National Council of Provinces (NCOP) two months later. It has since been referred back to the Justice Portfolio Committee of the National Assembly after certain amendments were proposed by the Lower House. It will be promulgated into law, however, once the president gives it the required assent. Some of its more caustic features include granting security agencies unprecedented and wide-ranging powers to intercept all forms of communications between individuals, besides proposing punitive measures against those found guilty of offences under the statute.

In spite of what senior state officials have called the Act's in-built "constitutional safeguards", this legislation will have a chilling effect on many individuals and organisations in the country. In the hands of the state, it is possible that it may be used to restrict the ability of critical institutions, such as social movements, to communicate, plan or prepare forms of protest action that the state feels uncomfortable with.

The second piece of legislation is the Anti-Terrorism Bill, arguably one of the most draconian statutes ever to have come out of the nascent South African democratic parliament. By a process of clever, though deceptive, drafting, this Bill extensively circumscribes the right to dissent by ring-fencing the ambit of political struggle. Its definition of "terrorism" ensures that even ordinary forms of protest such as "illegal" strikes fall within its dragnet as long as they "intimidate or are likely to intimidate the population or a segment of it".

But it is precisely for these reasons, to recall the words of respected Guardian journalist George Monbiot, that the voices of dissent must now be heard rather than repressed. Commenting a week after the attacks on New York and Washington in September 2001, he warned that governments would quickly close up the few avenues available for political expression, while civil liberties would suddenly become the subject of negotiation. He argued that at this historical juncture, it is essential for opposition to be sharpened and focussed because "the right is seizing the political space, which has opened up where the twin towers of the World Trade Centre once stood".[1]

What, therefore, is dissent and why do we consider it important enough to warrant a critical reappraisal in South Africa, a country that has been touted as perhaps one of the most democratic in the world and with the most progressive constitution? Broadly speaking, dissent can be described as opposition to established authority, dogma or social systems.

Writing at the beginning of the 1970s during the era of civil and political upheavals in the US, international law expert Cherif Bassiouni located dissent principally in three areas of human activity: religious, political and social. He defined it as the "open disagreement with or resistance to established authority".[2] He observed that these areas sometimes overlap and they can even encompass wider fields of human endeavour.

With respect to political dissent, Bassiouni argued that it is normally restricted by governments and is: “Legally valid only within the narrow limits set by the established political system. When dissent moves beyond the permitted boundaries, it encounters laws specifically designed to protect and preserve the system.”[3]

From this perspective, both legalism and political realism encumber dissent. It is the existing political framework, through its legal machinery, that determines how far its own citizens can express dissent.

Liberal bourgeois democracy encourages and even fosters dissent within the limits that cannot threaten its own existence. Its defenders argue that dissent is a right just like any other, and it must be exercised in such a way that it does not unreasonably infringe upon the rights and freedoms of other individuals in society. In 1968, Abe Fortas, then an associate Justice of the US Supreme Court, viewed dissent as a fundamental component of any true democratic system. He saw it as one of the defining features of US democracy and lauded it thus: “We have insisted that each of us is and must be free to criticise the government, however sharply; to express dissent and opposition, however brashly; even to advocate the overthrow of government itself.”[4]

Furthermore, he argued that whenever people wish to express dissent, the state cannot unreasonably withhold this right from them by way of administrative subterfuge. The state’s role is merely to reduce public inconvenience and safeguard the rights of protesters and non-protesters alike. But this does not mean that the right to dissent can be exercised ad infinitum because limitations must be triggered by the need not to cause injury to others or unreasonably interfere with their rights. Dissenters must not violate other laws while their actions, however meritorious and conscionable, must conform to the existing constitutional paradigm, unless the laws are themselves unconstitutional.

In South Africa, dissent has been part of the political landscape for more than 400 years, though the state’s response to it assumed horrific, if not absurd, proportions, with the advent of apartheid rule by the National Party in 1948. During the four decades of apartheid, all meaningful outlets for political expression against the existing order were effectively sealed. A growing array of repressive statutes was passed by successive white minority governments to silence any opposition to apartheid’s immoral order. Particularly hard hit were the majority black people and progressive elements within the white community who denounced racial segregation, black exploitation and the economic privileging of the whites at the expense of the rest of the people.

With the end of formal apartheid in 1989, the unbanning of political parties and the release of political prisoners, including Nelson Mandela, in 1990, South Africa entered a new phase in the realm of democracy and the protection of fundamental rights and freedoms. In the Interim Constitution (200 of 1993), the right to dissent became encapsulated within the right to freedom of expression (Section 15) as well as the right to freedom of assembly, demonstration and petition (Section 16). This was an extremely significant development particularly in light of the country’s transition from authoritarianism to

constitutional democracy.

The rights to demonstrate and protest are generally treated as forms of expression, a notion that seems to have been carried over from the Interim Constitution to the final one promulgated in 1996. As a right, dissent enjoys substantive constitutional protection, but analysts have argued that it must be balanced against competing interests and does not enjoy a higher ranking in relation to other basic rights. It is also qualified in the sense that when expressed by way of gatherings and demonstrations, these must be peaceful. The state may also limit the right to dissent providing it can show that such restriction is necessary and justifiable in a free and democratic society.

However, the right to express dissent has been recognised in many jurisdictions as essential to the growth and development of mature democracies. In arguing that individuals need to be able to express themselves freely through public forums or other mediums, Cachalia et al have observed that: "The right to peaceful assembly is regarded as a fundamental right, equated to the right of freedom of expression and regarded as the foundation of a democratic society."[5] Similar sentiments were expressed by a group of jurists and academics who stressed in 1990, while South Africa was beginning to emerge from the old apartheid political order, that: "The freedom to assemble without the need to get approval from some state authority is a fundamental human ... right."[6] Therefore, the contest is not whether the right to dissent is fundamental or not, but it is about how it should be exercised and the limits to which it may be subjected. Not surprisingly, the immediate post 1994 period did not see much conflict in the terrain of dissent, a fact mainly attributed to the goodwill expressed by the masses to the government to try and undo the social, political and economic ills entrenched by decades of apartheid.

By the end of the 1990s, however, discontent against the government's seeming reluctance to transform the lives of the majority poor was clearly beginning to assume a high profile. It is little wonder therefore that by the time of the second general elections in 1999, a number of activist-oriented organisations and social movements dealing with issues ranging from land and housing to HIV/Aids had made their mark on the national stage. In the four-year period between the 1999 general elections and the World Summit on Sustainable Development (WSSD) in 2002 those formations experienced a progressive growth, expansion and consolidation. At the same time, within the ruling party, dissenting voices became increasingly vocal, but these soon found themselves marginalised and constrained by the party's bureaucracy.

As some contributors in this book argue, the often extreme reaction demonstrated by the state towards activists and social movements during the WSSD is a manifestation of the insecurity those in power feel when confronted with the government's lacklustre performance. This is significant if one takes into account the fact that during the World Conference Against Racism (WCAR) in Durban only a year earlier, the state displayed a certain measure of tolerance to dissent which was a far cry from its stance during the WSSD. Of course, even during the Durban conference there were reports of harassment by the state's security agencies, but government behaved with slightly more

restraint.

But the state's hypersensitivity to dissent should not come as a surprise because many liberation movements that have come to power detest the very idea of being subjected to the same treatment that they dished out to their predecessors. "Often, the very group condemned in one generation for employing protest methods has in the next generation been part of the respectable establishment that is angered when the same methods are used by new dissident groups."[7]

If the WSSD is anything to go by, then South Africa has already entered a new phase of struggle, which will be waged mainly between activists and social movements on the one hand and the state on the other. This does not imply, however, that political contest will be a feature of that particular facade only because even ordinary forms of dissent will be frowned upon, while critical voices in other areas, including the ruling party itself, will be suppressed, as is already happening. With South Africa hosting an ever-expanding array of politically contested international events, it can only be expected that the level of repression against protests at these forums will grow exponentially.

For many of the protests organised by activists and social movements and the consequent state reaction to them during the WSSD, two particular issues occupied centre stage. The first was the question of interpreting Sections 16 and 17 of the Constitution, which deal with the right to freedom of expression, and the right to freedom of assembly, demonstration, picket and petition respectively.

The second issue was the manner in which the Regulation of Gatherings Act (205 of 1993 "the Act") was interpreted to give probity to the Constitution. Seen in retrospect, it appears that the state construed the right to assembly in the most restrictive and conservative manner possible. This helped the government achieve two key objectives: on the one hand it was able to limit dissent to its lowest possible denominator, and on the other it managed to shield itself from accusations of an outright violation of the Constitution.

That certain aspects of the Act may be out of consonance with current constitutional practice is a debatable, though not incontestable, question. As far back as 1993 the commission that considered the question of demonstrations and assemblies in the transition period, and which recommended the passage of the Act itself, expressed a view that the proposed legislation would need to change with time as South Africa's democracy progressed to maturity. In its report to the then-state president FW de Klerk on April 28 1993, the commission said it did: "... not believe that the draft bill contains no errors or that it cannot be materially improved. Indeed, appropriate amendments may be considered necessary by a future legislature ... but due to the urgency of the situation ... the subject could not be deferred and ... legislation is desirable even before the completion of the present period of transition."[8]

Many of the proposals made in the draft bill were incorporated into the final Act, which leads to the argument that because the circumstances informing the Bill's drafting were substantially different from those in South Africa today, there is a need to revise the final Act. This is a call made repeatedly in this

book by all the writers with the exception of the representative from the metropolitan police department (acting on behalf of the local authority) and the South African Police Service (SAPS).

The first paper, by Mandla Seleoane, presents a critical and comparative review of the Act and poses key questions about whether this legislation could be said to offend against the Constitution. Seleoane focuses on why certain fundamental rights enjoy a higher degree of claim than others. He argues that in any democracy the state has to perform a balancing act because the exercise and enjoyment of a particular right by an individual sometimes means the restriction and limitation of another right for another individual.

Seleoane contemplates the question of whether demonstrations are actions or forms of expression. The general thrust of his argument is that in South Africa demonstrations are regarded as a means of expression. The bulk of his paper dwells on a comparative analysis - mainly based on case law - of a number of jurisdictions including the US, Canada, Germany and Turkey.

In the US, the right to assembly is constitutionally protected as a First Amendment right with the Supreme Court having ruled more than 100 years ago that the mere idea of government gives rise to the right of citizens to meet and consult about public ideas. Other principles derived from Supreme Court practice reinforce the fact that the right to assemble is not absolute, but authorities must not on that account impose unreasonable restrictions on the exercise of this right.

South Africa's Bill of Rights draws many of its features from the Canadian Charter of Rights and Freedoms and the two share almost identical clauses regarding the right to freedom of expression and assembly. As in the South African case, the Canadian charter contains the specific caveat that demonstrators must be peaceful and unarmed, and that the right to demonstrate may be limited in a manner that is reasonable and justifiable in an open and democratic society. Due to this provision, courts in Canada are usually reluctant to interfere as long as the state can demonstrate that a limitation of the right to dissent is justifiable in the interests of defending the rights of others.

Germany seems to have adopted an approach similar to that of Canada and South Africa in relation to freedom of expression and assembly. For instance, its courts have ruled that the requirement of 48 hours advance notice to authorities before holding a demonstration does not violate the right of citizens to freely organise and express themselves. The Turkish constitution protects peaceful and unarmed assemblies and these do not need prior authorisation. An interesting development of the Turkish law is that even in circumstances where there is a disturbance of law and order, the authorities are only permitted to take such measures as are sufficient to contain the activity but not totally prevent the assembly or demonstration from taking place.

What emerges clearly from the comparison of these jurisdictions is the almost universal acceptance that the right to assembly and expression is part of the normal social and political fabric of many democratic countries.

Seleoane also looks at the Regulation of Gatherings Act, juxtaposing some of its

clauses against the constitutional guarantees of free assembly and expression. He argues that the clauses requiring individuals to get “consent” from the local authority before holding a protest march run against the grain of the Constitution whose only demand is that a demonstration should be peaceful. And, by requiring demonstrators not to use speech likely to cause or encourage violence, the Act considerably lowers the standards set by the Constitution which instead bars the incitement of “imminent violence”. Liability for damages resulting from demonstrations is another contentious issue that Seleoane feels may be contrary to the letter and spirit of the Constitution. The Act states that in the event of damages arising, any person who has taken part in the planning of that gathering is civilly liable whether or not they were present at the time the demonstration took place. Seleoane argues strongly that this negates even the basic principles of criminal procedure which first require culpability to be determined before an individual is held liable. His view is that this particular requirement is constitutionally suspect and its hidden aim seems to have been to make gatherings such risky affairs that people would be dissuaded from participating in them.

Seleoane considers the uncertainty created by the Act, where it is not clear if one needs merely to “notify” the authorities of the intention to hold a gathering, or if one has to obtain “permission”. This penumbra zone creates a great amount of confusion about the procedures relating to public demonstrations with the police, seemingly, convinced that “permission” has to be obtained a priori. Seleoane concludes that the infractions contained in the Act would need to be challenged in the Constitutional Court, but bearing in mind that, in certain respects, they may also be consistent with the general limitations clause of the Constitution.

Chapter two is an examination of the constitutional and political framework which underpins and defines the right to dissent in South Africa by two intellectuals and activists: Yasmin Sooka and Salim Vally.

Sooka draws on her long experience as a lawyer and human rights activist to argue that individuals and organisations have to take hold of the powers granted by the Constitution if they are to defend and advance the right to dissent. Tracing the origin of contemporary dissent in South Africa back to the early days of the 20th century, she says that successive white minority governments sanitised themselves to the calls for socio-economic and political change by passing a plethora of laws proscribing all forms of opposition to the status quo. As far back as 1927 the government of Jan Smuts passed the Black Administration Act with the sole purpose of curtailing political organisation among African people.

After 1948, the National Party relentlessly suppressed all forms of dissent, thereby quickly and ruthlessly transforming South Africa into a racially legislated semi-military state. However, the massive internal pressure brought to bear on the government by the United Democratic Front, the liberation movement and other forces, as well as the very unfavourable international climate against apartheid, led to the eventual demise of this system in the late 1980s. With the transition to democracy, the country moved to adopt a

substantive bill of rights and in 1992 a commission of inquiry was formed to consider a new approach to assemblies and protests. This resulted in the Regulation of Gatherings Act, the primary statute being discussed in this book.

Sooka identifies certain provisions of the Act which she feels negate the constitutional prescriptions on the right to free assembly and expression. She holds that the seven-day notice period required before a demonstration can take place is unreasonable and contrary to the letter and spirit of the Constitution. She also takes issue with the civil liability question which she describes as a move on the part of the state to scare away people from holding protests because of the potential consequences involved if demonstrations turn sour.

In relation to the WSSD, Sooka argues that the state clearly went overboard, demonstrating a remarkable sensitivity against all those who wanted to protest against its poor record of socio-economic delivery, as well as the powerful governments and international institutions whose policies continue to wreak havoc upon the Third World. She says it was extremely disquieting to watch TV footage of heavily armed police breaking up peaceful demonstrations, or troops in full combat gear lined up along the routes where marches were taking place.

Her challenge to civil society is that it must critically engage with the right to dissent by utilising the constitutional provisions to challenge the limitations imposed by the Act. She observes, however, that civil society will have to educate the people about the necessity of holding peaceful assemblies as well as how to respond to challenges that arise during a protest action. Her conclusion is that mass mobilisation and the active use of the Constitution are the only sufficient guarantees that can provide the poor and vulnerable with equal access to basic rights and resources.

According to Salim Vally, in his paper which examines the political economy of state repression in South Africa, anyone with an understanding of South Africa's post-apartheid transformation project should not have been surprised at the audacity and speed with which the ANC government moved to virtually outlaw dissent and cajole activists and progressive movements into submission during the WSSD. For Vally, the WSSD was simply an opportunity for South Africa's ruling class to showcase itself to international capital as capable of protecting and guaranteeing their interests, even if this meant the blatant violation of the basic rights of its citizens. He argues that senior apartheid-era security personnel were recalled and put in charge of operations during the summit and an unofficial state of emergence was declared in Sandton, venue for the meeting between heads of states and local and international capital.

On the structure of the post-apartheid state, Vally holds that the important discontinuities between it and its predecessor should not mask the real nature of the class that commands capital, the means of production and the repressive apparatus. This class has remained essentially unchanged. On the other hand, the ANC as the "party in office" has turned out to be the guardian protector of the dominant class interests, a role it was destined to serve with the negotiated settlement arrangement. It is no wonder that with the ever-rising opposition to those policies which impact drastically on the poor, the post-apartheid state is

forced to lean more heavily towards coercion and police power to keep the governed in check.

Holding that human rights are not fully realisable under capitalism, he argues that civil and political liberties are often severely constrained because of the social and economic framework that circumscribes them. It is, therefore, the responsibility of social movements and other progressive entities to deepen and expand them from the current narrow edifices defined by liberal bourgeois democracy.

Vally partly attributes the crackdown against dissent to the ANC's modus operandi, first as a liberation movement and later as the country's ruling party. He holds that the party's own Stalinist history and the lack of genuine internal democracy ensured that dissent was, and continues to be, ruthlessly suppressed. He cites as examples of growing intolerance, the dire threats made against "ultra-leftists", the covering up of massive corruption among the party's top echelons in a multi-billion dollar government arms deal, and the attempt to use state power to crush people deemed to threaten the power of the party's president.

As a way forward, Vally suggests that civil society organisations have to pool their efforts and shake off the sectarianism that has characterised their operations for a long time. He argues that prompt legal defence is a necessity given the onslaught of police harassment and the perfidious way in which the state breaks the backs of activists by denying them bail and keeping them in jail for weeks or months on end. The welfare of jailed activists and their family members also needs to be substantially addressed

Vally argues that the most effective barrier to the tendentious shift into authoritarianism is by way of a countervailing force from the social movements. Civil society must organise and mobilise and achieve growing popular support among the masses so that it can be able to respond adequately to the state's repressive measures.

The third chapter contains two papers given by representatives from the Johannesburg Metropolitan Police Department (JMPD) and the SAPS, about their role in regulating assemblies and gatherings. Their input was deemed essential because the two departments were the primary arms of state responsible for authorising and managing gatherings during the WSSD.

In the first paper Chris Ngcobo, chief of the JMPD enumerates the role that his department plays as the "responsible officer" on behalf of the Johannesburg City Council. He says that during the summit the department received dozens of applications for marches in and around Johannesburg and to their credit they were able to authorise all of them and no incidences of anarchy were experienced.

He holds that the WSSD was a unique event, coming as it did at a time of increased acts and threats of global terrorism and in the backdrop of the serious disturbances that have defined forums of this magnitude in other parts of the world. For these reasons, his department, in conjunction with the police and other security agencies had to make sure that while the right of individuals to demonstrate and express themselves was respected, it did not translate into

an opportunity for anarchy, violence and lawlessness.
Taking the prevailing circumstances into account, he says the metro police department and other concerned state agencies took a decision that marches would only be allowed along certain prescribed routes for particular durations. He argues that this was the only option available; otherwise the alternative would have been to impose a blanket ban on all demonstrations.
In his opinion, and contrary to some of the sentiments expressed by other speakers at the workshop, he says that the Act indeed enhances, rather than detracts from, the spirit, letter and purport of the right to freedom of expression and assembly guaranteed by the Constitution. He points out that the limitations imposed under the Act, such as the requirement to notify the authorities at least seven days in advance, are justifiable and do not infringe the Constitution. This is because the local authorities and the police need to be able to provide the necessary resources for protecting participants, non-participants and individual property.
Unfortunately, Ngcobo does not deal with the accusation made in many quarters that, during the summit, the JMPD deliberately refused to consider or grant permission expediently to organisations such as the Landless People's Movement (LPM) and the Anti-Privatisation Forum (APF), which were deemed "too radical" by the government. It is also silent on the fact that these organisations were only "allowed" to proceed at the last minute once it became clear that they would march with or without permission and irrespective of the consequences that would ensue.
It must be remembered also that prior to the big march by social movements on August 31 2002, government functionaries and the mainstream media had gone on the offensive, warning of dire implications for protesters if they failed to obtain permission to demonstrate. As Dale McKinley recounts in chapter four, in one incidence the head of the National Intelligence Agency even visited the offices of the APF to try to diffuse the tension and looming clash between social movements and the state.
With the benefit of hindsight, one can say that it was perhaps the persistence and determination shown by social movements to exercise their right to demonstrate that led to the state capitulating to avert a possible bloody confrontation in the streets of Johannesburg.
The second paper of chapter three comes from the area commissioner of the SAPS in Johannesburg Johan Meyer. Since police through their representative the "authorised officer" are part of the troika that considers applications for gatherings, the SAPS was invited to give specific insights on how the department deals with unauthorised protests. The manner in which police responded to demonstrations during the WSSD was meant to form the central thrust of this particular presentation.
Meyer provides a general examination of the Act and argues that it conforms in all respects with the constitutional requirements. He says that the aim of the Act is to make sure that each and every individual is able to exercise his/her right to freedom of expression and assembly in a peaceful manner, irrespective of ideological persuasion or political motive. He holds that some of the

circumstances that will lead to a protest being declared unlawful include instances where the convener fails to give notice of the planned gathering.
Meyer states that once a gathering is in procession, the responsibility for managing and ensuring that it conforms to the law lies with the Public Order Policing Unit (POPU), also known as the Operational Response Unit. If the gathering is unauthorised or even in cases where an authorised gathering turns violent, the kind of response employed by the police will depend on the particular circumstances. He points out that it is not in all cases that an unauthorised gathering will be dispersed.
Meyer gives a five-point strategy, based on the department's own Crowd Management Policy (CMP), of how POPU deals with a situation that gets out of hand. Firstly, the situational appropriateness is considered and then the proportionality of the means of force to be used on participants is weighed. He says that, to start with, the police will engage the participants in continuous dialogue to try and resolve the situation. This could mean, for example, ordering the protesters to deviate from a certain route.
In case negotiations fail, police will contain the gathering within a specific area and protect important points by use of defensive measures. It is only when these measures prove ineffective that the demonstrators will be warned that force will be used to disperse them. Again, in line with the Act and the CMP, the force used must be proportional to the situation. Meyer concludes that during the WSSD, aspects of the Act as well as the CMP were generally employed whenever police dealt with both authorised and unauthorised gatherings.
There are a number of critical gaps in Meyer's presentation and the events of the WSSD contradict the stance adopted by the police department. Two main examples in which police totally ignored the requirements of the Act and their own CMP will suffice. These have been recounted in chapter four and will only be mentioned in passing here. The first one was on the evening of August 24 2002, when police violently stopped a candle-lit procession with stun grenades. Dubbed the Freedom of Expression March, the procession had begun from the University of the Witswatersrand and was meant to proceed to Johannesburg Central Police Station. In the process, a number of local and international activists were injured and a local filmmaker was arrested, allegedly for "obstructing justice".
Though the procession had been peaceful, police gave no warning whatsoever that the marchers should disperse. When asked why they had reacted in this fashion, the provincial police spokesperson said that it was because the march was unlawful. She did not explain why no warning was issued or the reason why force had been used. The following day, it was claimed by sections of the media that the police department had declared that no more marches would be allowed in Johannesburg. Though the department later denied this claim, saying their spokesperson had been misquoted, it was only because of the strong reaction from human rights bodies and the threats of legal action that the decision was rescinded.
The second event occurred on the evening of September 2 2002 during an address given by former Israeli Foreign Affairs Minister Shimon Peres at one of

the University of the Witwatersrand's campuses. As in the previous case, police simply descended on protesters without warning, using rubber bullets, stun grenades and water cannons. Eighteen people were arrested and scores seriously injured. Again police could not explain why they had resorted to such extreme measures against peaceful and unarmed demonstrators. Similarly, the only excuse given was that the protest had not been authorised.

It is these incidents and other acts of state violence against protesters that the workshop aimed to examine in light of what is provided by the Constitution as well as the statute itself. Sadly, this does not appear to have been adequately addressed by the presentation from the police department and one can argue that such displays of force may be encountered again in the future.

Social movements bore the brunt of state harassment and intimidation during the WSSD and their experiences are recounted in chapter four. Ann Eveleth and Dale McKinley, representing the LPM and the APF respectively, attest to the extremely harsh conditions with which the movements were confronted before, during and immediately after the summit.

While visiting detained members of the LPM at the Johannesburg Central police station on August 22 2002, Eveleth was arrested and placed in solitary confinement for seven days at the Kempton Park police station, awaiting deportation. It was only timely legal intervention that ensured her release.

Eveleth says that harassment of members of the LPM has been an ongoing feature of the state despite the fact that on no occasion has the movement held a gathering without following the procedures laid down in the Act. She holds that the state's offensive against the LPM began in earnest in April 2002, four months before the summit got underway, when police in the small rural town of Ermelo, Mpumalanga, arrested more than 100 LPM activists at the end of a legal and peaceful march.

Until the end of the summit in early September, the authorities used every conceivable option to intimidate, harass and cajole the LPM into submission. She says that every time the movement organised a demonstration, the authorities threw obstacles on its path. State intelligence agents monitored the daily routine of activists, meetings were infiltrated and, during discussions with the JMPD and the SAPS, unreasonable conditions were often imposed in an attempt to scuttle the planned marches. On one occasion police even tried to have the LPM denied authority to march on the grounds that the premier of Gauteng would not be available to accept their memorandum.

Eveleth raises a number of key legal and political questions relating to dissent which social movements and activists should take time to ponder. She argues that in today's democratic South Africa the content of the right to assembly has been seriously diluted because during the days of apartheid, it required at least a magistrate with some knowledge of the law to grant permission to demonstrate. At present this is left to the discretion of a local authority official who is usually a junior police officer.

She points out that many aspects of the Act violate the fundamental precepts laid down by the Constitution in relation to the exercise and enjoyment of basic rights. She holds that because the Act itself acknowledges freedom of assembly

to be a fundamental right, there is no way in which this right can, at the same time, be subjected to the caprice of any other individual or authority by, for instance, requiring that “permission” be granted beforehand. The notification requirement is merely an administrative prerequisite meant to give the state reasonable time to put the necessary safety measures in place and not a legal instrument in the hands of the authorities to decide whether or not to allow a protest. Eveleth says that this critical disjuncture has been continuously ignored by the state and its institutions, the media and some civil society organisations. She locates the problem partly in the fact that the right to freedom of assembly has not been subjected to the same degree of inquiry and debate as other constitutional provisions. This situation has nurtured a cloud of ignorance about the right of assembly and expression in South Africa and the question often heard when social movements take to the streets is whether there was “permission” for them to march. Such duplicity has been well exploited by the state in the face of a rising tide of challenge from organised mass movements.

Eveleth’s conclusion is that civil society must embark on a campaign of educating the public, state institutions and the media about the primacy of the right to assembly. Police and local authorities must especially be brought on board in this campaign, but the ultimate strategy should be to push back the frontiers of repression through greater mass mobilisation and political conscientisation.

Being at the forefront of the struggles waged by social movements during the WSSD, the experiences of McKinley mirror those of Eveleth in many respects. McKinley presents a chronology of incidents of intimidation, coercion and outright state brutality running through the length of the summit. He recounts the cases of the 87 members of the APF who were arrested for protesting outside the house of Johannesburg’s executive mayor, and the close to 100 members of the Soldiers Forum who were detained for attempting to travel to Cape Town to protest in Parliament. He also recalls the earlier mentioned Freedom of Expression March and the Anti-Israeli protest where police resorted to brutal force to disperse and arrest demonstrators.

McKinley sees the repressive and intimidatory tactics of the ANC government during the summit as a deliberate attempt to crash the nascent social movements and silence the voices of dissent. Arguably, for the first time since the 1994 democratic elections, the ruling party found itself pitted against masses of organised urban and rural poor who threaten to deny the party its traditional base of support among the working class. He argues that this fact coupled with the open dissatisfaction expressed by the poor in relation to their unchanged socio-economic conditions in the new South Africa has signalled that the “liberatory haze”, which has embellished the ANC and other liberation movements across the continent, is fast fading.

What is especially significant about McKinley’s presentation are the sort of perspectives he offers to social movements and other progressive elements within the non-governmental organisation sector if they hope to counter the state’s blatant assault of basic rights and freedoms. For example, he suggests that beyond the usual menu of actions permitted within the legal framework of

bourgeois democracy, such as court actions, the only effective strategy lies in extensive mobilisation to attain a “critical mass” which could then swing the balance of forces in favour of the working class.

This book concludes by arguing that the deepening levels of inequality in South Africa will result in heightened opposition to the government’s macro-economic framework and its neo-liberal project. Such resentment, of necessity, means that dissent will be on the rise, and the state’s response to it will be to refine and use the control mechanisms and limitations available in the Act, to ensure that the dominant class interests are not threatened. It is a trend that is not confined to South Africa alone because, in reality, this repression forms part of the wider drift of suppressing global dissent against the New World Order.

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A critical and comparative review of the Regulation of Gatherings Act

Mandla Seleoane

Not too long ago South Africa adopted an interim Constitution, which was celebrated as one of the most progressive in the world. It also adopted a Bill of Rights, which again stands out as among the best in the world. The permanent Constitution does not stray too far from the progressive ground that was laid by the interim Constitution. To assess how well South Africa has engendered respect for human rights requires that one look not only at the text of the Constitution, but also at how it is operationalised. To measure how the country is performing as a democratic state requires an examination of the instruments of law, its institutions and, more particularly, its praxis.

This main aim of this paper is to inquire into The Regulation of Gatherings Act, (No 205 of 1993, "the Act") which was assented to on January 14 1994, and took effect on November 15 1996. The paper will examine the provisions of this Act against the related clauses of the Constitution in order to see whether it moves the country towards the glorious path held out by the Constitution.

Conceivably, the Regulation of Gatherings Act throws up many issues, procedural and substantive, which require a critical analysis. This paper will confine itself, however, to only two aspects of the legislation: its possible effect on freedom of speech and its impact on freedom of assembly. In analysing the possible effect of the Act on these freedoms, it will be necessary to take a look at the experiences of other countries. Countries such as India, Germany, France and Australia will be used as points of reference, but the paper will concentrate in greater detail on Canadian and United States jurisprudence.

From the outset, one realises that there is a potential conflict of values at issue when examining the right to freedom of expression and assembly. At play are questions such as the right to human dignity versus free speech and general convenience versus freedom of assembly. It is necessary, therefore, to examine these values and how they impinge on one another. In other words, do these rights and/or freedoms have some sort of priority according to which, when they clash, it could be said that one rather than the other should yield the right of way? Or is this dependent on the specific situation in every case? If so, in what sort of situation(s) can an individual demand that Right X should yield the right of way to Right Y?

A narrative of the Act

Primarily, the Act's main objective is to regulate the holding of public gatherings and demonstrations and to provide for matters connected with such activities. It creates ground for co-operation between the people who intend to hold a gathering, the local authority and the police. Three portfolios are established in order to make this co-operation possible: "authorised member", "convenor" and "responsible officer".

The "authorised member" is a representative of the police in the "triumvirate" which is required to ensure that the law is kept. The "convenor" is the person who is arranging the gathering or demonstration. He/she may have called the meeting personally, or he/she may have been appointed by an organisation to do so. The "responsible officer" is a person appointed by a local authority where the intended meeting is going to take place. His/her function is to represent the local authority during negotiations or discussions in the "triumvirate".[1]

Assuming that a certain organisation intends to hold a "gathering" or a "demonstration"[2], that organisation is required to appoint a convenor. The convenor must inform the responsible officer at least seven days ahead of the planned "gathering" or "demonstration" and provide him/her with the following:

- His/her own name, address and telephone numbers (if any) or those of his/her deputy;
- The name of the organisation convening the gathering or demonstration. If the gathering or demonstration is not called by an organisation, the convenor must make a statement that it is called by him/herself;
- The purpose of the gathering or demonstration;
- The date, time and duration of the gathering/demonstration;
- The place where it is to be held;
- The anticipated number of participants in it;
- The proposed number and, if possible, names of the marshals who will be appointed by the convenor and how they will be distinguished from the other participants;
- Where the gathering is going to take the form of a procession:
    - The exact and complete route of the procession;
    - The time and place at which the participants are going to assemble and at which the procession is going to start;
    - The time and place at which the procession is going to end and the participants are going to disperse;
    - The manner in which the participants will be transported to the place of assembly and from the point of dispersal;
    - The number and types of vehicles (if any) which will form part of the procession;
- In the event that the notice of the meeting is given less than seven days ahead of the meeting, the reason(s) for the delay;[3] and

- If a petition or any other document is to be handed over, the name of the person to whom, and the place where it is to be handed.[4]

At this stage, it is safe to presume that the responsible officer knows just about everything regarding the proposed gathering/demonstration.[5] The Act says that he/she must then immediately consult with the authorised member, i.e., the police representative. In plain language, the local authority (whose definition might include the magistrate in appropriate circumstances) must, together with the police, analyse all the information provided by the convenor.

If for any reason the two state representatives named above think that something might go wrong in the course of the assembly, the responsible officer must immediately call a meeting between him/herself, the authorised officer and the convenor. At this meeting, the "triumvirate" must negotiate about how the dangers perceived by the local authority and the police might be avoided or limited.

If, for whatever reason, the convenor or the authorised member is not present at the meeting referred to above, the negotiations may proceed in their absence. Consequently, any decisions made are as binding on the convenor or the authorised member as if he/she had taken part in them.[6]

But supposing that, in spite of all the parties being present, agreement cannot be reached on how the dangers perceived by the local authority and the police can be averted or limited, the authorised member may request the responsible officer to impose conditions, which in the opinion of the local authority are reasonable, in order to ensure:

- the least possible impeding of traffic;
- appropriate distance between participants in rival gatherings;
- access to property and workplace; and,
- the prevention of injury to persons or damage to property.[7]

But, just in case the authorised member is absent from the negotiations, or just in case he/she is present but, for whatever reason, does not request the imposition of the said conditions, the responsible officer may impose such conditions as he/she deems fit. Having determined what conditions to impose on the assembly, the responsible officer is required to communicate them in writing to the convenor, together with the reasons for the said conditions.

If the responsible officer does not know the whereabouts of the convenor, or if the responsible officer is of the view that the urgency of the matter justifies the method, he/she may publish the imposed conditions:

- in a newspaper circulating in the area where the gathering is meant to take place;
- by means of radio or television;
- by distributing the notice containing the imposed conditions among members of the public and affixing it in public or prominent places where the gathering is meant to be held;
- by announcing the said conditions orally where the gathering is meant to take place; or

- by affixing it in a prominent place at the address of the convenor specified in the notice.[8]

Up to this stage, the required precautionary measures should now be in place, and everything, therefore, should be fine. But there may be a possibility that a member of the public is still not happy that the peace will be kept. He/she may be worried that, notwithstanding all the precautionary measures put in place, there might be unforeseen circumstances resulting in "serious disruption of vehicular or pedestrian traffic", and that extensive damage to property might occur. He/she could even be concerned about the safety of the participants themselves.

According to the Act, such a person is entitled to approach the responsible officer with an affidavit, setting out his/her fears. Among other things, the affidavit must allege that the police and the traffic officers will not be able to contain the perceived threat.[9]

On receipt of such affidavit, the responsible officer must immediately consult the convenor and the authorised officer and such other person(s), as he/she might consider necessary, about the possibility of prohibiting the gathering. If, "on reasonable grounds", he/she is satisfied that none of the conditions discussed previously would be adequate for averting the dangers perceived, he/she may prohibit the gathering.[10] If the convenor or the authorised officer is not satisfied with a decision of the responsible officer, the matter is reviewable or appealable to a magistrate.[11]

Unless they happen on Saturdays, Sundays or public holidays, there is a blanket ban on all gatherings or demonstrations in buildings which house court buildings or within a radius of 100 metres from such a building. This prohibition extends to all areas mentioned in the first and the second schedules of the Act. The first schedule protects Parliament, the Provincial Building, the Supreme Court and the Magistrate's Court in Cape Town. The second schedule protects the Union Buildings in Pretoria.

If a gathering or demonstration is planned to take place during normal working days in a building housing a court, or within a radius of 100 metres of such building, the said assembly can take place only with the written permission of the magistrate of the district concerned. For the area in Cape Town covered in the first schedule, such a gathering or demonstration can only take place during normal working days and/or hours if written permission has been obtained from the chief magistrate of Cape Town. Regarding the area in Pretoria covered by the second schedule, such a gathering or demonstration can only take place during normal working days and/or hours with the written permission of the director-general of the Office of the State President.[12]

The person who authorises a demonstration or gathering to proceed is empowered to revoke such authority on the basis of "credible information on oath" that there is a danger the gathering or demonstration might have the consequences contemplated in Section 5 of the Act. In other words, such information must allege that the gathering or demonstration will turn violent or it will seriously disrupt pedestrian and vehicular traffic and the police and traffic

officers will not be able to contain that threat.
Suppose agreement has been reached, or conditions imposed, on how the gathering or demonstration should proceed. The convenor, assisted by the marshals, must ensure that all the terms of agreement or the imposed conditions are observed. In addition, participants must obey other existing laws relating to meetings, such as the ban on the carrying of dangerous weapons. Further, no person who is present at the gathering or demonstration, or who is a participant in it, shall incite hatred of other people by speech, song, banner or any other method, where such incitement is based on "differences in culture, race, sex, language or religion".[13]
No person who is present or participating in the gathering/demonstration is allowed to say or do anything which is calculated or likely to cause or encourage violence. Participants in such gatherings or demonstrations are also not allowed to wear anything that conceals their faces or part of their faces, so as to hamper the possibility of them being identified.[14]
The police are empowered to assess the situation independently of any procedure that may up to now have been followed in arranging the gathering or demonstration. If, on "reasonable grounds", a member of the police believes that they (the police) will not be able to "provide adequate protection for the people participating in the gathering or demonstration", he/she may notify the convenor of his/her belief. He/she may insist that the people at the gathering or demonstration follow the terms agreed to or imposed by the responsible officer. He/she may order anyone interfering or attempting to interfere with the gathering to stop doing so. He/she is obliged to take such steps as are "in the circumstances reasonable and appropriate" in order to protect people and property.
But in case a police officer believes, on "reasonable grounds", that the steps referred to above will not be adequate to protect people and property, he/she may call upon the people taking part in the gathering/demonstration to disperse within a "reasonable" time. To issue such a directive, however, the police officer must be of the rank of warrant officer or above. The call to disperse must be made in a loud voice and in at least two official languages. If possible, one of the languages must be understood by the people present.[15]
If the time stipulated for dispersal has passed but the participants have not complied, and there is no sign that they are about to disperse, the police officer who issued the order has the power to instruct the police under his/her command to ensure that the people disperse. If necessary, they can use force to ensure the dispersal, provided only that the weapons used are not "likely to cause serious bodily injury or death". Similarly, no more force should be used than is necessary to achieve the dispersal.[16]
But there may be a possibility that someone in the gathering or demonstration has become violent and he/she tries to injure or kill another person, or destroy or seriously damage property. It may also be the case that such a person merely "shows a manifest intention" to do harm. In this situation, the police officer in charge has the authority to order the police under his/her command "to take the necessary steps" in order to prevent the contemplated action.

Such steps include “the use of firearms and other weapons”.
Again the caveat is that such force has to be no “greater than is necessary” to prevent the actions contemplated.[17]
Notwithstanding every arrangement referred to above, some damage to property may also occur during the demonstration. In that case, every person who has participated in the gathering/demonstration and the organisation that convened the gathering/demonstration is “jointly and severally liable for riot damage”. If anyone who has had something to do with the gathering or demonstration, whether by attending it or by convening it, wishes to escape liability, he/she has to prove that:

- he/she has not permitted or connived at the act or omission, which resulted in the damage;
- the act or omission did not fall within the scope of the objectives of the gathering/demonstration and that it was not reasonably foreseeable; and,
- he/she did everything reasonable to prevent the act or omission. However, proof that he/she forbade the act or omission shall not, by itself, be deemed to be sufficient proof that he/she took all reasonable steps to prevent it.[18]

It is an offence to:

- convene a gathering without giving notice as required by Section 3;
- fail to attend a meeting called in terms of Section 4(2)(b);
- do or fail to do any of the things prohibited or enjoined by Section 8;
- knowingly contravene or fail to comply with any condition which a gathering/-demonstration is subject to, regardless of the particular provision of the Act from which the said conditions flow;
- fail to comply with an order issued, or to interfere with any steps taken, in terms of Section 9(1)(b), (c), (d) or (e) or (2)(a);
- fail to notify the responsible officer that a gathering/demonstration has been postponed or cancelled, as required by Section 4(6);
- give false information with respect to the provisions of the Act; and,
- hinder, interfere with, obstruct or resist a member of the police, the responsible officer, the convenor, the marshal or any other person in the exercise of his/her powers or the performance of his/her duties in terms of the Act or a Regulation made under the Act.

If convicted of any of the offences mentioned above, a fine not exceeding R20 000, or a jail sentence of not more than one year, or both such fine and sentence, may be imposed. To escape conviction on any of the charges mentioned in the foregoing, a person or organisation must prove that the gathering took place spontaneously.[19]

Stating the issues

As pointed out previously, there are a number of procedural and substantive issues that could be raised around the provisions of the Regulation of Gatherings Act. But what, precisely, are these issues?
To start off, there is a view that in a democratic society, speech should be free - for reasons, which will be discussed later. However, it is also recognised that

speech may be injurious of other people's rights and/or interests. In South Africa's situation, it is not too risky to assume that a majority of its population have a definite interest not only in the demise of racism, but in reparation for wrongs inflicted by racism over a period of more than three centuries. There is here, therefore, a potential conflict of values. If South Africans are committed to a social order that is free of racism, why should they have to tolerate racist views? Why should legal protection be offered for the propagation of racism? And yet, because the country undertook to proscribe racist speech, can its legal and political praxis be termed democratic?

What then happens to the right to hold an opinion and to free speech which racists may, rightly or wrongly, expect themselves to be accorded in a democratic society? Similarly, why should a person have to tolerate someone in the exercise of his/her right to free speech, while propagating views, which are injurious to that person's good name? But at the same time, if an individual's right to a good name overrides the speaker's right to speak his/her mind about that person, can it still be said that the country engenders freedom of speech?

Similarly, there is a view that in a democracy, citizens have the right to express their views - through actions if necessary - so that government, or whoever else that has the power to deal with their dissatisfaction, will take notice of their views. Citizens are thought to have the right, as the US Constitution might say, to petition government with a view to redressing their grievances. Therefore, citizens have the right to assemble and to demonstrate. On occasion, however, demonstrations and marches may degenerate to a situation that is not compatible with "the peace". The question then arises whether the right to demonstrate or public peace should take precedence.

Demonstrations or marches no doubt are in conflict with the rights of those who are not participants in such activities. Those who are not participants have rights, e.g., of movement, which are negated whenever demonstrators take to the streets. Whose rights, it may be asked, should prevail in these sorts of circumstances?

Problem(s) with demonstrations

Whether one speaks about criminal or civil law, it is generally accepted that law is concerned with actions. In other words, generally speaking, what invites the sanction of the law is, in the first instance, a specific act. In circumstances where the law enjoins on the subject an obligation to act, failure to do what the law commands is deemed to constitute an act (conduct) which then invites the sanction of the law just as if a positive act had been undertaken. Snyman formulates the matter thus:

> *The first general requirement for criminal liability is that there must be conduct. ... By "conduct" is understood an act or an omission. "Act" is sometimes referred to as "positive conduct" or "commission" and an "omission" as "negative conduct" or "failure to act". Since the punishment of omissions is more the exception than the rule, this first*

> *requirement of liability is often, if not mostly, referred to as the "requirement of an act".*[20]

Consequently, at a theoretical level, there should not exist too many problems about demonstrations inviting the sanction of the law. Theoretically, the inquiry should be whether a demonstration constitutes an act and, if so, whether the act is one that is forbidden. The rest should then follow almost as a matter of course. Unfortunately, there are at least two obstacles to this approach. Firstly, in the light of the fact that South Africa has a Bill of Rights which guarantees the right to demonstrate, another element now has to be factored into the equation, namely, is the law which forbids the act constitutional?
On the other hand, is a demonstration an action or is it a form of expression? If a demonstration is simply an action, then the inquiry ends there. If, however, a demonstration is a form of expression, then the next question becomes, is expression the same thing as speech? If expression is not the same thing as speech but merely a disguised form of action, then the law as it applies to actions should perhaps swing into operation. If, however, expression is the same as speech (or is a form thereof), then the inquiry goes back to the question that was raised above, i.e., should the law not be concerned with acts, rather than speech?

Some comparative jurisprudence on the right of assembly

United States
The First Amendment to the US Constitution provides:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

It must be mentioned, however, that the First Amendment does not provide a very good point of departure when discussing the right of assembly if one wishes to keep that right apart from the right to free speech. This is because the Amendment deals with the two rights together. In the US, therefore, the question would mostly present itself as a First Amendment issue, which comprises speech and assembly, rather than as a right of assembly. In other words, whether it is your right to speak freely or your right to assemble that is assailed, you need only plead that your First Amendment right has been violated. Perhaps this already anticipates the other question raised earlier, namely, whether expression and speech are the same thing.
Dealing with the right of assembly in 1876, the US Supreme Court stated as follows in the case of United States v Cruikshank:[21]

> *The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else*

connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs and to petition for a redress of grievances.

One hopes that this early pronouncement by the US Supreme Court would have put the matter to rest. However, the State of Oregon passed a law in 1930 which provided:

> *Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism ... or who shall preside at, or conduct or assist in conducting any assemblage of persons, or any organisation, ... which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term not less than one year nor more than 10 years...*[22]

This particular law came up for consideration in the case of De Jonge v State of Oregon. It was alleged during the trial that De Jonge had assisted in the conduct of a meeting organised by the Communist Party, which as a matter of principle advocated and taught the doctrine of criminal syndicalism. However, in that specific meeting, there had been no advocacy or teaching of criminal syndicalism, the meeting had in fact been orderly; but the police had broken it up, searched the venue and found no materials which propagated criminal syndicalism. The materials produced in court had been seized by the police at a different place and at a time other than during the meeting. De Jonge was convicted and sentenced to seven years for the mere fact of having assisted at the meeting.

On appeal the Supreme Court reversed his conviction, holding that De Jonge was wrongly convicted and had been deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting. His sole offence as charged, and for which he was convicted and sentenced to imprisonment, was that he had merely assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

Finally, the Court found that "the Oregon statute as applied to the particular charge by the state court was repugnant to the due process clause of the Fourteenth Amendment"[23] (author's emphasis), which provides:

> *All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without*

due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

It seems unfortunate that the Supreme Court accepted the interpretation given by the state court to De Jonge's indictment. This approach resulted in the Supreme Court limiting its inquiry to whether the law as interpreted by the state court did not deny the accused the benefit of due process. Therefore, the Supreme Court did not inquire into whether, independently of what the state court thought, the Oregon Code, or aspects of it, did offend against the First or the Fourteenth Amendments. The Supreme Court only inquired into whether, as interpreted by the state court, they did not offend against the Constitution in respect of due process. So seen, the inquiry could equally well have been whether the court's interpretation, rather than the statute itself, did violate constitutional rights.
In 1941, the matter of Cox v State of New Hampshire[24] came for consideration before the Supreme Court. At issue here was the validity of a statute of New Hampshire which provided:

> *No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air meeting upon any ground abutting thereon shall be permitted, unless a special licence therefore shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for.*[25]

Sixty-eight members of the Jehovah's Witnesses faith assembled in a hall in Manchester City on July 8 1939. Although the march was prearranged and the marchers knew a permit was required, they did not apply for one, and none was in fact issued. They divided themselves into "four or five groups", each with about 15 to 20 persons. They carried, among others, a staff with a sign to the effect that "Religion is a Snare and a Racket". They marched single-file.[26] They were charged with "taking part in a parade or procession on public streets without a permit".[27] They brought the validity of the statute into question on the basis that it offended against their constitutional right to disseminate information and to worship. In concluding that the statute did not contravene any constitutional right, the Supreme Court observed:

> *Civil liberties, as guaranteed by the Constitution, imply the existence of an organised society maintaining public order without which liberty itself would be lost... The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend...*
> *As regulation of the use of streets for parades and processions is a traditional exercise of control by local government, the question in a*

> *particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.*[28]

In another case, the Audubon Regional Library in Clinton, Louisiana, had a policy according to which it operated two bookmobiles, one red and the other blue. The red one served whites, and whites alone. The blue mobile served blacks alone. The library also issued registration cards to registered borrowers. The cards issued to blacks were stamped with the word "Negro".
On March 7 1964, Brown and four other blacks went into the library and requested a book titled "The Story of the Negro". After checking, the librarian informed Brown that it was not available but that she would order it from the state library and then notify him. Brown sat down and his companions stood around him. The librarian asked Brown and his companions to leave, but they did not. Her superior asked Brown and his companions to leave, but they did not. The sheriff, who had arrived shortly after Brown's arrival, asked Brown and his companions to leave, but they did not. The Sheriff and his Deputies then arrested them. They were charged with:

> *Congregat[ing] together in the public library of Clinton, Louisiana, "with the intent to provoke a breach of the peace and under circumstances such that a breach of the peace might be occasioned thereby" and [of failing and refusing] "to leave said premises when ordered to do so" by the Librarian and by the Sheriff.*[29]

It was common cause that, during the sit-in, apart from the two librarians (women) and the demonstrators, no other person was in the library, that the demonstrators were not rowdy and that they were orderly. Be that as it may, they were convicted and sentenced. The Supreme Court reversed all of that, reasoning:

> *Petitioners cannot constitutionally be convicted merely because they did not comply with an order to leave the library... The statute itself reads in the conjunctive, it requires both the defined breach of peace and an order to move on. Without reference to the statute, it must be noted that petitioners' presence in the library was unquestionably lawful. It was a public facility, open to the public. Negroes (sic) could not be denied access since white persons were welcome... Petitioners ... were neither loud, boisterous, obstreperous, indecorous nor impolite. There is no claim that, apart from the continuation - for ten or fifteen minutes - of their presence itself, their conduct provided a basis for the order to leave, or for a charge of breach of the peace.*[30]

Then the Supreme Court argued:

> *But there is another and sharper answer called for. We are here dealing with an aspect of a basic constitutional right - the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the government for a redress of grievances. The constitution of the state of Louisiana reiterates these guarantees... As this Court has repeatedly stated, these rights are not confined to verbal expression... the statute was deliberately and purposefully applied solely to terminate the reasonable, orderly and limited right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our constitution.*[31]

In Shuttlesworth v. Birmingham[32], the Supreme Court observed:

> *There can be no doubt that the Birmingham ordinance ... conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."*
>
> *This ordinance ... fell squarely within the ambit of the many decisions of this Court ... holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a licence, without a narrow, objective, and definite standards to guide the licensing authority, is unconstitutional... Our decisions have made it clear that a person faced with such an unconstitutional licensing law may ignore it, and engage with impunity in the exercise of the right of free expression for which the law purports to require a license...*[33]

From the cases cited above, the following general statements can be derived in so far as the right to assembly is concerned in the US:

- The right to assemble is constitutionally guaranteed. The Court's reasoning in United States v Cruikshank is that the mere idea of government gives rise to the right of the citizens to meet in order to consult about public affairs.
- The right to assemble is not absolute. From the language of the First Amendment it is already clear that to enjoy protection, the assembly must be peaceful. But the tone of De Jonge v State of Oregon also implies that, where a law is not unconstitutional, the right of assembly may be burdened with legal limitations. So, for example, De Jonge would have been duly convicted, had he propagated criminal syndicalism or sabotage at the meeting.[34] Indeed, the Court's judgment is clear that the purpose of the meeting should be "lawful".

- The right to assemble may be limited in the interests of general convenience. Since, however, a demonstration will invariably inconvenience some, a strict construction has to be placed on the import of general convenience. In Brown v Louisiana the court held that a statute which is designed so as to curtail the "reasonable, orderly and limited right to protest" an act or policy which is already manifestly unconstitutional must be struck down.
- Arbitrariness should be discouraged in the administration of laws which curtail or limit the right to assemble, as observed by the court in Shuttlesworth v Birmingham. Therefore, a statute which allows an official to be guided by his/her own views on "public welfare, peace, safety, health, decency, good order, morals or convenience" in deciding whether to allow a demonstration or not, should be struck down.
- The enforcing agent should adhere to the letter of the law in enforcing a rule which limits the right to assemble. Where the law forbids certain conduct, empowers the police to command the protesters to disperse and, failing to disperse, to arrest the protesters, the forbidden conduct must be present in order for the command of the police to be valid. Thus, if the law empowers the police to command rowdy protesters to disperse, the police act unlawfully if they command peaceful protesters to disperse. An arrest based on their failure to disperse is also unlawful as stated in Brown v Louisiana.

Kent Greenawalt sums the situation up in the following words:

> *The key features of American law are these. In its streets and parks, the state must permit some demonstrations. It cannot close off these traditionally public forums from those who choose to express themselves by demonstrating. It may, however, [impose certain] reasonable restrictions.*
>
> *If the restrictions confer unfettered discretion on executive officials, they will ... be held invalid, largely because wide discretion allows executive officials to engage in viewpoint discrimination. If demonstrations threaten some danger of a violent response, the essential responsibility of the government is to do all it can to protect the demonstrators and stop the violent bystanders, but in extreme circumstances, it can demand that demonstrators stop.*[35]

Canada

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[36] At the same time, it states that everyone has the following fundamental freedoms:

- freedom of conscience and religion;
- freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
- freedom of peaceful assembly; and

- freedom of association.[37]

Section 33(1) of the Charter provides that Parliament or a provincial legislature may pass laws, which are incompatible with Section 2, and then declare explicitly in the legislative instrument in question that the legislative act complies with Section 1 of the Charter.[38] In other words, the legislature may pass a law which curtails the fundamental rights or freedoms envisaged in the Charter, but declare that such curtailment is "demonstrably justified in a free and democratic society". Put simply, the legislature could pass a law and simultaneously sit in judgment of it. Greenawalt has commented: "The latter possibility means that the effectiveness of Section 2 as a judicially enforceable restriction depends on the hesitancy of the legislatures to rely on the power of override given by Section 33."[39]

In Canada, then, the judicial inquiry is not only whether constitutional rights have been violated or not. Once it is established that they are, the next level of inquiry is whether that violation is "demonstrably justified in a free and democratic society". This is similar to the situation in South Africa. But in Canada, unlike in South Africa, the lawgiver is empowered to shield its acts from adverse judicial review by pronouncing explicitly in the law which commits the mischief complained about that that mischief is demonstrably justified in a free and democratic society. The limitations of such a disposition are self-evident.

Prior to the Charter of Rights and Freedoms, Canadian jurisprudence suggested that demonstrations were not a form of expression, but rather a form of collective action.[40] Consequently, problems relating to the right of people to assemble would have been treated like any other legal problem, i.e., the right did not enjoy any special protection. After the advent of the Charter, demonstrations came to be firmly recognised as a form of expression, and now enjoy Section 2 protection.[41] In Regina v Committee for the Commonwealth of Canada[42], the Canadian Supreme Court ruled that some public spaces should be available for public protest and that regulation of public protest on state-owned spaces is subject to judicial review. The Court also ruled that the prohibition on the distribution of political pamphlets and the undertaking of political advocacy at airports is unconstitutional.[43]

Other jurisdictions

Recently, a court in Switzerland ruled in the case of Sozialdemokratische Partei Basel-Stadt v Kanton Basel-Stadt[44], which dealt with the right to assemble, that a statute which outlaws the wearing of any apparel at a demonstration which makes the demonstrator difficult to identify is not unconstitutional. The Court held that such a requirement is clearly aimed at preserving the interests of the public, e.g., the prevention of crimes being committed under the protection of a disguise.

As the court further observed, the right to gather freely and to disseminate ideas is not abridged by the prohibition of appearing at a demonstration wearing a disguise. Similarly, such prohibition does not detract from the right of

the demonstrators to be presumed innocent until proven guilty, since a demonstrator who is arrested for wearing a disguise is not presumed to have committed other crimes.[45]

The German Court decided in BvR[46] that a statute which requires demonstrators to notify the authorities at least 48 hours in advance of a demonstration does not infringe on the right of citizens to freely organise public gatherings and to express themselves freely. The Court found that such a requirement does not apply to spontaneous gatherings, but that urgency is not an excuse for not complying with the notification requirement. The Court reasoned that urgent gatherings are subject to notification as soon as the organisers announce their readiness to conduct the gathering.

Article 34 of the Turkish Constitution guarantees "everyone ... the right to organise unarmed and peaceful assemblies and demonstration marches without prior authorization". It also provides, however, that law shall prescribe the forum, conditions and procedures of such assemblies and demonstrations. The Turkish Court decided in Danistay[47] that the right to hold assemblies and to demonstrate is a fundamental right and can only be restricted in terms of the Constitution and for no other purpose. Further, any such restrictions should not go beyond the necessities of a democratic society.

Where there is activity (or a suspicion of activity) which leads to the disturbance of law and order or which is a threat to national security, the competent authority can take measures to deal with such activity. Such measures, however, must not amount to abolishing a right recognised by law. When, therefore, disturbances occur at a meeting, the authorities are entitled to take such action only as would "not totally prevent the meeting from taking place".[48]

It is heartening to note that the right to assemble enjoys constitutional protection in so many jurisdictions - and what has been discussed in this paper is merely the tip of the iceberg. But constitutional protection of rights is one thing and their implementation another. When courts are faced with the difficult task of striking down legislative instruments and executive or administrative acts, all sorts of considerations force themselves into the equation so that the path the courts follow is never cut and dried. Greenawalt captures the dilemma the courts find themselves in thus:

> *A crucial aspect of most constitutional cases is how much deference a court should give to the legislative or executive branches. The constitution limits what those branches are supposed to do, but when a case arises which challenges legislative or executive action, judges must decide how much weight to accord the judgment of members of that branch that they have behaved within constitutional boundaries.*
>
> *In favour of judicial deference is the notion that the will of the majority, best represented by legislative or executive decision, should be fulfilled unless it clearly violates the constitution. An argument against deference is that a constitution limiting governmental powers*

establishes that principles of public government are not simply democratic in the sense of allowing final determinations by the majority... That argument is bolstered by the claim that courts are much better able to assess constitutionality than the political branches.[49]

Viewed against this dilemma, it would appear that the weight of judicial opinion seems to point the way to the fact that the right to assemble is by no means absolute. The right has to be balanced against other social interests. At the same time, however, the weight of judicial opinion seems to be against unfettered government power in limiting the right to assemble.
Time and again, the notion arises that there must be objective and independent criteria for restricting the right of citizens to assemble. That, whatever limitation is imposed, it has to be shown to be justified in a democratic society, and that the limitation must not amount to a denial or even abridgement of the right of the citizens to assemble.

Is a demonstration an action or a form of expression?
As pointed out previously, it is necessary to raise this question because the answer will determine how the right to demonstrate should be treated. Advocates of an absolute right to free speech would also prefer that a firm distinction be kept between words and deeds. In a sense, posing this question at this stage is perhaps academic, since it must be clear already that judicial opinion treats demonstrations as expression rather than action. To the extent, however, that judicial opinion has to be brought under scrutiny, the inquiry is perhaps not altogether academic. Since, however, the question is intimately tied up with the problem whether speech should ever be punished, it may be better to deal with the question under freedom of speech.

Problems with freedom of speech
Harry M Bracken writes:

The history of the First Amendment to the US Constitution is the history of attempts to withdraw what had been promised. Even before the end of the eighteenth century, Congress passed a series of direct attacks on freedom of speech ... with the Alien and Sedition acts (1798), thereby beginning the long tradition of subversion paranoia that, from that day to this, has been a hallmark of American political discourse. Alexis de Tocqueville detected a source of the problem 160 years ago: "I know [of] no country in which there is so little true independence of mind and freedom of discussion as in America... The majority raises very formidable barriers to the liberty of opinion: within these barriers an author may write whatever he (sic) pleases, but he will repent it if he ever steps beyond them."[50]

What, then, is the problem about speech? Why do governments not simply deny the right to speak freely? Why do they grant it and then try to find a roundabout way of removing it? The problem with freedom of speech is a very old one. As observed in the case of United States v Cruikshank, there is a view that the very idea of government - at least democratic government - already throws up the notion of freedom of speech. But the philosophical considerations underpinning this notion have probably engaged people since the earliest concern with the evolution of society. Such eminent writers as John Milton, John Stuart Mill, Pierre Bayle, John Locke, Alexander Meiklejohn and Thomas Emmerson have contemplated the problem.

A lot of the social justifications for freedom of speech have already been hinted at in the cases referred to in this paper.[51] The critical question still to be dealt with is whether speech should ever be punished and, if so, under what circumstances. There are basically two schools of thought on this matter. The first one argues that speech should under no circumstances be punishable, while the second one holds that there are circumstances under which it should be punished.

The best-known proponent of absolute freedom of speech is Bayle. Basically, he maintains a strict philosophical distinction between words and deeds. This approach is also advocated by Bracken in his book, Freedom of Speech: Words are not Deeds. To a limited extent, this approach has had some judicial support in the US. Expressing the minority opinion in Communist Party v Subversive Activities Control Board[52], (by a majority of 5-4) Justice Hugo Black reasoned:

> *The Founders [of the US] drew a distinction in our Constitution which we would be wise to follow. They gave the Government the fullest power to prosecute overt actions in violation of valid laws but withheld any power to punish people for nothing more than advocacy of their views.*

But perhaps it will be more helpful to state the context in which the question arises in South Africa so that its import can be fully appreciated. The constitution outlaws meetings, gatherings, demonstrations or pickets which are not peaceful or in which the participants are armed. This is a factual matter. One has to inquire in every situation whether, as a matter of fact, the meeting, gathering, demonstration or picket is violent. Also, one has to inquire in every case whether, as a matter of fact, the participants are armed. Because this is a factual inquiry, it cannot be determined a priori: it can always only be determined on the basis of what one sees happening at the scene of the meeting, gathering, demonstration or picket.

There is no intention here to argue that the authorities should wait until violence actually breaks out before they can intervene. However, a case needs to be made for any action which reduces or tends to reduce rights. Government would have to make a case that the threat at hand justifies the introduction of this piece of legislation. Government would also have to make a case that the state of law as it was prior to the promulgation of the Regulation of Gatherings

Act is inadequate to deal with the threat at hand.
An examination of the situation leads to the conclusion that the problem in South Africa is not a lack of laws that would enable government to deal adequately with violent situations. South Africa's common law not only forbids violence on pain of criminal sanction, it also prohibits incitement to violence. Not only was the prohibition of the carrying of weapons at meetings already part of the country's statutory law before November 15 1996, but government actually used its power to ban the carrying of weapons at meetings.

A critique of the law
It is interesting to note that the Regulation of Gatherings Act (205 of 1993) was assented to on January 14 1994. The Constitution of the Republic of South Africa Act (200 of 1993) was assented to on January 25 1994. The two Acts, therefore, were piloted more or less during the same period. One might have expected that Act 205 would take its shape from the Constitution. Probably it was the realisation that its provisions might be problematic, at the very least, that, although assented to on January 14 1994 the Act did not take effect until November 15 1996.

The right to assemble
The Interim Constitution provided: "Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions."[53] Its successor reads: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions."[54] One might have thought, then, that so long as a meeting, gathering, picket or demonstration is peaceful and the participants are not armed, no further fetters need be placed on the right of citizens to assemble. Also, one might have thought that any legislation on the matter would not encumber the right to assemble except on the basis of the specific exceptions provided for by the Constitution.
In other words, the Constitution grants the citizens the right to hold meetings, demonstrations and pickets and to present petitions subject only to the requirement that these must be done peacefully and the participants are unarmed. The notion that a gathering or demonstration might require someone else's consent seems a clear deviation from the right granted by the Constitution. The fact that someone, a state official or police officer, might prohibit a gathering/demonstration on the basis that he/she is not satisfied that it will be possible to avert a perceived threat, seems a clear derogation from the right to assemble granted by the Constitution.
This mechanism of "granting" of rights via the Constitution, and then revoking them by way of legislation, is reminiscent of a statement made by Professor Lawrie Schlemmers in 1992. Addressing a workshop on Building Democracy, he chuckled rather prophetically: "what can one say about democracy? It is like a beautiful woman: nice to have, but difficult to keep."

Freedom of expression and violence

For current purposes it does not appear to matter whether it is freedom of speech or freedom of expression that is the issue, since the country's Constitution protects freedom of expression and it is established that speech is included therein. Section 16(2) of the Constitution states that constitutional protection of free speech does not extend to incitement of imminent violence. The Regulation of Gatherings Act lowers this horizon considerably. It prohibits any speech at all that is calculated or is likely to cause or encourage violence. It is suggested that a lower standard than that set in the Constitution must of necessity be constitutionally suspect.

Liability for damages resulting from gatherings/demonstrations

The Regulation of Gatherings Act attaches civil liability to persons who attended a gathering in the progress of which damage was caused to property. The Act does not, moreover, distinguish between being physically part of the demonstration/gathering and merely organising it for the purposes of such civil liability. If a person has had anything to do with the gathering/demonstration at all, then he/she invites civil liability for any damage to property that might be occasioned in the course of the gathering/demonstration. The fact that one may have instructed participants in clear, unmistakable terms not to cause the damage complained about is not an excuse: that person is just as liable as if he/she had done nothing to stop it.

There appears to be obvious problems with this. Civil liability has to be established on the basis of culpability, either in the form of intention or of negligence. It is hard to see that one person can be intentional or negligent on behalf of another in circumstances of the nature now under consideration. Generally, strict principles attach to vicarious responsibility. It is suggested that the kind of relationships that exist among people who are part, or not even part, of a gathering/demonstration are not of such a nature that vicarious responsibility can flow from their actions.

To make gatherings/demonstrations attract vicarious responsibility seems, therefore, not only constitutionally suspect, but also render useless the rules of evidence and proof that existed before the promulgation of the Regulation of Gatherings Act. It seems quite clear that the purpose was to render gatherings/ demonstrations such a risky affair as to dissuade people from participating in them.

Notification or permission?

It is not always clear whether the Regulation of Gatherings Act merely wants the authorities to be informed of, or whether it wants their permission to be obtained for gatherings/demonstrations. During the World Summit on Sustainable Development (WSSD), the authorities appeared to think that their permission should be obtained. Parts of the Act require mere notification for a demonstration or gathering to take place whereas in respect of certain areas, permission is obligatory. But even where permission is not explicitly required, the fact that the authorities have the power to prohibit

gatherings/demonstrations winds down to granting or withholding permission. The notion that permission might be required to hold a gathering/demonstration appears to be constitutionally suspect. If one deals merely with notification, it would be hard to challenge that requirement on constitutional grounds. But where permission must be obtained in advance, there is reason to think that the Act imposes a requirement that goes beyond the pre-existing constitutional grant in respect of gatherings/demonstrations. It must be stressed that there is a difference between regulating these matters for time and space, on the one hand, and undertaking to allow or disallow them, on the other.

Constitutional challenge

There is a view that the Regulation of Gatherings Act might offend against the Bill of Rights and that, therefore, it would not survive constitutional scrutiny. One could indeed say that certain aspects of the Act seem to be problematic, but finality on this matter can only be made if the Act is challenged at the Constitutional Court level. This challenge would need to be made, however, against the backdrop of Section 36 of the Constitution, which allows for any of the fundamental rights to be limited in a manner that is reasonable and justifiable in an open and democratic society.

References

[1] The Regulation of Gatherings Act (205 of 1993), Section 1.

[2] Act 205 of 1993 defines a 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 partially open to the air... " The gathering, in order to invite the application of the Act, has to "[discuss, attack, criticize, promote or propagate]" the "principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law". Alternatively, the assembly must be aimed at "form[ing] pressure groups, [handing] over petitions to any person, or [mobilising] or [demonstrating] support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution".
About the term "demonstration", the Act provides: "demonstration" 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".

[3] In all events the notice must not be less than 48 hours (Act 205 of 1993, Section 3(2)).

[4] Act 205 of 1993, Section 3.

[5] If the convenor fails to inform the responsible officer about the proposed gathering, and a member of the Police receives information about it, he/she is obliged to bring this to the attention of the responsible officer (Act 205 of 1993, Section 3(5)(a)). Where the responsible officer comes to know of such gathering, he/she is obliged to inform the

authorised member of it (Section 3(5)(b)). When the responsible officer has come by such information, whether through the police or through his/her own initiative, the responsible officer is obliged to "take such steps as he may deem necessary, including the obtaining of assistance from the Police, to establish the identity of the convenor ... and may request the convenor to comply with the provisions of this Chapter" (Section 3(5)(c)).
[6] Act 205 of 1993, Section 2(3).
[7] Act 205 of 1993, Section 4(4)(b).
[8] Act 205 of 1993, Section 4(5). It may be worth noting that the convenor is obliged to notify the responsible person if the intended meeting is postponed or cancelled, cf Section 4(6)(b).
[9] ibid, Section 5(1).
[10] ibid, Section 5(2).
[11] ibid, Section 6(1)(a) & (b).
[12] ibid, Section 7; First Schedule; & Second Schedule.
[13] ibid, Section 8(2),(3),(4) & (5).
[14] ibid, Section 8(6) & (8).
[15] ibid, Section 9(1) &(2).
[16] ibid, Section 9(2).
[17] ibid.
[18] ibid, Section 11.
[19] ibid, Section 12(1) & (2).
[20] Snyman, CR (1995), Criminal Law (3rd ed), Butterworths, p49. See also Gibson, JTR (1970) Wille's Principles of South African Law (6th ed), Juta & Co, p1; Burchell and Hunt (1970), South African Criminal Law and Procedure, Vol 1, Juta, p97; McKerron, RG (1965), The Law of Delict, Juta p11.
[21] 92 US 542 (1876). To the extent that this judgment makes the right to free speech and to assembly contingent on US citizenship, it is not free from controversy. This issue is dealt with in some detail by Justice Stone in Hague v Committee for Industrial Organization 307 US 469 (1939).
[22] Oregon Code 1930, Section 14-3,112 as amended by Oregon Laws 1933, Section 1-3, quoted in De Jonge v State of Oregon 229 US 353 (1937).
[23] ibid. p366.
[24] 312 US 569 (1941).
[25] New Hampshire, PL, Chap. 145, Section 2. Quoted in Cox v State of New Hampshire.
[26] Cox v State of New Hampshire, p573.
[27] ibid. p574.
[28] ibid. p575.
[29] Brown v Louisiana, http://neptune.fed...aisaction, p 4.
[30] ibid.
[31] ibid. pp5-6.
[32] 394 U.S. 147; 89 S. Ct. 935; 22 L.Ed. 2d 162 (1969).
[33] Robert F Cushman, supra, p 469.
[34] This, of course, gives rise to the question whether it would have been his right to assembly or to free speech which would then have been in issue. The question therefore arises whether it is the assembly per se, or the things that are said thereat which would have been forbidden. The question becomes rather philosophical when posed in those terms and could equally well be posed thus: if a gathering "degenerates" into violence and, therefore, gets broken up by the police, is it the gathering per se which is in issue, or

is it the violence? This would come down to introducing an artificial divide between the meeting and its business, or between the meeting and what happens thereat. If a meeting is called in order to discuss sabotage as a means of bringing about change, that is the business of the meeting and at that level, it is pointless to distinguish between the right of the delegates to meet and their right to speak.

[35] Greenawalt, K (1995), Fighting Words: Individuals, Communities, and Liberties of Speech, Princeton University Press, pp25-26. See also Justice Potter Stewart's dictum in Edwards v South Carolina: "[These petitioners] ... were convicted upon evidence which showed no more than that they were peaceably expressing [views] which were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection" (quoted in Congressional Quarterly's Guide to the Supreme Court (2nd ed) (1989), p411.

[36] Bracken, HM (1994), Freedom of Speech: Words are not Deeds, Praeger, p67.

[37] ibid.

[38] Greenawalt, supra, p13.

[39] ibid.

[40] ibid, p27. The Charter came into operation in 1982(cf Bracken, supra, p 51).

[41] Greenawalt, supra, p27.

[42] [1991] 1 S.C.R. 139.

[43] Greenawalt, supra, p27.

[44] (Bundesgericht, 1. Publ. Ch., November 14, 1991)[1992] EuGRZ, 137.

[45] European Current Law Year Book, 1992, p719.

[46] 850/88, October 23, 1991 [1992] EuGRZ 23. Cf European Current Law Year Book, 1992 p719.

[47] (D.1.D. 1990/95, June 14, 1990)[1991] 81 Danistay Dergisi 78.

[48] European Current Law Year Book, supra, p720.

[49] Greenawalt supra, p8.

[50] Bracken, supra, p21.

[51] Further justification can be gleaned from: Van der Westhuizen, J (1994) Freedom of Expression, in Van Wyk et al, Rights and Constitutionalism: The New South African Legal Order, Juta, pp267-271; Owen, U (1996), Hate Speech and Pornography, in Duncan J, Between Speech and Silence, FXI and Idasa, pp35-37; Bracken HM supra p24; Greenawalt K supra pp3-6.

[52] Quoted in Bracken supra, p28.

[53] Act 200/1993 Section 16.

[54] Act 108 of 1996, Section 17.

Defining the Constitutional right to freedom of expression, assembly and demonstration

Yasmin Sooka

Only a few years ago, the suggestion that a discussion on the right to dissent would soon become necessary in the new South Africa would have met with incredulity and sheer disbelieve. What is becoming obvious, however, is that the oppressed of yesterday have quite quickly transformed themselves into the oppressors of today and it is for this reason that the rights and freedoms found in the Constitution need to be cherished and guarded even more jealously. It appears that once people get into power the temptation to rely on old repressive laws or even enact new ones and use them in oppressive ways occurs with surprising speed.

On this basis, a workshop on the Right to Dissent is crucial because it seeks to examine the way in which people can exercise their right to protest and, by definition, how they can enjoy the freedom to express dissent. In doing so, it is necessary to examine a number of other contiguous rights and freedoms which entrench the right to dissent, such as the freedom of assembly, the freedom of expression and the freedom of association. All these are well established in domestic law as well as in regional and international human rights instruments.

The right to dissent is universally recognised and protected and there are a number of international and regional human rights instruments that have been passed to safeguard it. These include, for instance, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and the African Charter of Human and People's Rights.

In many democratic countries, the right to demonstrate and protest has become an important feature of their normal political landscape. Clearly, this right applies to peaceful protest and, even in this case, the right is subject to limitations imposed by local jurisdictions with a view to safeguarding the rights of other citizens. What needs to be examined, therefore, is the way in which a balance should be struck to ensure that whereas this right is respected, other fundamental rights and freedoms are not infringed. This issue is particularly pertinent given the experiences of many people and social movements during the World Summit on Sustainable Development (WSSD) and in light of the

ongoing anti-globalisation protests in many parts of the world.

South Africa's Constitution and the right to dissent

In South Africa, the right to dissent is encompassed in Section 17 of the Constitution, which reproduces almost verbatim Section 16 of the Interim Constitution. The latter provided: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions, as well as to enjoy freedom of association." In the final Constitution, freedom of association has been put separately under its own clause, but this has in a way enhanced, rather than diminished, its importance.

The Constitution also guarantees political rights, such as the right of every citizen to make free choices. These include the right to form a political party; to participate in the activities of or recruit members for a political party; and to campaign for a political party or cause, to stand for public office, and if elected, to hold office. Section 236 provides that to enhance multiparty democracy, national legislation must provide for the funding of political parties. Workers and employers are guaranteed the right to form, join and participate in the activities of trade unions and employer organisations respectively. The right of workers to strike is guaranteed and protected by the Constitution.

But these are not absolute and they may be limited in terms of a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society. The limitation must also be based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the purpose of the limitation, the nature and extent of the limitation and the relationship between the limitation and its purpose. In addition, anyone seeking to limit a fundamental right must first consider less restrictive means to achieve the desired purposes. Again, these rights may be derogated from in a state of emergency, but only in accordance with the terms specified by the Constitution.

In essence, freedom of assembly is concerned with the public expression of opinion by way of spoken words and by demonstration. It can be described as a synthesis or a melange of speech mixed with conduct and, through the ages, scholars have reasoned that, in reality, freedom of assembly is merely a particular form of freedom of speech.

But why is there a need to protect the right to dissent? As far back as 1978 John Dugard, an eminent South African jurist, wrote in his book *Human Rights and the South African Legal Order*, that the repression of public demonstrations by the apartheid government was not only undemocratic but also inherently dangerous. His rationale was that groups operating outside the confines of recognised parties are only likely to resort to clandestine and revolutionary political activities aimed against the structures of society.

Twenty years later in 1998, the Constitutional Court held that free assembly is a very important right since it was only public opinion that carried weight, and that it would be extremely difficult to organise public opinion if there was no right of public assembly. Some academics have also argued that the right to freedom of assembly paradoxically protects the individual from state coercion

to join an assembly or participate in demonstrations. They are of the view that this is necessary for democratic government, because minority groups and groups on the fringe of society lack adequate representation in parliament to influence the course of events. They therefore need to bring their political concerns to the attention of the government as well as the general public. To put it differently, it means that effective use of assemblies and demonstrations provide a countercheck to majoritarianism and in that way help to stabilise the political system.

Assemblies also ensure that there is a meaningful and continuous communication between government, voters and representatives of the people. The government is thus informed of the unpopularity of its policies and is able to identify and address problems in the intervening period between elections. From a general perspective, the right to dissent is essential to a society's commitment to universal political participation in the democratic process and discourse.

In South Africa this has become particularly significant in relation to the government's policy on land and its macro-economic policy, the Growth, Employment and Redistribution Strategy (Gear). Clearly, those policies do not enjoy the support and respect of the majority of the people, and so when government and Parliament are unwilling to listen, the only way in which that message can be conveyed is by people mobilising, gathering together and expressing their collective opinion.

During its transition from the Interim Constitution to the final Constitution in 1996, the right to dissent did not undergo any change in formulation. By its nature, it protects conduct and activities in respect of gatherings, demonstrations and petitions. It also applies to the voicing of opposition to any aspect of social or economic activity in the private or public domain. This right permits people to assemble, to demonstrate their opposition to, or indeed their support for any cause, and to present the authorities with demands for change. It is subject, however, to the modification that such conduct must be expressed peacefully and without arms, meaning that violent protests are proscribed. Because of this inherent limitation, it permits the authorities to enact laws that deal with breaches of the peace, violence and riots.

Constitutionally, the state is obliged to ensure that it not only protects the right to dissent but that it also facilitates the proper and reasonable exercise of this right. An important aspect of the right to dissent is that in the course of its expression it can be directed not only at public authority but also in respect of opposition to any particular issue or cause not necessarily of a public nature. Because all activities connected with the holding of an assembly are protected, preparation and organisation for the expression of dissent are by extension equally protected.

Whereas today the right to dissent enjoys constitutional protection, its long history is characterised by repression, coercion and outright political manipulation by the successive apartheid governments. It is to this history that the paper will now turn.

From Smuts to Botha: 70 years of suppressing dissent

From the outset, one quickly realises that the right to dissent has always been the subject of controversy and contestation between the oppressed and those with powerful vested interests. The latter have always sought, in different ways and by the use of different mechanisms, to limit this right.

South Africa's history is littered with examples of how the oppressed, in turn, further oppressed the rest once they climbed into power. During World War II, the government of General Jan Smuts enacted emergency legislation to suppress extremist Afrikaners, especially those who supported Germany and opposed the country's participation in the war on the side of the Allies. When these Afrikaners took over, they surpassed the former governments and went ahead to enact the most repressive and draconian legislation the world has ever seen. A few years after assuming power, they had succeeded in transforming South Africa into a virtual police and military state.

During apartheid, the right to assembly was extensively regulated. The offence of public violence was ruthlessly used to restrict freedom of assembly and became one of the most nefarious instruments in the hands of the government. By invoking this legislation, even children as young as 15 years were arrested and held for long periods in prisons such as Diepkloof (dubbed Sun City) on charges of public violence.

The government of General JB Hertzog used Sections 25 and 27 of the Black Administration Act of 1927 to severely proscribe and regulate gatherings among the African people. After World War II, the government of DF Malan initiated a battery of punitive security laws that were designed to extensively restrict freedom of assembly, particularly where it manifested itself in the form of robust political activities.

But it was under the rubric of Marxism and fighting communism that dissent became synonymous with treason. Section 9 of the Suppression of Communism Act of 1950 was so widely and vaguely formulated that virtually any vociferous opposition to the status quo could be brought within its nebulous definition. This resulted in the African National Congress's (ANC's) defiance campaign of 1952, resulting in more vicious laws being enacted, such as the Criminal Laws Amendment Act, which raised the penalties for offences committed in the furtherance of political protest. As the white minority government firmly entrenched itself, it increasingly passed a plethora of security laws, each one permitting more savage sanction.

It must be said that the apartheid judiciary did not distinguish itself as a defender of justice and freedom because it instead adopted a positivistic approach and thereby interpreted the country's laws in relation to the existing political status quo. Laws were construed from the standpoint of Parliament being supreme. The all-white Parliament gladly passed a mounting volume of draconian laws, and the judiciary willingly interpreted and implemented them to suit the needs of the government, resulting in the complete suppression of the majority of South Africans.

During these years many people languished in prisons, were tortured and brutally oppressed, and the county's judiciary was a willing, complacent partner

in all of this. Many of the judges from the apartheid era still hold positions of seniority in the country's judicial system and it is interesting to see how they interpret the question of dissent against the current government's unpopular policies.

Steve Biko's death in detention in 1977 gave rise to the Rabie Commission of Inquiry, which was meant to salvage the government's reputation internationally. The government wanted to be seen to be doing something about the political and human rights situation in the country. But the net outcome of this commission was to streamline the system more thoroughly and, in the following years, new laws were passed, such as the Internal Security Act in 1982 which prohibited demonstrations at or near court buildings and Parliament. PW Botha's government increasingly adopted a series of wide-ranging measures to deal with the rising political unrest in the country, including the active promotion of the homelands policy, repressing dissent, and destabilising neighbouring states.

In 1983, the United Democratic Front was formed and, together with the trade union movement, launched a massive civil and political campaign against the apartheid government. The state in return reacted by passing yet more repressive legislation, such as the Public Safety Act. It was also during this period that the judiciary excelled in its over-zealousness to please the executive and defend the existing social, political and economic relations.

There was a change, though, after FW de Klerk became president in 1989. In 1990, he lifted the ban on liberation movements and released most of the political prisoners, including Nelson Mandela. In 1992, the Goldstone Commission of Inquiry was formed, consisting of a multinational panel of experts to devise a new legal regime in relation to public protest and assembly. Its mandate essentially was to devise mechanisms for handling problematic issues inherent in the transition from authoritarianism to liberal democracy. It could be argued that this period, in a way, marks the coming of age of South Africa in political terms. Freedom of assembly and protest were now seen as important components of a new constitutional dispensation, and there began to emerge debates about the need to balance conflicting interests, such as public order and the individual rights of assembly and protest.

The Goldstone Commission identified ingredients that would be necessary to allow the rights of freedom of expression, assembly and demonstration to be effectively exercised. Firstly, it recognised that transparency and effective communication from all parties was important. It also identified a number of key role players, including the organisers of the protest, the police and the local authorities. Ongoing negotiations between the three parties in respect of protest were seen as important. In addition, the commission also felt that it would be essential for the police and local authority to know all relevant details relating to a planned march, such as the size of the demonstration, the nature of the protest and the route that would be followed.

The panel of experts explained that the role of the authorities in a democratic society is to protect rights rather than to suppress them. This means they have to ensure that protest and demonstration can take place in such a way that the

rights of other citizens are taken into account. Obviously, it requires skilful negotiation and a willingness to compromise, bearing in mind that fundamental rights and privileges are involved. In essence, an authentic democracy must not only permit but also facilitate the airing of grievances on issues of fundamental public interest.

Interestingly, the experts said that this did not mean, therefore, that a permissive approach to demonstrations was open season for radical groups, extremists or others to do as they pleased. Liberty, they observed, is not licence and democracy does not mean mob rule. Their views gave rise to the Regulation of Gatherings Act (Act 205), and some of its aspects are briefly examined below.

The Regulation of Gatherings Act: a synopsis

This Act was used extensively during the WSSD and it may be argued that indeed some of its provisions are unconstitutional. However, at the time it was enacted in 1996, it represented an important departure from the past. It was a product of compromise between the old order and the new dispensation and, therefore, some of its clauses have obviously become problematic. An example of this is the requirement that convenors must notify the authorities at least seven days in advance of their intention to hold a gathering. This is unreasonable because in some instances an event may occur for which individuals need to march or protest about and urgent decision-making is required.

The seven-day notice period may probably be contrary to the letter and spirit of Sections 16 (freedom of expression) and 17 (freedom of assembly and demonstration) of the Constitution, because it could dissuade people from expressing political dissent to an unpopular policy or conduct of government . Of course, if one is willing to accept more stringent conditions in the exercise of this right, then permission can be given in as little as 48 hours. The mere failure to comply with the requirement to seek “permission” for a gathering can result in the local authorities having unfettered power to impose unreasonable conditions or blanket prohibitions. Certainly, this is not in line with the ethos of the Constitution.

One interesting aspect of the Act is that whereas there is a seven-day notification requirement, there is also provision for a notice to be given within 48 hours. What should be borne in mind here is that the 48-hour period also has the potential to enable the state to impose all sorts of restrictive conditions which, if not accepted or complied with, can lead to a planned demonstration being prohibited. Furthermore, if one considers the way in which protests normally take place, it becomes evident that there is always a degree of urgency for matters which are spontaneous and for which it is impossible to give the required notice.

What the Act should have provided is a quick reaction process, perhaps along the lines of a 24- to 48-hour period, without necessarily creating the opportunity for the state to impose restrictive conditions. The overall aim would be to assure the authorities that these protests can take place peacefully.

Whatever the merits to the contrary, seven days is far too long and it may be possible to bring a successful challenge at the Constitutional Court on the grounds that it is an unreasonable infraction of the rights of freedom of expression and assembly. Though it is crucial to strike a balance between the enjoyment of these rights and the demands of maintaining law and order, such demands must not amount to a whittling away of the core content of the fundamental rights. Of course, sufficient notice must be given to the police to enable them to prepare for a gathering, but there is no reason why this cannot be done within a range of between 24 and 48 hours.

Chapter four of the Act imposes civil liability for riot damage, jointly and severally, on each member of a protest or demonstration. This has a chilling effect when one considers that the right to protest sometimes results in unforeseen consequences. The most direct result of this provision is that it could clearly limit the willingness of people to participate in protests. If a person knows that there may be a confrontation, or that things may get out of hand, and that he/she is going to be slapped with a fine, then they are not going to be eager to join a demonstration or protest march. Because of the potential implication of this provision, it may be possible to institute a case in the Constitutional Court to determine whether it does in fact abridge the spirit and letter of the Constitution.

Something that should not be taken for granted is that in a country like South Africa where inequality is such a glaring phenomenon, many people who march have nothing to lose and often the result is that when things go wrong, they trash property and loot whatever is within reach. Some of it is simply mindless violence and should not be condoned, and that does impose a greater responsibility on civil society organisations that plan these protests to ensure that people behave responsibly. Demonstrators must conduct themselves within the parameters of the law and they must also respect the right of others to not protest.

Alternative ways could be found for dealing with the problem of riot damage. For instance, the possibility should be considered of making an organisation that holds a march responsible for the damage that occurs. There must be, however, some kind of scrutiny, because often events that happen do not occur just because protesters are not peaceful. Sometimes this happens because they are provoked, or the way police handle a particular situation results in chaos and anarchy. These are the things that have to be scrutinised when the question of balancing rights comes to the fore.

There are no easy answers to the question of civil liability for riot damage, but it is quite interesting that when this discussion took place under the auspices of the Commonwealth, there emerged a similar pattern in the way in which governments consider protests and demonstrations. In most instances, the authorities believe that protesters are engaged in unlawful activity, which includes criminal damage, violence, not staying on prescribed routes and attempting to enter restricted areas. They also believe that police are entitled to use force to maintain public order, in self-defence and to take pre-emptive action to prevent violence and damage to property.

This is a very common view and it was not surprising during the WSSD to hear some state functionaries argue that the protesters were trying to prevent government officials and political leaders from exercising their rights to freedom of assembly and expression. Furthermore, the traditional state argument that protesters were out to damage the country's standing internationally was an oft-cited refrain. It may look surprising, but these sorts of arguments are used quite frequently, especially when a country finds itself in the glare of the international community.

In all fairness, it can be accepted that the Act, at the time it was passed, did attempt to balance all the conflicting interests. However, it has become obvious over time that it was the authoritarian view which won the day. The Act seems to favour authority rather than facilitate and guarantee freedom of expression. Whereas the rule of law must be respected, it is important, at the same time, for the public to have the right to express its opposition and opinions on matters relating to social and economic injustices. This facility is of fundamental importance, more so in a country such as South Africa, which is characterised by massive poverty, on the one hand, and great wealth, on the other. Arguably, assemblies, protests and gatherings may be the only means that some groupings have to bring their grievances to the attention of the public.

To return briefly to Section 17 of the Constitution, it provides that "everyone has the right, peacefully and unarmed, to assemble, picket and to present petitions". The phrase "peaceful and unarmed" is explicit, which means that it excludes the carrying of all kinds of weapons, including those characterised as "traditional". But in a shameful application of double standards, president De Klerk allowed the carrying of these "traditional weapons" by members and supporters of the Inkatha Freedom Party (IFP) and this led to tragic circumstances when the IFP marched on the ANC's headquarters at Shell House in Johannesburg in March 1994. Nevertheless, one must exercise caution when defining the term "peaceful", because the state may want to interpret this in a severe, restrictive and executive-minded fashion.

There are many other issues that need to be looked at, such as the question of violent protests and whether the conduct of the petitioner falls within the ambit of activity protected by freedom of assembly. There is also the question of the limitations clause in the Constitution (Section 36) - largely based on the Canadian model, and its implications for the right to assemble and demonstrate. This leads to the question of the WSSD and the way in which the state handled gatherings and demonstrations.

Dissent and the WSSD

During the summit, a collection of national groups tried to raise awareness about socio-economic rights and the current economic system, which they perceive to be unjust and inappropriate for South Africa. There were also individuals who came to join in solidarity protests on the issue of globalisation, the problem of privatisation and the land question, among others. It was obvious that most of the protesters were peaceful and their actions were not

intended to result in arrest, but police actions, on the contrary, were punitive and violent. Police were often heavily armed and because of their protective clothing and armoured vehicles, it cannot be said that they were acting in self-defence. Far from it!

What is well-known now is that many of these groups found it very difficult to get permission to march in the first place. Before the summit began, members of the Soldiers Forum, an affiliate of the Anti-Privatisation Forum (APF) were arrested and thrown into jail for no credible reason. Then Ann Eveleth (one of the contributors to this book) of the National Land Committee was detained and almost deported. Her case had to be taken to the Supreme Court, where the Department of Home Affairs and the police were strongly criticised by the judges for acting in an unlawful and un-procedural manner. There were also the various protests of the Landless People's Movement (LPM) and the Anti-Globalisation Forum that were broken by police through the use of force. Similarly, many organisations, especially social movements, were particularly hard hit and received very little opportunity to put across their views in the mainstream media.

One would have thought that South Africa had gone to war during the summit. Police did not always have any means of recognition in order to ensure that they could be identified if they acted unlawfully. Many senior police officers from the apartheid force were recalled and put in charge of security operations during the summit. It is regrettable, but the police force, like the judiciary and other institutions of state in South Africa, are yet to be transformed. Unfortunately, part of the political settlement was that apartheid bureaucrats would keep their jobs, and that is the reason why there has been no purge of those security officers who tortured political activists at the behest of the government. Many of these people really have no respect for the new culture of human rights and, during the summit, they suddenly found themselves with an opportunity to reimpose their will and power.

It was astonishing, for instance, to watch television footage of the march from Alexandra to Sandton on August 30 2002, where the state deployed perhaps the largest contingent of police and troops in South Africa since the 1994 democratic elections. It was almost unbelievable to watch the heavily armed police and soldiers lining every inch of the route with guns pointed at the marchers.

To say the least, it is incredible that in a country where people fought so zealously for the right to express their views and opinions, individuals were suddenly being put at the mercy of the authorities regarding the way in which they could exercise this right. The Foundation for Human Rights in South Africa was forced to set up a number of different legal teams to assist not only these groupings to negotiate with the authorities, but also to hold discussions with the police and local authorities around the issue of permission to march and demonstrate. These teams were on standby throughout the summit to ensure that if individuals were arrested or roughed up in any way they would be assisted to get some form of recourse. Such experiences signify that the road ahead is going to be a fairly difficult one.

Technically, there was permission to apply for a march but the process was made so difficult and so tortuous that it was only at the end, when it was clear that protesters would march with or without permission, that the state finally caved in. Many of the protests held during the summit went off peacefully and it is difficult to understand, for example, why police violently broke up the peaceful march outside the University of the Witswatersrand on the evening of August 24 2002. By all accounts there was no anarchy or threat of danger to people or property. There was not even the slightest degree of inconvenience to vehicular or pedestrian traffic. The violent and brutal reaction by the police on this occasion was an unseemly and ill-advised move that should never have happened.

Earlier in the year, however, there was at least one march that took place through the Johannesburg city centre and demonstrators looted goods belonging to hawkers. One wonders why innocent people, such as hawkers and others trying to make a living of the streets, should have their things taken or why property should be trashed. These issues have to be dealt with through a process of active engagement because, in the drive to make the state accountable, individuals too have to be held responsible for their actions.

In the Commonwealth meeting discussed above there was a general concern that, all over the world, governments are using the excuse of terrorism to enact repressive laws and to stifle basic human rights. This means that civil society must vigorously revisit the question of dissent, its voice needs to be heard much more loudly, and it must hold more discussions around this problem. Apart from the issue of restrictive laws, another major concern is that of self-censorship. Increasingly, dissenting voices in the public domain are dying out, not because the state is curtailing what individuals say, but because people themselves are self-consciously limiting their own right of expressing dissent. When considered carefully, self-censorship is an even more dangerous phenomenon than the actual state repression of the right to dissent.

Enhancing dissent: the role of civil society

There are a number of principles that need to be considered when attempting to implant the right to dissent on firm ground. To begin with, the Constitution provides many safeguards, which, one may submit, have not been tested sufficiently. Actually, the Act itself can be used within the framework of the Constitution so as to begin to determine what the ambit and content of this right is. In other words, the state must be challenged to interpret the legal framework in consonance with the spirit and ethos of the Constitution.

Then, obviously, there are those constraints that local authorities put on demonstrations. Ordinarily, these must be in conformity with the Constitution as well as the limitations normally set out in the Bill of Rights and international instruments. The question of appeal is also important and where a march is prohibited or unreasonable conditions are imposed, there must be a speedy and effective mechanism provided to petition against such decisions.

A lot of work, however, needs to be done in respect of provincial and local authorities, especially on the question of notification, and the way in which they

understand the right to dissent in practice. Civil society has to thoroughly analyse the manner in which police handle gatherings and demonstrations. Ultimately, civil society must accept that police have the authority for monitoring marches and what is needed, therefore, is a process of opening the path between them and civil society structures.

In this way, an understanding can be built around what role the police play or ought to play during gatherings and demonstrations, as well as the question of what is the appropriate degree of force that can be used to break up demonstrations that turn violent. At the same time, civil society needs to learn the methods of dealing with crowd control including how to hold peaceful protests. Also, strategies have to be devised on how these issues can be filtered down to the people at the grassroots level.

But there is a new dilemma, which, if not addressed soberly, may have grave implications on the right to dissent. This is the issue of the activities and threats posed by some extremist right-wing groups in South Africa, such as the shadowy Boeremag, in their bid to overthrow the government. A lot of caution is needed while responding to this problem because such phenomena can be used as an excuse by the state to enact even more restrictive laws and clamp down on the right to engage in freedom of expression, freedom of assembly and freedom of protest.

Using the Constitution as a sword

One of the things that should never be underestimated is the power the Constitution provides the ordinary man and woman in South Africa. It is a tool that can be used to push the frontiers of state restriction on the right to dissent, but it is only very recently that social movements and lobby groups, such as the Treatment Action Campaign, have used it with effective results. Since its inception, powerful lobbies and groups in the country have often used it to advance their specific interests, protect their benefits and maintain the status quo. Unfortunately, this has created the wrong impression that the Constitution is about the wealthy and the rich, when, in actual fact, the poor can use it successfully as a tool to acquire rights and create access to resources.

There are laws and international covenants that constrain governments, and there are laws and regulations that constrain ordinary people. But the reality of the matter is that private institutions and multinationals are not subject to the same set of limitations as ordinary citizens. However, there is an increasing rise of social movements which seek to build a kind of covenant and some form of international treaty which will ensure that powerful corporate bodies and multinationals are held accountable for their activities. Perhaps the best way to begin this critical journey is to enhance the process of dissent against such corporations and others with vested interests both at the local and international scene.

Conclusion

Debates and discussions on the right to dissent need to take place more frequently and have to be rooted more firmly among ordinary people in the

society. It is not the role of the state to lead such discussions. It is the responsibility of civil society to assume the mantle and actively promote the people's understanding of their right to protest or express dissent. Civil society has to create an understanding of what being responsible means, and how every time something is trashed, it is the image of the people that suffers and not that of the state when it reacts with force. Civil society also needs to address the issue of leadership and accountability and lay particular emphasis on the safety of both those who protest, as well as those who do not wish to do so.

The WSSD was not a unique occasion in the sense that its occurrence should not have armed the state with the excuse it sought to trample upon the basic rights of the people. What has become clear, however, is that there is a tendency to clamp down on the right to protest, providing the state can provide a "reasonable" justification for its actions, such as the need to provide security for visiting dignitaries. Granted, South Africa is in an era that is very different from the one when the only mode of political participation was by way of street protests. Now there is universal franchise in the country and it cannot be argued that people are living within the same paradigm as before. This means that existing instruments, such as the Constitution and the Bill of Rights, have to be put to greater use.

Lately, the country's political horizon has been reshaped by the emergence of social movements and activist-oriented non-governmental organisations. It is important for the state and its functionaries to develop a true understanding of what law is meant to do and what order is about. While acknowledging the fact that it is the responsibility of governments to promulgate laws and to maintain law and order, law should not be used to stifle opposition. Demonstrations are a good test of how the law should be interpreted.

The manner in which the state responded to individuals and organisations expressing dissent during the WSSD created a good opportunity to consider several issues ranging from what the content of the right to dissent entails, to how it can be interpreted in a more libertarian way. Based on the experiences learned from the summit, civil society organisations should give serious thought to the possibility of launching a constitutional challenge against the Regulation of Gatherings Act because it certainly infringes on the right to dissent. In certain respects, it even negates a number of key international and regional human rights standards on the right of every person to express dissent freely without undue hindrance by the state.

The political economy of state repression in South Africa

Salim Vally

For many foreign environmental justice activists at the World Summit on Sustainable Development (WSSD) the aura surrounding the post-apartheid state was sullied by both the connivance of South Africa's ruling class with big business and the extent of the police brutality aimed at those expressing dissent. Among the more enlightened foreign activists any residual sentimental attachment to the party in office in South Africa was rudely erased by evidence of increasing poverty, inequality, environmental degradation and repression. The trumpeting of enshrined civil, political and socio-economic rights in the "most progressive Constitution in the world" sounded decidedly off-key.

For the ruling class, the WSSD (dubbed by many as the World Summit of Shady Deals) was, in practice, less about the benevolent goals of environmental justice and sustainable development (although pronounced in the rhetoric of South Africa's politicians and on the expensive billboards dotting Johannesburg). Instead, it was more about showcasing South Africa for the benefit of the world's captains of industry, finance and their political surrogates, safely ensconced in the five-star hotels of Sandton - a window-shopping opportunity for international capitalists.

The abiding interest of the South African ruling class during the WSSD was to reassure and pamper the bringers of direct foreign investment (despite the futility of this policy since 1994).[1] Reassurance that the party would not be spoilt came from the president, cabinet ministers and high-ranking policemen. Senior apartheid-era security policemen were put in charge. Dire threats were issued against protesters, a cordon sanitaire was thrown around Sandton and an undeclared state of emergency was imposed. The mainstream media played its role well. Scaremongering was ratcheted up.

Some of the gullible and nervous Sandton residents who evacuated their homes for the duration of the conference should be forgiven if they thought that a grand alliance of Zimbabwean war-veterans, Al-Qaeda terrorists and black-clad, Molotov-wielding misfits were about to invade the sedate and opulent streets of their neighbourhood. Senior security officials unveiled high-tech surveillance equipment and, behind the scenes, National Intelligence Agency (NIA) operatives cajoled and intimidated those planning protests.

Major marches organised by social movements were initially prohibited and

then allowed at the last minute. It was obvious to the powers-that-be that protesters from South Africa's dusty townships, sprawling informal settlements and impoverished rural areas were determined to exercise their hard-won democratic rights whether they received "consent" or not.

Clearly, the government was keen to hide the extent of discontent among increasing numbers of poor people from the international guests and launched a campaign of intimidation against activists and social movements which is discussed elsewhere in this book.

For South Africa's activists, unlike the bewildered foreign delegates, this came as no surprise. Despite the political changes, state repression has continued unabated in South Africa. It has ranged from the use of soldiers against the truck drivers who blockaded the Mooi River Toll Plaza in 1994, the harassment of landless organisations, anti-eviction and anti-privatisation groups around the country and the hounding of undocumented migrants and refugees, to the restrictions placed on solidarity activists and striking workers.

The aim of this paper, however, is not to describe this litany of repressive acts by the police and private security companies at the behest of state structures.[2] It is aimed at uncovering the real nature of the post-apartheid state, why and when repression will be used, how it articulates with globalisation and the response of South Africa's activists in the new social movements.

The Post-Apartheid State

In his recent book, An Ordinary Country, Neville Alexander makes the salient point that:

> *...What we used to call the apartheid-capitalist system has simply given way to the post-apartheid-capitalist system. The jargon of those who make the decisions has changed (everyone has become "non-racial" and anti-racist), a few thousand black middle-class people have boarded the gravy train and are being wooed into the ranks of the established (white) elite, but the nature of the state has remained fundamentally unchanged.*[3]

While Alexander concedes that there are important discontinuities between the apartheid and post-apartheid state, what continues are the dominant interests that determine the strategic thrust of the South African state. Ownership and control of the commanding heights of the economy, the repressive apparatus of the state, despite the integration of former guerrillas by the army and the police, the judiciary, the top echelons of the civil service, of tertiary education and strategic research and development, have remained substantially in the same hands as during the heyday of apartheid.[4]

Imperialism's gamble in the late 1980s and early 1990s, that the African National Congress (ANC) would be the "valid interlocutor" and be able to control the mass movement (at least for the foreseeable future) has paid dividends. Over the past eight years the ANC has shown itself to be adept at managing and dissipating discontent and serving the interests of the local and

international capitalist class. A point well understood by the New National Party (NNP) leader, Marthinus van Schalkwyk, arguably the most class-conscious Member of Parliament. In forming an alliance "of the centre" with the ANC, Van Schalkwyk has castigated the Democratic Party (DP) for not understanding who the real opposition will be in time to come. For the NNP leader, it is clearly "those to the left of the ANC alliance".
President Thabo Mbeki's administration also fully understands the global conditions parodied by Castells:

> *...Nation-states must ally themselves closely with global economic interests and abide by global rules favourable to capital flows, while their societies are being asked to wait patiently for the trickle-down benefits of corporate ingenuity. Also, to be a good citizen of a multilateral world order, nation states have to co-operate with each other, accept the pecking order of geopolitics and contribute dutifully to subdue renegade nations and agents of potential disorder..."*[5]

The South African state is striving to gain a place for the ruling class in this "global pecking order" by leading regional and sub-regional cartels (the African Union and the Southern African Development Community), employing the justifying rhetoric of "African renaissance" and "black empowerment" (the latter conveniently displacing the tranquilising discourse of the "Rainbow Nation"), promoting the neoliberal framework of the New Partnership for Africa's Development (Nepad), the building of its military might and the shoring-up of its repressive apparatus.
No doubt, there are many state bureaucrats who genuinely feel they can make a difference to poverty, unemployment, inadequate education, health services and the welfare system. Culpability for this state of affairs, they insist, lies with the "legacy of apartheid" and not the political and economic choices made by the "new" state. They argue that they are able to negotiate the best possible terms in an unequal global economic system.
As Miliband has argued, though, leaving aside the obviously corrupt and mendacious individuals found in most capitalist societies:

> *The trouble does not lie in the wishes and intentions of power holders, but in the fact that the reformers are the prisoners, and usually the willing prisoners, of an economic and social framework which necessarily turns their proclamations, however sincerely meant, into verbiage.*[6]

Despite their often-honourable intentions, these are most likely to be irreconcilable with the exigencies and capacities of the budgetary, financial and labour-market policy of the capitalist economy. This is a fundamental issue conveniently ignored by those who criticise what they consider to be crude "monolithic" conceptions of the state. Also, lending one's technical skills to one or other bureaucratic organ of the state is not just that, but requires (wittingly

or unwittingly) a contribution to the supervision and control of class resistance.
The neoliberal features of South Africa's macro-economic strategy and the elitist nature of the many black empowerment ventures express the real interests of the dominant political elite. The post-apartheid state is primarily the guardian and protector of these dominant economic interests and the guarantor of capitalist property relations.
The erstwhile "left" comrades who have illusions in the post-apartheid state and liberals view the state as an agent of a democratic social order with no inherent bias towards any class or group. For them, any lapse from "impartiality" is occasional and accidental to the state's "real" nature. They fail to understand the elementary truism that the state in a capitalist society is not neutral in relation to different classes. This misconception is the fount from which all sorts of reformist illusions arise.

Human rights and capitalism

For the moment, it is true that with some notable exceptions, the post-apartheid state has remained compatible with a range of civil and political liberties. Still, these rights and constitutional guarantees are tenuous and are sometimes subjected to severe limitations and constraints. Most importantly, civil and political rights are severely circumscribed by the socio-economic and political framework within which they exist.[7]
Secondly, they are often infringed in practice (try and obtain "consent" for a march without any hassle!) Finally, in times of crisis, constitutional guarantees in liberal democratic states have not prevented oppression of particular groups and that for all "their democratic and liberal rhetoric, these regimes have shown themselves capable of massive crimes in the protection of sordid interests".[8] Yet, it is perilous and wrong to believe that "bourgeois freedoms" are of no consequence. A socialist critique of these freedoms should be that they are profoundly inadequate, and need to be extended, enriched and expanded by the radical transformation of the context, economic, social and political, which condemns them to inadequacy and erosion.
The irony is that increasingly it is the left that is fighting to defend from being whittled away the very democratic rights that were promoted prior to 1994. Human rights under capitalism can be transient, often they are undermined when they are inconvenient or when the ideological state apparatus is no longer adequate to guarantee subservience to class rule. Mandel captures this well:

> *The security of bourgeois political rule requires an acceptance of economic compulsion on the part of the great majority of the population who are not capitalist. This might be possible under normal circumstances. But from time to time sections of the masses rebel against the conditions of subordination, exploitation, and oppression in which they are locked.*

In order to reduce the risks or to see it through explosive moments, the bourgeoisie needs both an apparatus of repression - "la violence sans phrases" - and an apparatus of ideological indoctrination of the exploited and oppressed, above all of the wage earning proletariat. The bourgeois state thus plays a vital role for the reproduction of capitalist relations of production, without which capital accumulation cannot take place.[9]

The velvet glove slips, the iron fist is revealed

Promises made by the ANC in 1994 for a "better life for all" and renewed in 1999 have not been kept. The chronic privation of millions and the continuing rise in unemployment signals the abject inability of the state to match performance with promise. Various social reforms and "poverty alleviation" measures (such as "free" electricity and water for some, cramped and tiny houses which progressively crumble, vitamin-enriched food) are too trivial or ineffective. In the face of mass pauperisation, the spending of R70 billion on armaments and R600 million on a presidential jet exposes the reforms as hypocritical.

A political system which increasingly shows itself to be a lame version of a truly democratic order through revelations of corruption, opportunism and the ease with which rich individuals and business buy political favour does not endear itself to the populace. In these conditions, the post-apartheid state leans more heavily towards coercion and police power. When the consent to be ruled is questioned and reforms do not lift the pressure on the state, then "the state must arm itself with more extensive and more efficient means of repression. It continuously seeks to define more stringently the areas of 'legitimate' dissent and opposition and strike fear in those who seek to go beyond it."[10] Along this slippery road lies the transition from "bourgeois democracy" to authoritarianism, more likely than the gradual parliamentary road to socialism, South African Communist Party (SACP) ideologues are wont to make us believe.

Globalisation, repression and the 'war on terror'

In addition to the apartheid-era laws, such as the Regulation of Gatherings Act, a smorgasbord of Bills which give the security and intelligence agencies additional powers have been processed or are in an advanced stage of discussion. These include the Interception and Monitoring Bill, Intelligence Services Bill, the Electronic Communications Security (Pty) Ltd Bill, National Strategic Intelligence Amendment Bill and the Anti-Terrorism Bill.[11]

Under the propitious conditions created by United States President George Bush's "war on terror" and South Africa's own small bands of violent right-wingers, laws will be passed and measures instituted giving the repressive state organs many arbitrary and sweeping powers. Since the bombing of the World Trade Centre, countries around the world, taking their cue from the Bush administration, have cynically used the events of September 11 2001 (9/11) as a pretext to intensify repression against social movements. They have also increased punitive measures against refugees, asylum seekers and foreigners

generally.
This repressive foray entails greater and closer co-operation between different countries' intelligence and security agencies. The recent arrests of Professor Jaime Yovanovic, a Chilean anti-fascist, Ann Eveleth, a Landless People's Movement activist, and Dr John Pape from the International Labour, Research and Information Group is testimony to the South African repressive apparatus' willingness to co-operate. As Police Commissioner Jackie Selebi continuously reminds us, and with great relish too, South Africa now occupies the vice-presidency of Interpol.
It must be borne in mind that even before the 9/11 events US imperialism was on the lookout to aggressively promote its neoliberal economic agenda throughout the world, while stifling domestic unrest. In a short space of time, Bush's war on terror has conveniently shifted from action against the alleged perpetrators of the Twin Towers bombing into a war against any state, people or political movement that the US considers too independent or too defiant. From Bush's perspective, anything seen as a hurdle to the goal of US hegemony or a threat to the profits of multinational companies is quickly thrown under the canvas of the war against terror.
In a prescient article written before 9/11, Palestinian intellectual Edward Said argued:

> *Orthodox catchphrases of globalisation such as "free trade" and "privatisation" are repeated like a mantra not as they seem to be - instigations for debate - but quite the opposite, to stifle, pre-empt and crush dissent.*[12]

The issue of dissent is inextricably linked to the imperialist agenda of economic neoliberalism. To impose such a programme on the world requires co-operation between nation-states to promote large-scale repression.

Stalinist history
An accelerating and comfortable ingredient in this slide to authoritarianism is the historical lack of genuine internal democracy and a particular political culture within the Congress Alliance. The now discontinued journal Searchlight South Africa has narrated some aspects of the internal regime in the ANC camps from 1968 in Tanzania to the mid-1980s in Angola. It is a tale of ruthless punishment of dissenters, paranoia, brutal crassness, ethnic favouritism, sexual harassment and a Gulag-like existence for those who dared criticise those in authority.
According to Searchlight:

> *ANC administrative bodies ruled over its elected bodies, the security department ruled over the administrative organs, and KGB-trained officials - no doubt members of the SACP - ruled over the security apparatus. Over its own members, the ANC security apparatus ruled with all the arrogance of a totalitarian power.*[13]

For those who were in non-Congress left organisations in the1980s, a direct line of connection existed between the ANC's "reign of terror" in its prisons and the killings (often through the horrendous "necklace" method) of some activists in the period 1984-1990. This was also the period where many left unionists were purged from the Congress of South African Trade Unions (Cosatu) affiliates. Many of those accused for the excesses in the camps in exile, implicated in the harassment of left individuals in South Africa and responsible for the purging of left unionists, took up positions of authority in the post-1994 state apparatus.

The recent rabid threats against "ultra-leftists" and the craven mea culpa of SACP Deputy Secretary General Jeremy Cronin and other ritual recanters, indicates that the arrogance of totalitarian power is alive and well in the alliance. This is best demonstrated by the frantic attempts at covering-up the corruption involved in the arms deal in late 2000 and the sidelining of Andrew Feinstein (then head of the Parliamentary Select Committee on Public Accounts). In like manner, the bizarre incident in mid-2001 where three leading ANC members were accused by the then minister of safety and security of "plotting" to harm the president says much about the level of democracy within the ANC and the fragility of South Africa's state institutions.

Criminal justice and capitalism

Besides repression against political activists, the South African police have embraced the aggressive policing methods of the Bratton strategy (named after a New York police commissioner) based on the "broken windows" theory of conservative criminologists. The theory assumes that if you take care of minor offences, such as public drinking, littering and loitering, a sense of orderly regulation is created thus preventing more serious crime. Police officers are rewarded on the basis of arrests they make regardless of the nature of the "crime".

A number of senior police officers, including businessman Meyer Kahn, have visited the US to examine their "successes". In the US, as in South Africa, those who suffer the most as a result of the police's zeal are the homeless, the unemployed and foreigners. Often, the practice of "zero-tolerance" gives pseudo-scientific legitimacy to petty, xenophobic and racist police behaviour.

More starkly, the hundreds of deaths of prisoners every year in South Africa's overcrowded prisons and the massive electricity cut-offs in townships around the country should be seen as part of the repression against the poor and the vulnerable. The death of 43 000 children each year from diarrhoea, the refusal to provide the lifeline of anti-retroviral drugs to millions and the brutality against "illegal foreigners" in the privately owned (largely by prominent ANC women) Lindela prison, lays bare the government's empty rhetoric of concern for the vulnerable.

For Christian Parenti, capitalism was born of state violence and repression will always be part of its genetic code. For Parenti, the criminal justice system plays an important role for capitalism.

Too much social democracy and people stop being grateful for poorly paid, dangerous work. So too with the converse, the link between state repression, labour markets and profits is indirect but not complicated. Repression manages poverty. Poverty depresses wages. Low wages increases the role of exploitation and that creates surplus value.[14]

Niyabasaba na?!* The road ahead

In the many nascent left social movements being formed around the country and the inspirational and creative practices of some civic, environmental, student and youth movements, a growing group of rank-and-file unionists and solidarity groups, such as the Palestinian Solidarity Committee and others, a new left ethic is taking root. While still tentative, it is founded on co-ordinating activities and supporting each other in the face of state repression.

These organisations of the urban and rural poor contain many who have memories of past struggles, an understanding of the international situation and strong links with left movements elsewhere. Socialists and other anti-capitalists in these organisations are rapidly shaking off the blight of a debilitating sectarianism that characterised the left previously. While debate and polemics continue, often in a harsh way, there is a realisation that the modes of behaviour in their structures must instil attitudes that prefigure the society we aspire to. Miliband's plea is valid more than ever: "If socialist democracy is its aspiration for tomorrow, so must internal democracy be its rule today."[15]

The support provided by a range of progressive non-governmental organisations and individuals who possess technical skills must be encouraged as long as it does not jeopardise the class autonomy and independence of the social movements. Already, groups like the Indymedia Centre, Khanya College, the Freedom of Expression Institute, a few community radio stations and various educational centres have forged links with the new social movements. It is important, though, not to gloss over the weaknesses, contradictions and vulnerabilities obtaining within such a relationship.

The lack of a dedicated focus on gender issues, on the HIV/Aids pandemic, the difficulties of winning over many more organised workers, relations with refugee communities, issues of xenophobia and the very important but mundane issues of financial resources and national co-ordination remain unresolved. Many activists have realised this and the Education and Research Committee of the Anti-Privatisation Forum (APF), in Johannesburg at least, has feverishly arranged many well-attended forums in the past few months.

In these forums, issues and areas under on-going discussion range from struggles around water and electricity, education rights, the US and UK invasion of Iraq and the Palestinian struggle, to tactics around the 2004 elections and the building of a movement toward a mass workers' party.

Given the ferocity of police harassment, timely legal defence of various sorts is sadly lacking. Activists need to know their rights and, if need be, institute civil and criminal action against offending parties. A constitutional challenge to laws that hamper freedom of assembly and expression is necessary. It is crucial also to challenge vindictive actions such as those which keep activists in jail for

weeks on end ostensibly to verify their addresses!
The welfare of jailed activists and their families are also areas of concern. Also, the state's spokespersons and its sympathetic media are increasingly and routinely trying to portray members and particularly leaders of social movements as "maladjusted" and marginal people with a natural proclivity for maverick or criminal behaviour. Thus, abuses of the civil rights of the targeted individuals are justified and solidarity work hampered.
Social organisations must devise various ways of defending themselves - whether this defence requires using the law courts or preventative measures against physical attacks. The latter, of course, should not promote a militaristic culture as it did in some townships during the mid-1980s. Political understanding and consciousness must always be at the forefront. While it is important to take state repression, surveillance and the role of agent provocateurs seriously, it is equally important not to scare people away and make the rank and file of social movements paranoid. An atmosphere can be created that sows divisions and discourages activism. There is a clear need, though, to rely on sensible and reliable information about safety and security for activists, without diverting from the laid out goals.
The only bulwark against a shift to authoritarianism is the countervailing power of left-wing social movements. A task made more imperative because of the taming of the trade union bureaucracy and the co-option of social-democratic leaders into the administration of the state. Large numbers of the population, disillusioned by unfulfilled promises, are increasingly vulnerable to the blandishments offered by all sorts of charlatans. Alexander's warning of the ethnic danger in this regard makes sense. He describes it as:

> *An opening for would-be popular saviours whose extreme conservatism is carefully concealed beneath a demagogic rhetoric of national renewal and social redemption, garnished, wherever suitable, with an appeal to racial and any other kind of profitable prejudice.*[16]

Only when left movements become a hegemonic force in the words of Gramsci, only when they become a vast popular movement can they prevent a slide into authoritarianism. In the meantime, a compelling response to state repression requires increasing the numbers and the influence of social movements so that repression and intimidation will not reduce their size and capacity, but enlarge both. Michael Albert ponders on the violent Italian police action against protesters in Genoa in 2001 and argues:

> *...What choices ... will best restrain the military capacities of the state by creating conditions under which should they unleash their violence it will cost them more in lost public support than it costs us in harshly broken bodies?... We need to make known the state's violence against our dissent, of course. But we need to retain out priority focus on globalisation and capitalism, and on the vastly more widespread and deeper violence of these ubiquitous systems. We have to achieve*

growing popular support, growing movement commitment and insight, growing awareness of what we are doing and why we are doing it, and we have to simultaneously restrain the state's preferred repressive options. Our movement must be busy being born, not dying.[17]

Notes

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* Meaning, "Are You Afraid". The first line of a militant chant that was popular in the struggle against apartheid now resuscitated in the face of state repression.

References

[1] See Bond, P (2001), Against Global Apartheid: South Africa Meets the World Bank, IMF and International Finance, University of Cape Town Press, p127.
[2] The role of the red ants, white ants and now blue ants during evictions, the killing of a UDW student by a sergeant in the SAPS and the use of a private security company against students at UDW, and the role of consultants from the old apartheid security establishment need to be thoroughly researched. The latter appear to have maintained strong links with the state machinery; they also behave with arrogant impunity and seem immune from prosecution.
[3] Alexander, N (2002), An Ordinary Country: Issues in the Transition from Apartheid to Democracy in South Africa, University of Natal Press, p64.
[4] Ibid. p64.
[5] Quoted in Alexander, pp163-4.
[6] Miliband, R (1969), The State in a Capitalist Society, Quartet Books, p242.
[7] Lehulere, O (1998), Gear and Human Rights - A critical analysis of Gear from a Human Rights Perspective, Unpublished paper.
[8] Miliband,R, op.cit., p238.
[9] Mandel, E (1992), Power and Money. Verso, p153.
[10] Miliband, R op.cit. p243.
[11] The Interception and Monitoring Bill like snoop laws elsewhere attempts to give security agencies and the police the legal right to have access to all electronic and phone communications. This will allow them to intercept and access e-mails, text messages, faxes and listen in on phone conversations. Internet companies will be forced to assist - or face huge fines and even prison sentences. Police will also have the power to force the handing over of computer passwords and encryption keys. The Intelligence Services Bill prevents any former member from divulging "classified" information that may be "detrimental" to state security. The Electronic Communications Security (Pty) Ltd Bill will create a company that invents electronic communication systems for operatives and intends to secure all sensitive government communications. The Explosives Bill will allow the police to obtain fingerprints and genetic samples from any suspect without a search warrant. The Terrorism Bill, among other things, proscribes protests against

“internationally protected persons” including war criminals and warmongers, such as Ariel Sharon and George Bush.
[12] Nation 17/11/2001.
[13] Searchlight South Africa. See articles by Bandile Ketelo et al, Paul Trewhela and Olefile Samuel Mngqibisa in numbers 5, 9, 10 and 11 of the magazine. 1990-1993.
[14] Parenti, C (2001) The “New” Criminal Justice System: State Repression from 1968 to 2001, Monthly Review, July 2001.
[15] Miliband, R op.cit., p246.
[16] Ibid. p245.
[17] Albert, M (2002) After Genoa, How Do We Protest? At www.zmag.org/Znetgenoa.

Local authorities and the regulation of assemblies and demonstrations

Chris Ngcobo

According to the provisions of the Regulation of Gatherings Act (the Act), it is the local authorities, and in the case of Johannesburg City, the Johannesburg Metropolitan Police Department (JMPD), that has final legislative authority in granting permission for marches, demonstrations and gatherings within its area of jurisdiction.

This Act came into existence following the recommendations of the Goldstone Commission of Inquiry on the regulation of public gatherings. It was the purpose of the inquiry to submit recommendations intended to limit disruptions and violence during marches, demonstrations and gatherings. A wide-ranging process of consultation was done between the commission - made up of South African and international experts, and various stakeholders, such as political parties and non-governmental organisations. The final product of that consultative process was the acknowledgement that the right to assembly and demonstration is an integral part of any democratic process and should thereby be provided with the relevant regulatory framework.

In this presentation, the aim of the JMPD is to ensure that everyone understands the department's role in relation to gatherings, and to eradicate from their minds the view that it does in some ways violate the people's constitutional right to freedom of expression or the right to assemble. The paper will begin by very briefly explaining the difference between demonstrations and gatherings, some of the role players and their responsibilities, and the legal requirements that conveners of gatherings have to follow. It will then address the question of assemblies and demonstrations as they related to the World Summit on Sustainable Development (WSSD) and how, of course, the department dealt with all the applications made during the summit.

Definitions

The Regulation of Gatherings Act describes two kinds of activities, viz., demonstrations and gatherings. A demonstration is defined 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." In this instance, the participants do not march, or walk in a procession.

A gathering on the other hand is defined as: “Any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, (No. 29 of 1989), or any other public place or premises wholly or partly open to the air.” In this case, more than 15 persons participate in a procession along a public road. A public road is further defined in the Act to include a pavement or parking space.

Role players and their responsibilities

The three main role players created by and assigned particular responsibilities in the Act have already been discussed elsewhere (see chapter one). But for reference purposes, and very briefly, these individuals are the “convener”, the “responsible officer”, and the “authorised member”. Their roles are, respectively, to represent and be legally responsible for the gathering on behalf of the participants, to receive and approve applications for gatherings on behalf of the council, and to assesses the application in terms of public safety on behalf of the South African Police Service (SAPS).

What happens during gatherings?

The SAPS’s Public Order Policing (now renamed Operational Response Service) is responsible for crowd control during gatherings. Their members are trained to deal with public order policing. The Metro Police Department is responsible for the closure of public roads, direction of traffic and the regulation of both vehicular and pedestrian movement.

Experiences from the WSSD

The WSSD attracted more than 100 heads of states, many international organisations, individuals and local groups. As a United Nations (UN) summit, it became imperative that the policing agencies, the military and intelligence services plan thoroughly for the safety of all delegates and dignitaries. Security planning took the joint task team many months of intense planning and, following legal advice, conditions were imposed on the conduct of public gatherings as well as their duration.

As a result, therefore, it became necessary that appropriate control of participants during gatherings and demonstrations was ensured. The police agencies had to ensure a thorough policing of events. This is an important principle in terms of Section 5 of the Act. It must be remembered that this particular section empowers a responsible officer to either prohibit a gathering or impose conditions in situations where the police may not have the capacity to prevent injuries to persons and/or damage to property.

Furthermore, this section of the Act imposes a duty on the part of authorities to make sure that there is sufficient capacity to manage gatherings. If this capacity is lacking, then, as a first step, the responsible officer has to impose conditions on the event with the sole purpose of minimising the perceived risk. This duty was applied with regard to many organisations during the WSSD. It became necessary for the responsible officer to impose strict conditions on the route to be followed as well as the duration of the event. The latter imposition

was necessary due to the fact that tens of dozens of applications were received from diverse groups and individuals who wanted to express their views during the summit.

It was also important to ensure that everyone who desired to express his or her views during the summit would be given a chance to do so. The JMPD, in conjunction with other state security agencies, held a common approach that the WSSD was taking place in South Africa against a backdrop of certain specific threats. It is also common knowledge that a massive international event of this kind had the potential to attract acts of terror and incidents of violent protests.

In this sense, it would have been grossly irresponsible on the part of police and security agencies in the country to think that the summit was free of such dangers. One only needed to be reminded about the violent events that occurred in Seattle in 1999 and Genoa in 2001 to understand the sort of situation that confronted the country's security organs. Nevertheless, the JMPD is very proud that when compared with the situations cited above, South Africa's security agencies were able to sufficiently handle all kinds challenges and threats which came from various quarters.

During the summit, the JMPD had to deal with the challenge of an array of different organisations - which were as diverse in their ideologies as they were in their objectives - wanting to either march or protest on the same day and time, and along the same routes. In some cases, the department had to deal with the problem of handling as many as four groups marching or demonstrating on the same day.

For this purpose, therefore, both the department and the police services made a decision that all organisations, irrespective of the nature of their protest, would be allocated a maximum of two hours each to march or demonstrate. A second primary condition was that such demonstrations or marches would have to be conducted on routes determined in advance.

It must further be pointed out that because the WSSD was a UN event, in terms of international law, certain areas fell under the jurisdiction of the UN and, therefore, the South African government had no power to authorise gatherings and demonstrations there. In the department's view, the decision to allocate a maximum of two hours for each organisation to march or demonstrate along a specific route was very propitious because it enabled as many people as possible to have an opportunity to express their views.

If this had not been done, the alternative would have been to declare a blanket ban on marches and demonstrations from the vicinity of the summit, and this would have very likely resulted in confrontation between the state and individuals as well as acts of violence and lawlessness.

Conclusion

To a large extent, participants acted responsibly and within the parameters of the law. They expressed their frustrations, anger and aspirations in a way that also respected the rights of other people. It must be pointed out that the people's constitutional right to freedom of expression, assembly and

demonstration are supreme and cannot be unilaterally infringed on by the local police department or any other organ of the state. Nevertheless, the department is of the strong view that the Regulation of Gatherings Act does not violate the right of an individual to freedom of expression or assembly. It merely puts limitations on the conduct of gatherings.

The restrictions imposed by the Act are in compliance with the limitations clause as set out in Section 36 of the Constitution of the Republic South Africa. Among other things, the Act aims to ensure the safety of all people and property, and so accords the police the relevant powers to protect participants and non-participants as well. These limitations cannot be said to be inconsistent with the Constitution and, furthermore, they are also found in many other democratic systems in the world.

The Act has nothing whatsoever to do with the expression of people's convictions, ideologies or feelings. Law enforcement agencies in South Africa cannot prohibit a gathering or demonstration merely on the ground of convictions or feelings. It would be irresponsible and misleading, therefore, to suggest that the Act infringes on the right to freedom of expression.

Irrespective of the many divergent views which contested the essence of the WSSD, the JMPD has grown and become enriched by the experiences and challenges arising from the summit, and to its lasting credit, the department, in association with other relevant organs of state security, managed the situation responsibly.

Police and the regulation of gatherings and demonstrations: How should unauthorised demonstrations be managed? The WSSD as a case study

Johan Meyer

By definition, the South African Police Service (SAPS) is the organisation which must apply the Regulation of Gatherings Act and which must police gatherings within the framework and objectives stated in the Act. In doing so, it must confine itself within the parameters laid down by the Constitution, more particularly the provisions of the right to freedom of expression (Section 16) and the right to assembly, demonstration, picket and petition (Section 17).
In addition, the SAPS is well qualified to speak about the regulation and control of gatherings because it has been doing this quite successfully since the inception of the Act six years ago. It must also be noted that over the past few years, literally thousands of public gatherings and meetings, involving millions of people, have taken place. A large percentage of them have occurred under highly charged political conditions and other circumstances and challenges, therefore, have been enormous. Largely, these meetings took place without serious incidents like the loss of life or limb, or severe damage to property.
This paper will deal with the question of police regulation of gatherings and assemblies in three parts. Firstly, the paper will briefly revisit the workings of the Regulation of Gatherings Act from a police perspective. Secondly, the paper will touch on the constitutionality of the Act, in so far as it impacts on or impedes the right to freedom of expression and the right to gather. Finally, the paper will attempt to interrogate these principles in so far as they relate to the World Summit on Sustainable Development (WSSD) and unauthorised gatherings.

A police view of the Regulation of Gatherings Act
In its preamble, the Act acknowledges the right of each and every person to freedom of expression in public and to enjoy the protection of the state while exercising that right. It also provides that such expression must be peaceful and should be exercised with due regard to the rights of others. It needs to be noted that the Act therefore explicitly encourages the principle of freedom of expression and for that purpose creates a procedural and regulatory framework which must be followed where expression takes the form of a public

demonstration or gathering. These procedural prescriptions, on the whole, are mandatory. To put it differently, they must be complied with.

Broadly speaking, an ideal scenario of authorised marches should present itself as follows.

The convenor of a contemplated march gives at least seven days written notice to the responsible officer, which notice must include all relevant details of the march. The responsible officer must then, after consultation with the authorised member, decide whether to allow the gathering in the form and manner applied for, or whether a meeting must be held with the convenor. If such a meeting is called, the authorised member from the SAPS must also be brought on board.

At the meeting the contents of the notice and the manner in which the gathering will take place must be discussed. If agreement is reached, then the gathering will proceed in the agreed form. If no agreement is reached, the responsible officer may impose conditions to ensure that, for instance, traffic flow impediment is minimised as well as the prevention of injuries or damage to property. But it must also be said at this point that whenever a responsible officer imposes a condition(s), or whenever a gathering is prohibited by the responsible officer or magistrate, the convenor has a right to appeal to a magistrate, and eventually to the High Court.

At this juncture, it might be appropriate to deal with a number of circumstances under which a gathering will not be authorised in terms of the Act.

Firstly, where no notice of the gathering is given, i.e., the responsible officer did not consider it at all or where notice was given less than 48 hours before the gathering and the responsible officer for that reason prohibits the meeting in terms of Section 3(2) of the Act.

Secondly, in terms of Section 5(2) of the Act, a responsible officer may prohibit a meeting if he/she has credible information under oath that the proposed gathering will, inter alia, result in serious disruption of traffic, injury to participants or other persons, or damage to property. Such information may also allege that the SAPS and Metro Police personnel will not be able to contain the threat.

Thirdly, on request by the authorised member of the SAPS, a magistrate and a judge of the High Court can prohibit a meeting on the same grounds as mentioned in the preceding paragraph should the responsible officer fail to prohibit the meeting.

But even in respect of authorised gatherings, members of the SAPS can take steps, under certain circumstances and acting in terms of Section 9 of the Act, to ensure the movement of traffic and the protection of life and property. These steps generally pertain to crowd management and give the SAPS the power to order persons participating in a gathering or meeting to do or refrain from doing something. This can include ordering such participants to deviate from a particular route, limiting the gathering to a specific place, ordering participants not to interfere with another meeting, or dispersing them under certain specific circumstances. Non-compliance with such an order is an offence in terms of Section 12 of the Act.

Brief remarks on the constitutionality of the Act

On a thorough reading of the Act, the SAPS is of the opinion that, in as much as it creates a framework for the management and control of gatherings, its purpose is to ensure the safety of persons (whether such persons are participants or not) and to protect property. It also enables law enforcement agencies to assist with such protection. The jurisdictional facts, which in terms of the Act must be present before a gathering can be prohibited, all relate ultimately to the safety of persons and property, and not to the opinion or particular viewpoint which is, or will be, the subject matter of a march or gathering.

To emphasise the above point further, the particular opinion or conviction of the participants cannot be used as a basis to prohibit a proposed march or an on-going gathering or demonstration. For this reason, the SAPS does not think that any valid arguments can be advanced to support the contention that the Act limits the right of individuals or groups of individuals to freedom of expression or free speech. In the opinion of the SAPS, the Act is consistent with the country's Constitution and to the extent that certain limitations are placed on demonstrations and gatherings in particular circumstances, such infractions are justified in an open and democratic society.

Unauthorised gatherings and the WSSD

At the beginning of this paper, reference was made to the fact that the SAPS has a commendable record in policing gatherings - both authorised and unauthorised - since the inception of the Act. Generally, and this has been the case in almost all situations, the approach employed has been simply to apply the law with regard to such gatherings as provided in the Act and within the policies of the SAPS.

The Public Order Policing Unit (POPU) has the primary responsibility for policing gatherings and its members are specifically trained to handle public order situations. What actions will be taken will depend on the circumstances of the particular event. It also needs to be pointed out clearly that authorised gatherings are also policed by the POPU and that even such gatherings can be the subject of police actions, should a situation develop during the event that necessitates such a response.

The options available to the SAPS in the event of unauthorised gatherings include, in the first place, negotiations, deviation from the chosen route, the arrest and/or prosecution of convenors/participants and the containment of the gathering within a certain area. All these can be done either by negotiation or use of minimum force, or, as a last resort, dispersal of the gathering by force, where the principle of minimum force will always apply except in extreme circumstances where there is an immediate threat to life and limb. All of these options are not always utilised, and it certainly must not be interpreted to mean that force will always be used. In general, situations pertaining to unauthorised gatherings are usually resolved without any force being used.

An issue can be raised at this point which, though perhaps not directly connected to the debate at hand, is relevant to the question of police

involvement in gatherings. A large congregation of people has inherent dangers, and this means that it needs to be controlled and regulated properly by persons with the necessary skills and training. One need only refer to recent disasters in South Africa at sports and social events where persons were killed as a result of lack of proper crowd control. Because the necessity of proper crowd control is a universally accepted point, no further elaboration of it is necessary.

It ought to be said, however, that when, for instance, the POPU orders a gathering of persons to deviate from a specific route, or to remain where they are, such order should not necessarily be equated with an infringement of the right to freedom of expression. Instead, they ought to be seen within the purview of the fact that the members of the SAPS are acting in terms of a statute which has, as its ultimate aim, the prevention of injuries and damage to property.

Closely connected to the point of proper crowd management is the question of sufficient capacity on the side of law enforcement agencies to properly police a specific event. This principle features specifically in Section 5 of the Act and constitutes one of the main grounds upon which the responsible officer can prohibit a gathering. Of particular significance is the case where it is stated that the police may not be able to prevent injuries to persons or damage to property, and that such fact should form part of the consideration to prohibit a specific gathering. It follows that there is a duty on the authorities to ensure that, in respect of a specific event, there is sufficient capacity to manage it and if the capacity is lacking, (as a first step) to impose conditions on the gathering so as to minimise the risk.

During the WSSD this particular aspect of the Act was applied. In respect of numerous gatherings, conditions were imposed in relation to the duration of gatherings as well as routes to be followed. A major consideration for imposing these conditions was obviously the capacity of law enforcement organisations to handle the events in a responsible manner.

From a security perspective, the WSSD took place against the backdrop of certain very specific security threats, and it would have been grossly irresponsible on the part of the SAPS to have viewed it otherwise. Against this background, the authorities had to cater for a great number of gatherings and marches. On certain days of the summit, as many as six to eight groups requested authorisation to march or demonstrate on the same day and time at the WSSD.

Before the summit began a decision was taken that, at least as far as demonstrations at venues in Sandton were concerned, all marches should occur along a pre determined route in order to secure the safety of all and to lessen the burden on law enforcement agencies. Because of the number of applications, the duration of these marches was limited to two hours each. This was done simply to accommodate all applications and to ensure that as many of the demonstrations as possible took place. The option would have been either the refusal of permission for demonstrations, or to allow demonstrations which could not be properly policed with the accompanying dangers that would

have resulted.
To return to the question of unauthorised marches, it was mentioned earlier that apart from the Regulation of Gatherings Act certain policies of the SAPS also dictate the approach of members towards gatherings. There is, in particular, the Crowd Management Policy of the SAPS. Although it is not possible to deal with it in full, the following aspects of the Policy are essential:

- The situational appropriateness of intervention by the SAPS at the particular time, taking both the participants and non-participants into consideration. Situational appropriateness is the assessment by the operational commander of a public order situation and the taking of the most appropriate action at the time.
- The proportionality of the means used by the SAPS on the participants. This simply means that once force is used, it must be proportional to the situation.
- As a first step, if problems arise in respect of a gathering, continuous dialogue and communication with the protesters should be attempted.
- If negotiations fail, the next step would be to contain the situation and to protect critical points and non-participants through the implementation of defensive measures.
- Should defensive measures fail, participants will be warned that force will be used against them and thereafter preparations for the use of force can begin, once again subject to the above-mentioned principles of situational appropriateness and proportionality.

Conclusion

During the WSSD, many aspects of the Regulation of Gatherings Act as well as the Crowd Management Policy discussed above were generally applied. In the few situations where force was used it is fortunate that no life-threatening injuries or fatalities occurred.

It must also be said that in general, protesters abided by the law and, therefore, they could exercise their right to freedom of expression in a calm and orderly environment. In all cases, their rights and those of other people were respected and protected. The SAPS is generally satisfied that the WSSD and the many accompanying events gave everybody an opportunity to air their views in a situation where their physical safety and security was not compromised.

Criminalising dissent: experiences of the Landless People's Movement and the National Land Committee during the WSSD

Ann Eveleth

The experiences of social movements attempting to exercise their fundamental constitutional rights to freedom of assembly and demonstration during the World Summit on Sustainable Development (WSSD) cannot be isolated from the wider encounters of growing state repression and lawlessness which began months earlier. This trend of repression continues even today.

During apartheid, the exercise of the right to demonstrate required at least the involvement of a magistrate with some legal training. Today the exercise of this right is - in practice, although not in law - dependent upon the "permission" of a "responsible officer" appointed by the council, who is usually a junior police official. By simple logic, this means that the content of the right to freedom of assembly in democratic South Africa today is inferior to the right as it was defined during apartheid. Unfortunately, the absence of critical public debate has allowed the local councils and police to implement their inferior version of this right by force.

Experiences of state repression by the Landless People's Movement (LPM), as well as activists of the National Land Committee (NLC) supporting the LPM, began in earnest on April 26 2002 in the small rural town of Ermelo in Mpumalanga province. On this occasion, more than 100 land activists were arrested at the conclusion of a legal and peaceful march and demonstration to the provincial office of the Department of Land Affairs.

Erosion of the 'rule of law' by the state

Before returning to the issues and lessons emerging from the Ermelo incident, it is important to state that the illegal acts of state repression, intimidation and harassment of the LPM have been taking place despite the fact that the movement has never engaged in a single illegal march or demonstration.

Notwithstanding the above, land activists are deeply concerned with many aspects of the Regulation of Gatherings Act, (205 of 1993: "The Act") and strongly believe that it directly violates, in many respects, the fundamental constitutional right to freedom of assembly provided by Section 17 of the

Constitution. Nevertheless, the LPM and the NLC have always exercised this right in terms of the procedures required by the Act.

Significantly, the Act, despite its problems, clearly agrees that freedom of assembly is a fundamental right that cannot be subjected to the "permission" or other variable whim of any authority. The Act merely requires the convening organisation to "notify" the relevant local authority of its intention to march, protest or demonstrate. This notification process is an administrative requirement that should merely serve to enable these authorities to make safety provisions for participants and non-participants, and the control of traffic. This critical distinction has been routinely and increasingly ignored, both by the institutions of the state that are mandated to "respect, protect and promote" this and other fundamental rights, and by many in the media industry and even some human rights bodies. These institutions have not only failed to effectively guard and protect these basic democratic freedoms, but have also, to a large extent, actively promoted the state mythology needed to criminalise social movements attempting to exercise this right.

There are perhaps two main reasons for this disquieting state of affairs. On the one hand, the content of the right to Freedom of Assembly has not been subjected to the same degree of public debate and interrogation as other provisions of the Constitution, partly because the exercise of this right for the purpose of expressing dissent has only recently become commonplace. In the post-1994 honeymoon period, many marches and demonstrations occurred within the confines of the Tripartite Alliance, and thus did not represent a fundamental challenge to the neoliberal state.

The absence of debate about the nature and content of this right until recently has fostered a climate of public ignorance on the issue. This is evidenced by statements made even by such a legal mind as former President Nelson Mandela who, in the wake of the controversy surrounding the Congress of South African Students march in early 2002, remarked that it was unclear whether they had "obtained permission" for the march.

On the other hand, the end of the ANC government's honeymoon period has entrenched, rather than removed, the contradictions between the rich and the poor. Deepening poverty among the vast majority of the population has coincided with the rapid growth of a whole range of social movements opposed to the state's neoliberal agenda.

For the first time since 1994, the emergence of social movements such as the LPM, the Anti-Privatisation Forum (APF), the Concerned Citizens Forum, the Treatment Action Campaign and the Anti-Eviction Campaign, among others, has raised the spectre of a significant challenge to the hegemony of the ruling party's neoliberal ideology. More worrying for the ruling party is the ability of these movements to mobilise large numbers of people through joint action, as demonstrated during the World Conference Against Racism in Durban in August 2001, and again during the WSSD.

The government's fear of this challenge, crudely encapsulated in the frequent admonitions of state apologists against protesters who they claim are "hell-bent on embarrassing the government" during international conferences, has

also necessitated the cultivation of continued ignorance about freedom of assembly rights, and the de facto criminalisation of those who exercise these rights.

'Permission' to exercise a fundamental right? Ignorance on a mission

Despite the lack of public information about the actual contents of the Act, simple logic should lead public servants interfacing with the right to freedom of assembly to conclude that the exercise of a fundamental right cannot, by definition, be subjected to the "permission" of any power. If the right to life were subject to the agreement of the local police chief, people would surely be worried. Similarly, if the right to freedom of expression in the sense of media freedom to publish were subjected to the agreement of a local councillor, there would be a huge hue and cry from the South African National Editor's Forum about the country's descent into authoritarianism.

Yet, each time the LPM has faced harassment, intimidation and arrest while exercising the equally fundamental right to freedom of assembly, the public debate, the comments made by police and the question asked by the media and human rights representatives have centred on: "Did they get permission to march?"

The audacity of this assumption is clearly illustrated by the Ermelo arrests of more than 100 LPM members and two NLC activists. During this march, more than 200 LPM members held a legal and peaceful demonstration to the provincial office of the Department of Land Affairs to demand immediate responses to their long-outstanding labour tenant claims for ownership of land they occupy on the white-"owned" farms in the area.

The LPM was also demanding, among other things, that action be taken against the White farmers and army commandos who regularly abuse, threaten, intimidate and even torture the labour tenants, as well as the police, prosecutors and magistrates who protect the farmers and commandos from prosecution. The widespread collusion of the rural injustice system with the country's 60 000 white farmers is well documented, and not unusual, though it is especially pronounced in the southern highveld region of Mpumalanga.

A full seven days prior to the Ermelo march, the LPM branch in Mpumalanga sent a fax to the local council official responsible for marches and demonstrations in terms of the Act. The council never contacted the LPM, nor did the local police call the LPM to attend a meeting as stipulated by the Act. The LPM decided to proceed with the march in terms of Section 4(3) of the Act, which states that, "If a convenor ... has not, within 24 hours after giving notice ... been called to a meeting ... the gathering may take place ..."

This provision must have been designed with the Ermelo police in mind. Predictably, the police in this area - many of whom are white farmers in their own right, and were recognised as such by the labour tenants - made clear their interpretation that if they failed to contact the convenor, the march could not take place at all. In other words, the police-farmers believed that the law granted them arbitrary powers to deny "permission" to marches whose aims they did not like, simply by ignoring the notice given to them.

The Ermelo march proceeded as planned in the face of police attempts to stop the demonstration, notably including police hijacking a busload of protesters and driving it to the other side of town. After one failed attempt to disrupt the peaceful march, the heavily armed and ridiculously large police contingent descended on the marchers as they began to disperse soon after the peaceful demonstration had ended. In the process, they managed to arrest about half of the participants and held them for more than four hours before shuttling them into court, extracting personal details from the entire crowd, and then dismissing the case against all but six of the marchers. During the detention, police made it clear to the six that they intended to hold them for the entire weekend by delaying their court appearance. Only the intervention of a lawyer arranged by the NLC prevented this injustice. These six appeared two more times in the Ermelo magistrates court, where the matter was dragged out by the white deputy police station commander and the black prosecutor, over whom he hovered constantly during the proceedings. Eventually, like most charges for so-called "illegal marches and demonstrations", these charges were withdrawn.

State intelligence agencies turn up the heat

A related abuse of state power which can be directly linked to the LPM's planned protest march during the WSSD is the systematic harassment and intimidation of its entire national leadership by the National Intelligence Agency (NIA) in the months preceding the LPM's alternative "Week of the Landless".

Two successive LPM National Council meetings in the run-up to the WSSD were so inundated with complaints about NIA harassment that they were forced to make this an agenda item. Details of the harassment - which ranged from phone calls informing members that their whereabouts, which had been communicated over their cell phones, were known to the NIA, to questions, repeated visits and open infiltration of meetings - were collected. In one meeting, when an NIA agent was asked to remove himself he agreed but informed the participants that he would be waiting for them outside the venue.

A particularly alarming incident involved a phone call to a member of the LPM National Council on the night of August 20 2002. This was the day before the LPM Gauteng branch was to hold a large march to the office of Gauteng Premier Mbhazima Shilowa. The caller told the LPM council member that if he attended the LPM's Week of the Landless he would be arrested, and, further, that they "we[re] are going to arrest that Andile tomorrow". Unfortunately, the message was not taken seriously enough at the time, and NLC Land Rights Co-ordinator Andile Mngxitama was in fact arrested the following day during the march.

The ease with which the South African public, and particularly the media, has accepted the bona fides of the NIA's harassment of activists in the run-up to the WSSD is particularly disturbing. Few have questioned whether the NIA needs a "reasonable suspicion" of illegal activity to begin harassing people. Not a single commentator has questioned whether it is appropriate for the state intelligence agency to be deployed to protect the political interests of the ruling party.

Other incidents preceding the WSSD

Against the backdrop of growing state paranoia about the nascent social movements' ability to demonstrate to the world that all is not well in the new South Africa, the LPM began a series of actions against the brutal campaign of apartheid-style forced removals under way across the Gauteng province. These evictions were particularly acute in the informal settlements surrounding Johannesburg.

Each time the LPM planned a demonstration it duly notified the Johannesburg Metro Council of its intention to march a full seven days in advance. And each time, the Johannesburg Metro Police Department threw obstacles in front of the LPM. Here is a chronology:

On June 21 2002, the LPM's Protea South branch marched to Premier Shilowa's office to deliver a memorandum. Due notice was given to the Metro Police Events Section, but the responsible officer did not respond. Attempts to force a response from him ahead of the march met with the claim that the march could not take place because the police had failed to hold a meeting. Despite a flurry of phone-calls, a tense stand-off marked the start of the march, although it ultimately proceeded without incident.

On July 15 2002, the LPM Gauteng Province planned to march to the Union Buildings in Pretoria and gave due notice to this effect to the relevant authorities. The Pretoria City Council's responsible officer wrote back to say that the march could not be held on the planned date. He added that in fact the march could not take place on any adjacent dates, because the entire Pretoria police force would be too busy protecting a 200-person strong Congress of South African Trade Unions placard demonstration outside the Israeli Embassy for the entire week. The march was redirected to Johannesburg.

On July 24 2002, the LPM Gauteng province and the APF held a large march to the office of the Gauteng Premier. Due notice was given, and a meeting held with the Metro Police. During this meeting, the police attempted to deny permission on the grounds that people from the Thembelihle informal settlement were expected to participate in the march. Residents of Thembelihle had been engaged in a bitter struggle against the Johannesburg City Council's attempts to "voluntarily remove" them from their homes with the help of the notorious Red Ants (private eviction squads) and the police. The police refused to agree to the proposed route and times citing inconvenience to traffic flows. A flurry of phone-calls, including some to the Human Rights Commission and various police officials, was all that stood between the march proceeding peacefully and a violent confrontation with the police. The latter appeared particularly eager to arrest the marchers throughout the demonstration.

It is critical to note at this point that a fundamental constitutional right can never be restricted merely on the basis of administrative or operational inconvenience. It is also important to mention that, throughout this period, the legitimate struggle of the people of Thembelihle against the city's efforts to illegally evict them without a court order was actively criminalised by various sectors of the state, as well as the media.

On August 21 2002, the week preceding the WSSD, the LPM Gauteng held its

largest march, consisting of approximately 4 000 people, to the office of the Gauteng Premier to protest against the continuing forced removals under way in the province. As always, the procedures of the Act were rigorously followed to the last clause. Yet, when Premier Shilowa informed the police that he would not make himself available to receive the memorandum, the Metro Police informed the LPM that it did not have a right to march against the premier if he did not agree to be there. Apparently, the premier was opening a Blue IQ Project (a neoliberal, city development plan) on that day. The LPM correctly understood that its right was not dependent on the will of the premier and proceeded with the march, but only after following lengthy negotiations with the police who imposed strict route and time frames.

With the agreement of the Metro Police, the march took off but when the unreasonable police-imposed time limit expired and the LPM continued to demand that Premier Shilowa present himself to receive the memorandum, the police surrounded the marchers with Casspirs (armoured riot control trucks) and threatened to arrest them if they did not disperse within 10 minutes. The LPM immediately dispersed, and headed back to Beyers Naude Square to arrange their transport home.

The police pursued the marchers and arrested 77 people, specifically targeting most of the LPM Gauteng provincial and local leadership and NLC land rights co-ordinator Andile Mngxitama. When NLC director Zakes Hlatshwayo, who had not been present at the conclusion of the march, arrived on the scene to intervene, he was immediately arrested. Police also attempted to arrest the NLC farm dweller co-ordinator, Dan Mabokela, when he arrived on the scene. LPM members scattered across the city throughout the night as police cars pursued them in the streets of Johannesburg, stopping pedestrians to check under their clothing for the LPM's red "Land! Food! Jobs!" T-shirts.

The 77 marchers were detained at Johannesburg Central police station for two days before being released and warned to appear in court two weeks later on charges of "failing to disperse". The two-day detention achieved much of what the state had intended. The removal of its key leadership in the run-up to the WSSD destabilised the LPM's continued mobilisation drive, as well as the NLC's logistical preparations for the Week of the Landless. When the 77 appeared in court again in the aftermath of the WSSD, the charges were dropped before they even walked into the courtroom.

On August 22 2002, while organising legal representation for the 77 marchers inside a cell in Johannesburg Central police station, two white men and a white woman approached the author of this paper and asked her to accompany them. She refused until they showed her a picture of herself and informed her that she was being arrested for contravening the apartheid-era Aliens Control Act (No 96 of 1991) and would be deported. She was taken to police cells in Kempton Park, where she spent the next seven days in solitary confinement awaiting a court ruling, which ultimately secured her release. While in police detention, she was visited by a police intelligence officer who informed her that her arrest followed their investigation into her work with the LPM. She won two court judgments against the Department of Home Affairs, both times with

costs, which ordered her release from jail and allowed her to remain living and working in South Africa, where she has resided for 10 years, pending a final court ruling. It is also worth noting that her “prohibition order” was signed on August 15 2002 during the height of state attempts to prevent the upcoming WSSD protests. At the time of publication of this book, Eveleth was still facing an ongoing legal battle with the state.

On August 31 2002, more than 10 000 LPM members and supporters joined with other social movements for a large march under the banner: “Social Movements United: Land! Food! Jobs!” from Alexandra township to the Sandton Convention Centre. The LPM and NLC decision to join this march was largely in recognition of the need for unity within the climate of repression in which various social movements were struggling against the attempts of the state to prevent them from marching.

The joint LPM/NLC notice in terms of Act 205 for its earlier plans to hold a specific March of the Landless on August 31 was hand-delivered to the Metro Police more than a month earlier. A meeting called by the Metro Police at the Johannesburg World Summit Company headquarters - demonstrating the legally unacceptable involvement of a private company in the administration of demonstrations and gatherings during the WSSD - failed to reach agreement on the route and timeframe for the march. Police began the meeting by announcing that they were going to “dictate” the route and times for the march and, not too surprisingly, the meeting ended without agreement. Letters and phone calls followed, but agreement on the dictated route was only extracted from the NLC when the director was unable to attend a follow-up meeting with the police due to the fact that he was still in jail.

It is also important to note that while the Social Movements United march proceeded peacefully, the animosity of the state security apparatus towards the right of social movements composed of the poor and landless to exercise their fundamental right to freedom of assembly still continues. On November 6 2002, about 300 LPM members from Thembelihle marched again to the office of the Gauteng premier, under threat of imposed routes and time frames. The Metro police warned that if the march did not finish by 2:30pm all the marchers would be arrested. Although the march was peaceful, by 2:00pm the police officers in charge of the operation were looking anxiously at their watches, waiting for the chance to pounce on the protesters.

What is to be done?

It is important to begin a public debate about the right to dissent in South Africa, and the Freedom of Expression Institute’s (FXI) workshop on this topic is a good starting point. Nevertheless, this discussion must be taken beyond the confines of forums such as workshops and seminars whose reach, no doubt, is limited. There must be public education and continuation of the debate. Human rights institutions, such as the FXI and other public bodies, can also help to educate the media as well as state organs responsible for the implementation of the right to freedom of expression, assembly and demonstration. Particular emphasis must be placed on the police and local authorities in the hope of

giving them some conscience about the right to dissent and its importance in any democratic society.
Ultimately, however, political space is not given, but won. Social movements must continue exercising their right to freedom of assembly and demonstration, and they must do so more frequently, more stridently and more numerically, so as to compel the state to recognise and accept the full expression of these fundamental rights. A right that cannot be exercised does not exist.

Trying to 'kill' the messenger, and failing: Experiences of the Anti-Privatisation Forum during the WSSD

Dale T McKinley

Events prior to, during and immediately after the World Summit on Sustainable Development (WSSD) marked a sea change in the political landscape of South Africa. For the first time since the African National Congress (ANC) government ascended to power in 1994 a collection of new social/political movements emerged to mount a mass organisational challenge and political critique of the government, the state that it controls and the socio-economic policies it is implementing.

Utilising the unique opportunity provided by the WSSD, these movements, all of which have eschewed any formal ties with the main political parties in South Africa, and which generally represent the voices of the urban and rural poor, put up a concerted and varied programme of activities. They were designed to highlight their grievances with the contemporary socio-economic situation in the country, institute a serious challenge to the neoliberal policies of the ANC government and raise the voices of the marginalised poor against a WSSD seen as consolidating the interests of elite politicians and corporate capital.

The ANC government chose to utilise the repressive and intimidatory machinery of state in a direct and conscious attempt to crush these incipient challenges and critiques. While this attempt failed to silence the voices of dissent, it revealed, in no uncertain terms, that South Africa has entered into a new period of social and political conflict, predominately shaped along class lines. It also lifted the mythical, liberatory "haze" that has surrounded the ANC since its conversion from mass liberation movement to bourgeois political party.

The Anti-Privatisation Forum (APF) is one of the new social/political movements in South Africa and it played a central role in the mass mobilisation, ideological critique and political activism that marked the movements' interventions around the WSSD. The APF's involvement in such activities saw it joining the Social Movements Indaba (SMI); a collection of mass-based organisations united in opposition to, and struggles against, the political and social agendas of the ANC government and the WSSD.

It was clear that the South African government was determined to smash

dissent and protest in the run-up to the WSSD and beyond. It made a mockery of its claims to represent the democratic aspirations of the people of South Africa, not to mention its assertions that it was the leading democratic force on the African continent as well as the global South. As the government went about imprisoning legitimate protesters and criminalising the activities of those that opposed its policies, it told the world about how wonderfully democratic the country was and how its policies were lifting the nation out of its horrendous political and socio-economic past. However, such hypocrisy was now being exposed in full view of the international community.

What follows is a run down of events involving the APF and the SMI that present a diary of engagement and struggle in the period surrounding the WSSD. They provide confirmation, among many others, that the right to dissent has entered dangerous waters. More than ever, it is imperative that dissenting voices be heard, and that they be heard loudly and clearly. Silence is the voice of complicity at this point in time.

The Kensington 87

On April 6 2002, 87 members of the Soweto Electricity Crisis Committee (SECC) were arrested for protesting against the water and electricity cut-offs outside the house of Johannesburg's Executive Mayor, Amos Masondo. They were demanding that the city council immediately stop its ongoing campaign of disconnecting water and electricity from households unable to pay for these services in the townships of Johannesburg. They were subsequently charged with public violence, malicious damage to property and assault with intent to do grievous bodily harm and faced steep jail sentences and/or fines if found guilty.

The trial was postponed twice for the state to gather evidence. It was obvious that the state would try to present information that painted the protesters as criminals and hooligans so as to silence legitimate public protest and dissent over neoliberal government policies and the privatisation of basic services. Obviously, the state would say nothing about the mayor's bodyguard who opened fire on the gathering which included pensioners, youths and children. The state would also maintain a deep silence about the devastation caused by water and electricity cut-offs as well as how privatisation has continued to deprive the poorest of the poor of basic services that are human rights and not economic privileges.

The trial of these SECC members (dubbed the Kensington 87) has remained a classic example of how the South African state is showing increasing signs of intolerance towards protest action as well as the free and public expression of dissenting views. During the WSSD, this case served as an indictment that the summit merely pandered to the global political and economic elite who want to further implement policies that will deepen poverty, increase the natural destruction of the world and deprive ordinary people of their basic rights.

While the WSSD delegates debated behind closed doors in the highly guarded enclave of Sandton, protests were being held at South African embassies in Britain and the United States as a show of solidarity with the Kensington 87.

These protests coincided with the days when the “accused” appeared in court for the hearing. The anti-globalisation movement also came out very strongly in support of the Kensington 87 and during one of the court appearances in August, two world-renowned activists, Naomi Klein and Dennis Brutus, spoke outside the Johannesburg’s magistrate’s court in support of the protesters. Mass demonstrations have also continued to be held demanding that the state should drop all the charges against the accused. Eventually on March 5 2003, the Magistrate’s Court in Johannesburg dismissed the charges and acquitted the 87 members after finding that the state had not established a prima facie case against them.
In an extensive half-hour ruling the magistrate found that the testimony of the state’s main witness - the mayor’s bodyguard - was not credible, that he had regularly contradicted and that the state’s case was riddled with inconsistencies.

The Soldiers’ Forum
On August 17 2002, nearly 100 members of an APF affiliate, the Soldiers’ Forum (SF), were arrested and thrown into jail for no other reason than that they wanted to travel to Cape Town to hold a protest at Parliament. Quite importantly, the case of the SF signalled a growing trend by the South African government during the summit to criminalise the exercise of the right to freedom of expression and protest.
The SF, all former members of the South African Defence Force and Mkhonto weSizwe (the ANC’s armed liberation wing), were arrested at Park Station in Johannesburg as they sat in a designated train coach waiting to travel to Cape Town. They intended to protest against their unfair dismissal by the state and the failure of the government to provide them with pension payments.
Management of the passenger train services, Shosholoza Main Line, had agreed to sponsor the trip and had allocated a separate coach for the purpose. Despite this, and in a premeditated move, the South African Police Service (SAPS) prevented the train from leaving and - after a lengthy stand off with the SF in which National Police Commissioner Jackie Selebi accepted their memorandum - moved to arrest them. They were charged with “failing to pay the required train fare”. The members were locked up at the Johannesburg Central Prison (known during the days of apartheid as John Vorster Square) where they were subjected to threats of force in an attempt to coerce them to co-operate with the police.
During this period, the SF members faced tear gassings, assaults, racial slurs and the denial of even the most basic human rights in prison. This resulted in seven of them being hospitalised while many others were left with an assortment of injuries. In an example of the callousness with which government authorities were now treating the ex-combatants, the commander of the prison, a Mr Botha, chose to attend his own birthday party rather than deal with the dire situation then prevailing in the prison under his command.
Sixty-nine of the soldiers were eventually released on September 10 2002, having spent more than 21 days in prison waiting for bail. The release of

another 20 was delayed, ostensibly for technical reasons. Three of the SF leaders remained in prison, unable to pay the outrageous sum of R3 000 bail each and the APF had to raise funds to ensure their freedom. Eventually, on December 10 2002, the Johannesburg Regional Magistrates' Court dropped all the charges against the 93 soldiers. It was a resounding victory against the state's continuing and opportunistic attempts to repress legitimate political dissent and to criminalise the actions of those who are struggling for social and economic justice.

The APF pointed out that the arrest, imprisonment and trial of the SF members was part of an ongoing and intensified campaign by the South African government to suppress legitimate dissent and protest. It stated that it was the same campaign of intimidation which had led to the imprisonment of 30 workers in Cape Town who were on a legitimate strike at the privatised Zandvliet Water Plant. The workers were soon released; however, one of their leaders, Max Ntanyana, who is also an activist with the Western Cape Anti-Eviction Campaign, remained in prison on trumped-up charges and faced several other charges related to protest activities against privatisation and evictions.

The completely unwarranted arrest and imprisonment of members of the SF also took place against the background of the government's heavy-handed actions on striking municipal workers in early July 2002. In addition, a new tactic was developed by government intelligence and security forces during the WSSD of harassing and intimidating anti-WSSD activists, including those from the APF, and, in one case, the National Intelligence Agency even tried to recruit an APF member to spy for them.

All these attacks should be seen as part of a systematic campaign to curtail legitimate public dissent and opposition to government policies. Not only has it amounted to a direct violation of basic human and constitutional rights but it has also been a clear sign that the South African government is increasingly becoming intolerant of an informed and active citizenry.

The Freedom of Expression March

Early in the evening August 24 2002, the SAPS brutally attacked a peaceful freedom of expression march organised jointly by the SMI and the International Forum on Globalisation (IFG). At least three marchers were injured and a prominent South African filmmaker, Rehad Desai, was arrested.

The march was intended to protest against the government's increasingly brutal use of repression against those who dared to voice dissent against the corporate agenda of the WSSD and state policies that are wreaking devastation on the poor. In the week before the march, more than 150 activists had been arrested and imprisoned for protesting against the WSSD and the government's neoliberal policies. And in one notable case outside Johannesburg, an APF member and leader of the Ikageng Community Crisis Committee (ICCC) in Potchefstroom, Papi Molefe, was arrested and held in prison for putting up anti-government posters, while other members of the ICCC were continually harassed for wearing APF T-shirts.

Armed with candles, the several hundred marchers from South Africa and abroad were proceeding from the University of the Witswatersrand, in Braamfontein, when, without warning, the police attacked with stun grenades. In the ensuing melee, a Canadian activist, Karen Coge, was hit by one of the grenades and was rushed to hospital, suffering from serious burns. An APF member, Dudu Mphenyeke, was also taken to hospital with a dislocated knee and at least one other marcher was injured. Several children who had joined the peaceful march were left in a state of trauma. Desai, who was filming the march, was arrested for "obstructing police operations" and hauled off to Hillbrow Police Station where he was charged and released on R1 000 bail. Several internationally renowned anti-globalisation activists and intellectuals, including Vandana Shiva, Maude Barlow, Naomi Klein, Tony Clarke and John Saul, were caught up in the police attack.

After the onslaught, marchers regrouped in the street and faced-off against a small army of heavily armed and aggressive riot control police officers. The march leaders attempted to reason with them to allow the march to proceed, without success. To drive their point home, police responded by indicating that they were prepared to arrest everyone present there by force. After a spirited street rally, the marchers eventually dispersed.

Perhaps more than anything else, the events of that evening were further confirmation of the ever-narrowing space in the "new" South Africa within which the exercise of basic constitutional and human rights such as freedom of expression and assembly are now permitted. It became clear that the government is hell-bent on smashing legitimate dissent by whatever means it deems appropriate, including resorting to violence against peaceful protesters.

Social movements emerge victorious in spite of government's threats and intimidation

In a major victory for social movements and freedom of expression and assembly in South Africa, the government on August 28 2002 finally backed down from its consistent refusal to allow the SMI to march from Alexandra to the Sandton Convention Centre where the WSSD was being held.

During the two weeks preceding this date, the SMI and its activists had been subjected to imprisonment, intimidation, harassment, unprovoked threats and attacks on peaceful public activities, all orchestrated by various arms of the South African government. Throughout, the SMI had remained steadfast in its principled stand on the right to freedom of expression and assembly. The SMI had also stood firm in its political message to the people of South Africa and the world that there can be no sustainable development as long as the capitalist system continues to dominate national and global social and economic relations.

It was the SMI's struggle, alongside those of other progressive forces in South African and beyond, which forced the government to realise the unsustainability of its suppressive actions. This reversal represented an important political victory for all progressive forces in the country during this period and beyond.

By this stage, many of those who had put their faith in the WSSD were now beginning to wake up to the reality that the summit was nothing but a fa□ade in the employ of capital and state interests. The threatened walkout by thousands of NGO delegates from the WSSD at the Sandton Convention Centre over inaccessibility, and thus their inability to have any substantive impact on the proceedings, confirmed that unfortunately, they had been played for fools. The belated announcement by the Global People's Forum held at Nasrec, that they would now embark on a protest march to Sandton, provided further evidence of the generalised crisis of legitimacy within which the entire WSSD found itself.

In a vain attempt to rescue the WSSD process and deflect legitimate public dissent over its own policies, the South African government had resorted to spreading lies about anti-summit activists and their activities. This was best personified by South Africa's Foreign Affairs Minister Nkosazana Dlamini-Zuma's disingenuous attempt, at the opening of the WSSD press conference, to portray the freedom of expression march mentioned earlier as violent, and its activists as immature hooligans.

Likewise, the ANC had regularly made all manner of accusations against the anti-WSSD activists saying they were engaging in "mindless violence" and that they were hell-bent on the "irresponsible pursuit of confrontation and anarchy". In addition, the head of the National Intelligence Agency visited the offices of the APF on the evening of August 27 2002 in an attempt to diffuse the impending confrontation between protesters and the state in the march planned for August 31. The SMI had vowed that this march would proceed with or with out "authorisation" from the state.

In the last two or three days before the march, there had been a great deal of confusion sown about the various protests against the WSSD that were scheduled to take place on the same day. This forced the SMI to issue a statement clarifying the purpose and character of its protest march. It stated that at the beginning of August, the SMI had publicly announced its intention to organise a mass demonstration on the WSSD from Alexandra to Sandton. It further stated that soon after, the SMI had released a detailed political statement on its approach to the summit and began mobilising its forces and engaging in public activities to spread this message.

Despite the ever-increasing acts of state repression, the SMI had fought and won a political and legal victory when government finally relented and agreed to let the march go ahead. This battle had unfortunately opened a window of opportunity for those forces that consistently opposed the SMI's struggle, which now quickly jumped onto the protest bandwagon. All of a sudden, a multiplicity of organisations including the ANC and other pro-government elements within the Global People's Forum, announced their intention to hold a rally in, and march from, Alexandra on the same day as the SMI's march. It was not at all clear what such activities were meant to achieve, given that these forces supported much of the political and socio-economic agenda being pursued at the WSSD as well as the policies of the South African government. But while the SMI supported the right of these forces to engage in their activities, it was

obvious that their actions were primarily designed to contest the SMI's political success in mobilising huge numbers of people in Alexandra and beyond.
The SMI expressed its dismay at such levels of political opportunism but, all in all, these side detractions failed to diminish both the consistent political purpose and message of the march, as well as its peaceful character. The SMI further welcomed the increasing support, which had been pouring in from various progressive forces, locally and internationally.

The Big March: history made as 25 000 protesters 'take' Sandton in militant, peaceful demonstration

In a historic show of "people's power", over 25 000 people marched to Sandton, Johannesburg, on August 31 2002 to reject the neoliberal policies of the WSSD and the South African government. Under the banner of the "Social Movements United" (consisting of the Social Movements Indaba, the Landless People's Movement and La Via Campesino), the marchers made their way from the poverty-stricken township of Alexandra to the ultra-wealthy suburb of Sandton to send a peaceful, yet militant message that "enough was enough".
Anchored by thousands who had come from across South Africa's urban and rural poor communities, and joined by activists from various communities and movements from around the world, the march represented the largest and most popular rejection of the corporate and anti-poor policies of the South African government since 1994. It also represented a continuation and strengthening of the growing global rejection of the capitalist neoliberal "developmental" framework, which has wreaked so much devastation on the world's majority poor.
Despite attempts at suppression and the constant beating of war drums by the government, as well as sections of the mainstream press, thousands of poor people "took over" Sandton and showed that disciplined and organised mass action could overcome even the most blatant attempts at disruption. Marchers were not even deterred by the presence of thousands of heavily armed police and army troops, and this protest became a resounding victory for those who continued to be marginalised and treated with contempt by the rich and powerful.
For South Africa, in particular, the march marked a turning point in the country's political landscape. It became clear that a new movement was coming into being, which for the first time since 1994 posed the potential of a serious challenge to the South African government among its historical core base - the broad working class. Quite tellingly, the ruling party could not even mobilise its own masses as indicated by the extremely poor response to the government-sponsored rally and march in Alexandra, where President Thabo Mbeki spoke to a stadium that was less than half-full. Such was the desperation of the ANC and its allies that they went to the extent of diverting busloads of people destined for the Social Movements United March to the stadium. Also, attempts by elements within the Global People's Forum to organise a separate march failed miserably.
In a similar vein, the disingenuous attempts by the mainstream South African

press to grossly underestimate the numbers of marchers and to ignore their militant message could not fool anyone except, one may say, those who continue to live in a world of self-fulfilling illusions. In the final analysis, and due to its steadfast commitment not to be deterred by any amount of repression, the SMI was able to march on the WSSD with its principles, and its message, intact.

The Anti-Israeli protest

On the afternoon of September 2 2002, the real face of the "new" South African state once again bared itself for all to see when police used brutal and almost lethal force to break up a protest against Israel. After learning that the then Israeli Foreign Minister Shimon Peres was scheduled to speak in the Linder Auditorium at the University of the Witswatersrand Educational Campus at 6pm, several members of the Palestinian Solidarity Committee (an affiliate of the SMI) arrived at the campus to attend the address.

One of the members, Salim Vally (a contributor to this book), was on his way to his office to meet a fellow academic when he was accosted by a self-styled "security" contingent of the Jewish Board of Deputies outside the campus. This illegal outfit accompanied by members of the SAPS barred him from getting inside the college. When he protested that he had every right as a university employee to be there, the police arrested him and dragged him off to Hillbrow Police Station where he was charged with trespassing and resisting arrest.

Several others, most of whom were Witswatersrand University students, who had managed to make their way into the auditorium were asked if they belonged to any organisation by the same "security" and police personnel and then physically dragged out of the building. All black individuals were specifically targeted and forcibly removed, as were people with scarves or bearing a "Muslim appearance".

Upon hearing of this incident, several hundred supporters of the Palestinian Solidarity Committee, including members of the APF, arrived at the entrance to the campus where a spontaneous demonstration began. Police then began to use water cannons, batons and pepper spray in an attempt to disperse them, leading to several of protesters being injured including an elderly woman who had to be rushed to hospital.

By 8:30pm, the demonstrators decided to march to Hillbrow Police Station to demand the release of Vally. As they were approaching the station, police again opened up on them with water cannons, batons and rubber bullets. One demonstrator, Ahmed Veriava, was shot three times in the hand and was rushed to Brenthurst Clinic; he was later transferred elsewhere because of police round-ups in the area. Many demonstrators were cornered and beaten severely. Eighteen were arrested, four of whom were subsequently released because they needed urgent medical attention.

Police employed tactics reminiscent of the days of apartheid to deal with the demonstrators, particularly their use of racial slurs while beating and arresting the protesters. It was rather shocking that eight years after the end of formal apartheid, university academics and students were being thrown out of their

own institution because of their skin colour and ethnic origin. Despite its promise to protect and defend the fundamental rights of all individuals in the country, the ANC government's own police force, just like in the days gone by, was firing rubber bullets and water cannons at peaceful and unarmed protesters.

Concluding remarks

The experiences recounted in this paper have exposed the government's tendency to show remarkable sensitivity and intolerance to dissent. Of particular importance, however, are the critical challenges that this state of affairs poses to social movements and other formations, which aim to challenge the government and its policies.

In the first place, it is critical to take the discussions held in this workshop further in order to lay a foundation for a longer process of engagement between civil society and the state, with a view to redefining how the right to dissent can be freely exercised.

Beyond this, there are also a number of strategies and tactics that can be adopted to deal with a state which represents capital and bourgeois interests. Part of this, for instance, is the need for social movements to consider whether to mount an immediate legal challenge against the unconstitutionality of the Regulation of Gatherings Act. By and large, however, social movements and progressive non-governmental organisations will have no option but to mobilise extensively and create a critical mass of popular support that can swing the balance of forces in favour of the working class, in order to guarantee its own survival.

A flash in the pan? The relevance of the WSSD for freedom of expression

Jane Duncan

Why is this publication necessary? Why is it necessary to reflect in such depth on the experiences of repression over the period of the World Summit on Sustainable Development (WSSD)? Surely the many accounts of police repression were a flash in the pan, resulting from overzealous police members awed by the gravity of their city hosting an international United Nations conference? This sentiment was expressed by an ANC representative who attended the Right to Dissent workshop:

> *To what extent was the WSSD, where there certainly were serious problems and violations that took place from the side of the police, to what extent was it a unique occasion that arose because of the presence of an international jurisdiction within the country and an international meeting? Is there, other than the events of the WSSD, evidence of the kind of thing you've presented [at the Right to Dissent workshop] as the old oppressed [having] now become the new oppressors? Was the WSSD an exception to that or is there a crackdown [on] dissent or on any demonstrations? I don't think so.*[1]

This book is necessary because the events over the WSSD period were not specific to that event, and are, therefore, of historical importance. As a number of the contributors to this book have pointed out, the conflagrations over freedom of expression were not a flash in the pan: they were symptoms of a far more systemic crisis that is not only national, but international, in nature. As mentioned in the introduction, the exacerbation of economic inequalities after 1996 has heightened latent contradictions in the social democratic project of the ruling party, the African National Congress (ANC).

The severity of the inequality problem must not be underestimated. A recent study, partly funded by the Department of Labour, found that about 32 percent of the labour force is now unemployed, on the narrow definition, and fully 45 percent are unemployed if all those without work are included. South Africa remains, along with Brazil and Guatemala, one of the most unequal societies on earth. Inequality is growing, especially among blacks, with the top African income earners earning 21 times that of lowest income earners. Among whites,

the top earners earn 12 times that of the lowest income earners.[2]
These inequalities are not simply legacies of apartheid. According to a report released by Statistics South Africa, comparing household earning and spending between October 1995 and October 2000, the average South African household has become poorer. In October 1995, the average household income was R37 000, and was expected to rise to R51 000 in October 2000: in reality, by that stage, income had grown only to R45 000. In 1995, the poorest 20 percent of households received a mere 1,9 percent of the total income of the country: a figure which dropped to 1,6 percent in 2000. In addition, the poorest 50 percent of South African households had lost income relative to the richest 50 percent. If income levels are broken down by race, the average African household experienced a 19 percent drop in income, compared to white households, which experienced a 15 percent increase. In 1995, the average white household earned four times as much as the average African household: in 2000, the former earned six times as much.[3] The ANC has attempted to explain these statistics away by arguing that they are as a result of the deepening inequalities in the global arena, which are reinforcing inequalities inherited from apartheid, coupled with a fundamental mismatch between South Africa and the global economy: what they term “objective factors”.
However, this argument is wearing thinner and thinner and fewer people are willing to accept that the government has no agency in the situation. New organisations and social movements outside the ambit of the ANC-SACP-Cosatu alliance are establishing themselves, and are increasingly using the right to assembly, demonstration and picket to express these independent politics. In the process, the inherent problems of the Regulation of Gatherings Act - namely its ability to become a repressive rather than a facilitative instrument - are being brought to the fore. After all, the state would have an interest in facilitating only those demonstrations that do not threaten its class interests: hence the need to use the control mechanisms available in the Act to the fullest. So the rise of independent politics has necessitated a review of the Act.
However, this development has also led to a highly critical approach towards the legal system itself, given the fact that the law is not a neutral instrument; this is especially in relation to those aspects of the law that “regulate” forms of expression that are working class-based. According to Dale McKinley:

> *...the tools of expression available to different sectors and classes in society to express their grievances are responded to very differently. So, for example, what do corporations do when they have a grievance against the state? What tool do they [use]? They don’t have a mass march downtown. What they do is an investment strike. What they do is take their money outside the country. That is not punishable according to the law of the land. In fact, it’s encouraged. Is that any less violent - and the socio-economic consequences of the violence that takes place, the poverty and a whole range of things - than somebody going up and having some fisticuffs with a police officer? Please, let’s be serious. In relation to the application of the law, we have to look at what is violent*

and what's not and what causes violence and the specific applications of these laws.

Two points emerge from McKinley's comments. Firstly, as social contradictions sharpen in South Africa, some forms of expression come under more pressure than others; this is especially so with respect to those forms of expression that are most accessible to workers, and are as direct and as unmediated as possible, such as assembly and demonstrations. Highly mediated forms of expression, such as the media, are less subject to the attention of the authorities (although they are by no means immune from censorship). The second point relates to the neutrality of the law. In the same way that the law is not neutral, then neither is the state. Those who enter the state machinery must accept that their relationship to the various classes in society will be a structural one, and that the relationship to the working class will by nature be antagonistic. This does not mean - as Salim Vally points out in chapter two - that there will not be contradictions, and that the state cannot be used to implement really meaningful reforms. However, when state power is challenged, it will respond as all states do, irrespective of the parties in office, and repress the source of the threat.

These contradictions are not peculiar to South Africa. Globally, inequality levels are on the rise, leading to similar faultlines to the ones in South Africa opening up internationally. These levels are pushing trade unions and civil society organisations to become more militant: in the words of Kim Moody.

> *...The pressures of globalisation and lean production, the transforming powers of renewed struggle, and the fresh forces that have come to the working class in recent decades are all pushing the working class and its organisations in a more aggressive and confrontational direction.*[4]

Moody also notes that this confrontational mode often conflicts with the prevailing culture based on a partnership (or social contract) with capital around corporate competitiveness, and may lead to internal union conflict. Of course, this conflict is not confined to unions, and can be seen in other civil society organisations, including civics and non-governmental organisations.[5] The internal forces favouring the retention of the social contract often have strong supporters, or even financiers, on the outside, often including ruling political organisations, or organisations with significant representation in the electoral system.

The polarisation of militant and reformist forces has also been fuelled by international geopolitical struggles, especially around the imperialism of the United States. One of the tentpoles of the US's dominance in the world today is access to cheap oil supplies, and some of the most brutal conflicts being waged by the US or its surrogates (such as Israel) are, in fact, disguised oil wars, waged in an attempt to maintain its control over the world's most important oil supplies: at the time of writing the US and Uk had already invaded Iraq because of their insatiable greed for oil.

A great deal of current global activism has focussed on the US's imperialist agenda, and the struggles being waged against the Israeli state and the ideology of Zionism by Palestinians and sympathetic individuals and organisations (and, in some instances, even by Israelis themselves). According to James Petras, the rise of US imperialism, coupled with the coming to office of right-wing parties in Europe, has added to the crisis of electoral politics around the world. It has become increasingly difficult to distinguish between social democratic, liberal democratic and right-wing parties, as political agendas begin to share more and more characteristics. For example, the social democracy of Britain's Prime Minister Tony Blair becomes indistinguishable from the right-wing politics of US President George Bush on a crucial foreign policy issue such as war in Iraq.

But the most consistent area of agreement among parties across the political spectrum has been in the area of macro-economic policy, with neoliberal emphases on international competitiveness and balance of payments, low inflation and high interest rates, becoming de rigueur for all parties caught up in the electoral machinery. These are the "objective factors" that define the terrain of electoral politics, and which the ANC has wholeheartedly embraced. According to Spain's "socialist" minister of economics, "... macro-economics recognises neither right nor left. Where there is a negative balance of payments or inflation, the government reacts in the same manner whether it is right or left... In macro-economics there's only success or failure."[6] These words could have easily been said by South African Finance Minister Trevor Manuel, as well as a host of other social democratic or "socialist" finance ministers. Here is not the place to enter into the debate around subjective versus objective factors, although it should be noted that there are fierce debates about whether macro-economic strategies generally associated with neoliberalism are forced on governments by factors beyond their control. These debates focus on the extent of agency governments still enjoy in these areas, but that they willingly give away in an attempt to convince their electorate of the need to adopt unpopular policies.[7]

Once key policies are termed non-negotiable, it is a small step to authoritarianism; in fact, their non-negotiable status is premised on authoritarianism, as any dissent about the wisdom of these policies must not be entertained. These global developments have led to a situation where traditional divisions between right and left parties have collapsed, to be replaced by new divisions between those caught up in the electoral system (which may involve hitherto "right-wing" and "left-wing" parties) and those whose terrain of struggle has increasingly become the streets. According to James Petras:

> *In summary, the old electoral divisions between the centre-left and right have become irrelevant: most of the communist and social democratic parties have adopted centre-right and right-wing policies, favouring capital and imperial wars [and] abandoning welfare state social legislation. The left/right divisions, however, are more relevant*

than ever if we take as our protagonists the growing left mass movements and the electoral-institutional forces of the right.[8]

In view of these global trends, it should not be surprising that freedom of expression is dying by degrees in the very countries that claimed to hold it sacrosanct. Increasingly, we are witnessing social democratic, "socialist", liberal democratic and right-wing parties reaching consensus on the need to suppress global dissent to the new world disorder. Most recently, the former left and the right have found common ground on a range of anti-terrorist measures, following the attacks on the US on September 11 2001: a matter referred to in the introduction. A cursory examination of how these measures are being used in practice points to the fact that the so-called war against terror has mutated very quickly from its original intentions of targeting Osama bin Laden and his supporters. The US and the European Union (EU) have effected anti-terrorist measures, including the blacklisting of organisations. Apart from focussing on increasingly global organisations, the compilers of the blacklists have also taken heed of the Federal Bureau of Investigation (FBI) definition of domestic terrorism to include "left-wing groups" who "profess a revolutionary socialist doctrine and view themselves as protectors of the people against the dehumanising effects of capitalism and imperialism". The central thrust of all the legislation is to introduce unprecedented powers to outlaw, interrogate and jail opponents of the ruling political establishment.

These blacklists have undergone three broad phases of the development in delineating the global and domestic "axis of evil"; initially they listed Al-Qaeda and related organisations and individuals, proceeding to list revolutionary national liberation organisations opposed to American imperialism and Palestinian occupation, such as the Kurdistan Workers' Party (PKK), ETA, the Lebanon-based Hizbollah, and the Popular Front for the Liberation of Palestine (PFLP). The third trend, which is still emerging, is to target the anti-globalisation and social movements that have emerged independently of the older and increasingly mainstream liberation movements.

The PKK and ETA have drifted towards electoral politics since the collapse of the Soviet Union in 1990, leading them to establishing political wings, with the latter even calling in the Irish Republican Army and its political wing, Sinn Fein, to assist with its transformation. ETA's political wing, Batasuna, has been banned by the Spanish government for its links with ETA, and for advocating the right to self-determination of the Basque people. The government also used its newly acquired jackboot powers to close down the Basque free press. Then there are the individuals that have been listed by the EU and the US, such as Professor Jose Maria Sison, a leading figure of the Philippine national democratic revolution for almost 40 years, and a member of the Communist Party of the Philippines. South Africa looks set to follow suit and outlaw these organisations and individuals under its own law, which will see the ruling ANC banning organisations that share remarkably similar political histories to its own.

The US and the EU have deliberately ignored the crucial distinction between

national liberation organisations and terrorist organisations, recognised in numerous international documents, including UN documents. For example, the Organisation of African Unity's Algiers Convention of 1999 states that:

> *... the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including the armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.*

Countries such as Lebanon have argued that laws and UN conventions must foreground this clause, rather than burying it away in some vague reference to respecting international legal principles. It has repeatedly refused to ban Hizbollah, arguing that the organisation is pursuing a just war and pointing out that the organisation has been responsible for the ejection of Israeli forces from South Lebanon and a buffer zone on the border.

All these concessions to the US war machine expose the "third way" that social democratic governments are supposed to be charting in the context of globalisation - including South Africa - as self-serving nonsense. In fact, it is the social democratic governments in Britain, Germany and France that have spearheaded the anti-terrorist measures, in the process doing the dirty work for repressive right-wing regimes. In effect, repression is no longer the preserve of the right-wing: it is owned equally by all parties in government.

However, the repressive potential of social democratic and former socialist parties is even greater than the traditional right. The captains of industry and the multilateral institutions have begun to realise that if these parties can be coaxed into electoral politics, and beyond that into the machinery of the state, they can act as far more effective custodians of their interests than right-wing parties. After all, what do you do if you need to stifle the growing anti-globalisation movement? You bring a pliant former left-wing organisation to power, one that still enjoys mass legitimacy, and use it to contain social contradictions while introducing even more draconian right-wing policies: the sorts of policies mentioned above that are then presented as being in response to "objective factors" that are beyond your control.

These parties have the added advantage of being able to contain social contradictions by stifling dissent at its source, namely in these parties' support bases in trade unions, non-governmental organisations, civics and street committees, education organisations and other organs of civil society. For a time, while the legitimacy of the party in question exists, they have eyes and ears in every popular structure that are able to sound the whistle if dissent rears its head.

The case of Brazil is particularly instructive with respect to the custodianship role of former left-wing parties. Brazil is one of the only countries that surpasses South Africa as the most unequal country in the world. In fact, a recent government study showed that Brazil's wealthiest 10 percent earn nearly 20 times more than the bottom 40 percent. The extremeness of the situation has led to some of the most intense class struggles in the world;

struggles which gave rise to organisations such as the Brazilian Workers' Party (PT) in 1979. The PT became renowned internationally for its system of inner-party democracy, recognising permanent tendencies which openly contest the politics and leadership of the organisation. These tendencies represent various shades of centrist and left-wing opinion. This situation changed gradually as the PT began to contest elections, firstly at local government and then at national level. A trend towards greater authoritarianism and bureaucratisation was paralleled by policy changes in the PT, reflecting the argument that socialism was to be achieved through evolutionary rather than revolutionary means.

One of the consequences of this drift to the mainstream was the establishment of independent social movements, notably the Landless Workers' Movement (MST). Formed in 1985, the MST has evolved into a full-blown social movement engaged in direct action around land, involving land invasions on unproductive land. The distribution of land in Brazil is a highly charged matter, given the fact that less than 3 percent of the population owns two-thirds of the land; 60 percent of this land lies idle. The MST was brought under pressure by the PT in June 2002 when the party was preparing to contest national elections, with the former agreeing to suspend land invasions as a gesture of support. When the PT eventually came to office in October 2002, relations with the MST became extremely strained, with the PT attacking the MST for continuing their land occupation programme.

The stifling of dissent was accompanied by the implementation of neoliberal monetary polices. When the new government of President Luiz Inacio Lula da Silva came to office, it stated that sacrifices would need to be made by the very electorate that brought him to office, and that an austerity package would have to be introduced to stabilise the country's finances, including raising interest rates to 25,5 percent to fight inflation. The government also stated that there was very little chance that the monthly minimum wage would be raised, and reaffirmed its commitment to continuing the implementation of an International Monetary Fund agreement negotiated by Lula's predecessor. A commentator argued thus:

> *In other words, the Brazilian bourgeoisie, reviewing the study of the ideologists of imperialism, has come to the understanding that in order to suppress the workers' movement in Brazil, which one day soon could explode, it would be wiser to use the method of the democracy already tested in the western European countries than carrying out the oppression through their own thugs; an organisation that bears the name of "workers", and their policies do not endanger the system and, at the same, time is willing to work with the bourgeoisie is, in fact, a much better choice when it comes to facing the masses after the election. It would be to put up people's own "leaders" against them, while the bourgeoisie continues to execute its plans with no worries (at least for a while). This election indeed was a selection made by the global capitalists to suppress the mass protest for another period while they rob Brazil's national wealth.*[9]

These recent developments in Brazil are echoed in South Africa, with repressive steps being taken against the Landless People's Movement (LPM) by the state: measures that have been so carefully documented by Ann Eveleth in chapter four. The inference one draws from the state's actions is that organisations such as the LPM are seen to be attempting to subvert the rule of law implemented by a legitimate government and are, therefore, legitimate targets for repression. The backdrop to these heightened struggles around land redistribution is even worse than in Brazil, given that South Africa has seen fit to write the "willing buyer, willing seller" model into the country's Constitution.

South Africa and Brazil have proved that it is possible to have progressive political parties in office, elected through a popular vote, presiding over the most unjust disparities in the world today. In fact, they even exacerbate these inequalities by implementing policies for reasons that they claim to be beyond their control. The disjuncture between principle and practice means that dissent is to be expected, especially the expression of dissent through direct action. New and independent formations also spring up as an organic response to the concessions made by these parties. It is to be expected that the response to this dissent will be one of repression. As mentioned earlier, repression is no longer a preserve of right-wing governments; recently, and especially since September 11 2001, it become a consequence of, and instrument of, social democratic politics.

In summary, the repression of dissent over the WSSD period was not a flash in the pan. Censorship has a political economy: the political economy of neoliberalism. The theory and practice of repression and dissent in recent years in South Africa and beyond should tell us that the WSSD was a taste of things to come.

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NO. 205 OF 1993: REGULATION OF GATHERINGS ACT, 1993.
STATE PRESIDENT'S OFFICE

No. 132 28 January 1994

NO. 205 OF 1993: REGULATION OF GATHERINGS ACT, 1993.

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:

ACT

To regulate the holding of public gatherings and demonstrations at certain places; and to provide for matters connected therewith.

(English text signed by the State President.)
(Assented to 14 January 1994.)

PREAMBLE

WHEREAS every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so;

AND WHEREAS the exercise of such right shall take place peacefully and with due regard to the rights of others:

BE IT THEREFORE ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-
(i) "authorized member" means a member of the Police authorized in terms of section 2(2) to represent the Police as contemplated in the said section; (iii)
(ii) "branch", in relation to an organization, includes-

(a) any section or committee of the organization; and
(b) any local, regional or subsidiary body forming part of the organization; (xii)

(iii) "Commissioner" means the Commissioner of the South African Police appointed in terms of section 3 of the Police Act, 1958 (Act No. 7 of 1958), and includes a regional commissioner as defined in the said Act; (iv)

(iv) "convener" means–
(a) any person who, of his own accord, convenes a gathering–, and
(b) in relation to any organization or branch of any organization, any person appointed by such organization or branch in terms of section 2(1); (xi)

(v) "demonstration" 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; (i)

(vi) "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 No. 29 of 1989), or any other public place or premises wholly or partly open to the air–
(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
(b) held to form pressure groups, to hand over petitions to any person, or 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, including any government, administration or governmental institution, (ii)

(vii) "local authority" means any local authority as defined in section I of the Promotion of

Local Government Affairs Act. 1983 (Act No. 91 of 1983), within whose area of jurisdiction a gathering takes place or is to take place, but does not include a regional services council or a joint services board in respect of the area of jurisdiction of another local authority; (ix)

(viii) "magistrate" means a magistrate appointed in terms of the Magistrates, Courts Act, 1944 (Act No. 32 of 1944); (v)

(ix) "marshal" means any person appointed as such in terms of section 8(1): (xiii)

(x) "Minister" means the Minister of Law and Order; (vi)

(xi) "organization" means any association, group or body of persons, whether or not such association, group or body has been incorporated, established or registered in accordance with any law; (viii)

(xii) "peace committee" means a local committee or a regional committee as defined in section 1 of the Internal Peace Institutions Act, 1992 (Act No. 135 of 1992), and contemplated in the National Peace Accord signed at Johannesburg on 14 September 1991; (xv)

(xiii) "Police" means the South African Police mentioned in section 2 of the Police Act, 1958 (Act No. 7 of 1958), and includes any body of persons established or enrolled under any law and exercising or performing the powers, duties and functions of a police force, but does not include any body of traffic officers; (x)

(xiv) "responsible officer" means a person appointed in terms of section 2(4) (a) as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2(4) (b) to be a responsible officer; (xiv)

(xv) ".riot damage" means any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering. (vii)

CHAPTER 1

Appointment of conveners, authorized members and responsible officers

2. (1) (a) An organization or any branch of an organization intending to hold a gathering shall appoint-

(i) a person to be responsible for the arrangements for that gathering and to be present thereat, to give notice in terms of section 3 and to act on its behalf at any consultations or negotiations contemplated in section 4, or in connection with any other procedure contemplated in this Act at which his presence is required; and

(ii) a deputy to a person appointed in terms of subparagraph (i).

(b) Such organization or branch, as the case may be, shall forthwith notify the responsible officer concerned of the names and addresses of the persons so appointed and the responsible officer shall notify the authorized member concerned accordingly.

(c) If a person appointed in terms of paragraph (a) is or -becomes unable to perform or to continue to perform his functions in terms of this Act, the organization or branch, as the case may be, shall forthwith appoint another person in his stead, and a person so appointed shall be deemed to have been appointed in terms of paragraph (a): Provided that after the appointment of a person in terms of this paragraph, no further

such appointment shall be made, except with the approval of the responsible officer concerned.

(2) (a) The Commissioner or a person authorized thereto by him shall authorize a suitably qualified and experienced member of the Police, either in general or in a particular case, to represent the Police at consultations or negotiations contemplated in section 4 and to perform such other functions as are conferred or imposed upon an authorized member by this Act, and shall notify all local authorities or any local authority concerned of every such authorization. and of the name, rank and address of any authorized member concerned.

(b) If an authorized member is or becomes unable to perform or to continue to perform his functions in terms of this Act, the Commissioner or a person authorized thereto by him shall forthwith designate another member of the Police to act in his stead, either in general or in a particular case, and the member so designated shall be deemed to have been authorized in terms of paragraph (a) for the purposes contemplated in the said paragraph: Provided that after the designation of a member of the Police in terms of this paragraph, no further such designation shall be made, except with the approval of the responsible officer concerned.

(3) If any consultations, negotiations or proceedings in terms of this Act at which the presence of a convener or an authorized member is required, are to take place and such convener or member is not available, such consultations or negotiations or other proceedings may be conducted in the absence of such convener or member, and the organization or Police, as the case may be, shall be bound by the result of such consultations, negotiations or proceedings as if it or they had agreed thereto.

(4) (a) A local authority within whose area of jurisdiction a gathering is to take place or the management or executive committee of such local authority shall appoint a suitable person, and a deputy to such person, to perform the functions, exercise the powers and discharge the duties of a responsible officer in terms of this Act.

(b) If, for any reason, a local authority has not made an appointment in terms of paragraph (a) when a convener is required to give notice in terms of section 3(2) or when a member of the Police is required to submit information in terms of section 3(5)(a), such notice shall be given or such information shall be submitted to the chief executive officer or, in his absence, his immediate junior, who shall thereupon be deemed to be the responsible officer in regard to the gathering in question for all the purposes of this Act.

Notice of gatherings

3. (1) The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him.

(2) 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.

(3) The notice referred to in subsection (1) shall contain at least the following information:

(a) The name, address and telephone and facsimile numbers, if any, of the convener and his deputy;

(b) the name of the organization or branch on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;

(c) the purpose of the gathering;

(d) the time, duration and date of the gathering;

(e) the place where the gathering is to be held;

(f) the anticipated number of participants;

(g) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;

(h) in the case of a gathering in the form of a procession–

(i) the exact and complete route of the procession;

(ii) the time when and the place at which participants in the procession are to assemble, and the time when and the place from which the procession is to commence:

(iii) the time when and the place where the procession is to end and the participants are to disperse;

(iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;

(v) the number and types of vehicles, if any, which are to form part of the procession;

(i) if notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously;

(j) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over.

(4) 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.

(5) (a) When a member of the Police receives information regarding a proposed gathering and if he has reason to believe that notice in terms of subsection (1) has not yet been given to the responsible officer concerned, he shall forthwith furnish such officer with such information.

(b) When a responsible officer receives information other than that contemplated in paragraph (a) regarding a proposed gathering of which no notice has been given to him, he shall forthwith furnish the authorized member concerned with such information.

(c) Without derogating from the duty imposed on a convener by subsection (1), the responsible officer shall, on receipt of such information, take such steps as he may deem necessary, including the obtaining of assistance from the Police, to establish the identity of the convener of such gathering, and may request the convener to comply with the provisions of this Chapter.

Consultations, negotiations, amendment of notices, and conditions

4. (1) If a responsible officer receives notice in terms of section 3(2), or other information regarding a

proposed gathering comes to his attention, he shall forthwith consult with the authorized member regarding the necessity for negotiations on any aspect of the conduct of, or any condition with regard to, the proposed gathering.

(4) (a) If, after such consultation, the responsible officer is of the opinion that negotiations are not necessary and that the gathering may take place as specified in the notice or with such amendment of the contents of the notice as may have been agreed upon by him and the convener, he shall notify the convener accordingly.

(b) If, after such consultation, the responsible officer is of the opinion that negotiations are necessary, he shall forthwith call a meeting between himself and-

(i) the convener;

(ii) the authorized member;

(iii) any other responsible officers concerned, if any; and

(iv) representatives of such other public bodies, including local authorities, police community consultative forums and peace committees, as in the opinion of such responsible officer or officers ought to be present at such meeting, in order to discuss any amendment of the contents of the notice and such conditions regarding the conduct of the gathering as he may deem necessary.

(c) At the meeting contemplated in paragraph (b) discussions shall be held on the contents of the notice. amendments thereof or additions thereto and the conditions, if any. to be imposed in respect of the holding of the gathering so as to meet the objects of this Act.

(d) The responsible officer shall endeavour to ensure that such discussions take place in good faith.

(3) 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.

(4) (a) If agreement is reached at the meeting contemplated in subsection (2)(b) the gathering may take place in accordance with the contents of the notice, including amendments, if any, to such contents, on which agreement was reached at the meeting, but subject to the provisions of sections 5 and 6.

(b) If at a meeting contemplated in subsection (2)(b) agreement is not reached on the contents of the notice or the conditions regarding the conduct of the gathering, the responsible officer may, if there are reasonable grounds therefor, of his own accord or at the request of an authorized member impose conditions with regard to the holding of the gathering to ensure–

(i) that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or

(ii) an appropriate distance between participants in the gathering and rival gatherings; or

(iii) access to property and workplaces; or

(iv) the prevention of injury to persons or damage to property.

(c) A responsible officer who imposes any condition or refuses a request in terms of paragraph (b) shall give written reasons therefor.

(5) (a) The responsible officer shall ensure as soon as possible that a written copy of the notice,

including any amendment thereof and any condition imposed and the reasons therefor, is handed to the convener and the authorized member who, and to every party which, attended the meeting referred to in subsection (2)(b): Provided that if the identity or whereabouts of the convener is unknown, or if in view of the urgency of the case it is not practicable to deliver or tender the said written notice and reasons to him, the notice shall forthwith, notwithstanding any provision to the contrary in any other law contained, be published in one or more of the following manners:

(i) In a newspaper circulating where the gathering is to beheld; or

(ii) by means of the radio or television; or

(iii) by the distribution thereof among the public and the affixingthereof in public or prominent places where the gathering is to be held; or

(iv) by the announcement thereof orally where the gathering is to be held; or

(v) by affixing it in a prominent place at the address of the convener specified in the notice.

(b) The convener and the authorized member shall, respectively, ensure that every marshal and every member of the Police at the gathering know the contents of the notice, including any amendment or condition, if any.

(6) (a) If a gathering is postponed or delayed, the convener shall forthwith notify the responsible officer thereof and the responsible officer may call a meeting as contemplated in subsection (2)(b), and thereupon the provisions of subsections (2)(c) and (d), (3), (4) and (5) shall apply, mutatis mutandis, to the gathering in question.

(b) If a gathering is cancelled or called off, the convener shall forthwith notify the

responsible officer thereof and the notice given in terms of section 3 shall lapse.

(7) If a responsible officer is notified as contemplated in subsection (6) (a) or (b), he shall forthwith notify the authorized member accordingly.

Prevention and prohibition of gathering

5. (1) When credible information on oath is brought to the attention of a responsible officer that there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat, he shall forthwith meet or, if time does not allow it, consult with the convener and the authorized member, if possible, and any other person with whom, he believes, he should meet or consult, including the representatives of any peace committee or police community consultative forum in order to consider the prohibition of the gathering.

(4) If, after the meeting or consultation referred to in subsection (1), the responsible officer is on reasonable grounds convinced that no amendment contemplated in section 4(2) and no condition contemplated in section 4(4)(b) would prevent the occurrence of any of the circumstances contemplated in subsection (1), he may prohibit the proposed gathering.

(5) If the responsible officer decides to prohibit the gathering, he shall in a manner contemplated in section 4(5) (a), notify the convener, authorized member and every other person with whom he has so met or consulted, of the decision and the reasons therefor.

Reviews and appeals

6. (1) (a) Whenever a condition is imposed in regard to a gathering in terms of section 4(4)(b) or when a gathering is prohibited in terms of section 5(2), the convener of such gathering may apply to an appropriate magistrate for the setting aside of such prohibition or the setting aside or amendment of such condition, and the magistrate may refuse or grant the application.

(b) 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.

(4) The rules made under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), if any, shall apply mutatis mutandis in respect of an application referred to in subsection (1).

(5) (a) An application in terms of subsection (1) (a) or (b) shall be made within 24 hours after the responsible officer has given notice in terms of section 4(5)(a) of the imposition of, or the refusal to impose, the condition in question or the prohibition of, or the refusal to prohibit, the gathering in question, and under no circumstances later.

(b) Such condition shall, subject to any amendment thereof, remain in force until set aside and such prohibition shall remain in force until set aside.

(c) No order as to costs shall be made by a magistrate in respect of an application under subsection (1).

(4) A convener or authorized member referred to in subsection (1) (a) or (b), as the case may be, may by means of an urgent application in accordance with the Uniform Rules of the several Provincial and Local Divisions of the Supreme Court of South Africa, appeal against any order made by a magistrate in terms of the said subsections.

(5) Notwithstanding the provisions of subsections (1), (2) and (4), the convener. authorized member or any person whose rights may be affected by the holding of a gathering or by its prohibition or by any term in a notice or any condition imposed or failure to impose any condition in relation to a gathering may by means of an urgent application in accordance with the Uniform Rules of the several Provincial and Local Divisions of the Supreme Court of South Africa, apply to an appropriate court for the striking, out or amendment of any, such term or condition or the imposition of any other condition or for permission to hold or for a prohibition of, the gathering, and the court may strike out or amend any such term or condition or impose any other condition or grant such permission or prohibit the gathering, as it deems fit.

(6) (a) If a responsible officer or the Minister, or a court on application in terms of the common law, has prohibited a gathering at any place, or if a magistrate or court has upheld the prohibition of a gathering at any place or in the case of a demonstration or gathering contemplated in section 7(1), the authorized member concerned shall cause access to such place or any area adjacent thereto, to be barred, and such place or area shall be kept closed or inaccessible to the public, for such time as may be necessary to prevent the gathering from taking place.

(b) The authorized member shall, at the entrance to or in the vicinity of the place or area in question or in a manner described in section

4(5)(a), give notice that that place or area is so closed or inaccessible to members of the public.

(c) The police may take such steps to uphold the prohibition as are in the circumstances reasonable and appropriate, including the steps contemplated in section 9(2) (a) (i) and (ii) and, subject to paragraphs (c) and (e) of section 9(2), the steps contemplated in paragraphs (b) and (d) of section 9(2).

CHAPTER 2

Demonstrations and gatherings in vicinity of courts, buildings of Parliament and Union Buildings

7. (1) Subject to the provisions of subsection (2) all demonstrations and gatherings–

(a) in any building in which a courtroom is situated, or at any place in the open air within a radius of 100 metres from such building, on every day of the week, except Saturdays, Sundays and public holidays; and

(b) in the areas defined in–

(i) Schedule 1; and

(ii) Schedule 2, are hereby prohibited.

(2) The provisions of subsection (1) shall not apply–

(a) to any demonstration or gathering referred to in subsection (1)(a) for which permission has, on application to the magistrate of the district concerned, been granted by him in writing; or

(b) within the area contemplated in subsection (1)(b)(i), to any demonstration or gathering within such area for which permission has, on application to the Chief Magistrate of Cape Town, been granted by him in writing; or

(c) within the area contemplated in subsection (1)(b)(ii), to a demonstration or gathering within such area for which permission has, on application to the Director General: Office of

the State President, been granted by him in writing.

(3) Any application for permission contemplated in subsection (2) shall be made to the person empowered to grant such permission, within a reasonable time before such demonstration or gathering is to take place.

(4) When credible information on oath that there is a threat as contemplated in section 5(1), is brought to the attention of a person who has already granted permission in terms of subsection (2), he may, subject to the application, mutatis mutandis, of the provisions of section 5, revoke such permission, and thereupon the provisions of section 6(6) shall, mutatis mutandis, apply to the demonstration or gathering in question.

CHAPTER 3

Conduct of gatherings and demonstrations

8. The following provisions shall apply to the conduct of gatherings and, where so indicated, to the conduct of demonstrations:

(1) The convener shall appoint the number of marshals mentioned in the notice or, if it was amended in terms of section 4, in the amended notice, to control the participants in the gathering, and to take the necessary steps to ensure that the gathering at all times proceeds peacefully and that the provisions of this section and the applicable notice and conditions, if any, are complied with, and such marshals shall be clearly distinguishable.

(2) The convener shall take all reasonable steps to ensure that all marshals of the gathering and participants in the gathering or demonstration, as the case may be, are informed timeously and properly of the conditions to which the holding of the gathering or demonstration is subject.

(3) The gathering shall proceed and take place at the locality or on the route and in the manner and during the times specified in the notice or, if it was amended, in the amended notice, and in accordance with the contents of such notice and the conditions, if any, imposed under section 4(4)(b), 6(1) or 6(5).

(4) Participants at a gathering or demonstration shall abide by any law in respect of the carrying of dangerous weapons, and the convener and marshals, if any, shall take all reasonable steps to ensure that the said laws are complied with.

(5) No person present at or participating in a gathering or demonstration shall by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion.

(6) No person present at or participating in a gathering or demonstration shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons.

(7) 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.

(8) No person shall at any gathering or demonstration wear any form of apparel that resembles any of the uniforms worn by members of the security forces, including the Police and the South African Defence Force.

(9) The marshals at a gathering shall take all reasonable steps to ensure that–

(i) no entrance to any building or premises is so barred by participants that reasonable access to the said building or premises is denied to any person;

(ii) no entrance to a building or premises in or on which is situated any hospital, fire or ambulance station or any other emergency services, is barred by the participants.

(10) No person shall, in any manner whatsoever, either before or during a gathering or demonstration, compel or attempt to compel any person to attend, join or participate in the gathering or demonstration, and the convener and marshals, if any, shall take all reasonable steps to prevent any person from being so compelled.

Powers of Police

9. (1) If a gathering or demonstration is to take place, - whether or not in compliance with the provisions of this Act, a member of the Police-

(a) may, if he has reasonable grounds to believe that the Police will not be able to provide adequate protection for the people participating in such a gathering or demonstration, notify the convener and such people accordingly;

(b) may prevent people participating in a gathering from proceeding to a different place or deviating from the route specified in the relevant notice or any amendment thereof or from disobeying any condition to which the holding of the gathering is subject in terms of this Act;

(c) may, in the case of a responsible officer not receiving a notice in terms of section 3(2) more than 48 hours before the gathering, restrict the gathering to a place. or guide the participants along a route, to ensure-

(i) that vehicular or pedestrian traffic. especially during traffic rush hours, is least impeded, or an appropriate distance

between participants in the gathering and rival gatherings, or

(ii) access to property and workplaces; or

(iii) the prevention of injury to persons or damage to property;

(d) may order any person or group of persons interfering or attempting to interfere with a gathering or demonstration to cease such conduct and to remain at a distance from such gathering or demonstration specified by him;

(e) may, when an incident, whether or not it results from the gathering or demonstration, causes or may cause persons to gather at any public place, by notice in a manner contemplated in section 4(5) (a) specify an area considered by him to be necessary for-

(i) the movement and operation of emergency personnel and vehicles; or

(ii) the passage of a gathering or demonstration; or

(iii) the movement of traffic; or

(iv) the exclusion of the public from the vicinity; or

(v) the protection of property; shall take such steps, including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property, whether or not they are participating in the gathering or demonstration.

(2) (a) In the circumstances contemplated in section 6(6) or if a member of the Police of or above the rank of warrant officer has reasonable grounds to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) if the gathering or demonstration proceeds, the Police or such member, as the case may be, may and only then, take the following steps:

(i) Call upon the persons participating in the gathering or demonstration to disperse, and for that purpose he shall endeavour to obtain the attention of those persons by such lawful means as he deems most suitable, and then,

(ii) in a loud voice order them in at least two of the official languages and, if possible, in a language understood by the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable.

(b) If within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.

(c) The degree of force which may be so used shall not be greater than is necessary for dispersing the persons gathered and shall be proportionate to the circumstances of the case and the object to be attained.

(d) 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.

(3) No common law principles regarding self-defence, necessity and protection of property shall be affected by the provisions of this Act.

ANC - African National Congress
AU - African Union
APF - Anti-Privatisation Forum
COSAS - Congress of South African Students
Cosatu - Congress of South African Trade Unions
DP - Democratic Party
EU - European Union
FBI - Federal Bureau of Investigation
FXI - Freedom of Expression Institute
Gear - Growth, Employment and Redistribution
HRC - Human Rights Commission
ICCC - Ikageng Community Crisis Committee
IFG - International Forum on Globalisation
IFP - Inkatha Freedom Party
IMF - International Monetary Fund
JMPD - Johannesburg Metropolitan Police Department
LPM - Landless People's Movement
MST - Landless Workers' Movement
NCOP - National Council of Provinces
Nepad - New Partnership for Africa's Development
NIA - National Intelligence Agency
NLC - National Land Committee
NNP- New National Party
NP - National Party
OAU - Organisation of African Unity
PFLP - Popular Front for the Liberation of Palestine 105
PKK - Kurdistan Workers' Party
POPU - Public Order Policing Unit
SACP - South African Communist Party
SADC - Southern African Development Community
SADF - South African Defence Force
SAPS - South African Police Service
SECC - Soweto Electricity Crisis Committee
SF - Soldiers' Forum
SMI - Social Movements Indaba
UDF - United Democratic Front
UN - United Nations
WCAR - World Conference Against Racism
WP - Workers' Party (Brazil)
WSSD - World Summit on Sustainable Development

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