

Exercising the right to protest

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The International Covenant on Civil and Political Rights (ICCPR) recognises the right to peaceful assembly in Article 21:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals”

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EXERCISING THE RIGHT TO PROTEST

Legislative framework Section 17 of the Constitution of South Africa, 1996 states that '[e]veryone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'.

The Regulation of Gatherings Act 205 of 1993 ("RGA") is the legislation that gives effect to this constitutional right. The RGA provides for a notification procedure for anyone who wishes to hold a gathering of 15 or more people.

The conveners of a gathering would need to give notice to the relevant authorities of their intent to hold a gathering. The notice should be given at least seven days prior to the gathering. If this is not possible, it should be given at the earliest opportunity.

If the notice is given less than 48 hours before the proposed protest, the local authority may prohibit the march without providing reasons. The convener of the protest must be called to a meeting with SAPS and the local authorities within 24 hours of providing notice, if this does not happen, the protest may proceed as intended in the notice provided.

Trends observed around protest action in South Africa

Despite the right being a constitutionally protected right and available to all, the right is being restricted in South Africa, with many people not being able to voice their concerns and participate in the political space. In the period from 1 October 2016 until 30 September 2017, Right 2 Protest coalition that we are part of, received a total of 820 cases through its hotline and secured legal assistance for approximately 547 arrested people and assisted approximately 981 people. Of those, 430 arrests related to protests on and around university campuses and the remaining 117 were related to community protests. Of these, about half came from community organisations in Gauteng, while the remainder came from predominantly rural areas of South Africa or on the outskirts of urban centres. Many of the community protests were related to service delivery, lack of public participatory processes, lack of basic services, housing allocation, unemployment and corruption.

Reflections on the state of protest in South Africa for the period over the past few years

R2P as a coalition has observed through its hotline and the cases that it has worked on that the right to protest is being stifled in South Africa. The space for dissent is shrinking. Despite the right being constitutionally recognised and there being an enabling legislation to this right, the application of the legislation is manipulated around the country and applied inconsistently.

It is arguable that perceptions and the narrative around the protester feed into how administrators apply the legislation. The protester is often viewed as a criminal that is lazy and just wishes to create destruction and disruption. This is disheartening as protest is considered to be a working class right.

It is unmediated and one of the most effective methods of ensuring accountability. The majority of South Africa's working class is poor and black. Protest is often the only tool for the working class to participate in the political space and have their voices heard as government institutions have weakened and their grievances often fall on deaf ears. Administrators often abuse the vulnerable position of the working class protester and



overwhelm them with legalese and procedure as well as intimidate them at the section four meeting.

It is vital that progressive lawyers and civil society organisations such as the organisations in the R2P network ensure the effective and consistent application of RGA across the country and help all people in South Africa exercise their right to protest.

The RGA compares relatively well internationally in terms complying with the international human rights law to freedom of peaceful assembly, however there are several shortcomings to the Act, particularly around its notification procedure.

At present the procedure is overly bureaucratic and is intimidating and complex for the indigent protester. Further, protesters often have to give notice to the very same municipalities that they are protesting against. In light of the vulnerable position of the protester, a lot of abuse occurs around the notification process.

The work of R2P since its existence has aimed to educate the protester and assist them with these complex procedures involved in exercising their right to protest. The establishment of R2P and its hotline provides protesters with a resource to utilize for advice and assistance with protest laws and the notification procedure. Further, R2P has conducted workshops with various communities where they were informed of their rights and the laws around protest.

R2P also provides educational material in English and IsiZulu that are available on the R2P website and also distributed during workshops. R2P has also provided protesters with the security of being afforded legal assistance for legal proceedings arising out of protest actions. The abuse of the notification procedure and the criminal conviction that results out of failing to comply with this procedure is being challenged in the South African courts currently.

PROTEST IS...

Free Speech & Public Participation

- The right to assemble peacefully applies to all individuals and groups, unregistered associations, legal entities and corporate bodies. Any discrimination based on grounds such as “race”, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited.
- The right to assemble peacefully in order to protest, demonstrate, celebrate, commemorate and generally to collectively communicate one’s views to the authorities and other citizens rests at the core of functioning democratic systems
- The right to freedom of peaceful assembly is included in all the major international human rights instruments including:
 - a) Article 20 of the Universal Declaration of Human Rights (1948);
 - b) Article 21 of the International Covenant on Civil and Political Rights (1966);
 - c) Article 11 of the European Convention on Human Rights and Fundamental Freedoms (1950); and
 - d) Article 15 of the UN Convention on the Rights of the Child (1989).

- It is closely related to other cornerstones of democracy and pluralism, such as freedom of expression and freedom of association.
- The right to freedom of peaceful assembly is enshrined in a number of international human rights instruments and is guaranteed in the South African constitution

Types of Assemblies:

There are diverse forms of public gatherings that are covered by the right to peaceful assembly. These include meetings, rallies, pickets, demonstrations, marches, processions, parades and flash mobs. Peaceful Assembly: An assembly should be deemed peaceful if the organizers have professed peaceful intentions and the conduct of the participants is non-violent. Peaceful intention and conduct should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence. The term “peaceful” should be interpreted to include expressive conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties

Spontaneous Assembly:

This is an assembly that takes place in response to an incident or event, making it impossible to comply with the formal legal requirements for advance notification and/or where there is no formal organizer. Such assemblies occur around the time of the triggering event, and the ability to hold them is important because delay imposed by the notice process would weaken or prevent effective expression of the message. While the term “spontaneous” does not preclude the existence of an organizer of an assembly, spontaneous assemblies may also include gatherings with no identifiable organizer. Such assemblies may occur when a group of people gathers at a particular location with no prior advertising or invitation. Spontaneous Assembly: This is an assembly that takes place in response to an incident or event, making it impossible to comply with the formal legal requirements for advance notification and/or where there is no formal organizer. Such assemblies occur around the time of the triggering event, and the ability to hold them is important because delay imposed by the notice process would weaken or prevent effective expression of the message. While the term “spontaneous” does not preclude the existence of an organizer of an assembly, spontaneous assemblies may also include gatherings with no identifiable organizer. Such assemblies may occur when a group of people gathers at a particular location with no prior advertising or invitation.

Simultaneous Assembly:

Where notification is provided for two or more unrelated assemblies at the same place and time both should be facilitated as far as possible. The prohibition of an assembly solely on the basis that it is due to take place at the same time and location as another assembly will likely be a disproportionate response if both can be reasonably accommodated. The principle of non-discrimination requires, further, that assemblies in comparable circumstances do not face differential levels of restriction. This is an example of where dialogue between the police and organizers can help to mitigate risk and resolve problems at an early stage of planning. If it is not possible to facilitate both assemblies at the same time, then the assembly for which notification was provided first should be allowed to take place as intended, while the other assembly should be facilitated in a nearby location or at another time suitable to the organizers.

Counter-Demonstration:

This is a particular form of simultaneous assembly in which participants wish to express their opposition to the views expressed at another assembly. Emphasis should be placed on the state's duty to protect and facilitate each event where a counter-demonstration occurs. The state should make available adequate policing resources to facilitate such simultaneous assemblies, to the extent possible, within sight and sound of one another. However, it should be noted that the right to counter-demonstrate does not extend to inhibiting the right of others to assemble. There may be circumstances where the authorities may legitimately restrict the right of counter-demonstrators to protest within sight and sound of the assembly they are protesting against in order to protect the other assembly

Violence and Assemblies

- The right to assemble is a right to peaceful assembly. But, it should be reiterated that the violent actions of a small number of people should be differentiated from the peaceful behaviour of others and should not remove the right of those who remain peaceful to continue to assemble.
- If individuals or small groups of people engage in acts of physical violence during an assembly, the police should always ensure that their response is proportionate and focuses on those who are engaged in violent behaviour rather than directed at the participants in the assembly more generally. This is true whether the violence is directed against the police, individuals, property, people within the assembly or those perceived to be in opposition.
- The police should always remain aware that any use of force towards participants in an assembly may generate an angry or aggressive response from participants, which would only serve to escalate the situation. For this reason the intention and planned action of the police should be communicated openly. The use of force, whenever possible, should be preceded by adequate prior warning.

Police should always be vigilant for potential aggression against members of particular groups within assemblies because of their gender, age, disability, ethnicity, faith, nationality or sexual orientation in order to ensure that all participants are able to exercise their right to peaceful assembly.

Restricting Assemblies

In terms of the RGA, a protest may only be lawfully prohibited when credible information on oath is brought to the attention of the responsible officer that the proposed gathering will result in serious disruption of vehicular or pedestrian traffic; injury to participants in the protest or other persons; or extensive damage to property and that SAPS or traffic officers will not be able to contain this threat.

- The responsibility of the state to protect and facilitate the right to freedom of peaceful assembly does not mean that peaceful assemblies cannot be limited, or reasonably regulated in lawful ways due to concerns for national security or public safety, public order, public health or the protection of the rights and freedoms of others.
- However, any such restrictions must be necessary, and proportionate. In other words, the restrictions must be narrowly tailored to address a pressing social need
- “No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedom of others.

- A presumption in favour of assemblies: As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation. Anything not expressly forbidden by law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so. A presumption in favour of this freedom should be clearly and explicitly established in law
- The positive obligation to facilitate and protect peaceful assembly: The state should put in place adequate mechanisms and procedures to ensure that the freedom of peaceful assembly is practically enjoyed and not subject to undue bureaucratic regulation. In particular, the state should always seek to facilitate and protect public assemblies at the organizers' preferred time, location and manner, and should also ensure that efforts to disseminate information to publicize forthcoming assemblies are not impeded.

What are the challenges to the realization of this right?

- Facilitating the right to freedom of peaceful assembly can prove challenging for the authorities.
- It is particularly challenging for the police, who will have the primary responsibility to enable an assembly to take place while also ensuring that the rights and freedoms of other people are not disproportionately impeded and that the public order is maintained.
- Freedom of peaceful assembly is a fundamental human right, enshrined in a number of international human rights instruments
- It provides the foundation of a democratic society, enabling everyone to publicly express views that may be dissenting and unpopular

Police brutality, intimidation and arrests

Police presence during protests has often been aggressive. In fact, heavy handed police conduct has been noted as an escalator for conflict in protest situations which are then characterised as “violent”. The use of force by police officials during protests is often not proportional to any threat.

The United Nations Committee in 2016 expressed concern over the disproportionate use of force by police officials when monitoring public protests in South Africa. The police have also been observed using various underhanded tactics to target protesters and activists. Activists complained of being harassed and their movements monitored by the police

In addition to the excessive use of force by police officials during protests, there have also been numerous cases of protesters targeted by the police and arrested in an apparent attempt to stifle the protest. In recent times, we have observed a trend whereby the criminal justice system is abused or manipulated to intimidate or unfairly punish protesters. The police often use the criminal justice system to criminalise protesters for exercising their right to protest. This is often done by arresting protesters for frivolous and unfounded charges of public violence; illegal protesting even though they have met the requirements of the RGA; attending an illegal gathering (which is not a criminal offence) and trespassing. The leaders of protests are usually targeted. This is strategically done in order to stifle the protest and the cause of the protesters. The aim is to keep protesters behind bars for as long as possible to intimidate and frustrate them, and let their cause lose momentum. As a result, the bail procedures are often manipulated and abused by the criminal justice system.

The leaders of the protest are usually targeted with the most common charge being public violence. The charges are very often dropped after a few months of postponements and frustration on the part of the protesters.

Misapplication of the RGA by local municipalities

We have also observed that the RGA is not applied correctly and consistently by municipal officials. This has been a worrying constant feature across different municipalities in the country.

In order to legally gather and protest, most protesters try to comply with the RGA by providing notice to their local municipality or police station.

However, the notification procedure is conflated with a permission seeking procedure, and municipalities have different practices that they occasionally claim to be “by-laws” (although we often find these to be informal unlawful practices rather than a law) and requirements that make the notification procedure in terms of the RGA difficult.

There is suspicion that the misapplication of protest laws is done deliberately to curb dissent and stifle protests. These practices or “by-laws” can range from having to pay a fee to protest; ensuring the entity or person against whom you are protesting against will accept your memorandum, to a complete deviation from the RGA provisions.

These laws undermine the right to protest and make it extremely difficult for protesters to exercise their constitutional right. R2P has further observed that some municipalities are eager to deny protests. In order to comply with the RGA, the protest is often denied on the basis that the relevant official states that ‘there is credible information on oath that there will be severe traffic disruption or threat of violence’.

It is unfortunate that the RGA does not provide for a counter-affidavit procedure to disprove the allegations of the official.

What is the state’s role and responsibilities in ensuring the right to assemble?

- States have an obligation to respect, protect and fulfil this right.
- The right to peaceful assembly is only guaranteed as long as the assembly remains peaceful
- Unlawful but peaceful assemblies, when an organizer or individuals may fail to comply with a legal requirement, enjoy the same level of protection as all peaceful assemblies.

Roles and responsibilities of the Police

- The role of police in facilitating assemblies is paramount. Being the most visible manifestation of government authority, the police demonstrate a state’s commitment to upholding the rule of law and protecting fundamental human rights and freedoms.
- The police must facilitate all peaceful assemblies, including spontaneous and simultaneous assemblies and counter-demonstrations, and protect participants in assemblies, allowing them to express their views freely within sight and sound of the intended audience.

What we need the police to understand

- Police mentality in approaching the policing of assemblies, from looking at assemblies as potentially dangerous events to recognizing assemblies as manifestations of an important human right that the police must respect and protect.
- The majority of assemblies are, in fact, peaceful and do not present particular public order challenges. However, it is crucial for police to be well prepared and trained to prevent any conflicts related to assemblies, as well as to de-escalate tensions should they arise

In considering if restrictions should be placed on an assembly, the Guidelines have set out the following key principles that should be taken into account by police organizations

A presumption in favour of assemblies:

- As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation.
- Anything not expressly forbidden by law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so.
- A presumption in favour of this freedom should be clearly and explicitly established in law.

The positive obligation to facilitate and protect peaceful assembly:

- The state should put in place adequate mechanisms and procedures to ensure that the freedom of peaceful assembly is practically enjoyed and not subject to undue bureaucratic regulation.
- In particular, the state should always seek to facilitate and protect public assemblies at the organizers' preferred time, location and manner, and should also ensure that efforts to disseminate information to publicize forthcoming assemblies are not impeded.

Legality:

- Any restrictions must have a formal basis in law and be in conformity with international human rights instruments. Well-implemented legislation is vital in framing the discretion afforded to the authorities.
- Any law must be compatible with international human rights standards and be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, as well as the likely consequences of any such breaches.
- Furthermore, the relevant authorities must ensure that any restrictions imposed during an event are in full conformity with the law and consistent with established jurisprudence.
- Finally, the imposition an assembly of sanctions and penalties that are not prescribed by law is not permitted

Proportionality:

- Any restrictions imposed on the time, place or manner of an assembly must be proportionate. The least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference.
- The principle of proportionality requires that authorities not impose restrictions that would fundamentally alter the character of an event, such as relocating assemblies to less central areas of a city or preventing the assembly from taking place within sight and sound of its target audience.

Necessity:

- Any restrictions imposed on the exercise of the right to freedom of assembly in a democratic society must be necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

- The necessity test requires evidence of a “pressing social need” for restricting freedom of assembly in specific circumstances.

Notification:

- It is not necessary under international human rights law for domestic legislation to require advance notification of an assembly. Indeed, in an open society, many types of assembly do not warrant any form of official regulation.
- Prior notification should, therefore, only be required where its purpose is to enable the state to put in place the necessary arrangements to facilitate freedom of assembly and to protect public order, public safety, public health or morals and the rights and freedoms of others.
- Any such legal provision should require the organizers of an assembly to submit a notice of intent rather than a request for permission.
- The notification process should neither be onerous or bureaucratic and the period of notice should not be unnecessarily lengthy. Rather the notification period should be imposed to allow:
 - a) Adequate time for the relevant authorities to make the necessary plans and preparations to satisfy their positive obligations; and
 - b) Time for an appeal to, and ruling by, a court should any imposed restrictions be challenged.
- If the authorities do not promptly raise any objections to a notification, the organizers of an assembly should be able to assume that they may proceed with their proposed activities according to the terms presented in their notification and without restriction.
- Restrictions should generally not be placed on the content of the message that an assembly is trying to communicate, to guarantee freedom of expression.
- Police may have to react to instances of speech that constitute incitement to discrimination, hostility or violence.
- However, police officers must differentiate between those who use such speech and other participants of the assembly whose right to peaceful assembly cannot be unduly restricted. At the same time, especially during a large scale operation or particularly controversial events, the decision to act should follow a command structure and the relevant plans should be laid out beforehand, rather than each officer acting individually.
- Police should develop the plan to address such situations and in particular, to know who has the authority to take decisions about intervention, and what texts or slogans will require action. In some countries, public prosecutors will be involved in setting the limits in this respect.
- The time, place and manner of individual public assemblies may, however, be regulated to prevent them from unreasonably interfering with the rights and freedoms of other people.
- This reflects the need for a proper balance to be struck between the rights of persons to express their views by means of assembly and the interest of not imposing unnecessary burdens on the rights of non-participants.
- Where there are legitimate reasons to impose restrictions on an assembly then the authorities should then ensure that those restrictions are the minimum necessary and that a suitable alternative time or place that is acceptable to the organizers is made available. Any alternative must be such that the message that the assembly seeks to convey is still capable of being effectively communicated to those to whom it is directed, in other words, within sight and sound of the target audience.

Prohibiting or banning an assembly

An assembly should only be banned in exceptional circumstances. This may include:

- a) a situation where there is a significant and real threat of crime or public disorder, an imminent threat to national security or where the aim of the assembly is to incite hatred or violence, intimidate or threaten others or to deliberately deny others the right to exercise their legitimate rights.
- b) the fact that an assembly is likely to face a violent counter-protest, or even to be directly attacked by dissenting people, should not, as a matter of principle, lead to the prohibition of the peaceful assembly.
- c) in that case, it is the responsibility of the police to protect the peaceful assembly against the attacks or the violence of counter-protesters

A blanket prohibition of all assemblies at a certain location or for a specific period of time is likely to be a disproportionate restriction on the right to peaceful assembly. If an assembly is banned or restricted there should be a right to appeal or challenge the decision.



Costs relating to exercising the right to protest/assemble

- The costs of providing adequate security and safety (including policing and traffic management operations) should be fully covered by the public authorities.
- The state must not levy any financial charge for providing adequate policing.
- Organizers of non-commercial public assemblies should not be required to obtain public-liability insurance for their event.

2

KEY PRINCIPLES IN POLICING ASSEMBLIES/PROTESTS

2.1 A human rights-based approach:

This should form the basis for all contemporary policing, including the policing of public assemblies. This entails recognizing that the police have a responsibility to take reasonable and appropriate measures to enable people to exercise their rights, that they should not unduly interfere when people seek to do so, and that they should always act in an impartial manner.

Democratic Policing:

A criterion of democratic policing is that police serve the public, not the state. The manner in which this should be done should be collaborative (rather than adversarial) and transparent (accessible and open). Democratic policing is also inclusive, involving civilians and others. A further feature is accountability

A number of basic principles that should underpin all forms of policing and that provide the foundational framework for the approach to policing assemblies:

- Democratic policing is orientated towards the service of society rather than the state (or the groups in power)
- is protected from undue political interference
- is adequately and securely funded
- has personnel who are representative of the communities they serve
- has skilled professional members who can perform effectively and efficiently across the organisation
- has governance and management structures that ensure integrity and support democracy
- has members who are treated respectfully and rewarded equitably
- protects democratic rights, including freedom of speech, movement and participation
- provides safety and security
- is characterised by the way in which police conduct themselves
- is characterised by the extent to which members of the organisation enjoy the same rights and privileges as ordinary members of society
- is accountable through multiple mechanisms enacted through law
- is watched and supervised by elected politicians, civil, criminal and administrative courts, the media, and independent ombudsmen and civilian complaint review boards.

a) Pursuing objectives of democratic policing:

The police are the most visible manifestation of government authority with their main duties being to maintain law and order, protect and respect fundamental rights and freedoms, prevent and combat crime, and provide assistance and services to the public.

b) Upholding the rule of law:

The police must operate in accordance with domestic law and the international law enforcement standards accepted by the OSCE participating States, and demonstrate commitment to the rule of law in practice

c) Police ethics and human rights:

In order to live up to the public's trust, the police must adhere to a code of professional conduct and demonstrate professionalism and integrity. The protection and preservation of life must be their highest priority.

d) Police accountability and transparency:

Democratic policing requires that the police be, and consider themselves to be, accountable to the citizens, their representatives, the state and the law.

Their activities, including the behaviour of individual police officers, the strategies for police operations, appointment procedures and budget management, must be open to scrutiny by a variety of oversight institutions.

Furthermore, a central feature of democratic policing is the understanding that the consent of the people is required.

Prerequisites for gaining public support are providing transparency in police operations; and cultivating communication and mutual understanding with the public the police serve and protect.

e) Police organization and management issues:

States are obliged to create a structural and managerial environment that will enable the police to effectively and efficiently implement the provisions of the rule of law, domestic and international law, and accepted human rights standards.

This includes the chain of command, regulations on supervision, the composition of the police, the rights of police personnel and the provision of adequate resources and training.

These basic principles apply to all forms of democratic policing and, in particular, to the policing of public assemblies, which can be a complex and challenging task.

Assemblies can vary widely in their scale, their manner, the number of participants and the levels of contention they may generate.

Assemblies may cause disruption to daily routines and thus may have a negative impact on the ability of other people to exercise their rights.

The police may, therefore, have to balance competing claims from different groups and individuals.

2.2 Understanding Participant Behaviour

Basic knowledge of participant behaviour provides important background to the way in which assemblies may be policed.

This understanding provides the basis on which all further actions should be based, including planning, enforcement and debriefing.

It is important for police to be familiar with the different types of group behaviour, to recognize these groups within the larger assembly, to differentiate between various groups of people and their behaviour, and to deal with each behaviour appropriately, rather than to view the whole assembly in the same way.

Inside a group an individual's behaviour can change both for the better and for the worse during an assembly.

There are many factors that can have an impact and these may include:

- The behaviour of people around the individual;
- An individual's personal beliefs and standards;
- A perception of being held accountable for one's actions;
- A perception of what an individual believes is acceptable behaviour;
- The mood of the individual (angry, happy, frustrated, fear or anxiety); and
- The use of alcohol and/or drugs.

With so many different factors impacting behaviour it is not surprising that participants do not behave the same way all the time. Some people may try to ensure that participants remain peaceful and adhere to the law; some may encourage civil disobedience, while some may urge confrontation, or even violence

There may be pockets of disorder or unruly behaviour while the vast majority of the people continue to behave in a totally orderly fashion and may not be engaged in anything other than peaceful assembly.

The starting point for police should always be the proactive policing of order rather than the reactive policing of disorder.

The relevant police commander will need to continuously monitor the situation to assess the dynamics of the assembly, onlookers and, where necessary, counter-demonstrators, so that they can best manage the situation to ensure that peaceful order is maintained.

This may mean that the police need to be flexible in relation to any legal restrictions placed on an assembly and to minor infractions of the law.

An approach that is too rigid to both may increase tension and provoke more hostile or aggressive responses from participants.

Even in situations where some voices promote confrontation or violence the police should be able to counter such influences if they remain aware of the differentiation among participants, draw upon their knowledge of the range of groups and individuals who are present, maintain a positive relationship with people and act with discretion and tolerance.

2.3 Principles for Policing Assemblies

Four key principles for policing an assembly/gathering/protest. These should guide police organizations in addressing the challenges and should underpin their approach to any assembly:



I. *Knowledge:*

- Knowledge of the various groups that are part of an assembly is an essential prerequisite. It is important to be aware of their norms, values, intentions and goals, their sense of what is right and proper, stereotyping and expectations in relation to other groups, their history (including previous assemblies they have organized) and other elements that have a special symbolic meaning.
- Such knowledge enables the police to understand the interests and goals of the groups and to be able to facilitate their legitimate goals. This knowledge also gives awareness of what kind of police action may be perceived as offensive or provocative by a group and may lead to conflict.

- Information gathering by the police before an operation should be focused on developing and increasing knowledge of the groups that are expected to participate in the assembly and their motivations, together with information on individuals who may be considered a source of risk (criminal intelligence work).

II. *Facilitation:*

- Police strategies should primarily seek to facilitate the efforts of organizers and participants in a peaceful assembly to achieve their legitimate objectives.
- The underlying premise is to assume that most people who are part of an assembly will have peaceful intentions. The police need to identify participants' intentions in order to consider how they can be achieved
- By making it easier for them to achieve their goals the police can not only avoid violence, but also get support from participants in order to reduce the potential for disorder and be able to respond effectively to any disturbances that may occur

- This presupposes that there is information that enables the police to understand the priorities of the groups and to use police approaches and tactics that enable the groups to achieve their legitimate goals. Experience and research show that restrictions and controlling measures are not enough to maintain order.
- If there is a risk of unrest or violence, it is particularly important to clarify and inform organizers and participants why restrictions are necessary and to suggest alternative ways for participants to achieve their goals.

III. Mediation and or communication as well as

- The policy of “no surprises” should guide communication between police and organizers, as well as other stakeholders, to establish and maintain trust throughout all stages of an assembly and, as such, is a key preventative and de-escalation tactic.
- The police should actively communicate in order to create relationships with participants in an event and provide a foundation for future conflict prevention. Experience shows the importance of respectful and calm police communication with participants in an assembly in order to avoid the creation, or the escalation, of conflicts.
- Communication should take place during all phases of an operation and is of particular importance when tension begins to rise. If restrictions have to be imposed, it is important to inform people about the reasons – not least to avoid misunderstandings – and to suggest alternatives.
- Police should use different ways to convey the police intentions, such as: talking directly to participants and organizers of the assembly, the use of portable speakers and special car speakers and the use of media, including social media.
- Non-verbal communication, i.e., the way the police behave and appear, the uniforms they wear and the equipment they may carry or display are also important and convey messages to participants and people in the wider environment.
- In multi-ethnic societies it is important that the police have the ability to convey messages in different languages.

IV. Differentiation

- An important risk factor during assemblies is the danger of regarding and treating all participants in a group as if they were the same and, also, potentially dangerous.
- There are many examples of how conflicts have arisen and tensions have escalated when the police have intervened in an indiscriminate manner.
- A group of people is never homogeneous from the beginning, but may begin to behave as such if they are treated as a single entity. It is therefore important to know what groupings there are at an assembly and the different ways in which they may act and react.
- If one individual initiates a conflict, it is important that the police reaction to this does not lead to others being drawn into the conflict.
- By identifying individuals in a group and being able to quickly isolate those that may disturb the public order from those that remain peaceful, the police may gain respect for their actions and support for their work from a broad range of participants.
- It is important to realize that assemblies can consist of many different groups, with differing agendas and goals, and with different opinions about the police.

These four principles should be utilized and applied by police commanders at all stages of planning, preparation, implementation and debriefing of operations to ensure that assemblies occur in a peaceful manner.

The principles should also be drawn upon and applied by police officers at all levels in the policing of assemblies.

2.4 Outcomes

Self-policing:

Research has shown that the application of the above principles can help participants at an assembly develop a more positive view of the police. This happens because the participants perceive that the police are fair in facilitating the enjoyment of their rights.

Participants at an assembly may then take responsibility for intervening with individuals who may breach the peace and, thus, may contribute to the assembly taking place in the desired manner.

When the participants themselves take this responsibility, a “we versus them” relationship between the police and the assembly is avoided and trusting co-operation may be established.

3 GENERAL APPLICATION OF THE PRINCIPLES

The right to assemble peacefully applies to everyone, and the police have a responsibility to facilitate the right to assembly for all groups in society so that everyone can participate in a diverse range of expressive activities in public spaces.

3.1 Diversity and Equality:

- The nature of the assembly or the makeup of the participants may mean that there are some people who require specific consideration in the course of exercising their fundamental right to assemble peacefully
- Ensuring an assembly can take place in a safe and peaceful environment means that the police should have knowledge of the range of likely participants, should give special consideration as to how the expressive activities of different groups will be facilitated, that will require appropriate means of communication before, during and the assembly, and that all officers involved in the policing of an assembly are able to differentiate between groups and individuals.

Children

Article 15 of the UN Convention on the Rights of the Child requires “State Parties to recognize the right of children to organize and participate in peaceful assemblies”. However, due to their smaller size, children may be more vulnerable in certain assembly contexts, and the police should take this into consideration when considering their operational options.

Lesbian, Gay, Bi-sexual, Transgender, Intersex (LGBTI)

LGBTI individuals have the same human rights and fundamental freedoms as anybody else, including the freedoms of assembly and expression. LGBTI individuals still have to endure vociferous and violent opposition to their public presence on many occasions and in many countries.

The police will need to provide sufficient resources to facilitate their assemblies, as they would any other group, and ensure the safety of participants.

Women

Under Article 3 of the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW), state parties are obliged to take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”

While women should not be considered a vulnerable group per se, there have been occasions when women have been isolated and attacked or sexually assaulted by criminals within assemblies. Police must be alert to this and be ready to protect them. Women are not a minority, but a numerical majority.

However, unless their needs are specifically considered, it is likely that the perception and arrangements of police will be based on an assumption that a majority of male participants will take part in assemblies. Therefore it is essential that police give due regard to the needs of women.

Persons with disabilities

The UN Convention on the Rights of Persons with Disabilities emphasizes the need to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities...” and to ensure their full and effective participation in society on an equal basis with others, and in particular to the rights to freedom of expression and to participation in political, public and cultural life.

The presence of persons with disabilities in an assembly should be taken into account during police planning and facilitation of the assembly

Use of Force as the Last Resort

One frequent concern is that assemblies will lead to forms of disruption and that the gathering of large groups of people in public space may result in disorder or violence. In fact, the vast majority of public assemblies pass off peacefully with limited disruption to daily routines, and this likelihood can be enhanced if the police pay attention to four principles.

- If the police have good quality **knowledge** of the aims and intentions of the organizers, adopt an approach to facilitate assemblies, **communicate** this intention to the organizers, participants and others within the community, and always seek to **differentiate** between the various participants, then the risks of and opportunities for disorder will be reduced.
- The starting point for police in policing assemblies should always be facilitation, which may be achieved through dialogue, negotiation and other forms of communication. In spite of this, in some circumstances the police may need to use force. Any use of force by police should always be an exception rather than the norm.

- Preference should always be given to exploring the peaceful de-escalation of tensions through dialogue, persuasion and negotiation and mediation as alternative to the use of force.
- On occasion, the police may consider it necessary to use force to deal with violent behaviour. The use of force should always be proportionate and the minimum necessary to restore order. Any use of force or escalation of deployment should be quickly followed by de-escalation of force as soon as the situation is resolved.
- If the police decide there is a need to use force, they should always bear in mind the diversity of participants and should differentiate between different groups within the assembly.
- Force should not be used against peaceful participants in an assembly, nor should it be used to disperse a peaceful assembly even if the assembly is unlawful or is causing an unreasonable, but not dangerous, level of disruption to the lives of others.
- Police should always take into consideration the potential risk of escalation with even worse consequences when opting to use force. The intention to use of force should always be communicated and explained prior to taking action, so as to generate transparency and maintain trust.
- Any use of force against a person may have serious consequences. Wherever possible, force should not be used against children or those who are elderly or disabled, but if it is unavoidable, the level of force should be proportionate for the circumstances
- In some contexts the police may need to use force to protect those participating in an assembly if they are faced by hostile or aggressive counter demonstrations. In such contexts, the police should seek to differentiate between the aggressors and the targets of the aggression, and remember that they have a responsibility to protect the rights of those exercising their right to peaceful assembly
- The **United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted in 1990**, outline the general principles governing the use of force that should apply to all police officers. The Basic Principles emphasize that use of force should always be a last resort, rather than the norm, and that whenever force is used must be proportionate and aim to respect human life.
- Before considering any use of force in connection with an assembly, police should first consider its necessity. If the same objective can be achieved by peaceful means, then force should not be used.
- Secondly, where force is used, **consideration should also be given to its proportionality to achieve the legitimate policing objective.**
- Where force is used in conjunction with an assembly, then the police command team (at strategic, operational and tactical levels) must be able to explain to the public what policing objective they were trying to achieve, such as facilitation, restriction, containment or dispersal, and why that was the most appropriate option under the circumstances.
- It is also imperative that communication and dialogue exist throughout the duration of the planning process and the facilitation of the assembly between the command levels, especially if use of force is considered **unlawful orders must be opposed.**
- Firearms should generally not be used in the context of assemblies except in self-defence or defence of others, against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives
- In any event, intentional lethal use of firearms should only happen when strictly unavoidable in order to protect life.
- Where the use of the firearms becomes unavoidable, as a rule, a warning must be issued. Firing indiscriminately into a violent crowd is never a legitimate or acceptable method of dispersing it.

- It is, therefore, crucial that only officers who are suitably trained be deployed in dealing with assemblies. Their training should be effective and verified to ensure that it is human rights compliant. There should always be effective command structures in place to prevent overreaction by police or misuse of force.
- Any use of force must be recorded by the officer concerned and procedures should be in place to assure that use of force is promptly reported to a supervisor as soon as practicable.
- Where it is believed or alleged that such use of force is unlawful, then a full investigation into the circumstances must take place



Police and the Media

One of the principles of democratic policing relates to accountability and transparency and highlights the need for the police to be accountable to citizens and their representatives, as well as to the state and the law. One of the principles of democratic policing relates to accountability and transparency and highlights the need for the police to be accountable to citizens and their representatives, as well as to the state and the law.

One way in which the police may be held accountable in the policing of public assemblies is through the work of the media and through their ability to report, record, analyse and interrogate police actions and motivations.

- Engaging with the media is also an important means of **communication** with the wider public and can serve as a means of sharing information about the police intentions to **facilitate** an assembly to the general public and to participants, and of the ways they intend to ensure that the assembly occurs peacefully.
- The police must always recognize the **rights** of journalists to attend and **report** on public assemblies. The police have a positive **obligation** to **facilitate** the rights of journalists at such events and a negative obligation not to **obstruct** or **prevent** the work of the media.
- It is in the interest of police to facilitate the work of journalists at assemblies: when journalists receive easy **access** to the event, the chances are higher that the **reporting** regarding the role of the police in handling of the event will be in a more positive tone. It also generates trust between journalists and police.

Handling the Media during Political Demonstrations: sets out expectations for the interactions between police and journalists at public assemblies:

1. Law-enforcement officials have a constitutional responsibility not to prevent or obstruct the work of journalists during public demonstrations. Journalists have a right to expect fair and restrained treatment by the police; and
2. Senior officials responsible for police conduct have a duty to ensure that officers are adequately trained about the role and function of journalists and particularly their role during a demonstration. In the event of an overreaction from the police, the issue of police behaviour vis-à-vis journalists should be dealt with separately, regardless of whether the demonstration was sanctioned or not.

3. Adequate response from senior police officials is necessary to ensure that such an over-reaction is not repeated in the future and should send a strong signal that such behaviour will not be tolerated. Individuals have the right to publicly photograph or otherwise record actions and activities at assemblies, as they are public events that take place in open public space. This includes the actions of the police in carrying out their duties. The principles of legality should be observed, taking into account that some states prohibit this by law. Police officers must, therefore, always be aware that they may be digitally recorded or photographed at an assembly. All police officers should behave as if their actions are being broadcast live and should be trained and briefed not to over-react when they are subjected to media attention.
 4. Wilful attempts to confiscate, damage or break journalists' equipment in an attempt to silence reporting is a criminal offence, and those responsible should be held accountable under the law. Confiscation by the authorities of printed material, footage, sound clips or other reportage is an act of direct censorship and, as such, is a practice prohibited by international standards. The role, function, responsibilities and rights of the media should be integral to the training curriculum for law-enforcers whose duties include crowd management.
- Any attempts to limit or restrict the rights of media personnel, to interfere, damage or confiscate their equipment may, thus, be interpreted as breaches of an individual's human rights and of the fundamental principles of democratic policing



4

RECOMMENDATIONS

Protest is an important and essential right in any democracy. The South African Constitution does recognise the importance of this right in our democracy and has the legal mechanisms in place to ensure that it can be exercised. However the law is not being applied consistently and other legal mechanisms such as interdicts are being used to stifle protest. In concluding, the following recommendations are suggested to remedy the situation and ensure the Right 2 Protest is being respected and protected:

We recommend to SAPS and municipalities that:

There needs to be a more consistent application of the RGA throughout the country. Municipalities and police officials cannot use their own unlawful practices to override the RGA and undermine the right to protest. We further recommend that policing around protest needs to be urgently demilitarised in line with the recommendations of the Farlam Commission. Police officials are very often aggressive and heavy handed in policing protests. The police presence often creates a fearful and apprehensive atmosphere to the protest.

One of our other major concern is over the trend of police officials identifying, targeting and at times criminalizing protest leaders. These protest leaders are often arrested after the protest in their homes or place of employment, and the charges against them in many cases are frivolous and unfounded.

Further recommendations to civil society and progressive lawyers that:

There needs to be a stronger network of progressive lawyering to challenge municipalities that act outside the ambit of the law to stifle protest. Progressive lawyers also need to push back with greater force against the private sector that uses the law to stifle protests. Further, through different coalitions of those intended to protect the Right 2 Protest, there needs to be a greater reach to raise awareness among more communities and protesters on their rights and the laws around protest to ensure they can assert their rights. There is a need more progressive lawyering outside the urban centres of South Africa, where a lot of abuse around protest laws and procedures occurs and usually goes unnoticed.

Grassroots organizations and Civil Society Organization should invest in communications and raising awareness of the hotline service, especially outside of campuses and outside of Gauteng and the Western Cape. In its first year, R2P was predominantly used to coordinate legal support after protesters had been arrested. R2P could reduce the strain on legal support capacity by making clients aware of the hotline services before protests take place, to increase the opportunities for legal advice and interventions that may help protests go ahead without clampdowns or arrests