

# Failing to respect and fulfil

## South African law and the right to protest for children

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*Despite the historical and ongoing importance of protest as a vehicle for children to express themselves, current laws fail to protect and enable children's participation in protest. More than two decades after the formal end of apartheid, a child may be subject to criminal processes for convening a peaceful, unarmed protest. This article highlights the importance of the right to protest for children and the obligation on the state to respect, protect and fulfil the right to protest, specifically taking into account children's interests. Through a description of the Mlungwana & Others vs The State and Others case, the article highlights the manner in which the criminalisation of peaceful protest by the Regulation of Gatherings Act fails to take into account the best interests of children and violates the right to protest.*

A crucial feature in the history of anti-colonial and anti-apartheid struggles in South Africa was the role of youth-led movements and protests. Organised youth protests against government policies date as far back as the early 1920s.<sup>1</sup> At its height, waves of iconic student protests in the mid-70s highlighted the role of young people in opposing apartheid policies.<sup>2</sup> By the same token, the repressive response of the state to youth protests, including mass arrests of children, laid bare the violence of the apartheid regime and became the focus of international condemnation.<sup>3</sup>

More than two decades after the formal end of apartheid, youth-led protests and youth participation in protests continue to play an important role in South Africa's political landscape. Young people have engaged in protest as a vehicle of expression over the past two decades in various contexts and through multiple modes. Whether spontaneous or organised, children use protest as a means to raise awareness and call attention to issues impacting their daily life. These can range from marches in urban centres<sup>4</sup> and pickets outside legislatures,<sup>5</sup> to creative forms of demonstration, including art and film.<sup>6</sup> Indeed, albeit contested, the national imagination has at times been captured by the symbolism of youth-led demonstrations. In 2016 iconic images were shared across the country of young women in school uniforms, arms crossed and held up,

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facing off against school officials and carrying slogans such as 'Fists Up, Fros Out'.<sup>7</sup> Through protests such as these, young people have given expression to broader sentiments around, among others, racial injustice and economic exclusion. While cautious of romanticisation, it is indisputable that children have shaped South Africa's political landscape through protest in profound ways, and continue to do so.

Despite the historical and current importance of protest as a vehicle for children to express themselves, the legal framework regulating protest fails to sufficiently respect, protect and enable children's participation in protest. Indeed, as will be argued here, the current legal framework unduly limits and chills the exercise of free assembly and political expression through draconian and inflexible measures, which are particularly burdensome for children. Before turning to the national legislation regulating protest, it is necessary to outline the importance of the right to protest for children and how it is recognised in the South African Constitution, as well as in international law.

### **Importance of protecting the right to protest for children**

Freedom of assembly is vital in democratic societies. The right to protest has been described – alongside the right to vote – as a route 'by which ideas can be promoted and debated'.<sup>8</sup> The Constitutional Court has specifically emphasised the role of freedom of assembly in enhancing the voice of the most vulnerable and powerless:

[T]he 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 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.<sup>9</sup>

For children, who are a particularly vulnerable group and not legally entitled to vote, protest becomes an even more significant avenue through which to participate and be heard in social and political life. It is thus important to emphasise that constitutional and international law protections of the right to protest and free expression are not the preserve of adults, but also extend to children.<sup>10</sup> Indeed, the paramountcy of the 'best interests of the child' in all matters concerning children is specifically required by the Constitution.<sup>11</sup> As explained by the Constitutional Court, the best interests of the child standard must be used to test laws or conduct that affect children.<sup>12</sup> In *S v M*,<sup>13</sup> Justice Albie Sachs put it such:

The comprehensive and emphatic language of section 28 indicates that **just as law enforcement must always be gender-sensitive, so must it always be child-sensitive**; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children.<sup>14</sup> (Emphasis added)

Consequently, laws or conduct that regulate the right to protest must also be child-sensitive and developed in a manner that protects and advances the interests of children. Furthermore, an important component of the best interests of the child principle is the recognition of the need to protect children's participation rights. In this regard, international law frameworks have highlighted the special obligation on states to ensure that the right of a child to be heard is respected, protected and fulfilled.<sup>15</sup> National legislation has also recognised the right of children to participate in matters concerning them.<sup>16</sup> As Daly notes, the evolution of children's participation rights has developed alongside broadened conceptions of citizenship, where

children are increasingly recognised as ‘the human beings they are in the present’ and not simply as ‘future adults’.<sup>17</sup> In relation to the right to protest, Daly argues that this necessitates that children ‘should be seen as a group with as much interest in protest as adults, but one with particular needs that must be met to allow them to exercise the right’.<sup>18</sup>

Despite the robust constitutional and international law protections for children’s right to participation, expression and protest, current laws in South Africa fail to adequately protect and enable the right to protest for children. As explained below, children holding an entirely peaceful protest may – under the current regulatory framework – be subject to criminal sanction.

### **South African law fails to respect and fulfil the right to protest of children**

The state has an obligation to respect, protect, promote and fulfil the exercise of the right to protest by all persons – including children.<sup>19</sup> This entails negative and positive obligations. The current legislative framework fails on both fronts.

The Regulation of Gatherings Act<sup>20</sup> regulates the exercise of the right to protest in South Africa. The Act affirms the right of everyone to peaceful assembly and protest, and puts in place procedures and mechanisms that are arguably aimed at facilitating the exercise of the right. These procedures are far from child-friendly. Navigating the difficult and intimidating bureaucracy of, among others, notification procedures<sup>21</sup> and meetings with officials<sup>22</sup> is straining for adults, let alone for children. Yet, there are no specific child-friendly provisions within the Gatherings Act that require officials to take into account the needs and best interests of children.

Moreover, not only does the legislative framework fail to provide for special measures in order

to positively protect the right to protest of children, but it is arguable that the overly broad provisions of the Gatherings Act, which criminalise peaceful protest unreasonably and unjustifiably, infringe the right to protest. In this regard, section 12 of the Gatherings Act creates an array of offences for breaching administrative requirements of the Act. These include, among others, criminal liability for failure to provide notice of a gathering;<sup>23</sup> failure to attend a meeting called by an official to negotiate the terms of a proposed protest;<sup>24</sup> and failure to notify relevant officials of the postponement or cancellation of a protest.<sup>25</sup> It bears emphasis that criminal liability is not only applicable when harm or the reasonable apprehension of harm has occurred. Rather, the pain of criminal sanction can attach for mere failure to comply with bureaucratic procedures, even where a gathering has taken place peacefully and without incident. This applies to adults and children. Consequently, more than two decades after the formal end of apartheid, a child may be subject to criminal processes for leading an entirely peaceful, unarmed protest.

The constitutionality of criminalising protest for the mere failure to meet administrative requirements is now being tested in South African courts. *Mlungwana & Others vs The State and Others* (case no. A431/15) (‘the SJC10 case’), which was heard by the Cape High Court in June 2017, is one such case. The appellants – members of the Cape Town based Social Justice Coalition (SJC) – convened a protest outside the offices of the mayor of Cape Town in 2013. The protest, which included activists chaining themselves to the railings outside the offices, was a deliberate act of civil disobedience.<sup>26</sup> It was common cause that the activists had chosen not to notify relevant officials of the intended protest and had initially intended for the protest to remain under 15 people.<sup>27</sup> It was also common cause that the protest remained non-violent.<sup>28</sup>

Nevertheless, during the course of the assembly the total number of participants increased to more than 15 persons, and consequently the activists were arrested. Ten individuals were ultimately convicted under section 12(1)(a) of the Gatherings Act, which stipulates that it is a criminal offence to convene a protest of more than 15 people without having given prior notice of the intended protest.<sup>29</sup> The appellants challenged the constitutionality of the offence, arguing that to the extent that compliance with the notification procedure is sought, less restrictive measures can be applied before resorting to criminalisation. The appellants noted that there are existing sanctions imposed by the Gatherings Act and common law that impose liability when actual harm is caused as a result of protest action. In addition, the appellants pointed to measures such as enhanced civil liability and administrative fines that could be imposed as an alternative to criminalisation.

In submissions made as a friend of the court, Equal Education (EE), a social movement composed primarily of high school learners called 'Equalisers', argued that the impact of criminalisation on children should be considered when testing the constitutionality of the relevant provisions.<sup>30</sup> EE emphasised that the offence created by the Act also makes children vulnerable to criminal justice processes when exercising their right to protest. Such a harsh approach, EE submitted, does not adequately take into account the position of children. As submitted by EE:

Understandably, children, such as the Equaliser members of EE, are unlikely to – by themselves – have access to resources and practical means to fulfil the written notice requirement. It is not unsurprising then for gatherings organised by or amongst children to fail to meet the notice requirement. These children face the threat of their conduct being criminalised

under the impugned provision and could be subjected to the criminal justice system.<sup>31</sup>

EE further noted that even though the Child Justice Act<sup>32</sup> does aim to establish a more child-sensitive regime for children in conflict with the law, this does not sufficiently counter the chilling effect of peaceful protest action being criminalised.<sup>33</sup> Categorised as a Schedule 2 offence under the Child Justice Act, alongside arson, housebreaking and assault with intent to do grievous bodily harm, a child is susceptible to arrest for contravening section 12(1)(a) of the Gatherings Act. Even though there is a possibility of diversion under the Act, this falls within prosecutorial discretion and is not guaranteed.<sup>34</sup> Where a diversion order is made, a register of the child's offence and the diversion order is maintained.<sup>35</sup> In cases where diversion is not granted, a criminal record may apply. Thus, even with the protections of the Child Justice Act, a child may be arrested, exposed to criminal justice processes, and obtain a criminal or diversion record for the mere failure to provide notice of a protest. As expressed in EE's submission:

It is striking that in our constitutional democracy, political expression of children in the form of a peaceful gathering can, for mere failure of meeting a procedural requirement, be considered as a criminal offence at all, let alone an offence within the same category of seriousness as arson and housebreaking.<sup>36</sup>

EE went on to highlight that the harsh penalty of criminalisation for exercising the right to protest sits uncomfortably with international law, which indicates that subjecting children to criminal justice processes should be a measure of last resort.<sup>37</sup> The Constitutional Court has confirmed that detention of children should be a measure of last resort<sup>38</sup> and has emphasised that children should be protected against avoidable trauma.<sup>39</sup> This is not merely academic. Reports of children threatened with arrest and forceful measures

while engaged in peaceful protest action are not uncommon.<sup>40</sup> Authorised by legislation to use the threat of criminal sanction when seeking to disperse a protest, officials and police who have not been trained otherwise rely on it – even when children are involved.

At the time of writing, judgment had yet to be handed down in the SJC10 case. The matter will ultimately require the attention of the Constitutional Court. The court's pronouncement will have significant implications for the exercise of the right to protest for all persons, including children.

## Conclusion

In light of the history of youth protest and struggle in South Africa, it is concerning that the protection of the right to protest for children, as a special interest group with particular needs, has not received considered attention. While the removal of criminal sanctions is an important step, further measures are required to properly protect and fulfil children's exercise of their right to protest. Such measures may include training officials and police in managing protests led by or involving children, so as to be respectful of their autonomy and rights but also protective of their particular needs and vulnerabilities. It may also include revised administrative requirements that are aimed at facilitating the right to protest for children, rather than serving as a barrier. For children's rights advocates, academics and legal practitioners, current challenges to legislation and practices present an important opportunity to highlight the perspective of children and to develop models for child-friendly frameworks, which may better serve our children – the future of our democracy.



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## Notes

- 1 South African History Online, Youth and the national liberation struggle, [http://www.sahistory.org.za/topic/youth-](http://www.sahistory.org.za/topic/youth-and-national-liberation-struggle-1894-1994)

[and-national-liberation-struggle-1894-1994](http://www.sahistory.org.za/topic/youth-and-national-liberation-struggle-1894-1994) (accessed 2 September 2017).

- 2 Ibid.
- 3 Ibid.
- 4 Ashraf Hendricks, Philippi High students demand promised new schools, *News24*, 6 March 2017, <http://www.news24.com/SouthAfrica/News/philippi-high-students-demand-promised-new-school-20170306> (accessed 25 September 2017).
- 5 Mxolisi Mngadi, Equal Education pickets outside Eastern Cape legislature over bad state of schools, *News24*, 8 June 2017, <http://www.news24.com/SouthAfrica/News/equal-education-pickets-outside-eastern-cape-legislature-over-bad-state-of-schools-20170608> (accessed 27 September 2017).
- 6 Equal Education, KZN Education MEC and security officials embarrassed by EE members peacefully calling for scholar transport, Press Statement, 12 July 2017, <https://equaleducation.org.za/2017/07/12/media-statement-kzn-mec-security-officials-embarrassed-call-police-to-disperse-lawful-gathering/> (accessed 25 September 2017).
- 7 Greg Nicholson, Pretoria Girls High: a protest against sacrificed cultures and identities, *Daily Maverick*, 30 August 2016, <https://www.dailymaverick.co.za/article/2016-08-30-pretoria-girls-high-a-protest-against-sacrificed-cultures-and-identities/#.WcyEsmiCy00> (accessed 27 September 2017); *Mail & Guardian*, Sans Souci Girls High School pupils protest against discriminatory code of conduct, 1 September 2016, <https://mg.co.za/article/2016-09-01-sans-souci-girls-high-school-pupils-protest-against-discriminatory-code-of-conduct> (accessed 27 September 2017).
- 8 Aoife Daly, Demonstrating positive obligations: children's rights and peaceful protest in international law, *The George Washington International Law Review*, 45:4, 2013, 763–813, 770.
- 9 *South African Transport and Allied Workers Union and Another v Garvas and Others* (Freedom of Expression Institute as Amicus Curiae) [2012] ZACC 13, para 61.
- 10 Constitution of the Republic of South Africa 1996 (Act 108 of 1996), section 17 provides that '[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions', while section 16 provides that '[e]veryone has the right to freedom of expression'. section 19(1) protects the freedom of all citizens to 'make political choices', including the right to join or form a political party. These protections extend to all persons, including children. The right of children to freedom of assembly and association is specifically recognised in Office of the High Commissioner (OHCHR), Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989 (UNCRC), Article 15, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 27 September 2017); African Commission on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (African Charter), Article 8, <http://www.achpr.org/instruments/child/> (accessed 17 September 2017); and African Union Commission, African Youth Charter, Article 5, [http://www.un.org/en/africa/osaa/pdf/au/african\\_youth\\_charter\\_2006.pdf](http://www.un.org/en/africa/osaa/pdf/au/african_youth_charter_2006.pdf) (accessed 28 October 2017). Similarly, the right of children to freedom of expression is specifically recognised under Article

- 13 of the UNCRC; Article 7 of the African Charter, and Article 4 of the African Youth Charter.
- 11 Section 28(2) of the Constitution provides: 'A child's best interests are of paramount importance in every matter concerning the child.' Under international law, Article 3(1) of the United Nations Committee on the Rights of the Child (UNCRC) provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' See also UNCRC, General Comment 14, Right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14 29 May 2013.
  - 12 *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, para 69.
  - 13 *S v M* (Centre for Child Law as Amicus Curiae) [2007] ZACC 18.
  - 14 *Ibid.*, para 15.
  - 15 Article 12 of the UNCRC provides: 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.' The UNCRC has explained the evolution of the concept of children's participation rights as follows: 'A widespread practice has emerged in recent years, which has been broadly conceptualized as "participation", although this term itself does not appear in the text of Article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.' See UNCRC, General Comment 12, Right of the child to be heard, CRC/C/GC/12 1 July 2009, para 3, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> (accessed 27 September 2017).
  - 16 The Children's Act 2005 (Act 38 of 2005), section 10 provides 'every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration'. For more on the right of children to participation, see Lucy Jamieson, Children's rights to participate in social dialogue, in Lucy Jamieson et al. (eds), *South African child gauge 2010/2011*, Cape Town: Children's Institute, University of Cape Town, 30.
  - 17 Daly, Demonstrating positive obligations, 775. See also Jeremy Roche, Children: rights, participation and citizenship, *Childhood*, 6:4, 1999, 475.
  - 18 *Ibid.*
  - 19 Section 7(2) of the Constitution provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
  - 20 Regulation of Gatherings Act 1993 (Act 205 of 1993).
  - 21 *Ibid.*, section 3 prescribes that a convener of a gathering give notice of an intended gathering within particular timeframes.
  - 22 *Ibid.*, section 4 provides for meetings to be held with the convener of a protest, along with relevant officials, to negotiate the conditions under which a protest may be held.
  - 23 *Ibid.*, section 12(1)(a).
  - 24 *Ibid.*, section 12(1)(b).
  - 25 *Ibid.*, section 12(1)(h).
  - 26 Social Justice Coalition, The 'SJC10': civil disobedience and challenging apartheid laws, <http://www.sjc.org.za/sjc10> (accessed 25 September 2017).
  - 27 *Mlungwana & Others vs The State and Others* (case no. A431/15), Appellant's Heads of Argument, 9–10, [https://d3n8a8pro7vnm.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1497432388/2016-12-13\\_SJC\\_Heads\\_%28FINAL%29.pdf?1497432388](https://d3n8a8pro7vnm.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1497432388/2016-12-13_SJC_Heads_%28FINAL%29.pdf?1497432388) (accessed 27 September 2017).
  - 28 *Ibid.*, 11.
  - 29 Gatherings Act, section 12(1)(a), read together with section 3 and the definition of 'gathering' in section 1.
  - 30 *Mlungwana & Others vs The State and Others* (case no. A431/15), Equal Education's Heads of Argument, [https://eelawcentre.org.za/wp-content/uploads/2017/04/equal\\_education\\_heads-of-argument\\_final.pdf](https://eelawcentre.org.za/wp-content/uploads/2017/04/equal_education_heads-of-argument_final.pdf) (accessed 27 September 2017).
  - 31 *Ibid.*, para 32.
  - 32 Child Justice Act 2008 (Act 75 of 2008).
  - 33 *Mlungwana & Others*, Equal Education's Heads of Argument, para 35–56.
  - 34 Child Justice Act, section 52(2) provides that a prosecutor may in the case of a Schedule 2 offence indicate that a matter may be diverted. The Constitutional Court has emphasised that 'the mere existence of a prosecutorial discretion creates the spectre of prosecution, which undermines adolescents' rights' (See *Mlungwana & Others*, Equal Education's Heads of Argument, para 94, citing *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, para 76).
  - 35 Child Justice Act, section 60. Section 60(3) does provide that '[a]ccess to the register must be limited, as prescribed, to persons or organisations requiring the information for the purposes set out in [section 60(2)]'.
  - 36 *Mlungwana & Others*, Equal Education's Heads of Argument, para 41.
  - 37 *Ibid.*, para 90. Article 37(b) of the UNCRC provides: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'
  - 38 *Mpofu and Others* (CCT 124/11) [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC) (6 June 2013), para 1.
  - 39 *S v M* [2007] ZACC 18, para 19.
  - 40 *Mlungwana & Others vs The State and Others* (case no. A431/15), Equal Education's Heads of Argument, [https://eelawcentre.org.za/wp-content/uploads/2017/04/equal\\_education\\_heads-of-argument\\_final.pdf](https://eelawcentre.org.za/wp-content/uploads/2017/04/equal_education_heads-of-argument_final.pdf) (accessed 27 September 2017).