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Students' right to demonstrate at South African universities

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Table of Contents

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List of Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress
APF	Anti-Privatisation Forum
ASA	African Students Association
AU	African Union
AZAPO	Azanian People's Organisation
ICCPR	International Covenant on Civil and Political Rights
NSFAS	National Student Financial Aid Scheme
NUSAS	National Union of South African Students
OAU	Organisation of the African Unity
RGA	Regulation of Gatherings Act
SANSCO	South African National Congress
SAPS	South African Police Service
SASCO	South African Students Congress
SASO	South African Student Organisation
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
NRA	National Road Agency

Chapter 1: Introductory Chapter

1. Introduction

In South Africa, the culture of student's protests is not a new phenomenon as it dates way back to the anti-Apartheid protests of different sorts. Fast forward to post-Apartheid and disadvantaged students are still protesting routinely against rising fees and the cost of higher education. These protests not only resulted in massive disruptions but also to retaliation from the authorities in the form of the repeated assault of the participants, use of firearms and detention of students. The wide-spread student protests in higher education institutions following the 2015/2016 #FeesMustFall movement were in pursuit of the realization of the overarching objective of free education. Despite the achievement of a 0% fee increase in 2016 and increased government funding for Universities, the protests also resulted in a loss of quality learning time, the destruction of property, injuries, arrests of students, exclusion of students from campuses and others excluded from furthering their studies. The fact that the Constitution of South Africa guarantees citizens right to protest, this thesis examined the students' right to demonstrate in South African Universities and looked into the extent to which the right is being recognized and how it can be protected.

2. Research Problem

In 2015/2016, student-led protests gained momentum and spread across the country; the #FeesMustFall campaign led to heated debates about fee increases in universities.[1] Students further demanded the decolonization of the educational system, the transformation of universities to address radical and gender inequalities in terms of staff composition and also the insourcing of domestic workers.[2] At the start, these protests were peaceful and gained considerable support from academics and various stakeholders. The message being put across was very clear; the costs of higher education were too high and unaffordable to the majority of the students.[3] But

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1 Langa, M 'an analysis of the FeesMustFall movement at South African Universities.' 1 Jan 2017 https://csvr.org.za (accessed 10 February 2018).

2 n 1 above, 6

3 n 1 above, 6.

as the protests continued to gain momentum, support quickly waned as the protests started to turn violent.

Notwithstanding the fact that all the violence that occurred cannot be blamed on the police, the police easily resorted to shooting the protesters with rubber bullets and stun grenades in order to disperse the protesters. For example, on 23rd October 2015, police officers used stun grenades, rubber bullets, tear gas and water cannons to disperse protesting students at the Union Buildings.[4] On 20th October 2016, Eye Witness News (EWN) reported that police fired stun grenades to disperse groups of students at both the Union Buildings in Pretoria and at WITS University.[5]

As a result of the #FeesMustFall movement and its protests in all South African Universities, the public became more aware of the shortage of funding for higher education. This movement forced the hand of the state and, as a result, former President Jacob Zuma announced that there would be no fees increase for the 2016 academic year, and that, furthermore, the government was committed to putting additional funding into the National Student Financial Aid Scheme (NSFAS) in order to increase financial support for students.[6]

The former president also announced, in December 2017, that higher education would be free for poor and working-class students.[7] The new President, Cyril Ramaphosa, during his State of the Nation Address provided some clarity by saying, "Honorable Members, On 16 December last year, former President Jacob Zuma announced that government would phase in fully subsidized free higher education and training for poor and working-class South Africans over a five-year period. Starting this year, free higher education and training will be available to first-year students from households with a gross combined annual income of up to R350, 000.[8] The Minister of Higher Education

4 https://www.ewn.co.za/2015/10/23/running-battles-continue-between-cops-students-at-union-buildings (accessed 10 February,2018).

5 n 4 above.

6 https://ww.enca.com/south-africa/president-zuma-addresses-protesing-students (accessed 10 February 2019).

7 https://m.news24.com/SouthAfrica/News/Zuma-announces-free-higher-education-for-poor-and working-class-students-20171216 (accessed 10 February 2019).

8 https://www.biznews.com/undicated/2018/01/05/zumas-free-education-promise/amp (accessed February 10 2018)

and Training will lead the implementation of this policy, while the Minister of Finance will clarify all aspects of the financing of the scheme during his Budget Speech next week…Funza Lushaka Bursary Programme plans to award 39,500 bursaries for Initial Teacher Education over the next three years." These initiatives sound promising, but they do not address the root causes of the protests and how student protests are handled by the university authorities and the police force. The National Government still remains relatively silent in this regard.

As stated in the Constitution of the Republic of South Africa, everyone has a right, peacefully and unarmed, to demonstrate, to picket and to present petitions.[9] Moreover, the Gatherings Act states that gatherings should be dispersed forcefully only under the most extreme of conditions: where there is no other way of guaranteeing public safety, and when the protestors have been warned to disperse. No protest that is peaceful and unarmed should be dispersed.[10] So, looking at the state of the protests in 2015, documentary evidence recorded cases of private security guards and police using force to disperse persons assembled and gathered peacefully and unarmed.[11] Students were arrested and some are still on trial for violating interdicts granted to the Universities.

#FEESMUSTFALL activist Bonginkosi Khanyile is one of the students that was charged with public violence and failing to comply with a police order during the height of the 2016 nationwide student protests. He has been given a suspended five-year sentence and a R5000 fine finally bringing to an end a matter that has been hanging over his head for two years. Magistrate Siswe Hlophe handed down judgment ordering that Khanyile is placed under house arrest for three years and must pay a fine of R5000.

In December 2018, a group of 32 young activists led by Khanyile embarked on a tough, close to 500km walk from KwaZulu-Natal to the Union Buildings in Pretoria to hand over their memorandum to President Cyril Ramaphosa, calling for blanket amnesty for

9 The Constitution of the Republic of South Africa sec 17

10 Regulation of the Gatherings Act 205 of 1993.

11 Duncan, J and Frassinelli, P.P. (2015), the right to protest? : An account of Human Rights violations during #FeesMustFall #OccupyUJ and #Endoutsourcing protests at the University of Johannesburg.

students convicted of crimes arising from the #FeesMustFall protests. The aim of this walk now known as “The Historic Walk”, was to highlight the plight of poor young people in South Africa and to stand in solidarity with jailed #FeesMustFall activist Khaya Cekeshe. The Historic Walk began on 18 December 2018 and ended on 2 January 2019. Khaya Cekeshe was sentenced in December 2017 for his role in the October 2016 protests by Wits University students, although he was not a student at the institution. He was caught on a CCTV camera trying to set alight a police car. Cekeshe is currently serving an eight-year sentence at Leeuwkop prison, for setting a police van alight during the 2016 student protests.

This begs the questions: “Why did these protests become violent?” “What are the limitations to the right to protest?” “Who is to blame for the violence that erupted as a result of these protests - the students, the police, the universities for ignoring, and the government for their initial dismissiveness?”

To try to answer the above questions, using literature from various publications, this research study focused on the following research question: **To what extent are the student protests within or outside the ambit of the law, including international law, and is the response by the university authorities and police justifiable?**

3. Research Questions

By way of answering the research problem, the research will focus on answering the following research questions:

1. What is the history of demonstrations in South Africa?
2. To what extent can South African students express their right to demonstrate?
3. To what extent is the South African Law on the right to protest compatible with the African Charter?

4. Research Objectives

The objectives of this study served as a guide to the research study and are listed below;

- To examine the scope of the students' right to demonstrate as per the constitution; and
- To analyze the extent to which the students' rights to protest are within or outside the ambit of the law, including International Human Rights Law.

5. Literature Review

In an article by Lisa Chamberlain, she notes that the constitution of the Republic of South Africa contains a Bill of rights which is the cornerstone of democracy in South Africa and it enshrines the rights of all the people in the country and affirms the democratic values of human dignity, equality, and freedom.[12] She goes on to state

[12] L Chamberlain 'Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and access to information in South Africa' (2016) 16 African Human Rights Law Journal 365-384 http://dx.doi.org/10.17159/1996-2096/2016/v16n2a3.

that, the right to Assembly, demonstration, picket, and petition are both enshrined in the constitution of South Africa in section 17.[13]

“Assembly, demonstration, picket, and petition

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

The right to protest is a justiciable right, and the Regulation of Gathering Act 205 of 1993 (Gathering Act) was passed in order to provide basic details on how this right can be exercised.[14] This is the law that regulates the right to protest. In the case, South African Transport, and Allied Workers Union and Another v Garvas and others, [15] “the constitutional court acknowledged that the right to protest was central to South Africa’s Constitutional democracy as it exists primarily to give a voice to groups that do not have political or economic power. The right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of the advancing human rights and freedoms.” Jafta J,[16] held that ‘ it is through the exercise of section 17 rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery.’ The Gatherings Act came into operation at the beginning of South Africa’s democracy as a result of the Goldstone commission of inquiry to bring South Africa’s assembly jurisprudence at par with international practice.[17] The Preamble states that ‘every person has a right to assemble with other persons to express their views on any matter in public and enjoy the protection of the state while doing so’, although this right is qualified by the duty to protest, peacefully and with due regard of the rights of others’.[18]

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13 n 12 above.

14 n 12 above.

15 The case, South African Transport and Allied workers Union &Another V Garvas and others 2013 (1) SA 83 (CC), as discussed in Chamberlain (n 12 above).

16 n 12 above.

17 n 12 above.

18 n 12 above.

In an article by Jameelah Omar,[19] she notes that the procedure for a lawful protest involves three primary components which are stated in the Gatherings Act. Firstly, the provisions that ought to apply prior to a protest taking place which includes, the role of the convener, the notice procedure, consultations, negotiations and conditions, how protests can be prohibited and the procedures for appeal or review of such prohibition.[20]Secondly, one has to look into the conduct during gatherings and the powers of the police during a protest.[21] Lastly, the final component addresses the post-protest phase, namely the liability for damages, and offences and penalties.[22]

Jameelah Omar notes that in the Gatherings Act the terms 'demonstration' and 'gathering' which differ from the terms used in Section 17 of the constitution that uses the terms 'assembly' and 'picket'. 'Public Gathering' as defined in the Gathering Act, is assembly, enclosure or procession of more than 15 people on a public road,[23] or any other public place wholly or partly open to air'. She goes on to note that, as per the Act, it is important to note that a demonstration that involves more than one but fewer than 15 persons does not require prior notice, while a gathering is an assembly, concourse or procession of more than 15 persons in a public space and does not require prior notice.[24] The act does not properly define these terms but instead uses additional terms in relation to gatherings, namely assembly, concourse or procession which are also not defined.[25] The terms demonstration and gathering are not defined in the Act, but rather, the act gives alternatives terms that may refer to gathering. The purposes of a gathering can include criticising or promoting a policy or actions of any government, political party or political organisation, the handing over of petitions, and demonstrating either support for or opposition to, the policy or actions of any person or institution including any government, administration or government institution.[26] Chamberlain notes there are three main actors involved in protest procedures and they are, the municipality, the police and the convener of the gathering as stated in

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19 J Omar 'A legal analysis in context: The Regulation of the Gatherings Act – a hindrance to the right to Protest? (2017) *62 SA Crime Quarterly* 21-31.

20 n 19 above.

21 n 19 above.

22 n 19 above.

23 n 19 above.

24 n 19 above.

25 n 19 above.

26 n 12 above.

the Gatherings Act.[27] She goes on to state that Section 2(1),[28] defines a convener as the leader of the gathering and is appointed by the person organisation arranging the gathering to be the point of contact.

In an article by Chamberlain and Gina Snyman,[29] they noted that in the case, S v Mamabolo,[30] it was restated by the court in this case that freedom of expression is 'an inherent quality' of an open and democratic society, including freedom of assembly as provided for in the bill of rights. In South African National Defence Union v Minister of Defence and other, as stated in an article by Chamberlain and Snyman the court captured the value of the right to protest as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society, and its facilitation of the search for truth by individuals and society generally.[31] In terms of legal regulation, the right to protest is firmly entrenched in South Africa's democratic dispensation. Omar notes that, the right to protest is also protected under international law and that it is protected by article 21 of the International Covenant on Civil and Political Rights and article 11 of the African Charter on Human and Peoples Rights' both of which have been ratified by South Africa provide for the protection of the right to peaceful protests.[32]

At the end of 2014, a document entitled 'WITS Transformation memo 2014 was released by a group of postgraduate students at the University of the Witwatersrand's politics department. The memo called for the end of, decolonisation of the curriculum, an increase in the number of black academic staff, and a shift towards embracing the political philosophical and historical intellectual traditions of Africa and the African diaspora in order to build a truly postcolonial African University.[33] This was then followed by 'open Stellenbosch' where the minority students felt extremely marginalised, excluded and intimidated in an environment that barely changed since

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27 n 12 above.

28 n 12 above.

29 L Chamberlain and G Snyman 'Lawyering protest: critique and creativity: where to from here in the public interest legal sector (2017) 62 SA Crime Quarterly 7-20.

30 L Chamberlain and G Snyman 'Lawyering protest: critique and creativity: where to from here in the public interest legal sector (2017) 62 SA Crime Quarterly 7-20, The S v Mamabolo 2001 (3) SA 409 was cited and briefly discussed.

31 L Chamberlain and G Snyman 'Lawyering protest: critique and creativity: where to from here in the public interest legal sector (2017) 62 SA Crime Quarterly 7-20, cited the case of South African Defense Union V Minister of Defence and others 1999 (4) 469 (cc).

32 n 19 above.

33 Naicker, C, 2016, From Marikana to #feesmustfall: The Praxis of popular politics in south Africa.

the end apartheid.[34] The idea behind the above was to bring to an end a culture that forced the minority to attend their classes in a language they neither spoke nor fully understood. They were calling for language structure that included them too.

Then came the call to end the outsourcing of service staff in order to offer better wages. At WITS, this took the form of a worker solidarity committee, and students together with the workers staged a three-day sit-in on the 11th floor of the Senate, where they occupied offices of the top management after the dismissal of 22 outsourced workers.[35] As 2015 came to an end, the Department of Higher Education (DHET) announced that the University tuition fees would increase by 10.5 percent for 2016. Together with all the other institutions, the #FeesMustFall movement was born.

#FeesMustFall is a student-led protest movement that started in October 2015, spearheaded by the University of Witwatersrand Student Representative Council of 2015 as a response to an increase in fees in South African Universities. But well before #FeesMustFall, historically black Universities had been characterised by multiple violent protests. This movement did not mark the beginning of student protests in South Africa. Universities like, Cape Peninsula University of Technology, Fort Hare University, and the Tshwane University of Technology have since 1994, been protesting routinely against rising fees.[36] The #FeesMustFall movement was a result of failed attempts at negotiating a non-fee increment of 10.5 percent for the 2016 academic year in October 2015 at the University of Witwatersrand. According to Wits, the weakening rand against major currencies led to the decision to increase fees, hence hike in books, journals, and other research material prices, a decrease in staff salaries in the backdrop of the government subsidy of just 5 percent.[37] At the University of Rhodes, the protests began due to a requirement by the University that

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34 n 33 above.

35 n 33 above.

36 Mpofu, S. (2017), 'Disruption as a communicative strategy: the case of #FeesMustFall and #RhodesMustFall students' protests in South Africa. Journal of African Media studies, volume 9, Number 2.

37 n 36 above.

students' pay 50 percent of their tuition upfront n top of the fees hike.[38] This meant that even though the University was increasing tuition, they wanted students to still pay half of their tuition in order for them to register. In no time, the protests began to spread to other Universities leading to attempts at occupying parliament and Union Buildings, the seat of the country's administration. Students, parents, workers, and supporters took to the streets in protest. In Pretoria, they marched to the Union Buildings, and in Cape Town, they marched to the parliament and demanded that the minister of Higher Education, Blade Nzimande come and address their issues.[39]As a result, former President Jacob Zuma was forced to announce that there would be no fee increase in 2016.

5. Research Methodology

The researcher used desk research. This study made use of the qualitative method as it is concerned with understanding phenomena from the perspective of an insider or subject in order to understand a particular phenomenon in its natural context. This study specifically used Historical Research which is one of the research types of the qualitative method. Historical research involves drawing conclusions about the past and making predictions about the future. Throughout the research, the researcher described, analyzed and interpreted those events that have already taken place, giving preference to primary sources wherever possible. Data were obtained from relevant journals, books, legislation, and other academic publications

6. Limitations

The researcher encountered a couple of limitations to this study. Having carried out desk research, the researcher had to rely on research that had already been conducted by other researchers. In some instances, the articles were not clear and

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38 Quintal, G. (2015), 'What you need to know about #FeesMustFall', Mail and The Guardian, 19 October,http://mg.co.za/article/2015-10-19-four-thingsyou-need-to-know-about-feesmustfall#.Vih8l2qxP0o.facebook

39 n 38 above.

this made it difficult to understand what the authors were trying to argue. Another shortcoming was the inability to gain access to some of the resources like books and articles- as some articles and books are not bought by the university and this meant that the researcher could not gain free access to them unless they paid for them.

7. Chapter Outline

- **Chapter One**

This introductory chapter provides an overview of the research problem for the study. It included the research questions, the aim, and objectives of the study, research methodology, and chapter outline.

- **Chapter Two**

This chapter focuses on the history of demonstrations in South Africa, looking at both pre- and post-1994 demonstrations.

- **Chapter Three**

This chapter looks at the legislative framework of the right to protest in South Africa in comparison to international instruments.

- **Chapter Four**

This chapter compares the wording of Article 11 of the African Charter that protects the right to protest to Section 17 of the South African Constitution. It further looked at how Section 17 has been interpreted in South African case law.

- **Chapter Five**

This chapter provides a summary, recommendations and the conclusion of the study.

Chapter 2: The History of demonstrations in South Africa

1. Introduction

The previous chapter provided an overview of the research problem for the study and it also included the research questions, the aim, and objectives of the study, research methodology, and chapter outline. This chapter will focus on the history demonstrations in South Africa looking at both pre- and post-1994 demonstrations.

2. Understanding the right to protest in South Africa

The focus of South African social movement studies has been on relatively established social movements like the Anti-Privatisation Forum (APF), the Treatment Action Campaign (TAC) and the Anti- Eviction Campaign, as well as the trade union movement, and these have also sought to analyse and theorise about the first wave of protests in the early 2000s.[40] The right to protest or the lack thereof has not been taken as a distinct area of research by these studies although some have touched on the issue. In addition to this, most of all the community protests, with the exclusion of industrial protest, have been conducted by small, more localised community groupings that do not appear to have any links to the existing established movements.[41] Peter Alexander and Peter Pfaffle have noted that many of the most notable protests that have taken place since 2009 have done so independently of social movements.[42]

Two theoretical approaches have been articulated by South African scholars.[43] The first one understands the recent protests to be an expression of a broader rebellion of the poor, involving a fundamental, anti-systemic challenge to the social order in South Africa.[44] In other words, these protests entail challenges to the state, neo-liberalism or even capitalism. This rebellion has been characterised by protests that have often at

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40 J Duncan *Protest Nation: The right to protest in South Africa* (2016) 36-41.

41 n 40 above, 36.

42 P Alexander & Pfaffe, 'Social Relationships to the Means and Ends of protest in South Africa's Ongoing Rebellion of the poor: The Balfour Insurrections', social movement studies, 13, 2, August 2014.

43 n 40 above, 36.

44 n 40 above, 37.

times reached the proportions of insurrection.[45] As defined by Peter Alexander, 'insurrection' is the exclusion of the police from an area through the erection of barriers, leading to the streets being claimed by the protestors even if only for a period.[46]

On the other hand, others have understood protests from an institutional perspective, as being a means of calling the government to account while remaining supportive of its political direction and the existing social order more generally.[47] Susan Booysen discusses the notion of 'dual repertoire', which is where protestors see protests and more traditional forms of political participation, such as voting, as being complementary rather than contradictory actions.[48] Protests have been used by protestors as a way to pressurise the African National Congress (ANC) into taking the protestors seriously on a range of concerns and making sure that the government delivers.[49] This, therefore, means that protests were not anti-systemic in nature or insurrectionary in intention but rather system-maintaining as they recognised the authority of the ANC to continue ruling within a broader framework of neo-liberalised capitalism.

Looking at the empirical research available, it suggests that protests have not been intentionally anti-systemic in nature.[50] Their ideological character still continues to remain unclear. It is, therefore, very important not to emphasize the insurrectionary nature of the protests. The focus of many grievances remains the state, especially the local state, even when the grievances relate to services that were a provincial competence like housing.[51] According to Peter Alexander, protests come about as a result of a "demonstration effect" where protestors follow protests elsewhere through the media and not because of national coordination.[52]

When one compares South Africa to the United States, it is clear that the two are different in the sense that the former's militarised police force has been more than willing to resort to brute force in order to control protests even in situations where there

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45 n 42 above.
46 n 42 above.
47 n 40 above, 37.
48 Susan Booysen, *The African National Congress and the Regeneration of Political Power* (Johannesburg: Wits University Press, 2011)126-73.
49 n 40 above.
50 n 40 above, 37.
51 n 40 above, 38.
52 n 40 above, 40.

is no immediate threat to the police and others.[53] Marcelle Dawson notes that, while the post-apartheid police have been restructured from being a police 'force' to being a police 'service', in reality, the police have unfortunately resorted to more authoritarian public order policing forms.[54] This has led to activists developing the perception that their voices were being muted.

3. Demonstrations in South Africa Pre-1994

For over two centuries, South African history has been characterised by violence on both a political and personal level although violence was generally constrained by the 1910 Union of South Africa government and succeeding administrations for over 70 years until the 1980s.[55] On many occasions, the state used violence to control and suppress popular protests that often had the potential of violence. Forcing the ANC underground led to the growth of new ideologies and the formation of student groups, radical Christianity, black consciousness and independent unions between 1968 and 1973.[56] In 1959, University of Fort Hare (UFH) students decided to affiliate to the ANC in order to strengthen their resistance against the Extension of the University Education Act which had sought to reserve UFH for the Amaxhosa as an ethnic group.[57] This was indirectly subverting the history of UFH as an institution open to black students from across the continent. Having lost this battle, the students resorted to expressing their dissatisfaction with the apartheid-run institution in more overt ways, for example vandalising the car of a visiting academic, pelting a newly-appointed registrar with eggs and tomatoes.[58] There was a shift in student protests from issues of food, fees and corporal punishment to a more direct challenge of the apartheid system.

From the 1970s the democratic and economic strength of black people had been growing, but Lodge *et al* note that in the 1980s a new era for black politics in South

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53 n 40 above.
54 n 40 above.
55 W Beinhart & M.C Dawson Popular Politics and Resistance Movements in South Africa (2010) 18–19.
56 n 55 above, 18.
57 n 55 above, 19.
58 D Massey Under protest: The Rise of Student Resistance at the University of Fort Hare (2010) 159.

Africa was ushered in.[59] This began with black students refusing to accept the educational system which resulted in the most sustained and determined black rebellion against the white minority rule in South African History. This new era comprised student consumer and voter boycotts, mass demonstrations, and national sit-down strikes. Community based action was embarked upon simultaneously which rendered apartheid unworkable.[60] As a result of this, the government was forced to start seeking new political solutions. The overwhelming pressure from the black majority then forced the Apartheid government to concede defeat and, as a result, this led to the unbanning of the exiled black political parties, the release of their leaders, and the beginning of negotiations with the then South African government for major political transformation.[61] This was the birth of South African politics; it was no longer Black politics, White politics or Coloured politics.

The student protests that happened in 1961 played a very important role in the development of student organisations at the time.[62] There was an increase in the number of students who identified with the daily struggle of the oppressed majority and, as a result of this, many university students became more accepting of their fellow school counterparts as equals in the struggle against the Apartheid regime.[63] On 16 December 1961, the first student organisation was formed in Durban, called the African Students Association (ASA).

In South Africa, student politics can be seen from two ideological standpoints, the Black Consciousness movement, and the Congress movement.[64] The South African Student Organisation (SASO) was formed in 1968/69. It was the first black political higher education student organisation, a major milestone for black students and a step towards a more organised, independent political force for national liberation in South Africa.[65] As noted by some scholars, this step turned South African Universities and Colleges into sites of struggle. In addition to this, scholars believe that SASO was not only intended to be only a student organisation designed to voice the academic

59 Lodge *et al* All here and now: Black Politics in South Africa in the 1980s (1991) 3.
60 n 59 above, 3.
61 n 59 above.
62 Heffernan et al Students must rise: youth struggle in South Africa before and beyond Soweto ’76. 5-6
63 n 62 above.
64 n 62 above.
65 n 62 above.

concerns of black students but was also geared towards a commitment to challenging the foundations of the Apartheid racial structures.[66] SASO was the alternative to the National Union of South African Students (NUSAS) which was dominated by white students. SASO was banned in 1977 by the apartheid government.

As a result of SASO being banned, there was an ideological shift from the philosophy of the Black Consciousness movement to a more Congress-aligned student movement being undertaken by student leaders.[67] The Azanian People's Organisation (AZAPO) was launched in 1981 but later changed its name to the South African National Congress (SANSCO) to reflect a more inclusive ideology.[68] SANSCO then forged ties with NUSAS against the de Klerk Education bill that had sought to reduce subsidies to politically-active universities.[69] In 1990, SANSCO and NUSAS combined and formed what was referred to as the South African Students Congress (SASCO) that represented both black and white students across South Africa.[70]

A link can be seen between the French Revolution of 1789-799 and the 1968 Paris student uprisings and South African history prior to 1994. They were all characterised by dissatisfaction on the part of the majority in respect of the wide-spread experience of inequality between the minority and the majority. The minority learned that demonstrations, often acting outside the law, provided the only language to which the government responded. Student protests in South Africa in the 1960s by both white and black students were largely the result of the poor living conditions in residences.[71] The other issues included food insecurity, the poor quality of food, and the general inadequacy of institutional resources. In the period between the 1980s -1990s the political situation worsened, and students then drew up an Education Charter that tried to provide a different perspective of a South African higher education system moving forward.[72] The 1983 Education Charter campaign was of significance in the South African political turmoil of the 1980s as it was non-violent, and the focus was solely on making the then government and the society aware of the bigger challenges in

66 n 62 above.
67 n 62 above, 5-6.
68 n 48 above, 7.
69 n 48 above.
70 n 48 above.
71 Cele *et al* Student Politics in South Africa. An Overview of key developments (2003) 201-223.
72 n 71 above.

education and society and it involved a signature petition campaign.[73] Universities became grounds for protests, and anti-government protests become common in the 1980s. Protests increased as students started becoming involved in protest action, with some joining underground military wings of banned organisations.

Below are examples of notable key protest action that happened before1994 and resulted in mass killings by the police.[74] These are also key markers in the history of South African State violence.

- ❖ Sharpeville Massacre 1960

Sharpeville is a township located to the west of Vereeniging that was built in the early 1940's to accommodate workers, mainly migrants in order for them to work at the nearby iron and steel industry.[75] In the 1950s residents experienced various hardships as a result of Apartheid and labour exploitation, especially the harsh enforcement of the pass laws, growing unemployment, and rising prices.[76]

This took place on 21 March 1960 at the township of Sharpeville in Transvaal in South Africa. A group of black residents marched to a police station in protest against the Pass Laws which were a form of internal passport system designed to segregate the population, manage urbanisation, and allocate migrant labour.[77] This peaceful protest was organised by a group called the Pan African Congress (PAC), the idea was for the protestors to march to the local police station without their passes and ask to be arrested.[78]

As the protesters gathered peacefully, more and more police started appearing along with increasing numbers of armored vehicles. About 69 people were killed and more than 180 were injured, mostly shot in the back as they fled the violence.[79] Some witnesses claimed they saw police putting guns and knives in the hands of dead

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73 n 71 above.

74 J Rauch *et al* The policing of public Gatherings and Demonstrations in South Africa (1998) http://www.csvr.org.za/publications/1483-thepolicing-of-public-gatherings-and-demonstrations-in-south-africa-1960-1994.html (accessed 8 February 20181).

75 Lodge, Tom, sharpville:An Apartheid Massacre and its Consequences (New York: Oxford University Press, 2011).

76 n 75 above.

77 n 75 above.

78 n 75 above.

79 n 75 above.

victims, to ensure that it portrays a picture that the protesters were armed and violent. Even when ambulances came to take the injured to hospital, the police still followed them to the hospital, arrested them and took them to prison.[80] The protestors were harassed by low-flying sabre jets and police baton charges and dispersed by police gunfire resulting in the deaths of 69 people.

- ❖ Soweto Uprising 1976

This uprising began on the morning of 16 June and became a series of demonstrations and protests that were led by black school children in South Africa who were protesting against the use of Afrikaans alongside English as a medium of instruction in schools. They were killed by police and army fire over a period of weeks.

The uprising was triggered by the policies of the Apartheid government that led to the introduction of Bantu Education Act in 1953.[81] This Act contained an education policy referred to as the Bantu Education Policy. This policy was designed to train and fit Africans for their roles in the Apartheid era, these roles entailed being, labourers, workers, and servants.[82] This Uprising that started in Soweto and quickly spread countrywide greatly changed the socio-political landscape in South Africa. The political consciousness of many students was awaken as a result of the rise of the Black Consciousness Movement (BCM) and the formation of SASO.[83] Between 3000 and 10000 students led by the South African Students Movement's Action Committee supported by the BCM marched peacefully to demonstrate and protest against the apartheid government's order.[84] This march was intended to lead to a rally at the Orlando stadium. On their way, they encountered heavily armed police who fired teargas and later live ammunition on the demonstrating students.[85] A march that started out peacefully resulted into a revolt that turned into an uprising against the government. This uprising resulted in severe consequences for the Apartheid government as images of the police firing on peacefully demonstrating students led to an international revolt against South Africa as it was finally exposed.

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80 n 75 above.

81 https://www.ngopulse.org/article/2018/06/13/%E2%80%8B-june-16-soweto-youth-uprising (accessed February 12 2019).

82 n 81 above.

83 n 81 above.

84 n 81 above.

85 n 81 above.

- Western Cape 1980

In 1980, school children boycotted school and engaged in protest action in support of their demands for elected Student Representative Councils.[86] There were a number of confrontations between the police and demonstrations and these resulted in the loss of lives owing to police action.

- Vaal Triangle Uprising 1984

This popular revolt was the result of an increase in rent in September 1984; homes of policemen were burnt down and residents protested against the increase through both public demonstrations and boycotts.[87] This resulted in the deaths of 14 people and the injury of eight policemen. The government responded by launching a joint army and police operation called “Operation Palmiet” in order to control the unrest in the area. It was estimated by the South African Catholic Bishops Conference that 142 people had been killed as a result of police action during four months of township unrest.

- Uitenhage Massacre 1985

On 21 March 1985, 25 years after the Sharpeville Massacre, police opened fire on a group of people in Langa Township near Uitenhage in the Eastern Cape.[88] According to reports, at least 20 people were killed and 23 injured. Most of the dead were shot in the back as they were fleeing from the police. The then government had banned the funeral–in fact, during that time, it was not possible to bury the dead and honour the law

- Trojan Horse, Athlone 1985

On 15 October 1985, a number of (young people were killed when police opened fire on a crowd of demonstrators from where they had been hiding on the back of a lorry.

- Sebokeng Massacre 1990

This was a protest against the housing shortages and the education crisis. Marchers handed a petition to the Sebokeng station commander with whom the leaders of the

86 n 74 above.
87 n 74 above.
88 n 74 above

march agreed to terminate and disperse the march.[89] One white constable fired a teargas canister without any orders, and this resulted in a chain reaction in the police which left people dead and many wounded.

- Bisho 1992

During an ANC march into the Ciskei homeland, 29 people were shot dead when the Ciskei security forces did not abide by recommended new crowd control procedures.

- Shell House Massacre 1994

This was a 1994 shooting that took place at the headquarters of the ANC in Johannesburg. It was a day of marches and scuffles involving the supporters of Inkatha Freedom Party (IFP) protesting at the ANC's headquarters.[90] More than forty people died in various parts of the Reef, some of them killed by police fire.

4. Demonstrations in South Africa Post- 1994

It is now twenty four years since the 1994 elections, but we continue to see an increase in the number of strikes and demonstrations (violent and non-violent).[91] During Thabo Mbeki's second term in office, protests were a distinctive feature with an escalation after his removal from office. From March 2004 to the end of February 2005, 881 illegal protests were reported (where permission was not granted), and over 15000 in which permission was granted according to law.[92] As noted by the official police crowd management statistics, between 2009 and 2012, over 32500 protests were reported of which 3072 were characterised by unrest.[93]

The political era during the Mandela administration was relatively peaceful, unlike the Mbeki and Zuma administrations where a wave of political unrest has been experienced and general dissatisfaction has been displayed by South Africans with

89 n 74 above.
90 n 74 above.
91 C Bundy Short changed? South since apartheid (2014) 100–102
92 n 91 above
93 n 91 above.

regards to the government's performance. This is both in relation to the implementation of policy and the formulation of new policies.

Since the beginning of democracy in 1994, there has been a wave of protests, either service delivery protests, protests against undemocratic laws or land distribution, and these have become a central part of the society, notably from 2004 when the country's democracy was just 10 years old.[94] Since the start of 2014, the beginning of the second decade of democracy, police have revealed that Gauteng alone has experienced more than 500 protests of which over 100 turned violent.[95] A research group called Municipal IQ has noted that there had been an increase in protest action since 2009, viewed as "service delivery", "rebellion of the poor", "municipal revolt" or "ring of fire".[96] A good number of these protests were reported to have taken place in the informal settlements or poor urban areas in Cape Town, Johannesburg and Ekurhuleni.[97] Most protests have been attributed to the poor service delivery of housing, electricity, water and sanitation. There are also other protests that have been as a result of laws that are considered undemocratic, such as the Information Bill and the e-tolls in Johannesburg instituted by South Africa National Road Agency (NRA).

The 2015 student protests in South Africa marked an historic moment in the country. South Africa has had a long history of student protests, dating back to the anti-apartheid marches that took place before 1994 when South Africa attained democracy.[98] There has been a wave of student protest action in the recent years with students embracing the notion of protests as an alternative means of participating in policy making and as a means of engaging with government.[99] The 2015 #FeesMustFall protests cost the government R150 million in damages as reported by the Minister of Higher Education, Blade Nzimande. The #FeesMustFall protests still remain unresolved in relation to issues like the 'missing middle'.[100] The missing middle

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94 Student protests in democratic South Africa https://www.sahistory.org.za/article/student-protests-democratic-south-africa (accessed 8 February 2018).

95 n 94 above.

96 n 91 above.

97 n 94 above.

98 n 94 above.

99 Student protests in democratic South Africa https://www.sahistory.org.za/article/student-protests-democratic-south-africa (accessed 8 February 2018).

100 n 99 above.

is term used to refer to students who fall outside the means test as set by NSFAS as poor but whose parents cannot afford to keep them at University. The most common reasons behind the #FeesMustFall protests were the slow transformation processes, language policy and other academic policies.

In 2015, the students at the University of Cape Town protested in favour the removal of the statue of Cecil John Rhodes, and, during this protest, they also voiced their frustration over the slow transformation phase at the University.[101] These protests then sparked a debate on race relations, access and funding at the University. The 'Rhodes must fall' was a protest originally directed at the removal of a statute at the University of Cape Town, but the campaign then received a lot of global attention and led to a wider movement to decolonise education across South Africa.[102] Other Universities, like the University of Limpopo, Mangosuthu University of Technology, Tswane University of Technology, and University of the Witwatersrand, Vaal University of Technology, Water Sisulu University of Technology, experienced student protests concerning accommodation and National Student Financial Aid Schemes (NSFAS).[103] A number of student protests turned violent and resulted in injuries and arrest. Significant damage was caused by students to property and the protests threatened the safety of students and staff.

More than 20 years after the inception of democracy, students once again claimed the ANC's 1955 Freedom Charter as their own and demanded that the government fulfil its promise to the people of free education for all.[104] The students insisted that a report had been submitted to the minister of higher education, Blade Nzimande, which had been compiled by a team led by the vice-chancellor of the Nelson Mandela Metropolitan University to investigate the best model for free university education.

5. Conclusion

In the preceding paragraphs, the researcher has explored at the history of demonstrations in South Africa looking at them from both a pre-1994 and a post- 1994

101 n 99 above.
102 n 99 above.
103 n 99 above.
104 P Commey South Africa: Lessons in education. New African (2015).

national perspective. This has shown that protests have always been part of South African life. Even though they are not desirable, as they often turn violent, people continue to use them as a way to communicate their frustrations or problems. The next chapter will focus on the right to protest in South Africa in comparison to International Law.

Chapter 3: The right to demonstrate in South Africa

1. Introduction

This chapter builds upon the previous chapter which focused on the history of demonstrations in South Africa looking at both the pre- and post- 1994 periods. This chapter will focus on the legislative background of the right to protest in South Africa, focusing on the legal framework governing the students' right to demonstrate.

2. Section 17 of the Constitution

The Constitution of the Republic of South Africa is the supreme law of the republic, and any law or conduct that is found to be inconsistent with it is considered invalid and the obligations imposed by it must, therefore, be fulfilled.[105] This, in simpler terms, means that the Constitution is superior to all other laws and any law that is not in line with the Constitution is considered to be invalid. The constitution contains a Bill of Rights which is the backbone of South Africa's democracy. This Bill of Rights incorporates the rights of all people in South Africa and further affirms the democratic values which are human dignity, equality and freedom.[106] The state is also obliged to respect, protect, promote and fulfil the rights under the Bill of Rights.[107] Notwithstanding the above, the rights enshrined in the Bill of Rights are subject to limitations contained in or referred to in section 36 or elsewhere in the Bill.[108]

Section 17 of the constitution enshrines the right to assembly, demonstration, picket and petition.[109] This section states that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions. The Regulation of Gatherings Act was enacted to give effect to this provision.

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105 The Constitution of the Republic of South Africa, 1994.
106 n 105 above.
107 n 105 above.
108 n 105 above.
109 n 105 above.

3. The Regulations of Gatherings Act 205 of 1993 (Gatherings Act)

The right to protest is a justiciable right, and the Regulation of Gathering Act 205 of 1993 (Gathering Act) was passed in order to provide basic details on how this right can be exercised.[110] This is the law that regulates the right to protest. In the case of The South African Transport and Allied Workers Union and Another v Garvas and others, [111] "the constitutional court acknowledged that the right to protest was central to South Africa's Constitutional democracy as it exists primarily to give a voice to groups that do not have political or economic power. The right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of the advancing human rights and freedoms." Jafta J,[112] held that ' it is through the exercise of section 17 rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery.'

The Gatherings Act came into operation at the beginning of South Africa's democracy as a result of the Goldstone commission of inquiry to bring South Africa's assembly jurisprudence into line with international practice.[113] The Preamble states that, 'every person has a right to assemble with other persons, to express their views on any matter in public and enjoy the protection of the state while doing so', although this right is qualified by the duty to protest peacefully and with due regard of the rights of others'.[114]During apartheid, the right to protest was severely suppressed through the Riotous Assemblies Act.[115]As a result of this, in 1991, F.W. de Klerk who was the last president of the apartheid-era set up a Commission of Inquiry headed by Justice

110 L Chamberlain 'Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and access to information in South Africa' (2016) 16 African Human Rights Law Journal 365-384 http://dx.doi.org/10.17159/1996-2096/2016/v16n2a3.

111 The case, South African Transport and Allied workers Union & Another v Garvas and others 2013 (1) SA 83 (CC), as discussed in Chamberlain.

112 n 110 above.

113 n 110 above.

114 n 110 above.

115 J Duncan *Protest Nation: The right to protest in South Africa* (2016) 42-52.

Richard Goldstone.[116] The Commission had to look into the political violence and intimidation that had taken place between the July 1991 and the 1994 general elections. Multiple reports were submitted by the Commission to the President and, finally, the eighteenth report focused on the regulation of public gatherings in South Africa which also included protests.[117]

The New Regulation of Gatherings Act (RGA) was also drafted, and it significantly differed from the repressive practices of the past as it recognized many basic principles of freedom of assembly. The Commission's argument was that the state had to recognize gatherings as essential forms of democratic expression, rather than seeing them as threats to national security.[118] This essentially meant that the state should have a positive obligation to facilitate gatherings. This facilitative role would be played by municipalities through ensuring that negotiations took place among themselves, the SAPS and the convenors of marches. It was, hence, central to the spirit of this to notify the necessary authorities of the intention to stage a gathering as this was considered important in ensuring that the right to protest was facilitated effectively through protecting the rights of those participating and, on the other hand, also making sure that imminent threats to public safety were responded to appropriately.[119]

The Commission drew a distinction between 'notification' and 'permission-seeking'. They noted that it would be important in a democracy for one to seek permission to protest but rather to notify as the former would turn this act into a privilege than it being a right. This would require authorities to push for negotiations in the management of gatherings rather than enforcing conditions. In situations where the negotiations could deal with the imminent threats posed by the gatherings, they should then impose prohibitions. Gatherings were to be handled with tolerance and sympathy in order to

116 n 115 above, 47.
117 n 115 above.
118 n 115 above, 48.
119 n 118 above

avoid confrontation that could result in violence, as the Commission claimed that there was a need for a different way of policing gatherings.

It is clear that the Act acknowledged the right to gather which included the right to protest, and it also further introduced procedures to give effect to the new approach towards the policing of gatherings. Through the Act, the right to protest was entrenched and protests had to be within the accepted boundaries of the Act.

Seven days prior to a gathering, the convener must notify the local authority as stated in the RGA.[120] In a situation where a seven-day notice has not been given, a less than seven days' notice may be given as long as it is not less than 48 hours. The responsible officer may prohibit a gathering in circumstances where a less than 48 hours' notice has been given.

The RGA states that there are three main actors in a gathering, the police, the convenor and the responsible officer. When the responsible authority has been notified in due course, it may then call for a meeting which is attended by the three main actors to discuss the route to be taken by the marchers, the number of demonstrators, the number of marshals required, and other logistical matters if necessary.[121] The meetings must take place in good faith, and the police may request that certain conditions be imposed on the gatherings.

In an article by Jameelah Omar,[122] she notes that the procedure for a lawful protest involves three primary components which are stated in the Gatherings Act. Firstly, there are the provisions that ought to apply prior to a protest taking place, which include the role of the convenor, the notice procedure, consultations, negotiations and conditions, how protests can be prohibited and the procedures for appeal or review of such prohibition.[123]Secondly, one has to look into the conduct during gatherings and

120 The Regulation of Gatherings Act.

121 n 120 above.

122 J Omar 'A legal analysis in context: The Regulation of the Gatherings Act – a hindrance to the right to Protest? (2017) *62 SA Crime Quarterly* 21-31.

123 n 123 above.

the powers of the police during a protest.[124] Lastly, the final component addresses the post-protest phase, namely the liability for damages, and offences and penalties.[125]

The grounds recognized for a lawful prohibition are provided for in the RGA and are as described below.

The police must send credible information on oath to the responsible officer that a proposed gathering would result in serious disruption of pedestrian or vehicular traffic, injury to participants or other persons, or extensive damage to property, and as a result the police will not be able to deal with such a threat. Once the information has been received the officer can consult with the convenor and police with the view to prohibiting the gathering.[126] In a situation where a gathering is held where the authorities have not been notified, this is considered to be a crime and the convenor can be fined or jailed. Notwithstanding the above, the RGA also recognizes a defence that a gathering had taken place spontaneously.[127] This means that a convener can use this defence in order to avoid being fined or facing jail time.

All decisions that are agreed on during negotiations or all conditions that are enforced on a proposed gathering, including the prohibition of a gathering, can be challenged within 24 hours in the magistrate's court.[128] In cases where gatherings turn violent or there is any serious risk to persons or property, police are required to use 'reasonable force' to disperse the demonstrators.[129]

The Act states that the argument that a gathering was spontaneous rather than premeditated can be used as a valid defence against a charge of holding an illegal gathering owing to the fact that the Act contemplates situations where people gather spontaneously in reaction to unforeseen events.

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124 n 123 above.
125 n 123 above.
126 n 120 above.
127 n 120 above.
128 n 120 above.
129 n 120 above.

Jameelah Omar notes that, in the Gatherings Act, the terms 'demonstration' and 'gathering' differ from the terms used in Section 17 of the constitution that uses the terms 'assembly' and 'picket'. 'Public Gathering', as defined in the Gathering Act, is assembly, enclosure or procession of more than 15 people on a public road,[130] or any other public place wholly or partly open to air'. Omar goes on to note that, as per the Act, it is important to note that a demonstration that involves more than one person, but fewer than 15 persons, does not require prior notice, while a gathering is an assembly, concourse or procession of more than 15 persons in a public space and does not require prior notice.[131] The act does not properly define these terms but instead uses additional terms in relation to gatherings, namely assembly, concourse or procession which are also not defined.[132] The terms demonstration and gathering are not defined in the Act, but, rather, the act gives alternative terms that may refer to gatherings.

The purposes of a gathering can include criticising or promoting a policy or actions of any government, political party or political organisation, the handing over of petitions, and demonstrating either support for or opposition to the policy or actions of any person or institution including any government, administration or government institution.[133] Chamberlain notes there are three main actors involved in protest procedures, and they are the municipality, the police and the convenor of the gathering as stated in the Gatherings Act.[134] She goes on to state that Section 2(1)[135] defines a convenor* as the leader of the gathering and is appointed by the person or organisation arranging the gathering to be the point of contact.

In a report by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association presented to the Human Rights Council in 2012,

130 n 120 above.
131 n 122 above.
132 n 122 above.
133 n 110 above.
134 n 110 above.
135 n 110 above.

it was noted that Act measures up well against best practices.[136] This report advocates peaceful assemblies and does not recognize a system of prior authorization of gatherings but rather a system of notification. Convenors should in no way seek permission to exercise their right but rather notify the concerned parties. The report also provides for spontaneous gatherings and recognizes the imposition of conditions or the prohibition of gatherings as exceptions to the general rule.

Although the Act gives effect to these rights, it also criminalises a gathering where the municipality has not been notified but this is contrary to the Special Rapporteur's report.[137] In the report it is stated that, in cases where a gathering has not involved prior notification but is peaceful, it should not be dispersed forcefully and nor should its members be subject to legal sanction. In addition to this, there is a civil liability clause in the Act which states that, if riot damage occurs, then participants shall be held liable jointly and severally for that damage.[138] The Act also, however, goes on to provide defences for this charge, such as when a participant did not connive in riot damage, the damage was not within the scope of the gathering and was not reasonably foreseeable, and further that the participant took all reasonable steps to prevent the damage from occurring.[139] Contrary to this, the Special Rapporteur states

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136 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns (A/HRC/17/28) 26 May 2011.

137 n 120 above.

138 Section 11(1) of the RGA provides:

"If any riot damage occurs as a result of—

a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection."

139 Section 11(2) of the RGA provides:

"It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves—

a) that he or it did not permit or connive at the act or omission which caused the damage in question; and

b) (b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

c) (c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question."

that individuals should be solely liable and that no one should be held accountable for the actions of others.[140]

The constitutional court held that the civil liability in the RGA is constitutional. In this case,[141] the applicants asserted that the Supreme Court of Appeal had been incorrect, that section 11(2) of the RGA is contradictory and irrational, that it limits the right to freedom of assembly in Section 17 of the Constitution and that the limitation is not justifiable. The Constitutional Court granted leave and the appeal was dismissed. The decision of the high court was upheld, section 11(2) does not implicate nor does it limit any of the rights entrenched in section 17 of the constitution.

The RGA has been manipulated in practice in so many ways in order to repress protests. On a number of occasions, notification has been confused with permission seeking, and this has resulted in police breaking up gatherings where the convener cannot produce a permit proving that the march had been permitted to proceed. The responsible authority makes the application more complicated than it actually is as convenors apply as though they are seeking permission and not simply notifying.

4. International Instruments that protect the Right to Protest

The right to protest is recognised and protected widely by international instruments. Article 20(1) of the Universal Declaration of Human Rights (UDHR) and Article 21 of the International Covenant on Civil and Political Rights (ICCPR) both recognize the right to peaceful assembly.[142] The African Charter on Human and Peoples' Rights

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140 n 136 above.

141 South African Transport and Allied workers Union & Another V Garvas and others 2013 (1) SA 83 (CC)

142 Christof Heyns (n 136 above),
Article 20 of the UDHR states that;
1. Everyone has a right to Freedom of peaceful assembly and association
2. No one maybe compelled to belong to an association

Article 21 of the ICCPR states that,
The right to peaceful assembly shall be recognised. No restrictions may be placed on the exercise of the right other than those imposed in conformity with the law and which are necessary in a democratic

(African Charter), at a regional level, recognizes this right in Article 11.[143] It is stipulated in the ICCPR and the African Charter that any restrictions on this right must be in line with the law and must be necessary in a democratic society, in the interest of national security, public safety, public order, the protection of health and morals, or ethics, or the protection of the rights of others. The state has a positive obligation to facilitate peaceful protests.

In the European Court of Human Rights it was held that,[144] ' An individual does not cease to enjoy the right to a peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstrations, if the individual in question remains peaceful in this or her own intentions or behaviours.'

Christof Heyns noted that,[145] 'Supporting Freedom of assembly implies a realization that, as expressed so eloquently by the Spanish constitutional court, in a democratic society, the urban space is not only an area for circulation, but also for participation.' In an article by Chamberlain and Gina Snyman,[146] the authors noted that, in the case S v Mamabolo,[147] it was restated by the court that freedom of expression is 'an inherent quality' of an open and democratic society, including freedom of assembly as provided for in the bill of rights. In South African National Defence Union v Minister of Defence and other, as stated in an article by Chamberlain and Snyman, the court captured the value of the right to protest as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society, and its facilitation of the search for truth by individuals and society generally.[148] In terms of legal regulation, the right to protest is firmly entrenched in South Africa's democratic dispensation.

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society, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

143 Article 11 states that:
'every individual shall have the right to assemble freely with others without explicitly requiring the assembly to be peaceful.'

144 Cisse v France ECHR (Application No 51346/99) (9 April 2002) at para 50 and Christians Against Racism and Facism v United Kingdom (1980) 21 DR 138 (Application No 8440/78) at para 4.

145 n 136 above.

146 L Chamberlain and G Snyman 'Lawyering protest: critique and creativity: where to from here in the public interest legal sector (2017) 62 SA Crime Quarterly 7-20.

147 n 146 above.

148 n 146 above.

It is very important to note that the right to freedom of expression is essential to the right to demonstration. The right to freedom of expression is a necessary precondition to the enjoyment of other rights, such as the right to vote, free assembly and freedom of association. During demonstrations, both the freedom of expression and assembly are very important and necessary as people will either express themselves verbally or through nonverbal expression such as raising banners or placards.[149] In the Constitutional Court case Islamic Unity v Independent Broadcasting Authority and others it was stated that, "freedom of expression is one of a 'web of mutually supporting rights' in the constitution. It is closely related to freedom of religion, belief and opinion, the right to dignity, as well as the right to freedom of association, the right to vote and to stand for public office, and the right to assembly. The rights implicitly recognize the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial".[150] Freedom of expression and freedom of assembly are linked and interrelated, as free speech would mean nothing if there was no right to use public spaces to make one's views known and *vice versa*.

5. The Right to demonstrate and the #FeesMustFall protests

As a result of the #FeesMustFall protests, the government has introduced a new higher education funding policy which Higher Education Deputy Minister Buti Manamela said was a victory for the student activists.[151] It has been three years since the protests took place, and Minister Naledi Pandor announced that there would be an additional seven billion in grant funding for the 2018 academic year.[152] In article by

149 UN Human Rights Committee. (1994). Kivenmaa V. Finland, Communication No.412/1990, UN Doc.CCPR/C/50/D/412/1990.

150 Islamic Unity v Independent Broadcasting Authority and others 2002 (5) BCLR 433 (CC).

151 Babalo Ndenze 'New funding policy victory for fees must fall Activists' 24 April. http://ewn.co.za/2018/04/24/new-funding-policy-victory-for-fees-must-fall-activists (accessed 23 May 2018).

152 n 151 above.

Shaeera Kalla, an activist and former president of the WITS SRC,[153] she mentions that there are students who are still on trial, some of whom are languishing in prison. She gives an example of Khanya Tandile Cekeshe, a student who was sentenced to eight years in prison of which three were suspended, and he is currently serving his time at Leeukop prison.

Even though fees have fallen, court cases against seven of the Cape Town activists have not.[154] These students still have to appear in court for their trials as a result of their participation in the #feesmustfall protests. Masixole Mlandu is an honour's student who is facing the following charges:[155] a) malicious damage to property for allegedly banging on the blinds of security manager Steven Granger's office "with intention to injure" him or his or the university's property; b) public violence relating to a gathering of around 25 people unlawfully assembled to disturb the peace and allegedly threatening the security manager; c) contempt of court for allegedly disobeying a court interdict and allegedly inciting violence at UCT; and (d) the Contravention of the Intimidation Act for allegedly threatening Granger to remove security officers.

Jane Duncan noted in an article that, although it may not seem clear from all the media coverage,[156] #FeesMustFall protests were overwhelmingly peaceful and highly disciplined even if many were disruptive. She goes on to say that protests will always have some form of disruption and that that does not mean that they are violent. Disruption may be the only way institutions will hear the protesters' voices. Duncan strongly believes that no one should be criminalized for participating peacefully in a protest even if the authorities have not been notified. During the #FeesMustFall protests, people were indiscriminately arrested at the Union Buildings, Universities increased their private security presence, and the government activated the National Joint Operating Centre at the parliament, which is a government body that coordinates

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153 Shaeera Kalla 'Do not criminalise those who are marginalized' 23 March 2018 https://www.dailymaverick.co.za/opinionista/2018-03-23-do-not-criminalise-those-who-are-marginalised/#.WwZ3mkiFPIW (accessed 20 May 2018).

154 Jenni Evans 'Charges have not fallen for 7 Cape Town #FeesMustFall protesters https://www.news24.com/SouthAfrica/news/charges-have-not-fallen-for-7-cape-town-feesmustfall-protesters-20180503 (accessed 23 May 2018).

155 n 154 above.

156 Jane Duncan '#feesmustfall: A question of human rights violations' 9 November 2015 https://mg.co.za/article/2015-11-09-the-question-of-human-rights-violations-against-feesmustfall-protesters (accessed 20 May 2018).

the joint work of the police intelligence agencies and the military.[157] This decision could open the door to the army's being deployed against students in the future.

In 2015, a group of activists from the Social Justice coalition were accused of violating the RGA for holding a peaceful protest outside the Cape Town Mayor's office in 2013 in which they called for adequate sanitation services.[158] They chained themselves to the railings at the entrance to the mayor's office, and they were arrested and convicted based on having failed to provide authorities with a notice of their gathering. During the appeal, this conviction was overturned as the judge ruled that the criminalization of a gathering of more than 15 on the basis that no notice was given violates s17 of the constitution as it deters people from exercising their fundamental right to assemble peacefully and unarmed.[159] The judge continued to note that the limitation is not reasonable and justifiable in an open and democratic society based on the values of freedom, dignity and equality. In addition to the constitution, this ruling was also based on the principles of the ICCPR and the African Charter which have both been ratified by South Africa.

6. An example of Uganda and the Right to Protest

The major problem surrounding the right to freedom of assembly in Africa is that states feel that people ought not to gather and yet the reality of life in Africa is that people want to gather as Africans are associational by nature. Even though most laws governing the right to assembly clearly state that the organiser should notify the concerned authority but not seek permission, this has been misinterpreted to mean permission seeking. Citing Uganda as an example, Article 29 of the Constitution of Uganda protects the freedom of conscience, expression, movement, religion, assembly and association. Article 29 (1) (d) states that everyone shall have the right to assemble and to demonstrate together with others peacefully and unarmed and to petition.[160] The Public Order Management Act 2013 (POMA) is the law that governs

157 n 157 above.

158 Mlungwana and Others V S and Another (A431/15) (2018) ZAWCHC 3; (2018) 2 ALL SA 183 (WCC); 2018 (1) SACR 538 (WCC) (24 January 2018).

159 n 158 above.

160 The Constitution of the Republic of Uganda.

this right. The POMA defines public meetings as gathering, assembly, procession or demonstration in a public place or premises held for the purposes of discussing, acting upon, petitioning or expressing views on a matter of public interest.[161] The organisers of public meetings are required to notify the authorized officer of their intention to hold a public meeting three to fifteen days ahead of time but permission from the Ugandan state is not required.[162] The Act further states that the police are required to ensure fairness and equal treatment of all parties by giving consistent responses to organizers of the public meetings. The POMA grants the police wide-ranging powers to stop or prevent a public meeting from taking place, and these powers have been found to be inconsistent with international standards.

As reported by the Human Rights Watch, the police unjustifiably block, restrict, and disperse peaceful assemblies and demonstrations mainly by opposition groups, relying on the vague and over-broad 2013 Public Order Management Act (POMA) which grants police wide discretionary powers over public and private gatherings.

Fifty six members of an opposition party, The Forum for Democratic Change (FDC), were arrested and detained in July for a total of three days on charges of holding an "unlawful assembly" which was held at a private home.[163] In another incident, members of an opposition party, the Democratic Party (DP), were arrested in July and August as they prepared to address the public to oppose the draft constitutional amendment lifting the age limit of presidential candidates. But, contrary to the above, demonstrators who were advocating for the constitutional amendment in Arua, West Nile and Kabale were escorted by the police.[164]

Several opposition leaders and protestors were also arrested in September and October in a number of towns as they protested against the lifting of the presidential age limits. At least two people were killed in Rukungiri and one in Amolatar by police as they used excessive force to disperse what they referred to as illegal rallies.[165]

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161 The Public Order Management Act 2013 of the Republic of Uganda (POMA).

162 n 161 above.

163 Human Rights Watch 'World Report 2018: Uganda https://www.hrw.org/world-report/2018/country-chapters/uganda (accessed 23 May 2018).

164 n 163 above.

165 n 163 above.

Opposition leader, Kizza Besigye, and two colleagues were charged with murder, assault, inciting violence, and unlawful assembly for the deaths in Rukungiri.

7. Conclusion

From the discussion above it is clear that the South African legal framework does protect the right to protest. Although it is clearly stated in the Gatherings Act that one does not require permission to protest, the provision is often interpreted to mean that they do. This is often the case in most African countries. The next chapter will focus on the African Charter framework for the right to freedom of assembly as protected under Article 11 of Charter in comparison to Section 17 of the South African Constitution. The chapter will further analyze whether there is a need to reconcile the wording of Section 17 of the South African Constitution.

Chapter 4: African Charter and South African law and jurisprudence on the right to protest

1. Introduction

The previous chapter focused on the legislative background of the right to protest in South Africa, concentrating on the legal framework governing the students' right to demonstrate. This chapter looks at the African Charter framework of the right to freedom of assembly as protected under Article 11 of Charter in comparison to Section 17 of the South African Constitution. The chapter will further analyze whether is a need to reconcile the wording of Section 17 of the South African Constitution.

2. The African Charter on Human and People's Rights

The Organisation of the African Unity (OAU) Assembly of Heads of State Government enacted the African Charter on Human and People's Rights (African Charter) in 1981.[166] The African Charter entered into force on 21 October 1986 after the majority of the OAU member states had ratified it. To date, 53 member states have ratified the African Charter.[167] As stated in Article 1 of the Charter, all member states of the Organisation of the African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

The African Charter provides for the following rights:[168]

- **Article 9**
  The right to receive information and free expression;
- **Article 10**
  The right to freedom of association;

166 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa' (1999) 43 *Journal of African Law*

167 n 166 above

168 African Charter on Human and Peoples' Rights (African Charter)

- **Article 11**
  The right to freedom of assembly; and
- **Article 12**
  The right to freedom of movement.

Particularly in relation to my paper, Article 11 protects the right to freedom of assembly. This article states that, "every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, heath, ethics and rights and freedoms of others.[169]" Article 11 should not be read in isolation but in relation to other articles in the Charter, for instance the freedom of expression (Article 9), the freedom of association (Article 10), and the freedom of movement (Article 12). All these articles are related. In the case*, S v Mamabolo (E TV and other Intervening),* Judge Kriegler stated, "That freedom to speak one's mind is now an inherent quality of the type of society contemplated by the constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by sections 15 to 19 of the Bill of Rights. It is the right – idealist would say the duty – of every member of civil society to be interested in and concerned about public affairs."[170] The central article for this paper is, however, Article 11.

This right, as guaranteed in article 11, is not absolute as the exercise of this right shall be subject to necessary restrictions provided for by law, in particular in order to protect national security, safety, heath, ethics and rights and freedoms of others. This right, as provided for in the African Charter, is therefore limited. Article 5 is an example of an absolute human right; it provides for the prohibition of torture and cruel, inhuman and degrading treatment.[171] This article states that every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his/her legal status. All forms of exploitation and degradation of humankind, particularly slavery, the slave trade, torture, cruel, inhuman or degrading punishment and

169 Article 11 of the African Charter.
170 S v Mamabolo (CCT 44/00) [2001] ZACC 17.
171 Article 5 of the African Charter.

treatment, shall be prohibited.[172] Contrary to this, the right to assembly, even though it is protected, is subject to restrictions.

3. The African Charter and the South African Constitution

Section 17 of the South African constitution, just like article 11 of the African Charter, protects the right to assembly. This section provides for the right to assembly, demonstration, picket and petition. It states that everyone has a right, peacefully and unarmed, to assemble, to demonstrate, to protect and to present petitions.[173] The way this right is protected under the South African constitution it can be implied is that it is absolute, and this is the problem. There is need for the reconciliation of section 17 of the South African constitution with article 11 of the African Charter. The Republic of South Africa is a member state of the African Union and has ratified the African Charter without any reservations. Whereas article 11 emphasises that the exercise this right shall be subject only to necessary restrictions particularly in the interest of national security, the safety, health, ethics and rights and freedoms of others, section 17 does not state any limitation. This is the source of the problem in South Africa when people demonstrate; this usually results in violence, for example the burning of cars and looting, among other things. Can we blame such demonstrators? If one reads this section, it could be interpreted to mean that there is no limitation to the right.

Having noted the above, the researcher will look at South African cases relating to the right to assemble in order to ascertain how the judges have interpreted section 17 of the constitution.

4. Case law on the right to assembly

- **South African Transport and Allied Workers Union v Garvis and others**

172 n 167 above.

173 The Constitution of the Republic of South Africa 1996 (the Constitution).

The appellant in this case was the South African Transport and Allied Workers Union ("the Union") which had organised a protest march. This constituted a gathering as defined in the Regulation of Gatherings Act 205 of 1993 ("the Act").[174] As this march proceeded, it resulted in chaos which led to massive damage to vehicles and shops along the route. The respondents in this case were individuals who claimed that they had suffered loss as a result of the riot. The respondents lodged an action in the High Court against the Union in terms of Section 11 of the Act in order to recover damages.[175] They argued that the Union was liable for the loss they had sustained. In terms of Section 11(1) of the Act, the organisers of a gathering are held liable for damage that is caused during that gathering.[176] According to Section 11(2) of the Act, three factors have to be proved in order for a defendant to escape liability.

Section 11(2) reads as follows:[177]

"It shall be a defence to a claim against a person or organisation contemplated in subsection (1) if such a person or organisation proves -

a) That he or it did not permit or connive at the act or omission which caused the damage in question; and
b) That the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
c) That he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it look all reasonable steps to prevent the act in question."

The Union argued that Section 11(2) places a huge burden on trade unions, other organisations and individuals who intend to assemble and protest publicly.[178] They further submitted that this provision suppresses the rights set out in section 17 of the Constitution which guarantees the right "peacefully and unarmed, to assemble, to

174 South African Transport and Allied Workers Union and Another v Garvas and Others (CCT 112/11) [2012] ZACC 13 (SAWATU v Garvas and others).
175 n 174 above.
176 n 174 above.
177 Act 205 of 1993, thereafter 'the Act' Regulation of Gatherings Act 205 of 1993 sec 11.
178 n 174 above.

demonstrate, to picket and present petitions".[179] They noted that this section would deter them from organising marches, protests and other gatherings for fear of financial ruin. The Union argued that this section was unconstitutional owing to the fact that it limits the right entrenched in section 17 of the Constitution. The High Court ruled that the issue of the constitutionality of section 11(2)(b) should be determined prior to and separately from the other issues in the case.[180]

In addition to the above, the Union also served a third party notice on the Minister of Safety and Security stating that if it was to be held liable for the damage, the Minister had to contribute. The Union contended that the damage suffered by the respondents was partly due to the negligent conduct of the South African Police service.[181] The Minister made common cause with other respondents on a separated issue of the constitutionality of Section 11(2)(b).[182] They contended that this section was not unconstitutional. The High Court ruled that the inclusion of the words "and was not reasonably foreseeable" in section 11(2)(b) of the Act was not inconsistent with section 17 of the Constitution. The Union then appealed to the Supreme Court of Appeal against that decision. This Appeal was dismissed by the Supreme Court of Appeal in a unanimous judgement.[183]

The Union argued that section 11(2) of the Act was internally self-destructive and, therefore, incoherent, pointing out that, in situations where the defendant neglected its duty of making sure they had taken all reasonable steps in their power to prevent the act or omission in question, the act or omission would always be reasonably foreseeable in terms of section 11(2)(b).[184] They went on to argue that it was impossible to take reasonable steps to prevent an act from occurring if one did not foresee the possibility of its happening. They, therefore, contended that that this section was misleading and intrinsically destined to failure.

The court ruled that this was not the case by ruling that section 11(2) was not misleading. As set out in section 17 of the Constitution, persons engaging in assemblies and demonstrations had the right to do so only if they were "peaceful and

179 n 173 above.
180 n 174 above.
181 n 174 above.
182 n 174 above.
183 n 174 above.
184 n 174 above.

unarmed".[185] Section 17 only guaranteed the right to assemble and demonstrate peacefully. This section ensures the protection of the public against any behaviour that is against the rule of law and the rights of others, so that, in circumstances where liability is attached to unlawful behaviour at a gathering that leads to a riot, it is just and in accordance with constitutional values that liability is attached to the organisers.[186] The Supreme Court of Appeal dismissed the appeal against the decision of the Western Cape High Court on the ground that the statutory defence provided for in section 11(2) against a claim for riot damage is not illusory but real and capable of being proved.

The court further noted that the scope of the right to freedom of assembly does not extend to persons who assemble in a manner that is not peaceful or unarmed.[187] The court found that the idea of having included section 11 in the Act was to restrict unlawful, violent behaviour that infringes on the rights of others and to ensure that the organisers of those gatherings are held liable.[188]

The belief that section 11(2)(b) has an alarming effect on the exercise of the right to freedom of assembly was discarded and found to be unproven and inconsistent with the uncontested evidence put forward by the respondents.[189] It was then concluded that any chilling effect section 11 has is on unlawful behaviour which is not protected by the right.

"In the Constitutional Court, the applicants contended that the Supreme Court of Appeal was incorrect, that section 11(2) is contradictory and irrational, that it limits the right to freedom of assembly in section 11 of the Constitution and that the limitation is not justifiable."[190] The three preliminary issues that were raised included condonation for the late filling of the application for leave for appeal, COSATU's application for leave to intervene in these proceedings and the application for leave to appeal. The issues of substance that arose were that the words "and was not reasonably

185 n 174 above.
186 n 174 above.
187 n 174 above.
188 n 174 above.
189 n 174 above.
190 n 174 above.

foreseeable" caused section 11(2)(b) to be intentionally inconsistent and irrational, thus rendering the section constitutionally invalid, and, if not, section 11(2) limits the right to freedom of assembly, and, if so, the limitation is justifiable.

Judge Jafta noted that what emerges from the plain reading of section 17 is that it guarantees four rights, the right to assemble freely, to hold a demonstration, to hold pickets, and to present petitions.[191] He went on to say that it is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business and even matters of governance and service delivery.[192] Although not recognised during apartheid, this was the only way through which black people in South Africa could express their views with regards to the decisions made by government that affected their lives. Although these rights are guaranteed now by the constitution, their enjoyment may be limited by a manner accepted by the Constitution.[193] The constitution recognises that none of these rights is absolute and hence lays down conditions for their limitation.[194] Section 36 of the Constitution states that the rights contained in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation itself is reasonable and justifiable.[195] Hence, for a limitation to arise, it has to be clear from the terms of the law that it limits a guaranteed right and the extent to which it limits it.

The Court interpreted section 17 of the Constitution as follows:[196]

"everyone who is unarmed has the right to go out and assemble with others to demonstrate, picket and present petitions to others for any lawful purpose. The wording is generous. It would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises. There is, however, nothing, in our history or internationally, that justifies taking away that promise."

In a majority judgment, Mogoeng CJ held that the law aims to afford victims effective recourse where a gathering becomes destructive and results in injury, loss of property or life. The majority held that the defence provided for by the law is viable and that

191 n 174 above.
192 n 174 above.
193 n 174 above.
194 n 174 above.
195 n 173 above.
196 n 174 above.

the limitation on the right to freedom of assembly in section 17 of the Constitution is reasonable and justifiable because it serves an important purpose and reasonably balances the conflicting rights of organizers, potential participants and often vulnerable and helpless victims of a gathering or demonstration which degenerates into violence.[197]

Mogoeng CJ emphasised that the reasonable steps taken on the one hand and reasonable foreseeability on the other hand were inter-related. Organisers are obliged at all times to take reasonable steps to prevent all reasonably foreseeable conduct that causes damage, and the reasonable steps must be of the kind that renders the conduct causing damage unforeseeable.[198] For these reasons, the majority dismissed the appeal.

- ***Mlungwana and others v S and another;*** [199]

The appellants in this case were accused before the magistrate's court for contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the RGA"), in that, on or about 11 September 2013, they unlawfully and intentionally convened a gathering in protest against poor sanitation services without giving the relevant municipal authority any notice that such a gathering would take place.[200] In other words, the appellants were charged with attending a gathering for which notice had not been given. The appellants were convicted in this court, and they appealed against this conviction. They contended that the criminalisation of the convening a gathering without giving notice is unconstitutional and invalid. The trial court convicted the appellants for contravening section 12(1)(a), and it they made the following findings:[201]

a. "By their own admissions, the appellants had convened the gathering of the day in question but had decided not to give notice as the number of people protesting would be no more than fifteen. Although initially there indeed were no more than fifteen protesters, when others joined in, the conveners failed to

197 n 174 above.
198 n 174 above.
199 Mlungwana and Others v S and Another 2018 1 SACR 538 (WCC) (Mlungwana & others v S & another).
200 n 199 above.
201 n 199 above.

stop them whilst knowing full well that they had exceeded the permissible number of 15 protesters; and

b. The appellants made a conscious decision not to give notice of the intended protest, and, when the number of protesters exceeded fifteen, the protest constituted a gathering as defined in section 3 of the RGA."

The appellants noted that they did not challenge the requirement that notice be given in terms of section 3 of the RGA as they found that it serves a legitimate purpose. The issue here was the criminalisation of the actions of a person who convenes a gathering without giving notice. They further noted that the criminalisation of this action stops people from gathering owing to the fact that they might face fines and imprisonment for exercising a right protected in section 17 of the Constitution. As stated in section 7(2) of the Constitution, the state must respect, protect, and promote and fulfil the rights in the Bill of Rights.[202] This, therefore, means that the rights as enshrined in the Bill of Rights impose an obligation that requires those bound thereby not to act in any manner which would infringe or restrict the right. This obligation is a negative one as it requires that nothing should be done to infringe the rights. As noted in *Satawu and another v Garvas* and others, the wording of section 17 is generous in that it would need some particularly compelling context to interpret this provision as actually meaning less than its wording promises.[203]

As per the Constitution, s39(1) of the Constitution states that, when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, (b) must consider international law, and (c) may consider foreign law.[204] In addition to this, Section 233 states that, when the court is interpreting any legislation, it should prefer any reasonable interpretation that is consistent with international law as opposed to an alternative interpretation that is inconsistent with international law.[205]

202 n 173 above.
203 n 174 above.
204 n 173 above.
205 n 173 above.

The case, *Glenister v President of Republic of South Africa and others*,[206] as noted in the above case,[207] explained the relevance of international law to South African constitutional framework as follows:

"To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of parliament. The approval of an international agreement by the resolution of parliament does not amount to its incorporation into domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic." This does not mean that a an international agreement by a resolution of parliament is to be dismissed as useless, but is to be considered a positive statement by parliament to the signatories of that agreement that parliament is to act in accordance with the ratified agreement.[208] It was further noted that international agreements are important in our law, whether binding or not. Although they may not create rights and duties, they may be used as interpretive tools to evaluate and understand our Bill of Rights.[209]

Seeing as South Africa has signed and ratified the African Charter on Human and People's Rights, the first Amicus in this matter cited the case of *Malawi African Association and others v Mauritani.*[210] This was cited as an example of international precedents supporting the view that the criminalisation of the failure to give notice constitutes a limitation on freedom and peaceful assembly.[211] In this case about 30 people were arrested for distributing a document that contained evidence of racial discrimination against black. Mauritanian government employees who were suspected of being part of the opposition political party.[212] It was held by the commission that the

206 Glenister v President of Republic of South Africa and others 2011 3 SA 347 (CC).
207 n 199 above.
208 n 205 above.
209 n 205 above.
210 Malawi African Association and others v Mauritani ACHPR, Comm. Nos 54/91, 61/91,98/93,164/97, à 196/97 and 210/98 (2000) as discussed in Mlungwana & others v S & another (n 199 above).
211 n 210 above.
212 n 210 above.

imprisonment of presumed political activists on charges of holding unauthorised meetings constituted a violation of the right to assemble.[213] They argued that the government had not come up with any proof to show that the accusations had any basis in the interest of national security, safety, health, ethics, and the rights and freedoms of others, as specified in article 11.[214]'

The first Amicus further noted that a state party must show that the enforcement of a notice requirement pursues a legitimate aim. A report by a study group on freedom of association and freedom of assembly, commissioned by the ACHPR, was also cited where the study group concluded that, in a case of small public gatherings or gatherings leading to no disruption to others, no notification should be necessary.[215]

The court held that, owing to the disastrous impact of a criminal conviction and the lifelong impact it has on the lives of those convicted for contravening s12(1)(a), a criminal sanction would be inappropriate to the offence.[216] The criminalisation of a gathering based on a notice not having been given violates s 17 of the constitution as it is stops people from exercising their fundamental constitutional right to assemble peacefully and unarmed.

- **Hotz and other v University of Cape Town**;[217]

Over 200 people protested during a UCT student protest called "Shackville", where the main issues were the difficulties experienced by many students, predominantly black students, in paying fees and the problems relating to finding suitable accommodation for them to pursue their studies.[218] A shack was erected on the premises of UCT in the middle of residence road which obstructed traffic in and around

213 n 210 above.
214 n 210 above.
215 ACHPR, Report of the Sudy Group on Freedom of Association and Assembly in Africa, 2014ACHPR, Report of the Sudy Group on Freedom of Association and Assembly in Africa, 2014, p, 60, para 5, available at http://www.achpr.org/mechanisms/human-rights-defenders/FreedomofAssociation
216 n 199 above.
217 Hotz and Other v University of Cape Town 2018 1 SA 369 (CC).
218 n 217 above.

the University by a group of protesters [219] Slogans were also painted on the War Memorial at the campus, and paintings and portraits removed from University buildings and burnt.[220] The University management attempted to have the protest moved to another location but failed.

An urgent application was launched by UCT in the high court when a member of the campus security received a threat of arson directed at the university buildings. UCT was granted an interim interdict by the high court against several people and, on the return date of the rule *nisi*, UCT successfully applied for a confirmation of the rule *nisi* against five applicants only.[221] A final interdict was granted against these five applicants, and they were ordered to pay UCT's costs jointly and severally including the costs of the two counsel.

In the Supreme Court of Appeal, the issue was not the legitimacy of the protests but the unlawfulness of the applicants' actions.[222] The court held that their conduct infringed UCT's rights and was unlawful. The court noted that the University's apprehension of the recurrence of the harm was of reasonable intensity in which the protesters expressed their complaints against the University and its management. [223]The applicants' request for an internal disciplinary action as an alternative remedy was rejected. The court held that the High Court's order was broad as it limited the applicants' rights and effectively excluded them from the university campus.[224] This court differed from the terms of the final interdict by the High Court but it confirmed the costs order.

In the Constitutional Court, the applicants sought leave to appeal the decision of the Supreme Court on the basis that this matter implicated student rights countrywide especially the rights to education, freedom to expression, assembly, demonstration, picket and petition, and as well as the right to freedom of association.[225] It was noted that the applicants' right to assemble and demonstrate, although enshrined in section

219 n 217 above.
220 n 217 above.
221 n 217 above.
222 n 217 above.
223 n 217 above.
224 n 217 above.
225 n 217 above.

17, ceased when their demonstration or protest became violent as they had violated the rights of others on campus and not just those of the university.

During this protest, tyres were carried onto the campus and used to fuel a fire that was used to burn the university's artworks. The bust of Jan Smuts and the War Memorial were defaced, dust bins were burned and used to block certain entrances, a shuttle bus was set alight and acts inciting violence were committed.[226] The court pointed out that the destruction of property, particularly in learning institutions, cannot be tolerated. They went on to note that the High Court was correct as it would not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct.[227] The conduct of the protestors was beyond the limit of a peaceful and non-violent protest.

From the above cases, it is very clear that everyone has a right to freedom of assembly as per the constitution of the Republic of South Africa. The RGA was promulgated to regulate the holding of public gatherings and demonstrations at certain places in line with Section 17 of the Constitution. The preamble reads that every person has the right to assemble with other persons and to express his/her views on any matter freely in public and to enjoy the protection of the state while doing so and that the exercise of such a right shall take place peacefully and with due regard to the rights of others.

5. Conclusion

In conclusion, even if the right in section 17 of the Constitution may seem absolute from its wording that is not the case. From the case law discussed it is very clear that when judges are interpreting this section they emphasise that the right is limited. This right can be protected only if it takes place peacefully and with due regard to the rights of others. As interpreted in the case Hotz and Other v University of Cape Town 2018 1 SA 369 (CC), it was noted that it would not have been within the contemplation of the drafters of the Constitution that section 17 be used to justify hooliganism, vandalism or any other unlawful and illegitimate misconduct.

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226 n 217 above

227 n 217 above

Chapter 5: Conclusion and Recommendations

1. Conclusion

We have seen, through the various chapters and the discussion of legislation and cases, that it is clear that the South African Constitution does indeed guarantee, promote and protect the right to assemble, petition and protest. There are, however, sometimes issues in the interpretation of this constitutional right as citizens have interpreted it to mean that the right is absolute and without limitations while that is not necessarily true.

The limitation to this right, which might not be clear when you read the section in the constitution, is that your constitutional right to protest and assembly is subject to the limitation that such assembly and protest must be peaceful and unarmed. It is also important to state that, if a gathering turns violent and there is damage to property, the conveners can be held liable for delictual damages as was seen in the SAWATU v Garvas case. The limitation in the form that the gathering needs to peaceful and unarmed was found to be reasonable and justifiable as it serves as an important balance of the rights of organizers, participants and victims of gatherings that turn violent.

The Gatherings Act was promulgated in 1993 but it has served as an extension of the rights to protest as set out in section 17 by setting out regulations as to how such gatherings should be done. This particular paper has focused closely on the section 12(1)(a) which states that the convener must notify the authorities at least 48 hours before the protest, and failure to do so is a criminal offence. In the interpretation of this act, authorities have interpreted it to mean “asking for permission” when that is not the case. This, however, has been clarified through case law that ‘notify’ means ‘notify’ and not ‘permission’.

Case law has further developed the Gatherings Act regulation in that the act had criminalized failure to notify in terms of 12(1)(a) of the regulation of the gatherings Act. The Mlungwana case ruled that it is not a criminal office not to notify the authorities of one’s intention to convene a protest and, in this case, the accused won their appeal

and charges were withdrawn. The court noted that a criminal sanction would be inappropriate for the offence and if would further violate section 17 of the constitution as it would prevent people from exercising their constitutional rights. If conveners had to ask for permission before convening a protest it would be an unreasonable limitation on the constitutional right to assemble, petition and protest.

South Africa has ratified the universal declaration of human rights and the African Charter, namely articles 9,10,11,12, and the South African Constitution's section 17 is in line with the provisions of these articles.

South African law, therefore, does guarantee its citizens, which includes students, the right to demonstrate with the limitation that such demonstration is unarmed and peaceful so as to not violent the rights of other participants and innocent bystanders. The student protests during the fees must fall movement were, therefore, within the ambit of the law as reports have shown that the protests were peaceful for the most part, and it was the premature reaction of the police, universities and private security on the instruction of the universities that led to some incidents of violence. Our courts have also noted that the fact that a protest turns violent does not deny a peaceful participant of his/her right to protest.

It is against this backdrop that the right to protest and, especially, student protests is set.

Regardless of challenges South Africa faces when it comes to the implementation of the Constitution, and ensuring that participants take part in the exercise of their constitutional right to assemble, protest and petition, South African laws are in line with international standards and the country has come a long way in the advancement of human rights since the abolition of apartheid.

2. Recommendations

There is a need for police to change how it reacts to protests, specifically student protests. This research study has touched on the brutal killings of students during student protests during the apartheid era, while, even after the dawn of the new South Africa governed by the constitution, one unfortunately cannot say that this has changed as our police are still somewhat militarized. Students have not fully enjoyed their right to assembly without any assault on their bodies. Given the fact that there could be an increase of protest in South Africa, whether against student fees or service delivery, the country has to improve the way it protects the rights of those who participate in protest. Through the research conducted, it showed that protests usually resort to violence when there is high level of police presence.

Universities should provide more opportunities for students to engage and contribute to the decision making as this is crucial. It is important that students are made aware of any new developments or changes before they are implemented.

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