THE EFFECT OF THE 1996 CONSTITUTION ON SECTION 5
OF THE REGULATION OF GATHERINGS ACT 205 OF 1993

by

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The Regulation of Gatherings Act 205 of 1993 is an old order piece of legislation, but gives full recognition to the right to freedom of assembly and expression. These rights are entrenched in sections 16 and 17 of the Bill of Rights and enjoy a generous interpretation. Section 5 of the Act creates limitations on these rights, as the responsible officer of a local authority is allowed to prohibit a gathering when he has reasonable grounds to believe that the police will not be able to prevent traffic disruption, injury or substantial damage to property. Given the fact that this limitation serves to protect a compelling state interest, it constitutes a reasonable and justifiable limitation in terms of section 36 of the Bill of Rights.
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INTRODUCTION

Recently, a radical change in the South African law took place without the fanfare, pomp and ceremony accorded to the interim and final Constitutions and some other new order legislation, such as the Labour Relations Act. What makes this change the more interesting is the fact that the legislation implementing this change, was to a large extent a negotiated and cooperative effort by the previous government and its most vociferous opponents.

The Regulation of Gatherings Act\(^1\), an old order\(^2\) piece of legislation, makes a clean break with the legislation and policies of the apartheid government.\(^3\) It recognizes fundamental rights such as the right to freedom of assembly and expression (and to a lesser extent association) in a manner unknown in South Africa before the adoption of a bill of rights.

The aim of this discussion is to evaluate the effect of some of the limitations on the freedom of assembly and expression, as imposed by section 5 of the Regulation of Gatherings Act. To evaluate these limitations, it is essential to introduce the topic by reviewing the new order created by the Regulation of Gatherings Act and its effect on police policy regarding gatherings. The main purpose of this is that it is necessary to fully understand the rationale behind the Regulation of Gatherings Act and its general effect on fundamental rights and

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\(^1\) Act No. 205 of 1993 (as amended).
\(^2\) The Regulation of Gatherings Act was assented to on 14 January 1994.
\(^3\) Admittedly under major international and local pressure.
police action.

The second part of the paper will be devoted to a critical evaluation of the constitutionality of the mechanisms created by the Regulation of Gatherings Act that limits constitutionally entrenched rights, such as the freedom of assembly and expression.
2.1 HISTORICAL OVERVIEW

Historically, the position regarding riotous and prohibited gatherings and assemblies has been regulated by statute.⁴ Previously, most gatherings fell into one of four categories, namely general gatherings, gatherings at or near Buildings

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of Parliament in Cape Town, at or near the Union Buildings and in or near court buildings. For purposes of this discussion, only the position regarding the first category will be set out.

*The Internal Security Act*

Section 46 of the notorious Internal Security Act, 1982 boiled down to this: the Minister of Law and Order or the magistrate of a district could legally prohibit all gatherings that they were convinced were not in the interests of public order. The magistrate could also allow a gathering, but place restrictions on the gathering. Non-compliance with a prohibition was an offence in terms of section 57.

The police had certain legal duties in terms of sections 47 and 48 of the Internal Security Act. Should a warrant officer or officer of higher rank have reason to believe that a prohibited gathering would take place, he could close the place or area to the public. Entering or remaining in the area was an offence under section 57(4). The police also had a legal duty to disperse "illegal" gatherings, or gatherings at which participants killed or seriously injured persons or damaged valuable property. Section 48 provided for the powers to use the necessary force to attain this goal. An oral warning to disperse stating the consequences of a failure to disperse, had to precede the use of force. Section 49 provided for safety measures, in that the police had to use non-lethal methods of dispersal before using weapons likely to cause serious bodily injury or death. The political masters of the police expected positive enforcement of these provisions, which often resulted in overzealous policing of crowds, sometimes with excessive force.
Against this backdrop, the police and participants became increasingly adversarial in the application of the Internal Security Act and violence and disruption during gatherings became common. During 1991 the then State President appointed the Goldstone Commission\(^5\) to investigate the phenomenon of public violence in the RSA, its nature and causes and persons involved in it. The Commission's functions were *inter alia* to report to the State President and to make recommendations on steps to be taken to prevent such violence or intimidation.

*The Goldstone Commission*

The Goldstone Commission\(^6\) *inter alia* inquired into the events after the assassination and during the funeral of Mr Chris Hani and the events at the World Trade Centre, where the AWB stormed the venue of the CODESA negotiating process.

Furthermore, the Commission inquired into the regulation of gatherings and marches, to limit disruption and violence as far as possible. A panel of local and international experts undertook this inquiry and consulted with interest groups such as the African National Congress, the Inkatha Freedom Party, the former South African Police, the former South African Defence Force and the

\(^5\) The Commission was appointed in terms of the Prevention of Public Violence Act, Act No 139 of 1991.

Department of Justice. After these consultations, the panel produced a report to serve as a model for such regulation.\(^7\)

In the Commission's final report on the prevention of public violence and intimidation, it referred to an agreement and commented on some aspects. The South African Police, the African National Congress, Cosatu, the South African Communist Party and the Inkatha Freedom Party concluded an interim agreement on the conduct of public demonstrations.\(^8\) The following remark on page 4 of the final report is quite interesting:

\[
4. \text{Dat die Tussentydse Ooreenkoms ten opsigte van Massa-optogte en Betogings feitlik deurgaans getrou nagekom is, is bewys van die wyse waarop mense hulle gebonde ag aan voorwaardes van 'n ooreenkoms waartoe hulle partye was. Die komitee vertrou dat die meerderheid Suid-Afrikaners hierdie konsepwetsontwerp in dieselfde lig sal beskou.} \(^9\)
\]

This agreement was the basis upon which organizers and the South African Police agreed that the South African Police would maintain a low profile during the funeral of Mr Chris Hani. Because emotions were running high during that phase, the presence of police officials would probably have aggravated the situation. The Commission stated in its report that the organizers were supposed to have been responsible for and capable of, controlling the crowd. On the day,

\(^7\) The report of the panel was published in Heyman (Ed) Towards Peaceful Protest in South Africa: Testimony of multinational panel regarding lawful control of demonstrations in the Republic of South Africa. (1992)

\(^8\) A copy of this agreement is contained in the report: "Towards Peaceful Protest In South Africa" n7 at 196.

\(^9\) That the interim agreement regarding mass marches and protests was faithfully complied with almost consistently, is proof of the way in which people regard themselves bound by the conditions of an agreement to which they are parties. The committee trusts that the majority of South Africans will see the Bill in the same light. (free translation)
however, this was problematic, as the organizers were not able to control the crowds, and the police were not able to respond reactively and timeously.

The final report further points out that agreements should form the foundation of any operational planning for a gathering. The report also covered other relevant aspects, but the Commission stated unequivocally that political tolerance is a key factor in successful management of a crowd. This tolerance was, at the time, "sadly lacking".

The draft Bill

After publishing a draft Bill, the panel incorporated comments of more than 35 bodies into further drafts. They also incorporated further comments on these drafts where feasible. The resultant Regulation of Gatherings Act\textsuperscript{10} is therefore a truly cooperative and negotiated effort and serves as an essential instrument in the maintenance of public order.

2.2 AN OVERVIEW OF THE ACT

The safety triangle

An essential element of the Act is the creation of a so called "safety triangle" - the appointment of a convener of a gathering, a responsible officer of the local authority and the authorized member of the South African Police Service. These

\textsuperscript{10} The Act was amended by the Safety Matters Rationalization Act, Act No. 90 of 1996.
three parties are the main role players and form a "partnership" to manage the event.

**Procedures and mechanisms**

The Act provides that the convener must give notice to the local authority,\(^{11}\) whereafter negotiations take place between the members of the "safety triangle" and other interested parties.\(^{12}\) Conditions may be imposed by the responsible officer for the holding of the gathering, and a gathering may also be prohibited in limited and specified circumstances.\(^{13}\) Review and appeal procedures are created\(^{14}\) and provisions regarding the conduct of gatherings and demonstrations are set out.\(^{15}\) The Act describes police powers to protect participants and non-participants, provides a framework for the use of force by the police\(^{16}\) and creates liability for organizers for riot damage.\(^{17}\) The Regulation of Gatherings Act creates offences and penalties\(^{18}\) and provides for interpretation guidelines.\(^{19}\)

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\(^{11}\) In Northern Ireland and the Netherlands, a *notice* is also sufficient (n7 at 72 and 97); a licence is required in Israel (n7 at 79); a permit in Columbia USA (n7 at 92); no notice whatsoever in Germany (n7 at 94); in Belgium the local authority may make municipal police by-laws to regulate gatherings (n7 at 99).
Purpose of the Regulation of Gatherings Act

One of the purposes of the Regulation of Gatherings Act is clearly not only to preserve and promote freedom of assembly and expression, but also to protect the rights of non-participants. This objective is also of overriding concern and the rights of non-participants should be taken into account when any negotiations with conveners are conducted and conditions are imposed upon the event. The preamble makes it clear that the Regulation of Gatherings Act is aimed at promoting the exercise of fundamental rights, with due regard to the rights of participants and non-participants alike.20

2.3 CHANGES EFFECTED BY THE ACT

Some interesting changes effected by the Regulation of Gatherings Act are the shift in approach, the shift in responsibility and police powers.

The new approach to crowd management

From the Act, it is quite apparent that the emphasis has shifted from crowd control to crowd management. This paradigm shift is also reflected in the South

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20 The preamble reads:

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

And whereas the exercise of such right shall take place peacefully and with due regard to the rights of others...
African Police Service Policy on Crowd Management. The new approach acknowledges the rights of the individual to express him or herself, associate with others and to gather or demonstrate. It also gives effect to these rights by promoting state protection in the exercise of these rights. Whereas, in the past, the police were deployed to control crowds, the Act and policy promote co-ownership of the event and co-management thereof by the local authorities, organizers and the police. The local authority and the convener play a major part in the planning of the gathering, while the convener is involved in the actual control and management of the crowd.

The shift in responsibility

In the past, magistrates had the responsibility to approve gatherings, marches, rallies etc. The police played a major role in advising the magistrate and this advice was often based on political intolerance. This situation was clearly an obfuscation of the role of the magistrate as it is an executive government function and ought not to be a function performed by judicial officers. The Act recognises the fundamental rights associated with public protest and demonstration and shifts this responsibility to the local authority as an organ of

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21 The Crowd Management Policy was approved of by the Ministers' Forum shortly after the Regulation of Gatherings Act came into operation.

22 Section 165(1) of the Constitution clearly states that the courts are vested with judicial authority - an indication of the intended separation of power. Section 165(3) requires of other organs of the state to assist and protect the courts to ensure independence, impartiality, dignity, accessibility and effectiveness. In Northern Ireland (n7 at 73), Israel (n7 at 81) and Columbia (n7 at 93), this function is usually performed by police officials, while in the Netherlands (n7 at 97) and Belgium (n7 at 99) the local mayor performs this function. In Zambia, this function is performed by the police - see The South African Law Commission Final Report on Group and Human Rights 1994 at 48.
the state.

This not only promotes tolerance and accountability, but also ensures that the process is transparent. According to the procedures created by the Act, the local authority is the axis around which successful implementation of the Act revolves, thereby bringing the community closer to the democratic decision-making process. Local authorities will therefore ultimately be responsible to the electorate in the exercise of this function of government.

In the past, control of a crowd was a police function. The Act now shifts this responsibility to the convener, who must appoint "marshals" to control the crowd and ensure compliance with the negotiated aspects as well as the law. This is a positive shift in responsibility as the participants are more likely to adhere to the orders from their own officials on the one hand, and officials of the organization are more likely to be tolerant of their own supporters on the other.

**Police powers**

Section 9 of the Act provides for police powers. The police may exercise these powers whether the gathering is held in compliance with the Act or not. The Act therefore recognises that the distinction between a "legal" and "illegal" gathering has faded considerably when policing of that gathering is at issue. This is because legality and situational appropriateness lie at the core of police action. Spontaneous gatherings will therefore be policed in the same manner as regular gatherings where the organiser has given proper and timeous notice. The only "illegal" gatherings will be those prohibited in, or by authority of the Act.
The focus of police powers is more concentrated towards negotiation than the past strong handed tactics. Predictability and tolerance are promoted.

The circumstances in which the police may use force to disperse crowds are very clear and the use of lethal force only permitted in extreme situations. Dispersal does not therefore depend upon the “legality” or “illegality” of a gathering, but rather upon the circumstances. This is more in line with the common law principles of self-defence, necessity and duty of care.23

Safety valves

The safety valves built into the Regulation of Gatherings Act are contained in section 6. This section allows the role players in the safety triangle to call on the judiciary to review bad administrative decisions and for interested parties to apply to court for the appropriate relief.

2.4 THE EFFECT ON POLICING

The Regulation of Gatherings Act did not only have a profound effect on policing, but more importantly, influenced the policy behind policing. The Crowd Management Policy of the South African Police Service rests on four key principles:

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23 The common law principle of duty of care, as confirmed in Minister van Polisie v Ewels 1975 3 SA 589 (A) was, in my view, extended by the inclusion of section 12(1)(c) in the Constitution. The police will, therefore have a positive duty of care towards all people.
Legality

Before the police undertake any action, the operational commander will ask whether he or she has any legal authority to intervene. In other words, whether the police has the necessary mandate. Because the Constitution, the South African Police Service Act\textsuperscript{24} and the Regulation of Gatherings Act (especially section 9) create a clear framework for police action, it is necessary for the police to recognize the parameters of this legal framework in order to act lawfully. The authority to intervene and the restrictions on such intervention must be clear to the police before they take any measures.

Situational appropriateness

This second principle requires of the police to assess a particular situation to be able to respond within the framework of legality. The prevailing circumstances of a specific situation will guide the police in deciding which actions to take.

This principle gives effect to the notion that every situation where a crowd needs to be managed, will be different and that operational decisions should be based on the actions of the crowd rather than prescribed procedures.

\textsuperscript{24} Act No. 68 of 1995, more specifically see section 13(1) that reads:

Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.

See also section 13(3) which requires reasonableness and the use of minimum force in the performance of official duties.
Optimization

The principle of optimization concerns the optimal use of equipment and personnel to reach or obtain the goal set out in the planning phase. The optimal use of equipment and personnel should be possible when a complete analysis is made of the particular situation. This analysis entails the consideration and study of all factors which could possibly influence the effective achievement of suitable action to contain the situation.

Proportionality

The principle of proportionality concerns the relationship between the means the police apply during a public order situation, and the end sought to be achieved. The police should suitably equip members according to the circumstances before they are deployed. Already during the planning phase, the police should determine which methods and equipment may be regarded as least forceful in the circumstances. When the use of force is unavoidable, it must cease immediately once police members attain the objective of the operation.²⁵

Comments on the Crowd Management Policy

The Crowd Management Policy actively defines and promotes the purpose of the

²⁵ This objective will normally be to maintain public order, to prevent injury or death to persons, or prevent damage to property. It thus relates to the duty of care of the police.
Regulation of Gatherings Act. Read with the Act, the Crowd Management Policy forms a framework within which the police can define their powers. It thus prevents arbitrary police action, the overzealous use of force and violent dispersal of “illegal” gatherings.

The Crowd Management Policy clearly reflects aspects of the 1996 Constitution by acknowledging fundamental rights and promoting an approach consistent with section 36(1):

- The principle of legality requires a clear legal framework justifying intervention by the police.

- The principle of situational appropriateness is in line with the requirement of section 36 that limitation of a fundamental right must be reasonable and justifiable and that all factors must be taken into account.

- The principle of proportionality requires that the police consider the purpose of the limitation, its nature and extent as well as the relationship between the limitation and its purpose. This process should logically lead to a decision to use the least forceful (restrictive) methods to attain the lawful goal of maintaining public order.

2.5 PROHIBITION

The Regulation of Gatherings Act also effects the prohibition of gatherings and demonstrations. It provides for two types of prohibition of gatherings or
demonstrations. The first of these is an *ab initio* prohibition in section 7. This type of prohibition is generally accepted in other countries. The second type of prohibition is issued by the responsible officer of a local authority. It is this category of prohibition that will be evaluated below.

**Power of a local authority to prohibit a gathering**

In stark contrast with the previous position, the Regulation of Gatherings Act limits the power to prohibit a gathering. The only sections dealing with local authority prohibitions are section 3(2) and section 5. Section 3(2) enables the local authority to prohibit a gathering when the necessary notice is received less than 48 hours before the event. Section 5 allows for a prohibition the circumstances set out below. A responsible officer may not prohibit any gathering *arbitrarily*, even if there are some grounds to feel that a prohibition may save the day.

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26 The section prohibits gatherings at or near courts, buildings of Parliament and the Union Buildings. This prohibition is, however, not absolute, as conveners may obtain written permission from the relevant authority. This permission can obviously only be refused to protect a compelling state interest and the decision would have to comply with section 33 of the Constitution regarding administrative justice. I submit that the factors provided for in section 36(1) should also be considered when exercising this discretion.
### THE EFFECT OF THE CONSTITUTION ON PROHIBITION

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#### 3.1 INTRODUCTION

The dawning of a constitutional dispensation has a profound effect on the implementation of the Regulation of Gatherings Act and defines the frame of reference within which it must be viewed. It is therefore prudent to define the rights in question and determine their scope, before discussing a limitation of these rights by the Regulation of Gatherings Act.

Contrary to the literal interpretation favoured by the South African courts before
the interim Constitution, the Constitutional Court has accepted that, in interpreting
the Bill of Rights, a purposive and generous approach should be adopted.\textsuperscript{27} It is,
however, necessary to distinguish between "purposive" and "generous" within
such an approach, as a purposive approach does not necessarily embrace
generosity.\textsuperscript{28} Du Plessis and Corder argue convincingly that the "purposive"
approach could better be described as "purpose-seeking". According to Du
Plessis and Corder, this means that

..from the point of view of ascertaining the \textit{ratio legis}, teleological interpretation is part
of a contextual approach which also includes grammatical\textsuperscript{29}, systematic\textsuperscript{30}, historical\textsuperscript{31},
and comparative\textsuperscript{32} interpretation.

\textsuperscript{27} \textit{S v Zuma} 1995 4 BCLR 401 (CC) at 411C-G; see also \textit{S v Makwanyane} 1995
6 BCLR 665 (CC) at 676 where the approach is described as "generous" and
"purposive", giving expression to the underlying values of the constitution, while
paying due regard to the language.

\textsuperscript{28} This distinction needs to be drawn clearly. See Hogg "Interpreting the Charter
of Rights: Generosity and justification" 1990 \textit{Osgoode Hall Law Journal} 818
at 820-1 where he argues that the purpose of the right will determine the
generosity afforded to its interpretation. See also Du Plessis & Corder
\textit{Understanding South Africa's Transitional Bill of Rights} (1994) at 85, where they
argue that most rights will normally be construed generously.

\textsuperscript{29} See \textit{S v Zuma} (supra n27) at 412F-H where Kenterdige AJ discusses the
grammatical method. In \textit{Kalla v The Master} 1995 1 SA 261 (TPD) Van Dijkhorst
J emphasizes this method at 268G-H:

\begin{quote}
Obviously, when one seeks to interpret the fundamental rights clauses of chap
3 thereof, which sets out broad principles, this has to be done in the spirit of the
Constitution, But surely not when one has to determine whether Bloemfontein
is the seat of the Appellate Division as provided for in s 106(2)?
\end{quote}

\textsuperscript{30} See the judgement of Chaskalson P in \textit{S v Makwanyane} (supra n27). The
approach adopted by Chaskalson P corresponds to a large extent with what Du
Plessis and Corder refer to as "systematic interpretation". (n28 at 73)

\textsuperscript{31} See \textit{S v Zuma} (supra n27) at 411E-F where the historical aspect is addressed.

\textsuperscript{32} See \textit{S v Makwanyane} (supra n27) at 686A-B where Chaskalson P recognizes
that foreign and comparative law may be of value to deal with certain issues,
but are also relevant to section 35(1) of the 1993 Constitution.
The approach of Ou Plessis and Corder have some advantages and cannot be faulted. Against this backdrop, the authors propose the following elements of interpretation:

- defining the rights or entitlements entrenched in the Constitution and determining their scope;

- understanding the law in force (legislation and common law) or the administrative action subordinate to the Constitution and this includes -
  - construing "ordinary" legislation and interpreting applicable common and customary law so as to determine their scope and effect, and/or
  - comprehending the effects of administrative action;

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33 The purposive approach and the contextual approach both fall into one broad category as opposed to the textual or literal approach category. See Botha Wetsuitleg, 'n Inleiding vir studente 1991 11-15. See also Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus Fundamental Rights in the New Constitution 1994 at 121; Spitz "Eschewing silence coerced by law: the political core and protected periphery of freedom of expression" (1994) SAJHR 301 at 303; The South African Law Commission Final report on Group and Human Rights (1994) at 178. These authors all prefer a purposive or contextual approach. The approach of Du Plessis and Corder differs in some respects. They prefer to group the five methods named above together to form their method of interpretation. This approach has the advantage that the text is interpreted with reference to the linguistic exposition thereof, the context and purpose of the provision as well as the historical and international context of the provision. (n28 at 73-74) The weight accorded to each of these is determined by the nature of the statute. (n28 at 66) This method provides a sound basis for a holistic interpretation, and is therefore preferred.

34 n28 at 72.
determining whether law in force or administrative action prima facie limits rights or entitlements entrenched in the Constitution;

adjudicating the constitutionality (i.e., the constitutional tenability or justifiability) of any limitation above.

The grammatical, systematic, teleological, historical and comparative methods then serve as a backdrop against which these elements are invoked.

The relevant sections of the Constitution must therefore be looked at to define the right to freedom of assembly and expression, and to determine their scope.

3.2 DEFINING THE RIGHT AND DETERMINING THE SCOPE

In order to properly define the right to freedom of assembly and also that of expression, it is necessary to examine the application and interpretation of the Constitution, as well as some of the most relevant rights entrenched in Chapter 2. A proper definition of any right is impossible without due regard to its context.

The Constitution: Application

The Constitution of the Republic of South Africa provides in the preamble that the Constitution is adopted to:

... lay the foundations for a democratic and open society in which government is based

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35 Act 108 of 1996 - referred to as “the 1996 Constitution”
on the will of the people and every citizen is equally protected by the law;

It further provides in section 7(2):

7  (2). The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

And in section 8(1):

8.  (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

The Constitution: Interpretation

The Constitution makes provision for interpretation:

39.  (1) 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.

      (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Constitution: Fundamental rights

The relevant rights are contained in sections 16, 17 and 18:

Freedom of expression

16.  (1) a) freedom of the press and other media;
      b) freedom to receive or impart information or ideas;
      c) freedom of artistic creativity; and
      d) academic freedom and freedom of scientific research.

      (2) The right in subsection (1) does not extend to -
          (a) propaganda for war;
          (b) incitement of imminent violence; or
          c) advocacy of hatred that is based on race, ethnicity, gender, or
religion, and that constitutes incitement to cause harm.

Assembly demonstration, picket and petition

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

Freedom of association

18. Everyone has the right to freedom of association.

These rights are not absolute, as they may be limited, not only in terms of their own internal limitations or modifiers, but also in terms of section 36.

The fundamental rights to freedom of assembly and expression: The context

Freedom of thought and speech ... is the matrix, the indispensable condition of nearly every other form of freedom

36 Carpenter "Internal Modifiers and other qualifications in bills of rights - some problems of interpretation" 1995 SAPL 260 expresses misgivings about the way in which the interim Constitution was worded. Many of these problems were not addressed in the final Constitution.

37 Besides the limitation clause, the right to freedom of assembly must obviously also be interpreted with regard to the phrase "peacefully and unarmed", which is an internal modifier further limiting this right. See infra for a discussion regarding s36.

38 The famous statement by Justice Cardozo in Palko v Connecticut 302 US 319 (1937); also quoted by Devenish "Freedom of expression: the 'marketplace of ideas" 1995 TSAR 442 at 443 n15; Marcus "Freedom of expression under the Constitution" 1994 SAJHR 140; Van Schalkwyk J in Mandela v Falati 1994 4 BCLR 1 (W) at 7F. Compare this with S v Makwanyane (supra n27) where Chaskalson P finds at 722H-723B that

[These rights to] life and human dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.
In a decision of the Supreme Court of Zimbabwe in *In re Munhumeso* the court found that freedom of expression serves four broad purposes:

- It helps the individual to obtain self-fulfilment;
- It assists in the discovery of truth;
- It strengthens the capacity of an individual to participate in decision-making; and
- It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

This approach favours the view that

> ...the final end of the State was to make men [sic] develop their faculties.

Freedom of speech is therefore not only the means to the lofty ideal of self-fulfilment of the individual, but the end in itself. Clearly the right to freedom of expression at 568i as "a central value of our constitutional enterprise."

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39 1995 1 SACR 352 (ZS); see also *Retrofit (PVT) v Posts and Telecommunications Corporation* 1996 1 SA 847 (ZS) where the court, not surprisingly, referred to this statement with approval.


41 *Whitney v California* 274 US 357 (1927) 375.

42 In *Rivett-Carnac v Wiggins* 1997 4 BCLR 562 (C) Davis AJ describes the freedom of expression as "a central value of our constitutional enterprise."
expression is seen as one of the pillars of a democracy - gatherings and demonstrations are often used as the means to convey ideas and messages. This interdependence between the right to freedom of expression and that of assembly, is a clear indication that freedom of assembly is to be regarded as important as that of expression and (sometimes inseparably) linked to it. Freedom of the media is seen in a similar light.\textsuperscript{43} Freedom of assembly was recognized in the South African law even before the bill of rights entrenched it.\textsuperscript{44}

It is, however, important to keep in mind that section 16 defines the freedom of expression more narrowly than it is defined in countries such as the USA.\textsuperscript{45} Besides the internal limitations contained in section 16(2) of the 1996 Constitution, section 36 also provides for further statutory limitations. Freedom of expression in terms of the 1996 Constitution therefore does not enjoy the same scope as it did in terms of the 1993 Constitution.

Our Constitutional Court adopted the approach to define a right generously, and to interpose any constitutionally justifiable limitations only at the second stage of the analysis.\textsuperscript{46} The right to freedom of assembly and expression should therefore

\begin{itemize}
\item \textsuperscript{43} Holomisa v Argus Newspapers Limited 1996 6 BCLR 836 (W) at 855E-F, which is also applicable to the right to gather and demonstrate.
\item \textsuperscript{44} In During NO v Boesak and Another 1990 3 SA 661 (A) 673 the Appeal Court per Grosskopf JA held the view that the right to hold a gathering is regarded as one of the fundamental rights in our society.
\item \textsuperscript{45} The right to freedom of expression was defined more broadly the 1993 Constitution. Section 15(1) had a striking resemblance to article 21 of the Namibian Constitution. The limitations placed on freedom of expression by section 16(2) would therefore probably prevent a similar result such as that reached by the Namibian High Court in S v Smith 1997 1 BCLR 70 (Nm).
\item \textsuperscript{46} S v Zuma (supra n27) at 414; S v Makwanyane (supra n27) at 707. Quoting from Attorney-General v Moagi 1982 2 Botswana LR 124 at 184, Kentridge AJ
\end{itemize}
be construed generously, because it is regarded as one of the foundations of democracy.\textsuperscript{47}

In \textit{Acting Superintendent-General of Education of Kwazulu-Natal v Ngubo and Others}\textsuperscript{48}, Hurt J found that the right to assemble and demonstrate

\[
\ldots \text{implicitly extends no further than is necessary "to convey the (demonstrator's) message". I do not consider that there is any basis for concluding that the implicit limits of the right to assemble and demonstrate are any more extensive than those of the right to freedom of speech and expression. It follows that I cannot conceive of any situation where the right to assemble and demonstrate can be so extensive as to justify harassment, "tortuous actions" or criminal actions.}\textsuperscript{49}
\]

This \textit{dictum} defines the right to freedom of expression and freedom of assembly in the South African context - especially in view of the wording of section 16(2). From the above it is clear that the right itself ought to be given a generous interpretation, but within the parameters of its purpose and text.

\section*{3.3 UNDERSTANDING THE LAW IN FORCE}

\begin{flushright}
\begin{small}
\text{stated in his judgement in} S v Zuma \text{at 412H-I that}
\end{small}
\end{flushright}

\begin{center}
a constitution "embodying fundamental rights should \textit{as far as its language permits} be given a broad construction." (My emphasis)
\end{center}

\textsuperscript{47} Cachalia et al n33 at 57. See also the report of the South African Law Commission n33 at 47 where it is stated that the general rule will favour protection of freedom of expression, its restriction is the exception.

\textsuperscript{48} 1996 3 BCLR 369 (N) at 375l.

\textsuperscript{49} At 375l-376A.
Section 3(2) and section 5 authorize the responsible officer of a local authority to prohibit a gathering. Section 3(2) provides that a responsible officer may prohibit a gathering, if the convener gives notice less than 48 hours before the commencement of the gathering.

Section 5(1) and (2) is more specific about the jurisdictional facts that must precede a prohibition and reads as follows:

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

5(2) If, after the meeting or consultation referred to in subsection (1), the responsible officer is on reasonable grounds convinced that no amendment contemplated in section 4(2) and no condition contemplated in section 4(4)(b) would prevent the occurrence of any of the circumstances contemplated in subsection (1), he may prohibit the proposed gathering.

It is obvious that five jurisdictional facts must exist, before a responsible officer may prohibit a gathering.\textsuperscript{50}

\textit{Credible information on oath}

\textsuperscript{50} The decision to prohibit the holding of a gathering will be subject to section 33 of the 1996 Constitution regarding just administrative action. Section 33(1) and (2) must be read with item 23(1) of Schedule 6. See also para 82 of the judgement in \textit{In re: Certification of the Constitution of the Republic of South Africa 1996 10 BCLR 1253 (CC) at 1290D-F}, which will apply by analogy to section 33.
The Responsible Officer must have "credible information on oath" brought to her attention, in order to initiate a prohibition. I would submit that "credible" means that the statement must be, objectively speaking, worthy of belief.\(^{51}\) This information may contain hearsay evidence, as long as it is reasonably convincing. The responsible officer may obviously rely only on information that is not only reasonable, but also relevant.\(^{52}\) I would further submit that oral evidence, on oath, will also satisfy this requirement.

**A threat of serious disruption of traffic, injury or damage**

The information above must be credible and show that a threat of serious traffic disruption, injury to people or extensive damage to property will result if the gathering is held. The information must also identify the threat and provide sufficient reasons for anticipating it. It is not necessary to prove that the threat is actually going to materialise, as the section indicates a standard of proof that is far less than reasonable doubt - rather along the lines of a balance of probability test.

**That the police or traffic officers will not be able to contain this threat**

Besides furnishing reasons for anticipating a threat, the police (or traffic officers) must also show that they are unable to cope with the threat.\(^{53}\) A lack of resources

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\(^{51}\) See Baxter *Administrative Law* 1984 at 501 where the author refers to "substantial" or "reasonable" evidence.

\(^{52}\) Baxter describes this requirement as "universally appropriate". See n51 at 503.

\(^{53}\) This is clear from the word "and" that links the two requirements.
may be a valid argument, as will the lack of time to plan and prepare properly. Another aspect may also be the sheer magnitude of the event.\textsuperscript{54}

An interesting Catch-22 is created by this provision. In terms of section 6(6)(a) the police must make the venue inaccessible in the event of a prohibition. In other words, to obtain a prohibition, the police must, in terms of section 5(1), first provide evidence under oath that they cannot contain a certain threat. As soon as the gathering is prohibited, they must effectively stop the gathering from taking place with that same limited capacity!

\textit{Meet with or consult the interested parties}

After the first two facts are established, the responsible officer must meet or consult with the convener and the authorized member or other interested parties to consider a prohibition.\textsuperscript{55} This meeting or consultation is obviously intended to provide parties with an interest, such as the convener, an opportunity to present facts to persuade the responsible officer to exercise her discretion along certain lines - in other words the rules of natural justice, such as the \textit{audi alteram partem} rule, should be applied.\textsuperscript{56}

\begin{flushleft}
\textsuperscript{54} In the \textit{Report of the Commission of Inquiry into the violence and occurrences at Eldorado Park, Westbury, Reiger Park and Noordgesig on 6 February 1997}, Justice Froneman remarked at 32 of the typed report upon the inability of the police to deal with certain situations, not because of the size of the crowd, but due to unique factors that may present themselves only on that day.

\textsuperscript{55} The responsible officer must consult. Non compliance with this requirement is fatal and any decision taken may be set aside on review. See \textit{OVS Vereniging vir Staatsondersteunde Skole v Premier Prov. Vrystaat} 1996 2 BCLR 248 (O) at 275C-D.

\textsuperscript{56} The rules of natural justice can be incorporated in a general duty to act fairly. See Baxter n51 at 540, \textit{Jenkins v Government of the RSA} 1996 8 BCLR 1059
"Consider" implies that the merits of the issue should be weighed up objectively\(^5\) - the Responsible Officer will therefore be obliged to:

- act in good faith;\(^6\)

- take alternatives into account;\(^7\)

- weigh up the consequences of prohibiting or not prohibiting the proposed gathering;\(^8\) and

- take a course of action that is reasonable, or "adequately just or right".\(^9\)

**Convinced on reasonable grounds that no amendment or condition will prevent the threat**

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\(^5\) See *Cekeshe v Premier Prov Eastern Cape* 1997 12 BCLR 1746 (Tk) at 1769E-1770G and the authorities quoted there. Wiechers *Administratiefreg* 1984 at 257 sees the rules of natural justice as a tool to ensure that the administrative organ applies her mind to the issue properly. See also *Kotzé v Minister of Health* 1996 3 BCLR 417 (T) at 426B-C where the court found that fairness dictates that the administrative organ should afford the party affected by its decision the opportunity to deal with information intended to be taken into account when considering the application, but does not form part of the application.

\(^6\) Baxter n51 at 539.

\(^7\) Baxter n51 at 505. Wiechers n56 at 267 states that all administrative acts are subject to the requirement of *bona fides*.

\(^8\) Baxter n51 at 538

\(^9\) Baxter n51 at 522 and Wiechers n56 at 275.

\(^5\) Kotzé v Minister of Health (supra n56) at 425F.
Before the Responsible Officer may prohibit the gathering, she must be convinced on reasonable grounds that no negotiated amendment to the notice (i.e. pertaining to the venue, route, time, date, etc) or condition will prevent the occurrence of the circumstances relating to the threat. The test is obviously objective - the decision must be based on objectively ascertainable facts. This requirement is designed to prevent arbitrary decisions and will probably be the basis of most applications for judicial review.

Commentary

The section as a whole clearly aims at ensuring that the responsible officer does not take arbitrary decisions relating to a prohibition. I would argue that the decision to prohibit in terms of section 3(2) must ex consequentibus follow the same procedure, although it is not so specified.

3.4 DOES SEC 5 CONSTITUTE A PRIMA FACIE INFRINGEMENT?

Prohibition of a gathering effectively means that the means of getting a message across, is taken away. Prohibition of a gathering may therefore be likened to censorship.

Prior restraint

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As the purpose of the Act is rather to facilitate the exercise of the right to freedom of assembly and expression, one would assume that the authority to prohibit is limited. The effect of section 33 of the 1996 Constitution would be to impose a duty of fairness on the local authority.
In the United States of America a limitation of this sort, would certainly be seen as a form of prior restraint,\(^{63}\) and as a result subject to a rebuttable presumption of unconstitutionality.\(^{64}\) In South Africa a broad range of censorship provisions existed at the end of 1989, that had the effect of prior restraint.\(^{65}\) In South African law this aspect was discussed by Van Schalkwyk J in *Mandela v Falati*\(^ {66}\) where the learned judge held that

\[\text{... a prior restraint would not, save in exceptional circumstances, prevail against the right of free speech.}\]

Since 1989 the political situation has changed drastically, especially with the introduction of the Regulation of Gatherings Act and the Constitution. Some South African authors regard the right to freedom of assembly as equal to the right to freedom of expression.\(^{67}\) Seen in the light of the generous formulation of the freedom of expression in the 1996 Constitution, one cannot but agree. In the light of past restrictive practices and the values that underlie the Constitution, the prohibition of any gathering seems to be a *prima facie* infringement of the right to assemble.

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\(^{63}\) *Cantwell v Connecticut* 310 US 296 (1940). At 306 the US Supreme Court held that:

A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

\(^{64}\) Devenish n38 at 452 and the authorities quoted there. To justify the restraint, the executive must prove a "clear and present danger".

\(^{65}\) Marcus "Censorship under the emergency" 1990 SAHRLLY 24 at 24. At 33-4 he gives an overview of prohibitions of gatherings during that period.

\(^{66}\) n38. Also quoted and discussed in Spitz n33 at 321.

\(^{67}\) Cachalia et al n33 at 57.
3.5 IS THIS A CONSTITUTIONALLY TENABLE LIMITATION?

The Constitution provides as follows:

Limitation

36. (1) The rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Constitutional Court remarked as follows:

Although section 36(1) differs in various respects from section 33 of the interim Constitution its application still involves a process, described in S v Makwanyane and Another as the 'weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests.\(^{68}\)

The rights in question, are both core fundamental rights, as was shown above. On the other hand, the state has a compelling interest, not only in ensuring the rights of non participants, but also in ensuring the safety and security of the people.\(^{69}\) It is therefore clear that the state has a compelling interest to protect.

\(^{68}\) Per Ackermann J in De Lange v Smuts NO and Others 1998 7 BCLR 779 (CC) at 816B-C.

\(^{69}\) See, for instance, section 12(1)(c) which places a positive duty on the state to safeguard the safety and security of every person. See also Towards peaceful protest n7 (supra) at 2 regarding the role of police to prevent violent mass actions.
The nature of the limitation is such that it would only be in extreme circumstances that a responsible officer can prohibit a meeting. Under section 5 of the Regulation of Gatherings Act it would virtually be impossible to prohibit the holding of a gathering arbitrarily. The purpose of section 5 is to ensure the safety and security of everyone, not to prohibit the holding of gatherings because they are a nuisance. The purpose is achieved with the least infringement on the right to freedom of speech and assembly.

Cachalia et al\textsuperscript{70} indicate that the right to assembly is always qualified in public international law. The right may, according to the authors, be restricted provided the restrictions are necessary in a free and democratic society and in the interests of public safety, the protection of public health or morals, or the protection of the rights and freedoms of others.\textsuperscript{71}

Section 39(1)(b) requires of a court, tribunal or forum, when interpreting the bill of rights, to consider international law. Section 39(1)(c) provides that such a court, tribunal or forum may consider foreign case law. The 1996 Constitution therefore makes it clear that international law and foreign case law will play some role in interpreting the scope and application of fundamental rights. The extent to which such factors will influence a court is limited in an enquiry regarding the

\textsuperscript{70} Ibid. The authors quote s21 of the International Covenant on Civil and Political Rights; s11(2) of the European Convention for the protection of Human Rights and Fundamental Freedoms; and s11 of the African Charter on Human and People's Rights. In India the state can only make regulations to \textit{facilitate} the right of assembly, and can therefore impose reasonable restrictions to safeguard the rights of citizens and to preserve public order. See The South African Law Commission n33 at 56 where they quote \textit{Himat Lai K Shah v Commissioner of Police} (1973) 1 SCR 227 (Supreme Court of India). The same judgement is quoted in Cachalia et al.
rights to freedom of assembly and expression, as the 1996 Constitution limits the application of these rights. Although the 1996 Constitution did not apply to the parties, the High Court in *Acting Superintendent-General of Education of Kwazulu-Natal v Ngubo*\(^{72}\) found foreign articles and judgements to be “a morass of words” rather than helpful. On the other hand, considering international law and foreign case law may be extremely helpful to a court. An example of this is the exposition by Friedman J in *Nyamakazi v President of Bophuthatswana*\(^{73}\). I submit that the extent to which international law will be applicable to the right to freedom of assembly and especially the right to freedom of expression, will depend on the constitutional text of such a foreign country, but does not detract from the duty to consider such law.

Would it be possible to have legislated for less restrictive means? Not likely, as section 5 ensures that the rules of natural justice, as embodied in section 33, must be adhered to for a lawful prohibition. The section therefore creates a situation where the decision by the responsible officer is substantially and procedurally fair.

To summarize:

- The objectives to be served by the Regulation of Gatherings Act, are sufficiently important to warrant overriding a constitutional right or freedom. The objective relates to societal concerns which are pressing and

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\(^{72}\) Supra n48 at 374J-376A.

\(^{73}\) 1994 1 BCLR 92 (B) from 99 onwards. This judgement has been described as a “veritable thesaurus of international authority” by Kentridge AJ in *S v Zuma* (supra n27 at 410F-G).
substantial and can be characterized as sufficiently important.

The state will be able to show that section 5 is demonstrably justified, especially in the light of international law and jurisprudence. The proportionality test employed involves three elements:

- The measures in section 5 are fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that question (the "causation test"74).

- The means - section 5 - impair the rights in question as little as possible (the "threshold test"75).

- There is proportionality between the effects of section 5 and the objective - the more severe the deleterious effects of the measure, the more important the objective must be (the "balancing test"76).

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74 Devenish n38 at 448.
75 Ibid.
76 Ibid.
The period from 1990 to 1994 was indeed very violent. Not only did political activism play a major role in this, but also state intolerance of opposing views. This period was a watershed, mainly because the spirit of cooperation was slowly starting to gain valuable ground. The philosophy of police control of crowds changed and started to move in a new direction. Co-ownership and co-management of crowds were the new buzz words and the South African Police started concluding more agreements with organizers on public demonstrations and gatherings.

Crowd management moved away from the situation where legislation shrouded the police and judiciary roles in political decisions. Negotiation, objective and reasonable exercise of discretion, with the built in safety valves, make the Regulation of Gatherings Act not only a leading international measure of statutory regulation of public protest and demonstration today, but also an important stage for the executive to act out its commitment to the promotion of fundamental rights and freedoms.

Clearly, aspects of the Regulation of Gatherings Act restrict the already limited fundamental right to freedom of assembly or expression. That restriction serves a substantial and pressing governmental interest, namely the safety and security of its people. The effect of the Constitution is that such an infringement on the fundamental freedom of assembly or expression is interpreted restrictively.
Seen in this light, the limitation on the right to freedom of assembly in terms of section 5 of the Regulation of Gatherings Act ought to withstand the scrutiny of the Constitutional Court. The focus of the Act moved away from *permission* to hold a gathering to the situation where *notice* of an intended gathering is sufficient. Consequently, the fact that the Act does not expressly require *permission* is an indication that it limits the right to freedom of assembly or expression in a way that is reasonable and justifiable in our society.

Because of the requirements of section 5 of the Regulation of Gatherings Act, responsible officers will have to ensure that they comply with the requirements for just administrative action, or see their decisions overturned on review.

The maintenance of law and order is of crucial importance, but almost equally important are the methods of maintenance.  

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77 OD Schreiner as quoted by WHB Dean in the foreword to Van der Vyver *Seven lectures on human rights* (1976) at v.
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