CLAMP DOWNS ON DEMOCRATIC SPACE: THE ROLE OF THE POLICE AND LITIGATION

Naadira Munshi, Socio-Economic Rights Institute

Participation in formal mechanisms of local government process is increasingly being constrained through poor implementation of policies and the influence of party politics. Local municipalities often do not have the resources, and lack political will to attend to community needs, whilst corruption frustrates communities when promises are made but never materialise.

PHOTO: SOCIO-ECONOMIC RIGHTS INSTITUTE

THE INADEQUACY OF local government to respond to community grievances and demands through formal channels of participation leads to further frustration and marginalisation of communities (Clark 2014; Webster 2015). Examples of such communities include Slovo Park and Thembelihle communities, which have engaged with the state for over 20 and 15 years respectively (SERI 2014b; SERI 2014c). The result is the exclusion of communities from formal participatory mechanisms, and the lack of delivery of services. This has led to communities turning to engagement outside of the formal participatory channels through local issue-based CBOs, social movements and community forums, as well as protest action and litigation through rights-based legal strategies.

The Constitution protects and creates the space for dissent and opposition. Section 17 of the Bill of

Rights states: 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'. The legislation which governs the right of assembly is the Regulation of Gatherings Act, 205 of 1993. The act is intended to be permissive and facilitative of public gatherings, marches and protests, and outlines a notification process to be followed by convenors of protests, the respective municipality and importantly, the South African Police Service (SAPS).

This paper begins by analysing the Regulation of Gatherings Act followed by an overview of public order policing in South Africa. Policing is essential to the maintaining of public order whilst remaining inclusive and tolerant of dissenting voices. Instead of policing with restraint, there has been a narrowing of democratic space through deliberate discrimination and persecution, without grounds, of community leaders and protestors by the SAPS. Litigation in this context has proven an important and effective tool in defending civil and political rights.

The paper demonstrates, through legal cases from the Socio-Economic Rights Institute of South Africa (SERI), the effectiveness of litigation to counter the manner in which the SAPS respond to protest action. Litigation has ensured that where protestors have been charged, their rights are protected and proper procedure is adhered to by the SAPS. The paper concludes with efforts undertaken by civil society to reclaim democratic space, and recommendations to protect democratic engagement outside of formal channels of participation.

THE LEGAL FRAMEWORK GOVERNING PROTEST

In February of 1991, a National Peace Accord, signed by the main political parties, recognised that protest forms part of a legitimate exercise of political expression and democratic participation, which needed to be protected in the post-apartheid state (Brown 2015). As part of its work, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, better known as the Goldstone Commission, was mandated to develop regulations that would govern such forms of political expression (Brown 2015). The Goldstone Commission tasked an international panel of experts to draft a set of laws in line with the Accord and international practice. This draft gave rise to the Regulation of Gatherings Act.

The genesis of the Act was to enable political expression, including protest action. It governs a set of rights, as guaranteed by the South African Constitution. Enabling constitutional rights include freedom of expression; freedom of association; freedom of movement; right to assemble, demonstrate, picket and present petitions; just administrative action; and access to justice. In democratic South Africa, the Constitution is the supreme law, and governs economic, social and political life. The protection of civil and political liberties in law and in the Constitution is an important feature of a democratic state and governance, which allows for protected democratic participation and engagement.

The purpose of the Act is to facilitate peacefully and with due regard to the rights of others:

1. The right to assemble with other persons;
2. To express views on any matter freely in public; and
3. To enjoy the protection of the State while doing so.[1]

The Act distinguishes between a demonstration and a gathering. A demonstration is defined as a group of 15 or less people demonstrating 'for or against any person, cause, action or failure to take action' (The Regulation of Gatherings Act [No. 205 of 1993]). There is no notification required for convening a demonstration. A gathering is defined as:

An *authorised member* is a representative of the SAPS who is consulted and practically ensures that a gathering proceeds as intended. Where notification is provided for an intended gathering, a responsible officer may convene a meeting in terms of section 4 of the Act.

> [A]ny 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. (The Regulation of Gatherings Act [No. 205 of 1993])

There are three main actors identified in the Act, dubbed the *golden triangle. A convenor* is the person organising the intended gathering. The *responsible officer* is the local authority (municipality) within whose area of jurisdiction a gathering is to take place. Powers are given to a magistrate where a municipality does not exist or is not functioning. An *authorised member* is a representative of the SAPS who is consulted and practically ensures that a gathering proceeds as intended. Where notification is provided for an intended gathering, a responsible officer may convene a meeting in terms of section 4 of the Act. At section 4 meetings, concerns are raised and addressed to ensure the gathering proceeds in accordance with the Act.

Through examining the implementation of the Regulation of Gatherings Act below, the paper demonstrates how municipalities and the SAPS often misinterpret and abuse their power to stop or place additional conditions on gatherings. Despite the problems with the implementation of the Act, it remains an important piece of legislation that protects the right to assembly.

IMPLEMENTATION THE REGULATION OF GATHERINGS ACT

The Act delegates powers and duties to members of the golden triangle. Yet increasingly, municipalities and police stations are sites of protest, which was not envisaged by the drafters of the act. Local power dynamics between communities, the SAPS, and local councillors are a cause for concern (van Holdt et al. 2012). The independence of municipalities is questionable due to unwarranted political interference. When local councillors are invited into Section 4 meetings, tensions often increase and gatherings are not allowed to proceed. Differences between community organisations and their relations to the ruling alliance may result in the suppression of their right to protest as demonstrated below in the case of Makause. However, this may not always be the case. For example in Rustenburg Municipality, COSATU and SANCO-led marches have not always been approved (Duncan and Royappen 2013).[2]

It is the SAPS's responsibility is to ensure that a gathering proceeds without disruption. Often, the SAPS exceed their mandate by hindering the process of section 4 meetings or prohibiting a protest. Authorities also delay by not calling a section 4 meeting, or calling for a meeting within hours of the planned gathering (FXI 2003; SERI 2014a).

Some municipalities have placed additional requirements for convenors to comply with which are not required by the Act. The level of restrictive measures that municipalities put in place differ, and generally, protests are the most prohibited form of gathering. For example the Rustenburg Municipality, disapproved protests for the following reasons:

- There was no recipient available to receive the memorandum.
- The list of marshals was missing.
- The confirmation of the use of the venue was missing.
- The application not made within the required time.
- No map of the route was provided.
- No letter of approval from the magistrate's court was provided when protests took place outside the court.
- The police were unable to provide assistance for the gathering. (Duncan and Royeppen 2014)[3]

In 2012, the Department of Co-operative Governance and Traditional Affairs (COGTA) sent a memo advising municipalities about how to bring down the rate of protests. A proactive measure municipalities could take was: '[working] with the office of the speaker [and] public participation units to ensure ongoing engagement between councillors and communities and residents' (Duncan and Royeppen 2014). This was interpreted to mean that convenors must show that they made all possible attempts to engage before being allowed to gather. In Mbombela, not approving allegedly troublesome gatherings has led to an increase in unrest-related protests taking place outside of the Act, and therefore more vulnerable to forceful intervention by the SAPS (Duncan and Royeppen 2014).[4] The increase of such protests has been attributed to municipalities making it increasingly difficult to protest in accordance with the Act. When protests do proceed, protestors are at risk of being criminalised under the Act.[5]

Despite the challenges of the Act, from an international comparative perspective, the Act is viewed as largely being in compliance with international human rights law. Various countries, including Swaziland and Northern Ireland, have used parts of the Act (and the South African model of the golden triangle meeting) as a basis to draft new law and develop a system of notification for assemblies. The Act has been cited as an example of good practice on the international level. In a context where the state is increasingly intolerant to dissent, a challenge to the Act in its entirety is strategically unwise. An opportunity to further bureaucratise the notification process may result in the further narrowing of democratic space, and, as demonstrated above, in protest action taking place outside of the Act.

A key challenge in South Africa is finding a way to bridge the gap between the rights and values of the Constitution, the obligations of the state to protect the right to assemble and freedom of expression, and the practices that unfold on the ground. The existing legislation is meaningless when state institutions do not value or uphold the principles of the Constitution. A tension exists between the legislation and the actions of the SAPS. The SAPS have found ways of using the criminal justice system to deliberately punish and harass protestors. As demonstrated below, community leaders and activists are targeted and caught up in drawn out legal action. It is therefore not enough for laws such as the Regulation of Gatherings Act to exist in isolation. Municipalities and the SAPS need to understand and buy into the existing legislation and the principles that inform them so that the gap between law and practice is bridged. The next section focuses on the SAPS and their response to protest action.

POLICING OF PROTESTS IN DEMOCRATIC SOUTH AFRICA

PUBLIC ORDER POLICING

The SAPS's conduct of the policing of gatherings is essential to understanding local democratic space. The SAPS's actions demonstrate the unwillingness of the state to tolerate dissent in the form of protest action. Of particular relevance is the history of public order police in South Africa.

Since the transition to a democratic South Africa, there have been a number of changes made to the SAPS to train police officers in public order policing and restructure the apartheid riot police units. Restructuring took place in 1992 and again in 1996 to what became known as Public Order Policing Units (POPU) (Omar 2007). POPU were designed to be more community orientated and its philosophy shifted from crowd control to crowd management which brings together the police and organisers to ensure that crowds remain peaceful. In 2002 and 2006, POPU were further restructured to decentralised units as the need for public order policing declined. Trained POP members decreased from approximately 11 000 in 1992, to a mere 2595 in 2006 (Alexander et al. 2015). As the number of protest began to increase, in particular the rise of service delivery protests, SAPS's ability to conduct crowd management had decreased.

Between 1997 and 2013, 156 230 crowd incidents were recorded, of which 90% were classified as crowd peaceful and 10% classified as crowd unrest (Alexander et al. 2015). The classification of incidents as crowd peaceful or crowd unrest is determined on the character of police intervention. Where an incident requires some form of intervention by POP members, such as arrests, dispersals, push-backs or the opening of criminal cases, it is classified as unrest. Whilst further analysis is required, these statistics point to the far lower number of violent protests than is popularly believed to be the case (Right2Know 2012; Alexander et al. 2015).

THE SAPS RESPONSE TO PROTEST

With the decline in specialised POP units, the number of people killed during protest action has increased (CASAC 2013).[6] This is attributed to the re-establishment of Operational Response Services (ORS) as a full SAPS division which include paramilitary units such as the Special Task Force (STF), National Intervention Unit (NIU) and Tactical Response Team (TRT).[7] These specialised units carry lethal weapons and have been called to assist in public order policing. The rise in police killing is also attributed to SAPS training, lack of accountability and a culture which is permissive of brutality.[8]

The culmination of the use of force by the police was the killing of 37 mineworkers during a labour strike for a living wage at Lonmin Mine, in Marikana, North West in August 2012. Marikana is significant because it demonstrates the SAPS failure to conduct effective public order policing, the consequences of militarised SAPS units policing public order incidents, and the impact of political interference on policing. The SAPS foresaw that there would be deaths when they requested 4 mortuary vehicles and 4000 rounds of live ammunition on the morning of the 16th of August 2012 (Report of Marikana Commission of Inquiry 2015). The SAPS units present on the day included the TRT, STF, NIU, K-9 (dog units) and POPU. The TRT were responsible for the use of semi-automatic R5 combat rifles which killed 17 people at scene one of the killings, and TRT and other units killed 17 workers at scene two. The police then arrested 270 mineworkers, charging them under the Doctrine of Common Purpose.[9] The legal doctrine is notorious for being used by the apartheid state to avoid police accountability and to arrest anti-apartheid activists.

Following Marikana, there were calls for the army to assist the November 2012 farm workers strike at De Doorns, Western Cape. The strike claimed the

lives of at least two people by the SAPS.[10] Most recently, the state response to the student protests against increases in university fees have again brought into question the excessive use of force by the SAPS. Whilst the SAPS have largely exercised caution in using live ammunition, they have not been restrained in their use of stun grenades, rubber bullets, tear gas, and general show of force with armoured vehicles and physical presence. The 2015, student uprising was accompanied by hundreds of student arrests around the country.

The attitude of the state towards protest has been concerning. The state has demonstrated a willingness to use force to fight crime, and with protest action increasingly being criminalised, this use of force is extended towards stopping protest action (CASAC 2013). President Jacob Zuma, whilst addressing students at Tshwane University of Technology, said 'do not use violence to express yourselves, or I might be forced to relook at the apartheid laws that used violence to suppress people'.[11]

Of great concern is the rising intimidation and harassment to crush dissent. Activists and leaders of protests increasingly face criminal charges of public violence and malicious damage to property. Once arrested and charged, activists enter into the criminal justice system, which is an intimidating and lengthy process. As demonstrated through the examples in the sections below, charges are sometimes dropped, or the accused are acquitted as the SAPS fail to produce evidence linking the accused to a crime. The politicisation of the criminal justice system undermines the intentions of the Regulation of Gatherings Act founding principles and premise that people are rational agents who consciously use protest action to voice their discontent (Brown 2016).

Litigation has been necessary to mitigate some of these abuses. When activists are arrested and charged during protest action, legal representation is important to ensure their rights are protected, and they are not unlawfully detained without charge or access to bail.

With the increasing suppression of dissent, criminal defence services, including bail applications are needed to protect civil and political rights of citizens raising discontent.

LITIGATION AS A MEANS OF RECLAIMING DEMOCRATIC SPACE

Public legal interest services are an important political tool to achieve social change (SERI 2015). Despite its limitations, litigation, when used strategically and in conjunction with other political and social strategies, has proven effective in challenging established institutional power, contributing to the building of social movements and making positive interventions in key sectors of society. This includes addressing the social needs of people to access social goods such as healthcare, education and housing, addressing the needs of vulnerable groups, and holding the state to account (SERI 2015).

With the increasing suppression of dissent, criminal defence services, including bail applications are needed to protect civil and political rights of citizens raising discontent. As a result, organisations like SERI have responded by developing skills in criminal law in order to provide criminal defence services, in addition to defending socio-economic rights. The silencing of dissent has heralded a new moment in the democratic era in South Africa, one in which classic human rights defence work is again on the agenda. This kind of litigation is critical for protecting democracy and socio-economic rights realisation and can no longer easily be separated

from civil and political rights (SERI 2015). In this sense, opening up democratic space is a significant site of impact for litigation strategies.

SERI's clients live in the inner city of Johannesburg, as well as in numerous townships across the country, and often include community organisations and local activists. Their engagement and participation with local government has taken on numerous forms. Predominantly, this has been formal engagement through ward councillors, the speaker's office, engagements with the city, and through litigation. Protest action has been one informal means of engagement and has been a tool employed by movements at specific moments in their struggle. SERI's client-led representation of activists who are arrested in protest action is due to the recognition that the state has begun to use the criminal justice system as a means of silencing dissent. The provision of criminal defence services means that lawyers are present to ensure that the lawful processes are followed to access bail and prevent unlawful detentions. The issues that arise from the case studies include wrongful arrest, targeted harassment and intimidation of activists and the abuse of the criminal justice system. Below are three examples of this.

ABAHLALI BASE MJONDOLO (ABAHLALI)

- On 12 September, 2006, Abahlali's chairperson Sbu Zikode was travelling with Philani Zungu when their vehicle was stopped and searched by the police. They were assaulted, arrested and charged with *crimen injuria*, assaulting a police officer and resisting arrest. The prosecutor did not deem the charges worthy of prosecution. In response, residents of Kennedy Road informal settlement gathered at a local community hall and were preparing to march to the police station when they were dispersed by the SAPS with live ammunition, tear gas and rubber bullets. SERI pursued a civil claim on behalf of the accused which resulted in the state paying damages.
- On 27 and 28 September, 2009, an armed mob at Kennedy Road informal settlement attacked and evicted a number of Abahlali members from the Kennedy Road informal settlement. The SAPS knowingly arrested 12 Abahlali members instead of the mob, and charged them with a range of charges from public violence to murder. The trial was concluded on 18 July, 2011, with all charges against the accused dropped. Once again, the SAPS failed to provide evidence.
- On 30 September, 2013, Bandile Mdlalose, then General Secretary of Abahlali, was arrested and charged with public violence in Durban. Her arrest occurred after she arrived at Cato Crest informal settlement to show support to the family of Nqobile Nzuza, who was shot and killed following a protest against illegal evictions at the settlement. She was held for a week at the Westville police station before being granted bail of R5000 on condition that she did not enter the Cato Manor area until the finalisation of her trail, and she reported to the station every Monday and Friday. On the 7 August 2014, she was acquitted of all charges as the SAPS failed to produce any evidence linking her to a crime.

THEMBELIHLE

- SERI represented 14 residents, including 3 minors, of the Thembelihle informal settlement in Johannesburg who were arrested from the 5th to the 9th of September, 2011, following protests against the lack of services such electricity and water. The MEC for Local Government and Housing addressed the community on the second day of the protest, but refused to address the grievances saying residents would

be relocated (SERI 2014c). After seven months and nine postponements to prepare its case, the state could not produce an adequate charge sheet with details of the offences of which the residents stood accused. Instead, the SAPS kept postponing, preventing the residents from engaging in political action. The case was struck from the roll on the 10th of April 2012 at the Protea Regional Court.

- One of the 14 people arrested was the Chairperson of the Thembelihle Crisis Committee, Bhayi Bhayi Miya. The state delayed his bail proceedings by adding charges of malicious damage to property and arson against him. They also argued that Miya owned no assets, lived in an informal settlement and therefore was likely to evade trial, and should be held in preventative detention. He was denied bail by the Magistrate Court. Well over a month after his arrest, the South Gauteng High Court granted Miya bail after the state conceded that there was little evidence to link Miya to any crime, and in fact he had tried to ensure that the protests remained peaceful.
- On the 26th of February, 2015, the SAPS arbitrarily arrested 32 residents from Thembelihle informal settlement following a protest where residents expressed anger towards the MEC for Traditional Affairs and Human Settlements. Public violence charges were brought against 27 residents who were detained for four nights because the police failed to charge them timeously.[12] The magistrate set bail for the residents despite the state arguing it needed seven days to verify residential addresses because the accused lived in allegedly unnavigable informal settlements. Although they were granted bail, the residents spent a fifth night in jail because the cashier's office was closed. Despite the lack of credible evidence, 13 residents made a deal with the prosecution for diversion[13], and the remainder who continued with the trial had their charges withdrawn.
- During the week of the 25th of January, 2016, 28 residents of Precast and Thembelihle were arrested following a two day protest in the area. Bail was granted almost three weeks after their arrest. Some of the residents lost their jobs, and many families lost income, during this extended and unwarranted detention. The state continued to oppose bail despite providing no evidence to link the accused to an offence. The magistrate granted bail of R500 per person.

The above cases demonstrate the deliberate detention and discrimination against communities and their leaders by the SAPS. The protests are focused around local service delivery issues yet the SAPS have often responded with violence, arrests and criminal charges. The SAPS know the community leaders, and when protests occur, they are obvious targets for arrest (Knoetze 2014).[14] Many of these charges have been difficult to uphold in court, as demonstrated above. Legal representation has been crucial to ensure community activists were granted bail and to mitigate the consequences of arrest where possible. With increasing numbers of political arrests, the number of people held in extended preventative detention without charge is of grave concern. In the case of Makause below, tensions that existed between the local ANC branch, the police station and the community impacted on how the SAPS responded to the intended protest action, even when the community complied with the Act.

The protests are focused around local service delivery issues yet the SAPS have often responded with violence, arrests and criminal charges.

MAKAUSE

- In September, 2012, Makause Community Development Forum (Macodefo) gave notice in terms of the Regulation of Gatherings Act 205 of 1993 to the Ekurhuleni Metropolitan Police Department (EMPD), notifying them of a planned protest march on the 5th of October, 2012. The purpose of the march was, among others, to protest against police brutality by the Primrose SAPS, the police's alleged refusal to investigate the Makause residents' cases, and the lack of police action in investigating the attack on the Macodefo offices and homes in August 2012. The march was refused by the station commander who threatened that if it proceeded there would be 'another Marikana' (SERI 2014a).
- The Macodefo re-applied for the march to be held on 19 October 2012. Despite it being telephonically approved, a day before the march, a meeting in terms of section 4 of the Act was convened inappropriately and obscurely at the Primrose police station which was the very station that the Macodefo was planning to march against. The SAPS officers invited the local ANC members who by then had set up an alternative structure in Makause to challenge Macodefo's legitimacy (SERI 2014a). The police refused to allow the march to proceed.
- The following day Makause residents convened a mass meeting to decide on a way forward. The SAPS arrived in numbers, dispersed the peaceful crowd, and arrested the Chairperson General Alfred Moyo. Three further arrests took place at the police station, and bail of R1 000 was eventually granted. After several unreasonable delays and postponements, the state dropped the all charges except a charge of "intimidation" in terms of the Intimidation Act 72 of 1982 against Moyo. A complete charge sheet and a docket in connection with his trial were not provided to him until a full year after his arrest. The case was provisionally withdrawn pending the outcome of a constitutional challenge to the Intimidation Act.[15]

Moyo argues that the charges were an attempt to frustrate the Macodefo's legitimate rights to protest against and criticise what they see as biased policing practices sanctioned by the local police station. Even when communities try to engage in the established processes set out in the Act, they are frustrated and denied the right to assemble. It was clear that the SAPS were protecting their own interest, as well as the local political interests of the councillors. Further, the arrest and charges against Moyo were a deliberate attempt to intimidate a well-known community activist and leader.

CONCLUSION

This paper has demonstrated that claims of police harassment, intimidation, excessive use of force, and deliberate discrimination and persecution without grounds are not unfounded. The problem is systemic, and some of the most significant implications are that the SAPS need to rebuild their capacity to conduct public order policing whilst training needs to emphasis restraint. The current political climate in which the SAPS operate allows them to make arbitrary arrests, delay charging people, and hold people in prolonged detention without fear of accountability. Litigation in this context has been effective in ensuring that basic citizens' rights have been protected, and legal process following an arrest have been adhered to.

The arrests of known community leaders and activists are neither coincidental nor non-partisan. Trusting, accountable and effective relations between local government, communities and the police force must be built and maintained. Protest actions needs to be respected and protected as both legitimate

and rational democratic action in the light of the failure of the state to provide adequate services, and its inability to address community concerns. By respecting citizens' rights to gather, and by respecting leadership structures outside formal institutions, political leaders and the SAPS can ensure that local government remains a democratic yet contested space. Rather than being inimical to democracy, community based organisations and social movements are legitimate vehicles for democratic participation, including holding power accountable. Instead of silencing dissent, protest should be treated as an opportunity for local government to remain consultative, transparent and accountable in an effort to maintain effective democratic governance. After all, contestation is a central feature of democracy.

Litigation has proved an important tool in ensuring that when arrests have been made, the arrested are able to get bail as soon as possible. It has also made it difficult for the state to demobilise community organising, especially when charges are dropped or the accused are acquitted. But litigation has also been necessary in challenging the legislation. There are two important cases reported previously before the courts which are challenging the criminalisation of protest under the Regulation of Gatherings Act; and the "illegality" of protest. Both are being run by NGO's in the public interest legal sector.[16]

Civil society therefore needs to continue to build a coordinated effort to challenge and document the closing down of political space. This includes strengthening its effort to provide legal representation for communities and activists engaged in protest action. There are lessons to be drawn from the student uprising, including how to be responsive to the needs on the ground and supporting those who have been targeted and harassed. More importantly, civil society needs respond to the daily abuses against poor people who engage in protest activity across South Africa, in an effort to access basic services. Advocacy strategies to engage with municipalities, government departments and the SAPS both on legislation governing protest and on the policing of protest are urgently required.

Training for municipal officials on the purpose and procedure outlined in the Regulation of Gatherings Act is needed. Officials need to be more informed on the procedure of holding section 4 meetings, their purpose, and their responsibility, despite conflicting political interests. Training for municipalities could be headed by SALGA.

Following the recommendations of the Farlam Commission, the Ministerial task team set up to investigate POP provides an opportunity for related departments within the police service and local government to conduct police training on the Act, and importantly training on building trusting and meaningful relationships with communities.

The spirit in which the Regulation of Gatherings Act was drafted must be revived. It saw protest as an integral part of democratic participation that needs to be protected. The right to assembly must be respected by government – especially the national political leadership, COGTA, and local government, including ward councillors. Protest reveals community frustrations, needs, desires and directs government to improve. Rather than posing a threat to local government, protest must be treated as an integral aspect of democratic engagement.

REFERENCES

Alexander P, Runciman C and Maruping B (2015) *South African Police Service Data on Crowd Incidents: A Preliminary Analysis*. Research Chair in Social Change, University of Johannesburg.

Brown J (2015) *South Africa's Insurgent Citizens*. Jacana Media.

CASAC (Council for the Advancement of the South African Constitution) (2013) *The role of the South African Police Service in the Marikana massacre on 16 August 2012:* Submission by CASAC to the Marikana Commission of Inquiry. CASAC.

Clark M (2014) *An Anatomy of Dissent and Repression: The Criminal Justice System and the 2011 Thembelihle Protest*. Johannesburg: SERI.

Office of the Presidency (2015) *Marikana Commission of Inquiry: Report on matters of Public, National and International Concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province*. Pretoria: Office of the Presidency.

FXI (Freedom of Expression Institute) (2003) *The right to dissent: Freedom of Expression, assembly and demonstration in South Africa*. Johannesburg: FXI.

Omar B (2007) A Review of Public Order Policing Capacity *ISS Monograph Series:* 138. Institute for Security Studies.

Right2Know Campaign (2015) *Defending the Right to Protest* Right2Know Campaign comments on Draft White Paper on Policing.

SERI (Socio Economic Rights Institute of South Africa) (2015) *Public Legal Interest Services in South Africa: Project Report*. Johannesburg: SERI.

SERI (Socio-Economic Rights Institute of South Africa) (2014a) *Makause: Resisting Relocation on the East Rand* (Community Practice Note). Johannesburg: SERI.

SERI (Socio-Economic Rights Institute of South Africa) (2014b) *Slovo Park: Twenty Years of Broken Promises* (Community Practice Note). Johannesburg: SERI.

SERI (Socio-Economic Rights Institute of South Africa) (2014c) *Thembelihle: Engaging an Unresponsive State* (Community Practice Note). Johannesburg: SERI.

von Holdt K et al. (2011) *The smoke that calls: Insurgent citizenship and the struggle for a place in the new South Africa*. Johannesburg: Centre for the Study of Violence and Society, Work and Development Institute.

NOTES

1 This section draws heavily on the Regulation of Gatherings Act, 205 of 1993

2 Duncan J and Royeppen A, Inside Rustenburg's banned protests, *Daily Maverick*, URL: http://www.dailymaverick.co.za/article/2013-03-07-inside-rustenbergs-banned-protests/, 7 March 2013.

3 Duncan J and Royeppen A, People's protest is being criminalised, *Mail and Guardian Online*, URL: http://mg.co.za/article/2014-05-01-peoples-protest-is-being-criminalised, 2 May 2014.

4 J Duncan &A Royeppen, People's protest is being criminalised, *Mail and Guardian Online*, URL: http://mg.co.za/article/2014-05-01-peoples-protest-is-being-criminalised, 2 May 2014.

5 There are two cases currently before court. In *The State vs Phumeza Mlungwana and 20 Others*, 21 protestors were initially arrested for holding an unlawful gathering. In *Tsoaeli and 93 others v State*, 94 Community Health Workers were arrested for being part of an "illegal gathering". The possibility of conviction under the Act may act as deterrence for people wanting to gather.

6 Bruce D, The Road to Marikana: Abuses of Force during Public Order Policing Operations, *The South African Civil Society Information Service*, URL: http://sacsis.org.za/site/article/1455, 12 Oct 2012.

7 Bruce D, The Road to Marikana: Abuses of Force during Public Order Policing Operations, *The South African Civil Society Information Service*, URL: http://sacsis.org.za/site/article/1455, 12 Oct 2012.

8 Bruce D, The Police at War Again, *The South African Civil Society Information Service*, URL: http://sacsis.org.za/site/article/1590, 4 March 2013.

9 Mail and Guardian Online, *Lonmin miners charged with murder, Mail and Guardian Online*, URL: http://mg.co.za/article/2012-08-30-18-lonmin-miners-charged-with-murder, 30 August 2012.

[10] SAPA, Zille wants army in Western Cape's rural areas, *Mail and Guardian Online*, URL: http://mg.co.za/article/2012-11-28-zille-wants-army-in-rural-areas, 28 November 2012; and Roelf W, Man dies from rubber bullets during W Cape farm protest, *Mail and Guardian Online*, URL: http://mg.co.za/article/2013-01-15-western-cape-farm-protest-death-toll-rises-to-3, 15 January 2013.

[11] Van Onselen G, Zuma and apartheid: The excuse with a thousand faces, *Business Day Live*, URL: http://www.bdlive.co.za/opinion/columnists/2015/07/01/zuma-and-apartheid-the-excuse-with-a-thousand-faces, 1 July 2015.

[12] They were charged 24 hours after their arrest, on a Friday and therefore not in time to be heard in court before the next Monday.

[13] By accepting a diversion, the accused do not go to trial. This is often an easier option as SERI clients have lost jobs after missing work during their arrest, and often do not have the luxury of following staying through to the end of the trial. Had they not taken diversion, it likely the charges against then would have been drawn for lack of evidence.

[14] Knoetze D, Criminalising protest and dissent in South Africa, *Mail and Guardian Online*, URL: http://mg.co.za/article/2014-09-18-criminalising-protest-and-dissent-in-south-africa, 18 September 2014.

[15] The case was heard by the North Gauteng High Court on 1 September 2015. At the time of print, judgement was still pending.

[16] See note 6 above: The Legal Resources Centre is representing the Social Justice Coalition in *The State vs Phumeza Mlungwana and 20 Others*. Section 27 is representing the TAC and Community Health Workers in *Tsoaeli and 93 others v State*.

[17] Civil Society organisations, including those in the Public Interest Legal Sector, have formalised the Right to Protest Project to respond to the growing need for legal representation, and advocacy work in relation to protest action. The project aims to provide legal representation for protest-related cases, conduct research, and provide information and practical assistance to convenors of gatherings, in line with the Regulation of Gatherings Act.