

**RE-OPENING THE DEBATE ON DEVELOPING THE CRIME OF
PUBLIC VIOLENCE IN LIGHT OF THE VIOLENT PROTESTS AND
STRIKES**

BY

KHULEKANI KHUMALO

(209512054)

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DECLARATION

I, Khulekani Khumalo, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

Signed and dated at Pietermaritzburg on the 4th day of November 2015

A handwritten signature in black ink, appearing to read 'K. Khumalo'. The signature is written in a cursive style with a large, prominent 'K' at the beginning.

Khulekani Khumalo

ABSTRACT

While section 17 of the Constitution guarantees the right to freedom of assembly, the violence that often accompanies the exercise of this right culminates in the violation of the rights of non-protesters to, *inter alia*, life, dignity, equality and freedom and security of the person. The crime of public violence is the primary measure in place for the maintenance of the community's interest in public peace and order as well as the protection against the invasion of the rights of other people. Therefore, this dissertation seeks to lead a debate on the question whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives? Addressing the topic for debate invariably leads to an assessment of the jurisprudential direction the South African courts are likely to take in the question of developing the crime of public violence as a remedy to the erosion of the rights of non-protesters during violent protests.

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➤ Glossary of terms

For purposes of this dissertation, save where otherwise stated or as appears from the context, the terms listed below bear the following meaning:

- Any reference to **protests** includes strikes, gatherings, assemblies, pickets and/or demonstrations and vice versa.
- Any reference to **protesters** includes strikers (or striking workers) and vice versa.
- Any reference to **non-protesters** includes non-strikers (or non-striking workers) and vice versa.
- The words **offender**, **accused** or **transgressor** are used interchangeably and they all bear the same meaning.
- The interests protected by the crime of public violence are:
 - (i) The maintenance of the community's interest in peace and order; and
 - (ii) The protection against the invasion of the rights of other people.
- Any reference to '**advocates for development**' pertains to those who contend that the crime of public violence needs to be reformed or developed.
- Any reference to '**advocates for the status quo**' pertains to those who are against any reform or development of the crime of public violence.
- The masculine gender includes the feminine and neuter genders and vice versa.
- The singular includes the plural and vice versa.
- Any reference to the **RGA** means the Regulation of Gatherings Act 205 of 1993.

➤ Structure of the dissertation

This dissertation is structured as a debate on the question whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives? In essence, the topic for debate invariably leads to an assessment of South Africa's jurisprudential direction in developing the crime of public violence as a remedy to the erosion of the rights of non-protesters during violent protests.

It will become apparent that there are two sides with diverging views and arguments to the debate. The one side will be referred to as the advocates for development and the other as the advocates for the *status quo*. The presentation of the arguments and the weighting thereof in order to come to a conclusion on the topic for

debate is dealt with in chapter four of the dissertation. These arguments are drawn from the contents of the discussion in chapters one to three. Therefore, the discussion in chapters one to three is structured in such a way that arguments for and against the development of the crime of public violence may be drawn therefrom.

Chapter one of the dissertation is entitled '*introduction*.' The chapter comprises a broad outline of the purpose of the present study. The topics that follow thereafter provide a background to the study. Among these topics is the prevalence of protests and strikes in the post-apartheid South Africa as illustrated by statistics and media reports. The other topic is concerned with the issues pertaining to the policing of protests. The last topic deals with the rationale for the criminalisation of public violence.

The second chapter is entitled '*public violence*.' The chapter comprises an examination of the history of the crime of public violence in order to trace the significant events in the development of public violence jurisprudence. The chapter also comprises a discussion of the sentencing principles for the crime of public violence and concludes with a discussion of the statutory forms of public violence and other related issues.

In the third chapter entitled '*freedom of assembly*', an examination is undertaken into South Africa's assembly jurisprudence with a view to ascertain the history and importance of the right. The chapter also comprises a discussion and analysis of the recent Constitutional Court case dealing with the right to freedom of assembly. The case provides an indication of the current assembly jurisprudence in light of the increase in violent protests and strikes and the accompanying violation of various rights of other people.

The final chapter (chapter four) is entitled '*summary of arguments and conclusion*'. In this chapter, I refer back to the preceding chapters in order to extract arguments which are likely to be advanced by both sides in defence of their position on the topic for debate. These arguments are then consolidated or weighed with the view to come to a conclusion on whether or not the crime of public violence falls short of the spirit, purport and objects of the Bill of Rights and requires to be developed, and how it must be developed.

Chapter 1

INTRODUCTION

1.1 Purpose of the study

“Democracy cannot neglect to maintain public order; neither can the maintenance of public order be done at the expense of citizens’ rights”.¹

Section 17 of the Constitution² guarantees the right “peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”. Section 23(2)(c) of the Constitution further provides for the right of every worker to strike. In the exercise of the right to strike, the workers may, subject to compliance with the provisions of section 69 of the Labour Relations Act,³ be permitted to stage a picket aimed at peacefully demonstrating in support of the protected strike or in opposition to a lock-out.

The corollary of the rights enshrined in sections 17 and 23(2)(c) of the Constitution is the individual’s freedom to choose whether or not to participate in a protest or a strike.⁴ Freedom of choice forms part of the individual’s autonomy, which is an integral part of the right to human dignity.⁵ Therefore, any act of violence directed at an individual with a view to persuade him to join a protest or a strike action violates that individual’s freedom of choice. The acts of violence not only impact adversely

¹ See DT Masiloane ‘Guaranteeing the safety of non-striking employees during strikes: the fallacy of policing’ (2010) 23(2) *Acta Criminologica* 31 at 38, quoting the words of M Bjork ‘Between frustration and aggression: legal framing and the policing of public disorder in Sweden and Denmark’ (2005) 15(3) *Policing and Society* 305-326. To further enhance the point made in the quote, in C Twala ‘The Marikana massacre: a historical overview of the labour unrest in the mining sector in South Africa’ (2013) 1(2) *Southern African Peace and Security Studies* 61 at 66, writing from the perspective of the labour unrest in Marikana in the year 2012, the writer argues that “regardless of the legitimacy or otherwise of the workers’ grievances, no civilised democracy could condone the behaviour of the rampant strikers at Marikana”.

² The Constitution of the Republic of South Africa, 1996.

³ 66 of 1995.

⁴ Masiloane op cit (n1) 31.

⁵ See S Hoctor ‘Dignity, criminal law and the Bill of Rights’ (2004) 121(2) *South African Law Journal* 304 at 316. The right to human dignity is enshrined in section 10 of the Constitution.

on the individual's right to human dignity, but also the rights to life,⁶ equality,⁷ as well as freedom and security of the person.⁸

Various other rights of non-protesters may also be violated during violent protests and strikes depending on the facts of each case. For example, where the violence during a protest is accompanied by the looting of businesses, the right to freedom of trade⁹ and the right not to be deprived of property arbitrarily¹⁰ may be affected. Where journalists are assaulted and prevented from carrying out their duties, the right to free press may also be implicated.¹¹ Therefore, the aforementioned rights do not constitute a closed list. A description as to how the violence impacts on all the aforementioned rights is provided in 4.1 below.

The right to protest or strike is not absolute and may accordingly be limited in appropriate circumstances. One notable limitation is that the exercise of the right must not infringe the rights of others.¹² Notwithstanding the latter, it is often the case that protests turn violent, which then translates to the total disregard for the rule of law and the rampant violation of the rights of non-protesters to, *inter alia*, life, dignity, equality, as well as freedom and security of the person.¹³ In such instances, the right to protest is not exercised peacefully and within the dictates of the law. Therefore, the offenders are susceptible to being sued for damages as well as to being arrested and criminally charged with crimes such as public violence, among others.

Burchell¹⁴ submits that the crime of public violence provides a legal sanction for the abuse of the constitutional right to gather and demonstrate. It follows from Burchell's submission that the crime has a crucial role to fulfil especially in affording protection against the violation of the rights of non-protesters during protests and strikes. However, there are certain factors which arguably point to the failure of the crime to

⁶ See section 11 of the Constitution.

⁷ See section 9(1) of the Constitution which provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".

⁸ See section 12 of the Constitution. In terms of section 12(c) and (d) of the Constitution, the right to freedom and security of the person includes, *inter alia*, the right "to be free from all forms of violence from either public or private sources" and the right "not to be tortured in any way".

⁹ See section 22 of the Constitution which provides that "every citizen has the right to choose their trade, occupation or profession freely".

¹⁰ See section 25 of the Constitution.

¹¹ M Iiyayambwa 'When human rights congregate with public order policing: a South African perspective' (2012) 2(19) *International Journal of Humanities and Social Science* 140 at 145.

¹² S Tait & M Marks 'You strike a gathering, you strike a rock – current debates on the policing of public order in South Africa' (2011) 38 *SA Crime Quarterly* 15.

¹³ The case of *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) is a typical example in point. In this case, a march in the city of Cape Town turned into a full scale riot during which massive damage to property was committed. For a discussion of this case, see 3.4 below.

¹⁴ J Burchell *Principles of Criminal Law* 4 ed (2013) 755.

adequately safeguard the rights of non-protesters. These factors include: first, the mere fact that violent protests and strikes are increasing each year despite the existence of the crime.¹⁵ Second, the view resonating in society that “people who are arrested and charged with public violence are never prosecuted, in fact they walk out freely without bail”.¹⁶ Third, the seeming lack of a political will to enforce the crime of public violence, and that even if prosecuted and convicted, the sentences imposed on public violence offenders are too trivial and thus serve little, if any, deterrent purpose.¹⁷

The purpose of this dissertation is thus to lead a debate on the fundamental issue given rise to by the apparent failure of the crime to adequately safeguard the rights of non-protesters as evidenced by the above considerations. The issue which arises is whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives?¹⁸

The topic for debate outlined above invariably leads to an assessment of the jurisprudential direction the South African courts are likely to take in the question of developing the crime of public violence as a remedy to the erosion of various rights of non-protesters during violent protests and strikes. It must, however, be made clear at this early stage that the focus of this dissertation is specifically on the development of the crime of public violence as a means to protect the rights of non-protesters. Although that is not to suggest that the protection of the rights of non-protesters is the only interest protected by the crime of public violence, it makes it abundantly clear that by no means could the discussion in this dissertation be construed as suggesting that the crime of public violence would also be in need of development in order to adequately protect the other interests which are also protected by the crime, for example the protection of state security or state property.¹⁹

¹⁵ For crime statistics reflecting an upward trend in the prevalence of violent protests and strikes in South Africa, see 1.2.1 below.

¹⁶ See ‘Heavy sentences for public violence convicts’ *SAnews.gov.za* 02 July 2013, available at <http://www.SAnews.gov.za/south-africa/heavy-sentences-public-violence-convicts>, accessed on 24 May 2014.

¹⁷ P De Vos ‘Freedom of assembly and its limits: Constitutional Court’ (2009) 9(8) *Without Prejudice* 4.

¹⁸ For the context as to how this issue fits in the constitutional law structure and the Bill of Rights litigation, see the discussion in 3.1 below.

¹⁹ The significance of making this point becomes clear in the discussion in 1.3 below.

1.2 Background to the study

It was held in *S v Thebus and Another*²⁰ that the need to develop the common law arises at least in two instances. The first is when a common-law rule is inconsistent with the Constitution, and the second is when a common-law rule is consistent with the Constitution but falls short of its spirit, purport and objects. This dissertation is concerned with the latter. The court in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*²¹ expressed the following with regard to developing a common-law rule that is consistent with the Constitution but falls short of its spirit, purport and objects:

“In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives”.

Generally, the courts have a duty to develop the common law and they may undertake such development of their own accord without specifically being requested by the parties to the dispute to do so.²² The said development must be such that the common law is “adapted so that it grows in harmony with the objective normative value system found in the Constitution”.²³ In essence, the purpose of section 39(2) of the Constitution is to instil the values of the Constitution throughout the common law and the procedure in so doing entails no more than that the common-law principles be understood and applied within the normative framework of the Constitution.²⁴

²⁰ 2003 (6) SA 505 (CC) at para 28.

²¹ 2001 (4) SA 938 (CC) at para 40. The judgment in *Carmichele* has since been approved and applied in subsequent cases. For instance, see *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) in regard to the development of the vicarious liability principles. See further *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) in regard to the development of the crime of rape.

²² *Carmichele* 2001 (4) SA 938 (CC) at para 39.

²³ I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2005) 61 quoting *Carmichele* 2001 (4) SA 938 (CC) at para 54. See also P De Vos et al *South African Constitutional Law in Context* (2014) 343 and *Thebus* 2003 (6) SA 505 (CC) at para 27.

²⁴ See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

The question as to whether the crime of public violence falls short of the spirit, purport and objects of the Bill of Rights cannot be addressed without first ascertaining the meaning or interpretation of the term “spirit, purport and objects of the Bill of Rights”. It is submitted that the term “spirit, purport and objects of the Bill of Rights” finds expression in the values on which the Constitution is founded.²⁵ These values are provided for in sections 1 and 7 of the Constitution. Section 7, in particular, envisages a Bill of Rights which is a cornerstone of democracy and which enshrines the rights of all people and affirms the democratic values of dignity, equality and freedom.²⁶

Therefore, the values upon which the Constitution is founded constitute a backdrop against which the term “spirit, purport and objects of the Bill of Rights” is to be interpreted. It is submitted that one view of the interpretation of the term “spirit, purport and objects of the Bill of Rights” is that the *Carmichele* and *Masiya* cases, among others, illustrate an inclination on the part of the courts to readily interpret the provisions of the Constitution (which includes its founding values) in a manner that promotes the rights and interests of the vulnerable groups in society which do not have a significant political voice.

Generally, women and children fall under the category described above. In *Masiya*²⁷ the court had this to say about women and children and their position in society with regard to sexual abuse:

“The object of the criminalisation of this act (i.e. rape – my emphasis) is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights – a cornerstone of our democracy”.

The protection of women, being a vulnerable group in society, has also been visible in the protection of their marital and property rights under customary and religious law.²⁸ Similar sentiments of vulnerability were also successfully raised in the string

²⁵ Currie & de Waal op cit (n23) 57. See also De Vos op cit (n23) 338.

²⁶ *Carmichele* 2001 (4) SA 938 (CC) at para 43.

²⁷ *Masiya* 2007 (5) SA 30 (CC) at para 37.

²⁸ In regard to the protection of the rights of women married by Muslim rites, see for instance *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC); *Hassam v Jacobs NO and Others (Muslim Youth Movement of South Africa and Women’s Legal Trust as Amici Curiae)* 2009 (5) SA 572 (CC); *Ryland v Edros* 1997 (2) SA 690 (C); and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA). In regard to the protection of the rights of women married by Hindu rites, see *Govender v Ragavayah* [2009] 1 All SA 371 (D). In regard to the protection of the rights of women married in terms of African customary law, see *Gumede v President*

of litigation towards the recognition of marital and other rights of gays and lesbians.²⁹ It could, therefore, be argued that the same protection the law affords to vulnerable groups in general has to be extended to non-protesters or non-strikers by developing the crime of public violence so that it carries sufficient weight to adequately achieve its purpose to protect the rights of non-protesters. The victims of violence committed during protests and strikes could also be argued to constitute a vulnerable group in society without a significant political voice and therefore require the protection of the law in a similar fashion as women, children, gays and lesbians.³⁰

On the other hand, another view is that a proper construction of the term “spirit, purport and objects of the Bill of Rights” in light of the founding values of the Constitution is one that affords recognition to the injustices of the past and the sanctity of fundamental rights, such as freedom of assembly, that were severely suppressed under the apartheid system in favour of state security. Authority may be found in various cases³¹ to the effect that, given the constitutional protection of the fundamental right to freedom of assembly in section 17 of the Constitution, the courts should not readily uphold any law or conduct that has the effect of restricting this fundamental freedom.

Freedom of assembly is a historically significant right and a major tool for workers in collective bargaining with the employer. It provides a voice to the voiceless

of *Republic of South Africa and Others* 2009 (3) SA 152 (CC). See further *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) in regard to the inclusion of women as heirs in terms of the rules of intestate succession.

²⁹ See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA); *Minister of Home Affairs and Another v Fourie and Another (Doctors For Life International and Others)*; and *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* 2006 (1) SA 524 (CC). See further *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) in regard to the declaration of the crime of sodomy as unconstitutional on the basis that it unfairly discriminates against gay men.

³⁰ The approach of depicting the victims of protest violence as a vulnerable group was adopted in *Garvas* 2013 (1) SA 83 (CC). In the same case, the High Court (the judgment of which is reported as *Garvis and Others v SATAWU (Minister for Safety and Security, Third Party)* 2010 (6) SA 280 (WCC) at para 7) accurately described the Plaintiffs as “... a disparate group of persons. They are brought together by the mutual misfortune of having been victims of the violence (the riot damage) perpetrated during the march”. This case is discussed at length in 3.4 below.

³¹ Some of the cases in point date back to the pre-constitutional era. In this regard, see *S v Turell and Others* 1973 (1) SA 248 (C); *S v Budlender* 1973 (1) SA 264 (C). There is also foreign case law in point, see *In Re Manhumeso and Others* 1995 (1) SA 551 (ZS); and *Seeiso v Minister of Home Affairs and Others* 1998 (6) BCLR 765 (LesCA). On the relevance of these foreign cases, it suffices to state that the assembly jurisprudence of Lesotho and Zimbabwe does not differ much in substance to that of South Africa. For cases decided in the post-apartheid South Africa emphasising the sanctity of the right to freedom of assembly, see *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); and *S v Mamabolo (Etv and Others intervening)* 2001 (3) SA 409 (CC).

especially the economically marginalised communities and workers. Therefore, any restriction of this fundamental freedom, either by law or conduct, would certainly have to be supported by extremely compelling considerations.

It is clear that there are two sides with diverging views or arguments on the topic for debate. The one side comprises those who advocate the view that although the crime of public violence as it stands is consistent with the Constitution, the apparent failure of the crime to adequately safeguard the rights of non-protesters renders the crime to fall short of the spirit, purport and objects of the Bill of Rights and thus requires to be developed. For ease of reference, this group shall be referred to as the advocates for development. The second side comprises those who advocate the view that the crime of public violence as it stands is consistent with the spirit, purport and objects of the Bill of Rights and thus requires no development. This group shall be referred to as the advocates for the *status quo*.

The discussion in each of the chapters is structured in such a way that at the end (in chapter 4), arguments for both the advocates for development and advocates for the *status quo* which are pertinent to the topic for debate can be drawn from the contents of each chapter. The presentation of the arguments will follow the sequence of responding to the question tabled for debate. That question is whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives? In the course of the presentation of the arguments in chapter 4, the consolidation or weighting thereof will also take place with the view to come to a conclusion on the jurisprudential direction the courts are likely to take in developing the crime of public violence.

The focus of this dissertation is on the common-law crime of public violence. From its inception, the crime has always been directed primarily at prohibiting mob violence.³² There are other common-law offences which overlap with the crime of public violence and they may be even competent verdicts to a charge of public violence in appropriate circumstances, but the accused is charged mainly with public violence. These common-law offences include assault, malicious damage to property, arson and robbery.³³

³² For a discussion on criminalisation of public violence, see 1.3 below.

³³ A st Q Skeen 'Criminal Law' in WA Joubert (2 ed) *The Law of South Africa* Vol 6, Replacement Volume (2010) para 182.

The reason for charging public violence as opposed to any one or more of the aforementioned offences is best expressed by the *dictum* in *R v Ndaba*³⁴ to the effect that:

“The underlying idea of charging public violence instead of the nominate offences is still the same as the Roman notion: aggravation. The offence may be committed by a concourse of people, in regard to persons or in circumstances which aggravate the individual deeds and individually venial offences and give them a dangerous and subversive aspect”.

There are also other statutory offences which overlap with the crime of public violence. These statutory offences (provided for mainly in section 12 of the Regulation of Gatherings Act (RGA)³⁵) are also directed at punishing the various acts of public violence, notably the disturbance of the peace or participation in gatherings that endanger the peace. As discussed in 2.8.1 below, statutory offences of this nature were a prominent feature in the old apartheid statutes aimed at regulating assemblies and the protection of state security. Today, however, many of the offences created in section 12 of the RGA criminalise mainly the various breaches of the provisions of the Act and not so much the acts of public violence. This is one of the reasons for preferring the crime of public violence over the offences created in section 12 of the RGA.

Even if the RGA did create offences which overlap with the crime of public violence, those offences would nonetheless suffer from the criticism that the statute in which they are provided for, like all other penal statutes, create offences which are by their very nature limited to the specific circumstances stipulated in the enactment,³⁶ whereas the scope of the common law-crime of public violence is much broader. Therefore, the all-encompassing nature of the crime of public violence makes it a desirable stand-alone offence to pursue following violent protests and strikes.

It must also be highlighted that an alternative remedy in the form of civil action³⁷ in terms of section 11 of the RGA or the common law (the law of delict) is also available

³⁴ 1942 OPD 149 at 156.

³⁵ 205 of 1993.

³⁶ See the South African Law Commission *Report on the Codification of the Common Law Relating to the Crimes against the State* RP 17/1976 (1976) 8.

³⁷ For a case where civil action for damages in terms of section 11 of the RGA was pursued by the victims of protest violence against the organisation under whose auspices the march was organised, see *Garvas* 2013 (1) SA 83 (CC). The case is discussed at length in 3.4 below.

to the victims of protest violence in addition to the crime of public violence and other common-law and statutory offences. While the aggrieved party has an election either to proceed by way of civil action, the state may simultaneously pursue criminal charges against the perpetrators of protest violence of its own accord. The rationale for having both civil and criminal remedies for public violence is explained in 1.3 below.

1.2.1 The prevalence of violent protests and strikes in South Africa

The culture of violent protests in South Africa dates back many years and was instrumental in the dismantling of decades of apartheid rule.³⁸ For a couple of years into a democracy, South Africa seemed to have made a break from the violent nature of the protests seen particularly in the 1980s under the theme of the “people’s war”.³⁹ It was not long until the year 2004 that protests marred by violence once again became a common phenomenon.⁴⁰

For purposes of this dissertation, the violence associated with protests over the delivery of services as well as wage strikes in the industrial sector will be used to exemplify the extent of the violence during protests and strikes. That is not to suggest that the delivery of basic services and wage disputes are the only societal concerns which lead to protest action.⁴¹ It must also be highlighted that the statistics and incidents of violent protests documented below are obtained partly from a series of newspaper articles mindful of the controversies around the reliability of data collected from press reports.⁴² The idea is not to delve into the issue of the accuracy of the statistics and media reports, but simply to depict a picture of the prevalence of

³⁸ P Pfafe *A protest event analysis of South African’s rebellion of the poor* (unpublished LLM thesis, Global Labour University, 2011) 4.

³⁹ FG Netswera & S Kgalane ‘The underlying factors behind violent municipal service delivery protests in South Africa’ (2014) 49(1) *Journal of Public Administration* 261 at 269.

⁴⁰ Ibid 264. The same view is also advanced by Pfafe op cit (n38) 9; and P Hjul ‘Restricting freedom of speech or regulating gatherings’ (2013) 46(2) *De Jure* 451 at 463. Therefore, these commentators complement one another in that the outbreak of the violent protests, akin to those of the apartheid era, resurfaced notably from the year 2004 and have been gradually increasing from then to date.

⁴¹ See I Silgado ‘Service delivery protests: a wake up call for South Africa: Africa-wide – monitoring economies’ 2013 *Africa Conflict Monthly Monitor* 15. It is pointed out that protests are caused by a mixture of issues including, *inter alia*, unemployment, urban migration, poor service delivery, corruption and xenophobia.

⁴² Academic commentators have issued warnings on the reliability of data collected from press reports. In this regard see Masiloane op cit (n1) 33; and DL Kgosimore ‘Workplace violence: a criminological analysis of a violent labour strike in South Africa’ (2007) 20(2) *Acta Criminologica* 61 at 71. See further D Bruce ‘Police brutality in South Africa’ (2002), available at <http://www.csvr.org.za/old/wits/papers/papbruc5.htm>, accessed on 27 April 2015. Writing in the context of measuring the extent of police brutality through press reports, Bruce warns of the factors which may affect the credibility of the recorded statistics. He comments that the media is likely to focus on incidents which are regarded as the most shocking, sensational and most serious.

protests and the associated violence. Press reports are therefore ideal for this purpose.

1.2.1.1 Service delivery protests

Newspaper articles reporting on the violence during protests are a frequent occurrence in South Africa. For instance, during a protest in Rethabiseng a house and a library was reportedly burnt down.⁴³ In another protest in Zithobeni outside Bronkhortspruit, a local municipal building, a satellite police station, two trucks and a tractor were reportedly burnt down and vehicles pelted with stones.⁴⁴ Other media reports tell the tale of protesters opening live ammunition at the police, assaults on journalists and municipal councillors, and people being killed by the protesting crowd.⁴⁵ Most of the protests of this nature are occasioned by the non-delivery of basic services such as housing, water, electricity and sanitation.⁴⁶

Chief amongst the methods of protest employed during demonstrations include the barricading of the roads with burning tyres, bricks, stones and garbage; mass marches accompanying the delivery of the memorandum of demands to the relevant authorities; disruption of business operation, work and schools; the looting of businesses; and attack on various properties and vehicles.⁴⁷

Relevant crime statistics reveal the following about protests and strikes in South Africa: violent public service delivery protests are reported to have increased from 41.66% in the year 2007 to 54.08% in 2010.⁴⁸ Interestingly, Pfaffe⁴⁹ observes that according to the classification of protests by the police ministry, which is the primary source of data on protest violence, protests which are deemed peaceful are

⁴³ See Netswera op cit (n39) 269.

⁴⁴ V Abreu 'Don't dare burn down the police station' *IOL News* 1 February 2014, available at , <http://www.iol.co.za/news/crime-courts/don-t-dare-burn-down-police-station-1.1640420>, accessed on 22 June 2014.

⁴⁵ See liyayambwa op cit (n11) 145.

⁴⁶ H Jain 'Community protests in South Africa: trends, analysis and explanations' *Community Law Centre – Local Government Working Paper Series No. 1*, August 2010, available at <http://www.mlgi.org.za/.../localgovernment...southafrica/communityprotests/final%20Report%%Community%20Protests%20South%20Africa.pdf>, accessed on 8 November 2014. The writer records that 36.33% of the protests between 2007 and 2010 were occasioned by demands over housing, 18.36% for water, 18.16% for electricity and 15.43% for sanitation. These remain a major concern for poor communities even today.

⁴⁷ P Alexander et al 'Media briefing – community protests 2004-2013: some research findings' (2013), available at <http://www.issafrica.org/./Public-violence-13March2014-Peter-Alexander.pdf>, accessed on 8 November 2014.

⁴⁸ Netswera op cit (n39) 261. See also Jain op cit (n46) wherein it is further recorded that in 2008, the number violent protests stood at 38.13% and 43.6%% in 2009.

⁴⁹ Pfaffe op cit (n38)14.

associated with those that are occasioned by labour demands (strikes) and unrest (violent) gatherings are linked to service delivery protests.

It is further documented that for the period 2009/10 the police accounted for 9,007 cases of gatherings, 7,993 of which were peaceful and 1,014 were violent.⁵⁰ In 2010/11 the police responded to a total of 12,817 cases of gatherings, 11 843 of these were peaceful and 974 were violent.⁵¹ Tait⁵² submits that a total of 629 of gatherings which occurred in the period 2010/11 occurred spontaneously or were unplanned.

The 2011/12 period was no exception as there were 10,832 peaceful gatherings and 1,226 unrest incidents.⁵³ A total of 1,152 unrest incidents were reported to the police.⁵⁴ In 2012/13 the police responded to and stabilised 12 399 crowd-related incidents, 10 517 of which were peaceful and 1882 of these gatherings were accompanied by violence.⁵⁵ A total of 1,783 cases of violence were reported to the police.⁵⁶

Du Plessis⁵⁷ further submits that between the period November 2013 and January 2014, at least 32 violent protests took place per day. The final 2013/14 crime statistics also reveal 1,691 reported cases of public violence cases for the year.⁵⁸ In his 2015 State of the Nation Address,⁵⁹ President Jacob Zuma announced that the

⁵⁰ South African Police Service *Addendum to the Annual Report (2012/13)* 44, available at http://www.saps.gov.za/.../annual_report/.../saps_crime_stats_report_%202011-1, accessed on 8 November 2014.

⁵¹ *Ibid.*

⁵² Tait op cit (n12) 17.

⁵³ See above (n50) 44. For more statistics, see Alexander op cit (n47) in which it is recorded that a total of 13 service delivery protests were accounted for in 2004; 104 in 2005; 50 in 2006; 169 in 2007; 162 in 2008; 314 in 2009; 252 in 2010; 206 in 2011; 470 in 2012 and 287 in 2013. These figures are significantly low compared to those supplied by the police ministry. The author does provide a justification for this. Of importance, however, is that the number of protests is reflected to have increased. The same applies to the statistics recorded in Silgado op cit (n41)15.

⁵⁴ South African Police Service *RSA: April to March 2004 – 2014: Crime Categories Figures and Ratios* available at http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php, accessed on 8 November 2014. Statistics reveal the following with regard to reported cases of public violence: in 2004/05 – 974 cases were reported; in 2005/06 – 1,044; in 2007/08 – 895; in 2008/09 – 1,500; in 2009/10 – 1,323; and in 2010/11 – 1,226 cases were reported.

⁵⁵ See above (n50) 44.

⁵⁶ See above (n54).

⁵⁷ C du Plessis 'Zuma sidesteps flames' *City Press* 03 February 2014, available at <http://www.citypress.co.za/news/zuma-sidesteps-flames/>, accessed on 22 June 2014. See also Netswera op cit (n39) 269.

⁵⁸ See above (n54).

⁵⁹ See JG Zuma, *State of the Nation Address: opening of parliament February 2015* available at www.gov.za/president-jacob-zuma-state-nation-address-2015, accessed on 19 February 2015.

police brought under control 13 575 cases of public protests, 1 907 of which were violent and 11 668 were peaceful. Some media reports have gone as far as to regard the number of violent protests in the year 2014 as having reached an all-time high.⁶⁰

Arrests by the South African Police Service (SAPS) have also featured prominently in the course of the violent protests. In 2009/10, a total of 1 952 arrests were carried out by the SAPS.⁶¹ In 2012/13 the SAPS carried out 3 680 arrests in total.⁶² It remains questionable whether or not the public violence charges emanating from these arrests as well as the other cases reported to the police are followed through and successfully prosecuted given the infrequency of public violence cases in reported judgments. The number of violent protests and strikes together with the number of reported cases and arrests carried out by the SAPS create an expectation that more than just two judgments on public violence would appear in the law reports calculating from the year 2004 since that is the year in which the trend of protest violence re-emerged.⁶³

One must, however, appreciate other possible reasons for this state of affairs. For instance, it is often difficult to secure sufficient evidence in crowd situations to secure a conviction for public violence.⁶⁴ Furthermore, many public violence cases are dealt with in the Magistrates Court and never make it to the High Court either on appeal or review because most of the times the accused persons are poor and lack the necessary funds to pursue the case further. It is also possible that the acts of public violence for which the offenders are apprehended are not charged as public violence but rather as assault, malicious damage to property, arson or robbery.

To make matters worse, the *S v Le Roux and Others*⁶⁵ case, which is one of the two reported judgments on public violence, emanates from the so-called 'faction fighting' category of public violence cases and not from the 'rioting' category as one would have expected given the prominence of riots lately. The *S v Whitehead and Others*⁶⁶ case is a bit odd in that it involves a group of men attacking the striking workers. Usually it is the opposite that occurs. Therefore it does not fall within the category of

⁶⁰ 'Violent protests reach all-time high in 2014' *Fin24* 20 February 2015, available at <http://www.fin24.com/Economy/Violent-protests-reach-all-time-high-in02014-20150220>, accessed on 20 February 2015.

⁶¹ Pfaffe op cit (n38) 48.

⁶² See above (n16).

⁶³ The reported cases are those of *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) and *S v Le Roux and Others* 2010 (2) SACR 11 (SCA).

⁶⁴ See liyayambwa op cit (n11) 145.

⁶⁵ 2010 (2) SACR 11 (SCA).

⁶⁶ 2008 (1) SACR 431 (SCA).

'forcible coercion by strikers of other workers' but leans more towards 'faction fighting'.⁶⁷

Whilst it is clear that protests are on the rise in terms of numbers with each year passing, an assessment of just about how much individual support the protest action attracts also reflects an upward trend. For the period between 2004 and 2013, 5.8% of the protests had less than 100 participants; 44.9% had participants of between 100 – 499; 19.4% had 500 – 999 protesters and 6.5% protests had over 5000 participants.⁶⁸ Pfaffe⁶⁹ further enhances the point by recording that in 2007 to 2009, an average of no more than a thousand people participated in peaceful protests. During the same period, an average of 4000 participants took part in violent protests.⁷⁰

In summary, the above statistics indicate an upward trend in violent protests generally. They further indicate that as violent protests increase annually, so does the number of participants in those protests. A developing trend is that protests now seem to occur spontaneously without being led by political parties or trade unions as it has historically been the case.⁷¹ The police have been intervening and effecting arrests where necessary and cases have been reported to them, but it is unclear whether or not the charges of public violence are successfully prosecuted. It is plausible to conclude from the foregoing statistics that the trend of well-attended and violent protests is likely to continue to increase.

1.2.1.2 Industrial action (strikes)

As indicated above, a rather peculiar observation is recorded by Pfaffe⁷² to the effect that peaceful gatherings, according to the police ministry, are associated with protests over labour demands, whereas, unrest gatherings are associated with protests over the delivery of basic services. The developments around strike violence render the accuracy of such a view questionable. It is submitted that the scenes of violence observed during service delivery protests are often replicated in the industrial sector when workers take to the streets for better wages.

⁶⁷ For a further discussion on the categorisation of public violence cases, see 2.6.3 below.

⁶⁸ Alexander op cit (n47).

⁶⁹ Pfaffe op cit (n38) 14.

⁷⁰ Ibid.

⁷¹ See Alexander op cit (n47). It is recorded that 47.8% of the protests which occurred between the year 2004 and 2013 were led by community organisations compared to the 21.3% of protests which were led by political parties and 4.8% by trade unions.

⁷² Pfaffe op cit (n38) 14.

Press reports on the damage to the property of various companies and that non-striking workers are threatened, victimised, tortured, and even killed are no stranger to South African newspapers. As far back as the year 2006, the strike in the security industry led by the South African Transport and Allied Workers Union (SATAWU) resulted in the death of about fifty workers and property estimated to be worth R1,5 million was damaged.⁷³

During the course of the same strike in the security industry, there were also reports of non-striking workers being subjected to physical violence such as being stripped naked and assaulted, others were verbally abused and humiliated.⁷⁴ This stands contrary to a well-recognised principle that the right to strike is not absolute and the exercise thereof should be in line with the rights of other citizens and employers.⁷⁵ Furthermore, Kgosimore⁷⁶ documents the statistics collected in connection with the 115 incidents of violence, both physical and non-physical, during the security industry strike led by SATAWU.

According to Kgosimore, these incidents of violence may be categorised as follows: killing/murder accounted for 52%; assault 13%; intimidation 8%; arson and theft/looting 6%; damage to property 4%; coercion, harassment and abduction 3%; and robbery 2%. It also transpired that the violence against non-striking workers was perpetrated largely outside of the workplace, particularly when the non-strikers were commuting to and from work. Kgosimore⁷⁷ records that 45% of the victims died as a result of being pushed off the train, a significantly high margin compared to those who died by shooting and stabbing. The police responded by effecting 256 arrests.⁷⁸

The subsequent strikes in the later parts of the 2000s were also characterised by violence and, most notably, tended to be more protracted. For instance, the strike by the municipal workers in 2009 went on for a number of weeks and was characterised by various acts of violence and strikers strewing garbage in the streets during

⁷³ C Nqakula South Africa Department of Safety and Security *Budget Vote* (2006/07). See also E Manamela & M Budeli 'Employees' right to strike and violence in South Africa' (2013) 46(3) *Comparative and International Law Journal of Southern Africa* 308 at 322. The violence that unfolded during the course of this strike led to the landmark case of *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC). The case began in the Western Cape High Court and is reported as *Garvis and Others v SATAWU (Minister for Safety and Security, Third Party)* 2010 (6) SA 280 (WCC). It then went to the Supreme Court of Appeal and is reported as *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA). For a detailed discussion and analysis of this case, see 3.4 below.

⁷⁴ Kgosimore op cit (n42) 74.

⁷⁵ Ibid 74.

⁷⁶ Ibid 72.

⁷⁷ Ibid 72.

⁷⁸ Masiloane op cit (n1) 35.

demonstrations.⁷⁹ In the same year, three thousand members of the South African Defence Force went on rampage during the so-called 'wild-cat' strike when they marched on the union buildings despite a court order prohibiting them from doing so.⁸⁰

The year 2012 saw strikes take place in all critical sectors of the economy, these being the transport, mining and agricultural sectors.⁸¹ One glaring example is the strike by truck drivers which was plagued by various scenes of violence such as trucks being set alight and several non-striking drivers were assaulted.⁸² The increasing violence accompanying strikes in South Africa reached a pinnacle point in August 2012 during a strike at Lonmin's Marikana mine where 34 striking miners were shot and killed by the police and over 70 miners were injured.⁸³ Three police officials were also killed on the days of the strike.⁸⁴

The country once again held its breath in the first part of the year 2014 when the miners in the platinum sector, including the Lonmin mine in Marikana, led by the Association of Mineworkers and Construction Union (AMCU) once again went on a five-month strike over wages. As expected, the strike turned violent with striking miners reportedly having pelted cars with stones, roads barricaded with burning tyres, and businesses set alight.⁸⁵

During the 2014 strike in the metal and engineering industry led by the National Union of Metalworkers of South Africa (NUMSA), the striking workers reportedly followed the non-striking workers to their homes to pass threats in order to ensure that they do not report for duty.⁸⁶ Even the workers who were not NUMSA members

⁷⁹ 'South African municipal workers strike – 29 July 2009' *Oryx Media* 29 July 2009, available at <http://www.oryxmedia.co.za/south-african-municipal-workers-strike-29-july-2009>, accessed on 24 July 2014.

⁸⁰ Pfaffe op cit (n38) 31.

⁸¹ Manamela op cit (n73) 310.

⁸² Ibid 323.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ 'AMCU protesters turn violent - cops' *Business Report* 24 January 2014, available at <http://www.iol.co.za/business/companies/amcu-protesters-turn-violent-cops-1.1636281>, accessed 07 July 2014. AMCU members at Amplats, Impala Platinum and Lonmin went on strike demanding an entry-level monthly salary of R12,500.

⁸⁶ 'NUMSA defies interdict' *Fin24* 20 July 2014, available at <http://www.fin24.com/economy/labour/news/Numsa-defies-interdict-20140718>, accessed on 24 July 2014.

were forced to join the strike and were subjected to threats of being harmed.⁸⁷ In some instances the strikers looted the factories and stole expensive equipment.⁸⁸

The underhand incidents of violence and intimidation which took place outside of the parameters of the regulated area for demonstration and into the neighbourhoods and homes of the non-striking workers were rife during the NUMSA strike. As a result, the Democratic Alliance (DA) formed the view that the restrictions and prohibitions on gatherings imposed by the RGA could not apply to the violence of this nature as it falls outside of the recognised structures of a gathering.⁸⁹

The DA then introduced to parliament a private members' Bill⁹⁰ which calls on trade unions to take practical steps to curb strike violence, failing which the trade union will be held liable for damages. The Bill also proposed that the courts be empowered to direct the parties to go into arbitration if the strike is excessively violent or even declare the strike as unprotected. It remains to be seen whether or not parliament will enact the proposed Bill into law.

Statistics further indicate that in the year 2012 a total of 99 strikes across various industrial sectors took place in South Africa, 67 took place in 2011, 74 in 2010, 51 in 2009 and 57 in 2008.⁹¹ In 2013 there were 114 cases of strikes that were recorded and the upward trend is expected to continue.⁹² Although the right to strike is constitutionally guaranteed⁹³ and is regarded as the workers' crucial weapon in collective bargaining with the employer, there is no doubt that the exercise thereof has a significant impact on the economy and social stability of the country.⁹⁴ In fact, any protest or strike threatens peace and good order in society. As protests and strikes garner more participants and as they become more prevalent and violent, the law needs to develop with these trends in order to curb the violence and protect public peace and order as well as the rights of non-protesters.

⁸⁷ 'When will the NUMSA strike end?' *Fin24* 21 July 2014, available at <http://www.fin24.com/economy/labour/news/when-will-the-Numsa-strike-end-201>, accessed on 24 July 2014.

⁸⁸ 'Numsa strike: Police on high alert' *Eye Witness News* 07 July 2014, available at <http://www.ewn.co.za/2014/07/05/Numsa-strike-Police-on-alert>, accessed on 7 July 2014. The striking workers were demanding 12% wage increase, R1000 housing allowance, career and training and complete ban of labour brokers.

⁸⁹ See the Democratic Alliance: *Memorandum on the Objects of Labour Relations Amendment Bill, 2014*.

⁹⁰ Labour Relations Amendment Bill, 2014.

⁹¹ M Schutte & S Lukhele 'The real toll of South Africa's labour aggressiveness – regular and prolonged violent strikes characterise endless labour strife' 2013 *Africa Conflict Monthly Monitor* 69.

⁹² DA memorandum op cit (n89).

⁹³ In terms of section 23(2)(c) of the Constitution of the Republic of South Africa, 1996.

⁹⁴ Schutte op cit (n91) 69.

1.2.2 The policing of protests

The policing, or the inadequacy thereof, of the volatile situation by the Public Order Police Unit has been occupying much of the media space when it comes to the reporting of public violence cases.⁹⁵ As a result, other issues of importance such as the possibility that the gathering or demonstration was illegal, that the protesters were carrying dangerous weapons and in fact posed a threat to the police, and that the rights to life, dignity, equality, freedom and security of the non-protesters or non-strikers were infringed are often sidelined. While the significance of proper policing of protests is not disputed at all in this dissertation, it is equally important to bring attention to other important issues⁹⁶ arising from violent protests and strikes that are often overshadowed by the unfortunate scenes of police brutality or the use of unnecessary and perhaps excessive force.⁹⁷

It is submitted that the RGA, being the law in place for the regulation of gatherings and demonstrations, requires cooperation between protesters and the police before and during a protest, thus bearing testimony to the significance of the role played by the police in the build up to and during a protest.⁹⁸ The police have an obligation to safeguard both the rights of protesters and non-protesters⁹⁹ during demonstrations and they also bear a duty to facilitate the protest action.¹⁰⁰ In order for the police to fulfil all their duties and obligations, measures have been put in place in order to empower them to deal swiftly with unlawful conduct during protests and strikes.¹⁰¹

The crime of public violence exists in conjunction with the said policing measures.¹⁰² This way there is uniformity amongst the common and statutory law aimed at regulating protests. Consequently, there can be no doubt that the tension between

⁹⁵ For a more recent commentary on the subject, see M Marks & D Bruce 'Groundhog day? public order policing twenty years into democracy' (2014) 27(3) *South African Journal of Criminal Justice* 346-376.

⁹⁶ In this context, I am referring to the rampant disregard for the rule of law, the law enforcement agencies, the disturbance of peace and order as well the invasion of the rights of other people during protests and strikes. This dissertation, as already explained in 1.1, focuses primarily on the issue of the protection of the rights of other people during protests and strikes.

⁹⁷ The phrase 'excessive force' is used sparingly as there has not been a ruling or pronouncement by a court or any other appropriate forum to the effect that the force used by the police in a particular protest was unnecessary and excessive.

⁹⁸ For a description of the contents of the RGA, see below (n349).

⁹⁹ Masiloane op cit (n1) 38.

¹⁰⁰ Iiyayambwa op cit (n11) 141.

¹⁰¹ For a list of these measures, see Burchell op cit (n14) 755.

¹⁰² Ibid.

the police and protesters is not healthy if there is going to be mutual cohesion and cooperation between them as envisaged by the philosophy of community policing.¹⁰³

1.2.3 The use of force by the police

Notwithstanding the provisions of legislation and other policing measures regulating the conduct of the police during protests and strikes, South Africa still experiences incidents of excessive force being used by the police from time to time in order to quell unruly crowds. One example is the Andries Tatane incident in April 2011.¹⁰⁴ During a service delivery protest in Ficksburg, a township in the Free State Province, a retaliating protester by the name of Andries Tatane died after being beaten and shot by the police. The seven accused police officials were later acquitted of murder.¹⁰⁵

In what has become widely known as the Marikana massacre, the police fired live ammunition at striking miners thereby killing 34 workers and injuring over 70.¹⁰⁶ It is also reported that three police officials had been killed during confrontations with the striking miners three days prior to the massacre.¹⁰⁷ It remains to be seen whether the Farlam Commission of Inquiry will come to a finding that the police were liable for the mass killings in Marikana.¹⁰⁸

It also arguable that the possession of weapons, traditional or otherwise, by the strikers in Marikana prompted parliament to enact the Dangerous Weapons Act¹⁰⁹ which effectively criminalises the possession of dangerous weapons as defined in

¹⁰³ MP Sebola 'The community policing philosophy and the right to public protest in south Africa: are there positive developments after two decades of democracy?' (2014) 49(1) *Journal of Public Administration* 300 at 301. The author explains that when the democratically-elected government took power, it committed to the philosophy of community policing aimed at fixing and strengthening the relationship and cooperation between the police and citizens.

¹⁰⁴ 'Deadly police force – timeline' *New24* 23 January 2014, available at <http://www.news24.com>, accessed on 02 August 2014.

¹⁰⁵ P Hornberger 'We need a complicit police – political policing then and now' (2014) 48 *SA Crime Quarterly* 17.

¹⁰⁶ *Ibid.* See also Schutte op cit (n91) 73; and Twala op cit (n1) 65.

¹⁰⁷ Manamela op cit (n73) 310.

¹⁰⁸ The report containing the findings of the Farlam Commission is reported to have been submitted to the President of the Republic of South Africa. At the present moment, the country awaits the decision of the president as to whether or not he will make the report public. For a further commentary on the Marikana massacre, see Twala op cit (n1) 66. The author also discusses various issues arising from the Marikana massacre including the grievances of the workers. For a detailed account of the events leading up to the fatal day in Marikana, including interviews with striking workers, see further P Alexander et al *Marikana – a view from the mountain and a case to answer* (2012) 13 - 157 (Chapters 1 – 6).

¹⁰⁹ 15 of 2013.

section 1 of the Act and mandates a maximum punishment of imprisonment for three years or a fine.¹¹⁰

Apart from the widely reported and televised incidents where the police responded with force as articulated above, statistics indicate that a total of 5 cases of police brutality in general were recorded in the year 2006, then an upward trend took effect with 16 in 2007; 25 in 2008; 59 in 2009; 35 in 2010 and 49 in 2011.¹¹¹ What is even more disturbing is that 40% of the victims of police brutality are innocent bystanders.¹¹² Netswera¹¹³ further reports that the killings by the police associated with service delivery protests were nil in 2006 and 2007; 1 in 2008; 3 in 2009 and 2010; 9 in 2011; 5 in 2012; 11 in 2013 and 7 in the first part of 2014. The casualties of the Marikana shooting are excluded from the above data.

There appears to be overwhelming of support for better training of the Public Order Police unit as a means to eliminate the cases of police brutality or the use of unwarranted and excessive force.¹¹⁴ Be that as it may, the crime of public violence remains relevant should violence and the invasion of the rights of non-protesters emerge during the course of a protest or a strike notwithstanding the presence of the police. It also becomes more relevant as protests sometimes take place spontaneously and without prior warning or planning involving the police.

1.3 Criminalisation of public violence

In order to further set the tone for the dissertation, it is important to examine the rationale for the criminalisation of public violence. As a point of departure, it is generally accepted that a crime¹¹⁵ is viewed as human conduct that is harmful to the

¹¹⁰ See sections 1 and 3 of the Dangerous Weapons Act 15 of 2013. See also Netswera op cit (n37) 270.

¹¹¹ Tait op cit (n12) 15.

¹¹² Ibid. A typical example in point is a report (See above (n85)) that in January 2013, a 23 year old female who worked at a spaza shop was shot dead allegedly by the police during the farm workers' strike in De Doorns. She had not been party to the strike action.

¹¹³ Netswera op cit (n39) 270. See also Alexander op cit (n47).

¹¹⁴ This view has been consistently reiterated by the Ministry of Police in various budget vote speeches. See EN Mthethwa Ministry of Police *SAPS and IPID Budget Vote Speech, Parliament, Cape Town* (2013), available at, <http://www.gov.za/speeches/view.php?sid=36938>, accessed on 23 August 2014.

¹¹⁵ For a discussion of the evolution of the criminal law, see generally J Burchell *Principles of Criminal Law* 3 ed (2005) 19-48 (Chapter 2); CR Snyman *Criminal Law* 6 ed (2014) 3-10 (Chapter 1); JRL Milton *South African Criminal Law and Procedure Vol II: Common Law Crimes* 3 ed (1996) 58-97 (Chapters 3 and 4); PMA Hunt & JRL Milton *South African Criminal Law and Procedure (formerly Gardiner and Lansdown) Vol II: Common law Crimes* Revised 2 ed (1982) 55-102 (Chapters 3 and 4); EM Burchell et al *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 2 ed (1983) 11-50 (Chapter 2); and Skeen op cit (n33) paras 180 - 186. In essence, the criminal law

public interest.¹¹⁶ Thus, the criminal law is invoked in order to protect society, its institutions and members from such harmful conduct.¹¹⁷ More specifically to the crime of public violence for purposes of this dissertation, the public interest protected by the crime includes the maintenance of public peace and order¹¹⁸ as well as the protection against the invasion of the rights of other people.¹¹⁹

The above-named interests are not the only interests protected by the crime of public violence. The reason for limiting the interests protected by the crime of public violence to those which are relevant for purposes of this dissertation is to avoid creating a misconception that should the crime be found to be in need of development in order to adequately protect the rights of non-protesters, then the same would apply to the other interests which are protected by the crime. The conclusion that the crime of public violence requires to be developed in order to protect the rights of non-protesters does not automatically translate to the conclusion that the crime would also be in need of development to protect, for example, the state's interest in the security of the state or state property. Different considerations and principles would apply in that case.¹²⁰

evolved as an alternative to the system of "private vengeance" which conferred on an aggrieved party the right to seek revenge against those who have inflicted harm or damage against him. This system riddled the Roman society with non-ending family/tribal feuds which culminated in violent conflicts. When society became no longer tolerant of the social disruption occasioned by the feuds, a tacit social contract was concluded with the state in terms of which the citizens vested in the state their right to seek revenge in return for the state to diligently seek out and punish the offenders. This marked the emergence of the criminal law. Thereafter significant developments in the law followed. In this regard, mention can be made of Code of Twelve Tables which significantly restricted the notion of private vengeance. Numerous statutes also followed. The functions of these statutes ranged from creating crimes to shaping the court structure and the whole criminal law system. One of these statutes was the *lex Julia de vi publica et privata*, which was directed at punishing both public and private violence.

¹¹⁶JR Midgley & JC van der Walt 'Delict' in WA Joubert (2 ed) *The Law of South Africa* Vol 8, Part 1 (2010) para 3. See also EM Burchell op cit (n115) 2.

¹¹⁷ EM Burchell op cit (note 115) 2. See also ATH Smith *Offences against public order including the Public Order Act 1986* (1987) 1. Smith submits that the public interest protected by the criminal law includes the society's interest in personal safety and physical integrity as well as property rights.

¹¹⁸ Burchell op cit (n14) 755.

¹¹⁹ See Skeen op cit (n33) para 11. The writer explains that the interest protected by a particular crime, in particular those serious common-law crimes, can be deduced from the definition of the offence itself (see 2.6 below for the definition of the crime of public violence), hence the crime of public violence, judging from its definition, is also aimed at affording protection against the invasion of the rights of other people.

¹²⁰ This point comes out clearly in 4.2.2 below when analysing the courts' treatment of the right to freedom of assembly. It will become apparent that one of the few times that the courts tend to uphold the limitation of the right to freedom of assembly is when the right is limited for purposes of protecting the rights of other people. Where, for instance, the right to freedom of assembly is sought to be limited by a legislative provision which empowers government officials to prohibit certain gatherings, the courts have been reluctant to uphold the limitation of the right in the absence of compelling reasons.

Nowadays, the power to criminalise, as per the principle of legality,¹²¹ lies with the legislature. It is therefore the legislature that decides which legal interest to protect by means of a criminal sanction.¹²² The courts only have the power to develop the common law and not to create new crimes. The question that arises is what informs the legislature's decision to criminalise certain conduct? It is submitted that there appears to be very little that guides the legislature in exercising its power to criminalise.¹²³ Therefore, it follows that the decision to criminalise is still driven

¹²¹ On the principle of legality, see generally Burchell op cit (n14) 34-38; Burchell op cit (n115) 94-96; Snyman op cit (n115) 35-49; S Hoctor 'Specific crimes – recent cases' (2007) 20(1) *South African Criminal Law Journal* 79-80; and AS Matthews *Law, order and liberty in South Africa* (1971) 1-47 (Part I). The principle of legality is important for present purposes since the topic for debate led in the dissertation turns on the issue of the development of the common law (i.e the common-law crime of public violence) and the principle of legality places some very significant constraints on the exercise of the power to interpret and develop the common law. To provide a brief background, the principle of legality, expressed in the maxims *nullum crimen sine lege* and *nulla poena sine lege*, denotes respectively that prohibited conduct is only punishable if it is explicitly identified by a properly made law as constituting a crime (*ius acceptum* principle) and that for there to be a crime in law there must be punishment affixed to the commission of that crime. The application of both maxims bear some fundamental consequences for the common-law crimes and statutory offences. For instance, the effect of the *nullum crimen sine lege* maxim on common-law crimes is that the definitions of these crimes are required to be reasonably precise and settled (*ius certum* principle). As a result, there can be no new common-law crimes created by the courts. The power to create new crimes vests solely in the legislature and the courts are confined only to the adaptation or development of the common law so to ensure that it reflects the changing social, moral and economic fabric of society. In exercising their power to develop the common-law crimes, the principle of legality requires the courts to be careful not to extend the definitions of crimes by analogy. However, there is a very thin line between the interpretation and development of the common law and adaptation by analogy. The Constitutional Court decision in *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) and its resultant controversy is evidence for this. In *Masiya*, The Constitutional Court upheld the extension of the common-law definition of rape to cover the cases of anal penetration of females. The court's decision has opened a debate as to whether the extension violated the principle of legality. See further the debate between Snyman and Phelps on this point in CR Snyman 'Extending the scope of rape – a dangerous precedent: note' (2007) 124(4) *South African Law Journal* 677 - 678 and K Phelps 'A dangerous precedent Indeed – a response to CR Snyman's note on Masiya' (2008) 125(4) *South African Law Journal* 648 - 659. Also consider the view expressed by Hoctor op cit (n121) 78.

¹²² Skeen op cit (n33) para 11.

¹²³ Ibid para 8. It suffices to mention that as per the *Report* of the Canadian Committee on Corrections entitled *Towards Unity: Criminal Justice and Corrections* (1969) 11-12, cited in EM Burchell op cit (n115) 9, the proposed criteria for criminalisation was formulated as follows: "(1) [n]o act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society; (2) [n]o act should be criminally prohibited where its incidence may be adequately controlled by forces other than the criminal process; and (3) [n]o law should give rise to social or personal damage greater than it was designed to prevent". Another criteria for criminalisation is presented in Burchell op cit (n115) 61 and is formulated as follows: "(1) [t]he conduct is prominent in most people's view of socially threatening behaviour, and is not condoned by any significant segment of society; (2) [s]ubjecting it to punishment is not inconsistent with the goals of punishment; (3) [s]uppressing it will not inhibit socially desirable conduct; (4) [i]t may be dealt with through even-handed and non-discriminatory enforcement; (5) [c]ontrolling it through the criminal process will not expose that process to severe qualitative or quantitative strains; and (6) [t]here are no reasonable alternatives to the criminal sanction for dealing with it".

mainly by the inclination to protect members of society and its institutions from harmful conduct.¹²⁴

Although the criminal law is aimed at protecting the public interest, certainly not every violation of the public interest needs to be met with a criminal sanction.¹²⁵ It has been contended that the crucial consideration in criminalisation is that “the interest in question should be so valuable that peaceful and orderly societal co-existence cannot be guaranteed without its protection through the criminal law, even if it may also be protected through other branches of law”.¹²⁶

The question that follows is whether the invasion of the rights of other people during violent protests and strikes is a valuable interest that requires protection through the criminal law although there are also civil remedies available in terms section 11 of the RGA or the common law. The phenomenon whereby a single incident gives rise to a civil claim and a criminal charge is explained by the fact that the interests protected by the civil (law of delict) and the criminal law sometimes overlap or are identical.¹²⁷ However, not all criminal acts give rise to a civil (or a delictual) claim and not all delicts amount to a crime.¹²⁸

Despite some apparent similarities between delicts and crimes, there are, however, some fundamental differences between the two and the distinction has to be maintained.¹²⁹ For example, the criminal law falls under the branch of public law and is aimed at protecting the public interest, whereas the law of delict falls under the branch of private law and is aimed at protecting the individual (private) interest.¹³⁰ Even the sanctions emanating from these two fields of law also differ. Civil sanctions are compensatory in nature (compensating and indemnifying the party who has suffered a loss, harm or damages as a result of a delict) while criminal sanctions are punitive in nature (they punish the offender for the breach of the public interest).¹³¹

¹²⁴ See EM Burchell op cit (n115) 3-4. The writer respectfully submits that this approach is also consonant with JS Mill’s formulation that “the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others”.

¹²⁵ Skeen op cit (n33) para 11.

¹²⁶ Ibid.

¹²⁷ Skeen op cit (n33) para 11.

¹²⁸ J Neethling et al *Law of Delict* 6 ed (2010) 7.

¹²⁹ For a historical treatment of delicts and crimes under the Roman and Roman-Dutch law, see Midgley & Van der Walt op cit (n116) para 3.

¹³⁰ See Neethling op cit (n128) 7; Snyman op cit (n115) 3-4; and Midgley & Van der Walt op cit (n116) para 1.

¹³¹ Neethling op cit (n128) 7.

The maintenance of the distinction between the civil and criminal law is closely guarded to the extent that some writers are of the view that those common-law principles which upset this distinction should be abolished.¹³² Therefore, the invasion of the rights of other people has historically been a valuable interest and is worthy of protection through the criminal law and other fields of law.

¹³² Ibid.

Chapter 2

PUBLIC VIOLENCE

2.1 Introductory remarks

The South African common law¹³³ has as its source of origin a mixture of different legal systems, these being the Roman,¹³⁴ Roman-Dutch¹³⁵ and English law.¹³⁶ Likewise, the common-law crime of public violence consists of a mixture of legal principles borrowed from these legal systems and tailored by the South African jurists and legislators over the years to serve the needs of the South African society.

Thus, the significant historical developments in public violence jurisprudence, in particular the historical developments leading up to the adoption of the present definition and elements of the crime, are foreshadowed in this chapter. There is also a discussion of the sentencing principles used to guide the courts in reaching a sentence for public violence offenders.

The chapter also comprises a section on statutory forms of public violence, a discussion which will outline the various statutory measures of the pre-Union, post-Union and apartheid legislatures aimed at regulating assemblies, as well as the reason(s) for the conclusion that a legislative response to the violent protests is highly unlikely.

2.2 Roman law

Roman law is the oldest source from which the common law of South Africa derives. Burchell¹³⁷ submits that during the Roman times the crime of public violence was prosecuted and punished as a type of the *crimen laesae majestatis*, a generic name for various conduct which constituted an offence against the existence, independence, safety, authority or dignity of the state whereby the *majestas* or the

¹³³ Snyman defines the common law as referring to “the rules of law not contained in an Act of parliament or legislation enacted by some other subordinate legislature, such as a provincial legislature, but which are nevertheless just as binding as any legislation” – see Snyman op cit (n115) 6.

¹³⁴ See 2.2 below.

¹³⁵ See 2.3 below.

¹³⁶ See 2.4 below.

¹³⁷ Burchell op cit (n14) 756.

supreme power was impaired.¹³⁸ The rationale for punishing public violence as such was informed by the fact that since the maintenance of peace and order was the responsibility of the state, any disturbance of public peace and order impaired the *majestas* of the state.¹³⁹

For lack of a precise definition of the *crimen laesae majestatis* as it encompasses a number of criminal acts thus broadening its scope, the crime can nonetheless be understood to be committed where a person “unlawfully and intentionally arrogates to himself the authority vested exclusively in the president or government of the Republic, but without entertaining any hostile intent against the Republic”.¹⁴⁰ The question as to whether or not the *crimen laesae majestatis* still forms part of the South African law is a subject of some doubt and controversy.¹⁴¹

As the criminal law in Rome continued to evolve with an increasing number of statutes being enacted to create various offences, public violence became a subject of statute known as the *lex Julia de vi*.¹⁴² The statute drew a distinction between public (*vis publica*) and private violence (*vis privata*), and punished the various prohibited acts, although not all of those acts would today be considered to constitute public violence.¹⁴³ The common feature of the acts constituting public and private violence in the *lex Julia de vi* was that most of these comprised some element of violence or the potential to lead to violence¹⁴⁴ and many of the examples given in the statute were of mob violence.¹⁴⁵

¹³⁸ See Milton op cit (n115) 58-97 (Chapters 3 and 4); Skeen op cit (n33) para 176 - 179; Hunt op cit (n115) 55-102 (Chapters 3 and 4); and SALC report op cit (n36) 1-12. See also MF Ackerman *Die reg insake openbare orde en staatsveiligheid* (1984) 143-147 (Chapter 8); and JC De Wet & HL Swanepoel *Die Suid-Afrikaanse Strafreg* 2 ed (1960) (Chapter XXVI). It has been observed in the above authorities that should the crimes of treason and sedition be divorced from the genus *crimen laesae majestatis* and become independent offences (as is already the case in modern South Africa), the remaining species of the genus *crimen laesae majestatis* can be arranged into the following categories: (a) the usurping of imperial prerogatives and public authority; (b) impairing the dignity of the emperor and the state (the *crimen laesae venerationis*) and (c) conduct which challenges the authority or safety of the state (falling short of constituting treason and sedition as defined today in South African law). It is unclear whether any of these offences still exist in South African law or they have all fallen into abrogation by disuse.

¹³⁹ SALC report op cit (n36) 7.

¹⁴⁰ Skeen op cit (n33) para 179. Although various writers have provided definitions of their own, it is noteworthy that all of them make use of more or less the same elements - see Milton op cit (n115) 68.

¹⁴¹ Refer to the discussion at 138 above. Skeen op cit (n33) para 179 contends that it would be taking it too far to suggest that the offence has now been abrogated by disuse.

¹⁴² Burchell op cit (n14) 756.

¹⁴³ Ibid.

¹⁴⁴ Milton op cit (n115) 77.

¹⁴⁵ EM Burchell op cit (n115) 17. Although the statute gave examples of mob violence, it transpires that a large number of examples provided were those of violence committed by individuals such as rape, kidnapping, robbery, burning a building, appearing armed in public, harbouring vagabonds, plundering a shipwreck, executing, scourging or imprisoning a Roman citizen who has appealed to

Furthermore, it is not entirely clear what the difference was between public and private violence. There is, however, authority to suggest that the distinction between the two was drawn by considering whether or not the persons causing the violence were armed.¹⁴⁶ If they were armed, public violence was committed and if they were not armed, then private violence was committed. Any object which might cause injury sufficed.¹⁴⁷ This could entail spears, shields or stones.

Roman law did not recognise as the essential elements for the crime of public violence the “serious dimensions” as well as the “concerted action by a number of people” elements.¹⁴⁸ Those Roman law texts which did make mention of the number of persons element did not define the required number of persons who must act together in concert.¹⁴⁹ It was, however, envisaged in D 47.8.4 of the statute (which dealt with damage caused by a disorderly crowd (*turba*)) that the word *turba* referred to a riotous assembly caused by a multitude of men, at least ten or fifteen of them.¹⁵⁰

Although the descriptions of the offences created under the *lex Julia de vi* were largely vague and unsystematic, the statute remains the founding authority for the crime of public violence.¹⁵¹ The public violence jurisprudence which resonated in Rome and codified in the *lex Julia de vi* was to later become a part of the Dutch legal system and thereby form part of what became known as Roman-Dutch law, a major subject of comment by many Dutch writers.¹⁵²

2.3 Roman-Dutch Law

As the name suggests, Roman-Dutch law is the end product of the amalgamation of Roman and Dutch law.¹⁵³ The fusion happened during a process in Holland which

the emperor or people, violating a sepulchre, collecting together an abnormal quantity of arms, forcibly dispossessing someone of his villa or land, and forcibly seizing one's debtor's goods - see Milton op cit (n115) 77.

¹⁴⁶ Milton op cit (n115) 77.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ EM Burchell op cit (n115) 14.

¹⁵² The writers include Philippus Wielant (1439 – 1519) *De pratyke crimenele*; Joost Damhouder (1507 – 1581) *practycke in criminele saken*; Antonius Matthaeus *De criminibus* II (1601 – 1654); Pieter Bort (1615 – 1674) *Tractaet van crimineele saecken*; Johan Moorman (1696 – 1743) *Verhandelinghe over de misdaden*; DG van der Keessel (1738 – 1816) *Dicta ad criminale libri*; Groenewegen (1613 – 1652) *Tractus de legibus abrogatis*; Van Leeuwen (1626 – 1682) the *Het roomsch-hollandsch recht (RHR)*; Huber (1636 – 1694) *Hedendaegse rechtsgeleerdheyt (HR)* and *Praelectiones juris civilis*; Voet (1647 – 1713) *Commentarius ad pandectas*; Van der Linden (1756 – 1835) *Rechtsgeleered practicaal en koopman's handboek*.

¹⁵³ EM Buchell op cit (n115) 22.

took effect in the thirteenth century until the seventeenth century.¹⁵⁴ At the time, the United Netherlands did not have uniform laws applicable across the whole country, but each province had its own legal system and common-law principles which were notably similar in many respects.¹⁵⁵

In regard to the crime of public violence, Roman-Dutch law proceeded from the same premise as Roman law. It maintained a distinction between public violence (*openbare geweld*) and private violence (*geweld*) and regurgitated the wide-ranging Roman examples of prohibited acts.¹⁵⁶ Roman-Dutch law also did not recognise the “concerted action by a number of people” and “serious dimensions” factors as essential elements for the crime of public violence.¹⁵⁷ However, Milton¹⁵⁸ submits that *dolus* and unlawfulness were recognised as the essential elements in Roman-Dutch law.

There came a point where differences of opinion among the Dutch writers on certain aspects of the Roman law emerged and this led to uncertainties and contradictions in Roman-Dutch law. For instance, the Dutch writers were split on the approach for the classification of crimes.¹⁵⁹ Some also questioned the basis for the distinction between public and private violence i.e. that if the perpetrators of violence were armed, then public violence was committed and if they were not armed, then private violence was committed.¹⁶⁰ These uncertainties and contradictions became a phenomenon of the Roman-Dutch law era.¹⁶¹

¹⁵⁴ Ibid.

¹⁵⁵ Ibid 28.

¹⁵⁶ See Burchell op cit (n14) 756; and Skeen op cit (n33) para 181.

¹⁵⁷ Milton op cit (n115) 78.

¹⁵⁸ Ibid.

¹⁵⁹ EM Burchell op cit (n115) 27 submits that the Roman-Dutch writers were divided into two categories: one group comprised those who followed the Roman classification and treatment of crimes (i.e. that crimes must be classified according to the nature of the tribunal which took cognisance of them) and the other group comprised those who classified crimes according to the interests they protected. The latter was entirely foreign to the Roman people. It would seem that one of the leading Dutch writers to classify crimes according to the interests they protected was Van Leeuwen in the *Het Roomsche-Hollandsche Recht (RHR)*. He categorised the various crimes into: (1) crimes against the Supreme Power and the Government; (2) crimes against life; (3) crimes against the body; (4) crimes against natural liberty; (5) crimes against honour and good fame; and (6) crimes against property – see EM Burchell op cit (n115) 96. As was typically the case for many Dutch writers, Van Leeuwen’s work showed very little clear definition of crimes.

¹⁶⁰ Milton op cit (n115) 78. For example, some writers argued that there were instances where public violence could be committed without arms. They singled out the instances of aggravated violence committed without arms such as when a mob creates so much of commotion or applies force in a dangerous fashion.

¹⁶¹ EM Burchell op cit (n115) 27.

Following from the Roman-Dutch law contradictions and uncertainties, it will become apparent in 2.5 below that although the present South African criminal law writers have embraced the classification of crimes into common-law crimes and statutory offences, and that crimes are further classified according to the interests they protect, the writers are still not in agreement as to the specific interests protected each crime. As a result, for one writer a particular crime protects a particular interest while for the other writer a different interest is protected by the same crime.

Furthermore, hardly any clear definitions of crimes appeared in the work of many of the Dutch writers.¹⁶² Often the writers focused more on punishment rather than on the development of proper definitions of crimes. It therefore follows that the answers to questions sought to be answered by reference to Roman-Dutch law are not readily accessible.¹⁶³ There is a whole host of authorities one would need to dig through before arriving at an answer, if there is an answer.¹⁶⁴ As will be discussed in 2.6 below, the historical characteristic of Roman-Dutch law of not having clear definitions of crimes still reflects in South Africa today. Modern writers still have different formulations of the definition of the crime of public violence although they are all substantially similar.

One of the Roman-Dutch writers by the name of Van der Linden did, however, bring forth somewhat of a clear and fairly precise definition of the crime of public violence. According to his exposition, “*geweld* is committed not only by causing an *oproer*, but by all such acts as have for their object the unlawful disturbance of the peace and security or a forcible invasion of the rights of other people”.¹⁶⁵ Despite visibly not incorporating the elements of “concerted action by a number of people” and “serious dimensions”, Van der Linden’s work was highly regarded in the nineteenth and twentieth century during the formative period of the South African criminal law.¹⁶⁶

Roman-Dutch law was introduced into South Africa in the year 1652 following the arrival of the Dutch settlers at the Cape of Good Hope. Britain’s occupation of the Cape in 1795 and again in 1806 saw a lot of the English jurisprudence creeping into South African law although it did not sweep off Roman-Dutch law as the common law.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Milton op cit (n115) 79.

¹⁶⁶ EM Burchell op cit (n115) 26. It suffices to mention once more that Roman-Dutch law recognised *dolus* and unlawfulness as the elements of the crime.

2.4 English Law¹⁶⁷

English law punished the notions of unlawful assembly, rout, riot and affray.¹⁶⁸ An unlawful assembly consisted in the coming together of a crowd with a common purpose to riot.¹⁶⁹ Hunt¹⁷⁰ adds further that the said crowd must have consisted of no less than three persons engaged in a common purpose to commit the crime of violence or to achieve some other object, be it lawful or unlawful, in a manner that is likely to cause a reasonable person to apprehend a breach of the peace. An otherwise lawful assembly could become unlawful in the event that a common purpose to commit violence as articulated above surfaces.¹⁷¹

A rout took place when, during an unlawful assembly, some act was done leaning towards the execution of the common purpose, but falls short of the actual execution of that common purpose.¹⁷² It was in actual fact a stage between the completion of the unlawful assembly and the inception of a riot.¹⁷³ A riot took place when the unlawful assembly reached its pinnacle point and the common purpose was partially or completely executed.¹⁷⁴ Essentially, the crowd ought to have been engaging in violent and destructive behaviour in order for a riot to have taken place.¹⁷⁵

Lastly, an affray consisted in the “fighting or a display of force by one or more persons without actual violence in such a way that reasonable people might be frightened or intimidated”.¹⁷⁶ Despite the failed attempts by the Criminal Law Commissioners in the 1840s to consolidate these misdemeanours into one, they have nonetheless been repealed by the Public Order Act of 1986 and replaced with statutory offences of violent disorder, riot and affray.¹⁷⁷ In South African law,

¹⁶⁷ For a history of the English criminal law, see Burchell op cit (n115) 29-30; and Skeen op cit (n33) paras 1-2. Burchell submits that English criminal law also evolved from Germanic origins. However, the English Kings managed to significantly limit the traditional principle of private vengeance in their criminal law system. The criminal jurisdiction was conferred on the King’s judges (the royal justices) through the extension of the King’s peace. All serious offences were punishable by the royal courts as breaches of the peace. The resounding effect of the foregoing was that a single and coherent body of the criminal law was established and applied throughout the kingdom. English law influenced the South African criminal law, in particular the specific crimes, through the Native Territories Penal Code 24 of 1886.

¹⁶⁸ Burchell op cit (n14) 756.

¹⁶⁹ Ibid.

¹⁷⁰ Hunt op cit (n115) 73.

¹⁷¹ Ibid.

¹⁷² Ibid 73.

¹⁷³ Burchell op cit (n14) 756.

¹⁷⁴ Under the Riot Act of 1714, which is now repealed, a riot was punished if twelve or more persons who were “unlawfully, riotously and tumultuously” assembled together with a view to disturb the peace continued their activities for an hour or more after being called upon to disperse - see Hunt op cit (n115) 73.

¹⁷⁵ Burchell op cit (n14) 756.

¹⁷⁶ Hunt op cit (n115) 73.

¹⁷⁷ Milton op cit (n115) 79.

conduct which would have constituted the crimes of unlawful assembly, rout and riot in English law was always covered by the common-law crime of public violence.¹⁷⁸

2.5 Public violence in South Africa

South Africa inherited a Roman-Dutch law system in a state of disarray and chaos with writers disagreeing on certain aspects of the substantive criminal law. At the same time, English law was exerting influence on South African law.¹⁷⁹ It is submitted that the acceptance of Van der Linden's definition¹⁸⁰ of the crime of public violence served as a point of departure for the articulation of the definition and elements of the crime of public violence in South Africa. Gardiner and Lansdown expanded on Van der Linden's definition of public violence and articulated the definition as follows: "public violence (*geweld*) is committed by all such acts as openly and publicly effect, or are intended to cause, a violent and forcible disturbance of the public peace and security, or a forcible invasion of the rights of other people".¹⁸¹

¹⁷⁸ Ibid.

¹⁷⁹ See EM Burchell op cit (n115) 28-50. The arrival of the Dutch settlers in the Cape of Good Hope in 1652 together with the British occupation of the colony had some very profound consequences for the law. In the early years of the reception of Roman-Dutch law in 1652 to 1795, not much movement was observed in the law. None of the *Placaats* and legislation that was passed at the time had a significant influence on the development of the common law. Significant changes came in the period 1795 to 1910 following the capturing and occupation of the Cape of Good Hope by Britain. The period was characterised by a great deal of suspense as to whether or not English law would eventually supersede Roman-Dutch law. There were indeed some fundamental changes that were introduced particularly in regard to the procedural aspect of the criminal law. However, the British government, apart from some of the changes it introduced, did not allow a total replacement of Roman-Dutch law with English law. In actual fact, the criminal law of South Africa came to be a mixture of both Roman-Dutch and English law by the time of the Union in 1910 and continued to develop as such until today. During the period from 1910 onwards, the courts, including the Appellate Division which came with the Union of 1910, developed the definitions of crimes along the same lines as the previous colonial courts and thus maintained a mixture of both Roman-Dutch and English law. However, in the course of defining the common-law crimes, some crimes ended up reflecting more of the English law principles in their definitions (for example rape, defamation, administering poison, perjury, compounding, bigamy, public indecency, robbery, receiving stolen property, theft by false pretences, assault, contempt of court, housebreaking, forgery, and uttering) and others (such as public violence, sedition, high treason, abduction, kidnapping, bribery, *crimen injuria*, incest, defeating the ends of justice, extortion, fraud and arson) experienced little English law influence. Other crimes had significant English law influence in some of the elements, but Roman-Dutch law remained decisive in regard to other elements. This category comprises crimes such as theft, malicious damage to property, culpable homicide, murder and blasphemy.

¹⁸⁰ That "*geweld* is committed not only by causing an *oproer*, but by all such acts as have for their object the unlawful disturbance of the peace and security or a forcible invasion of the rights of other people".

¹⁸¹ The definition has been cited with approval in a number authorities including, *inter alia*, *R v Marthinus and Others* 1941 CPD 319 at 328; *R v Ndaba and Others* 1942 OPD 149 at 152; *R v Segopotsi* 1960 (2) SA 430 (T) at 433; and *R v Kashion* 1963 (1) SA 723 (SR) at 724. See further Milton op cit (n115) 74.

As both definitions by Van der Linden as well as that of Gardiner and Lansdown omitted some crucial elements for the crime of public violence, the courts, in carving out a uniquely South African notion of public violence, supplemented these definitions with the addition of the elements of “concerted action by a number of people” and that the acts must assume “serious dimensions”.¹⁸² It remains a subject of debate whether the courts were influenced by English law in adding the concerted action element to the definition of the crime of public violence. It is noteworthy that only English law recognised the notion of the “common purpose” to commit a crime.¹⁸³

Whatever the case may be, the courts nonetheless added the “concerted action by a number of people” element with little or no visible citation of the English authorities.¹⁸⁴ If the move was motivated by English law influence, that would also not be surprising as it is well recognised that in the 1800s there was a lot of movement towards the introduction of English jurisprudence into the criminal substantive law of South Africa, but without a blanket replacement of Roman-Dutch law.¹⁸⁵ Apart from this, the crime of public violence retained most of the Roman-Dutch elements. It has also been noted as one of the offences that experienced minimal English law influence.¹⁸⁶

In regard to the “serious dimensions” element, it has been noted by Milton¹⁸⁷ that some Roman-Dutch writers (notably Van der Linden and Huber) found a distinction between public and private violence in the dimensions factor and that the South African courts also relied on this distinction without expressly citing the Dutch writers

¹⁸² Milton op cit (n115) 81.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Refer to the discussion at 179 above. See further EM Burchell op cit (n115) 34-36: some of the reasons for the move towards the adoption English law include: first, at that particular point in time, Roman-Dutch law in the Netherlands had been dispensed with and in 1809 the Napoleonic *Code Penal* was applicable throughout the Netherlands. Therefore, Van der Linden’s *Koopmans Handboek* (1806) was the last publication on the Roman-Dutch law system. Second, most judicial appointees were versed largely in English law. Third, very few judges and practitioners had proper command of Dutch and Latin. Fourth, many of the old authorities were inaccessible as they were poorly indexed. Lastly, Roman-Dutch criminal law principles were largely uncertain as the Dutch jurists often focussed on punishment rather than on the development of the substantive law.

It has been pointed out that by no means could the foregoing reasons for preferring English law be interpreted as “a deliberate policy of the Anglicization of the law”. The courts never took the approach of deliberately substituting a Roman-Dutch law principle with that of English law. It could have occurred that the court opted for an English law principle because it bore resemblance to that of the Roman-Dutch law, that the names in both systems were similar, that the courts could not find any Roman-Dutch authority to fill the void, that much of the legislation of the time had adopted English law terminology, or simply a belief that “every system of enlightened jurisprudence must share a particular English doctrine”.

¹⁸⁶ EM Burchell op cit (n115) 44.

¹⁸⁷ Milton op cit (n115) 81.

as authority. Thus, the legal position is settled in that where the dimensions of the fracas, taking cognisance of the duration, locality, numbers involved, the nature of the quarrel and other circumstances, are not sufficiently serious, then a charge of public violence will not suffice, but that of a lesser offence such as assault, malicious injury to property, arson and robbery.¹⁸⁸

Furthermore, the South African courts, in developing the country's jurisprudence for the crime of public violence, cast doubt on the existence of a distinction between public and private violence as previously recognised in Roman and Roman-Dutch law.¹⁸⁹ In *R v Van Daventer*,¹⁹⁰ the court stressed that even though the notion of *vis privata* still existed in South African law, it was nonetheless a common practice for private violence amounting to assault to be charged as such. A couple of years later in *Dabee v R*¹⁹¹ the court also downplayed the significance of the distinction between public and private violence. A further rejection of the charge of private violence emerged in *R v Ndwandwa and Others*¹⁹² where, on appeal, the court rejected the finding of the court *a quo* that private violence was a competent verdict to a charge of public violence.

As already mentioned in 2.3 above, the effects of the Roman-Dutch law phenomenon of writers differing on the classification of crimes is still felt in South Africa even today. While the writers have embraced the classification of crimes according to the source of the provision (i.e the distinction between common-law crimes and statutory offences) and classification of both the common-law crimes and statutory offences according to the interests they protect, the writers have nonetheless failed to come to an agreement on the exact interest protected by each crime.¹⁹³ As a result, it has become a custom for each writer to develop his own classification of crimes according to the interests protected by that particular crime as he perceives them.¹⁹⁴ This approach is not a strange practice in South Africa since various Roman-Dutch writers also adhered to the same practice.¹⁹⁵

¹⁸⁸ Ibid.

¹⁸⁹ See for example *R v Molosi and others* 1916 EDL 401.

¹⁹⁰ (1917) 38 NLR 454.

¹⁹¹ (1928) 49 NLR 50.

¹⁹² 1937 TPD 165.

¹⁹³ Skeen op cit (n33) at para 20. See also EM Burchell op cit (n115) 96. Burchell applauds the approach to the classification of crimes according to the interests they protect as being able to shine the light specifically on why the state has criminalised particular conduct and that it allows for the interpretation and development of the elements of the crime in a socially acceptable and satisfactory manner.

¹⁹⁴ Skeen op cit (n33) at para 20

¹⁹⁵ See EM Burchell op cit (n115) 96-98. For example, Roman-Dutch law writers such as Van Leeuwen, Moorman and Van der Linden offered different classification approaches. Further, upon reception of Roman-Dutch law in South Africa going forward to the apartheid era, the Transkeian

The crime of public violence is one of the crimes that has notably been classified differently by different writers. For instance, Burchell¹⁹⁶ classifies public violence as a crime against community interests, Snyman¹⁹⁷ classifies it as a crime against the state, Milton classifies it as a crime against public order, and in LAWSA¹⁹⁸ public violence is classified under crimes against the state and administration. Given the conflict on the approach to classifying crimes, particularly the crime of public violence, the expectation might well be to give an indication as to which one is correct or is to be preferred. It is submitted that none of these classifications are wrong or undesirable because the crime of public violence does protect all the above-named interests.

It is correct to classify the crime of public violence under crimes against the community like Burchell has done. Each and every crime is intended to protect the community. Thus, the crime of public violence also protects the community interest in public peace and order.¹⁹⁹ To classify public violence as a crime against the state is also not entirely wrong for it does serve to protect the interests of the state in public peace and security²⁰⁰ as well as state property. Classifying public violence as a crime against public order is also acceptable because that is one of the interests protected by the crime of public violence.

It suffices to add, however, that there is an additional interest protected by the crime of public violence as is evident from the definition of the crime.²⁰¹ In this regard, I am referring to the protection against the invasion of the rights of other people whom I refer to as non-protesters. It is contended throughout this dissertation that the crime of public violence serves to protect the rights of non-protesters which are often violated during protests and strikes in South Africa.

2.6 The current definition and elements of the crime

As already mentioned in 2.3 above, the lack of clear definitions of crimes characterises the state of disarray and chaos in which South Africa inherited the

Penal Code, LAWSA, and writers such as Gardiner and Lansdown; and De Wet and Swanepoel, also developed their own classifications.

¹⁹⁶ Burchell op cit (n14) 755.

¹⁹⁷ Snyman op cit (n115) 311.

¹⁹⁸ Skeen op cit (n33) at para 180.

¹⁹⁹ Burchell op cit (n14) 755

²⁰⁰ See Skeen op cit (n33) at para 180; and Snyman op cit (n115) 312.

²⁰¹ It has been argued in 1.3 above that the interests protected by a particular crime may also be deduced from the definition of that crime.

Roman-Dutch law system. The crime of public violence was not spared the misfortune of not having a clear and precise definition. However, the South African jurists have over the years attempted to formulate a precise definition of the crime of public violence. Owing to the difficulty, if not the impossibility, of precisely defining the crime of public violence which many of the courts have conceded, it is not surprising that different writers have formulated slightly different definitions of the crime, though they are all substantially similar.²⁰²

Milton²⁰³ provides a concise summary of the reasons for the difficulty of precisely defining the crime of public violence and the vagueness of some of its elements as was articulated in *R v Salie*.²⁰⁴ The reasons are as follows:

“Firstly, public violence can occur in various circumstances and arise out of various causes; there are diverse kinds of public violence. *Secondly*, though this offence is usually defined in terms of the unlawful and intentional conduct of a group, it must not be forgotten that the accused’s liability depends on his individual unlawful and intentional participation. There are in a sense two sets of elements to be proved; one set concerns the group, the other the accused as an individual participant. *Thirdly*, it is probably impossible to define the exact boundaries between assault by a group and public violence; it is probably necessary to resort (as our Courts have done) to the fairly vague criterion of gravity; the dimensions of the fracas must be sufficiently serious for it to be regarded as public violence. One who seeks to define public violence is consequently met by something of what one might call a conflict between theory and practice”.

Therefore, according to Burchell²⁰⁵ “public violence consists in the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions that are intended to forcibly disturb the public peace or security or to invade the rights of others”. The essential elements of the crime are: (1) unlawful; (2) number of persons; (3) disturbance of serious dimension; (4) personal

²⁰² In this regard, see for instance Milton op cit (n115) 74; Skeen op cit (n33) at para 180; and the SALC report op cit (n36) 4. To illustrate the point for present purposes, only the definitions advanced by Burchell and Snyman are cited below.

²⁰³ Milton op cit (n115) 74. The reasons for the difficulty of precisely defining the crime and the vagueness of some of its elements were also accepted with approval by the court in *S v Thonga* 1993 (1) SACR 365 (V) at 371.

²⁰⁴ 1938 TPD 136 at 137-8.

²⁰⁵ Burchell op cit (n14) 755.

association with the group; (5) intention; it must also be proved that the accused (6) was unlawfully and intentionally party to the conduct of those who acted jointly.²⁰⁶

On the other, hand Snyman²⁰⁷ submits that “public violence consists in the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which are intended forcibly to disturb public peace and tranquillity or to invade the rights of others”. The elements of the crime are: (a) an act; (b) by a number of people; (c) which assumes serious proportions; (d) which is unlawful and (e) intentional, including more specifically an intention (e(i) to disturb the public peace and order by violent means, or (e(ii)) to infringe the rights of others.²⁰⁸

The above definitions and elements of the crime of public violence have been met with approval from South African courts in a number of cases although the courts conceded the vagueness of some of the elements of the crime and the difficulty of giving the offence a precise definition.²⁰⁹ For convenience, this dissertation adopts the definition and elements of the crime advanced by Burchell. I now turn to consider each of the elements in some detail.

2.6.1 Unlawful

Both the acts of the group together with the participation of the individual in the acts of the group must be unlawful in order to satisfy the unlawfulness element for purposes of the commission of the crime of public violence.²¹⁰ It is submitted that the basic criterion for determining the unlawfulness element is whether or not there was an element of violence or a threat of violence in the disturbance of the peace and order or the invasion of the rights of other people.²¹¹ The reference to violence in this context means that there must be an “exercise of physical force so as to inflict injury or damage to persons or property or both”.²¹²

²⁰⁶ Ibid 757-760.

²⁰⁷ Snyman op cit (n115) 311.

²⁰⁸ Ibid.

²⁰⁹ In this regard, see in particular *R v Salie* 1938 TPD 136 at 137-8. See further *S v Mei* 1982 (1) SA 299 (O) at 301-302; *S v Mlotshwa* 1989 (4) SA 787 (W) at 794; *S v Whitehead* 2008 (1) SACR 431 (SCA) at para 38 and *S v Le Roux* 2010 (2) SACR 11 (SCA) at para 5; and *S v Thonga* 1993 (1) SACR 365 (V) at 371.

²¹⁰ Skeen op cit (n33) para 186. See also Snyman op cit (n115) 313.

²¹¹ Burchell op cit (n14) 756.

²¹² Milton op cit (n115) 85.

It follows that protest action of passive resistance or other forms of non-violent protests are not unlawful for purposes of the commission of public violence since there is no element of violence regardless of the disruption to, *inter alia*, the flow of traffic or the disruption to police operations.²¹³ The immediate consequence of the requirement of violence or a threat thereof is that the mere participation in an unlawful protest or unprotected strike does not render the participants guilty of public violence. However, the act of association with an unlawful protest or unprotected strike may carry some other adverse consequences, legal or otherwise.²¹⁴

As already stated above, both the conduct of the group and the individual's participation therein must be unlawful. The unlawfulness of the individual's participation in the acts of the group may be vitiated if the person was coerced²¹⁵ or acted under necessity in committing the unlawful act in concert with the others.²¹⁶ Any legally-recognised ground of justification is available to a member of a group charged with public violence. Private defence has notably been the most commonly used ground of justification in public violence cases.²¹⁷

2.6.2 Number of persons

This is one of the elements of the crime of public violence that are the innovation of South African jurists since the element was not recognised in Roman and Roman-Dutch law. It is noteworthy that neither the Roman, Roman-Dutch or English law stipulated the number of persons who must act in concert despite being the earliest authorities to somewhat postulate the requirement. This is not to suggest that Roman and Roman-Dutch law officially recognised the "concerted action by a number of persons" as an element of the crime of public violence, but that there are scattered references to the question of the number of persons involved in the crime.

The closest indication of a likely number of persons required for purposes of the commission of public violence in Roman law was that the word *turba* (a disorderly crowd) referred to a riotous assembly of a multitude of men, ten or fifteen of them,

²¹³ Burchell op cit (n14) 757. See also *S v Mei* 1982 (1) SA 299 (O).

²¹⁴ For instance, in labour law, section 68(5) of the Labour Relations Act 66 of 1995 provides that participation in an unprotected strike may constitute a fair reason for the dismissal of employees who are guilty of having participated in an unlawful strike. Furthermore, in terms of section 68(1)(b), the Labour Court may order the payment of what it deems to be a just and equitable compensation for the loss suffered because of the unprotected strike. The employer may also be within its rights to invoke the 'no work, no pay' principle if the employees go on strike.

²¹⁵ See *R v Samuel* 1960 (4) SA 702 (SR).

²¹⁶ Burchell op cit (n14) 760.

²¹⁷ *Ibid* 757. See also Skeen op cit (n33) para 186.

thus placing within the ambit of a quarrel (*rixa*) a crowd of less than ten people.²¹⁸ Furthermore, of all the Dutch writers, only Moorman advanced the number of persons element for purposes of the commission of public violence.²¹⁹ However, he did not specify the actual number of persons required.²²⁰ In English law, under the Riot Act of 1714, which is now repealed, a riot was punished if twelve or more persons who were “unlawfully, riotously and tumultuously assembled together with a view to disturb peace continued their activities for an hour or more after being called upon to disperse”.²²¹

Be that as it may, it is plain that public violence cannot be committed by a single person acting alone.²²² The “number of persons” element, however, no longer turns on the numerical figure of the actual participants in isolation,²²³ but that each case depends on its own facts taking into account the character and dimensions of the disturbance of the peace or the invasion of the rights of others.²²⁴

The participants in the conduct of the group must act in concert. That means they must have a common purpose²²⁵ to forcibly (i.e. violently) disturb the public peace and security or invade the rights of others. The essence of the common purpose doctrine is that where two or more persons agree to commit a crime or associate in the commission of a crime jointly, then each individual may be held responsible for the acts of the others.²²⁶ Milton²²⁷ submits that the rationale for the crime of public violence imputing liability based on the common purpose doctrine is that:

²¹⁸ Milton op cit (n115) 77.

²¹⁹ Ibid 83.

²²⁰ Ibid.

²²¹ Hunt op cit (n115) 73.

²²² See also Skeen op cit (n33) para 183.

²²³ Compare *R v Terblanche* 1938 NPD 229 (where five people were found to be sufficient for the number of persons element) and *R v Mvelase* 1938 (NPD) 239 (where ten people who were attacking four were also held to be sufficient). However, in *R v Mgunu* 1938 NPD 229 (six people were found to be insufficient); *R v Salie* 1938 TPD 136 (eight people were insufficient); *R v Nxumalo* 1960 (2) SA 442 (T) (ten people were found to be insufficient). Close scrutiny of the cases where the number of people involved were held to be insufficient for the commission of public violence shows that the findings of the courts were informed not just by the consideration of the numbers involved, but also the consideration of the seriousness of the dimensions by taking into account the factors such as, *inter alia*, the duration of the fracas or whether the quarrel was of a restricted or private nature. Therefore, it is submitted that Milton is correct in his conclusion that the number of persons required for the commission of public violence is informed by the seriousness of the dimensions of the fracas – see Milton op cit (n115) 84.

²²⁴ Snyman op cit (n115) 312. See also Burchell op cit (n14) 758.

²²⁵ For more on the common purpose doctrine, see generally Skeen op cit (n33) paras 117 – 128); Burchell op cit (n14) 32; Burchell op cit (n115) 574–597; and DS Koyana, DS ‘Legal pluralism in South Africa: the resilience of Transkei’s separate legal status in the field of criminal law’ (2005) 26(1) *Obiter* 14-25. See also *S v Mgedezi* [1989] 2 All SA 13 (A).

²²⁶ M Reddi ‘The doctrine of common purpose receives the stamp of approval’ (2005) 122(1) *South African Law Journal* 59.

“A person who is part of a group will draw courage from the conduct of others in the group, and may well behave in ways that he would not act when alone. His chances of detection are, in the nature of things, rather lower when he can hide in the rabble...[W]here several people are together acting violently, their weight of numbers in itself increases the dangers to public order inherent in their conduct”.

The doctrine of common purpose in South Africa finds application in various crimes such as murder, treason, housebreaking, robbery, fraud, theft and assault.²²⁸ A common purpose exists either where there was a prior agreement (express or implied) to engage in a joint criminal venture or where there was no such agreement, in which case the common purpose can be established by way of active association in the joint criminal venture.²²⁹

Much of the controversy around the common purpose doctrine emanates from what some writers correctly argue to have been an unwarranted extension of the scope of the doctrine, in its active association form, to secure the guilty verdicts of the accused persons in murder cases committed or perpetrated by large groups or organisations as seen in the cases of *S v Safatsa*²³⁰ and *S v Nzo*.²³¹ However, the constitutionality of the common purpose doctrine was once and for all ironed out in *S v Thebus and Another*.²³²

²²⁷ Milton op cit (n115) 75-76 quoting Smith op cit (n117) 3.

²²⁸ Ibid 59.

²²⁹ Ibid 62.

²³⁰ 1988 (1) SA 868 (A). The *Safatsa* case became widely known as the ‘Sharpeville Six’ case. In this case the doctrine was extended to secure a guilty verdict and death penalty for the six accused held jointly for the murder of the deceased in the absence of any evidence of specific participation in the said murder except that they were members of a crowd that killed the deceased.

²³¹ 1990 (3) SA 1 (A). In this case the Appellate Division fuelled the criticism of the doctrine even more when it was extended and applied to secure the conviction of the two Appellants not because they participated in any way in the murder of the deceased, but because they were members of the African national Congress (ANC), an alleged terrorist organisation with a common purpose to commit acts of sabotage. The court reasoned that the members of the ANC, including the Appellants, must have foreseen the possibility of fatalities occurring in the course of the said campaign of the ANC. Therefore, the Appellants were convicted because the murder took place in the furtherance of the common purpose of the ANC campaign in which they had actively associated themselves.

²³² 2003 (2) SACR 319 (CC). The Constitutional Court upheld the constitutionality of the common purpose doctrine despite the criticism that it exempts the state from proving beyond a reasonable doubt all the elements of the crime, in particular the causation element. It was held that the doctrine was necessary for crime control purposes in cases of joint criminal ventures. The court also rejected the argument that the doctrine infringed the right to be presumed innocent until proven otherwise, the right to dignity and freedom and security of the person.

Despite the finding of constitutionality in *Thebus*, the criticisms of the doctrine keep on surfacing.²³³ The latest attack was occasioned by the attempt, though later withdrawn following the widespread public outcry, by the National Prosecuting Authority to prosecute the 270 miners arrested during the strike in Marikana for the murder of the 34 workers killed during the 2012 Marikana massacre on the basis of the common purpose doctrine.²³⁴ However, all the criticisms of the doctrine will remain purely academic for as long as the *Thebus* decision is unaltered.

It is noteworthy that not all the acts of a single member of the group will fall within the ambit of the common purpose of the whole group. There have been cases where, on the evidence, the courts held that certain acts of a member of the protesting crowd “went beyond the common purpose of the group and became his own individual acts”. Whether a particular act falls within the common purpose of the group depends on the facts of each case. In *R v Kashion*²³⁵ the act of throwing a stone at two individuals against whom the crowd had jeered was found to have gone beyond the common purpose of the crowd since the accused was the only member of the crowd who carried and threw a stone. Furthermore, in *S v Mer*²³⁶ the court found that the common purpose was absent unless it could be shown that by barricading the road with stones the group had as its object the stoning of vehicles.

When a similar stone-throwing incident occurred in *S v Mbuyisa*,²³⁷ the matter was decided differently as the court found no evidence dissociating the accused’s act of throwing a stone from the common purpose of the main group. Therefore, despite the accused being the only person who threw a stone from a sub-group of about ten pupils, his conduct could not be dissociated from that of the main crowd which was

²³³ Of note is Burchell op cit (n115) 575-597 who insists on thwarting the doctrine in murder cases on the basis that it infringes the right to be presumed innocent, the right to freedom and security of the person, and the right to dignity. He contends further that the infringement of these rights is not justifiable in terms section 36 of the Constitution as there are alternative crimes with which the offender may be charged. These include public violence, defeating the administration of justice, conspiracy, incitement, attempt and accomplice liability. He further rejects the emphasis on crime control as a justification for the doctrine and emphasises the more pressing need for fair labelling of offenders. See also J Grant ‘Common purpose: Thebus, Marikana and unnecessary evil’ (2014) 30(1) *South African Journal on Human Rights* 1 – 23 in which further criticisms of the doctrine are well documented.

²³⁴ See Grant op cit (n233) 1-23.

²³⁵ 1963 (1) SA 723 (SR).

²³⁶ 1982 (1) SA 299 (O).

²³⁷ 1988 (1) SA 89 (N). The accused threw a large stone onto the roof of a school. It was accepted into evidence that there was violence at the school characterised by the throwing of stones, screaming and shouting. The accused was the only member of a group of about ten pupils who threw a stone. It was contended on his behalf that the state’s evidence did not establish that his act of throwing a large stone was committed in concert with the others and with the intention to commit public violence. The court held that “it ought to have been apparent to the accused that public violence was being committed and once it was accepted that he had thrown a stone, nothing served to dissociate his act from those of the other pupils who were throwing stones”.

throwing stones. Accordingly, it seems that the common purpose of the whole group is imputed even to sub-groups if the members of the sub-group perform some act sufficiently associating them with the conduct of the main group.

While the state is generally required to prove all the elements of the crime beyond a reasonable doubt, the application of the common purpose doctrine in public violence cases renders it unnecessary for the state to establish the specific act of violent disturbance of the peace and order or the invasion of the rights of others committed by each individual member of the group.²³⁸

2.6.3 Disturbance of serious dimension

This element was also not recognised in Roman and Roman-Dutch law. It is established law that the reference to a ‘forcible disturbance’ in the definition of public violence connotes a violent disturbance or a threat of such violence. The requirement that there be violence remains in force despite the fact that the definition of the crime of public violence does not make use of the word “violent”, but rather uses “forcibly”. However, the mere use of force is insufficient as any public protest may involve the use of force in its physical manifestation.²³⁹ The court in *S v Mei*²⁴⁰ expressed obiter that the use of the word “forcibly” as opposed to “violent” by Professor Hunt in the definition of the crime of public violence is intended to capture that even a threat of violence suffices for the commission of the crime of public violence.

While it is conceivably easy to identify the instances of actual violence from a set of facts, the same cannot be said for threats of violence. Thus, the test is that a threat of violence must be “such that a person so threatened would apprehend immediate personal harm”.²⁴¹ Applying the test to the facts such as those in *S v Mei*,²⁴² it follows that the court was undoubtedly justified in finding that the barricading of the road with stones does not amount to violence or a threat of violence despite it being a common trend that such conduct has a tendency to lead to the stoning of vehicles in the course of demonstrations in South Africa. There was certainly no apprehension of immediate harm emanating from such conduct.

²³⁸ Skeen op cit (n33) at para 183.

²³⁹ Burchell op cit (n14) 758.

²⁴⁰ 1982 (1) SA 299 (O).

²⁴¹ Milton op cit (n115) 85. See also *R v Cele and Others* 1958 (1) SA 144 (N) at 153; *R v Segopotsi and Others* 1960 (2) SA 430 (T) at 437 and *R v Pungula and Others* 1960 (2) SA 760 (N) at 763-4.

²⁴² 1982 (1) SA 299 (O).

The disturbance or intended disturbance must assume serious or dangerous dimensions. The inclusion of the serious dimensions element in the definition of the crime of public violence is a result of the innovation of South African jurists in carving out a uniquely South African public violence jurisprudence which is distinct from the Roman and Roman-Dutch law approach. It is noteworthy that in *R v Salie*²⁴³ the court acknowledged as one of the reasons for the difficulty of precisely defining the crime of public violence and the vagueness of some of its elements the impossibility of drawing boundaries between assault by a group and public violence and that this led the courts to have recourse to a vague criterion of serious dimensions. Therefore, in essence, the serious dimensions element came about in order to determine when certain conduct would be elevated to constitute public violence.

To further illustrate that the serious dimensions element is central to the determination of when public violence would be committed, it will be recalled that even the “number of persons” element²⁴⁴ is also determined with reference to the seriousness of the dimensions. The factors taken into account in order to establish the seriousness of the dimensions include the number of persons involved in the fracas, time, locality, duration of the fight, the cause of the quarrel, the status of the persons engaged in it, the way which it ended, whether the participants were armed or not, and whether there were actual assaults on people or damage to property committed.²⁴⁵ The seriousness of the dimensions element thus plays a significant role in ensuring that the crime of public violence is not abused to bring to book the offenders in instances particularly where a large number of people are involved and identification is not easy.²⁴⁶

It is unfortunate that the cases of public violence which were decided on the basis of threatened violence were decided in terms of the old definition of public violence advanced by Gardiner and Lansdown and thus did not factor in the serious dimensions element.²⁴⁷ Assuming that the dimensions in those cases were sufficiently serious, the immediate consequence is that the act of marching on the streets carrying sticks and other dangerous weapons, chanting slogans, singing and dancing (all of which amounts to conduct which is common during the course of protests and strikes in South Africa) would amount to public violence as there is an apprehension of harm on the part of the members of the neighbouring community

²⁴³ 1938 TPD 136. See also Milton op cit (n115) 74.

²⁴⁴ Refer to the discussion at above 2.6.2 above.

²⁴⁵ Snyman op cit (n115) 313. See also Skeen op cit (n33) para 185). For a further discussion of each of these factors see Milton op cit (n115) 94.

²⁴⁶ Skeen op cit (n33) para 185.

²⁴⁷ See *R v Xybele and Others* 1958 (1) SA 157 (T); *R v Segopotsi and Others* 1960 (2) SA 430 (T); *R v Cele and Others* 1958 (1) SA 144 (N), *R v Pungula and Others* 1960 (2) SA 760 (N), *R v Kashion* 1963 (1) SA 723 (SR).

(thus qualifying as a threat of violence). It also means that the protesters in Marikana could have been apprehended and charged with public violence for gathering on the mountain carrying traditional weapons and other objects since so doing had elements of threats of violence.

However, the loophole was rectified in *Mlotshwa*²⁴⁸ where there clearly was a threat of violence, but the court held that the threatening conduct did not assume serious dimensions because it lasted for a mere seven seconds, the striking workers were not armed and there was no injury to any person or property. The court also expressed the need for the courts not to make adverse inroads into the right of workers to strike by categorising conduct during strikes as public violence. A further stamp of approval for the *Mlotshwa* case is that it pushed out of the ambit of the crime of public violence the criminal conduct of carrying weapons during strikes and protests into the ambit of statute, the Dangerous Weapons Act.²⁴⁹

Public violence can take place on public or private property,²⁵⁰ it being an aggravating factor that it took place in public. Furthermore, the cases of public violence can be organised into the following non-exhaustive categories of instances where it normally arises:²⁵¹ faction fighting,²⁵² rioting,²⁵³ violent resistance to the police acting lawfully,²⁵⁴ forcible coercion by strikers of other workers,²⁵⁵ and breaking up or taking over a meeting.²⁵⁶ Milton²⁵⁷ goes further and adds two more categories, these being a gratuitous group attack on members of the public or their property²⁵⁸ as well as stone-throwing²⁵⁹ and disruption of traffic.²⁶⁰

²⁴⁸ 1989 (4) SA 787 (W).

²⁴⁹ 15 of 2013.

²⁵⁰ Milton op cit (n115) 87. See also *R v Tshayitsheni* 1918 TPD 23; *R v Tailor* 1920 EDL 318; *Dabee v R* (1928) 49 NLR 50; and *R v Mjoli* 1934 EDL 236.

²⁵¹ See Burchell op cit (n14) 759; Skeen op cit (n31) para 184 and Milton op cit (n110) 89.

²⁵² See *R v Tshayitsheni and Others* 1918 TPD 23; *R v Mjoli* 1934 EDL 236; *R v Salie* 1938 TPD 136; *R v Ngubane* 1947 (3) SA 217 (N); *R v Xybele and Others* 1958 (1) SA 157 (T); *R v Ndaba and Others* 1942 OPD 149; *R v Mcunu* 1938 NPD 229; *R v Mvelase* 1938 NPD 239; and *S v Usayi and Others* 1981 (2) SA 630 (ZA).

²⁵³ See *R v Tailor* 1920 EDL 318; *S v Katsande*, *S v Mahlangu*, *S v Mutisi* 1974 (1) SA 355 (RA); *R v Ndaba*; *R v Samuel and Others* 1960 (4) SA 702 (SR) and *R v Mashotonga and Others* 1962 (2) SA 321 (SR).

²⁵⁴ See *R v Ndwandwa and Others* 1937 TPD 165; *R v Marthinus and Others* 1941 CPD 319; *R v Lekoatha and Seven Others* 1946 OPD 6; *R v Mathlala and Another* 1951 (1) SA 49 (T) and *R v Segopotsi and Others* 1960 (2) SA 430 (T).

²⁵⁵ See *R v Cele and Others* 1958 (1) SA 144 (N); *S v Mlotshwa* 1989 (4) SA 787 (W) and *S v Whitehead* 2008 (1) SACR 431 (SCA).

²⁵⁶ See *R v Wilkens and Others* 1941 TPD 276 and *R v Claassens and Another* 1959 (3) SA 292 (T).

²⁵⁷ Milton op cit (n115) 89.

²⁵⁸ See *R v Terblanche* 1938 TPD 229; *S v Solani en Andere* 1987 (4) SA 203 (NC); *S v Quandu en Andere* 1989 (1) SA 517 (A); and *S v Khumalo en Andere* 1991 (4) SA 310 (A) and *S v Le Roux* 2010 (2) SACR 11 (SCA).

²⁵⁹ See *S v Mbuyisa* 1988 (1) SA 89 (N); and *S v Mei* 1982 (1) SA 299 (O).

2.6.4 Personal association with the group

The accused must have done some act sufficiently indicating that he associates himself with the conduct of the group.²⁶¹ Association is usually evidenced by the accused's unlawful and intentional participation in the acts of the group (and not just mere presence at the scene). The accused's association with the conduct of the group has been previously established by proving the verbal utterances of the accused which can be construed as indicating his association with the group.²⁶²

2.6.5 Intention

The intention element (be it *dolus directus* or *dolus eventualis*)²⁶³ in the first part envisages that the individual must have intended to form part of the offending group.²⁶⁴ That means the individual must have been aware of what the group is doing or aiming to do (i.e. to commit the public violence).²⁶⁵ The second aspect entails that the group itself must have as its intention a common purpose to forcibly (through the manifestation of actual violence or a threat thereof) disturb the public peace or to invade the rights of others.²⁶⁶ This does not mean that there must be a prior plan to commit public violence as the common purpose can arise spontaneously or tacitly even from a lawful gathering.²⁶⁷ Therefore, it is clear that both the participation of the individual in the acts of the group and the acts of the group itself must be intentional in order to satisfy the intention element for purposes of the commission of the crime of public violence.²⁶⁸

2.6.6 Commentary

²⁶⁰ See *S v Dingiswayo* 1985 (3) SA 75 (Tk); *S v Samaai* 1986 (4) SA 860 (C); and *S v Maseko* 1988 (4) SA 1 (A).

²⁶¹ Burchell op cit (n14) 760. It is not sufficient that the accused should be found guilty because some act of violence was committed by other members of the group, but that the accused must be shown to have been party to that specific act.

²⁶² See generally Burchell op cit (n14) 760. Shouting "Kill, Kill" and that "we shall not sleep tonight" was found to be sufficient in *R v Simati* 1961 (1) PH H46 (SR). In *R v Aaron* 1962 (2) PH H177 (SR) it was sufficient for personal association that the accused was found looting a grocery store in which the rioting mob was rampaging and shouting "freedom!". The accused further uttered the words "go away- don't you know today is freedom". Both these cases are cited in Milton op cit (n115) 92.

²⁶³ Intention in the form of *dolus eventualis* in public violence cases is manifest when a person foresees the possibility of the commission of public violence through the disturbance of the peace or the invasion of the rights of others, but nonetheless continues with that conduct. See Milton op cit (n115) 92.

²⁶⁴ Burchell op cit (n14) 760.

²⁶⁵ Snyman op cit (n115) 314.

²⁶⁶ Ibid 760.

²⁶⁷ Burchell op cit (n14) 758.

²⁶⁸ Skeen op cit (n33) para 186.

The purpose of this commentary section is to sum up the discussion of the elements of the crime and highlight some crucial observations which are pertinent to the topic for debate. It will be recalled from the discussion in 2.1 and 2.2 above that neither the Roman nor the Roman-Dutch law recognised as essential elements of the crime of public violence the “concerted action number of persons” and “serious dimensions” elements. Their inclusion in the definition and elements of the crime is, in essence, the creation of the South African jurists following the years of the development of the crime.

Milton²⁶⁹ goes as far as to state that the “concerted action by a number of persons” and “serious dimensions” elements are decisive in determining when conduct amounting to other crimes which overlap with public violence (such as assault, malicious injury to property, arson and robbery) will be elevated to constitute public violence. As for the elements of intention and unlawfulness, Milton²⁷⁰ submits that these were recognised as elements of the crime in Roman-Dutch law. Therefore, the law on the elements of intention, unlawfulness and, personal association with the group appears to be reasonably settled.

Despite being once notorious for controversy, the law on the “concerted action by a number of persons” element is now settled following the *Thebus*²⁷¹ decision which sealed any doubt or speculation with regard to the constitutionality of the common purpose doctrine. In regard to the “number of persons” aspect, the law is settled in that this aspect no longer turns on the consideration of the numerical figure of the number of people involved, but is determined through the consideration of the character and dimensions of the disturbance.²⁷² As such, the seriousness of the dimensions is decisive in determining the number of persons element.

In essence, only one element of the crime of public violence remains open-ended or vague, and that is the “serious dimensions” element. What is even more startling is that the serious dimensions element, vague as it is, is central to the determination of the commission of public violence (i.e. it determines the number of persons element and also determines when certain conduct would constitute public violence). However, its vagueness is perhaps not entirely a negative feature for it has been utilised to achieve some very fundamental goals.

²⁶⁹ Milton op cit (n115) 76.

²⁷⁰ Ibid 78.

²⁷¹ 2003 (6) SA 505 (CC).

²⁷² Refer to the discussion in 2.6.2 above.

For example, the court in *Mlotshwa*²⁷³ can be argued to have utilised the vagueness of the serious dimensions element as a loophole or conduit to infuse into the jurisprudence of public violence the recognition of the fundamental right to strike so that the future application of the crime in strike situations is done with restraint given the need to preserve fundamental right to strike. It will be remembered that at the time that the *Mlotshwa* case came about, South Africa was at the beginning of a transitional era towards democracy and the recognition of human rights. It is submitted that the approach in *Mlotshwa* of redefining the interpretation afforded to the serious dimensions element was a perfect way of infusing the recognition of human rights so that the application of the crime also reflected this change in society.

Likewise, today South Africa is confronting the scourge of violent protests and strikes characterised by the invasion of the rights of other people and the call being made is that the crime of public violence must be developed in order to reflect that the Constitution and its underlying values endorses the need for the protection of the rights of other people. Following from the finding in the case of *K v Minister of Safety and Security*²⁷⁴ in regard to the development of the common-law principles of vicarious liability, the purpose of section 39(2) of the Constitution is to ensure that the values of the Constitution are infused into the common law and the procedure for the said infusion entails nothing more than that the common-law principles be understood and applied within the normative framework of the Constitution.

Therefore, all that is required in developing the crime of public violence in light of section 39(2) of the Constitution is to approach the crime and the interpretation of all its elements bearing in mind the values of the Constitution and the protection of the rights of other people sought to be achieved by the crime. Thus, the vagueness of the serious dimensions element in particular, being an element that is central to determining when public violence is likely to be committed, presents an ideal opportunity to infuse into the jurisprudence of the crime of public violence the recognition of the vulnerability of non-protesters, their general plight as well as the role which the crime ought to play in the protection of non-protesters' rights.

²⁷³ 1989 (4) SA 787 (W). In *Mlotshwa* the striking workers barred the non-striking workers from entering the premises of the employer. They surrounded the vehicle conveying the non-striking workers and opened its doors shouting and hitting the vehicle. The court found that the dimensions of the fracas were not sufficiently serious since neither of the striking workers were armed, nor was there any injury to persons or property and the incident lasted for merely seven seconds. The court expressed further that the accused were on a lawful strike and the courts should be careful not to make adverse inroads into the right of workers to strike by classifying conduct during a strike as public violence.

²⁷⁴ 2005 (6) SA 419 (CC).

2.7 Sentencing for public violence

Sentences for public violence offenders have been omitted from the minimum sentences legislation save for those instances where the accused had with him a firearm which was intended for use during the commission of public violence, amongst other offences.²⁷⁵ It follows that the sentencing discretion in respect of the crime of public violence lies with the courts guided by the principles encapsulated in the *Zinn*²⁷⁶ triad.

The *Zinn* triad consists of the crime, the offender and the interests of society. These considerations combined guide the court towards reaching an appropriate sentence which achieves the purposes of sentencing, these being deterrence, prevention, rehabilitation/reformation and retribution.²⁷⁷ Should the Draft Sentencing Framework Bill proposed by the South African Law Commission (SALC) in the year 2000 be enacted into law, the above purposes will be replaced with new purposes of sentencing, these being the restoration of the victim's rights, the protection of society and affording the offender the opportunity of a crime-free life.²⁷⁸

It has been stressed by Terblanche²⁷⁹ that the crime element (the first element of the *Zinn* triad) is the most crucial factor in sentencing. It is the seriousness of the crime that determines the severity of the sentence, subject to the personal circumstances of the accused mitigating the sentence. The expression that "punishment must fit the crime" goes to further enhance the point. The relationship between the seriousness of the crime and the sentence is also expressed by the requirement of proportionality between the two.²⁸⁰

Generally, the seriousness of the crime is deduced from society's view (this being the view of right-minded or reasonable members of society) of the offence.²⁸¹ However, the courts must supplement society's view of the crime with the exercise of its own value judgment as to the seriousness of the crime so to ensure that the

²⁷⁵ See section 51(2)(c)(i) – (iii) of the Criminal Law Amendment Act 105 of 1997. The Act stipulates a minimum imprisonment sentence of five years for a first offender, a minimum of seven years for a second offender and ten years for a third or subsequent offender.

²⁷⁶ *S v Zinn* 1969 (2) SA 537 (A) at 541.

²⁷⁷ S Terblanche *Guide to sentencing in South Africa* 2 ed (2007) 137.

²⁷⁸ See section 3(3) of the Draft Sentencing Framework Bill, 2000 annexed to the South African Law Commission (Project 82) *Report: Sentencing (A New Sentencing Framework)* (2000) 100. See also S Terblanche 'Sentencing guidelines for South Africa: lessons from elsewhere' (2003) 120(4) *South African Law Journal* 858 at 860.

²⁷⁹ Terblanche op cit (n277) 147.

²⁸⁰ Ibid.

²⁸¹ Ibid 149.

society's view is correct.²⁸² The SALC in section 3(2) of its Draft Sentencing Framework Bill, 2000²⁸³ proposed that the seriousness of any offence must be established through the consideration of: (1) the degree of harmfulness (or risk of harmfulness) of the offence; and (2) the degree of culpability of the offender. The latter will take effect once the Bill is enacted into law.

For the crime of public violence, factors that are crucial to the determination of the seriousness of the crime include the size of the group, the duration of the attack and the extent of the damage caused.²⁸⁴ It is trite that although the seriousness of any crime is deduced from society's view of the crime, the courts must be wary not to approach sentencing with the view to satisfy public opinion, but rather to ensure that the sentence serves a public interest.²⁸⁵

The second leg of the *Zinn* triad entails the consideration of the personal circumstances of each individual offender. The court, in determining the appropriate sentence, assesses the blameworthiness or culpability of the offender, his character and motive.²⁸⁶ Other personal circumstances in mitigation may include, *inter alia*, age, marital status, the presence of dependants, level of education, employment and health of the convicted offender.²⁸⁷ Remorse exhibited by the accused bodes well in calling for mercy in sentencing.²⁸⁸ Therefore, in determining the appropriate sentence, the court weighs the personal circumstances of the offender against the seriousness of the crime and the interests of society.

The third leg of the *Zinn* triad is the interests of society and it comprises a dual meaning.²⁸⁹ On the one hand it refers to the community's reaction to the offence (i.e. the indignation or abhorrence of the offence) and their subsequent expectations or demands relating to the sentence. On the other hand it emphasises that the sentence should serve society or the public interest. The former meaning does no more than to emphasise that it is society's view of the offence that determines the seriousness thereof. Only the latter meaning of the interests of society warrants a further discussion.

²⁸² Ibid.

²⁸³ SALC (Project 82) report op cit (n278) 99.

²⁸⁴ S Terblanche 'Sentencing: recent cases' (2010) 23(3) *South African Journal of Criminal Justice* 427 at 437.

²⁸⁵ *Mhlakaza and Another v S* [1997] 2 All SA 185 (A); 1997 (1) SACR 515 (SCA).

²⁸⁶ Terblanche op cit (n277) 150.

²⁸⁷ Ibid 150.

²⁸⁸ Ibid 147.

²⁸⁹ Ibid 153.

The interests of society or the public interest find expression in the following principles: first, the interests of society are best served by a sentence that produces the greatest advantage and least harm to society, but does so at the lowest cost for the criminal justice system.²⁹⁰ Second, a sentence can also be justified as being in the interests of society if it achieves any one or more of the fundamental purposes of punishment (retribution, deterrence, prevention and rehabilitation) or any other positive purpose for the community.²⁹¹ Third, the ideal sentencing framework is one which promotes consistency in sentencing, eradicates the perception that some crimes are not visited with the appropriate degree of seriousness, allows for the participation of the victim and restorative initiatives, and produces sentences which are within the capacity of the state to enforce.²⁹² It is therefore trite that the interests of society are not served by a sentence which is too lenient, neither are they served by a sentence which is too severe. The punishment must be in proportion to the crime.

There can be no doubt that the right-minded or reasonable members of society would consider it to be in the interests of society that public violence offenders, an offence which is becoming prevalent and adopts a recurring pattern of violence and blatant disregard for the rule of law and the rights of other people, be subjected to harsher punishment, though the need for freedom of assembly which is free of unwarranted restrictions and impediments must be spared with the greatest conviction.

It must be highlighted that the aforementioned purposes of punishment are further divided either into retributive or utilitarian theories of punishment.²⁹³ Following the tussle of philosophical opinion on the most appropriate theory between retribution and utilitarian theories, the research evidence produced criticises and discredits both theories of punishment to the extent that it is unclear which theory is to be preferred. Burchell's response is that the retributive theory of just desert should be preferred,²⁹⁴ while Terblanche²⁹⁵ argues that for some writers such as Snyman, the answer lies in the combination theory, which is the combination of the attractive aspects of both retributive and utilitarian theories.

²⁹⁰ Ibid 154.

²⁹¹ Ibid 155.

²⁹² SALC (Project 82) report op cit (n278) 25.

²⁹³ On which see Burchell op cit (n115) 68-93; Snyman op cit (n115) 10-20; and Terblanche op cit (n277) 171-178. According to Burchell's classification, the ideas grouped under the retributive theories include: the appeasement of society (revenge), expiation or atonement, denunciation, and just deserts. Grouped under the utilitarian theories is the idea of prevention/incapacitation, deterrence, reinforcement, and reformation or rehabilitation.

²⁹⁴ Burchell op cit (n115) 80.

²⁹⁵ Terblanche op cit (n277) 174.

The courts have since shied away from this philosophical debate and they insist on handing down sentences which they believe to achieve the purposes of punishment (retribution, deterrence, prevention and rehabilitation). In so doing, the courts have ignored the research evidence which apparently shows that punishment for crimes hardly, if ever, achieve the purposes of punishment.²⁹⁶ Take the issue of deterrence for instance, despite research evidence showing that there is hardly any relation between punishment and deterrence, the courts still insist on handing down sentences informed by the need for deterrence, in particular the deterrence of potential offenders (general deterrence).²⁹⁷ The generally accepted view by the courts is that the harsher the sentence, the greater the deterrent value.

In actual fact, deterrence is one of the leading factors in sentencing crimes which are deemed to be prevalent.²⁹⁸ No doubt public violence would fall into the category of prevalent crimes and therefore, the sentence for public violence offenders ought to have a deterrent and preventative²⁹⁹ measure, while the sentence must remain in proportion to the offence.

Given that the court bears the sentencing discretion in public violence cases and that each case depends on its own facts, it is be difficult, if not impossible, to pre-determine the appropriate sentence for public violence offenders. Therefore, in determining the appropriate sentence, the court must always undertake the exercise of weighing the seriousness of the crime, the personal circumstances of each individual offender and the interests of society. The courts can, however, look to previous cases for guidance. For public violence, the courts can have regard to the cases of, *inter alia*, *S v Dingiswayo and Others*,³⁰⁰ *S v Samaai*,³⁰¹ *S v Whitehead and Others*³⁰² and *S v Le Roux and Others*.³⁰³

²⁹⁶ Ibid 156. Terblanche observes that there are instances where the courts have taken judicial notice of such research.

²⁹⁷ Ibid 157. Terblanche argues that where the courts do take into account evidence of such research, it is nonetheless dismissed on the ground that logic would dictate that some people have to be deterred from committing crimes as a result of the sentences handed down by the courts.

²⁹⁸ Ibid 158.

²⁹⁹ Ibid 162.

³⁰⁰ 1985 (3) SA 175 (CK).

³⁰¹ 1986 (4) SA 860 (C).

³⁰² 2008 (1) SACR 431 (SCA).

³⁰³ 2010 (2) SACR 11 (SCA).

Both the *Dingiswayo* and *Samaai* cases were decided in the 1980s during the peak of the uprisings against the apartheid regime.³⁰⁴ Patterns of violent protests, akin to those presently taking place, were the order of the day. In both these cases the courts emphasised strongly the cost implications occasioned by damage to property committed during protests in sentencing the offenders, a factor that could easily be dismissed as being aligned to the protection of the apartheid state. In *Dingiswayo* the court went further and expressed that it was unsustainable to proceed with punishing public violence offenders with a fine or a wholly suspended sentence. Direct imprisonment was thus considered an appropriate sentence.

The *Whitehead* and *Le Roux* cases are the most recent cases on public violence. Although factually they do not emanate from instances of protest violence, they nonetheless provide a guideline for sentencing the extreme cases of public violence (for instance, a fracas which resulted in the death of a person or one which was characterised by severe damage to property).³⁰⁵ These cases serve as authority for the imposition of more or less six years imprisonment, suspended as the court deems appropriate.

2.8 Statutory forms of public violence

The purpose of this section is two-fold. First, it is to place on record an acknowledgement of other statutory offences³⁰⁶ which overlap with the common-law crime of public violence in their punishment of the various acts of public violence, notably the disturbance of peace and order as well as participation in gatherings which threaten public order. Second, it is to present reasons for the view taken in this dissertation that the prospects of any legislation being introduced to counter the violence during protests are remote.

2.8.1 Statutory public violence

South Africa boasts a number of statutory offences enacted from the reign of the pre-Union, post-Union and apartheid legislatures to the current democratic parliament,

³⁰⁴ For more sentencing principles for public violence from the 1980s to date, see *S v Solani en Andere* 1987 (4) SA 203 (NC); *S v Maseko* 1988 (4) SA 1 (A); *S v Mbuyisa* 1988 (1) SA 89 (N); *S v Quandu en Andere* 1989 (1) SA 517 (A); *S v Thonga* 1993 (1) SACR 365 (V); and *Ningi and Another v S* 2000 (2) SACR 511 (A).

³⁰⁵ For a discussion and detailed critique of the sentences handed down in *Whitehead* and *Le Roux* cases, see Terblanche op cit (n284) 436-438.

³⁰⁶ See Skeen op cit (n33) para 367 – the term ‘statutory offence’ denotes “any crime, regardless of its gravity, which has its origin either directly or indirectly in a legislative enactment. It originates from legislation enacted by parliament, provincial legislatures and local authorities as opposed to common law offences which are sourced from precedents and other old authorities”.

provincial legislatures and local authorities. Below are some of the leading examples of legislation that made up the body of statutory public violence at various stages of the South African history.³⁰⁷

The pre-Union and post-Union statutes in point can be arranged into three categories; namely legislation that prohibited: (1) fighting; (2) assemblies which threaten public order; and (3) breach of the peace. Included in the above-named categories is the Transkeian Penal Code 24 of 1886 (repealed in 1983 and replaced with the Penal Code Act, 1983 (Tk)); Law 11 of 1896 (N) which penalised faction fighting within the territory of Natal; the Police Offences Act 27 of 1882 (C) which, in the territory of the Cape, prohibited the use of threatening, abusive or insulting words or behaviour with the intention to cause a breach of peace or from which a breach of peace may be occasioned; the Bantu Administration Act 38 of 1927; Development Trust and Land Act 18 of 1936 and the Bantu (Urban Areas) Consolidation Act of 25 of 1945.

During the reign of apartheid from the year 1948 onwards, mention must be made of the Riotous Assemblies Act 17 of 1956 (previously the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914); Suppression of Communism Act 44 of 1950; Criminal Law Amendment Act 8 of 1953 (in regard to organising or instigating unlawful campaigns to protest against the laws of the Republic); Boxing and Wrestling Control Act 39 of 1954; Unlawful Organisations Act 34 of 1960; General Law Amendment Act 76 of 1962 (section 21 of the Act created the crime of sabotage); and the Terrorism Act 83 of 1967.

Other apartheid legislation includes the Prohibition of Political Interference Act 51 of 1968; Gatherings and demonstrations in the Vicinity of Parliament Act 52 of 1973; Internal Security Act 74 of 1982; Demonstrations in or near Court Buildings Prohibition Act 71 of 1982; Intimidation Act 72 of 1982; Natal Code of Zulu Law (as amended in 1987); and the Gatherings and Demonstrations at or near the Union Buildings Act 103 of 1992.

³⁰⁷ On which see Hunt op cit (n115) 94-102 (Chapter 4); Matthews op cit (n121) 53-313 (Parts II & III); SALC report op cit (n36) 8; JRL Milton & NM Fuller *South African Criminal Law And Procedure (formerly Gardiner and Lansdown) Vol III: Statutory Offences* (1971) Chapters 1, 7 and 10; SV Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* 2 ed (revision service no 23, 2013) (2010) 1-16; J Dugard *Human Rights and the South African legal order* (1978) 146-191 (Part two); and E Cameron 'Civil disobedience and passive resistance' in H Corder *Essays on law and social practice in South Africa*, (1988) 230-231.

In the transitional period to the democratic era, mention must be made of the Prevention of Public Violence and Intimidation Act 139 of 1991; Internal Peace Institutions Act 135 of 1992; the Regulation of Gatherings Act 205 of 1993; and the Dangerous Weapons Act 15 of 2013 (previously the Dangerous Weapons Act 71 of 1968 and similar Acts of the various independent (homeland) states).

A large number of these statutory measures have since been repealed either in whole or in part³⁰⁸ save for the RGA which is the existing legislation regulating gatherings and demonstrations in the democratic South Africa. The enactment of these statutory measures does make sense because certainly not every breach of the peace, the invasion of the rights of other people, participation in unlawful assemblies that threaten public order, fighting or any other act of public violence will amount to the commission of the common-law crime of public violence, hence the need for legislation punishing conduct that falls short or outside of the definition of the crime of public violence.

The intimidation of non-protesters or non-strikers is a typical example of behaviour which is common during protests and strikes in South Africa, but on its own does not amount to public violence. The prohibition of intimidation is therefore criminalised not as public violence but rather in terms of the intimidation Act.³⁰⁹ Likewise, the carrying of dangerous weapons during a protest is also not punished as public violence but rather in terms of the Dangerous Weapons Act.³¹⁰

Liability for inchoate offences of incitement, conspiracy and attempt also exemplify the above phenomenon. More specifically to public violence, the accused may be charged with the crime of incitement to commit public violence within the meaning of section 17 of the Riotous Assemblies Act³¹¹ if, from the acts so committed, it can “reasonably be expected that the reasonable and probable consequence of his act would be the commission of public violence by members of the public generally or by persons in whose presence the acts took place or to whom the speech or publication was addressed”.³¹² It suffices to add that it is clearly imperative that both the common and statutory law dealing with public violence must co-exist with one

³⁰⁸ See the Pre-Union Statute Laws Revision Act 24 of 1979; the Safety Matters Rationalisation Act 90 of 1996; and the Justice Laws Rationalisation Act 18 of 1996.

³⁰⁹ 72 of 1982.

³¹⁰ 15 of 2013.

³¹¹ 17 of 1956. See also *R v Radu* 1953 (2) SA 245 (E) at 248 and *R v Maxaulana* 1953 (2) SA 252 (E) at 253-4. For more general principles on incitement to commit public violence, see *R v O'Brien* 1914 TPD 287; *R v Msimang* 1919 OPD 38; *R v D'Arcy* 1934 GWL 8; *R v Njongwe* 1953 (1) PH H88 (E); *R v Cobo* 1953 (2) PH H127 (GW); and *R v Moilwanyana and others* 1957 (4) SA 608 (T).

³¹² See Milton *op cit* (n115) 94.

another, unless it is the express intention of the legislature to alter the common law.³¹³

2.8.2 Prospects of a legislative response to violent protests

While on the topic of statutory forms of public violence, it is worth commenting on the attitude of the legislature in relation to the possibility of a legislative response to the violence during protests and strikes. Perhaps the biggest and most patent drive for statutory intervention to curb the violence accompanying protests came in the year 1976 with the proposal by the South African Law Commission (SALC)³¹⁴ to codify the crimes of treason, sedition and public violence.

However, to date, the call has not yet been heeded by parliament and it is not likely that would happen in the foreseeable future. It goes to reason that given the reluctance on the part of the apartheid parliament, coupled with the reluctance of the first four democratic parliaments which have already sat in the past 20 years of democracy, to enact the proposed legislation by the SALC, the feasible conclusion is that the current fifth parliament is also not likely to do so.³¹⁵

More recently, the Democratic Alliance (DA) tabled before parliament a private members' Bill dealing with strike violence.³¹⁶ However, the Congress of South African Trade Union (COSATU) was quick to reject this Bill and sternly reiterated that the existing laws were sufficient to deal with strike violence.³¹⁷ This goes to question the prospects of the Bill being enacted into law given that COSATU is in alliance with the African National Congress (ANC), the majority party in parliament and government of South Africa. It would not be for the first time that COSATU successfully lobbies the ANC to reject the amendments to the Labour Relations Act (LRA)³¹⁸ which it disagrees with. In the recent past, some of the proposed amendments to the LRA which COSATU was not happy with were omitted from the Act on the instruction of the ANC.³¹⁹

³¹³ Skeen op cit (n33) para 372.

³¹⁴ SALC report op cit (n36).

³¹⁵ See Snyman op cit (n115) 5. Snyman also shares the view that it is not likely that the codification of these crimes will be adopted by parliament in the foreseeable future.

³¹⁶ The Labour Relations Amendment Bill, 2014. See also the Democratic Alliance: *Memorandum on the Objects of Labour Relations Amendment Bill*, 2014.

³¹⁷ W Khuzwayo 'Cosatu opposes claims of violence' *Business Report* 09 July 2014, available at <http://www.iol.co.za/business/news/cosatu-opposes-claims-of-violence-1.1716580>, accessed on 18 November 2014.

³¹⁸ 66 of 1995.

³¹⁹ Khuzwayo op cit (n317).

Apart from the influence of COSATU within the ANC, the attitude of the current government when it comes to the violence during protests has also not echoed the sentiments of enacting legislation or amending any of the existing legislation, but rather to capacitate the Public Order Police Unit and use the existing law to prosecute the perpetrators of violence.³²⁰ That means for parliament and government, the civil and criminal sanctions created in terms of section 11 and 12 of the RGA respectively as well as the common-law crime of public violence will remain the measures in place to deal with protest and strike violence, hence the debate led in this dissertation calling for a consideration as to whether or not the crime of public violence needs to be developed in order to perform this crucial function effectively.

Although the prospects of a legislative response appear to be a foregone conclusion, that does not mean that legislation would be unwelcome or would not be an apt response to the violence. In actual fact, any legal response, legislative or otherwise, to the violence would be welcome in this dissertation. Indeed, legislation has its advantages,³²¹ but at the present moment, the view taken in the dissertation is that it is unlikely that there would be any statutory intervention for reasons stated above. In closure, the relevance of the discussion in this chapter will be crystallised further in Chapter 4 below when dealing with the arguments on the topic for debate led in this dissertation.

³²⁰ See Mthethwa op cit (n114).

³²¹ Snyman provides a concise account of some of the major advantages of codification (which, in essence, could be used to justify preferring legislation over the common law) in the introduction part to his book entitled: CR Snyman *A draft criminal law code for South Africa* (1995).

Chapter 3

FREEDOM OF ASSEMBLY

3.1 General

The purpose of this section is to briefly set out how the topic for debate³²² fits in the whole constitutional law structure and the Bill of Rights litigation. To begin with, it is noteworthy that in every constitutional dispute, the court must first address certain procedural issues³²³ and thereafter deal with substantive issues and then turn to consider the appropriate remedies.³²⁴ The procedural issues that the court must first address include the consideration of whether the Bill of Rights applies to the dispute in question and how it applies (i.e. the application of the Bill of Rights), the justiciability of the issues (i.e. the mootness or ripeness of the issues as well as the *locus standi* of the applicant), and the jurisdiction of the court to hear the dispute and hand down the remedy sought.³²⁵

When dealing with substantive issues in constitutional disputes, the court is at that stage engaged in the process of interpreting the Bill of Rights in light of the facts of the case with a view to come to a conclusion as to whether a right in the Bill of Rights was limited, and whether the limitation is justifiable or not.³²⁶ In the present case, however, the court would be dealing with substantive issues when it is engaged in the examination of whether the crime of public violence falls short of the spirit, purport and objects of the Bill of Rights and thus requires to be developed, and how that development must take place.

From the above-mentioned procedural issues, for purposes of this dissertation, only the application of the Bill of Rights warrants further discussion. Other issues can be presumed not to be controversial and therefore they do merit any further discussion. The application of the Bill of Rights raises a question which comprises two parts. The first part is whether the Bill of Rights applies to the present debate or dispute? If so, how does the Bill of Rights apply? In regard to the first part of the question, there

³²² That being whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives?

³²³ Currie & De Waal op cit (n23) 23.

³²⁴ DW Freedman 'Constitutional law: Bill of Rights' in WA Joubert (2 ed) *The Law of South Africa* Vol 5, Part 4 (2012) para 2. See also De Vos op cit (n23) 323.

³²⁵ Currie & De Waal op cit (n23) 23.

³²⁶ Freedman op cit (n324) at para 2.

can be no doubt that the Bill of Rights does apply to the dispute.³²⁷ The Bill of Rights finds application because the victims of violent protests have a legitimate claim to the benefits of the Bill of Rights, in particular the rights to life, dignity, equality as well as freedom and security of the person. These rights are often violated during protests despite the protesters having an obligation to respect them.

In regard to the second part of the question, it suffices to state that from the reading of section 8(1) and (2) and section 39(2) of the Constitution,³²⁸ the Bill of Rights generally applies directly³²⁹ and indirectly³³⁰ to both vertical and horizontal disputes.

³²⁷ A dispute on the development of the crime of public violence could arise and come before a court of law in a number of ways, the simplest being the State referring a dispute to court for the development of the crime.

³²⁸ Section 8(1) provides that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”. Section 8(2) provides that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. Section 39(2) provides that “[w]hen 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”.

³²⁹ For a further discussion of the meaning of direct and indirect application of the Bill of Rights as well as the principle of avoidance, see Currie & De Waal op cit (n23) 29-89 (Chapter 3); Freedman op cit (n324) at paras 1 - 13; De Vos op cit (n23) 319-338 (Chapter 9); MH Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 19-44 (Chapter 3).

Direct application of the Bill of Rights: when the Bill of Rights is said to have a direct application to a dispute, that refers to a situation where the Bill of Rights imposes duties on specified actors (these being the state actors and private persons) and a breach of such a duty amounts to a violation of a constitutional right. The purpose of applying the Bill of Rights directly to a dispute is to determine if the ordinary rules of law (these being the common law, legislation and customary law) are consistent with the Bill of Rights. Should there be an inconsistency between the Bill of Rights and ordinary law or conduct of the specified actors, the effect of applying the Bill of Rights directly to such a situation is that the Bill of Rights would override the ordinary law and conduct that is inconsistent with it. The Bill of Rights in the circumstances also generates its own remedies such as declaratory orders, constitutional damages, reading down or reading in etc.

Furthermore, the Bill of Rights can be applied directly to vertical and horizontal relationships or disputes. A vertical relationship is one that exists between an individual and the state. It is created when the Bill of Rights confers rights on private persons and imposes a duty on the state not to violate the rights of individuals either by law or through the conduct of state actors. Therefore, section 8(1) of the Constitution provides a legal framework for challenging state conduct or law that is allegedly inconsistent with the Bill of Rights.

A horizontal relationship is one between private persons governed by the common law. Traditionally, the Bill of Rights only concerned itself with regulating vertical relationships and did not concern itself so much with horizontal relationships. The rationale for the foregoing was that a vertical relationship was not a relationship of equality as the state was far more powerful than an individual, hence the need to protect individuals from state power. Following on the traditional model, the Bill of Rights under the Interim Constitution applied directly only to vertical disputes. This came about in two ways. First, it came as a result of the exclusion of the word “judiciary” from the wording of section 7 of the Interim Constitution (the application section) despite the judiciary being responsible for adjudicating and enforcing the rights and duties of private individuals. Secondly, the Bill of Rights was not applicable to “all law”. Accordingly, the duty to uphold the constitutional rights of others was imposed only on state actors and not private individuals and the judiciary.

To eradicate the effect of confining the direct application of the Bill of Rights in the Interim Constitution only to vertical disputes, the words “judiciary” and “all law” were added to section 8(1) of the Final Constitution together with the whole of section 8(2). These changes or additions paved the way for the direct application of the Bill of Rights even to horizontal disputes. The changes or additions also

An example of a situation where the Bill of Rights is applied directly is where a common-law rule or a statutory provision is alleged to be inconsistent with a provision of the Bill of Rights and after engaging the inquiry in terms of section 36 of the Constitution the court finds that the common-law rule or the statutory provision is unconstitutional because it unjustifiably limits a right in the Bill of Rights and the common-law rule or statutory provision is struck down.

However, before a court may resort to applying the Bill of Rights directly and strike down the common-law rule or statutory provision in question, the principle of avoidance³³¹ requires the court to first attempt to interpret the impugned common-law rule or statutory provision in such a way that it conforms to the Bill of Rights. When the court conforms to the latter, the Bill of Rights is said to be applied indirectly

came following the realisation that private violations of human rights could be as invasive as those of the state. Thus, section 8(2) of the Constitution sets out the circumstances in which the conduct of private individuals may be challenged for infringing the Bill of Rights.

It has been argued by some writers that despite the inclusion of section 8(2) to the Final Constitution, the courts hardly apply the Bill of Rights directly to horizontal disputes. As a result, the section is nearing redundancy since the courts insist on applying the Bill of Rights indirectly to horizontal disputes. One possible explanation for this reluctance is perhaps the principle of avoidance which prefers the indirect application before the direct application of the Bill of Rights.

³³⁰ **Indirect application of the Bill of Rights:** the Bill of Rights is said to apply indirectly when, instead of the Bill of Rights directly imposing rights and duties, they are imposed by the ordinary law (legislation, common law or customary law) and, in turn, the Bill of Rights exerts its influence on the ordinary law through the development and interpretation of the ordinary law in light of the Bill of Rights. The purpose of indirectly applying the Bill of Rights is to test whether the ordinary rules of law promote the values and objectives of the Bill of Rights. Section 39(2) of the Constitution becomes relevant as it sets out the values that must be promoted when legislation is being interpreted or when the common law is being developed.

The Bill of Rights can apply indirectly both to vertical and horizontal disputes. As already explained above, a vertical relationship is one between an individual and the state. A horizontal relationship is one between private persons governed by the common law. When the Bill of Rights is indirectly applied, it does not override the ordinary law nor does it generate its own remedies, but instead it calls for the ordinary law to be interpreted or developed in a manner that is consistent with the Bill of Rights, thus creating harmony between the Bill of Rights and the ordinary law.

Although the Bill of Rights in the Interim Constitution did not apply directly to horizontal disputes, it did apply indirectly to vertical and horizontal disputes because of the old section 35(3) of the Interim Constitution which has a similar effect as the current section 39(2) of the Final Constitution.

³³¹ **The principle of avoidance:** According to the principle of avoidance, constitutional issues in any case (civil or criminal) should, where possible, be avoided. That means the courts should first try to “resolve a dispute by applying ordinary legal principles, as interpreted and developed with reference to the Bill of Rights, before applying the Bill of Rights directly to a dispute”.

Therefore, in regard to impugned statutory provisions, the principle of avoidance requires that before a court resorts to the invalidation of such a statutory provision, it must first attempt to interpret the provision in such a way that it conforms to the Bill of Rights (indirect application). This is widely known as ‘reading down’. Other ways of curing a constitutionally defective statutory provision, apart from a declaration of invalidity (direct application), include ‘reading in’ or severance of the offending provision. The principle of avoidance is also influenced by section 39(2) of the Constitution which places a duty on the courts, any tribunal or forum to promote spirit, purport and objects of Bill of Rights when interpreting legislation.

For the common law, the principle of avoidance holds that if the common-law provision is found to be inconsistent with the Bill of Rights or if it falls short of its spirit, purport and objects, the court is required to develop the common law in order to quell the inconsistency or develop the common law such that it is in harmony with the objective normative value system found in the Constitution.

to the dispute. Therefore, the present debate is premised on the indirect application of the Bill of Rights. Should the issue of the development of the crime of public violence come before court, it would require the court to develop the crime so that it is in harmony with the Bill of Rights and this procedure is said to be the indirect application of the Bill of Rights.

3.2 Background to assembly jurisprudence

The theory of human rights was first expounded in the 17th century by John Locke.³³² Since then, the Constitutions of various jurisdictions now incorporate the basic human rights consolidated in the Bill of Rights section.³³³ South Africa has also had its fair share of Constitutions dating back to the pre-Union or colonial era. The common feature of all the previous Constitutions (i.e. the Constitutions of the pre-Union, post-Union or apartheid era) is that none of these had an entrenched and justiciable Bill of Rights.³³⁴

Only the pre-Union constitution of the Orange Free State is an exception in that it guaranteed certain rights; such as the right of peaceful assembly and petition, equality before the law and property rights; although these rights were reserved largely for the enjoyment of the white population only.³³⁵ However, a rigid

³³² Q Dlamini 'Mass action and the law – can South Africa do without the Regulation of Gatherings Act?' (2009) 1 *African Journal of Rhetoric* 86 at 88.

³³³ Ibid. See further IM Rautenbach 'The liability of organisers for damage caused in the course of violent demonstrations as a limitation of the right to freedom of assembly *SATAWU v Garvas* 2012 8 BCLR 840 (CC): regspraak' (2013) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 151 at 158. The writer submits that the first Constitution to incorporate an entrenched and justiciable Bill of Rights was that of the United States of America in the 18th century.

³³⁴ For a history of constitutionalism in South Africa see Dugard op cit (n307) 3 - 201 (Parts 1 & 2). The writer submits that in the years building up to the Union of 1910, each of the four colonies (the Cape of Good Hope, Natal, Orange Free State and Transvaal) had a Constitution of its own. Although none of these Constitutions had an entrenched Bill of Rights, the Constitutions of the Orange Free State and the Cape nonetheless comprised some elements of the protection of individual liberties, although much of these liberties were reserved for the enjoyment of the white population. The Constitutions of Natal and the Transvaal had no such attributes and were notably the most racist. Even during the deliberations towards the finalisation of the Union Constitution, it is the representatives of Natal and the Transvaal that eventually succeeded in driving a racist and flexible Constitution premised on racial exclusion; the supremacy of parliament; and the exclusion of the Bill of Rights, civil liberties and the rule of law. When the constitutional debate once again opened up in the year 1961, the call for the inclusion of the Bill of Rights, despite having garnered support from some segments of the white population, also fell to be rejected by the reigning apartheid rulers of the time because of the fear that a rigid Constitution with a Bill of Rights would not bode well with the notion of parliamentary sovereignty.

Even if a rigid Constitution with an entrenched Bill of Rights had been opted for, some writers have expressed doubt that a rigid Constitution with an entrenched Bill of Rights would have thrived in an environment where parliament was sovereign – see IM Rautenbach & EFJ Malherbe *Constitutional Law* 5 ed (2009) 316.

³³⁵ Dugard op cit (n307) 18. See also De Vos op cit (n23) 6; and S Woolman 'Freedom of Assembly' in S Woolman et al (2 ed) *Constitutional Law of South Africa* (2005) 2-11.

Constitution with an entrenched Bill of Rights was rejected by the drafters of the Constitution of the Union in 1910 and again in 1961.

Notwithstanding the decades of the non-existence of an entrenched Bill of Rights, the concept of freedom of assembly has always been a part of the South African history and even enjoys international recognition.³³⁶ The South African courts and academics have over the years unequivocally expressed the notion of freedom of assembly as a right of every citizen, though it can be limited in certain circumstances especially for purposes of public safety.³³⁷ It is submitted that the source of the right was the common law.³³⁸

Extensive statutory regulation of the right to freedom of assembly began in the year 1914 with the enactment of the Riotous Assemblies Act 27 of 1914 in an attempt to deal with white labour unrest.³³⁹ It would seem that prior to the enactment of the laws regulating the freedom of assembly, the right was exercised almost without any legal impediments.³⁴⁰ This is informed by the fact that the common-law position at the time was that an individual was entitled to all rights not expressly prohibited or limited by statute or the common law.³⁴¹ Therefore, the common-law crime of public violence was the primary limitation of the right to freedom of assembly.³⁴²

The implementation of repressive laws aimed at frustrating this fundamental freedom gained momentum from the 1920s and peaked at the inception of the official apartheid policy in 1948.³⁴³ Thereafter, a number of statutory measures which made significant adverse inroads into freedom of assembly were enacted.³⁴⁴ For black South Africans, however, their right to freedom of assembly did not have to wait until

³³⁶ See Dlamini op cit (n332) 88; and GE Devenish 'Constitutional law' in WA Joubert (2 ed) *The Law of South Africa* Vol 5, Part 3 (2004) para 87. Freedom of assembly has received recognition in international treaties, notably articles 17, 19 and 20 of the Universal Declaration of Human Rights; articles 19, 21 and 22 of the International Covenant on Civil and Political Rights; articles 10 and 11 of the African Charter on Human and People Rights; articles 15 and 16 of the American Convention of Human Rights; article 11 of the European Convention; article 5 of the Convention on the Prohibition of All Forms of Racial Discrimination; and article 7 of CEDAW.

³³⁷ The court in *S v Turell and Others* 1973 (1) SA 248 (C) at 256 and in *S v Budlender* 1973 (1) SA 264 at 272 made it clear that freedom of assembly was a right enjoyed by the citizens of this country. See also E Kahn 'Freedom of Assembly' (1973) 90 *South African Law Journal* 18; and Dlamini op cit (n332) 96 citing the cases of *Makwele v Government of Bophuthatswana* 1994 (1) SA 503 (BA) and *Segale v Bophuthatswana* 1990 (1) SA 434 (BA).

³³⁸ See Cheadle op cit (329) 241.

³³⁹ Woolman op cit (n335) 43-5.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ For a list of these statutory measures see 2.8.1 above.

the coming into effect of the official policy of apartheid in order for it to endure severe suppression. The Black Administration Act 38 of 1927, Development Trust and Land Act 18 of 1936 and Black (Urban Areas) Consolidation Act 25 of 1945 already had an impact on the regulation of assemblies of the Bantus or black South Africans.³⁴⁵

As already stated, unregulated assemblies were short-lived and numerous statutory measures began to emerge from the year 1914 and escalated particularly after the official adoption of the apartheid policy in the year 1948. The trend continued for a number of years until the beginning of the 1990s. A major breakthrough towards democracy in South Africa which set the tone for the adoption of a Constitution with an entrenched Bill of Rights came with the signing of the National Peace Accord in February 1990 by the majority of political parties.³⁴⁶

The year 1992 saw real attempts to reconcile the right to freedom of assembly with the state's interest in the maintenance of peace and order. This led to the appointment of a Commission of Inquiry known as the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation ("the Goldstone Commission")³⁴⁷ whose task was to carve a new and uniquely South African approach to assemblies and demonstrations.³⁴⁸

A major innovation of the Goldstone Commission was the adoption of the Regulation of Gatherings Act (RGA).³⁴⁹ The RGA is lauded for having struck a balance between

³⁴⁵ Woolman op cit (n335) 43-5.

³⁴⁶ Ibid 43-6.

³⁴⁷ On which see Heymann, PB *Towards peaceful protest in South Africa: Testimony of multinational panel regarding lawful control of demonstrations in the Republic of South Africa before The Commission of Inquiry regarding the prevention of public violence and intimidation* (1992) ("the Heymann report").

³⁴⁸ Hjul op cit (n40) 458 observes that, unlike other commissions of inquiry which are appointed by the President in terms of the Commissions of Inquiry Act 8 of 1947, the Goldstone Commission was mandated by the Prevention of Public Violence and Intimidation Act 139 of 1991. The Act was never repealed, but its provisions can be argued to have fallen into disuse because, although the Act intended the Goldstone Commission to live beyond the three-year life span that it survived, the presidency never appointed the successor to Goldstone J. Hjul argues further that the collapse of the Commission might have had a role in the resurfacing of violent protests and strikes.

³⁴⁹ 205 of 1993. The Act lays down the procedural requirements for organising and holding demonstrations, it stipulates the role and powers of the police, local authorities and interested parties, it provides for the imposition of civil liabilities on organisers or conveners of demonstrations should riot damage occur, and sets out the criminal penalties for the breach of certain provisions of the Act. For a summary of the provisions of the RGA, see *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC) paras 12 - 18; and *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA) paras 21 - 28. For an analysis and a critique of the provisions of the RGA, see Woolman op cit (n335) 43-7 – 43-17; De Vos op cit (n23) 556-557; Currie & De Waal op cit (n23) 381-383; Cheadle op cit (n329) 243-245; and Hjul op cit (n40) 456.

the right to assemble freely and the maintenance of peace and order.³⁵⁰ Thereafter, the official demise of the apartheid system came with the Interim Constitution and the Final Constitution, both of which had an entrenched Bill of Rights.

3.3 The importance of free assemblies³⁵¹

The right to freedom of assembly has not lost the significance it has always carried. In actual fact, the need for free assemblies has become even more important especially now that South Africa is a democratic state. In a democracy, dialogue is a crucial precursor to decision-making. Individual views are represented by organised formations, hence the need for legal recognition and protection of the right of individuals to organise themselves into these formations and then be able to express themselves freely.³⁵² As a result, assemblies create a platform or an environment which is conducive for collective dialogue and deliberations.³⁵³

The backdrop against which the right to freedom of assembly is to be interpreted and treated, hence signalling the importance of the right, was articulated in *S v Turrell and Others*³⁵⁴ as follows:

“Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundations upon which parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly”.

The case arose in the context of the interpretation of the Riotous Assemblies Act 17 of 1956 (as amended). The interpretation of the sections of the said Act dealing with the powers of the Magistrate and the Minister of Justice to prohibit gatherings, and the overall aura of the judgment is couched in terms which are favourable to the preservation of the freedom to assemble.

³⁵⁰ De Vos op cit (n23) 556. See also P De Vos ‘Freedom of assembly and its limits: Constitutional Court’ (2009) 9(8) *Without Prejudice* 4 at 5.

³⁵¹ For a comparison of the treatment of the right to freedom of assembly in South Africa with that of Germany and the United States of America, see Rautenbach op cit (n333) 157.

³⁵² Woolman op cit (n335) 43-1. See also De Vos op cit (n23) 550.

³⁵³ Woolman op cit (n335) 43-2.

³⁵⁴ 1973 (1) SA 248 (C) at 256.

The subsequent cases of *S v Budlender*,³⁵⁵ and *Seeiso v Minister of Home Affairs and Others*³⁵⁶ also advance the preservation of the fundamental right to freedom of assembly. These cases call for the courts to exercise restraint in interpreting the statutory provisions which have the effect of curtailing the right to freedom of assembly and not readily uphold the laws and conduct that restrict the right to freedom of assembly.³⁵⁷

In *Seeiso*³⁵⁸ the court held that “[i]n view of the provisions of the Constitution articulating this fundamental freedom, the Court should be loath to give a strained or extended meaning to a statute which would through such an interpretative process seek to confer power to abridge or curtail the right to free assembly”. Therefore, in the absence of compelling evidence to sustain the limitation of the right to freedom of assembly, it was found to be insufficient that the right to freedom of assembly be limited in favour of the maintenance of state security, the protection of the public interest and the maintenance of law and order.

The court in *Budlender*³⁵⁹ also made some crucial findings. First, it noted that the Riotous Assemblies Act created a “political offence”. Having done so, it further took into account a crucial consideration of the nature of the South African society, and that is South Africa comprises various racial, cultural, tribal and linguistic communities. With that in mind, the court then reasoned that all these communities possess different beliefs and ideologies and they do not view the “political offence” created in the Act with the same degree of condemnation, if any. In fact, in some communities the commission of what is deemed to be a political offence even carries approval. It was then held that the courts have a duty to approach such an offence with an open mind so to ensure that people are not severely punished for upholding their beliefs.

No doubt the *Budlender* case holds relevance for the offences and civil remedies provided for in the RGA as well as the crime of public violence. The RGA and the crime of public violence operate in a societal setting that is no longer defined mainly

³⁵⁵ 1973 (1) SA 264 (C).

³⁵⁶ 1998 (6) BCLR 765 (LesCA).

³⁵⁷ Other leading cases where the importance of the right to freedom of assembly is emphasised include *In Re Manhumeso and Others* 1995 (1) SA 551 (ZS); *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); and *S v Mamabolo (Etv and Others intervening)* 2001 (3) SA 409 (CC).

³⁵⁸ *Seeiso* 1998 (6) BCLR 765 (LesCA) 777. In this case the Minister of Home Affairs had relied on the provisions of the Chieftainship Act of 1968 to prohibit a meeting of the Chiefs convened by the King to discuss matters of succession on the ground that it would threaten public safety and the maintenance of law and order.

³⁵⁹ *Budlender* 1973 (1) SA 264 (C) 268.

by race but by economic disparities. Therefore, the breach of the RGA or the commission of public violence carries different degrees of condemnation for the privileged and less privileged communities and the court must bear this in mind when enforcing the statutory offences in the RGA or the crime of public violence. This also ties in with the Constitutional Court's view on the importance of the right to freedom of assembly expressed in *SATAWU and Another v Garvas and Others*.³⁶⁰

“The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have a political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This 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 advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights”.

To further elaborate on the importance of free assemblies, it is noteworthy that resort to protest action is a potent tool used by vulnerable groups in South Africa to communicate their concerns. Unlike in western countries where communities have an option communicate their concerns electronically through computers, televisions and newspapers, the vulnerable groups in South Africa do not have access to the media, thus leaving demonstrations their only available avenue to vent out their frustrations.³⁶¹

Woolman³⁶² submits further that by allowing minorities to protest and signal their dissatisfaction with the ruling majority, that helps to quench the feeling of marginalisation, helplessness and isolation for these vulnerable groups, and it provides for democracy to be seen to also work in their favour, thereby legitimising the exercise of power by the majority. It goes without saying that the demonstrations envisaged are peaceful demonstrations only.³⁶³

³⁶⁰ 2013 (1) SA 83 (CC) at para 61. For a discussion and analysis of this case, see 3.4 below.

³⁶¹ Woolman op cit (n335) 43-3.

³⁶² Ibid.

³⁶³ Section 17 of the Constitution provides for the right to freedom of assembly, but also incorporates its own internal modifiers to the effect that the gathering must be peaceful and the participants in the gathering must be unarmed. See further *Fourways Mall (Pty) Ltd and Another v South African*

Furthermore, the exercise of the right to assemble also assists the government to identify pressing issues in society in-between elections, thereby promoting government accountability and responsiveness.³⁶⁴ It has also been observed that free assemblies contribute to a participatory democracy in terms of which the citizens are actively involved in public affairs.³⁶⁵ Therefore, free assemblies “create space for large, vocal social formations that service representative democracies; act as catalyst for debate; and enhances the legitimacy of the political processes by allowing for the articulation of minority views”.³⁶⁶

Even though South Africa is a democratic state and all segments of society are allowed an opportunity to express their views in matters of governance, one cannot be naïve to assume that individuals and organised formations would have an equal voice and equal bargaining power. Free assemblies become more crucial in the event that dialogue dies down and the balance of power is skewed or abused to the detriment of the minority.³⁶⁷ Assemblies and demonstrations thus provide a voice for the minority to communicate their views with a sufficient degree of force for them to get attention.

3.4 SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC)

3.4.1 Background

This case is the most recent and landmark pronouncement by the Constitutional Court on the right to freedom of assembly.³⁶⁸ It comes in the wake of a growing pattern of violent protests sweeping right across the country. The judgment provides an indication of South Africa’s current assembly jurisprudence in light of the violence during protests and strikes as well as the violation of the rights of non-protesters. Therefore, the jurisprudential articulations outlined in this case offer some insight into the court’s likely attitude towards developing the crime of public violence.

Commercial Catering and Allied Workers Union and Another.1999 (3) SA 752 (W). The effect of this decision is that section 17 of the Constitution and the Labour Relations Act 66 of 1995 does not extend to protect protesters from liability for assaults and other conduct that violates the rights of other people.

³⁶⁴ Woolman op cit (n335) 43-3.

³⁶⁵ De Vos op cit (n23) 550.

³⁶⁶ Woolman op cit (n335) 43-21 – 43-22.

³⁶⁷ Ibid 43-2.

³⁶⁸ M Bishop & J Brickhill ‘Constitutional law’ (2013) *Annual Survey of SA Law* 150 at 175.

3.4.2 Facts

During the course of a protracted strike in the security industry led by the South African Trade and Allied Workers Union (SATAWU), which had already seen about 50 people being killed and massive damage to property, SATAWU proceeded to convene a march of thousands of people in the city of Cape Town to present the concerns of the workers in the security industry. The gathering turned into a full-scale riot and property to the value of R1.5 million was damaged. As a result, the Respondents (Claimants/Plaintiffs in the High Court), most of whom being business owners as well as persons with a financial interest in the vehicles damaged during the riot, instituted legal action against SATAWU in terms of section 11(1) of the RGA³⁶⁹ and, alternatively, in terms of the common law for damages suffered.

In the run-up to the march in question, SATAWU had complied with the procedural requirements of the RGA. It, *inter alia*, gave the necessary notice to the local authority, arranged about 500 marshals to control the crowd, requested the local authority to cordon off certain roads and advised its members to refrain from any unlawful and violent behaviour. Despite these precautionary measures, a riot ensued causing massive damage to property.

SATAWU denied liability and contended that the words “and was not reasonably foreseeable” in section 11(2)(b) of the RGA, render the statutory defence against the imposition of civil liability for riot damage created in section 11(1) internally destructive and irrational, and therefore unconstitutional. The irrationality was argued to emanate from the wording of subsections (b) and (c) of section 11(2) which effectively requires on the one hand that the organiser of a gathering proves that the act or omission which led to riot damage was not foreseeable, and, on the other hand, that it (the organiser) took reasonable steps to guard against the act or omission that was not reasonably foreseeable.

³⁶⁹ Section 11(1) of the RGA holds the organisers or conveners of gatherings as well as the participants in demonstrations jointly and severally liable for riot damage arising from the said gatherings or demonstrations. To ameliorate the effect of section 11(1), section 11(2) provides a defence as follows: “[i]t 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 took all reasonable steps to prevent the act in question”.

SATAWU argued further that an organiser who has taken steps to guard against the occurrence of riot damage can never prove that the riot damage was not foreseeable, thus would never satisfy subsection (c) of section 11(2) and will automatically be liable. Furthermore, section 11(2) was argued by SATAWU to have limited the right to freedom of assembly and that the limitation was not justifiable.

The Respondents argued that the right to freedom of assembly was not implicated in the present case because the march in question had not been peaceful. They pointed out that the right in section 17 of the Constitution is only available to gatherings that are peaceful and unarmed. Therefore, it was argued to be unnecessary to even undertake the balancing of rights in terms of section 36 of the Constitution. The parties agreed before the High Court that the constitutional pronouncement on section 11(2)(b) had to be decided separately and before the consideration of the merits of the case.

3.4.3 Findings of the High Court³⁷⁰ and Supreme Court of Appeal³⁷¹

The High Court, per Hlophe JP, held that the right to freedom of assembly was not implicated because the assembly in question had not been peaceful as it led to riot damage. The court also rejected that the requirements of section 11(2) of the RGA had a chilling effect on the exercise of the right to freedom of assembly. In that regard, it reasoned that even with SATAWU being aware of the Act and the potential for liability, it still proceeded with the planned march. This way, clearly SATAWU was not prevented from exercising its right to demonstrate and thus there was no chilling effect.

Also on the chilling effect argument, the court held further that SATAWU had not given evidence of a situation where the intended gathering was not held because of the fear of liability. The court also accepted the testimony of two witnesses who had frequent dealings with the RGA to the effect that section 11 of the RGA does not inhibit organisations or people from embarking on demonstrations.

Notwithstanding the finding that section 17 of the Constitution was not implicated in the present case and that the imposition of civil liability did not have a chilling effect on the exercise of the right to freedom of assembly, the court nonetheless engaged

³⁷⁰ The decision of the High Court is reported as *Garvis and Others v SATAWU (Minister for Safety and Security, Third Party)* 2010 (6) SA 280 (WCC).

³⁷¹ The decision of the Supreme Court of Appeal the case is reported as *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA).

the section 36 inquiry and found that even if section 11(2) did limit the right to freedom of assembly, the limitation was justifiable taking into account the individual's right to dignity, and freedom from violence and arbitrary deprivation of property.

When the matter went on appeal before the Supreme Court of Appeal (SCA), SATAWU insisted mainly on the argument that the defence created in section 11(2)(b) was internally incoherent and self-destructive. It was held that section 11(2) created a real defence which was capable of being proven and the court cited a number of hypothetical examples to enhance its finding. The SCA also agreed with the High Court and found that the right to freedom of assembly was not implicated in the present case.

The court did not undertake the section 36 inquiry to test if the right to freedom of assembly had been unjustifiably limited because counsel for the Appellants had conceded that if the defence so created was intelligible and provided a real defence, then it would be unnecessary to embark on the section 36 inquiry. The court remarked further that the internal modifiers of the right (peaceful and unarmed) are deliberately included in constitutions in order to ensure that no constitutional challenges can be raised in respect of the laws regulating riots and other breaches of the peace.³⁷² On the "chilling effect" argument, the court held that the only chilling effect the section had was on unlawful behaviour that threatens the rule of law and the rights of others.

3.4.4 Findings of the Constitutional Court

On the rationality³⁷³ of the defence created in section 11(2) of the RGA given the allegedly unintelligible and self-destructive wording of subsection (b) of section 11(2), the majority of the Constitutional Court, per Mogoeng CJ, found that it is a long-standing principle that if an impugned statutory provision is capable of a rational interpretation which is within the bounds of the Constitution, then the said provision must be afforded that interpretation so to preserve its constitutional validity and preserve the purpose of the provision.³⁷⁴

³⁷² It suffices to add that the restriction imposed by these 'internal modifiers' has been a part of the right to freedom of assembly from the eighteenth century when the first entrenched and justiciable Bill of Rights was adopted in America – see Rautenbach op cit (n333) 158.

³⁷³ For a critique and further analysis of the rationality requirement, see Rautenbach op cit (n333) 153-156.

³⁷⁴ At para 37.

In that regard, the court reasoned that the intention of the legislature by enacting section 11 of the RGA was to hold the organisations liable for their decision to hold gatherings and demonstrations.³⁷⁵ The effect of such liability was alleviated by the creation of a statutory defence in section 11(2). Therefore, by imposing civil liability on organisers of gatherings and demonstrations, and also providing a defence thereto, parliament sought (i) to create statutory liability of organisations, so as to avoid the common-law difficulties associated with proving the existence of a legal duty on the organisation to avoid harm; (ii) to afford the organiser a tighter defence, allowing it to rely on the absence of reasonable foreseeability and the taking of reasonable steps as a defence to the imposition of liability; and (iii) to place the onus on the Defendant to prove this defence, instead of requiring the Plaintiff to demonstrate the Defendant's wrongdoing and fault.³⁷⁶

The court then found that the irrationality of the defence would be avoided if the whole of section 11(2) is taken together and understood as requiring that reasonable steps within the power of the organiser be taken to guard against an act or omission that is reasonably foreseeable.³⁷⁷ Therefore, if the steps, within the power of the organiser, so taken were reasonable to prevent what was foreseeable, then the act or omission subsequently giving rise to riot damage would not have been foreseeable and the organiser would not be liable.³⁷⁸

On the issue of whether section 11(2) limits the right to freedom of assembly and whether the limitation is justifiable, the court rejected the finding of the High Court and the Supreme Court of Appeal (SCA) that the right in section 17 of the Constitution was not implicated at all in the present case because the existence of riot damage meant that the march had not been peaceful. By implication, the majority of the court disagreed with the finding of the minority of the Constitutional Court, per Jafta J, that that the right in section 17 was not applicable in the present case, although the minority of the court concurred with the majority of the court that section 11(2) of the RGA was rational and that it was a justifiable limitation of the right to freedom of assembly, also decided. In this regard the court³⁷⁹ stated that:

“[n]othing said thus far detracts from the requirement that the right in section 17 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when

³⁷⁵ At para 38.

³⁷⁶ At para 39.

³⁷⁷ At para 43.

³⁷⁸ For a critique and alternative approach to untangle the interpretation impasse, see Bishop op cit (n368) 177.

³⁷⁹ At para 53.

they have no intention of acting peacefully that they lose their constitutional protection”.

The court proceeded to cite with approval the *dictum* of the European Court of Human Rights in *Zilberberg v Moldova* (ECHR Application No 61821/00; 4 May 2004) at para 2 to the effect that:

“[a]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour”.

The court then went on to consider how the right to freedom of assembly was limited by section 11(2) of the RGA. It found that compliance with section 11(2) requirements to successfully raise the defence so provided significantly increases the cost of organising a demonstration and thereby limits the right to freedom of assembly.³⁸⁰ Furthermore, the right to freedom of assembly was also limited because those poorly-resourced organisations would be inhibited from organising protests to express their views on pressing societal issues.

The court expressed further that it is not only the right of organisers to freedom of assembly that was limited, but also of many people who would have wanted to participate in the protest action.³⁸¹ However, upon engaging the section 36 inquiry, the court found that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It emphasised that the right to freedom of assembly was very important,³⁸² but the importance of the limitation was also crucial because it served to protect members of society especially those without the necessary resources to identify and pursue the perpetrators of riot damage which they have suffered.³⁸³

The court went on to say that the nature and extent of the limitation must not be exaggerated.³⁸⁴ The RGA does not prevent people or organisations from embarking on demonstrations, but imposes conditions in order to prevent damage to property

³⁸⁰ At para 57.

³⁸¹ At para 58.

³⁸² At para 61. See further the *dictum* of the court quoted in 3.3 above

³⁸³ At para 67.

³⁸⁴ At para 69.

and personal injury. In so doing, the RGA placed a presumption of liability on the organisers of demonstrations for damages arising out of a demonstration. The effect of the presumption was alleviated by the possibility of organisers claiming from other joint wrongdoers on the basis of the apportionment of damages.

On the relation between the limitation and its purpose, the court found that the purpose of section 11 of the RGA was to afford the victims of riot damage a viable legal recourse in the event that riot damage occurs.³⁸⁵ This way, an appropriate balance is struck between the right to assemble and the safety of people and property.³⁸⁶ This balance could not have been achieved through any other means.

3.4.5 Analysis of the case

The analysis of the *Garvas* case is geared towards ascertaining South Africa's jurisprudential direction when it comes to the development of the crime of public violence in light of the right to freedom of assembly. As a point of departure, the analysis proceeds on two premises. The first premise is that criminal sanctions for acts of violence committed during protests provided for in the RGA and in terms of the common law (that being the crime of public violence) are hardly ever enforced or, if enforced, the sentences imposed are too light/trivial to have a deterrent effect,³⁸⁷ hence the question whether or not to develop the crime of public violence in order to enable the crime to adequately safeguard the rights of non-protesters.

The second premise is that freedom of assembly is a very important right and that it would take very compelling reasons to limit it.³⁸⁸ This begs the question whether in South Africa's jurisprudence the need to uphold the laws (be it civil or criminal laws) that serve to protect the rights of non-protesters constitute a compelling reason for limiting the right to freedom of assembly. In regard to civil laws that protect the rights of non-protesters, the Constitutional Court in the *Garvas* case answered in the affirmative the question articulated above. It held that the RGA's imposition of civil sanctions on organisers of protests was a justifiable limitation of the right to freedom of assembly. However, whether or not the court would also uphold the criminal sanctions (by allowing the development of the crime of public violence) aimed at protecting the rights of non-protesters is debatable.

³⁸⁵ At para 80

³⁸⁶ At para 81.

³⁸⁷ De Vos op cit (n350) 4-5. De Vos attributes the lack of strict enforcement of public violence laws to the following: first, South Africa's apartheid past which promoted the undue restriction of assemblies; second, the use of brutal force by the police in breaking up demonstrations; and third, the fact that the demonstrators are usually a poor and desperate group of people.

³⁸⁸ At para 66.

The object of this analysis is to examine what the court's position would be in regard to developing the crime of public violence given that civil sanctions have already been given a stamp of approval. The approach to this analysis would be to draw from the reasoning of the Constitutional Court in the *Garvas* case and apply that reasoning as though the development of the crime of public violence had been in issue.

As already indicated, the court in *Garvas* held that the imposition of civil sanctions on organisers of protests, in terms of section 11 of the RGA, for the protection of the rights of non-protesters is a justifiable limitation of the right to freedom of assembly. Given this finding, there is an inclination to simply conclude that the same applies to the crime of public violence because, like civil sanctions, the crime also serves to protect the rights of non-protesters, particularly in the event that they lack the financial means to pursue a civil suit against the organisers of demonstrations or the actual perpetrators of violence.³⁸⁹ However, the matter is not so simple. There are certainly some very compelling arguments that would operate against the development of the crime of public violence. These arguments will be outlined below coupled with the examination of the weight the courts could attribute to them in deciding the question of whether or not the crime of public violence ought to be developed.

I now turn to consider these arguments more closely. The most potent argument is that the civil sanctions, and by implication the criminal sanctions (i.e. the development of the crime of public violence), have a chilling effect on the exercise of the right to freedom of assembly and thereby limit the said right. Before examining the weight of this argument, it is best to track back and firstly consider whether the right to freedom of assembly provided for in section 17 of the Constitution is really implicated in public violence cases. One view is that the right to freedom of assembly is not implicated because a demonstration loses its constitutional protection when it is not peaceful or where the protesters are armed.

³⁸⁹ On the face of it, it seems to be the next logical conclusion that if a civil remedy limiting the right to freedom of assembly is constitutionally valid, then a correlative criminal sanction with the same effect would also be constitutional. I say this because section 11 of the RGA (through the imposition of civil liability on organisers of demonstrations) and the crime of public violence protect the same interests that are harmed because of the violence during protests. I have also explained previously in the section on *criminalisation* (see 1.3 above) that it is because of this phenomenon of identical interests being protected by civil and criminal law that in some instances a single incident can found a civil claim and a criminal charge.

The majority of the Constitutional Court in *Garvas*, per Mogoeng CJ, mindful of the fact that the march in question turned into a riot during the course of which serious damage to property occurred, nonetheless found that section 17 of the Constitution was applicable although it did not express such in so many words, unlike the High Court,³⁹⁰ the Supreme Court of Appeal³⁹¹ and the minority of the Constitutional Court³⁹² which expressly stated that the right in section 17 was not applicable at all. The majority of the court acknowledged the generous nature of the right in section 17 of the Constitution and stated that each individual taking part in the demonstration is a bearer of this right, thus an individual does not forfeit his right to freedom of assembly because others have turned violent or have committed unlawful acts during the course of the demonstration, provided the individual remains peaceful in the way he conducts himself.³⁹³

The resounding effect of the generous interpretation of the right in section 17 of the Constitution adopted by the majority of the court in *Garvas* is that the participants in violent demonstrations do not forfeit their right to assembly and protest freely even when others turn violent and that any other “indirect limitations” that constrain or make it difficult to exercise the right to protest would be found to limit the right to freedom of assembly and would thus have to be shown to be a justifiable limitation.³⁹⁴ It is therefore clear that the generous or broad interpretation of the right in section 17 of the Constitution leads to some significant legal conclusions, yet many of the academic commentators in the constitutional law field appear to endorse the idea of a broad or generous interpretation of the right to freedom of assembly.³⁹⁵

To illustrate the above point, in his quest to provide a solution to the problem created by the notion of “definitional limitations”³⁹⁶ which is visible in South Africa’s right to assemble in section 17 of the Constitution, Rautenbach³⁹⁷ suggests that a broad interpretation of the right to freedom of assembly is a solution to overcoming the difficulty of interpreting the meaning and extent of the internal modifiers (peaceful

³⁹⁰ *Garvis and Others v SATAWU (Minister for Safety and Security, Third Party)* 2010 (6) SA 280 (WCC) at para 29.

³⁹¹ *SATAWU v Garvis and Others* 2011 (6) SA 382 (SCA) at para 48.

³⁹² At para 88.

³⁹³ At para 53.

³⁹⁴ Bishop op cit (n368) 178.

³⁹⁵ In this regard, I can mention Woolman op cit (n335), Bishop & Brickhill op cit (n368), Rautenbach op cit (n333), and Dlamini op cit (n332).

³⁹⁶ See Rautenbach op cit (n333) 158-160. The notion of “definitional limitations” refers to a situation where certain rights in the Constitution are formulated in such a way that certain actions or activities are excluded from its ambit. For example, section 17 of the Constitution excludes from its ambit those assemblies which are armed and which are not peaceful. A major drawback for such provisions is that the constitutionality of the excluded activities is shielded from being reviewed nor can it be subjected to the limitations clause, though the answer is most likely to be the same.

³⁹⁷ Rautenbach op cit (n333) 160.

and unarmed) of the right. Woolman³⁹⁸ also argues that the generous construction of the scope of the right to freedom of assembly is necessary to:

“[p]revent the state from exploiting this requirement (i.e. peaceful) in order to suppress unpopular positions; to ensure that if some members of an assembly resort to violence, while the majority of the participants remain peaceful, the assembly remains protected; and to prevent a peaceful assembly from being hijacked by violent opponents or agents of provocateurs”.

Would the right in section 17 of the Constitution be applicable in public violence cases? To begin with, it will be recalled the right to freedom of assembly only applies to gatherings and demonstrations which are “peaceful” and “unarmed”. At first glance, a demonstration from which public violence is allegedly committed could not have been peaceful. Therefore, such a gathering should not fall within the protective ambit of section 17 of the Constitution.³⁹⁹ However, the effect of the court’s decision in *Garvas* is that the meaning of the word “peaceful” is restricted and a demonstration does not automatically become non-peaceful (such that the constitutional protection of the right to gather and demonstrate of all the participants is forfeited) simply because other members of the protesting crowd committed the acts of public violence.⁴⁰⁰

The situation is, however, different in public violence cases compared to what transpired in *Garvas*. Criminal liability for public violence attaches only to those individuals who are identified and apprehended for engaging in unlawful acts that amount to the commission of the crime of public violence. Those individuals so apprehended would, at the time of the commission of public violence, not have been

³⁹⁸ S Woolman, ‘My tea party, your mob, our social contract: Freedom of assembly and the constitutional right to rebellion in *Garvis v SATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)’ (2011) 27(2) *South African Journal on Human Rights* 351-352.

³⁹⁹ This conclusion follows from an ordinary everyday meaning of the terms “peaceful” and “unarmed”, which says that a non-peaceful gathering is one that leads to disorder or violence against property or person. An armed demonstration is the one in which the demonstrators carry arms in the conventional sense of the word (i.e. guns, traditional weapons and other dangerous objects) – see Rautenbach op cit (n333) 160.

⁴⁰⁰ Rautenbach op cit (n333) 160-161 provides examples of how in other foreign jurisdictions the meaning of “peaceful” and “unarmed” has been restricted. These jurisdictions include Canada, the United States of America and Germany. Of note is the three-fold German approach to restricting word “peaceful” intrinsic in the right to freedom of assembly. First, when the intensity of the disturbance is alleged to render a gathering non-peaceful, what is required is for there to be violence and serious damage to property. Second, regarding the possibility of the occurrence of violence, at least a direct threat of violence must be present. Third, in respect of the different categories of individual participants, simply because some members of the crowd became violent does not mean that the demonstration is not peaceful such that the constitutional protection of the right to freedom of assembly of all the other participants is forfeited. The last approach is identical to the one which was adopted by the Constitutional Court in the *Garvas* case.

exercising their right to freedom of assembly peacefully.⁴⁰¹ Therefore, in the light of the decision in *Garvas*, those individuals would forfeit their right to demonstrate, while the rest of the protesters who are peaceful in their intention and behaviour would still retain the constitutional protection of their right to demonstrate.

The above scenario is different from the *Garvas* case. The *Garvas* case concerned a situation whereby liability for riot damage sought to be imputed on the union (SATAWU). SATAWU was the bearer of the right to freedom of assembly. It follows that since SATAWU had not been shown to have failed to exercise its right peacefully or that it intended the march not to be peaceful, then its right to freedom of assembly remained constitutionally protected regardless of the fact that other participants in the march turned violent and, as a result, caused damage. It also follows that only those individuals who caused riot damage had not been peaceful. Had they been identified and sued for damages instead of SATAWU, those individuals would have been unable to defend themselves on the basis that the RGA's imposition of civil liability infringed their right to freedom of assembly because they would have forfeited the constitutional protection of their right to freedom of assembly.

It is submitted that public violence cases would give the court's decision in *Garvas* a practical application. These are cases that would compel the courts to find that an individual, by engaging in acts of public violence, was not acting peacefully and therefore forfeits his right to freedom of assembly. In closure, since the right to freedom of assembly is not implicated in public violence cases, the development of the crime of public violence cannot therefore be opposed on the basis that it would infringe the right to freedom of assembly.

Assuming that the above conclusion is incorrect and that the right to freedom of assembly is indeed implicated in public violence cases, would the development of the crime of public violence have a chilling effect on the right to freedom of assembly, and thereby limit the said right? It will be recalled that in the *Garvas* case section 11(2) of the RGA was found to have limited the right to freedom of assembly for two reasons: first, compliance with the requirements of the RGA increased the cost of organising a protest. Second, the possibility that poorly resourced organisations would be inhibited from organising demonstrations. Both these

⁴⁰¹ This is supported by Rautenbach's submission that some consensus exists among the German courts and writers that a gathering is not peaceful when it leads directly to disorder (*oproer* in Afrikaans) or violence against persons and property - Rautenbach op cit (n333) 160. See also Woolman op cit (n335) 43-19.

considerations had the effect of ‘chilling’ the exercise of the right to freedom of assembly.

It is difficult to conceive how the crime of public violence would have the same effect as section 11(2) of the RGA. The crime of public violence does not have any cost implications for anyone, let alone the organisers of gatherings and demonstrations. The organisers of demonstrations are not required to take any steps to prevent protesters from engaging in unlawful acts which might constitute public violence, nor does it impose any conditions or restrictions on demonstrations. Consequently, no organisation can complain of being inhibited from embarking on a demonstration because of the existence of the crime of public violence. The crime only comes into effect when the constitutional right to protest is abused and the rights of other people are violated.

Perhaps some weight could be given to Bishop’s⁴⁰² contention that the effect of the decision in *Garvas* is that even the “indirect limitations that merely make it more difficult to protest” also limit the right to freedom of assembly and will have to be shown to be justifiable. In my view, perhaps the argument stemming from this line of reasoning could be that the crime of public violence indirectly constrains the exercise of the right to freedom of assembly due to the inherent threat of incarceration and the resultant loss of personal liberty. Persuasive as the argument might seem, one cannot shake off the feeling that this argument is far-fetched. As a result, not much weight could be ascribed to it.

Even if the development of the crime of public violence has a chilling effect on the exercise of the right to freedom of assembly thereby limiting the said right, the limitation would, upon engaging the inquiry in terms of section 36 of the Constitution, be reasonable and justifiable in an open and democratic society for purposes of protecting the constitutional rights of non-protesters. Section 36 of the Constitution provides that:

“[t]he 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

⁴⁰² Bishop op cit (n368)178.

limitation and its purpose; and (e) less restrictive means to achieve the purpose”.

a) The nature of the right

The right to freedom of assembly is undoubtedly a very important right as illustrated in 3.3. above. All that is left to be said is that because of the nature and importance of the right to freedom of assembly, it would take some very compelling reasons to limit it.

b) The importance of the purpose of the limitation

While the right to freedom of assembly is undoubtedly a very important right, the importance of the purpose of the limitation is also as crucial. The limitation would serve to protect a vulnerable group in society that probably does not have the resources to pursue the organisers of protest action for damages and cannot even identify the perpetrators of violence in order to seek recourse against them. The development of the crime of public violence would protect the rights of non-protesters as it would ensure that justice is done and the perpetrators of violence and the invasion of the rights of non-protesters are adequately punished for their unlawful deeds.

c) The nature and extent of the limitation

The nature and extent of the limitation must not be exaggerated. By no means does the crime of public violence prevent organisations or people in general from embarking on peaceful, yet meaningful and powerful demonstrations. Developing the crime of public violence only affords protection to the rights of victims of violent protests and ensures that they are not left without a viable legal recourse for the protection of their rights, especially when they lack the necessary resources to pursue the organisers of demonstrations, or where they cannot identify the perpetrators of violence.

d) the relation between the limitation and its purpose

Given the nature and extent of the limitation discussed above, a proper balance or a relation is struck or achieved between, on the one hand, the protection of the rights of non-protesters and, on the other hand, the exercise of the right to freedom of assembly. The fact that already the civil sanctions in terms of section 11 of the RGA

serve this purpose is no impediment to developing the crime of public violence to balance the scales even more.

e) Less restrictive means to achieve the purpose

The crucial balance struck between the limitation and its purpose cannot be achieved through other less restrictive means.

It must be emphasised that the conclusion that the right to freedom of assembly in section 17 of the Constitution is most likely not to be implicated in public violence cases, that the development of the crime of public violence would most likely not have a chilling effect on the right to freedom of assembly and that the development of the crime would also constitute justifiable limitation of the right to freedom of assembly is not a blank cheque for the courts not to heed the call to approach with caution and restraint any limitation of the fundamental right to freedom of assembly.

As Bishop⁴⁰³ correctly observes, although the court in *SATAWU* found against those who wished to assert their right to freedom of assembly, the decision is landmark in that it makes out a strong case for the importance of the right to freedom of assembly in the democratic South Africa.⁴⁰⁴ The advocates for the right to freedom of assembly should be happy with the *Garvis* decision and therefore not contest its correctness. Indeed, Bishop believes that the decision of the court is “defensible”.⁴⁰⁵ I believe the Constitutional Court decision also alleviates Woolman’s⁴⁰⁶ concern that the High Court decision⁴⁰⁷ was contrary to the spirit of the generous interpretation that ought to be afforded the right to freedom of assembly.

A seemingly compelling argument against the development of the crime of public violence is that the limitation of the right to freedom of assembly more than it is limited by the RGA would threaten the country’s young constitutional order. This argument emanates from Woolman’s caution that the restriction imposed by the present case on the right to freedom of assembly places the country at risk of the public withdrawing their consent to the social contract that is manifest in the Constitution.⁴⁰⁸ The immediate result would be rebellion, and, if I may add, the

⁴⁰³ Bishop op cit (n368) 179.

⁴⁰⁴ Ibid 175.

⁴⁰⁵ Ibid 179.

⁴⁰⁶ Woolman op cit (n398) 353.

⁴⁰⁷ The High Court had found that the right to freedom of assembly was not implicated because the march in question had not been peaceful given that it led to the occurrence of riot damage.

⁴⁰⁸ Woolman op cit (398) 352.

resultant loss of legal order leading to a total state of anarchy.⁴⁰⁹ Woolman's contention is complemented by the following quote: "[v]iolence is seldom, if ever, spontaneous, but arises from a conviction that fundamental rights are denied".⁴¹⁰

It seems that Woolman was reflecting on the events of the apartheid era where every newly enacted law which increasingly restricted assemblies was met with more fierce opposition from the public, thus leading to a breakdown of legal order in the country and a total state of anarchy. Back then, many of the fundamental rights were denied and violence directed at persuading the government to recognise these fundamental human rights was rife.

It stands to reason that the undesirability of limiting the right to freedom of assembly any more than it is presently restricted cannot entirely be an impediment to the development of the crime of public violence if that promotes the spirit, purport and objects of the Bill of Rights. It may certainly be a factor, but it cannot be decisive on its own. Furthermore, it is doubtful that the threat of rebellion, violence and anarchy should the right to freedom of assembly be limited further by the development of the crime of public violence is a legally sound argument. It is actually tantamount to holding the courts ransom so as to make a particular finding that is favourable to a specific segment of society, failing which disorder would erupt.

A further crucial point against the on the development of the crime of public violence is submitted by Dlamini⁴¹¹ who points out that the state's response to service delivery protests (which he attributes to the government's own failure to deliver basic services) has largely been intolerant and suppressive, and such action has seen peaceful protesters being placed in custody, assaulted and charged with the crime of public violence. The point being made is that the development of the crime bears the risk of it being manipulated and utilised by those in authority to stifle dissent.

Dlamini⁴¹² provides some evidence for his above-mentioned assertion. Although the incidents of assault and detention of peaceful protesters cannot be said to occur frequently, one must acknowledge that such incidents do occur. To the extent that such manipulation and abuse occurs, it must certainly be condemned and punished. However, such abuse must be condemned with the same degree of disapproval as

⁴⁰⁹ Ibid 352-353. Woolman cites as proof of the looming rebellion of the public the frequently dangerous trends which South African protests have assumed over the years.

⁴¹⁰ Hjul op cit (n40) 456.

⁴¹¹ Dlamini op cit (n332) 98.

⁴¹² Ibid 98-99.

the violence seen in most recent protests which culminate in the invasion of the various rights of non-protesters. It must not appear as though one takes preference over the other for they are equally wrong.

There is also another factor to consider which might operate against the development of the crime of public violence. That factor is the patent lack of a political will to enforce the criminal sanctions applicable in cases of violent protests and the likely conclusion that perhaps civil sanctions, as opposed to criminal sanctions, are the desired sanctions for protest violence. This conclusion is drawn from the following: first, the apartheid system made organising and holding gatherings a difficult and dangerous exercise which could, notably under the Internal Security Act 74 of 1982 and the Riotous Assemblies Act 17 of 1956, result in the incarceration of the organisers and participants if not done strictly according to the law.⁴¹³ Today, section 12 of the RGA still imposes criminal sanctions and other common-law offences are still in place, but all of these offences are hardly enforced.⁴¹⁴

In those few instances where the perpetrators are prosecuted and convicted, the sanction that are handed down are trivial and hardly have a deterrent effect.⁴¹⁵ Therefore, resort to criminal sanctions for participating in a protest is associated with apartheid policing and the country would want to dispense with such a stigma. To further enhance this argument, common sense would dictate that incarceration is a very serious form of punishment. It involves a total loss of liberty of the convicted person. Indeed it must be reserved for very grave circumstances. Terblanche⁴¹⁶ goes further and argues that cases of public violence, especially those where there was no loss of life, such as in *S v Le Roux*,⁴¹⁷ present a perfect opportunity for the courts to apply restorative justice methods and not impose an imprisonment term.

The aforementioned argument must, however, be weighed against the submission made in 2.7 above to the effect that the elements of the Zinn triad applicable during the sentencing stage of a criminal trial, particularly the seriousness of the crime and the interests of the community, justify that a conviction for public violence be met with no less than an imprisonment term. Alternative forms of punishment such as a fine or a wholly suspended sentence are no longer apt for public violence offenders.

⁴¹³ De Vos op cit (n350) 4.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid 5.

⁴¹⁶ Terblanche op cit (284) 438.

⁴¹⁷ 2010 (2) SACR 11 (SCA).

The second source of the argument that criminal sanctions are perhaps not the ideal way to deal with protest violence is section 11 of the RGA which provides for the imposition of civil sanctions on organisers or conveners of protest action jointly and severally, and creates a reverse onus so to make it easier for the victims of violence to claim damages. This could be an indication that civil sanctions are the preferred remedy to aggrieved victims of protest violence.

However, the civil sanctions remedy operates against an adverse backdrop that might hinder its effectiveness. That backdrop is the possibility that despite the reverse onus which makes it easier to obtain damages, not all victims of protest violence would have the financial means,⁴¹⁸ or perhaps even the desire, to proceed by way of civil action. Another backdrop is the possibility that not all the organisations or conveners of protest action would have the financial means to pay the amount claimed by the victims of protest violence as damages.

It would, therefore, seem that in spite of the criminal sanctions being not so desirable, circumstances compel that criminal sanctions be invoked in order to protect the rights of non-protesters for the greater good of the community. The police have it within their means and resources to identify, pursue and successfully prosecute the perpetrators of public violence. It is argued in this dissertation that many, if not all, public violence cases are proven more or less on the identification and testimony of the police officers who were present at the scene. Their evidence can always be corroborated by other police officers who were also present at the scene and they are well resourced with equipment that can aid their identification of the perpetrators.

In any event, as indicated in 1.3 above under the topic on *criminalisation*, although sometimes the interests protected by the criminal law and the law of delict are identical and sometimes even overlap thus giving rise to a claim in delict and a criminal charge, there are however some fundamental differences between the two and the distinction must be maintained. Therefore, the mere fact that a remedy to the acts of public violence has been provided for in delict (either in terms of section 11 of the RGA or the common law) does not mean that the same acts cannot also be punished under criminal law and vice versa. These two fields of law co-exist with one another. The one does not replace the other.

⁴¹⁸ This sentiment is also echoed in *Iiyayambwa op cit* (n11) 146.

Chapter 4

SUMMARY OF ARGUMENTS AND CONCLUSION

4.1 Introductory remarks

It has been stressed that the purpose of this dissertation is to lead a debate on the question as to whether the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters means that the crime falls short of the objectives of section 39(2) of the Constitution and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights? If so, how must the development take place in order to meet these objectives? It has also been stressed that there are two sides with diverging views to the topic for debate. On the one hand, there are advocates for development and, on the other hand, the advocates for the *status quo*.

In this section I refer back to the discussion in each of the preceding chapters in order to identify and extract what could be likely arguments to be advanced by both sides to the debate. Therefore, this section is intended for the presentation and consolidation/weighing of the arguments advanced by each of the sides to the debate with the view to come to a conclusion on the topic. Before I turn to outline these arguments, it is best to first highlight a couple of points, also emanating from the discussion in the preceding chapters, which should be common cause between both sides. These are set out in 4.2 below.

4.2 Preliminary issues

It has been argued in chapter 1 that the violence during protests and strikes has an adverse impact on the rights of non-protesters, in particular the right to life, dignity, equality and freedom and security of the person. Each of these rights are adversely affected in the following manner⁴¹⁹: first, the right to life is implicated when non-protesters are being killed by the protesting mob as punishment for their non-participation in the protest or face threats of being killed as a means to persuade them to join the protest action.

The non-protesters' right to human dignity is also implicated particularly when their freedom of choice is disregarded and they are coerced by members of the protesting

⁴¹⁹ For real life examples of incidents of violence which exemplify the violation of each of these rights, see generally the discussion in 1.2.1 to 1.2.3 above.

crowd to join the protest. It is also implicated when non-protesters are assaulted and subjected to various humiliating conduct in public as punishment for their non-participation in the protest. The non-protesters' right to equality before the law is implicated when the perpetrators of violence are not prosecuted for their deeds, hence the non-protesters are not afforded the right to equal protection and benefit of the law. The intimidation, assault and other acts of violence directed at non-protesters impact adversely on the non-protesters' right to freedom and security of the person.

The aforementioned rights do not constitute a closed list. There are certainly other rights which may be implicated depending of the facts of each case. For example, the right to freedom of trade will be implicated in the event that the violence during a protest leads to the disruption of business operation as a result of damage to business premises and merchandise. Freedom of trade is also implicated in the event that the protesters resort to intimidation, assault, harassment or any interference with the employees or customers of the business or their property. The right not to be deprived of property arbitrarily would also be implicated where the looting of business stock and property takes place. Freedom of press would be implicated when journalists are assaulted or prevented in any way from carrying out their duties.

From the discussion in chapter 2, the following should be common cause: first, judging from the views publicly expressed by the Democratic Alliance, the official opposition party in South Africa, it can be said that it would fall under advocates for development category.⁴²⁰ Other groups which are likely to follow suite include the various corporate entities under the auspices of the Employers' Organisations to which they belong, and the middle-class to rich segment of the South African society. The latter are entities and individuals with an interest in the property which violent protesters normally target during the course of protest action.

The advocates for the status *quo* are likely to comprise in the main the Congress of South African Trade Union (COSATU); its alliance partners, the African National Congress (ANC) and the South African Communist Party (SACP); as well as the government.⁴²¹ Other organisations which are likely to follow suit are political parties such as the Economic Freedom Fighters (EFF); various community organisations representing the poor and illiterate segment of the South African society, other trade unions outside of COSATU such as the Association of Mineworkers and Construction Union (AMCU).

⁴²⁰ For an understanding of how this conclusion is reached, refer to the discussion in 2.8.2 above.

⁴²¹ Also refer to the discussion in 2.8.2 above.

The above-mentioned organisations are identified and grouped into one of the two sides to the debate on the basis of the views they have publicly expressed or appear to hold in regard to protests and strikes as well as on the basis of the constituency they represent in society. This does not constitute a closed list. Therefore, it is open for other organisations that have not been vocal about their views to also join in the debate and take whatever side they identify with.

There are also a few conclusions which I have come to during the course of the dissertation. These have to be highlighted once more (without extensively repeating the detail) for they constitute a premise from which the presentation of the arguments in this section proceeds. First, it is undisputed that the common-law crime of public violence has historically been designed to deal with mob violence and continues to be an apt offence to deal with such even today. It is a preferred offence with which the offender is charged for committing acts of public violence despite there being other common-law crimes (such as assault, malicious damage to property, arson and robbery), statutory offences (particularly those which are created in section 12 of the RGA) and civil remedies (available in terms of the common law (the law of delict) and section 11 of the RGA) which overlap with the crime of public violence.⁴²²

Second, the statistics and media reports cited in the dissertation are included for purposes of depicting a picture of the prevalence of violent protests and strikes in South Africa. These are to be accepted as indicating an upward trend in protest and strike violence. Arguments on the accuracy of the statistics and the reliability of the information obtained from press reports are not relevant for present purposes.⁴²³

Third, the prospects of a legislative response to the violence appear to be very remote. Parliament has repeatedly ignored the opportunities to enact legislation such that it is feasible to conclude that there is no forthcoming legislation or amendment of existing legislation to deal with the violence during protests and strikes. That leaves the crime of public violence and the RGA the law in place to deal with violent protests and other associated issues.⁴²⁴

⁴²² Refer to the discussion in 1.1 above. It is noteworthy that other common-law crimes which overlap with the crime of public violence can, in certain circumstances, be competent verdicts to the charge of public violence.

⁴²³ Refer to the discussion in 1.2.1 above.

⁴²⁴ See the discussion in 2.8.2 above.

4.3 Presentation and consolidation of arguments

4.3.1 Is the crime of public violence failing to adequately protect the rights of non-protesters?

The first question to consider is on what ground(s) can it be said that the crime of public violence is failing to adequately safeguard the rights of non-protesters? Drawing from the discussion in the first chapter, the advocates for development would argue that the failure of the crime is evidenced by the following considerations: first, the increasing number of violent protests regardless of the existence of the crime, thus raising doubt as to its deterrent effect;⁴²⁵ second, the numerous instances where the rights of non-protesters (particularly the rights to life, dignity, equality, as well as freedom and security of the person) are violated during violent protests;⁴²⁶ third, the public perception of the offence as being almost irrelevant as it is hardly enforced;⁴²⁷ fourth, the paucity of successful prosecutions for public violence;⁴²⁸ fifth, the reluctance or the lack of a political will to pursue public violence charges;⁴²⁹ and that the sentences imposed on public violence offenders are trivial and hardly have a deterrent effect.⁴³⁰

There are certainly other possible explanations, so the advocates for the *status quo* would contend in response to the above, which could negate the above-named factors as being evidence of the failure of the crime to safeguard the rights of non-protesters. For instance, the lack of successful prosecutions for public violence could be explained by the difficulty of securing sufficient evidence in a crowd situation to secure a conviction for public violence.⁴³¹ Furthermore, many public violence cases are dealt with in the Magistrates' Court and never make it to the High Court either on appeal or review because most of the times the accused persons are poor and lack the necessary funds to pursue the case further. It is also possible that the acts of public violence for which the offenders are apprehended are not charged as public violence but rather as assault, malicious damage to property, arson or robbery or other crimes.

⁴²⁵ See the statistics in 1.2.1 above.

⁴²⁶ Refer to the various incidents of violence and the violation of the rights of other people reported in media reports discussed in 1.2.1 to 1.2.3 above.

⁴²⁷ See above (n16).

⁴²⁸ There is no doubt that with so much of violence taking place during protests and the police effecting so many arrests, the expectation is that there would be more than two reported judgments on public violence, these currently being the cases of *S v Whitehead and Others* 2008 (1) SACR 431 (SCA) and *S v Le Roux and Others* 2010 (2) SACR 11 (SCA).

⁴²⁹ De Vos op cit (n350) 5.

⁴³⁰ Ibid 4.

⁴³¹ liyayambwa op cit (n11) 145.

The advocates for development would, in counter-argument, contend that even if it were true that the reason for the lack of successful prosecutions for the crime of public violence is perhaps that the offenders are charged with other offences such as assault and not public violence, then it is clear that the charges of assault or any other crime so charged still fail to curb the violence during protests because the levels of violent protests are still high. The conviction for those other offences would also seem to have done little to deter the violence as popular opinion still resonates in society that the acts of public violence are never prosecuted and the transgressors walk out freely without bail.

To reconcile the foregoing arguments, we must accept that it is nonetheless a possibility, irrespective of how remote, that the aforementioned factors could justifiably be construed as being indicative of the failure of the crime of public violence in protecting the rights of non-protesters. The crucial question is whether the alleged failure of the crime to adequately safeguard the rights of non-protesters renders the crime to fail to promote the spirit, purport and objects of the Bill of Rights? The answer to this question lies in the interpretation or meaning of the term ‘spirit, purport and objects of the Bill of Rights’.

4.3.2 Does the crime of public violence fall short of the spirit, purport and objects of the Bill of Rights and therefore requires to be developed?

It has been established that the term “spirit, purport and objects of the Bill of Rights” finds expression in the values upon which the Constitution is founded.⁴³² Therefore, looking at the issue of the need for the protection of the rights of non-protesters during protests and strikes against the backdrop of the values of the Constitution, the advocates for development would argue for an interpretation of the spirit, purport and objects of the Bill of Rights that affords protection to the rights of vulnerable groups in society that do not have a significant political voice.

Authority for the courts’ inclination to interpret the values of the Constitution in a manner that affords protection to vulnerable groups may be found in numerous cases, especially those dealing with the marital and property rights of women⁴³³ as well as the rights of gays and lesbians.⁴³⁴ More recently, in the case of *SATAWU and Another v Garvas and Others*⁴³⁵ the court identified with the plight of the victims of riot damage following a violent protest and upheld the constitutionality of a

⁴³² De Vos op cit (n23) 38. See also Currie & De Waal op cit (n23) 57.

⁴³³ See above (n28).

⁴³⁴ See above (n29).

⁴³⁵ 2013 (1) SA 83 (CC).

statutory provision which imposed liability on organisers of demonstrations for riot damage. Accordingly, should the proposed interpretation by the advocates for development prevail, then the failure of the crime to adequately safeguard the rights of non-protesters would mean that the crime fails to promote the spirit, purport and objects of the Bill of Rights and thus requires to be developed.

On the other hand, the advocates for the *status quo* would argue that a proper construction of the term “spirit, purport and objects of the Bill of Rights” in light of the founding values of the Constitution would lead to an interpretation that affords recognition to the injustices of the past and emphasise the sanctity and importance of fundamental rights, such as freedom of assembly, that were severely suppressed under the apartheid system in favour of state security. This interpretation is consistent with the view taken in various pre-constitutional, post-constitutional and foreign case law to the effect that the courts must be loath to uphold the laws and conduct that have the effect of restricting the fundamental right to freedom of assembly.⁴³⁶

The adoption of the interpretation proposed by the advocates for the *status quo*, so the argument continues, would illustrate that the Constitution jealously guards the hard-earned rights and freedoms and seeks to protect them from severe restrictions that curtail their enjoyment. Therefore, in light of this interpretation, the development of the crime of public violence would be contrary to the spirit, purport and objects of the Bill of Rights as that would have the effect of restricting the right to freedom of assembly.

The approach to choosing an appropriate interpretation entails looking at the current jurisprudential articulations evident in case law dealing with the treatment of the right to freedom of assembly in light of the prevailing trend of violent protests which are often accompanied by the invasion of the various rights of innocent by-standers. To begin with, some of the cases cited by the advocates for the *status quo* in support of their proposed interpretation date back to the years of apartheid. At the time, basic human rights such as the right to freedom of assembly did not enjoy constitutional protection. In fact, the right to freedom of assembly, among others, was heavily restricted for purposes of state protection. It is therefore not surprising that the courts in *S v Turell and Others*⁴³⁷ and *S v Budlender*⁴³⁸ cases felt so strongly about the right to freedom of assembly and the need for its protection.

⁴³⁶ See above (n31).

⁴³⁷ 1973 (1) SA 248 (C).

⁴³⁸ 1973 (1) SA 264 (C).

The courts continued emphasising the importance of the protection of the right to freedom of assembly even in the early period of the democratic era.⁴³⁹ While South Africa's history of apartheid might have been the major reason for the protection of the right to freedom of assembly, one must also appreciate that most of the cases where the courts came out strongly in support of the right to freedom of assembly arose in the context of the interpretation of the provisions of legislation that empower the authorities to prohibit certain gatherings.⁴⁴⁰ In these cases, vigilance on the part of the courts is required to guard against the abuse of power by the authorities.

The courts' position on the protection of the right to freedom of assembly seems to be different where the right to freedom of assembly is limited for purposes of protecting the rights of other people. It is a well-known fact the culture of violent protests in South Africa has since re-emerged and, as a result of the violence, many of the rights of non-protesters have taken strain. This has led the courts to gradually change their outlook towards the right to freedom of assembly as evidenced by the cases of *Fourways Mall (Pty) Ltd and Another v South African Commercial Catering and Allied Workers Union and Another*⁴⁴¹ and *SATAWU and Another v Garvas and Others*.⁴⁴² Both these cases emphasise that despite the importance of the right to freedom of assembly, it may nonetheless be limited for purposes of protecting the rights of other people.

Therefore, given the jurisprudential shift outlined above, the interpretation advanced by the advocates for development appears to be more persuasive. Any law that seeks to protect the rights of the victims of violent protests can be said to promote the spirit, purport and objects of the Bill of Rights. As a result, the failure of the crime of public violence to safeguard the rights on non-protesters means that the crime is failing to promote the spirit, purport and objects of the Bill of Rights. Of course, this is not a blank cheque for disregarding the importance of the right to freedom of assembly, but where necessary the right must be limited.

⁴³⁹ See *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC); *S v Mamabolo (Etv and Others intervening)* 2001 (3) SA 409 (CC). The courts' treatment of the right to freedom of assembly in these cases is consistent with that of Zimbabwe and Lesotho. In this regard, see *In Re Manhumeso and Others* 1995 (1) SA 551 (ZS); and *Seeiso v Minister of Home Affairs and Others* 1998 (6) BCLR 765 (LesCA). The substantive features of the assembly jurisprudence of both these jurisdictions are similar to that of South Africa – Woolman op cit (n335) 43-2.

⁴⁴⁰ See *Turell* 1973 (1) SA 248 (C); *Budlender* 1973 (1) SA 264 (C); *In Re Manhumeso* 1995 (1) SA 551 (ZS); and *Seeiso* 1998 (6) BCLR 765 (LesCA).

⁴⁴¹ 1999 (3) SA 752 (W). For a brief summary of this case, see above (n363).

⁴⁴² 2013 (1) SA 83 (CC).

4.3.3 Further arguments for and against development

To further enhance their call for development, the advocates for development would draw from the history of the crime of public violence outlined in chapter 2 and contend that the crime has always been evolving over the years through judicial interpretation and development. Although it could be argued that a major part of the evolution of the crime of public violence has been in regard to properly defining the crime and its elements, the facts giving rise to the charge of public violence have been emanating from instances of, *inter alia*, violent protests and strikes such that it could be argued that its evolution also entailed ensuring that the crime adequately deals with violent protests in society.

Also drawing from the history of the development of the crime of public violence, the advocates for development would argue that the development of common-law crimes never ceases as they are required to be flexible enough to evolve with the trends in society. Therefore, the rise in violent protests regenerates the need to continue to develop the crime of public violence so that it remains consistent with the changing social, moral and economic fabric of the country, failing which the crime will be unable to continuously reflect or promote the spirit, purport and objects of the Bill of Rights.

However, the advocates for the *status quo* would, in response to the above, argue that the best avenue for any reform of the law which is consistent with the principle of legality⁴⁴³ is through statute and not adaptation or development of the law by the courts. They would insist on this argument despite it being common cause that there are hardly any prospects of legislation being enacted to deal with the scourge of protest violence or the amendment of existing legislation.⁴⁴⁴

The difficulty with judicial development of the law, so the argument continues, is best illustrated by the case of *Masiya v Director of Public Prosecutions, Pretoria and Another*⁴⁴⁵ and the controversy it caused when the court arguably blurred the line between the permitted interpretation and development of common-law crimes (i.e the crime of rape) and the unacceptable extension of crimes by analogy. The general rule, as per the principle of legality, is that the courts are prohibited from creating new crimes or extending the existing definitions of crimes to include conduct not

⁴⁴³ On the principle of legality, see the discussion in 1.3 above.

⁴⁴⁴ Refer to the discussion in 2.8.2 above.

⁴⁴⁵ 2007 (5) SA 30 (CC).

previously covered by the definition of a particular crime⁴⁴⁶ as that would have the effect of that causing legal uncertainty.⁴⁴⁷

The *Masiya* case, so the advocates for development would counter-argue, illustrates that there is indeed a very thin line between interpretation and extension of crimes by analogy. However, for present purposes, the contemplated approach to developing the crime of public violence⁴⁴⁸ does not require the extension of the definition of the crime to cover new conduct not previously covered by the definition of the crime. The invasion of the rights of other people during violent protests has always been a form of behaviour punishable as public violence. The development of the crime only serves to ensure that it executes its task of protecting the rights of other people during violent protests effectively and thereby promote the spirit, purport and objects of the Bill of Rights. This way, the *Masiya* case is distinguishable and its controversies are forthwith avoided.

In any event, so the argument by the advocates for development continues, although there is a lot of debate on whether or not the *Masiya* case violates the principle of legality, that debate is rather academic because the effect of the decision of the court in *Masiya* is that it serves as authority for the view that the extension of the definition of the crime of rape in that particular case did not violate the principle of legality. Furthermore, the development of common-law crimes in this manner is not a new practice and the principle of legality has always been present. The same happened with the extension of the definition of the crime of theft to cover theft of credit.⁴⁴⁹ The same happened with the extension of the crime of defeating or obstructing the course of justice to cover the obstruction of the police in the execution of their duties and not just the courts.

The advocates for development would also draw from the courts' concession of the difficulty to precisely define the crime of public violence and the vagueness of some of its elements⁴⁵⁰ and argue that the concession is indicative of the need to develop the crime. Developing the crime of public violence, so the argument continues, would bring with it the advantage of eliminating the existing doubtful areas and fill whatever gaps there may be in the definition and elements of the crime.⁴⁵¹

⁴⁴⁶ Snyman op cit (n115) 678.

⁴⁴⁷ Ibid 680.

⁴⁴⁸ For a discussion as to how the crime of public violence stands to be developed, see 4.3.10 and 4.3.11 below.

⁴⁴⁹ Burchell op cit (n14) 41-42.

⁴⁵⁰ On this point, refer to the discussion in 2.6 above.

⁴⁵¹ CR Snyman 'Extending the scope of rape – a dangerous precedent: note' (2007) 124(4) *South African Law Journal* 677-678

Developing the crime as such would therefore ensure the overall effectiveness of the crime in curbing and deterring the acts of public violence as well as the invasion of the rights of others, and thereby aid the promotion of the spirit, purport and objects of the Bill of Rights.

In all of the above arguments, I have no reason to disagree with the advocates for development. Indeed, common-law crimes need to continuously evolve consistently with the trends in society. Given that the protection of the rights of non-protesters is an interest that has always been protected by the crime of public violence, the development of the crime to improve its overall effectiveness in achieving its intended purpose does not offend the principle of legality. Developing the crime of public violence does also have the advantage of eradicating whatever inconsistencies and doubts in the definition and elements of the crime.

The series of arguments in paragraphs 4.3.4 to 4.3.9 below have already been extensively discussed in 3.4.5 above under the analysis of the *Garvas*⁴⁵² case. It would thus be an unfruitful and undesirable exercise to repeat the detail in this section. Therefore, all that will appear in from paragraph 4.3.4 to 4.3.9 is a brief synopsis of the arguments and the consolidation thereof.

4.3.4 Is section 17 of the Constitution implicated in public violence cases?

The advocates for the *status quo*'s invocation of the right to freedom of assembly in opposing the development of the crime of public violence gives rise to the question as to whether in public violence cases the right to freedom of assembly provided for in section 17 of the Constitution is really implicated? It will be recalled that section 17 has its own internal modifiers to the effect that the right must be exercised peacefully and the participants must be unarmed.

To answer the above question, it is sufficient to state that, consistent with the decision in *Garvas*, in public violence cases the right to freedom of assembly is not likely to be implicated because at the time of the commission of the acts of public violence the offenders were clearly not exercising their right to freedom of assembly peacefully. Therefore they would forfeit the constitutional protection of their right to demonstrate, while the rest of the demonstrators who are peaceful in their behaviour and intention retain the constitutional protection of their right.

⁴⁵² 2013 (1) SA 83 (CC).

4.3.5 Chilling effect

It would seem that even upon the assumption that the right to freedom of assembly in section 17 of the Constitution is implicated in public violence cases, the development of the crime of public violence would not to have a chilling effect on the right to freedom of assembly. It has been stressed that, unlike the civil sanctions of the RGA, the crime of public violence does not have any cost implications for the organisers of demonstrations, nor does the crime inhibit organisations from organising demonstrations. Even on the subtle argument that the crime of public violence constitutes an “indirect limitation that merely makes it difficult to protest”,⁴⁵³ the argument is not sufficiently persuasive to justify the conclusion that the crime has a chilling effect on the right to freedom of assembly and thereby limits the said right.

4.3.6 Is the limitation justifiable in terms of section 36 of the Constitution?

Assuming once more that the crime of public violence did have a chilling effect on the exercise of the right to freedom of assembly, the implication would be that the right to freedom of assembly has been limited. The question then becomes whether the limitation is justifiable in terms of section 36 of the Constitution. Indeed, the consideration of the nature of the right, the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and the less restrictive means of achieving the purpose (all discussed at length in 3.4.5) leads to an unequivocal conclusion that the limitation of the right to freedom of assembly is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

4.3.7 Threat of rebellion

The advocates for the status *quo* would contend that any further limitation to the right to freedom of assembly is undesirable and could lead to the public withdrawing its consent to the social contract manifest in the Constitution.⁴⁵⁴ The immediate result would be rebellion, hence the loss of legal order and a total state of anarchy similar to that of the apartheid era. There is, however, considerable doubt that the threat of rebellion, violence and anarchy should the right to freedom of assembly be limited further by the development of the crime of public violence is a legally sound argument.

In fact, such an argument appears as a threat for holding the courts ransom so that they could arrive at a particular conclusion, failing which disorder would erupt.

⁴⁵³ See Bishop *op cit* (n368) 178.

⁴⁵⁴ See Woolman *op cit* (n398) 352.

Perhaps the argument should be that it is simply undesirable to limit the right to freedom of assembly any more than it is currently restricted. This may certainly be a factor worthy of consideration in determining whether or not the crime of public violence ought to be developed..

4.3.8 Stifling of dissent

The advocates for the *status quo* would also contend that the development of the crime of public violence exposes the country to the risk of the crime being abused by the authorities to stifle dissent. Indeed, there are a few isolated incidents which serve as proof of the abuse of the crime by the authorities.⁴⁵⁵ Such incidents are unfortunate and they must be condemned with an equal degree of disapproval as the invasion of the rights of other people during protests and strikes.

4.3.9 Criminal sanctions are not an ideal remedy for public violence

The advocates for the *status quo* would further contend that, given South Africa's apartheid history of undue detention of protesters and the need for the country to dispense with such a stigma, the lack of a political will to enforce criminal sanctions for public violence, the wide scope for the imposition of civil liability on organisers of demonstrations for riot damage in terms of section 11 of the RGA, and the emphasis on restorative justice methods in imposing punishment on offenders, resort to criminal sanctions is not an ideal remedy in public violence cases.

Despite there being hardly any authority to support this argument, the suggested alternative to criminal sanctions (i.e civil sanctions in terms of the common law or section 11 of the RGA) is not without its own flaws. For instance, not all victims of protest violence would have the financial means or the desire to pursue civil action against the organisers of demonstrations. Likewise, not all organisers or conveners of demonstrations or participants therein would have the financial means to pay the amount sought as damages.

It is also important that one must not blur the line between the criminal and civil law (the law of delict).⁴⁵⁶ While the interests these fields of law seek to protect might sometimes be identical or overlap, they are nonetheless different and the distinction must be maintained. Therefore, these must co-exist with one another, and where

⁴⁵⁵ See Dlamini op cit (n332) 98.

⁴⁵⁶ Refer to the discussion in 1.3 above.

necessary they can be relied upon simultaneously. The existence of one does not replace the other.

In closure, the consolidation of the arguments on the question whether the crime of public violence fails to promote the spirit, purport and objects of the Bill of Rights appears likely to lead to a conclusion in the affirmative. That means the crime of public violence requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights. The next stage of the inquiry enunciated in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*⁴⁵⁷ turns on how the development of the crime must take place.

- **How must the development take place?**

It must be highlighted that the ideal way to develop the law is indeed through legislation or the amendment of existing legislation. However, it has been established that this approach is highly unlikely to be pursued in the present case.⁴⁵⁸ Nevertheless, a perfectly suitable and legally recognised alternative remains and that is development or adaptation by the courts in the manner discussed below.

4.3.10 Interpretation of the elements of the crime

The advocates for development would argue that the discussion in chapter 2 shows that the crime of public violence has always been developed through the courts by means of revisiting and interpreting the elements of the crime bearing in mind the changing social, moral and economic fabric of society and the constraints imposed by the principle of legality. The same approach was endorsed in *K v Minister of Safety and Security*⁴⁵⁹ in regard to the development of the common-law principles of vicarious liability. The court held that, in essence, the purpose of section 39(2) of the Constitution is to ensure that the values of the Constitution are infused into the common law. It held further that the approach to infusing the values of the Constitution into the common law simply entails that the common-law principles be understood and applied within the normative framework of the Constitution.

The approach of the court in *S v Mlotshwa and Others*,⁴⁶⁰ although it was decided long before *K v Minister of Safety and Security*, is nonetheless a good example of how the courts have interpreted the common law with the view to instil certain

⁴⁵⁷ 2001 (4) SA 938 (CC).

⁴⁵⁸ Refer to the discussion in 2.8.2 above

⁴⁵⁹ 2005 (6) SA 419 (CC).

⁴⁶⁰ 1989 (4) SA 787 (W).

values. In *Mlotshwa* the court interpreted the “serious dimensions” element of the crime of public violence in a manner that afforded recognition and protection to the fundamental right to strike. The court had to apply the crime of public violence in strike situations so to punish and deter the violence, but at the same time it needed to accommodate the shift towards democracy and the recognition of basic human rights.

Today, South Africa confronts the increasing number of violent protests during which various rights of non-protesters are violated. In response thereto, the crime of public violence can be developed by approaching the interpretation of the elements of the crime bearing in mind the values of the Constitution as well as the purpose of the crime to protect the rights of other people during protests and strikes. This way the values of the Constitution (which emphasise the protection of the rights of non-protesters) are infused into the jurisprudence of the crime of public violence.

It stands to reason that the question as to which element needs to be revisited and interpreted differently will depend on the facts of each case. In the absence of such facts, it is difficult to identify which of the elements of the crime need to be interpreted differently. However, as discussed in 2.6 above, the “serious dimensions” element, despite being central to the determination of whether certain conduct amounts to the commission of the crime of public violence, remains a largely vague criterion. Given the vagueness thereof, the element places itself at the top of the list of the elements which may be interpreted differently and therefore be utilised as a conduit for infusing the values of the Constitution and the spirit of the protection of the rights of non-protesters into the jurisprudence of the crime of public violence.

4.3.11 Imposition of tougher sanctions

Another way of developing the crime of public violence, so the argument of the advocates for development continues, would be to revisit the sentences imposed on public violence offenders and ensure that they reflect the society’s condemnation of the violence. This has been a practice commonly called upon by the South African courts⁴⁶¹ and they have been doing so despite research evidence to the effect that there is no relation between the imposition of tougher sanctions and crime control or deterrence. However, what is required of each court exercising its sentencing

⁴⁶¹ See, *inter alia*, *S v Dingiswayo and Others* 1985 (3) SA 75 (Tk) and *S v Samaai* 1986 (4) SA 860 (C) wherein the courts adjusted the sentences to ensure that the punishment meted out for the crime deterred the youth of the time which was increasingly engaging in acts of public violence.

discretion is to take into account the crime, the offender and the interests of society (the Zinn triad).⁴⁶²

The flexibility to adjust sentences in public violence cases can be justified by the seriousness of the crime and the interests of society, mitigated by the personal circumstances of each offender. This is because the pattern of violent protests has notably been on the rise from the year 2004⁴⁶³ and it has escalated over the years to the extent that it has now become more and more invasive of the rights of other people. Logic would dictate that as public violence becomes more prevalent and destructive of the rights of others, the crime becomes more serious in the eyes of society and it also becomes more in the interests of society that the punishment for the crime be harsher.

It is difficult to conceive the basis on which the advocates for the *status quo* would oppose the infliction of harsher punishment for the perpetrators of public violence apart from questioning what the “harsher penalties” to be imposed on public violence offenders actually entail, whether these harsher penalties would achieve the intended purpose (i.e deterrence), and the cost of imposing such punishment (all of these factors being the philosophical arguments which the courts have shied away from).⁴⁶⁴ While the advocates for the *status quo* may by all means wish to protect their freedom to assemble against any restrictions or conditions, they would also respect other people’s rights and denounce the violence. As a result, they would not want to be seen to be interfering when the perpetrators of violence are punished for their deeds which are not consistent with the peaceful exercise of the freedom to assemble.

In the event that the call for harsher punishment is heeded, the question for the advocates for development thus becomes what kind of punishment would be sufficiently harsh for public violence offenders. The starting point would be to point out that in the *Dingiswayo*⁴⁶⁵ case the court ruled it to be no longer appropriate to impose a wholly suspended sentence or a fine in public violence cases. The norm is thus to sentence the offenders to some imprisonment term, suspended as the court deems appropriate. The precedent set in *Dingiswayo*, a case which was decided at the peak of the uprisings against the apartheid system during which public violence was rife, understandably disintegrated at the inception of democracy. The precedent

⁴⁶² For a discussion of the sentencing principles for the crime of public violence, see 2.7 above.

⁴⁶³ See 1.2.1 above.

⁴⁶⁴ See 2.7 above.

⁴⁶⁵ 1985 (3) SA 75 (Tk).

was hardly of any use between the year 1994 and 2004, the latter being the year in which statistics began to reflect an increasing trend of violent protests and strikes.

Now that the tides have changed and violent protests are a common phenomenon, the precedent in *Dingiswayo* is worthy of being considered. Adopting the same line of reasoning as in *Dingiswayo*, it is clear that the seriousness of the crime of public violence is such that it warrants that the offender serves at the very least some imprisonment term, no matter how short, but subject to the minimum imprisonment term permitted in law.⁴⁶⁶ A wholly suspended sentence or a fine is not desirable. The same reasoning can be applied in determining the portion of a prison term that should be suspended.

The next hurdle would be to give an indication of the imprisonment term that would be proportional to the seriousness of the crime of public violence and would serve the interests of society. If the *Whitehead*⁴⁶⁷ and *Le Roux*⁴⁶⁸ cases, being the most recent reported judgments on public violence, are anything to go by given the fact that these cases did not emanate from instances of violent protests, they provide a sentencing guideline for public violence in the region of five to six years imprisonment suspended as the court deems appropriate. However, such a sentence would be reserved for the extreme cases of public violence, such as those cases where one or more persons were killed or where there was severe damage to property.

Therefore, taking into account the importance of the right to freedom of assembly, its historical significance and its importance to the vulnerable and economically marginalised groups in society, the imposition of a prison sentence in the region of between the minimum four days permitted in law and five to six years (reserved for the most extreme cases of public violence), suspended as the court deems necessary, is apt for the expression of society's condemnation of the violence and for the protection of the rights of non-protesters. Anything above this range should be supported by extremely compelling facts.

The financial cost of sentencing public violence offenders as such is far outweighed by the benefit to society. The financial concern is also vitiated by the inevitably short

⁴⁶⁶ Section 284 of the Criminal Procedure Act 51 of 1977 prescribes a minimum imprisonment duration of at least four days unless the accused is sentenced to detention until the rising of the court. See also Terblanche op cit (n277) 218.

⁴⁶⁷ 2008 (1) SACR 431 (SCA).

⁴⁶⁸ 2010 (2) SACR 11 SCA.

imprisonment terms the court is likely to impose because certainly not all public violence cases would warrant a five to six year imprisonment term. Even in those extreme cases, the court is justified to suspend the sentence as it deems appropriate, thus reducing the time to be spent by the convicted offender in a prison facility. The possibility of the offender being granted parole before completing his or her prison term (which invariably would have been as short term) also vitiates the financial concern.

It is worth mentioning that even though the call may well be to meet the crime of public violence with nothing short of imprisonment, a major challenge confronting the crime is perhaps not so much the problem for the courts, but rather the National Prosecution Authority. That challenge is the issue of the paucity of successful prosecutions for public violence or even the reluctance to prosecute the crime. It is difficult to comprehend what informs the paucity of successful prosecutions or the prosecutorial reluctance in public violence cases.

Surely the difficulty of securing evidence which is sufficient to prove the commission of the crime beyond a reasonable doubt cannot be a factor in all cases. Many, if not all, public violence cases turn on the identification of the offender(s) and the rest of the testimony of the officer who witnessed the commission of public violence and perhaps even carried out the arrest of the offenders. That officer's evidence can be corroborated by other officers present at the scene. There is certainly no doubt that the police are also resourced with devices that can aid their identification of the offenders and their commission of violence, assaults, and damage to property.

The most likely conclusion any reasonable person would come to is that the prosecutorial reluctance in public violence cases is not informed just by the difficulty of proving the crime, but also the public outcry (given the plight of the protesters) as well as the lack of a political will to enforce the crime. Ignoring the public outcry and acting contrary to the popular views in communities would certainly not bode well for political parties at the elections.

Another major challenge for the advocates for development in calling for harsher sentences, so the advocates for the *status quo* would counter-argue, would be to convince society of the genuineness of such action and that it would not entail the abuse of the crime to stifle dissent. This is exacerbated by the fact that in cases where the courts emphasised the need for tougher sanctions for public violence, they

did so citing reasons which were largely based on sympathy for the state.⁴⁶⁹ The advocates for the *status quo* would argue that a sentence based on the sympathy for the government would be unfair and prejudicial to the offenders.

Perhaps it assists the advocates for development that from colonial times to date nothing seems to suggest that at some point the crime was applied inconsistently or fell to the mercy of government manipulation and abuse for purposes of stifling dissent. Even though the sentences handed down in some cases expressed sympathy for the government, the courts nevertheless did not blur the treatment and interpretation of the elements of the crime. Therefore, the sentencing framework can always be rectified because every judge exercises his or her discretion in sentencing.

To sum up, the crux of the argument advanced by the advocates for development is, in essence, a plea for the courts to look beyond the apartheid reminiscence of the undue suppression of the right to freedom of assembly and uphold the public violence laws where necessary. The *S v Thebus*⁴⁷⁰ case is instructive and exemplary in this regard. The Constitutional Court upheld the constitutionality of the much criticised and unpopular doctrine of common purpose because of its far-reaching consequences and its favour during apartheid. The court looked beyond the unpopularity of the doctrine and emphasised the need for the doctrine for crime control purposes even in the democratic dispensation.

Furthermore, as Reddi⁴⁷¹ points out, there is nothing wrong with the doctrine of common purpose *per se* except that its extension during apartheid was too wide. Likewise, there is nothing wrong with developing a new approach to interpreting the elements of the crime of public violence and toughen the sanctions thereof if that is done for a legitimate objective. Even legislation is amended from time to time with the view to increase the penalties and fines when necessary.

4.4 Conclusion

There is no doubt that the increasing number of violent service delivery protests and strikes are a pressing societal issue in South Africa. Solutions thereto are sought from various disciplines. Those in politics will talk of a political solution and those in the legal profession will advance a legal solution. To what extent the legal solution

⁴⁶⁹ See *Dingiswayo* 1985 (3) SA 75 (Tk) and *Samaai* 1986 (4) SA 860 (C).

⁴⁷⁰ 2003 (2) SACR 319 CC.

⁴⁷¹ Reddi op cit (n226) 65.

canvassed in this dissertation helps to eradicate the roots of the scourge of the violent service delivery protests and strikes is an entirely different matter.

The dissertation opens a debate on the viability of developing the crime of public violence as a legal remedy to the blatant disregard for the rights of non-protesters during violent protests and strikes. Engaging this topic also enables an assessment of the jurisprudential direction the South African courts are likely to take on the question of the development of the crime of public violence. An assessment of the academic views, arguments, opinions, case law and other authority in point indicates that South Africa's jurisprudence appears to be shifting away from the protection of the right to freedom of assembly especially in those situations where the rights of non-protesters were violated during the exercise of the right to gather and demonstrate.

Therefore, the courts are likely to uphold the constitutional validity of the criminal sanctions (which include the development of the crime of public violence) that seek to protect the rights of non-protesters or the victims of protest violence as they have done with the civil sanctions which served the same purpose. It follows that in light of the jurisprudential shift articulated above, the failure of the crime of public violence to adequately safeguard the rights of non-protesters renders the crime to fall short of the spirit, purport and objects of the Bill of Rights and therefore requires to be developed.

The development of the crime may be effected by way of interpreting the elements of the crime against the backdrop of the values of the Constitution and in the spirit of the purpose of the crime to adequately safeguard the rights on non-protesters. The vagueness or the flexibility of the 'serious dimensions' element in the definition of the crime of public violence can be used as a conduit through which the values of the Constitution may be infused into the jurisprudence of public violence.

Another approach to developing the crime entails revisiting the sentences imposed on public violence offenders in order to ensure that they reflect society's condemnation of the violence and the invasion of the rights of other people. In this regard, any other punishment short of imprisonment has been shown to be no longer apt for purposes of punishing public violence offenders.

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14 October 2015

Mr Khulekani Khumalo (209512054)
School of Law
Pietermaritzburg Campus

Dear Mr Khumalo,

Protocol reference number: HSS/1470/015M

Project title: Re-opening the debate on developing the crime of public violence in light of the violent protests and strikes

Full Approval – No Risk / Exempt Application

In response to your application received on 06 October 2015, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)

/ms

Cc Supervisor: Dr Shannon Hocter
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak / Ms Robynne Louw

Humanities & Social Sciences Research Ethics Committee

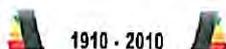
Dr Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snymam@ukzn.ac.za / mohunp@ukzn.ac.za

Website: www.ukzn.ac.za



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