

YOUR RIGHTS: THE GATHERINGS ACT, ARRESTS and COURT PROCESSES

This booklet on the law related to protest actions is designed for activists unfamiliar with legal vocabulary and processes.

The first section aims to give giving activists basic knowledge on any gatherings that can be seen as a form of protest, contestation or criticism in a public space. Anyone who plans to organize any kind of protest should make sure he or she understands the rules explained here. This section is presented in the form of questions and answers to help you to understand as clearly as possible.

The second section aims to give activists information on certain rights guaranteed by the South African Constitution, especially the rights of assembly and expression as well as the rights of arrested or accused persons. It also explains the limitations government can put on these guarantees and how to act during a possible arrest. Further, it gives a basic explanation of court processes that may follow an arrest and what to do in that situation.

Disclaimer: this booklet is provided for informational purpose and is not, in any way, an attempt to offer or give legal assistance. It is not all-inclusive and should be read as a guideline. Its authors accept no liability for any errors or activities that may result from a particular understanding of its contents. Statements may be based on an undeveloped jurisprudence and changes to the law may occur after publication.

SECTION 1: THE GATHERINGS ACT

1. What is the Gatherings Act?

The Gatherings Act is the South African law that regulates matters associated with gatherings that express any form of contest or criticism in a public space such as a street, a park, the steps of a building etc. This contest, protest or criticism may be directed at any individual, institution or issue, for example, a government minister, a private company, a government department etc. Basically, the Gatherings Act is a manual that explains in detail exactly what must be done, and how, in order for a gathering to be considered legal by the authorities.

2. What is a gathering?

In normal everyday terms a gathering is a meeting of two or more for any purpose whatsoever, for example, a march, a meeting, a wedding, a party etc.

However, in terms of the Gatherings Act, the word “gathering” has a different and specific meaning. The Act says that a gathering is a march, picket, or parade of

more than 15 people taking place in a public space, such as a street, park or on the steps of a building etc. Further, the Act says a gathering is understood as an activity that expresses any form of contestation or is critical towards whomsoever, whether it is, for example, a person, a company or government body. A gathering requires prior notification to the relevant local authority.

A march, picket, or parade of **15 people or less** requires **no notification**.

3. Who is the convener?

The convener is the person who is officially in charge of a gathering, and who is responsible for asking permission from the local authority.

The convener is the person appointed by an organization to obtain permission to gather from the local authority on behalf of that organization.

4. What is the role of the convener?

The convener is responsible for notifying the relevant local authority of the proposed gathering and being the contact person for the organization.

The process of notifying the authority of the gathering is as follows:

- Firstly, the convener fills in the notice form and gives it to the local authority. When the authority does not have a notice form to be filled in, the convener must create and complete a notice form on his/her own and give it to the authority.
- Secondly, the convener must take part in the negotiations at any meeting that may be called by a representative of the local authority.

5. What if the convener appointed by the organization is not playing his/her role in a given situation?

The person or the organization applying for a gathering must also appoint a deputy convener. The role of the deputy convener is to replace the convener when necessary. For example, if the convener is unable to attend a meeting called by a local authority, the deputy convener will then be called to attend it.

6. What is a notice?

A notice is a form or a document that is signed by the convener and which contains the details of the gathering, the details of the convener, and, when it applies, the details of the organization. This signed and completed document is handed to the local authority to get permission to hold the gathering. See attached example.

7. What kind of information must be put in a notice?

Where the local authority provides the notice form, the convener only needs to fill out the form with the required information. The information requested on the form that needs to be filled in to obtain permission to hold a gathering anywhere in South Africa is listed below. Where the local authority does not provide such a form, the convener must create a document that is similar to this by writing down all the questions below and completing the answers. In both cases the convener must sign the form.

The contents of a notice form:

- 1) The name, address and telephone and facsimile numbers of the convener and his deputy. The name of the organization or branch thereof on whose behalf the gathering is being organized, or if it is not so organized, a statement that the gathering is organized by the convener.
- 2) The purpose of the gathering.
- 3) The time, duration and date of the gathering.
- 4) The place where the gathering will be held.
- 5) The anticipated number of participants.
- 6) The proposed number and, where possible, the names of the marshals who will be appointed by the convener.
- 7) The manner in which the marshals will be distinguished from other participants.
- 8) In the case of a gathering that will take the form of a procession (march):
 - a. The exact and complete route of the procession.
 - b. The time when and the place at which participants in the procession will assemble, and the time when and the place at which the procession will start.
 - c. The time when and the place where the procession and the participants will disperse.
 - d. The manner in which the participants will be transported, both to the place of assembly and from the point of dispersal.
 - e. The number and types of vehicles involved in the procession, if any.
- 9) If notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given earlier.

7. To whom must the notice to be sent?

The notice must be sent to the responsible officer, either by hand or fax. The responsible officer is the person appointed by the local authority to deal with matters associated with gatherings and he/she has the authority to permit a gathering.

8. When must the notice be handed to the local authority?

The notice must reach the responsible officer 7 days before the planned gathering. When it is not possible to send the notice 7 days in advance, the convener may still send the notice to the responsible officer, but must include in the notice the reason why it was not sent on time.

When the notice is sent within 48 hours of the gathering, the responsible officer may prohibit the gathering without reasons.

9. What can the convener expect after sending the notice?

The convener can expect to be invited to a meeting by the responsible officer. This meeting will be attended by the following:

- The convener or, if he/she cannot make it, the deputy convener.
- The responsible officer.
- A representative of the police.
- Any other officer concerned.

The purpose of the meeting is to discuss any possible changes to the gathering as it is planned and described in the notice. The responsible officer or the police representative may want the gatherers to follow another route than the one described in the notice for security or other reasons.

If an agreement is reached at a meeting, the gathering may proceed in accordance with the notice as it has been changed. If no agreement is reached, the responsible officer may impose on the convener any reasonable changes to the conditions under which the gathering was planned to proceed by imposing any further conditions required for the gathering to take place. The officer must give written reasons to justify his/her decision.

10. What happens if the responsible officer does not call a meeting?

If the convener is not called to a meeting within 24 hours of sending the notice, the gathering is automatically legal and can proceed without any further formalities under the conditions described in the notice.

11. Can the responsible officer prohibit the gathering?

Yes, the responsible officer may prohibit the gathering, but he/she must first meet the convener. Secondly, the responsible officer must give written reasons justifying the prohibition. Thirdly, to justify the prohibition of the gathering, the officer must be convinced that one of the following will take place and that it will not be for the police to prevent these:

- The gathering will result in serious disruption of traffic.
- The gathering will result in injury to participants gathering or other persons.
- The gathering will result in extensive damage to property.

12. What happens if the gathering is prohibited?

If the gathering takes place despite the prohibition, it will be treated as illegal. Any person attending a prohibited gathering is committing an offence.

However a gathering should be prohibited only in exceptional cases. If you have any reason to believe your gathering should *not* have been prohibited, you may approach a Magistrate or High Court (preferably the High Court) and ask the magistrate or judge to give declare the prohibition illegal and give permission for the gathering to go ahead. You don't need a lawyer for this. Just go to the judge with your story written down in an affidavit and you should win your case.

SECTION TWO: THE GUARANTEED RIGHTS

1. Protesters and the Bill of Rights

The South African Constitution, which is the highest law of the country, contains a Bill of Rights that protects fundamental human rights and freedoms. This section deals with some of those rights and freedoms. First, however, it should be noted that, **in theory**, protesters are entitled to assert their fundamental rights and freedoms and as such, they can demand that state agents, e.g. police officers, respect these rights and freedoms. In **practice**, however, protesters who insist heavily on their rights and freedoms are subject to even more repressive actions from police officers.

2. Right to political protest

The right to political protest is protected by the Constitution. Section 17 of the Bill of Rights provides for rights to conduct peaceful and unarmed activities such as assembly, demonstrations, pickets and petitions. Political protest also involves imparting related information, and this right is guaranteed by the section regarding freedom of expression (Section 16 of the Bill of Rights).

Although the right to political protest is protected by the Constitution, this right may be limited by **principle**. Activists must remember that none of the fundamental rights and freedoms guaranteed by the Bill of Rights are absolute. The Constitution gives government the power to limit these rights. Section 36 of the Bill, however, says the limitation of fundamental rights or freedoms must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

However, there is no real certainty about what **is** a reasonable and justifiable limitation in an open and democratic society. It is for the court to decide whether or nor a particular state action limiting a right or freedom is reasonable and justifiable. For example, the court must decide if the broad power given to a local authority by the Gathering Acts is reasonable and justifiable.

The Constitution gives some guidelines to decide on these matters (Section 36 of the Bill), but more importantly, the result depends mainly on the circumstances of the case and on the judges responsible for assessing them. As an example though, a regulation prohibiting protest in all central business districts of the country, from 5pm to 6pm, would probably be seen as an unjustifiable limitation of the right to protest.

3. Rights of arrested, detained and accused persons

Section 35 of the Bill of Rights contains the constitutional rights of arrested, detained and accused persons. These rights include:

- The right to keep silent and not to be forced to make a confession.
- The right to be taken to court within two days of arrest, excluding weekends and holidays.
- The right to be released, either on warning or on bail.
- The right to be given a lawyer paid for by the government.
- The right to be kept in proper conditions and to be given something to read and medical treatment.
- The right to speak to and be visited by your husband, wife, family, religious counselor and your own doctor.
- The right to be presumed innocent.
- The right to be brought before a court within 48 hours after arrest.

The next section tries to put these rights into context.

3.1 Before the arrest

At any kind of protest, you may have to deal with the police, especially if there are large numbers of protesters. If you are approached by police officer who asks you questions during a protest, the best response is to ask him/her whether you are free to go. Then:

- 1) If the officer avoids the question, politely repeat it until he/she answers.
- 2) If the police officer tells you are free to walk or turn away. Do not run, it may be reasonable for the police to pursue you.
- 3) If the officer replies that you are not free to go, then you are either detained or arrested. The police often detain or arrest activists that they know.

3.2 Detention

Detention is the brief period in custody where the police investigate and decide whether there is enough proof to arrest you. In **theory** police must show reasonable suspicion that you have committed an infraction momentarily in detention. In detention you may be searched. They cannot search you without your consent – so, if the police want to search you, you can say no. Further, only an officer of the same sex as you can search you.

During detention, the police will ask your name and address. They have no right to request any other information, e.g. about comrades, your activities or organizations. Remember you have the right to remain silent and not to be forced to make a confession. Beware that anything you say can be used against you and comrades in a court of law.

3.3 Arrest

A detention often turns into an arrest, particularly if you answer additional questions. Once arrested you are required to tell the police your home address. No matter what they may say to you, police officers cannot request further information on you, your activities or organizations you are involved with. Police officers are professionals in the art of interrogation and will use every trick they know to get you to reveal the further information on your activities and friends and use that information against you and them. Police methods range from being nice to you and promising you special treatment, to intimidation and threats to scare you into submission. Again, remember you have the right to remain silent and not to be forced to make a confession. You should remain silent as anything you say can be used against you and your comrades in a court of law.

The purpose of the arrest is to take you in custody to be brought before the court as soon as possible. Never resist a police officer when being arrested. Be aware that police are allowed to exert reasonable force to arrest you.

During a protest, arrests are made without a warrant. The main goal of the police is to remove as many people from the scene as possible to suppress the voice of dissent.

You can be arrested if a police officer sees you commit an offence or has probable cause to believe you were involved in the commission of a crime.

If you are arrested, the police must tell you what you are charged with. In practice, they do not always do this. Further, after arresting you, the police can search you. For example, the police are allowed to search your clothes and body and go through your bag.

3.4 Legal steps following the arrest

a. Transport to the police or processing centre

The transport may be by squad car or police van, depending on the number of persons arrested at the same time. If it is a group arrest, do not talk about the event or anything sensitive to other arrestees because the police car, van, bus or centre could be bugged. Remain completely silent as anything said could be used against you in court.

b. The identification process

You are required to give your name and address. A police officer will take fingerprints and photographs.

c. Holding cell

You may be put in jail before you are booked. Police officers often try to confuse and exhaust you to make you talk. Contrary to the common belief, you do not have the right to immediately make a phone call or see a lawyer.

d. Interrogation

Interrogation is usually just a conversation that occurs in the police car or when booked. It may also take place in an interrogation room. If arrested, never answer the police's questions, besides your names and address. Just say: "I am going to remain silent".

Here are some lies police officers may tell you to try and make you speak:

- "You are not a suspect, just help us, what happened?"

If you were not a suspect, you would not be arrested, the mere fact that you are arrested means you are suspected of having broken the laws.

- "If you do not answer my questions we will charge you with resisting arrest."

They can't charge you with resisting arrest when you are already arrested. Above all you have the protected right to remain silent.

- "All your friends cooperated and were freed. You're the only one left."

Even if they were released, being released does not mean that you are freed of charges.

e. For minor offences, eg trespassing and malicious injury to property, 'police bail' can be granted. In this case, you can agree with the investigating officer that you pay a certain amount of bail, to be confirmed at the official bail hearing in court.

3.5 First appearances in court

These are three distinct hearings that are usually lumped together, but which may be separated.

a. Appointment of lawyer. You have the right to a public defender (free lawyer) only at the stage of plea and trial, not for your bail application.

b. Arraignment. This is the first step of a criminal prosecution. You are brought before the court to hear the charges against you (for example mischief...). The charges are made by the prosecutor, who is deemed to represent South Africa during criminal proceedings. After hearing the charges, you will enter a plea, either guilty, not guilty, or no contest.

Guilty: To plead guilty is to admit to the wrongs with which you are charged. Usually arrested people do not plead guilty in their first court appearance.

There are reasons for this: Many people are arrested unlawfully (without having broken the law). Even if you did break the law, the prosecutor must prove beyond reasonable doubt that you committed the offence as charged, you do not have to prove that you did not commit the crime. You can enter into a plea bargain with the prosecutor (where you agree on a certain sentence) in exchange for pleading guilty.

- c. Release hearing\bail hearing: Firstly, the court must decide whether to hold you until the trial. If the court releases you, it may release you on recognizance. That means the court trusts you enough to return, asking you to deposit a sum of money to secure your trial. The court may also release you on bail that is security for a future appearance. Actually, bail is money paid to the court, which they keep if you do not show up at court for all hearings until the case is completed. If you have a previous conviction or if the charge is serious (e.g. Murder), the bail hearing will be postponed for at least a week in order for you to prepare a formal written bail application and for the State to further investigate whether to recommend bail. If you are not represented by a lawyer at your bail application, you should motivate why you are not a flight risk or a danger to other witnesses/society and therefore should be granted bail (which is not granted automatically). You should state (if applicable):
- no previous convictions
 - your fixed residential address
 - fixed employment
 - personal circumstances (age, dependents, income)
 - your character

3.7 Sentencing

In the event of a plea bargain, the judge ratifies the sentence agreed to by the prosecutor and you. A plea bargain is a negotiated agreement between the prosecutor and you whereby you agree to plead guilty. The offences to which you plead guilty are less than those with which you were charged and the sentence is less than the one you were at risk of getting if found guilty of the first charge.

If you are found guilty, you must plead in mitigation of sentence. The following factors are considered:

- Remorse (pleaded guilty, co-operated with the police, made a confession)
- Personal circumstances (age, dependents, income)
- no previous convictions
- drunkenness/provocation/peer pressure

3.8 Release

You may be released by the police. You may be released on citation, which means the police will ask you to sign a citation, which is, in this context, an undertaking to appear in court at a given date or at a date to be determined. For a minor offence, you may be released on bail. In this case, a police officer will ask you to pay a standard bail. Make sure you get a receipt signed by the police

officer receiving the money. You may be also be released if the police decide to drop the charges.

