Toolkit on the right to Freedom of Association and Assembly
The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.

South African Transport and Allied Workers Union and Another v Jacqueline Garvas and Others, (2012) 33 ILJ 1593 (CC), paragraph 61
Introduction

The right to protest in South Africa is a fundamental right and serves as a bedrock to our democracy. The Constitution of the Republic of South Africa, 1996 confirms the right to protest:

**SECTION 17: ASSEMBLY, DEMONSTRATION, PICKET, AND PETITION**
Everyone has the right, peacefully and unarmed, to assembly, to demonstrate, to picket and to present petitions.

**SECTION 18: FREEDOM OF ASSOCIATION**
Everyone has the right to freedom of association.

The right to freedom of assembly and right to freedom of association are intrinsically connected. The freedom to associate, form groups and organisations for a common purpose forms the foundation for the freedom to assemble and gather. These rights form the tenets of South Africa’s constitutional democracy and are key rights for accountability and advancement of rights.

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**The Guidelines On Freedom Of Association And Assembly**


The Guidelines serve as a starting point to freedom of association and assembly in Africa, and seek to strengthen the African Commission’s obligations set out in Article 10 (freedom of association) and Article 11 (freedom of assembly) of the African Charter on Human and Peoples’ Rights.

**International Recognition Of Freedom Of Assembly And Freedom Of Association**

Both rights are recognised in international and regional instruments:

- Articles 10 & 11 of the African Charter;
- Article 8 of the African Charter on Human and Peoples’ Rights; Articles 20 & 20(1) of the Universal Declaration of Human Rights;
- Articles 21 and 22 of the International Covenant on Civil and Political Rights, Article 15 of the International Covenant on the Rights of the Child; Articles 5 & 7 of the International Covenant on the Elimination of All Forms of Racial Discrimination; and several other binding international and regional instruments.

As can be seen from the above, the rights to freedom of assembly and freedom of association are well-recognised and well-established under international law.
Freedoms of Assembly and Association in Domestic Law

In South Africa, the State adopted the Regulations of Gatherings Act 25 of 1993 (‘the RGA’) as one of its primary domesticated legislations regulating the exercise of the right to protest.

RGA also brings into life and expands on the constitutional rights to freedom of assembly and freedom of associations. The purpose of this Act is to regulate the holding of public gatherings of more than 15 persons in a public road as well as regulating demonstrations by one or more persons but not more than 15 people. The demonstration must be for or against any person, cause, action or failure to take action.

Gathering vs Demonstration

The Gatherings Act differentiates between a ‘gathering’ and a ‘demonstration’. Here are the definitions:

‘Demonstration’ includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.

‘Gathering’ means any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-

(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or

(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution;

What is an organisation in terms of the RGA?

The Gatherings Act defines ‘organisation’ as ‘any association, group or body of persons, whether or not such association, group or body has been incorporated, established or registered in accordance with any law.'
This booklet relies on the 10 Fundamental Principles established by the Guidelines and applies them in the South African context.

As explained above, the rights to freedom of assembly and freedom of association are intertwined and dealt with together in the Guidelines – this booklet takes a similar approach.

1 Purpose of this booklet

This booklet can be used by organisations, students, activists or any other person who wish to partake in protests, register their community organisation or learn more about the right to freedom of association and the right to freedom of assembly in South Africa.

2 How to use this booklet

This booklet relies on the 10 Fundamental Principles established by the Guidelines and applies them in the South African context.

As explained above, the rights to freedom of assembly and freedom of association are intertwined and dealt with together in the Guidelines – this booklet takes a similar approach.
**PRINCIPLE 1**

**Presumption in favour of the right**

The presumption shall be in favour of the exercise of the rights to freedom of association and assembly.

The starting point for the rights to freedom of assembly and association is: when in doubt, there is a presumption in favour of the right. This golden standard is confirmed in sections 17 and 18 of the Constitution, which states that ‘everyone has the right to...’.

In practice, this means that the right to freedom of association, for example to register your organisation, and the right to assembly vests automatically, so that any person who wants to challenge this will bear the onus of convincing the state that this person/organisation does not have the rights to freedom of association and assembly. Participating in and organising assemblies is a right and not a privilege.

**Regulation of Gatherings**

Act 205 of 1993

The Preamble of the RGA states: ‘every person has the right to assemble with other persons and to express his views on any matter freely in public’.

The only qualifier applicable to the right to freedom of assembly is that anyone exercising this right must do so peacefully and unarmed.

This principle was confirmed in the Constitutional Court case of SATAWU v Garvas 2013 (1) SA 83 (CC).

**Quick fact:**

Minors (persons under the age of 18) also have the right to protest, same as adults.

The right to freedom of association is enjoyed by individuals and by groups, such as organisations.

The right vests in organisations whether they are registered as an organisation or not.

Furthermore, the choice to join an association will always be voluntary.
Enabling framework

Any legal framework put in place or other steps taken relative to the rights to freedom of association and assembly shall have the primary purpose of enabling the exercise of the rights.

What is enabling legislation?

Enabling legislation means that it helps citizens to realise and enjoy their rights.

Enabling legislation will be framed using positive words and will embody the First Principle (the presumption in favour of the right) – for example, enabling legislation will primarily affirm the right to freedom of assembly and association, and secondarily might set out some situations in which that right cannot be exercised.

The focus will be on promoting the right, not curtailing or restricting it!

The Constitution

The Constitution guarantees citizens their rights to freedom of assembly (Section 17) and freedom of association (Section 18).

The Constitution declares that courts, tribunals and other decision-making bodies when interpreting a legislation MUST promote the spirit, purport and objects of the Bill of Rights (Section 39(2)).

The Constitution is therefore framed in an enabling manner, with a strong focus on promoting the rights and ensuring that courts and tribunals protect them.

The Verdict Is... Enabling
The RGA’s Preamble (as quoted in Principle 1) affirms the right to assemble with others and express views freely. The RGA works on the basis that citizens and organisations have a right to protest and then sets out circumstances in which this right has to be limited. However, the RGA does include some concerning sections. For example, it requires citizens to jump through several hoops to assemble more than 15 people in a public place, including the need to give 7 days’ notice.

In terms of the RGA failure to give sufficient notice is an offence (section 12(1). This is not an enabling function of the RGA. However, as highlighted in Principle 4 below, this section has now been declared invalid by the Constitutional Court. Overall, the RGA appears to be enabling. Unfortunately, some provisions do appear to place disproportionate restrictions on the right to protest.

National legislation
Three national statutes have an impact on the rights to assembly and association – we’re going to look at each of them in turn.

Regulation of Gatherings Act No. 205 of 1993 (‘RGA’)

The RGA’s Preamble (as quoted in Principle 1) affirms the right to assemble with others and express views freely. The RGA works on the basis that citizens and organisations have a right to protest and then sets out circumstances in which this right has to be limited.

However, the RGA does include some concerning sections. For example, it requires citizens to jump through several hoops to assemble more than 15 people in a public place, including the need to give 7 days’ notice.

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The Verdict Is... Mostly Enabling With Restrictive Elements
2 Non-Profit Organisations Act
No. 71 of 1997 (‘NPO Act’)

The NPO Act describes its purpose as providing an environment in which non-profit organisations (‘NPOs’) can flourish. This positive wording gives the impression that the Act is enabling.

The NPO Act was developed after lengthy negotiations between the government and civil society organisations. The Guidelines say that attempts to engage with civil society when drafting legislation tends to lead to enabling legislation – this is helpful.

The process to register an NPO is voluntary and is relatively straightforward. The NPO Act seeks to achieve its purpose through simplicity, transparency and encouraging engagement. Overall, the NPO Act takes a positive and enabling approach to facilitating the administration of organisations.

The Verdict Is... Enabling

3 The Companies Act
No. 71 of 2008 (‘CA’)

The aim of the CA is to provide for a consistent and harmonious regime of business incorporation and regulation. This positive wording is suggestive of an enabling purpose! The act applies different sets of rules to different organisations – there are fewer and less rigorous requirements for smaller companies.

Fewer statutory forms are required to set up a company than under the previous legislation, and the regulatory requirements during the operation of the company are lesser. This is all enabling in terms of the right to association! Unfortunately, the CA is lengthy and very complex to read. It is not written in an accessible format. This does not facilitate easy exercise of the right to association.

Overall, the purpose and function of the CA is enabling. Unfortunately, its length and complexity is not enabling for small companies without extensive business knowledge seeking to exercise their right to association.

The Verdict Is... Mostly Enabling But Not Very Accessible
In the South African context, the independence of civil society and the public sphere is guaranteed by the Constitution. This right is further expanded in the NPO Act which encourages and supports the contribution of civil society organisations.

South Africa’s civil society has become the line of defence fighting and advocating for ordinary citizens against corruption, service delivery failure and realisation of basic human rights. They continue to hold the State accountable.

What is Civil Society?

“Civil society refers to a wide array of organisations: community groups, non-profit organisations (NPOs), labour unions, indigenous groups, charitable organisations, professional associations, and foundations” - The World Economic Forum

The right to protest can also be described as a political right which is protected in our Constitution. South African citizens also have a constitutional right that guarantees freedom of expression (Section 16). Section 30 enables the exercise and participation in cultural life of your choice. **The South African law does indeed enable individuals and communities to participate in political, cultural and social lives. This guideline is promoted in South African domestic and local legislative measures.**

Notwithstanding the domestic laws and policies regulating the right to associate, there are also challenges civil society and the public sphere face when exercising these rights. These challenges include:

**The compromised safety and security of the lives of individual community activists.**

**The withdrawal of government funding, support, and contracts for being critical and censoring of government.**
All constitutional, legislative, administrative, and other measures shall comply with full extent of regional and international human rights obligations, deriving from the rights to freedom of association and assembly and all other guaranteed rights.

Human rights compliance by South Africa is informed by the state’s obligations in terms of binding international human rights instruments and the domestic legislative measures taken by the state to enable the right to peaceful assembly.

Sections 231 to 233 of the Constitution detail the binding powers of international agreements that South Africa has signed, ratified, and approved by resolution. They require courts to prefer any reasonable interpretation of the legislation that is consistent with the Constitution.
Section 21 of ICCPR provides that:

“The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with law and which are necessary in the democratic society...”

As outlined in the introduction, South Africa is signatory to a number of international and regional human rights mechanisms which guarantee the rights of assembly and association.

Importantly, South Africa is a state party to the 1966 International Covenant on Civil and Political Rights (ICCPR). And to the First Protocol to the ICCPR.

The Protocol allows individuals to petition the Human Rights Committee if such individuals believe the State has violated their rights that are protected in the ICCPR.


As outlined in the introduction, the Constitution guarantees all relevant rights.

(b) The Regulation of Gatherings Act, The Companies Act, and the Non-Profit Act

As outlined in Principle 2, the three key domestic statutes which impact upon the rights to association and assembly all state their aims and purposes in a positive, rights-affirming way.

(c) Case Authority

In the case of Mlungwana and Others v The State and Another (known as ‘SJC10’), the Constitutional Court dealt the criminalisation of a convener’s failure to give adequate notice to the local municipality when convening a gathering of more than 15 people. Section 12(1)(a) criminalised the failure to give notice of a gathering.

The Constitutional Court decided that section 12(1) of the RGA is inconsistent with the Constitution and thus invalid. This interpretation promotes fundamental freedoms and ensures that the RGA is compliant with international human rights instruments.
In South Africa, policing oversight is exercised by the South African Police Services (SAPS) and other law enforcement officers.

In terms of international law, the 1990 United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials stipulates that, in the dispersal of violent assembly, a law enforcement officer may only use firearms against a specific individual where this is necessary to confront an eminent threat of death or injury or grave and proximate threat to life.

Therefore, the use of firearms is a last resort, only justified after all less violent options have been explored.

Section 9(2)(d) and (e) of the RGA addresses the issue of fairness and impartiality when authorities are faced with an imminent threat against life or property caused by a protestor/convener.

It provides that the law enforcement officers may take necessary steps to prevent the threat and may, for this purpose, if other methods are ineffective or inappropriate, use force including the use of the firearm.

Furthermore, the degree of force which may be used shall not be greater than necessary. The force must also be proportionate and moderate to the circumstances.

This provision authorising the use of firearms is more permissive than the international rules.

The Marikana Massacre is proof of the non-restrictive authorisation for use of force and firearms by law enforcement during a protest.

The Marikana Massacre

The Marikana Massacre was the killing of 34 miners who were involved in a protest at a mine in the Marikana area, near Rustenburg, North West Province. About 78 protesters were seriously injured and 250 of them were arrested. The SAPS used force by means of firearms.
You are not required to obtain consent to protest, you merely have to notify the authorities of your intention to hold a gathering. As explained in Principle 1, you have an automatic right to protest; therefore consent is not necessary. Section 3 of the RGA states that the convener of a gathering shall give notice in writing of the intended gathering.

Lack of notification does not make an assembly illegal – there is a presumption in favour of the right.

PRINCIPLE 6

Simple, transparent procedures

Procedures relating to the governance of associations and assemblies shall be clear, simple and transparent.
When must you notify the local authorities of your gathering?

If there will be 15 people or less at the gathering, you do not have to notify the authorities, unless the protest is planned to take place at Parliament, the Union Building or any South African court. If the gathering is for more than 15 people, you should notify.

Under the RGA, you must notify the local authorities no later than 7 calendar days before the gathering. If 7-day notification is not possible, a 48-hour notice must be given. If notice is given less than 48-hours before the gathering, the responsible officer may prohibit the gathering.

The reason for notifying the local authorities is for the authorities to prepare, for example arrange with traffic services, or to negotiate conditions on the gathering if the gathering can cause unreasonable obstruction of activities.

Important!
No protest is ‘illegal’ or ‘unlawful’, even if you did not notify the SAPS.
Go to principle 10 for our recommendation on the more protective standard in this regard.

Registering an organisation

A non-profit organisation (NPO) can take one of three forms: (1) a Trust, (2) a Non-Profit Company or (3) a Voluntary Association. Choosing the right organisational structure for your NPO is very important, and some structures require more administration than others.

Trust: This is a contract entered into between a group of people known as ‘trustees’. The arrangement is recorded in a Deed of Trust. A trust must be registered with the Master of the High Court in terms of the Trust Property Control Act.

Non-Profit Company: The most formal and regulated structure. An NPC must be registered with the Companies and Intellectual Property Commission. A Memorandum of Incorporation is necessary as the founding document. The Companies Act prescribes a high standard of monitoring and regulating.

Voluntary Association: The most informal of the three structures. It is brought into existence when three of more people work together and form an organisation to achieve a common goal. Only a constitution is necessary as a founding document. Registering a VA with the NPO Directorate gives it a legal identity distinct from its members.

Once you have decided which structure your organisation will be, you can follow this link to a step-by-step guide on registering your organisation: https://bit.ly/33qkuK3
In South Africa, NPOs qualify for tax exemptions and people who donate money to registered organisations can benefit from tax deductions. However, tax is a very complicated area of law, and we recommend that you consult a lawyer or a tax consultant.

**Important!**

Tax benefits are not automatic, and an organisation must apply to SARS to receive tax benefits.

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**PRINCIPLE 7**

**Reasoned decisions, judicial review**

State decisions shall be clearly and transparently laid out, with any adverse decisions defended by written argumentation on the basis of law and challengeable in independent court of law.

The Constitution provides that everyone had the right to administrative action that was lawful, reasonable, and procedurally fair (Section 33(1)).

It also requires that reasons be given to anyone whose rights have been adversely affected by administrative action (Section 33(2)) and that national legislation must be enacted to give effect to these rights.

Section 33 therefore ensures your right to written reasons and to review any administrative decision taken.

The Promotion of Administrative Justice Act (‘PAJA’) was enacted to give effect to section 33 of the Constitution.

Section 6 of PAJA governs when an administrative action can be taken on review. If you are aggrieved by a decision taken by the local authority in respect of your gathering or by the NPO Directorate with regards to the registration of your NPO, you can take the decision on judicial review.
Before November 2018 section 12(1)(a) of the RGA criminalised peaceful protesters who failed to notify the authorities of their intention to protest.

As noted in principle 4, the SJC10 case made that section invalid as of 2018.

**PRINCIPLE 8**

**Limited Sanctions**

Sanctions imposed by states in the context of associations and assemblies shall be strictly proportionate to the gravity of the harm in question and applied only as a matter of last resort to the least extent necessary.

**What happens if you do not notify the police of your intention to protest?**

Before November 2018 section 12(1)(a) of the RGA criminalised peaceful protesters who failed to notify the authorities of their intention to protest.

As noted in principle 4, the SJC10 case made that section invalid as of 2018.
What happens if the protest is not peaceful?

The Gatherings Act provides that all gatherings must proceed ‘peacefully’, however no definition of ‘peaceful’ is provided in the Act. The Guidelines state that ‘peaceful’ include(s) conduct that annoys or gives offence as well as conduct that temporarily hinders, impedes, or obstructs the activities of third parties. The RGA states that any ‘riot damage’ (destruction of property due to a gathering or demonstration) will be the liability of the organisation/convener that organised the gathering, or every person that participated in the demonstration. This is a civil sanction.

The Guidelines however state that ‘neither the organisers nor fellow participants of a public assembly shall be subjected to sanctions of any kind on the basis of acts committed by others’. This element of the RGA therefore contravenes the Guidelines!

PRINCIPLE 9

The right to a remedy

The right to a remedy shall be protected in cases of violation of the rights to association and assembly.

What does this right entail?

Where the right to assembly or association has been violated, the individuals and/or association itself must have access to a remedy.

There is also a right to financial compensation for any damage arising from the violation.

Where the authorities are responsible for the violation, having made disproportionate limitations on the rights, those authorities should be held responsible.

What to do if your rights (or your association’s rights) have been infringed If you have suffered a violation, you can:

Approach the courts to seek a legal remedy

Approach a legal NGO, e.g., you can attend the walk-in centre of a law clinic to seek advice or even legal representation

Approach an organisation in your community which has relevant expertise – they may be able to provide assistance and support, or simply put you in contact with a lawyer or NGO.
What remedies exist under the RGA?

If conditions are added to your gathering or it is prohibited, you can apply to a magistrate to review the decision, which they can overturn or affirm (Section 6). You must apply within 24 hours of the decision!

The magistrates will not make an order as to costs – you will have to bear the costs of the application.

What remedies exist under the Non-Profit Act?

If you have tried to register an NPO, but the Directorate has refused to register it on any basis, you may appeal that decision (Section 14). You must appeal within 1 month. The Appeal Tribunal must hear your appeal within 3 months.

If your NPO has been deregistered, you may appeal this decision by reference to the Arbitration Tribunal (Section 22). Again, you must appeal with 1 month and the Tribunal will hear your appeal within 3 months.

The Appeal will either be dismissed or upheld. If it is upheld, the Directorate must reinstate the registration of the NPO by either reissuing a certificate of registration or amending the register itself.

What remedies exist under the Companies Act?

The primary recourse for any remedy in relation to the Companies Act is an application to the High Court.

If the name you have sought to register under is rejected for any reason, you may apply to the Companies Tribunal for a determination on this point.

If the reason the name was rejected is that it is propaganda of war, incites violence, or advocates hatred based on race, ethnicity, gender or religion (section 11(2)(d)), the application and proposed name can be forwarded to the Human Rights Commission, who can assess whether the name is offensive.

Each statute therefore has its own internal remedies system which you may follow if you feel that your rights to assembly or association have been violated. However, if there is not a remedy for the particular violation you have suffered, or the outcome you receive from the internal remedy is not the desired outcome, you can still seek a remedy. See Principle 7 for information on judicial review.
The Constitution confirms that when our courts adjudicate matters, it must consider international law and may consider foreign law.

Section 231 of the Constitution states that a treaty binds South Africa after the National Assembly and the National Council of Provinces adopt the treaty. Section 232 of the Constitution makes customary international law binding unless it is inconsistent with the Constitution or legislation.

**PRINCIPLE 10**

**More protective standard**

If conflict between provisions of these guidelines and other international regional human rights standards arise, the more protective provision takes precedence.

The Constitution confirms that when our courts adjudicate matters, it must consider international law and may consider foreign law.

Where there is a conflict between South African law and International law, South African law applies.

If conflict between provisions of these guidelines and other international and regional human rights standards arise, the more protective provision takes precedence.
Recommendation:

Notification less than 48-hours before the gathering should not penalise the convener, and the responsible officer should not have a discretion to prohibit the gathering.

Section 3(2) of the RGA states that if notification is received less than 48-hours before the planned gathering, the responsible officer may by notice prohibit the gathering.

The Guideline has the more protective standard which state that the notice period should be as short as possible, and assemblies should not be penalised for late notification.

Our recommendation is that the discretion of the officer to prohibit the gathering should be removed, and the presumption in favour of the right should trump the late notification.

Recommendation:

One single authority to give notification before the gathering.

The Guideline has the more protective standard in that it requires only one authority to whom persons should notify before a gathering. The RGA, however, does not clearly state who is the local authority and where there is no local authority, conveners should notify SAPS.

Our recommendation is that a national authority is established to ensure that there is only one authority, in compliance with the Guidelines.

Conclusion

Everybody has the right to assembly and to association. As can be seen from this toolkit, South African law in most instances is compliant with the Guidelines.
This booklet was developed as an information guide.

It was developed by Amy-Leigh Payne, Petra Marais, Ruby Peacock, Sherylle Dass and Zimkhitha Mhlahlo.

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