

Policing Protests in Kenya

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Contents

Notes on Contributors	i
List of Abbreviations	ii
Rethinking Policing of Protests and Gatherings In Kenya	1
<i>Dr Mutuma Ruteere and Patrick Mutahi</i>	
Police Perceptions, Attitude and Preparedness in Managing Public Assemblies	6
<i>Dr Duncan Onyango and Dr Petronila Otuya</i>	
‘Ready to Shoot!’ Vs ‘Ready to Loot! The Violent Potentialities of Demonstrations in Kenya.....	22
<i>Dr Naomi van Stapele and Dr Tessa Diphooorn</i>	
Manoeuvring Through Legal Ambiguity: Dispersing of Unlawful Protests in Kenya	44
<i>Melissa Mungai</i>	
Judiciary and Public Interest Litigation in Protecting the Right of Assembly in Kenya	55
<i>Marion Muringe Ogeto and Waikwa Wanyoike</i>	
The South African Experience of Policing Public Gatherings.....	73
<i>Dr Irvin Kinnes</i>	

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List of Abbreviations

ACHPR	African Commission on Human and Peoples Rights
APS	Administration Police Service
CAJ	Commission on Administration of Justice
CHRIPS	Centre for Human Rights and Policy Studies
CHRP	Centre for Human Rights and Peace
CKRC	Constitution of Kenya Review Commission
CORD	Coalition for Reform and Democracy
CSPS	Civilian Secretariat for Police
DCI	Directorate of Criminal Investigation
DPP	Director of Public Prosecution
ECHR	European Court of Human Rights
FGD	Focus group discussion
GSU	General Service Unit
IAU	Internal Affairs Unit
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IEBC	Independent Electoral and Boundaries Commission
IG	Inspector General
IPID	Independent Police Investigative Directorate
IPOA	Independent Policing Oversight Authority
IRIS	Incident Registrations Information System
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KPS	Kenya Police Service
MSJC	Mathare Social Justice Centre
NASA	National Super Alliance
NCO	Non-Commissioned Officer
NGO(s)	Non-governmental organisation(s)
NIU	National Intervention Unit
NPS	National Police Service
NPSA	National Police Service Act
NPSC	National Police Service Commission
OCPD	Officer Commanding Police Department
OCS	Officer Commanding Station
ORS	Operational Response Services
PIL	Public Interest Litigation
POP	Public Order Policing
ROGA	Regulation of Gatherings Act
SAPS	South African Police Service
SJC	Social Justice Coalition
SJCWG	Social Justice Centres Working Group
SSOs	Service Standing Orders
STF	Special Task Force
TRT	Tactical Response Team
UN	United Nations

Rethinking Policing of Protests and Gatherings In Kenya

Dr Mutuma Ruteere and Patrick Mutahi

Introduction

The management of public order in democracies - especially in fledgling democracies -- presents unending dilemmas, questions and challenges that speak to the theory as well as practice of policing. These challenges, tensions and dilemmas are particularly amplified in fledgling democracies struggling to establish and solidify a culture and practice of adherence to the rule of law while at the same time building confident, effective and accountable police services. Keeping public order is one of the traditional missions of police services. Public gatherings and protests often present scenarios that theoretically and practically test this mission.

Public protests that seek to challenge governments of the day and to question the legitimacy of those governments present particular challenges given the traditional attitudes and understandings by the police of their role and mission as enforcers and guarantors of the status quo through maintenance of social order. Although it is anti-government protests that often receive most media attention and coverage in countries like Kenya, there are many other occasions of public gatherings where the police are every day called upon to maintain order during the protests and to restore normalcy when such protests turn violent.

Different countries have enacted laws and regulations that seek to govern how public order is to be maintained and to regulate both police and citizens' conduct during public gatherings and protests. The laws and practice differ from context to context and in relation to the different political orders that each country has established. The bottom line though is that in a democracy, the police are expected to manage public protests in a manner consistent with the rule of law and consistent with rights.

Kenya's fledgling democratic experiment has in particular and perennially wrestled with the challenge of poor and unaccountable policing. Historically, the logic of policing in Kenya has been one of gratuitous use of force to punish those populations seen as a threat to law and order. The logic of punitiveness that has historically characterised police-citizens interactions has its roots in the very foundation of the police service and the State itself.

Most recently during the contested 2017 presidential election, Kenyan police came under widespread criticism over their use of excessive force in responding to protests in the opposition strongholds of the Nyanza region, and specifically Kisumu, Siaya, Homa Bay,

Kisii as well as in Mathare and Kibera in Nairobi¹. In 2007, when disputed elections led to widespread violence in various parts of the country, the official Commission of Inquiry into Post-Election Violence (CIPEV) concluded that while there were cases of heroic action by the police, their “response in relation to the management of protests and crowd control was inconsistent in its application, jeopardised the lives of citizens and was in many cases a grossly unjustified use of deadly force.”² Similarly, the National Taskforce on Police Reforms, in its 2009 report, noted that the public had lost confidence in the police due to their misuse by politicians and their use of excessive force in policing public gatherings, including protests.

These developments, as well as the 2010 Constitution, set in motion a process of policing reforms that were expected to transform the police service and replace the culture of police-public confrontations in protests and public gatherings. The Constitution explicitly requires that policing be undertaken consistent with the Bill of Rights. The right to assembly is also explicitly provided for under Article 37, recognising citizens’ right to assemble, demonstrate, picket and present petitions to public authorities peacefully and unarmed.

As part of the transformation of the police service, the 2010 Constitution provides for an operationally independent police service, headed by an Inspector-General and guided and restrained in its operations by the principles of human rights, professionalism, non-partisanship and accountability to the public.

The National Police Service Act of 2011 elaborates on the process and conditions under which the police can use force. This was supplemented by new Service Standing Orders to guide police conduct. Within the police service, the Internal Affairs Unit was established to receive and investigate complaints about police misconduct. As part of efforts to professionalise the police service, the recruitment and human resource management of the police is now placed under an independent National Police Service Commission. In addition, the Independent Policing Oversight Authority (IPOA) was created with the mandate of investigating serious cases of use of force by the police as well as deaths resulting from police action.

Through all these efforts, it was expected that the culture of excessive use of force by the police in their interactions with the public would be transformed. After about a decade of reforms, the record appears mixed. Institutional restructuring of the police services has been ongoing for better service delivery. Reforms in the service are now accepted as an ongoing process and the police service is more open to feedback than in the past.

¹ *In response to the protests, police used excessive force, often firing live bullets at protesters, leading to the deaths of an estimated 23 people, including a six-month old baby in Kisumu. There were also many incidents of police breaking into houses at night and beating up dwellers in poor neighbours of the city, accusing them of being protesters and of inciting violence.*
² *Republic of Kenya, Report of the Commission of Inquiry into Post-Elections Violence, p.417*

Restraining police use of force as anticipated under the Constitution and various pieces of legislation has, however, not been as effective or successful. As the 2017 policing of protests by Opposition parties indicated, the use of excessive force is still ingrained in the culture of policing. Beyond the election-related protests, the police have also often used tear-gas to disperse many protests where there have been no incidents of violence or threats of violence. The laws and institutional reengineering have not transformed the service sufficiently to meet public expectations.

In addition, there are questions of adequacy of the legislation governing public gatherings and protests, their consistency with human rights norms and how these laws have been interpreted by courts. Whether it is a question of police culture and attitudes or the laws and institutions -- or both -- are all important considerations in evaluating how public gatherings are currently policed in Kenya.

The papers in this volume grapple with the questions of laws and institutions as well as attitudes and culture in policing and are aimed at contributing to the policy and scholarly discourse on policing of public gatherings and protests in Kenya. Bringing together a multi-disciplinary team of researchers, this publication presents both empirical and normative critiques of the complexities of policing protests and public gatherings in a young democracy with a robust regime of rights protection but one that has historically struggled with accountable and democratic policing.

Naomi van Stapele and Tessa Diphorn draw from actual contexts of interaction between protesters and the police to evaluate the decisions that inform police conduct. The authors suggest that both the police and protesters bring to their interaction certain assumptions of each other which influence how that interaction unfolds. For the police, there is an assumption that protesters are potential looters and for the protesters there is the assumption that the police are only too eager to shoot at them. The paper explores how the protesters attempt to mitigate the risks of police use of force by use of innovative measures such as the deployment of marshals to keep discipline and ensure safety.

Drawing from empirical survey data, Duncan Ochieng and Petronilla Otuya argue that the challenges in how police respond to protests are linked to command leadership and structures, police culture, attitudes and training. A significant number of police officers see the use of force as the appropriate way of dealing with protesters. Many of those officers often called upon to respond to protests have not undergone any refresher training on public order management either.

Even though the 2010 Constitution, the National Police Service Act and the Service Standing Orders spell out the limits to police powers and use of force in managing public gatherings, there are still ambiguities in laws and regulations that contribute to the problem of how the police respond to protests in Kenya. As Melissa Mungai argues in her chapter, the statutory framework has ambiguous provisions which, coupled with the wide discretion that the police have, contribute to some of the excesses in how the police respond to

protests. Determining when an assembly turns unlawful or when a breach of the peace has been occasioned is subjective and circumstantial and very often subject to the discretion of the officer in command. In light of this, she calls for clear guidelines on how police, protest organisers and communities ought to interact, which could positively contribute to better police conduct.

Marion Ogeto and Waikwa Wanyoike critically examine how the Judiciary -- through public interest litigation (PIL) -- has interpreted the right to assembly under Article 37 of the 2010 Constitution. The authors conclude that the Judiciary has been keen at protecting the right to assembly, carefully giving flesh to the bones of Article 37. Further, while PIL may not have done enough, it has ensured that the police are constantly reminded that the right to assembly is non-negotiable in the constitutional democracy that the 2010 Constitution sought to establish in Kenya.

A different kind of contribution is the paper by Irvin Kinnes, which principally draws from the South African experience in the policing of protests. The paper explores police practice against the background of South Africa's history of post-apartheid democratisation anchored on its Constitution. In spite of appreciable progress in transformation of policing, South Africa has also faced significant reversals as illustrated by police conduct in what is known as the Marikana massacre of 2012 where the police killed 34 miners and seriously injured 78.³ Irvin's paper presents important innovations on policing accountability that have resonance for the Kenyan context and at the same time demonstrates that transforming police culture is particularly challenging even where strong institutions have been running for a number of years.

This volume is a modest contribution to the complex subject of policing, regulation and management of public gatherings and protests. It presents original research from empirical data as well as normative interpretations of laws and conduct in the policing of public gatherings in Kenya. There are still many more questions that need to be posed and addressed through research, data as well as policy and legal innovations as part of the efforts to transform Kenya's police services. There are unanswered questions on how well-equipped the police usually are when they respond to protests. What kind of weapons should we make available to police units deployed to keep and restore public order? What training and preparations do these units have to prepare themselves to de-escalate, defuse situations and avert violence?

Policing is also changing rapidly from traditional imagination where the public police were seen as the exclusive actors. Now, policing functions are shared by private actors, who control data and technologies, for instance. Assistance to victims of violence during protests is often left to medical emergency personnel who have to coordinate with the police.

³ The SAPS opened fire on protesting mine workers in Marikana on August 16th 2012 and killed over 34 miners and injured 78 in two sites in the hill they were occupying. This became known as the Marikana massacre.

Use of big data has brought in the era of predictive policing where police can predict behavior and take preemptive action before violence breaks out. Facial recognition technologies are also being tested by police services and can potentially be deployed to “police” individuals profiled as “troublemakers”.

Policing in the 21st Century demands that we must be future-oriented and find solutions that speak to our context as it is and as we would like it to look like. This calls for more empirical work on policing in general. The papers in this volume have only sketched the nature of the problems and possible solutions. More empirical studies on police conduct and policing are needed to fill the gap between the promise and the reality with respect to policing in Kenya. The authors in this volume have led the way in that respect.

Police Perceptions, Attitude and Preparedness in Managing Public Assemblies

Dr Duncan Onyango and Dr Petronila Otuya

Introduction

The ability to assemble and act collectively is vital to democratic, economic, social and personal development; to the expression of ideas and to fostering engaged citizenry. An assembly is an intentional and temporary gathering in a private or public space for a specific purpose and includes demonstrations, inside meetings, strikes, processions, rallies, or even sits-in that play a vibrant role in mobilising the population and formulating grievances and aspirations, facilitating the celebration of events and influencing public policy (Kiai 2012). Freedom of peaceful assembly, though limited in some instances as stipulated by the Kenyan Constitution (Article 37) and other relevant laws, is a fundamental human right that allows persons and groups to organise and participate peacefully together and publicly convey their positions and opinions. It allows citizens to protest and demand action by the authorities without fear of threat, harassment, intimidation, reprisal or arrest. It also gives persons power to gather publicly or privately and collectively express, promote, pursue and defend their common interest (Constitution of Kenya 2010: Article 37).

Peaceful public demonstrations are a right in Kenya although the Constitution -- in Article 24 -- provides that the right may be limited to the extent that the limitation is provided by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society, taking into account other listed factors including the availability of less restrictive means to achieve the purpose of the limitation. Lawful purposes for which the right to freedom of assembly may be limited are expressed in statute, including the Penal Code Cap 63 and the Public Order Act Cap 56 of 2012. Section 78 of the Penal Code defines unlawful assembly as a situation in which three or more persons assemble with intent to commit an offence or cause persons in the neighbourhood to fear that they are likely to commit a breach of the peace or provoke other persons to commit a breach of the peace. Section 8 of the Public Order Act provides that an assembly may be stopped or prevented when there is clear, present or imminent danger of a breach of the peace or public order.

International, regional and national laws --which Kenya is a party to-- provide for the right to peaceful assembly and obligate police to ensure public safety and the protection of the lives and property of citizens during protests. Article 11 of the African Charter on Human and Peoples' Rights provides for the right of people to freely assemble with others and that the right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom of others. Article 21 of the International Covenant on Civil and Political Rights

(ICCPR) also provides that no restrictions may be placed on the exercise of the right to freedom of assembly 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, the protection of public health or morals or the protection of the rights and freedoms of others.

The Bill of Rights (Chapter 4) and Article 37 of the Constitution provide for freedom of peaceful assembly and states that “every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities”. The State has an obligation to respect, protect and fulfil the rights of those peacefully assembled and unarmed, including by protecting them from third parties provocateurs or violent elements (National Police Service Act 2011: Part III, Section 24). As outlined in the National Police Service Act (2011), police are required to provide assistance to the public when in need, protect life and property, and comply with the constitutional standards of human rights and fundamental freedoms (Constitution of Kenya 2010: Article 24 (1)).

Respect for human rights has become an essential component of policing in Kenya. The National Police Service (NPS), which comprises the Kenya Police Service (KPS), the Administration Police Service (APS) and the Directorate of Criminal Investigation (DCI) (Constitution of Kenya 2010: Article 243; NPS Act 2011: Part III, IV and V) is supposed to uphold human rights in execution of duty and to be accountable. It is notable that like the rest of the world, policing in Kenya has changed and become more complex, knowledge-based, professional and continues to evolve (Flynn and Herrington 2015). This includes through measures to regulate the use of force and use of weapons by police as provided in the Sixth Schedule of the NPS Act and Chapter 58 of the Service Standing Orders.

Despite the legal restrictions on the use of force, there still exist significant challenges on the regulation of use of force, particularly in response to protests. For example, in 2016, at least 5 people died and 60 were wounded by gunfire as police tried to obstruct peaceful protests in Nyanza region (Kenya Human Rights Commission 2017). At the same time, police response to protests following the disputed August 2017 presidential election and October 2017 repeat presidential election, left at least 214 people shot or beaten to death by the police (Ng’ethe 2017). Many more sustained gunshot wounds, debilitating injuries such as broken bones and extensive bruising as a result of police violence.

It is notable that police use of force against protesters took place despite on-going police reforms, which had aimed at making the police more professional in the management of public order. The reforms also sought to enhance civilian accountability for the service through the creation of the Independent Policing Oversight Authority (IPOA). It is against this background that this paper assesses the police culture in public order control. It does this by examining the structure and leadership in public order control as well as public perception of police public order control in Nairobi County.

An exploratory research design was adopted to gather opinion on police effectiveness in public order control. The data was collected from police officers within Nairobi County and members of the Kibera community that have interacted with the police during assemblies. The research was conducted between 25 November and 10 December 2018. There are approximately 5,000 police officers within the 34 police stations in 12 divisions of Nairobi County Regional police command. During public order control operations, each police division allocates at least 10 officers for such an operation in what is known as 1+1+8 in the NPS terms, that is, one Inspector, one Non-Commissioned Officer (NCO) and eight constables. In extremely large events, where the general duty police are overwhelmed, police deploy anti-riot standby officers known as *Kifaru* (Swahili for buffalo) while General Service Unit (GSU) personnel are called upon to assist.⁴

Simple random sampling technique was adopted to select a sample of 124 respondents from police officers within the 12 divisions in Nairobi Region police command providing a 95 per cent confidence level, to ensure that the sample represents the population. From the study findings, majority (73 per cent) of the respondents were male while 27 per cent were female. The respondents were relatively young with over 60 per cent being below 35 years, of the rank of constable, with secondary level education and had served in the NPS for less than 15 years.

Purposive sampling was used to identify key informants for interviews from police training campuses in Nairobi County, staff officers responsible for operations in Nairobi Region police command and other stakeholders including civil society representatives. A focus group discussion (FGD) was conducted with ten members from Kibera community in Nairobi.

The findings of this study are significant to various stakeholders in the security sector, civil society and the public both in Kenya and across developing nations where the challenges of public order control are remarkably similar. It will also be an eye-opener to the NPS in terms of operational effectiveness and efficiency, policy makers in the security sector including the National Police Service Commission (NPSC), IPOA, the Ministry of Interior and Coordination of National Government, police commanders and police campuses instructors and researchers.

After this introduction, this paper reviews literature on police culture, structure, leadership and perceptions in relation to public order control. It then analyses the research results and makes relevant policy conclusions.

Police culture, leadership and perception

Maintenance of public order is a complex activity involving “chaos and confusion” where police commanders make decisions under pressure and the consequences of those decisions may be serious, including death or serious injury to members of the public or

⁴ An informal interview with a station commander in Nairobi County, November 2018; and records from Nairobi Area police headquarters, November 2018.

police officers themselves (Barham 2016:13). Although there is a logical assumption that public order policing always involves violence, many assemblies take place peacefully and police commanders demonstrate their professional expertise, discretion and judgement through their actions and responses (Barham 2016: 14). However, these police actions are heavily guided by the culture, organisational structure and leadership of the police, as well as public perception of officers' actions.

Police culture

Organisational culture is the pattern of values, norms, beliefs, attitudes and assumptions that may not have been articulated but are a product of historical processes that shape the ways in which people behave and things get done in an organisation (Martins and Terblanche 2003). It is concerned with the subjective aspects of what goes on in an organisation (Schein 1990), is rarely completely static over long periods of time but is influenced by organisational environment. Organisational culture is subject to a continuous process of development and change due to learning that occurs as employees seek answers to problems of external adaptation and internal integration. These include the visible surface level artefacts such as physical environment, order of dress, language, stories told and the observable actuals and ceremonies, the publicly-espoused beliefs and values and the basic underlying assumptions (Schein 2004).

The process of socialisation, which creates the 'blue fraternity' begins at the police campuses and continues throughout a police officer's career (Workman-Stark 2017). These include protective, supportive and shared attitudes, values, understanding and views of the world (Cox et al 2017). As a profession, the police in Kenya, like in any other country, have veered off from Sir Robert Peel's ideals that the police are the people, and the people are the police, towards a culture and mindset more like warriors at war with the people they are sworn to protect and serve (Rahr and Rice 2015). The police administrative structure in Kenya is organised along military lines in command and control where there is reliance on rank authority, use of formal orders, reward on rule following and punishment for violations as well as hierarchal decision-making that controls and directs police operations from the top. This military model is not compatible with a profession that uses discretion like the police (Hughes and Newton 2010) and unfortunately this culture, that is, the practice of paramilitary style policing and intelligence gathering that is quite brutal and disproportionate with penal excesses (Bell 2013), has not changed much from the British era especially in public order control in which the police was centralised, militarised and usually under direct political control. The officers had recourse to wide emergency and special legal powers (Dzenisevich 2016; Bell 2013) and had no observation or protection of human rights while rampant indiscriminate abuse of power was tolerated (Oloka-Onyango 1990). Societal attitudes on the police use of force have been indecisive and citizens consider police misconduct a rampant problem and deeply ingrained in the culture of policing in Kenya (CHRIPS 2014:18).

Police culture may be understood from examining the perspective of officers who frequently deal with the public and with criminal suspects. It is intrinsically negative from the operational policing perspective as there is glorification of violence, the “us versus them”, isolation and solidarity and being prejudiced, authoritarian and suspicious (Waddington 1999). The atmosphere of secrecy “brotherhood” also promotes a culture that enhances a wide gap between formal rules and informal practices and causes social isolation (Loftus 2012). This is attributed to the police perception that they are in constant danger at work (Champion 2017) and the need to be suspicious, secretive, in solidarity and sometimes violent in order to properly carry out their role of protection of life and property (Greene 2007). This is also coupled with the authority to use force to achieve the ends expected by the society (Cox et al 2017).

Police culture, according to most police officers is also based on their body size, strength, and gender (Westmarland 2017). Police behaviour is also influenced by their culture and the working-class backgrounds of police recruits some of whom tend to view violence as legitimate and are preoccupied with maintaining self-respect as they prove their masculinity (Cox et al 2017). Culture is regarded as the by-product of modern police work, with common themes relating to the danger of the street environment, authority to use violence, officer discretion, isolation from the public, shift-work, bureaucracy, vague and conflicting mandates and conflict between front-line officers and managers (Workman-Stark 2017). One positive feature of police culture is reflected in their sense of duty and focus on the mission of policing in which the officers share values that enable them to survive a difficult and emotionally taxing assignment whose sub-culture includes supportiveness, teamwork, perseverance, empathy and caring that enables them to cope with post-traumatic stress (Cox et al 2017).

All these factors create an environment in which behaviour that violates existing and generally-accepted social norms and may be seen as deviant -- for example violence and aggression (Hanimoğlu 2018) -- are accepted by the police as a necessary norm, which is internalised, rationalised and passed on to all new recruits and promoted as a necessary attribute for success in the policing career.

Police structure and leadership

Leadership directly affects the behaviour of organisations and is a tool that helps in reaching institutional goals and influencing employees positively (Ghazzawi et al 2017). It is a process of motivating, inspiring, convincing, persuading and using different ways of compelling others to follow. It involves moving people, the organisation and processes to preferred states of being in order to enhance equity, efficiency and efficacy of police operations while exercising command and authority in times of crisis (Schafer and Boyd 2010).

Police officers are public servants and are held to higher standards than those they serve and should not break the law (Pollock 2010) but should instead display a sense of justice in

which all individuals are treated fairly and equally regardless of their status in the society. In order for the NPS to professionally perform its strategic task, it has a clear, transparent and a proper organisational command structure right from the headquarters to the station or ward level with all commanders having the legal instruments and the necessary tools and equipment to discharge their mandate (NPS Act 2011: Section 8). Compliance is complicated by the fact that most police work, especially during quelling of riots, is performed in a low-visibility context free from direct supervisory oversight and decision-making scrutiny (Giblin 2017). However, the established police structure minimises the risk of violence or use of force and ensures accountability for unlawful acts by police officers.

Police work comes with a number of duties and responsibilities which involve use of discretion and power in public service (NPS Act 2011: Section 49). Police officers have enormous discretionary power throughout every rank and have great freedom to make operational decisions, including the authority to deprive people of their freedom through arrest, search, seize, questioning in the maintenance of law and order, and to determine when to use force and firearms. This discretion is a fundamental precondition for fair effective policing (KNCHR and CHRP 2015:38; Pollock 2014). Power is critical, serving as both a means to coordinate the actions of individuals within the NPS for example, to structure and secure obedience from uncooperative offenders. Due process therefore protects the citizens from abuse of these powers in which certain freedoms are expected.

Protests are avenues for people to be heard by the government and though intended to be peaceful, in many cases when the police are called in, lives are lost and property destroyed. One of the tactics used by police leadership in public order control to minimise the loss of lives and destruction of property is the use of intelligence sources to identify potential aggressive or violent members during a protest then applying strategic anticipation techniques to counter the violence. Others include the establishment of no-protest zones; increased use of less lethal weapons for example water cannons and batons, arrests, surveillance and infiltration of protests. As much as these strategies increase public order, they serve as evidence to protesters that the police and the government do not respect the rights of citizens to protest (Redekop and Pare 2010).

Perception

Policing is generally described as a service industry where those who request assistance from police are members of the public who are police clients and are ultimately involuntarily subjected to police authority (Maguire and Johnson 2010). These members of the public have varying opinions about the quality of the service they receive from the police. There is consensus globally that public support is important both for the legitimacy and ability of the police to effectively carry out their mandate. There is a wider audience among the family and friends of each person who comes in contact with the police and once they feel they have been treated well or badly, their feelings toward the police appear to spread throughout these social networks (Miller et al 2004).

Generally, the public has low confidence in the police, are unwilling to cooperate with them and share information due to corruption and the fear of harassment by the officers (Amnesty International 2013). A 2016 study conducted in Kenya revealed that 53 per cent of the respondents were dissatisfied with the manner in which the police handled their issues (Transparency International 2016), and they view the police as a corrupt organisation that has institutionalised an extortion racket using illegal and violent methods to uphold the status quo. Perception persists that police do not always appear to behave in a professional way. Moreover, other people feel they do not adequately provide safety and security and their customer orientation when dealing with the public is wanting. This negative public perception of the police has impacted on the institution and is further reinforced when the police use force against protesters with impunity.

While independence of the police is necessary and important, oversight is crucial and the NPS has, therefore, come under scrutiny from both the general public and government oversight bodies. The NPS Internal Affairs Unit (IAU) receives and investigates complaints against officers⁵ while the NPSC is responsible for the recruitment, appointment, deployment, transfer and dismissal of all police officers (Constitution of Kenya 2010: Article 246 (3); NPSC Act 2014). IPOA provides civilian oversight over the work of police officers by investigating deaths and serious injuries caused by police actions and misconduct with the aim of preventing impunity and enhancing accountability (IPOA Act 2011). The Commission on Administration of Justice (CAJ) investigates any conduct in State affairs or any act or omission in public administration in any sphere of government and complains of oppressive, unfair or unresponsive official conduct (Constitution of Kenya 2010: Article 59 (4); CAJ Act 2011: Section 1). The Kenya National Commission on Human Rights (KNCHR) documents cases of gross human rights violations including torture, extrajudicial killings and other violations (KNCHR Act 2012). Non-governmental organisations (NGOs) such as the Kenya Human Rights Commission (KHRC) foster human rights, democratic values, human dignity and social justice by holding State and non-State actors accountable for the protection and respect of all human rights for all people and groups (KHRC 2017). There are many other human rights and development partners working towards enhancing accountability of the police service in Kenya. The challenge, however, is to ensure officers comply with supervisors' directives, organisational roles and legal mandates.

Police Perceptions about Public Order Control

Public order control training

Policing all public order events is a difficult task regardless of the groups involved due to lack of hierarchical structure affecting communication. The Kenyan Constitution and international human rights law require that police officers are properly trained in the lawful use of force and non-discrimination to prevent human rights abuses. 85 per cent of the police officers interviewed said they had participated in public order control while 14.5 per cent indicated otherwise. Of those who had participated in public order control, 72.5 per

⁵ See Chapter 5 of the National Police Service Standing Orders on Internal Affairs Unit (IAU); Section 1 on establishment of IAU, Section 3 on functions of IAU and Section 4 on powers of IAU.

cent said they have never had any other specialised training on public order control other than the initial police training. Further, the research findings show that the young and energetic police officers are mostly preferred in the allocation of public order control duties at the station level.⁶ Yet, these officers mostly have not gained much experience in terms of police work and more so public order control. This is a very significant finding given that public order control requires specialised training other than the initial or subsequent police on job training.

The study further sought to establish the types of trainings from the 27.5 per cent of the officers who indicated having been trained. From the respondents, the following types of trainings were undertaken: New Riot Act, baton use when quelling riots, tear gas use, public order control, riot management, crowd control, riot drill, community policing, public relations, international rules and standards for policing, mediation and reconciliation, security management in the university and understanding crowd psychology. This kind of training readies officers to react and expect violence and prepares them for worst-case scenarios. However, it does not prioritise communication, dialogue and graduated use of force (KHRC 2018), which are vital for de-escalation of tensions and chaos during assemblies.

The study also found out that 50 per cent of the respondents strongly disagreed or disagreed that the crowd dynamics and psychology training offered during the initial recruit training were adequate. About 53 per cent of the officers were of the opinion that training provided on crowd control was inadequate, 31 per cent strongly disagreed or disagreed while 16 per cent were neutral. However, 71.8 per cent strongly agreed or agreed that the training needs improvement by increasing hours of training, reviewing of the curriculum by adding more content such as human rights, group psychology, first aid and drills, firefighting, taming propaganda and passive position to cover riots. Of those interviewed, 16.9 per cent strongly disagreed or disagreed while 11.3 per cent were neutral on the need for improvement on public order control training that officers undergo in police campuses. Public order control training should prepare officers to exercise good judgement and engage in balanced decision-making aimed at protecting and promoting the rights of protesters (KHRC 2017). Nevertheless, 48.4 per cent of the respondents strongly agreed or agreed that the training is effective while 26.6 per cent strongly disagreed or disagreed while 25 per cent were neutral. Whether the training was realistic, 42 per cent strongly agreed or agreed, 28 per cent strongly disagreed or disagreed while 30 per cent were neutral. About 45.1 per cent strongly agreed or agreed that the training was well-planned, 51.6 per cent said it was well-organised and 46 per cent strongly disagreed or disagreed that the training is reinforced periodically throughout the year.

Approximately 60 per cent of the respondents acknowledged that equipment and materials used in police campuses were insufficient and need to be increased and updated with latest technologies. About 47 per cent strongly disagreed or disagreed that the annual refresher course for serving officers was adequate and 38.7 per cent strongly disagreed or disagreed that the annual crowd control training for supervisory personnel was adequate.

⁶ Interview with a station commander in Nairobi County, November, 2018

Training on public order control is an important part of police culture, yet a majority of the officers are not well-trained to deal with members of the public - 40 per cent disagreed that the NPS policies and procedures on crowd control are adequate. It is through socialisation that recruits are induced into police subculture enabling it to maintain its norms and continue existing (Volti 2008). Majority of the FGD members were of the opinion that a substantial number of police recruits are sometimes bitter because of their past experiences while growing up and become very excited to kill as part of their revenge mission to the society for the suffering they underwent while young.⁷ According to one of the discussant in the FGD:

“...the police are known not protect lives and property in Kibera in that majority are usually interested in causing suffering to the people and confiscating their properties especially electronics without regard to the existing laws and cannot enforce what they do not understand and as such the youths have been wrongly accused by the police of crimes they did not commit. I have been wondering whether these police officers are really well-trained. ‘Mtu msumbufu anakuwa polisi msumbufu’ na ‘wengi wao hawajui sheria’ (a stubborn person will definitely make a stubborn police officer and most of them do not understand the law...)”.

Lack of planning, analysis and limited investment in specialised trainings and resource requirements involved, lie in the police culture of action. Police discipline still lacks current, collective standards for training officers to manage crowds.⁸ Rarely do police policies get any deeper than superficial overviews, mainly due to complexities of each event, making training increasingly important.

Police culture and public perception on use of force

In all societies, police occupy an important position in the engagement between governments and citizens and have monopoly over the use of legitimate force, which gives them a special responsibility. A police officer must always attempt to use non-violent means and only resort to use of a firearm in managing assemblies when all other methods of crowd control have proven inadequate and only for the purpose of protecting life of the officer or other persons (NPS Act 2011: Sixth Schedule).

From the study findings, 42 per cent of police officers strongly agreed or agreed that an aggressive tough bearing culture is more useful than a friendly courteous manner in public order control, while 52 per cent either disagreed or were neutral. This displays an existing police culture of using excessive force in the execution of their duty.

Close to half of the respondents (43.5 per cent) strongly agreed or agreed that use of the quasi-military structure is the most effective organisation model for the police and this speaks to the culture of violently dispersing protests. In addition, 59.7 per cent of the respondents strongly agreed or agreed that police officers respond with violence during public order control owing to the risk of injury. This reflects the complexity of

⁷ Focus group discussion held with community members in Nairobi, November 2018.

⁸ Interview with an officer attached to Nairobi Area operation command centre, 2018.

factors informing police use of violence during management of assemblies. However, approximately 85.5 per cent strongly agreed or agreed that enforcing the law is the most important responsibility of the police and 76.6 per cent strongly agreed or agreed that clear roles and responsibilities should be assigned during public order control for efficiency.

It is important to note that peace, stability and security are largely dependent on capacity of the police to enforce laws and effectively maintain public order control (International Committee of the Red Cross 2014). Police have a duty to maintain security while facilitating peaceful protests and must act within the law when policing protests. However, the public perceives them negatively as people who do not understand their role during riots and use excessive force out of anger. The police are also seen as intimidating, violent, government-oriented, inhuman, ruthless and unreasonable with no respect for the rule of law.⁹ Anger control can act as a buffer in situations of impulsive decision-making especially when such anger is induced during public order control (Brown and Daus 2015).

The study also found that 56.5 per cent of respondent police officers strongly disagreed or disagreed that most people respect their authority during riots. About 50 per cent of the officers strongly agreed or agreed that citizens will not trust police to work together with them in managing assemblies. This finding alludes to the fact that citizens have less trust working with the police. It hampers citizens-police relations especially in managing assemblies, yet such a partnership could help in isolating those who want to cause violence and hence, ensure peaceful gatherings. According to the FGD participants, any person the police come across during peaceful gatherings must be seriously beaten. To them, when police are called in, they do not control the crowd but instead cause more harm as they use live bullets and tear gas. This has left many families struggling with sick people due to misuse of tear gas, beatings and shootings when police violently disperse protesters. In most assemblies, there are always opportunists waiting for such moments to loot, but police have failed to establish this. Culprits involved in causing chaos view officers as brutal while victims see police officers as saviours.¹⁰ Police need to use their own intelligence to identify and arrest those involved in fracas.¹¹ This can be done when the police embrace the community policing aspect and the *Nyumba Kumi* initiative by involving the local youths in identifying those out to engage in illegal or disruptive activity. As in some of the cases where the police are called in to quell riots, it turns out that there are usually some people from other localities that are involved in causing mayhem and not allowing the police to access the riot venue and control the protesters in a peaceful manner thereby endangering the lives of the protesters and the police, forcing the police to act the way they do to protect lives and property.¹² However, approximately 66.9 per cent strongly agreed or agreed that inadequate equipment and lack of resources affects their attitude towards discharging their mandate. The police have a key function and authority with regard to keeping peace,

⁹ Focus group discussion held with community members in Nairobi County, November 2018.

¹⁰ *Ibid.*

¹¹ Interview with senior police officers in Nairobi County responsible for planning of operations such as the public order control November, 2018; Focus Group Discussion with community members in Nairobi County, November 2018.

¹² Focus group discussion held with community members in Nairobi County, November 2018.

maintaining public security and safety and preserving common property for citizens in the society which are basic, physical needs in human society. Work effectiveness is the key to successful operation in an organisation and with limited resources and inadequate equipment, effectiveness is hampered (Tengpongsthorn 2017).

Law has always shaped and directed police work, serving as a source of power that helps get the job done. It also operates to limit, direct and render their power accountable. Section 78 of the Penal Code defines unlawful assembly and riot, Section 79 stipulates the punishment for unlawful assembly and riot while Section 80 gives conditions that warrant police intervention. The Penal Code grants the police enormous powers permitted under specific circumstances, which can be abused to deprive citizens of their freedom through arbitrary search of their person and dwelling, seizure of their property and unlawful use of force as stipulated in Section 82 and 83 of the Penal Code.¹³ Nevertheless, 51.6 per cent of the respondents strongly agreed or agreed that police officers act professionally according to their training standards and the existing laws during public order control exercising discretion in many of the instances. 46 per cent strongly agreed or agreed that the statutory law with regard to crowd control is adequate.

Police Structure and Leadership

About 40.3 per cent of the respondents strongly disagreed or disagreed that the NPS policies and procedures of crowd control are adequate, 37.9 per cent strongly agreed or agreed while 21.8 per cent were neutral. 52.4 per cent strongly agreed or agreed that the command decision-making structures during public order control are clear. From the findings, police effectiveness in public order control requires a structure where both protestors and police officers will not be injured, which is achievable by reviewing the current ways in which riots are managed since the methods are outdated. It is noted that the NPS training curriculum has been standardised for both the KPS and APS training campuses. However, no progress has been made towards the envisaged establishment of the National Police Academy that will ensure that officers undergo the same training conditions especially when dealing with assemblies and human rights (KNCHR and CHRP 2015:40).

One characteristic for public order control operations where special police tactics are used, compared to every day police work, is that there are temporary units created for the duration of an event. Some of these units are drawn from other specialised units within the NPS and even the military.¹⁴ Sometimes the police commanders are not well-informed enough on what is actually on the ground as the general operation command is given from the operation command centre away from the event.¹⁵ This puts great demands on the competency of commanders to influence a system of persons and techniques.

From the study findings, 50 per cent of the respondents strongly disagreed or disagreed

¹³ Interview conducted with human rights civil society representatives in Nairobi, November 2018.

¹⁴ Interview with senior police officers in Nairobi County responsible for planning of operations such as the public order control, November 2018.

¹⁵ *Ibid.*.

that the crowd dynamics and psychology training offered during the initial recruit training are adequate, while 41.9 per cent strongly agreed or agreed that utilisation of the incident command post during riots is effective and the intervention strategies with regard to crowd control are well-planned (35.5 per cent). Of those interviewed, 53.2 per cent strongly agreed or agreed that the lessons learnt from previous crowd control situations were realistic and that supervisory leadership on crowd control is not effective (39.5 per cent), tactical decision making in crowd control is effective (47.6 per cent) and that team arrest techniques are adequate (38.7 per cent).

Important command principles identified were, among others, ability of the command to communicate and organise in a systematic way with roles, responsibilities and resources clarified for each level; coherence between the analysis of the complexity of the event, possible developments of events and the command structure; support of the strategic command level to the operational level; the quality of the preparatory work; flexibility to adjust the actions to changed situations and a lot of responsibility for lower level commanders within the assignment given to them.¹⁶

Conclusion

This paper has argued that police officers are not effective in public order control and there are serious flaws in the crowd control training of the NPS officers. Lack of adequate knowledge, use of different tactical models by units from different formations called upon during public order control has led to inadequate coordination. Further, police public order practice is mainly based on outdated crowd theories and officers often act improperly in anger, frustration and in fear of real or imagined aggression.

Police officers often use unwarranted force during public order control despite the laws and regulations on the use of force being in place. Force should only be used when it is absolutely necessary and should be minimum and proportionate to the situation and use discontinued as soon as the danger to life and property subsides. In violent assemblies, firearms should be used only as stipulated in the law. Integrity is an important characteristic to demonstrate in police work. Without ethical conduct, the police lose legitimacy, and without legitimacy, they are ill-equipped to carry out their duties.

For uniformity, it would be crucial for the NPS to have a specialised directorate or unit charged with the duty of public order control and trained on specific skills related to crowd management. Officers need to be retrained on identifying those involved in the riot and handling the public during riot professionally.

There is also the need for proper and different channels for reporting of police brutality without fear of intimidation. This will require strengthening of the oversight mechanisms already in place such as internal IPOA and police IAU to properly investigate and hold officers accountable for their actions. When such mechanisms are in place, the police will not act with impunity and will be charged accordingly in court for their actions that may be outside the ambit of the law.

¹⁶ *Ibid.*

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‘Ready to Shoot!’ Vs ‘Ready to Loot! The Violent Potentialities of Demonstrations in Kenya

Dr Naomi van Stapele and Dr Tessa Diphoorn

Introduction

On 9 August 2017, a day after Kenyans cast their vote, the first author received a gruesome photo from a human rights activist in Mathare¹⁷ depicting the body of a young man whose head had been completely bashed in. A second later, the female activist sent a picture of a protester near Number 10, a neighbourhood in Mathare, at Juja Road and another one of a police officer in riot gear approaching her (the activist) as she tried to document what was happening. During a later phone conversation, she explained that Opposition supporters, mostly neighbours and friends in Mathare, had gathered at different spots to discuss their concerns over alleged irregularities in the process of vote tallying by the Independent Electoral and Boundaries Commission (IEBC). According to the activist, police in riot gear had been waiting in lorries by the roadside and as soon as they got wind of these small groupings, went into Mathare to disperse them by force. In the chaos that followed, one police officer allegedly broke a door to a house, whereas two others started hitting people with huge pieces of wood, wounding several and killing one. Her narration was corroborated by several eyewitnesses during later interviews conducted in November 2017.

This incident is one of the many that occurred during the presidential election of 2017, which included a first round of general elections on 8 August and a repeat presidential election on 26 October. This election period was marked by tremendous political uncertainty on numerous levels, displayed by recurring protests and use of force by police officers to quell these and other forms of public gatherings. Several reports written by various human rights organisations have extensively documented the cases of police violence across the country (Amnesty International and Human Rights Watch 2017). In Mathare alone, the Mathare Social Justice Centre (MSJC) documented over 20 people killed by suspected police officers and an even higher number injured.¹⁸ From these deaths, the killing of the 9-year-old Stephanie Moraa by a stray bullet while playing at the balcony of her house received a lot of attention,¹⁹ yet many cases, such as the one discussed above, received little or no attention. Given this high number of injured and killed persons during the election period, the congratulatory signal issued to the police by President Uhuru Kenyatta, on 30 November 2017 angered many human rights organisations and some Kenyans. Marked as a ‘confidential’ signal, the President commended the police for being “firm” and for acting “professionally” and “in accordance with the law” (Agutu 2017).

¹⁷ This is an informal settlement located in North East part of Nairobi.

¹⁸ Internal report by MSJC to the EU Election observers, which was presented by Kinuthia Mwangi and the first author to the chair of the observers in Brussels on September 2nd 2017.

¹⁹ See: <https://www.nation.co.ke/counties/kisii/Stephanie-Moraa-parents-want-justice-for-her-shooting/1183286-4209244-14ywwtr/index.html> (Accessed May 2019).

This laudatory message and its accompanied support among police versus the outcry by local activists and some Kenyans point towards a deep incongruence between perceptions and experiences of that period and the way that the Kenyan security officers addressed the unrest. Furthermore, this disparity extends beyond extraordinary times such as elections, but also shapes everyday policing in Kenya.

Despite the fundamental changes that have taken place in Kenya since implementation of the 2010 Constitution, especially pertaining to police reforms, public protests and demonstrations remain violent in nature. Use of force often leads to the death of citizens at the hands of the police, such as the killing of a female protestor in March 2016 during a spontaneous protest at Juja Road (Mathare) against corruption within the National Youth Service (NYS).²⁰ A more recent example is the protest that accompanied Raila Odinga's return to Kenya in November 2017 during which police killed five protestors (Reuters 2017).²¹ In this paper, we argue that a fundamental contrast between two main perspectives on responsibility, namely that of protestors and police, create space for violent potentialities during public gatherings. These different perspectives are shaped by discourses, experiences and expectations with regard to citizen rights, obligations and the meanings of the current social order, which together set the stage for repressive policing structures.

Protesters we interviewed mostly blame police officers for being 'ready to shoot' and either inciting violence during a demonstration or responding to minor incidents with excessive violence, which then triggers a response among some of them, and so forth. As a result, during the preparation for a demonstration, organisers often implement certain mechanisms to mitigate these potentialities to avoid police harassment of citizens who are exercising their constitutional rights to protest. Such mechanisms may entail attracting public attention to the event through the use of social media (see more below). Police officers, in turn, also anticipate violence during a demonstration. In the eyes of many officers, demonstrations are opportunities for criminals who are 'ready to loot' and these must be suppressed through (excessive) force. Police officers interviewed and observed during our research commonly blame protestors for lacking discipline to control themselves, hence the need to be reinforced with violence. Although responsibility for ensuring that demonstrations are conducted in a non-violent manner may (logically) be perceived to be the responsibility of the National Police Service (NPS) as part of public order management, many Kenyan police officers during interviews felt that citizens are equally or even more responsible for ensuring peaceful protests. Parties thus have different ideas about responsibility and easily blame one another when violence occurs, which further consolidates existing social divides.

In this chapter, we argue that in order to improve public order management in Kenya, these contrasting views on responsibility must be unpacked and addressed. To exemplify

²⁰ Interview with two anonymous activists in Mathare on 31 March 2016.

²¹ In this article, we follow popular distinctions between demonstration and protest, given that many Kenyans use demonstration when it is planned way in advance and protest when it is more impromptu, but our focus lies with demonstrations. However, we use the term 'protesters' to describe participants in both.

this, we will draw from ethnographic fieldwork conducted by both authors on different but complementary research projects on policing and security in Nairobi. As part of a wider research project on community organising and urban marginality (with a special focus on security), the first author explored activism against police violence and conducted ethnographic research for a total of nine months in different urban settlements in Nairobi, and with a wide range of activists, between July 2016 and February 2019. Accordingly, she has been intimately involved in supporting the organisation of various demonstrations and protests by different social justice centres in Nairobi, such as the Saba demonstration on 7 July 2018.

The second author focused on understanding the various mechanisms that exist to monitor police behaviour and the actors involved in this process. In addition to other qualitative methods, such as participant observation, the author conducted approximately 180 interviews with a wide range of research participants, such as police officers, human rights activists, lawyers and members of civil society. In addition, after formal permission was obtained from the Inspector General's office, the author conducted a total of 75 formal interviews with police officers in Nairobi between June and August 2018. These 75 interviews were conducted at police headquarters and across six police divisions/sub-counties and at fourteen stations/posts. The sample for officers was mainly selected by the officers in charge and as a result, most of the officers were men of higher-rank (Inspector and above) from the Kenya Police Service (KPS). Combined, the analyses made here are thus based on qualitative data collected through interviews (both open-ended and semi-structured) conducted with protestors and police officers and via personal observations made while attending and/or participating in demonstrations and other gatherings between 2017 and 2018.

In the first two sections of this paper, we will outline some of the conceptual debates around public order policing and explore the concept of violent potentialities in police-citizen interactions. In the third and fourth sections, we present two empirical cases of demonstrations that centred around the use of force by police officers. The first — “Stop Killing Us!” — was directed at the killing of protestors. It took place in October 2017 and resulted in the use of force (tear gas) by the police. The second — “Saba Saba March for Our Lives” — took place in July 2018 and was organised by a coalition of social justice centres against extra-judicial killings and other human rights violations. Social justice centres from Mathare, Dandora, Kayole, Githurai, Mukuru, Kiambiu and Kamukunji combined their efforts in the Social Justice Centres Working Group (SJCWG). Later, after the Saba Saba demonstration took place, other social justice centres also joined this working group. The demonstration eventually turned out to be peaceful despite looming violent potentialities. By discussing these two different demonstrations, we can explore how police violence was triggered or prevented and provide insights into the constraints and possibilities on both sides to realise peaceful demonstrations. In the concluding section, we discuss the crucial need to realign perspectives as a way of eliminating or minimising the violent potentialities that precipitate during demonstrations in Kenya and may lead to violent disruptions of public order from both sides, that is, police and protestors. We argue that such realignment is crucial to ensure more peaceful demonstrations in the future, and essentially, contribute to more democratic policing styles.

Public Order Policing

The policing of public order, or public order policing, remains the fundamental role of the police. Despite the increasing pluralisation of policing (Jones and Newburn 2006) and the increasing militarisation of policing, the police, albeit in different forms and styles, continue to act as the universal prime custodians for ensuring order during public gatherings and events.

Public order policing remains an extraordinary form of policing due to its distinctiveness from the more mundane or 'normal' policing (Waddington 2007a: 4). Firstly, everyday policing generally involves several officers (and very often only one or two) who patrol areas and approach citizens as individuals. Public order policing, in contrast, entails the deployment of numerous officers to deal with many individuals. Secondly, in contrast to fighting crime, which is directed against the 'criminal other' and thus generally perceived to be a good 'thing', public order policing is not as straight forward, as is very often directed at a collective of active citizens who are not necessarily criminal or deviant. Thirdly, while most policing practices go unnoticed and are thus invisible to the public eye, public order policing very often happens under the public gaze due to media attention. With all these factors combined, public order policing is an exceptional type of policing and cannot be compared to everyday patrols and crime investigations. It is also for this distinctiveness that in many parts of the world, police forces have dedicated anti-riot units or squads, often known as riot police, whose sole mandate is to address public gatherings, such as the South African Public Order Policing (POP) Unit (Marks 2017). In Kenya, the General Service Unit (GSU) is the specialised anti-riot unit in terms of training, even though other types of police officers are at times deployed to supplement the GSU numbers. Similarly, it clarifies why many countries have implemented specific legislation to outline the legal fundamentals and boundaries of public order policing.

The reality is that many public gatherings occur in a peaceful manner, yet the focus – both in academic scholarship and media discourse – lies with disorder, whereby gatherings are defined as riots and associated with mayhem (Waddington 2007a). The word 'riot' is regularly used in France, while, as argued by Body-Gendrot, it is often inappropriate and insufficient in explaining certain phenomena (2007). In South Africa, the idea of the 'mob' is frequently conjured (Buur 2009; Cooper-Knock 2014) to describe violence-prone gatherings, which reinforces the image of mobs as frantic forms of dissent staged by angry youth. One could argue that recent global events have brought the potential violent nature of public gatherings to the fore. Consider the numerous eruptions of violence in anti-globalisation demonstrations throughout the past decade (Waddington 2007b; Juris 2005) -- the Gezi park demonstrations in Istanbul in the summer of 2013, the Standing Rock protests against the expansion of a pipeline in 2016 in the USA, and more recently, the 'yellow vests' in several parts of Europe, to name a few examples. Combined, this demands a revisiting of how to frame and analyse such events.

Perhaps the most interesting dimension of public gatherings is that there is always a potentiality for violence, as we will discuss in more detail in the next section. It is precisely this dimension that has been the scholarly focus within the policing literature, in which studies have centred around the question of why some episodes result in the use of violence and why some do not, very often drawing from psychology to understand group crowd behaviour (see Waddington 1989; Reicher et al 2007). In turn, emphasis has been placed on understanding and developing the most appropriate tactics, strategies, and equipment to effectively deal with violent demonstrations. Amongst this vast literature, the most well-known explanatory model is the Flashpoints Model (Waddington 1989), which identifies how the combination of various levels — structural, political/ideological, cultural, contextual, situational, and interactional — can result in degrees of confrontation. Both praised and critiqued, the model has acted as a conceptual lens to analyse and clarify the outcome of public gatherings and the manner in which they are policed. In this paper, we will not zoom into this model, but rather argue that these various levels intersect in the construction of sharply contrasting narratives that in turn determine the space for violent potentialities of public order policing in Kenya.

Police Reform in Kenya

Similar to other parts of the world and the East African region (Baker 2015), Kenya has faced issues of public order policing for decades, dating back to colonial rule when protests were associated with political dissent and were met with excessive force by the police. Since independence, riots have not been absent in Kenya's politics and often go hand in hand with political events and presidential elections. A salient example is the multi-party protests and demonstrations of the early 1990s (Throup and Hornsby 1998). Yet, it was after the 2007-2008 Post-Election Violence that the government emphasised more than ever the need for urgent change in public order management and policing in general given the widespread outrage over the security services' response to the protests (Ruteere 2011; Osse 2014).

Alongside the new Constitution of 2010, numerous reforms have been implemented to transform the NPS. Key among these is the entry into force of the NPS Act of 2011, which entailed transforming the Police Force into the Police Service and wholly restructuring it, including its command structures. An array of other initiatives were also implemented, such as the creation of new training curriculums, the revamping of national-based community policing efforts, and more recently, the introduction of new police uniforms (Hope 2015; Kivoi and Mbae 2013; Osse 2014; Skilling 2016).

A key part of the police reform project has been the establishment of two oversight bodies to monitor police (mis)conduct. For internal oversight, the Internal Affairs Unit (IAU) was set up under Section 87 of the NPS Act. The IAU is responsible for handling police (mis)conduct internally; its main goal is to receive and investigate complaints against police officers, and these complaints can come from both the public as well as police officers themselves. For external civilian-led oversight, the Independent Policing Oversight Act of 2011 established

the Independent Policing Oversight Authority (IPOA). IPOA is an independent State institution that is required to investigate police misconduct, especially deaths and serious injuries caused by the police, review the functioning of internal disciplinary processes, monitor and investigate policing operations and deployment and conduct inspections of police premises.

IPOA is thus required to investigate police operations, including the conduct of officers during public gatherings. During 2012-2018, IPOA monitored a total of 151 police operations, of which 60 were episodes of public order management. This amounts to 39.7 per cent of all operations, and exceeds all other operations, such as traffic management and police recruitment (IPOA 2018). From these operations, IPOA also produced two in-depth reports on the anti-IEBC demonstrations²² between April and June 2016 and the 2017 election period.²³

The main objective of police reforms is to transform the culture and mind-set within the NPS, which would result in more democratic, accountable and inclusive forms of everyday policing. Although some of the dimensions target public order policing, it seems that public order management has been largely overlooked. The Public Order Act Cap 56 is the most crucial legislation and outlines the legal framework and provisions under which public meetings and processions can occur. Many of the provisions overlap with the NPS Act and the National Police Service Standing Orders (SSOs), such as the restriction on the use of force by police during demonstrations to exceptional circumstances. In particular, the legislation ensures that firearms may only be used to save or protect life or in self-defence against imminent threat to life or serious injury. Yet, despite the Public Order Act, a clear policy on public order management is urgently needed, as outlined by IPOA in their End of Term Report (IPOA 2018:130-131). In that report, they highlight the need for “a policy on public order management, where management of right to assembly, demonstration, picketing or presentation petitions to public authorities’ fails” (IPOA 2018:130). In 2019, however, this recommendation by IPOA is not yet followed through, forcing police officers to rely “on the Public Order Act and the Public Order Management as laid out under Chapter 58 of the SSOs to manage the public, almost repetitive of the NPS Act, Sixth Schedule” (IPOA 2018: 131).

In addition, IPOA also identified the urgent need to “establish a comprehensive training on public order management with reference to other international standards” (Ibid). The oversight body proposed that this training should be mandatory to all police officers although at the time of writing (early 2019), this had not been developed. Another recommendation focused on visibility and transparency. “During the public order management, assigned officers should have prominently displayed means of identification including visible name tags, number of the officer, even on their helmets. Rule 10 of Part A of the Sixth Schedule to the NPS Act, 2011 requires that “[a] Police officer in uniform shall at all times affix a name

²² These demonstrations were largely organized by the Coalition for Reform and Democracy (CORD) and aimed at disbanding the establishment and operations of the Independent Electoral and Boundaries Commission (IEBC). This was based on the assumption that the IEBC had failed to oversee fair and credible elections and between April – June 2016, numerous demonstrations were held.

²³ Both reports can be found on IPOA’s website: <http://www.ipoa.go.ke/other-documents/>

tag or identifiable Service number in a clearly visible part of the uniform” (Ibid), yet this too, had not been enforced by early 2019.

This shows that despite the legislative changes that have aimed to transform police culture, there is still much room for improvement for public order policing in Kenya. One explanation often given for the lack of such improvement is the persistent politicised nature of policing and the claim that the police protect the regime and interests of political elite rather than citizens in general (Hills 2007). According to Baker (2015), the political nature of a regime largely determines “how much force it is prepared to use in any given circumstance” (Ibid: 369), hence decisions regarding police violence are largely political. Ruteere (2011) has nuanced this claim by providing insight into the relative autonomy of police in Kenya — for instance when compared to the army. Yet, this does not withstand the fact that the contemporary political environment in Kenya does give rise to a police whose central mandate seems to be to exert control through violence and intelligence gathering so as to intimidate, coerce and eliminate perceived threats to the established social order. The legitimating discourses underlying this social order configure particular violent potentialities on both the side of police and of protestors that emerge and interact during protests and demonstrations, as we discuss in the following section.

Violent Potentialities in Police-Citizen Interactions in Kenya

Building on Vigh’s conceptualisation of ‘negative potentiality’ (Vigh 2011), violent potentialities denote the future violent effects that in/visible agents and social forces are perceived as being capable of producing. In Vigh’s discussion of negative potentiality, the agents or forces are considered invisible “because the complexity and simultaneity of relations and associations is simply too dense for full overviews to be gained and clarity achieved, making uncertainty and opacity foundational aspects of the social condition” (Vigh 2011: 94). Yet in the context of encounters between police and citizens during demonstrations in Kenya, a particular configuration of visibilities and invisibilities emerge and together constitute violent potentialities. Imagined invisible yet dangerous agents and forces are inscribed in the visible bodies of both police and protestors, and the vital conjuncture (Johnson-Hanks 2005) of their temporal and spatial interactions may or may not culminate in direct acts of violence (Galtung 1996). The potentiality hence relies on circumscribed orientations into the future by actors, which also inform their particular readings of bodies, practices and situations in the moment of an event. Such orientations and readings are configured by the temporal and spatial convergence of discursive and material conditions, including the framing of actors, by the specific interactions between actors and by the locality where protests take place.

The framing of the actors involved, that is, the protestors and police, derive from dominant discourses on order and disorder and revolve around citizenship and belonging. Direct acts of violence that threaten bodies and the bare life of bodies (Bay 2006) arise from “routine violence” (Pandey 2006), such as exclusion mechanisms in society. In- and exclusionary

aspects of notions of citizenship and belonging in Kenya are based on specific ethnic, age, class and gender configurations which for instance frame urban poor young men as ‘thugs’ (van Staple 2016) and police as ‘beasts’.²⁴ These framings inform legitimating discourses of escalating and excessive direct acts of violence, such as the police violence described in the introduction. The concept of routine violence allows a focus on the violence of routine political practices – the drawing up of political categories and the writing of national histories – and on the discursive, socio-economic and political conditions that allow and legitimise the ‘undisguised’ state violence and its ‘routinisation’ in everyday life (Pandey 2006). Routine violence, as it is described by Pandey, is the violence “written into the making and continuation of contemporary political arrangements, and into the production of majorities and minorities” (Ibid: 1).

The discursive and material conditions that make police violence possible during demonstrations are enmeshed in specific power relations between the state and its citizens in Kenya and in the concomitant exclusion mechanisms at work. Hence, these must be part and parcel of any analysis of the violent potentialities anticipated by both protesters and police and how these shape the potential for violence before, during and after particular events. The readiness of police to use violence in these contexts also speaks to broader understandings of the function of force as part of the police mandate.

In Kenya, the police are widely distrusted (Kagari and Thomas 2006) and imagined to protect the interest of the wealthy few (though majority in terms of power) against the grievances and demands for political changes harboured by diverse minorities (though majority in terms of numbers). Police violence during demonstrations is set against a backdrop of rampant unlawful police killings in Kenya. The persistent use of illegal force by police against citizens (Jones et al 2017; MSJC 2017; van Stapele 2016) reveals the extent to which a propensity for excessive (and often illegal) violence is a structural part of policing practices. This violence is often legitimised by police through ascribing the ‘thug’ (or terrorist) label to the victimised dead or injured, often without tangible evidence and, in some cases, even with witnesses countering such claims. However, as noted, these labels are not only deployed to legitimise violence but also shape expectations prior to and particular perceptions of events by police on the ground and in the moment of demonstrations. Hence, the discursive power of these labels feeds into certain discourses and expectations on the side of the police and inform particular practices during a demonstration.

Relevant for our discussions here is the way in which the ‘thug’ label casts young, poor, urban men protestors as potential ‘looters’, and are deemed to take advantage of demonstrations to rob people, shops and houses. While demonstrations are indeed sometimes sites of petty crimes,²⁵ this generalisation is deeply problematic and dangerous. What’s more, instead of arresting specific suspects, police use excessive and illegal violence on not only suspects but also protesters in general to quell the problem of petty crime. This does not

²⁴ During several discussions between the first author and residents of Mathare, Dandora and other Nairobi ghettos (and over many years of ethnographic research), people often described police as *wanyama* (the Swahili word for beasts).

²⁵ Interview with Saba Saba protest organisers on 2 July 2018.

resonate in any way with the laws described in the previous section.

To illustrate the readiness of police to use illegal force on suspects, three people were killed in Mathare during the post-election chaos in August 2017 depicted in the first vignette, after allegedly stealing a TV set in Mathare and getting caught red-handed by a well-known police officer who immediately shot them all dead on the spot.²⁶ A second witness later shared on the same incident in November 2017: “They (referring to the three murdered friends), were shot, right there; shot in the back.” Instead of arresting the suspects and taking them to court, the police shot the three who were trying to run away. They had already put the TV they had stolen down on the ground before trying to make their escape. Based on these and other experiences with the excessive and often illegal use of violence by police, protesters harbour stereotypical notions about officers as trigger-happy and thus as “ready to shoot”. This, in turn, also informs particular expectations and readings of events. The mutually dehumanising effects of such dominant narratives, casting particular groups of citizens as ‘thugs’ and ‘looters’ and police as ‘beasts’ and ‘shooters’, adds to anticipations of violence. The violent potentialities from either side build up in advance to and during demonstrations because of the uncertainty inherent in the political act itself.

The anticipation of violence is further reinforced by differences in the way the political act of demonstrating is considered by both parties and the uncertainty these divergences brings forth. To the police, demonstrations present disruptions in public order that aim to traverse and (potentially) destabilise the very social order they are trying to protect, whereas protesters perceive demonstrations as a moment to push for durable change of this order. Accordingly, a protest to the latter constitutes a moment for the oppressed minorities, granted by the Constitution, to voice their discontent with current State-citizen relationships. Temporal disruptions of public order are thus believed by them as critical to effect such change in the social order in the long-run, and they are legitimised by the protesters’ call on existing legal frameworks and dominant ideas of public participation in Kenya (Ghai 2008).

Likewise, police also draw on the law to justify their often-violent attempts to maintain public order, and it is not uncommon for legal arguments from opposing sides to offset one another. Protesters in Kenya draw on Article 37 of the Constitution, which states that “every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities”. Yet the police claim a duty as law enforcers to protect people’s lives and property as stated in the NPS Act (see also IPOA 2018: 131). Nevertheless, these legal arguments are further complicated by the contemporary rhetoric of public participation, which alongside democratic ambitions also favours a neoliberal tenet (Ong 2006) and in Kenya also builds on domestic ideas of ‘self-help’ and ‘pulling together’ (‘harambee’ in Kiswahili) (Widner 2002; Haugerud 1995). On the one hand, the current discursive frameworks of public participation in Kenya encourage citizens to participate in democratic processes, which include making their voices heard through protests and demonstrations, yet on the other hand, this language squarely rests on citizen

²⁶ Interview with an eyewitness, Mathare, on 3 November 2017.

responsibility and thus opens up space for the State to bestow citizens themselves with the responsibility to protect public order during such moments. In other words, democratic space, even if enshrined in the Constitution, is granted only to responsible citizens, as long as it does not transgress boundaries of (a certain) social order. So, the narratives of public participation are inherently ambiguous and expose unease between certain laws and what the police are supposed to do (Garriot 2013; Horneberger 2010; Baker 2015). At the same time, it provides police with a justified language to give back responsibility for public order management to citizens. The apparent contradictions that ensue contribute to uncertainty and may eventually also lead to violence.

The above alludes to the police's claim on having discretionary powers to translate laws to their own partialities at a time when protesters in Kenya increasingly emerge as 'contenders for power' (Hope 2015). Citizens' space for public participation is enhanced not only by the 2010 Constitution, but even more so by growing access to political knowledge, networks and alternatives through the Internet and global organising, all of which challenge the rather authoritarian State run by wealthy elites (Baker 2015). The Kenyan police may react as representatives of the State (instead of protectors of citizens) but also as an authoritative entity mandated by the State but with some measure of autonomy (Ruteere 2011), and from these positions, have been observed by the authors to impart conditions that force cooperation from the protesters. What this cooperation entails precisely may vary per situation, but mostly revolves around public responsibility to maintain public order. The underlying narrative, which delineates the reaction of the police to protest organisers, holds that it is in their power to approve or dismiss a notification of a pending demonstration—even if this is legally untenable in many cases. Indeed, the right to freedom of assembly and protest is not absolute but comes with conditions regarding purpose, organisation, security issues, and so forth. In light of this, the fact that the protestors have no right to appeal a cancellation or denial of a notice expands the discretionary powers of the police who have been observed by the authors to take advantage of this by referring to a perceived threat to deny permits to protests. This raises all sorts of questions that remain unanswered following the lack of procedures to challenge such decisions. For instance, what kind of threat? Or, why not just address the threat and let the protest proceed?

According to most of the police officers who were interviewed, citizen responsibility for public order was one of the main signs of the readiness of protesters to comply with 'the law' without further stipulating an exact law. Many of the organisers and protesters involved in the Saba Saba demonstration expressed that it felt as if they had to comply with the same order they aimed to demonstrate against — especially, given that this was a demonstration against police brutality. Hence, the narrative of citizen responsibility at the centre of dominant narratives on public participation provides the police with an opening to simultaneously allow police violence to occur and shift blame to protestors in case of any such violence. Any skirmish during the demonstration, even if unrelated to the protest itself, may be regarded as a breach of the conditions upon which the police allowed the demonstration to take place in the first place, and would instantly invite violence from them. Hence, the police language of citizen responsibility tweaks the original intentions of

the dominant public participation discourse. From the police perspective, this reduces the constitutional right to demonstrate into a privilege, and approval to demonstrate depends on many often impossible conditions that are determined by a reluctant police force.

However, there is more to it. The excessive and illegal use of police violence in Kenya can also be grasped as attempts to quell deep uncertainty about the growing tensions between State power and citizen unrest. Disruptions of public order happen perpetually every day, yet they especially consolidate during events such as demonstrations and become specifically embodied by the protesters. In any State that is increasingly challenged by informed citizens and calls for change from many different sides, such demonstrations present moments to assert State power and hold together the current social order (Comaroff and Comaroff 2016; Fassin 2013). Thus, a protest sets in motion all kinds of chaotic possibilities, triggering deep uncertainties among police whose job it is to ward off such chaos. On the protesters' side, uncertainty is often embraced for it holds possibilities of political expansion. Uncertainty to police, especially in Kenya, denotes loss of control and threatens their very position in society. The ensuing fear by Kenyan police is managed through the almost ritualistic ceremonies that precede the event of any demonstration (such as the notification process discussed below). Similarly, during the event, any 'provocation' to their position as police is met with excessive violence whose ultimate aim is to restore certainty. Police consider the visible disruption of order, constituted by the act of demonstrating, as akin to a wild fire that needs to be contained immediately before it spreads and becomes uncontrollable and irreversible. However, violence often begets violence, and the overreaction by police to minor incidents during demonstrations may be taken as evidence of State oppression and fuels violent reactions in the spirit of demanding for change (Paret 2015), while others may take advantage of the ensuing chaos to steal and engage in other prohibited acts. The escalation of violence is often attributed to the disorder of the "crowd". However, the above reveals that it is critical to explore how violence is actually produced in these contexts, when and by whom.

Hence, we argue that the violent potentialities of demonstrations commence way in advance and take shape during the production and perpetuation of routine violence (Pandey 2006) and the desire to maintain a specific social order. In the following analysis of two empirical cases, we explore further how discursive frames, experiences and expectations, from the perspectives of protesters and police, interact and produce violent potentialities. In the first case, these culminate in direct acts of violence by the police, whereas in the second case the protesters succeed in mitigating the violent potentialities emerging on both sides and the demonstration proceeds peacefully. Exploring these two cases will help to tease out the constraints and possibilities on both sides to realise peaceful demonstrations.

‘Stop Killing Us!’ Demonstrating against the Killing of Protesters²⁷

As discussed in the introduction, the election period of 2017 was marked by tremendous unrest and political uncertainty, and the death of protesters across the country was a clear manifestation of this. Many human rights activists felt an urge to speak out against the killing of protesters and on 17 October 2017, a demonstration was organised by photojournalist and activist Boniface Mwangi and his initiative, ‘Team Courage’. The demonstration entailed a march from the Freedom Corner in Uhuru Park towards the office of the Inspector General (IG) of the NPS. The demonstration was communicated through various social media and Mwangi, being a local celebrity, was able to create quite some media hype around the event. Following the conventions of previous demonstrations, the organisers used a network of civil society organisations and social media to mobilise support. A ‘Protest Code of Conduct’ and ‘Safety Protocol’, which detailed possible eventualities and appropriate responses had been posted online earlier.

Before the demonstration, the second author inquired among governmental officials and other activists about the safety of the event, especially considering the levels of violence employed during previous protests. All of them reacted with the same sentiment: This demonstration would surely not be violent. This expectation was based on 1) the content of the demonstration, that is, against police violence, and 2) due to Mwangi’s high-profile status and thus the amount of media attention it would receive. As a female activist said: “There will be a lot of press and high-profile people there, so the police won’t act out”.²⁸

In the morning, many people gathered at the offices of Pawa 254, an artists’ collective, to collect their T-shirts and placards for the event. And before they headed out, Mwangi instructed everyone that this was a peaceful march that was apolitical. This was not about the election, but it was about demonstrating against the killing of protesters and their constitutional right to protest. He repeated this several times, urging everyone that any form of violence would not be tolerated, and his claims were met with loud cheers from the group of approximately 30 protesters. (Interestingly, two police officers later shared with the first author that they indeed had expected violence due to the political tense moment and that the demonstration was held in the city centre and as such more in public view than if the demonstration would have taken place in the city’s outskirts. Even if in retrospect, this sheds some light on why the police may have been a bit more anxious and alert).

The protesters then walked in unison, adorned in branded black and white T-shirts. They carried placards and held red roses and wooden crosses that bore the names of the people

²⁷ This account is primarily based on personal observations by the second author. Additional details of the event were compiled from interviews with other participants and the personal account of Boniface Mwangi, publicly available on his own website, was also consulted, <https://www.bonifacemwangi.com/the-day-i-was-shot/> (Accessed 3 January 2018).

²⁸ Informal phone conversation with female activist working for a justice centre based in Nairobi, 16 October 2017.

whose lives had been taken by the police. After marching onto Kenyatta Avenue shortly after, they immediately spotted an Administration Police (AP) vehicle with six officers. As they continued to walk, the AP vehicle came towards them and one of the members of Team Courage stopped to talk to the officers. More policemen surrounded the demonstrators and then a female officer stood in front of them, on the pavement, instructing them not to proceed further. Some people tried to negotiate with the police and then Mwangi, holding a large dummy bullet, also arrived and addressed the officers. He showed the female officer in charge their written notification, thereby providing proof that he had alerted the relevant authorities to this planned demonstration and thus had abided by the law. Yet the commanding officer informed him that the IG, Joseph Boinett, had issued orders for all of them to be dispersed.

For about 10 minutes or so, the protesters shuffled around, unsure what was being said and would happen. In the meantime, another police vehicle also arrived at the scene and stood behind the protesters, encircling them. At this point, the negotiations turned into loud exchanges and Mwangi kept shouting: “There is no need for this, we are allowed to demonstrate, it is our right!” In return, the officers continued to demand that they leave and end the march. Within seconds, the female officer in charge unleashed a tear gas cartridge into Mwangi’s chest, forcing him to drop onto the ground. Shots continued and the protestors dispersed. Shortly after the police retreated and it seemed as if nothing had happened on that corner of Kenyatta Avenue. Yet the protesters were not defeated. Although they were never able to reach Freedom Corner, which was surrounded by officers in riot gear and where other protesters had gathered in the hope of joining them, various members congregated back together and took the demonstration to other parts of the city centre, such as Jevanjee Gardens, while they were continuously followed by the police.

The incident received quite some media attention and the following week, the IG was interviewed on KTN News.²⁹ During this interview, he claimed not to have seen the live footage and firmly stated that: “Boniface did not comply with the law. The Public Order Act requires that before you stage a demonstration, or a procession for that matter, you have to notify the officer in charge of the nearest police station and he did not do that”. The female interviewer counter-claimed that Mwangi had done so and photos of the letter were shown on the screen, yet the IG said that the letter was “misdirected” and that the proper procedure was not followed. It was for this reason that the demonstration was unlawful and thus not permitted to take place.

Regardless of whether or not Mwangi’s letter reached the appropriate commanding officer, this issue — of notifying the relevant authorities — is a recurring one when organising demonstrations. A common issue voiced by police officers, both those operating at police stations and those at high-ranking positions at headquarters, is that protesters do not abide by the law and fail to properly notify them about a demonstration. Many officers highlighted that it is not only about formally accepting a letter, but also about providing

²⁹ The news interview can be viewed here: <https://www.bing.com/videos/search?q=stop+killing+us+boniface+mwangi&view=detail-&mid=24BF072A0E1D7C7B0FD424BF072A0E1D7C7B0FD4&FORM=VIRE>, accessed January 3rd 2019.

permission for it to occur. According to a very high-ranking officer, “an OCS is allowed to decline if there is a reason for this”. He further elaborated that this reason does not need to be shared with the public for security concerns. Police officers thus feel a certain responsibility and entitlement to deny citizens the right to assembly on the ground that this will jeopardise the safety of other citizens and thus, the police mandate of maintaining public order. In the eyes of protesters, this gives police officers endless opportunities to refuse demonstrations, even when letters are formally accepted and permitted, as can be seen in the following example of a peaceful demonstration.

Saba Saba: Peacefully Demonstrating against Extra-Judicial Killings

On 7 July 2018, a network of social justice centres in Nairobi organised a demonstration against police killings, using the hashtag #SabaSabaMarchforOurLives. Against all expectations, this march proceeded without violence. Taking a closer look at the run-up to and at the event itself and its aftermath from the perspectives of the organisers and participants will allow us to tease out several key strategies the protest organisers deployed to mitigate potential police violence.

The idea to organise a protest on the historic Saba Saba day (‘seven seven’ in Kiswahili referring to 7 July 1990) was developed by several grassroots social justice centres. The protest was triggered by the consistent lack of effective redress for the families of victims from mandated governmental and non-governmental organisations and the urgent need for a collaborative grassroots approach to stop police violence against ghetto residents, especially against young and poor men.³⁰ A month before the day of the march on Saba Saba, the SJCWG launched a month of community dialogues during a press conference held at the MSJC in Mathare slums. The press conference and dialogues were the first two strategies to assuage violent potentialities and pre-empt direct acts of violence by police. The statement presented a united front of social justice centres and the press publicity helped to gather national and international support.

The community dialogues that were held in the month before #SabaSabaMarchforOurLives in Kayole, Kamukunji, Dandora, Mathare and Githurai had two objectives: 1) to raise awareness among residents about the Saba Saba demonstration and mobilise their support; and 2) to document and investigate cases of police violence. These cases were presented during the actual demonstration. These activities prior to the 7 July 2018 demonstration were accompanied by a rigorous social media campaign aimed at countering the dominant narrative on police violence in particular against suspects of crime — which still gathers some support from the wider public in Kenya. These dialogues and concomitant social media helped the centres to keep the public eye on the preparations for the march. One of the organisers said to the first author that this served to caution police against obstruction of the preparations and also helped to deter police violence on the day itself. While

³⁰ July 7th was chosen as a suitable date for the protest march because it commemorates July 7th 1990 when protesters in Kenya demanded multiparty democracy and called for free and fair elections. Their efforts led to a constitutional change in 1991 through the repeal of Section 2a, which paved the way for multiparty elections in 1992.

preparing for the demonstration, the organisers talked constantly about the imminent threat of police violence. Their premonition was informed by personal experiences with police intimidation and violence. Many of them had experienced detention without charge, abduction and torture and had been otherwise threatened by police.

Another important strategy to mitigate violence both in the run-up to and during the event included the formal notification of police about the pending demonstration and related activities, such as the community dialogues. One group of activists went to Pangani police station to notify the Officer Commanding the Station (OCS) but was met with open hostility. At first, the OCS did not want to receive the letter. This, however, did not deter the activists. One of them told the OCS that he did not have to receive it, but the witnesses present would be able to verify that the police at this particular station had been notified according to the 'law' (that is, the Public Order Act, see above). Therefore, he argued, the protest organisers had complied with the law and would thus go ahead with the demonstration regardless of how the notification was (or was not) received. This angered the OCS who shouted back that the demonstration "supported gangsters" and that "thieves would only come and steal during the demonstration". He threatened the activists by avowing that if anything happened on the day of the demonstration, the police would have to "intervene" and it would be "upon them". The OCS then clearly indicated that the protest organisers were responsible for public order and that the police in riot gear would be on stand-by in case anything happened.

The organisers who went to Kayole police station encountered even more difficulties. The police officers present (the OCS was absent during the first visit) refused to let them in. They went back the next day and the next. Each time, the OCS was absent and the activists were not allowed to enter the premises to hand over the notification letter. The Kenya National Commission for Human Rights (KNCHR) had to intervene by accompanying the team to physically hand over the letter to the OCS who reluctantly accepted the notification and expressed similar sentiments as those uttered by the Pangani OCS.

These rather tense encounters with the commanding officers from these police stations worried the organisers and highlighted the need for further assurance that the police would permit the demonstration to take place. The march was to start at different neighbourhoods, including Kayole and Githurai, before joining together at Juja road where MSJC is located and continuing together to the historic Kamukunji grounds. Hence, permission from different commanding officers was considered vital. The opportunity to gain support from higher-up arose two days before the march, namely during a consultative forum meeting of the Multi-agency Taskforce meeting organised and chaired by the Ministry of Interior. This meeting was a spin-off of the National Policing Conference that had taken place on 17 April 2018 and had the primary mandate of bringing various policing parties together. The conference was an initiative of Cabinet Secretary Fred Matiang'i, who proclaimed that the various parties, both within and outside the police, needed to work together in a more harmonious way. This included civil society and human rights organisations which had been invited to the conference and asked to present their views. One of the action points of the conference was the creation of a 'multi-agency taskforce' to address issues in

a collaborative way. The meeting on 5 July was thus a means of discussing pressing matters and public demonstrations was one of them. Yet, in the agenda, the issue was framed as: “Misconduct by public during demonstrations and other forms of protests”. This suggested that misconduct was performed by the ‘public’ and not by the police. This provoked a tense discussion between the various parties; the civil society members felt that blame was unjustly being placed on protesters, thereby ignoring the crucial role of the police, while the government and police representatives repeatedly emphasised the violent tendencies of demonstrations. One of the latter even stated: “When people go for demonstrations, they go to destroy property!” The prevalence of conflicting perceptions and the centrality of responsibility therein were all too palpable during this meeting.

At the end of the meeting, a round of ‘any other business’ was provided and one of the key organisers of the Saba Saba march took this chance to invite all the participants, including the high-ranking police officers, to attend the march. He then handed over a petition about police killings to the chair and asked another activist to take a photo of this moment, stating that he “needs evidence” and “must be accountable to the community”. Everyone laughed and clapped. During informal discussions later, many shared how this was a pivotal moment; a very high-ranking person from the Ministry of Interior had formally accepted the petition, and there was evidence of this! The participants hoped that this would trickle down to the police stations and ensure a peaceful Saba Saba march.

Yet, a day before the demonstration, when they were busy preparing for the march, they heard rumours that the police would not allow the marches to join together at Juja Road. Immediately after receiving these rumours, some of the organisers called police officers they knew personally to verify this information and all expressed fear of police violence. The social media team started tweeting for support, and other activists called their contacts in non-governmental organisations to help verify this information and in case it turned out to be true to see how this obstruction could be solved. Around 10 o’clock in the evening, it was still unclear whether the march would take place.

Early next morning, the protesters gathered to further prepare for the march. Among the growing crowd ready to march, several well-known plain-cloth police officers walked around and talked to some of the key organisers. Fear of police obstruction and ensuing violence still gripped the few organisers who observed the police officers with apprehension, but they hid their concerns from the participants. By now, most of the participants walked around proudly sporting T-shirts and banners accusing the police of unlawful and lethal violence while intermingling with police without their knowledge. As the crowd grew thicker, more police gathered, some with and some without uniform, but most visibly carrying walkie-talkies and guns.

In the days before the march, the coalition of social justice centres had taken a last but key precaution by installing a team of marshals with high-visibility jackets to organise security during the walk. The marshals were young members from the different centres who together had prepared a plan to keep order among the marchers and prevent violence

by participants. The team leader later shared:

“It was hectic. I knew of the threat. Will we even be able to reach Kamukunji? What if thieves come in and try to provoke the police? They [police] were all around us. They were ready to fight us, upon the slightest provocation. Most were visible, but in between some were also invisible, but we know them.”

When the march reached Amana petrol station along Juja Road, some participants started shouting directly at the police in uniform that they had to stop killing their friends. The marshals intervened immediately and pushed the boys to the front to keep an eye on them. The team leader recounted:

“We know ourselves, we know the thieves among us, also the boys who are so angry and hard core because the police kill them, we know how to treat them, make sure they don’t provoke. It was hard work, but we told these boys to shout yes but not go to one police or another and start offending them one on one. That would cause chaos.”

The marshals ran up and down to keep the marching crowd of over a thousand participants in order. A group of 20 at the front constantly had to bring the demonstration to a standstill by locking their arms and kneeling on the ground the moment people walked too fast. Speed was considered dangerous as another marshal detailed: “When they [protest participants] start running up and down, shouting, the next thing you see is them throwing stones. That anger is real. People are angry. But then police will come and shoot tear gas, even live bullets. We need to protect them.” Indeed, the marshals exerted great effort in maintaining a sense of calm to protect the crowd against the police during the march.

When the crowd reached Kamukunji grounds, the participants cheered and walked all over the field as if to claim it as theirs. The field was lined with police in riot gear and with guns. Interestingly, most of them were seated calmly observing the incoming mass of people, with their guns resting on their knees and their riot shields placed besides them. The marshal team leader later explained: “When we saw the police just seated there, like they were protecting us, it was great. They did not do anything, because we did not provoke them. And when we reached the ground, other big people had joined us, like Mutunga (Ex-Chief Justice Willy Mutunga). We kept order, so police could not fight us, now they were just there to protect us.”

Throughout the rest of afternoon, the celebrations continued. The afternoon was filled with talks given by invited guests, such as the former Chief Justice, Esther Passaris, the Nairobi Woman Representative in Parliament, and other representatives from the different justice centres. In between, everyone was entertained by musicians and dances from members of the various communities, and there was a photo exhibition of the various people that had died due to police violence. The mood of the entire afternoon was inspirational and hopeful, despite the numerous armed police officers standing and sitting on the periphery of the grounds, observing all that was happening. As the event came to a close, the officers also slowly went back to their respective police stations.

Concluding Observations: Realigning Perspectives

This paper aims to reveal the crucial need to realign the perspectives of both police and protestors as a way of eliminating or minimising the violent potentialities of demonstrations in Kenya and ensuring more democratic and peaceful ones. The urgency for this was again underscored by a recent protest held on 27 December 2018 in response to the killing of Carlton Maina by police in Kibera. Ostensibly without reason, the protest of over a hundred participants was dispersed by police using teargas. Later, one of the organisers shared with the first author that a police officer present had told her that the protest had been illegal because the organisers had not followed due procedure. According to her, the police officer had alluded to a lack of approval by police. So again, the notification procedure in practice seems opaque and pliable to interpretation and this grants police unrestricted powers. Subsequently, only a vague reference to ‘security’ serves as sufficient reason to deny citizens the right to protest. Yet, the perspectives on both sides differ profoundly on what such a notification legally entails. Does it include reception or also police approval? The latter interpretation, of course, raises great concerns when considering demonstrations against police violence.

The mutual dehumanisation, that is, pitting ‘thugs’ and ‘looters’ against ‘beasts’ and ‘shooters’, needs further attention and must be embedded in these ideas. The generalisations on both sides engender violent potentialities that can only be diminished through great effort, as evinced on the side of the protestors before and during the Saba march. Both cases reveal a police ready to use violence at the slightest provocation — as shown during the demonstration organised by Boniface Mwangi. Conversely, the laborious mitigation strategies deployed by the Saba Saba march organisers reveal the extent of responsibility they are willing to take to ensure the safety of participants. The same does not seem to apply to the police who are nevertheless mandated by law to manage public order during such events. The differences in perspectives on responsibility, and thus ownership, of public order during demonstrations centre mainly around the manner in which demonstrations and protests are perceived on both sides; namely as a right (protestors) or as a privilege (police). As a result, protestors may even resort to circumventing the actual police to try and get permission and support from higher up, as illustrated by the Saba Saba march organisers. However, this strategy is contingent on too many eventualities to inform long-lasting modes of realising peaceful demonstrations. More so, this again points at the lack of willingness on the side of the police to engage protestors in constructive ways and collaborate with them to ensure the safety of participants, police and bystanders alike.

Combined, the analyses shows that realising peaceful demonstrations and protests is not just about transforming cultures within police institutions, an issue widely discussed among policing scholars, but perhaps it is even more about realigning perspectives with those of citizens and about policing and the maintenance of order more generally. Although changing the institutional culture of the police is crucial, without a shared understanding of demonstrations and a readiness to unpack and counter violent potentialities, such efforts remain futile.

What's more, public order policing is often considered distinct from ordinary and everyday policing, yet there are also certain parallels that need to be taken into account. The violent potentialities that inform everyday policing, with extra-judicial killings as an extreme example, cannot be seen as wholly separate from the violent potentialities that emerge in the event of public order policing. Both are guided by experiences, expectations and stereotypes, such as those that are ascribed to the 'thug', that shape and legitimise direct acts of violence by police. A re-alignment may offer an excellent opportunity to develop a clear policy on public order management in Kenya.

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Manoeuvring Through Legal Ambiguity: Dispersing of Unlawful Protests in Kenya

Melissa Mungai

Introduction

Article 37 of the Constitution of Kenya 2010 provides for the freedom of citizens to assemble, demonstrate, picket and present petitions to public authorities peacefully and unarmed. The right can only be limited by law to the extent that the limitation is reasonable and justifiable for democracy. Article 24 outlines factors that should be considered and these include: the nature of the right, purpose of the limitation, nature of the limitation, the rights of others and the availability of less restrictive means to achieve the purpose of the limitation.

The 2010 Constitution and international human rights instruments point to a clear establishment of a presumption in favour of peaceful assemblies where the term ‘peaceful’ enjoys a broad interpretation that includes conduct that may annoy or give offence or temporarily hinders, impedes or obstructs the activities of third parties (Constitution of Kenya 2010: Article 37; OSCE 2010:15). These are buttressed by provisions that call for protection of life, individual criminal responsibility for protesters who behave violently as opposed to holding organisers criminally liable for the conduct of other demonstrators, and minimal restrictions on the endurance of the protest even in the face of imminent danger like the presence of offensive weapons among the protesters (KNCHR 2017, ACHPR 2017:31). The National Police Service Standing Orders (2017: Chapter 58) also mandate police officers to conduct themselves in a manner that respects the rights and freedoms of all people.

Pursuant to the Public Order Act (Cap 56: Section 5 (8) (a) & (b)), the power to disperse a gathering by police is based on two conditions; if the organisers have not notified the Officer Commanding Station (OCS) of the intended gathering and if there is a clear, present or imminent danger of a breach of the peace or public order. This chapter is concerned with the second condition: Looking at the judicial interpretation of incidents where police have stopped a public gathering in light of breach of the peace. In practice, the resulting judgements have a bearing on police comprehension of their role in maintaining public order during demonstrations.

When it comes to managing protests, the law affords wide discretion to police officers. First, they determine when a peaceful assembly turns riotous and thus, unlawful. Public order laws rely almost absolutely on the subjective view of a police officer to render a

public gathering by three or more individuals a breach of the peace. Similar to ‘peaceful’ in the context of a protest, the meaning of ‘breach of the peace’ could be anything that disrupts the orderly conduct of society as interpreted by the officer. Second, their broad powers to disperse a peaceful assembly have in some instances, escalated to the use of lethal force especially when protesters defy orders to disperse. Third, they have power to arrest, without a warrant, persons who they believe to have committed a breach of the peace in their presence.

Jude McCulloh (2017:324) notes that the “police are the law on the street using their discretion in ways that either uphold or undermine human rights”. A similar perspective surmises that, “police are the street-level face of the government of the day” and as such “in places where the government is viewed with public hostility, the police are seen as its extension” (Mutahi and Ruteere 2019:7). It then follows that police discretion—being a combination of pre-existing attitudes, personality traits, prejudices and police experiences on the job—could be likened to a pendulum swinging between over-enforcement and under enforcement of the law at any given moment (Burke 2013:1003-1005).³² Contextually, this begs the question of what informs police perceptions of public order and the steps taken to address instances of unlawful behaviour during protests.

After this introduction, the paper assesses the current legal framework with regard to freedom of assembly and the attendant duty of police officers to disperse unlawful assemblies. Here, some shortcomings of putting the legal framework into effect by the courts and police are highlighted together with possible remedial measures drawn from the global human rights framework and insights on policing before making a conclusion.

An Assessment of the Legal Framework on Right to Assembly

Police have a duty to disperse public gatherings which in their view do not fall within the constitutional ambit of peaceful or unarmed. Their duty is also informed by laws such as the Public Order Act (Cap 56), Penal Code and National Police Service Act (NPSA). According to the Penal Code, unlawful assembly is: “Where three or more persons, being assembled with the intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without reasonable occasion provoke other persons to commit a breach of the peace” (Penal Code: Section 78(1)).

Once they begin to conduct themselves as intended by “causing a breach of the peace and to the terror of the public”, this unlawful assembly is called a riot (ibid: Section 78 (3)). As per the Penal Code, a riot is a misdemeanour (one-year imprisonment) but the sanction

³¹ According to Alafair Burke, in the context of protests, over enforcement is manifested through over-criminalisation of the pettiest of offences, excessive force and custodial arrests even where less strict options are available. Contrastingly, the dangers of under enforcement could be enabling criminal conduct, thus undermining public safety and deteriorating expectations about police efforts to equally protect the public.

increases depending on the circumstances. For instance, rioters who demolish structures are liable to life imprisonment while those who injure structures can get a seven-year imprisonment term (ibid: Section 85-86).³²

Police powers to disperse a public gathering are based on two conditions; failure to notify the OCS of an intended gathering, and a clear, present or imminent danger of a breach of the peace or public order (Cap 56: Section 5 (8) (a) & (b)). The power to issue a dispersal order lies with the OCS. Second, the OCS is not limited to just issuing a dispersal order, they may give “any other reasonable order”. Third, irrespective of the order chosen, the disruption should take into account rights and freedoms of the participants and others (ibid: Section 5(8) (b))—which the author has taken to mean those within the vicinity of the gathering but are not involved in the protest.

Like Cap 56, the Penal Code also provides for how a proclamation to disperse a public gathering should be done. One, a proclamation (dispersal order) can be made by a magistrate or any commissioned officer of the military forces including naval and air forces. Two, the dispersal order can be made in any form or way that these listed officers see fit. Third, the proclamation is made where twelve or more persons are assembled or when they (the listed officers) apprehend that a riot by twelve or more people is about to take place (Penal Code: Section 81).

If these orders are defied, the Penal Code provides for the offence of rioting after proclamation which is felonious and carries a punishment of life imprisonment upon conviction. Section 82 of the Penal Code expressly refers to force as a legitimate method of dispersing a protest after dispersal orders and other means described as ‘all things necessary for dispersing the persons assembled’ fail:

“If upon the expiration of a reasonable time after such proclamation is made, or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make a proclamation, or any police officer, or any other person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled and for apprehending them or any of them, and, if any person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person”.

Further, the Service Standing Orders (2017: Chapter 47 (1) (d)) provide that lawful use of force may be applied “to suppress or disperse a riotous mob committing or attempting to commit serious offences against life or property”. Nonetheless, the police officer should “do everything possible to ensure that all demonstrations are conducted peacefully” (ibid: Chapter 58 (1)(7)). As per the Orders, “a police officer may only use force and firearm in

³² Injuring structures, according to Section 86 of the Penal Code, means unlawfully damaging any building, railway, machine or structures. This is a petty offence in comparison with demolishing structures as per Section 85 which means unlawfully pulling down or destroying or beginning to pull down or destroy a building, railway, machine or structures.

accordance with the rules laid down in the Sixth Schedule to the NPSA”.

The NPSA outlines comprehensively the situations in which the police can use force lawfully: *“A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended result. The force used shall be proportional to the objective to be achieved, the seriousness of the offence, and the resistance of the person against whom it is used, and only to the extent necessary while adhering to the provisions of the law and the Standing Orders”* (NPSA 2011: Sixth Schedule para. 1).

Some of these terms are vague. For instance, ‘no promise of achieving the intended result’ or ‘non-violent means are ineffective’ and are left to the subjective interpretation of the security officer in order to justify breaking up a public gathering. This wide discretion is problematic. To begin, the regulation of non-violent means needs to be more elaborated and backed by a clear statement that there should be progressive steps taken by police officers before resorting to violence. Moreover, it is unclear what non-violent means are and how their use can be lawfully justified. The Penal Code and Cap 56 refer to dispersal orders and any other orders that the police deem fit. It is not clear what these other orders are, whether their use can ever justify stopping an entire peaceful assembly and whether these envision singling out protesters whose conduct is unlawful.

Dispersal orders should be enforced as means of last resort because of the risk of escalating violence. Dialogue and negotiations are prevalent methods of maintaining order during protests. To illustrate, during the 2007/8 post-election violence, Joseph Ng’ethe, then acting superintendent of the General Service Unit (GSU), employed dialogue and negotiations four times, dissuading armed demonstrators from destroying property and convincing a group of Members of Parliament to call off a protest that could have escalated the ongoing violence (Momanyi 2008).

Comparatively, the South African Police Service (SAPS) lays emphasis on continuous negotiations between police and organisers of protests. The Regulation of Gatherings Act (RGA 1993: Section 4, 9) makes mandatory consultations on the terms and conditions of the protest within twenty-four hours of notification. Although these occur only if the police deem it necessary, the consultations should take place in good faith. The overall decision to deny or issue authorisation for the public assembly should, as per the RGA, be relayed by one of the following ways: *“newspapers circulating where the gathering is to be held; radio or television; distribution among the public or prominent places where the gathering is to be held; verbal announcement where the gathering is to be held”*. In addition, South Africa’s policy on policing of public protests (Ministry of Police 2011: 18), states that in the case of a planned gathering, the SAPS commanders must have negotiation skills to be used during gatherings while in spontaneous assemblies, SAPS should be able to identify key leaders from the group with whom to negotiate.

Reverting to powers by Kenyan police after protesters have defied a proclamation, Section 29 (b) of the NPSA gives police the power to arrest, without a warrant, a breach of the peace

committed in their presence. Even so, these arrests could culminate in charges of unlawful assembly, riot or the felonious offence of riot after proclamation. In some instances, the charges preferred are general public order offences such as idle and disorderly persons or offensive conduct conducive to breaches of the peace --which are not specific to protests -- or defying dispersal orders. Abu El Haj (2015:976) notes that the use of broad, catchall crimes—like the general public order offences—undermines the right of assembly. At the same time, *“it is the broad definitions of such crimes that make them particularly useful tools for order maintenance in the context of demonstrations”* (ibid).

Kenyan courts have maintained that there cannot be a linear legal interpretation of ‘breach of the peace’. Neither have judges adopted a direct approach to determine when it is ‘reasonable and necessary’ for police to disperse a protest. In their common view, it is up to police to discern whether a particular protest is unlawful and whether dispersal of the public gathering is reasonable and necessary to the point of employing force. The next sections not only assess how the courts have interpreted these ambiguous terms but calls attention to some possible consequences of the judgements on freedom of assembly and police duty to disperse illegal demonstrations.

Unclear Standard of (Mis)Conduct Meriting Dispersal Orders

According to Cap 56, the power to disperse is based on two conditions; failure to notify the OCS of an intended gathering and a clear, present or imminent danger of a breach of the peace or public order. The second condition triggers interpretation on what type of conduct police perceive as a danger to public order and therefore, meriting enforcement of dispersal orders.

The legal concept of breach of the peace originated from lay (untrained) perceptions and common sense, which was identical to common law concepts (Chowdhury 1993:13). Like most commonwealth States, its foundations in Kenya lie in common law and thus, its meaning has been retained by judicial precedent (case law). The concept has multi-dimensional relations with many other statutes which arouse public violence such as general public order offences like idle and disorderly persons or offensive conduct conducive to breaches of the peace.

There is neither a landmark judicial pronouncement defining unlawful assemblies and riots nor their relation to the concept of breach of the peace. In the cases *Ferdinand Waititu vs AG* (2016) and *Wilson Olal vs AG* (2017), the judges were of similar opinion that picket lines should be drawn by the police hence, determining the conduct of protesters. Yet still, outdoor (public) assemblies exist in a continuum from peaceful to disruptive, and further, that disruption involves acts that are principally inconvenient to other individuals (Abu El-Haj 2015:965). Such a range poses difficulties in defining consistent acceptable levels of disruption.

There was an attempt in the case of Hussein Khalid vs AG (2017) to give clarity to the concept of breach of the peace. This case centred on an alleged violation of the right to protest where the protesters released pigs and blood outside Parliament as a show of greed of the Members of Parliament. The police who had facilitated their peaceful procession and sit-in outside Parliament by securing the pathways and controlling traffic decided to disperse the crowd using teargas because the pigs ‘got out of hand’ and the protestors were too loud, disrupting the ongoing session in Parliament.

The petitioners who were charged with offences conducive to breaches of the peace, unlawful assembly, riot and cruelty to animals argued before the High Court that the concept of breach of the peace was “*vague and uncertain such that a person could be charged in contemplation of an offence or effectively doing nothing at all*”. Although Justice Lenaola did not directly address the ambiguity of breach of the peace, the case was dismissed on the basis that breach of the peace implies a reasonable limitation of the right to assembly where the protesters’ conduct interferes with the rights of others. The judgement read in part:

“The petitioners and others had all, at the beginning of the demonstration, been peaceful and were even under the escort of the police. It is their alleged acts of blocking a section of Harambee Avenue and thereby causing fear of terror to motorists, confining a pig with several piglets at the gate of Parliament, among others, that led to the stoppage of the demonstrations. Whether this fact created any offence with the petitioners as offenders is not for this court to determine” (Hussein Khalid vs AG 2014: para.74).

Aggrieved, the petitioners lodged their case at the Court of Appeal which reasoned that: “*the alleged lack of definition of what constitutes breach of peace is more apparent than real, granted the many cases that have set out what constitutes a breach of peace, such as Mule vs Republic and Tolley vs Republic*” (ibid:9). Indeed, the two cases which were decided in 1983 define what constitutes a breach of the peace but not in the (modern) context of freedom of assembly. Mule vs Republic is about a bar room brawl where the appellant (Mule) had been convicted for insulting a senior chief in a manner that created a disturbance in a manner likely to cause a breach of peace.³³

The Tolley vs Republic case involved an altercation between a lady (appellant) and some officials from the Ministry of Water who had been instructed to disconnect the appellant’s water supply because she was in arrears. When the appellant queried their appearance in her compound, she ordered them to leave by pointing a toy gun at them. Justice Sachdeva stated that “*the appellant’s conduct in threatening with a pistol, which only later was learnt to be a toy pistol, was likely to cause a breach of the peace*”.

The court, relying on the pronouncement of Lord Denning in R vs Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board [1982], further held that: “*There is a breach of the peace whenever a person who is lawfully carrying out his [or her] work is unlawfully and physically prevented by another from doing it. He [or she] is entitled by law peacefully to go on with his [or her] work on his [or her] lawful occasions*”.

³³ The appellant had called the senior chief ‘Emperor Bokassa’ (which according to the trial judge referred to ‘a dictator and a killer of children several times’) and then challenged him to a fight by starting to remove his coat. The fight never took place as people intervened.

From the above, breach of the peace relies almost absolutely on a police officer's perception, which is circumstantial. The unrestrained extent of their perception then becomes problematic and the law offers narrow clues on the standard to be applied by the officers. Further, lack of clear guidance from the Kenyan Judiciary on parameters of police discretion is an unexceptional approach in common law countries. To illustrate, in 2012, the Commonwealth Human Rights Initiative published a brief on policing of public assemblies in Tanzania and found that there were no cases on the reasonable limitation of the right to protest (CHRI 2012:8). Strikingly, there were cases in Uganda and Zambia which directly critiqued the broadness of breach of the peace in the respective public order laws whose provisions allowed the police to refuse to issue a permit for a protest when, in their view, there was a likelihood of a breach of the peace (ibid:8-11). In both countries, the courts rendered such wide police discretion unconstitutional because the provisions were highly subjective and there were inadequate guidelines/insufficient controls to prevent arbitrary decisions (ibid:9).

Nevertheless, a report by Amnesty (2013:20) points out that *"not all unlawful behaviour requires police intervention -- for example if there are no further risks involved and if the police intervention is likely to make things worse"*. In similar vein, Kenyan law mandates police intervention through non-violent means and where these fail through use of force with the caveat being when reasonable and necessary. The next section looks into this caveat.

Vague Threshold for Use of Force after Proclamation

Judicial interpretation on the validation of dispersal orders and the consequences of defying them after the expiry of reasonable time or preventing the proclamation from being made by use of force by protesters is based on constitutional guarantees and circumstances of the case. In *Ferdinand Waititu vs AG* (2016: para.35), Justice Onguto held that Cap 56 gives police the power to stop an assembly *"where appropriate and where it is obvious it will not meet the constitutional objectives"* (emphasis added). Further, the fact that *"since it is not uncommon for protest processions to turn riotous, this should not in turn implicate freedom of assembly; an essential feature of any democratic society"* (ibid: para. 37). Rather, the focus should be on how to ensure the protests do not turn violent (ibid). As a result, the Inspector-General, who was a respondent in this case, was ordered to help in maintaining law and order because it is the police service which should facilitate peaceful demonstrations.

The extent of adjudging the resort to force as reasonable is circumstantial. According to Justice Mativo in *Wilson Olal vs AG* (2017):

"What is reasonably justifiable in a democratic society is an elusive concept – one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the decision under challenge is to be judged according to whether it arbitrarily or excessively invades the enjoyment of a constitutionally guaranteed right".

In similar vein, ‘reasonable time’ before non-violent means and force can be employed to disperse a protest was defined as “the amount of time that is fairly required to do whatever is required to be done, conveniently under the permitted circumstances of a particular case”. However, this approach is too dependent on an aftermath evaluation where the damage is already done. Consequently, attempts to remedy the situation through awarding compensation, for instance, do little to address the problem holistically. The circumstances before the public gathering should also be put to scrutiny.

The final determination in *Wilson Olal vs AG (2017)* was that police did not act reasonably because they did not follow the law on dispersing public assemblies. According to the circumstances around the protest, first, the venue of the assembly had been cordoned off and guarded by armed police officers before the protesters arrived. Second, the protesters were informed that they could not proceed owing to national security concerns on the day of the protest. The organisers had notified the police service in advance and no rejection was communicated. Third, the proclamation was not made. Fourth, the police used tear gas to disperse the gathering. Fifth, some of the protesters were arrested and charged with rioting after proclamation and the trial court issued a cash bail of Ksh200,000 or bond of Ksh500,000. Additionally, they paid a police bond of Ksh10,000 on the day of their arrest.

The judgement took these circumstances into account, and the factors on limitation of rights in Article 24. The court noted that police could use less restrictive means such as providing security to facilitate the peaceful gathering in light of the national security concerns. In view of that, the use of force or violent means was not justified and amounted to a violation of the right to protest. Consequently, the four petitioners in the case were each awarded Ksh250,000.

Echoing Justice Onguto, the focus therefore, should be on how to ensure that protests do not turn violent and hence, guarantee right of peaceful assembly. In all, there should be an unbroken protection of the protesters’ rights even when charges of unlawful assembly and riot have been levied against them. Particularly, police and courts should issue reasonable bail.

Conclusion

This chapter has analysed how courts have interpreted the legal concept of breach of the peace within the context of dispersing unlawful assemblies. It noted that the law gives the police wide discretion to prevent or stop ongoing peaceful protests or declare an assembly unlawful. These however, as argued, are subjective terms, interpreted by police officers according to their own terms. Nevertheless, the courts have left the decision on what qualifies as disruptive or even violent conduct to the police on the ground as long as the Constitution is adhered to and the circumstances justify their decision.

Some of the remedial perspectives on policing practices in dispersing protests suggested in this chapter were dialogue and negotiations and issuance of reasonable bail by both

police and the courts. Pointedly, Kenya is yet to publish a policy on public order policing (IPOA 2017:29). The policy could address clearly the threshold for what makes a public gathering peaceful and what does not. Nevertheless, such a threshold should be flexible and adaptive to change. As Jerome Skolnick and James Fyfe (1993:120) assert, “hard and fast rules are of little assistance in the fluid discretionary situations that are the core of police work”.

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Judiciary and Public Interest Litigation in Protecting the Right of Assembly in Kenya

Marion Muringe Ogeto and Waikwa Wanyoike

Introduction

Despite it being one of the earliest universally acclaimed rights, the exercise of freedom of assembly continues to face daunting challenges in many parts of the world. As a trend sets in for populist and extremist illiberal regimes (Rodrick and Mukand 2015; MacDowall 2014),³⁴ freedom of assembly becomes highly sacrosanct as a facilitator of other civil and political rights, especially those of expression and association.

Kenya, since promulgation of its transformative and rights-based 2010 Constitution, has struggled significantly with its implementation. One of those contests is in the implementation of the freedom of assembly. Not strange given that Kenya's history before the passage of the 2010 Constitution was characterised by serious incidents of repression, including criminalisation of public gatherings particularly by those perceived as opponents of the government. The 2010 Constitution marked the liberalisation of rights in Kenya, including those relating to assembly. First was the provision on an expanded freedom of assembly that also expressly provided for the right to demonstrate, picket and present petitions to public authorities. Second was the requirement that the right could not be limited, except under a set out and strenuous constitutional criteria (Constitution of Kenya 2010: Article 24). Regardless, the State has continued to stifle the freedom of assembly, with the police and other State security agencies occasionally disrupting assemblies, sometimes in a violent manner, more so where such assemblies are convened to express dissatisfaction with the political regime in power.

However, unlike under the periods governed by 1963 and 1969 constitutions, Kenyans have, since the coming into force of the 2010 Constitution, used Public Interest Litigation (PIL) as a means of enforcing their right to freedom of assembly. The strategy of using PIL to vindicate the right to assemble has significantly succeeded because of the relative independence of Kenya's Judiciary. This Chapter looks at the role that the Judiciary and PIL have played in promoting and protecting the freedom of assembly, demonstration as well as the right to picket and present petitions to public authorities.

First, the chapter looks at what PIL is and draws its historical development including in England, USA, India and South Africa, demonstrating the potency of PIL in protecting and promoting rights. Second, it looks at a number of PIL cases brought in Kenyan courts in relation to Article 37 rights and demonstrates that the Judiciary has been keen at protecting the right to assembly. Moreover, the case law discussed shows that, more often than

³⁴ See also an earlier prophetic piece by Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs*, 76, November–December 1997: 22–43.

not, Kenyan courts take a fairly progressive view in the protection of the rights, including imposing obligations on police to ensure that, even for assemblies that may turn violent, they act to facilitate rights of those peacefully gathering. However, it is observed that courts need to do more to develop further nuanced jurisprudence on Article 37 especially given the complexity of the context under which the rights therein are to be protected.

The chapter concludes by noting that, despite the relatively progressive jurisprudence from Kenyan courts, the police seem incorrigible in adapting to the use of best global practices of facilitating the right to assemble, demonstrate, picket and present petitions to public authorities.

What is Public Interest Litigation?

Definitions of public interest litigation (PIL) are fairly diverse and most times rarely helpful. The diversity of definition is occasioned by varying jurisdictional practices, rules of standing as well as socio-political and economic issues of priority that each jurisdiction tends to focus on. It is also as a result of use of different, often interchangeable phrases, to describe what PIL is, such as social impact litigation, strategic litigation and even more precisely strategic human right litigation (Reventlow 2018).

Regardless, PIL can be broadly defined as litigation which focuses on issues of importance to the public at large (KPTJ et al 2015: 1), or for a major section of the public and whose outcome is likely to impact not only the individual litigant but a larger section of the society. One way of understanding PIL is by looking at the factors of the case such as the nature of the issues, the reason why the case is being initiated and the possible impact the case might have (Duffy 2018: 3).³⁵ These become the parameters of labeling a case as PIL (Martin 200).³⁶

There is ubiquitous literature that credits the USA for inventing PIL. The case of *Brown v. Board of Education* [1954], 347 US 483 is often cited as the first PIL case. The import of the case in regard to PIL has been aptly captured:

It is the classic model of public litigation: no private injury was asserted, no dollars in redress were sought, no individual person was prosecuted as a wrongdoer, and no past focus limited the remedy or the role of the Court (LaFrance 1988: 336).

However, there is subliminal evidence that PIL was practiced as early as the 18th century when it was used to expose the malaise of slavery in England (Harlow and Rawlings 1992).

Traditionally, the law in many jurisdictions around the world discouraged PIL, especially cases brought by those not directly affected by an issue. For example, Joe Oloka-Onyango argues that because of the historical private law conceptual nature of access to courts,

³⁵ Helen Duffy interrogates what makes strategic litigation including whether it is the goals pursued, or the way the litigation is conducted or the difference that the litigation makes in practice.

³⁶ For example, the Public Interest Law Clearing House in Victoria and the Public Interest Law Clearing House Inc in New South Wales in Australia use certain quantitative and qualitative criteria to determine which cases to support: "The matter must require a legal remedy and be of public interest, which means it must; a) affect a significant number of people not just the individual or; b) raise matters of broad public concern or; c) impact on disadvantaged or marginalized group, and d) it must be a legal matter which requires addressing *pro bono publico* ('for the common good')."

common law was inimical to litigation being anchored in public interest (Oloka-Onyango, 2017: 26-34). Initially, it was not any different at the supranational level (Duffy 2018:13). However, there have been changes in many countries, in rules of standing, costs, remedies and in other respects that have made PIL more useful as a tool of social change.

Many jurisdictions in the world have now adopted PIL in one form or another. These jurisdictions have done so by expanding the rule of standing, which historically made it difficult for individuals and groups to litigate public interest cases.³⁷ Some are also encouraging PIL by eliminating costs³⁸ or minimising the possibility that those who bring the matter will be punished with costs if they are successful.³⁹ Yet, other jurisdictions have become even more liberal by allowing litigation to be initiated through informal means, such as writing a letter to the court or orally complaining of systemic violations to judicial officers. This is mostly the experience in India, undoubtedly the leading jurisdiction in expanding the scope and extent of PIL.⁴⁰ This has been possible because of a combination of factors, including judicial activism, relaxed rules of standing⁴¹ and the growth of a civic engaged population (Narayana 2007). Similarly, South Africa has seen a robust growth of PIL, especially as a factor to correct most of the structural historical injustices of apartheid as well as post-apartheid economic and social injustices (Amit 2011; Marcus and Budlender 2008).

PIL in Kenya before 2010 Constitution

Before the passage of the Constitution of Kenya of 2010, it was difficult, if not nearly impossible to bring and sustain a PIL case in Kenyan courts. This was largely because of strict rules of standing which required that anyone approaching courts had to demonstrate how he/she was directly connected to the complaint being filed. For example, in *El-Busaidy v. Commissioner Of Lands & 2 Others* (2002) 1KLR, the court held that for any person to qualify to file a case in court, he or she needed to show that his /her own interest had been or was about to be affected and the effect went beyond what was suffered by the rest of the public. In that case, the court held that matters of public interests could only be litigated upon by the Attorney-General. A similar approach was seen in *Wangari Maathai v Kenya Times Media Trust Ltd* (1989) eKLR where the petitioner had applied for an injunction to restrain the respondent from constructing a building at Uhuru Park. The court ruled that Wangari Maathai could not be allowed to proceed with the case because it did not affect her personally.

37 Some include but are not limited to the United States, South Africa, India and Kenya.

38 In *Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others* [2017] eKLR, Justice G. V. Odunga noted the following about award of costs: "26. It is therefore clear that where a person is genuinely advancing public interest under the Constitution as he is obliged to do under Article 3(1) of the Constitution he ought not to be penalised in costs."

39 See for example the Judgment of South Africa Constitutional Court *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

40 For PIL in India, one can file a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973. Two Indian cases are credited with generating the initial enthusiasm on PIL in that country. The first was the case of *Peoples Union for Democratic Rights – AIR 1982 SC 1473* (Peoples Union) and the second was *S.P. Gupta vs. President of India, AIR 1982 SC 149* and popularly known as *Judges Transfer Case*.

41 In the *Peoples Union* case, the Supreme Court recognised for the first time that a third party could directly petition, whether through a letter or other means, the court and seek its intervention in a matter where another party's fundamental rights were being violated. Not only was this decision significant for expanding the scope of standing but also in revolutionising the manner in which impecunious parties could approach the court. A similar trend was also set in the *Judges Transfer* case where the court indicated that third parties could approach the court in order to litigate violations of rights of persons who may not be able to bring a case of violation before the courts. Now India courts entertain thousands of PIL cases each year following the efforts by the Supreme Court to encourage PIL.

The Supreme Court of Kenya has commented on the contrast between the former and 2010 Constitution in regard to the right to institute cases in public interest:

“Locus standi had operated, in the earlier constitutional dispensation, to limit the scope for litigants to pursue causes in the public interest. Articles 22 and 258 of the current Constitution opened the doors for such litigants to lodge causes on constitutional matters.” (Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2014) eKLR)

Standing and Constitution Reforms

The Constitution has now settled issues relating to standing on matters relating to human rights and any other violations of the Constitution. Both Articles 22 and 258 allow those affected by a justiciable action or persons acting on behalf of those affected to go to court to contest the violations. What is justiciable has also been expanded by the Constitution and it is hard now to argue that there is any aspect of government action or an action of a public official that is not justiciable.

Article 22 is contained within Chapter Four of the Constitution, which relates to the Bill of Rights. There are a number of key and common elements within Articles 22 and 258 of the Constitution which promote the use of litigation as a means of protecting and enforcing rights. This includes ability to act on behalf of other persons who are unable to act for themselves, litigating on behalf of a class or most commonly, initiating cases in public interest. Courts have indicated that these constitutional criteria are important to facilitate bringing cases in public interest but also ensuring that the expanded right to sue is not abused (John Wekasa Khaoya v. Attorney-General [2013] eKLR).

Article 37 and Public Interest Litigation

Article 37 is the premier provision in the Constitution that provide for the rights to assembly and demonstration. In its entirety, Article 37 states:

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

From the outset, two critical aspects relating to Article 37, (which will be elaborated later on) are notable; first, the clear need to be expansive on the type of activities permitted – assembly, demonstration, picketing and presentation of petitions to public authorities; and secondly, the inbuilt internal qualifier, that is, those activities are constitutionally-protected when those engaging in them conduct themselves peacefully and do so while unarmed.

However, it is important to decipher what is an *assembly*? The United Nations Special Rapporteur on Freedom of Assembly defines an assembly as “an intentional and temporary gathering in a private or public space for a specific purpose (HRC 2012: 10).” He argues that assembly includes “demonstrations, inside meetings, strikes, processions, rallies or even sits-in.” Perhaps a much more pragmatic understanding is one that looks at demonstrations, meetings, strikes, protests as the modes of exercising the freedom of assembly. Understood this way, freedom of assembly is expressed through, among other ways, the different actions reflected in Article 37.

Yet, this expansive style of constitutional drafting was not without a rationale. Because of the pervasive abuse of rights⁴² by the State before the 2010 Constitution and frequent use of technicalities to minimise on rights, the drafters of the 2010 Constitution chose to be deliberately detailed. This, and a constitutional drafting trend for new constitutional democracies then, may offer the twin explanation for the expansive nature of Article 37.⁴³

This elaboration of Article 37 is critical to courts when it comes to resolving disputes that touch on it. It offers the courts the basis to interpret the right in a more robust and purposeful way – the purpose here being to promote and protect the right to the greatest extent possible taking into account the varying nature of activities that traditionally may never have been understood to come within the realm of right to assembly.

Kenyan Cases under Article 37

Though the Constitution provides great clarity on Article 37 rights, Kenyan courts have not done much to provide an in-depth interpretation and application of these rights beyond what is apparent from the wording of the Constitution. Granted, though the courts have tended to err on the side of protecting rights of assembly and demonstration, they however continue to show unnecessary deference to the State and at times even seem to arrogate themselves the need to justify some of the excessive State actions that undermine the exercise of the rights. Regardless, courts have often intervened at critical times to ensure an interpretation of the law that mostly facilitates the right and to ensure that the State understands that it has a twin obligation in regard to right to assembly - to facilitate the observance of the right and not to interfere with those exercising the right within the peaceful confines defined by the Constitution.

Cases on Denial/Stoppage of Assembly

One of the first cases on Article 37 to come before courts after the promulgation of the 2010 Constitution was the Eugene Wamalwa v. Minister for State for Internal Security & Another (2011) eKLR. This case presented a good test case for the court to show its pulse on right of assembly under the 2010 Constitution. Essentially, Eugene Wamalwa, a prominent politician, had notified police of his intention to hold a political rally to launch his 2013 presidential bid. One of the noted attendees was formerly the head of Mungiki Sect – a group proscribed by the government for being an organised criminal group (BBC 2007). The police gave Wamalwa notice that they would not approve the meeting, alleging they had intelligence that criminal groups intended to infiltrate and violently disrupt the meeting. Wamalwa disagreed and asked the court to compel the police to allow the meeting and provide the necessary security.

Kenyan courts had been presented with a classic case to resolve the competing issues between the rights of a peaceful unarmed person to exercise their right to assembly in

⁴² Because courts under the former constitution took a minimalist approach in interpreting rights, the Bill of Rights was often colloquially referred to as the Bill of exceptions. See Orengo J (2000) 'Constitution and the crisis of governance in Kenya', Address given to the Kenya Community Abroad Conference, Concordia University, Minnesota, 30 June – 3 July 2000.

⁴³ See South African Constitution, Section 17: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

a situation where, ostensibly, there was evidence of possible disruption. Justice Musinga presented this dilemma thus:

‘It is agreed that a right or a fundamental freedom in the Bill of Rights can be limited as provided under Article 24 of the Constitution. However, in interpreting the provisions of Article 24, this court is not oblivious of the political background that gave rise to the crave for a new Constitution. The State should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons. By repressing such freedom the State will be encouraging people to look for alternative ways and means of ventilating their ideas. Such repression of the fundamental right of assembly may also amount to breach of the freedom of expression as guaranteed under Article 33 of the Constitution which grants every Kenyan the freedom to, inter alia, seek, receive or impart information or ideas.

That notwithstanding, all Kenyans and especially politicians, ought to be reminded that the right to freedom of expression does not extend to advocacy of hatred or any negative words that may constitute ethnic incitement, vilification of others on the basis of tribe, age, gender or economic status. See Article 33 (2) (d) and (3) of the Constitution.’ (Eugene Wamalwa v. Minister 2011:7>)

Justice Musinga would go on to underline what the dual-duty of the State was in such a situation, of facilitating assembly and securing those exercising it from any violence or disruption. He noted:

‘In this matter, I believe the State is well able to use its wide resources and machinery to prevent the occurrence of any violence in the planned meeting. The State is capable of ensuring that every person who attends the planned meeting is unarmed. Refusing to allow the planned meeting to proceed on the pretext of security concerns as aforesaid, is tantamount to admitting that the State is incapable of dealing with members of outlawed groups or sects, which is not the case.’ (Ibid: 7)

The judge’s view was that courts must be cautious in quickly agreeing with State’s argument to limit a right on the basis of national security. Additionally, his view was that for the court to bar freedom of assembly on account of national security, the State’s claim must be subjected to a fairly high degree of proof to ensure that the State does not use “national security” as a cloak to deny a fundamental right.”(Ibid: 7) This express prohibition is critical since States – and Kenya in particular - are known to dangle the vague concept of State security to deny rights where it is apparent they cannot objectively rationalise such denials.

The role of police in facilitating freedom of assembly came up again in Ferdinand Ndung’u Waititu & 4 others v Attorney General & 12 others 2016 (eKLR). This case has an interesting history. The Coalition for Reforms and Democracy (CORD) -- a coalition of political opposition formed in 2013 -- started a mass action campaign marked by weekly demonstrations and picketing outside the Independent Electoral Boundaries Commission (IEBC) with the intention of putting pressure on IEBC commissioners to vacate office. Though the demonstrations and picketing would start peacefully, police intervention would render them violent. Ferdinand Waititu and four other Members of Parliament from the

Jubilee Coalition – a rival political coalition to CORD – moved to court to request it to stop the demonstrations and picketing, citing the occurrence of violence and the inconvenience occasioned to the public.

Justice Louis Onguto heard the interlocutory motion to stop the demonstration. Taking cue from the jurisprudence developed in Wamalwa’s case, he held that it would be unconstitutional for the court to interfere with the right of assembly, demonstration and picketing, where there was no evidence that the demonstrators would not conduct themselves peacefully. Instead, he noted that it was incumbent on police to facilitate the assembly and picketing and maintain law and order to facilitate the right to the fullest possible extent.

On this he wrote:

“55. In these respects consequently, it would be appropriate for the court to intervene, not to draw any picket lines but to ensure that the 9th Respondent [The National Police Service] is not derelict in the performance of his duties (Ibid: 55).” Furthermore, the court recognised that Article 37 is a foundational right since it has direct bearing on enjoyment of freedom of expression and opinion as well as the freedom of association (Ibid: 27).

Courts have also found that police cannot invoke illegal processes to frustrate or constructively deny the right to freedom of assembly, demonstration and picketing. In *Boniface Mwangi v Inspector General of Police & 5 Others* (2017) eKLR the court found that the Officer Commanding Police Division (OCPD) had no legal authority to bar an assembly and demonstration that was intended to present a petition on corruption to the President. The court, found that the Public Order Act only recognised the Officer Commanding Station (OCS) to be the appropriate officer to receive and advice on a notification of a demonstration. This helps to enhance individual responsibility especially in a police force that so often likes citing “superior commands” when restricting rights.

Moreover, the *Boniface Mwangi* case raised another fundamental issue which the court prevaricated on, that is the intertwining between the freedom of assembly and demonstration and the sponsor of the assembly’s right to choose a venue for such assembly or demonstration. In this case, given that the sponsors intended to present a petition to the President, they had chosen to bring the petition to the gate of State House, ordinarily used as the delivery point in the place where the President conducted State business. The Attorney-General opposed the choice of venue on the assertion that State House was a protected area. While the court agreed that freedom of assembly encompasses the right and ability to choose the time, place and modalities of any assembly. It, however found, that there were laws that stipulated State House as a protected place. Thus, the refusal of the demonstration taking place at Gate A of State House was deemed justified on the basis of national security since the proposed venue is a protected area and in the court’s view that was a reasonable limitation to Article 37 (Ibid: 55-59).

Article 37 and Criminal Prosecution

Often, the State uses criminal law to penalise those engaged in the exercise of the right to assembly, demonstration and picketing. The intention of the police in invoking criminal law sanctions is to instill a chilling effect on anyone who intends to exercise those rights. In such circumstances, those accused have at times asked the court to determine whether criminal law is being used to frustrate or deter the exercise of their constitutional rights – and hence for an illegitimate purpose.

Courts have found it problematic in working out when to stop criminal prosecution brought against persons participating in an assembly. Often, the difficulty arises because the police would create an atmosphere of confrontation – as a means to frustrate the assembly - then use that to justify that those arrested were being violent and disorderly. This trend is highlighted in the Wilson Olal case as explained below.

Two cases that have brought to fore the intersection between criminal law and the right to assemble, demonstrate and picket are worth discussing. In *Wilson Olal & 5 others v Attorney General & 2 others* (2017) eKLR, the applicants among other civil society members, organised a demonstration but found heavy police presence at the venue of the demonstration. Despite having followed the right procedure and being peaceful, the police asked them to leave the venue of assembly even before they could hold their demonstration. Police did not explain why they were not allowed to engage in the demonstration.

When Olal and a few others insisted on an explanation, they were arrested. Importantly, the police failed to inform them of the reason for the arrest until very late in the day. The petitioners challenged the criminal prosecution at the High Court on the basis that the arrest was a violation of their Article 37 rights among other rights.

In the judgment, the High Court underlined the importance of Article 37 rights by stating that it is the responsibility of the State to ensure that citizens can effectively enjoy these rights because they are basic features of a democratic system (Ibid: 6). Furthermore, citizens have a right to express approval or lack thereof of the decisions of the Government on any subject of social or national importance (Ibid). The court also appreciated the link between Article 37 rights and freedom of speech, noting that these were among the bundle of rights which must be fostered in a democratic State.

“The importance of freedom of speech and expression must be examined from the point of view of the liberty of the individual and from the point of view of our democratic form of government. Freedom of speech lay at the foundation of all democratic organisations. Freedom of speech and expression of opinion is of paramount importance under a democratic constitution and must be preserved. The freedom of speech is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.” (Ibid: 7>)

As per the limitation of Article 37 rights, the court highlighted the internal limitation -- that the demonstration must be peaceful (Ibid: 8). However, it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection (Ibid). The court further interpreted the limitation under Article 24 by relying on the three-prong test noting that the limitation applied only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society; based on openness, justice, human dignity, equality and freedom and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account (Ibid). Relying on Human Rights Committee, General Comment No 31, The Nature of General Obligations Imposed on State Parties to the Covenant, the court held that restrictions of a right must never impair the essence of the right (Ibid: 9).

Critically, the court prohibited and permanently stayed the criminal prosecutions brought against the petitioners. On this, the court stated:

“The machinery of criminal justice cannot to be allowed to become a tool for the police [to] violate constitutional rights of citizens. The invocation of the criminal law, in unsuitable circumstances or for the wrong ends must be stopped and this court has the mandate to stop such proceedings. In the instant case, the criminal prosecution is in my view tainted with ulterior motives, namely, to curtail the rights of the petitioners to exercise their fundamental right to assemble, associate, demonstrate and exercise their freedom of expression. It would be a travesty to justice, a sad day for justice system should the criminal process be allowed to be used to stifle fundamental rights and freedoms guaranteed under the Constitution.”
(Ibid: 13)

Moreover, the court awarded the petitioners damages because it found that the arrest and prosecution were unconstitutional, an abuse of process and not in public interest.

The assertiveness of the court in its role as a defender of rights is palpable throughout the judgment. The court is especially apt at recognizing the deleterious and chilling effect the use of criminal sanctions would have in discouraging people’s urge to exercise such basic right as freedom of assembly. Given that often expression inherent in assemblies and demonstrations are directed at the State, it is encouraging that the court recognised that the State could not be allowed to use its monopoly of criminal law to criminalise dissent.

Hussein Khalid & Others v AG & Others (2014) eKLR, is another case where criminal law was invoked by the police to frustrate persons exercising Article 37 rights. Hussein Khalid and fifteen others who brought the case were arrested when a demonstration they were participating in - to condemn Members of Parliament (MP) for demanding a hefty pay increase - took a rowdy turn after police confronted them. The demonstration had dramatically featured live pigs to symbolise the greed of MPs.

At the High Court, the petitioners argued, among other grounds, that the arrest and prosecution were a violation of their rights to assembly, demonstration and presenting petitions to Parliament. Unlike in Wilson Olal (which was decided later), the High Court did little to analyse whether there was a relationship between the right to assembly and the

arrest. Instead, the High Court made a general statement and finding that the stoppage of the demonstration was not unconstitutional as it was in accordance with Article 24 (limitation of rights clause) of the Constitution (Ibid: 59-63). Even then, the court did not undertake a thorough analysis of Article 24. Moreover, the Court claimed that the determination of whether the police acted unconstitutionally by stopping the demonstration is to be determined by the Magistrate's Court during the trial of the criminal case. This presented a dilemma, because the magistrate had earlier rejected to hear constitutional complaints raised asserting that such questions could only be determined by the High Court.

At the Court of Appeal (*Hussein Khalid & Others v Attorney General & Others*, [2017] eKLR.), there was some analysis and emphasis of the correlation between freedom of expression, freedom of association, and freedom of assembly, demonstration, picketing and petition. The court underlined the import of Article 37 rights:

"Article 37 may be exercised by a lone individual without vocal expression as in the case of a lone demonstrator with a placard, it is normally meaningful when exercised in association with others and through expression which may be by pure speech or symbolic speech such as placards, handbills, leaflets, T-shirts, and possibly, without deciding, even messages on the bodies of pigs. Thus, freedom of assembly, demonstration, picketing and petition will be emasculated if it is not underpinned by freedom of association and freedom of expression."(Ibid: 5)

Ultimately, the Court of Appeal stated that although the High Court did not conduct a proper analysis of Article 24, it nevertheless failed to engage in an analysis and determination on when the use of criminal law may be considered an unjustifiable limitation to the freedom of assembly, necessitating the termination of criminal prosecution. Instead, the court emphasised on the internal limitation of Article 37 by stating that the demonstration or assembly must be held peacefully; and that the provisions of the Public Order Act as well as the Penal Code are reasonable and justifiable to ensure that there is peace - more presumably to avoid disorder, violence to citizens, damage to property (Ibid: 8). The court, however, avoided a nuanced analysis of when absence of peace in a demonstration is not attributable to the demonstrators, what is the fate of their ability to exercise the right as happened in this case. Subsequently, the court dismissed the appeal. The matter was appealed to the Supreme Court and judgment is pending. It is the first matter raising the use of criminal law in controlling assembly to reach the Kenya's apex court.

Article 37 – Some Depth Kenya's Jurisprudence Should Examine

As noted, Article 37 provision on freedom of assembly is highly permissive and expansive. In determining whether Article 37 rights have been violated, courts are expected to carry out a three-part test. First, courts must inquire whether the activity falls within those described in Article 37, that is, an assembly, a demonstration, picketing and presenting petitions to public authorities. Second, the provision has an internal qualifier in that even where an activity may fall within one of the clusters provided for in Article 37 it will not be protected

if those participating in it are armed or not conducting themselves peacefully. Third, even where the activity is peacefully conducted, it is still possible to limit it by recourse to Article 24 on limitation of rights.

The Scope of Article 37 Rights

Article 37 seems to have been borrowed from the equivalent provision in the South African Constitution. Section 17 of the South African Constitution, which is similarly worded, provides that “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.” The only variation is the addition of the phrase “public authorities” in the Kenyan provision.

It is instructive that Kenya has preferred such an expansive provision given how central the South African provision was to its constitution-making because of the many years of apartheid where the regime criminalised assembly, demonstrations and protests. Although the repression in Kenya, especially on freedom of assembly, never rose to the levels witnessed in apartheid South Africa, the drafters of Kenya’s Constitution saw the need to follow the South African trend to build in a more expansive provision that ensured there was no vagueness on the scope of protected activities.

The Constitution of Kenya Review Commission (CKRC), which provided the bulk of the language used in the Bill of Rights, explained that its approach to rights was informed by among others the *“expanding horizon” in respect of rights, where the conventional approach was to provide more in a right than limitation (CKRC 2005: 107-126). This included not only provision of new rights not otherwise in the former constitutions such as socio-economic rights, but expanding civil and political rights. This was done to make rights “comprehensive” (Ibid: 108) because under the then constitution, CKRC noted that “some of the rights are rather narrowly defined and would be clearer and perhaps more effective if they were more detailed.” (Ibid: 110)*

However, in Kenya, courts have not done much to nuance the elements of the expanded rights, instead choosing to explain the purpose more than the content of the right. Additionally, courts have also tended to emphasise more on the utility of the right especially its interlink with or its facilitative nature to other rights (Wilson Olla Case). Ideally, courts should provide what the scope or the elements of each component of Article 37 entails. For example, is assembly a superordinate word encompassing all other components of Article 37 - that is, demonstration, picketing and presentation of petitions? Do these phrases mean something different in the constitutional context, as contrasted to other components, for example the meaning of picketing in labour law context? Does the protection available differ depending on what component those exercising the right are engaged in such that perhaps the police duty to protect is heightened in a demonstration as compared to a spontaneous assembly? Do spontaneous assemblies require notification?

Defining the relevant contextual factors and scope of each component also helps to indicate to those seeking enjoyment of the right, the greatest extent to which they may enjoy that right but equally clarifies to those with obligation to protect and promote the right the parameters within which to operate in order not to impose undue restriction to the enjoyment of the right.

Article 37's Internal Limitation

Article 37 has an internal qualifier providing that the right is available to anyone who is “unarmed” and “demonstrates peaceably.” Kenya’s courts have engaged to some extent with what the implication of this qualifier is. In the Waititu case, Justice Onguto noted the following about the internal qualifier, which he referred to as a constitutional “claw-back”: “34. It certainly would be an antithesis of constitutional values and principles if picketers and demonstrators are allowed to participate in non-peaceful demonstrations or pickets whilst armed with implements set to stimulate aggression. It is therefore no surprise when the Constitution itself limits the right to assemble, to demonstrate, to picket and to present petitions.” (Waititu case: 34)

Similar findings were made in the Wilson Olal case, where Justice Mativo noted: *“I must point out that the right under Article 37 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted: ‘[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.’”*

But given the common occurrence in Kenya of police or security forces often violently disrupting assemblies or demonstrations, the fundamental question is whether every type of violence extinguishes the demonstrators’ constitutional right. Though courts have attempted to give clarity on this, they have shied away from drawing parameters or providing concise indicators as to when the blame for violence is to be borne by the police and hence the right to assemble and demonstrate remains preserved by the Constitution. However, as already discussed, perhaps a better exposition was by the High Court in the Eugene Wamalwa case (2013: 6) where the court noted that the “State should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons.”

The clarity we argue for above accords significance on the government’s negative obligation not to interfere with the exercise of the right and the concomitant positive obligation to promote and protect the right by providing those exercising it with the most conducive atmosphere to do so. Equally, where a sole participant or part of the group decides to engage in violence or where an opposing group engages in a confrontation that is violent, the police must, to the extent possible, try to protect those still peacefully engaging in peaceful assembly.

On this, Kenyan courts may wish to take cue from regional and international tribunals and UN specialist mechanisms. For example, the European Court on Human Rights (ECHR) has adopted the test of the intention of the demonstrator as the criteria to be used to determine whether the assembly or some part of it is protected when violence occurs. If the intention and action of the demonstrator is peaceful, that person preserves the right (Shwabe and M.G. v Germany (2011) ECtHR: 103). Even in a situation where the intention of the group is peaceful and later on the intention or action of some members of the group changes, the right of those who are still beholden to a peaceful intention is preserved (Ziliberberg v. Moldova (2014) ECHR: 4).

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has elaborated this by indicating that the State's obligation to protect the right of those peaceful in order that they may continue with the assembly still remains and requires the State to separate those who are not peaceful from the assembly (HRC 2012: 25). A similar approach has also been urged by the African Commission on Human and Peoples' Rights: "Where an individual bad actor is involved in violent or unlawful activity, the authorities should remove him rather than breaking up the assembly." (ACHPR 2014)

This obligation is not diminished when counter-demonstrations occur. The ECHR explained that genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere: A purely negative conception would not be compatible with the object and purpose of the right (Plattform "Ärzte für das Leben" v. Austria (1988) ECHR: 31). The police must, in such situations, make all efforts to separate the demonstrators by allowing each group, to the extent possible, to exercise its right to assembly and demonstration (HRC 2012: 30, 33). It is the responsibility of law-enforcement officials to facilitate assemblies by facilitating a peaceful atmosphere during the assembly and protecting the demonstrators from counter-demonstrators (HRC 2016: 37-49).

It is therefore prudent that the police prepare to facilitate an assembly with an expectation that a counter-assembly or demonstration may occur. In its Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, the African Commission of Human and Peoples Rights advises that even in the event where it is impossible for the police to facilitate the counter or simultaneous assemblies "preference should be given to the facilitation of the first notified assembly and alternatives must be provided to the other assemblies." (ACHPR 2017: 18.3)

The obligation on and manner of handling multiple assemblies, counter or simultaneous demonstrations is especially instructive for Kenya police, because often political demonstrations attract counter-demonstrations and police are quick to stop or disperse a peaceful demonstration on the pretext that violence is likely. Worse, at times, police are quick to secure or protect counter-demonstrators largely on the motivation that the

counter-demonstrators support the government of the day while dispersing the initial assembly.⁴⁴ The State also often cites possible violence from counter-demonstrations as a justification to limit the right to assembly. Luckily, courts in Kenya have been quick to reject this explanation observing instead that the State has the obligation and abilities to anticipate and deal legally with such situations with a view to facilitating the right to assembly (Eugene Wamalwa Case 2011: 14).⁴⁵

In summation, this means that the police must be better equipped at crowd control, employing a much more disciplined and objective approach in policing to allow for better isolation of rogue characters in order to minimise compromising on the right of those who have chosen and are practicing peaceful assembly.

Interaction between Article 24 and 37

Additionally, regional human rights tribunals and courts have established a consistent criterion as to when a right or freedom can be limited. In a nutshell, a three-prong test is used. First, the decision maker must inquire whether the limitation is by law. Second, the limitation must be for a legitimate purpose. Finally, the limitation must be such that can be justified in a free and democratic society.

Not every piece of law qualifies, for purposes of assessing limitation, as law. For example, a law that is too vague as to fail to give a clearly discernible indication of what is prohibited or not is not law. More critical is the question of what constitutes legitimate purpose. Too often, police and government in general have a high propensity to interfere with the exercise of freedom of assembly, especially where the reason is to register discontent with government action or policy. In such cases, an analysis on whether what is proffered by government as the reason for limiting the right is a reasonable one, is critical in order to establish whether the stated reason is legitimate. The notion of a free and democratic society is built on the foundational expectation that in such a democracy, individuals should enjoy rights to the greatest extent possible and hence governments have to have legitimate and justifiable reasons when limiting the enjoyment of a right.

Article 24 is a codification of the foregoing criteria on limitation of rights except in a much more detailed manner. A critical element of such elaboration is the requirement that even where the court finds that there is a legitimate purpose to limit the right, it must still conduct a proportionality assessment founded on the question of whether the limitation proposed is the least restrictive means of limiting the right that is available to the State (Constitution of Kenya 2010: Article 24).

⁴⁴ For example, during the period the National Super Alliance (NASA) was undertaking demonstrations to push for the disbandment of the Independent Electoral and Boundaries Commission (IEBC), Moses Kuria, a leading Member of Parliament for the ruling Jubilee Party was quoted as having proposed that a concerted recruitment for The Nairobi Business Community members (a group that countered NASA demonstrators) be done in order that they assist the police in disruption of the NASA demonstrations. See, Gachane, N. (2017) 'More Business Community Coming Soon: Moses Kuria,' Daily Nation, 5 October, <https://www.nation.co.ke/news/More-business-communities-coming-soon-says-Moses-Kuria/1056-4126600-vmyd8/index.html> (Accessed on 15 February 2019).

⁴⁵ Eugene Wamalwa v Ministry of State Affairs, Petition No 9 of 2011; [2013] eKLR.

Though Kenya courts have now developed fairly elaborate jurisprudence on the assessment required by Article 24, no court has conducted a systematic and detailed assessment of Article 24 limitation in the context of Article 37 rights. Yet, while jurisprudence on Article 24 in regard to other rights is a relevant guide in conducting a right's limitation assessment for Article 37 rights, given the complexity of possible issues under that right, jurisprudence on Article 24 in regard to other rights cannot offer complete guidance on how Article 24 limitation should operate in regard to the right to assembly.

Yet, it is how the courts nuance Article 24 assessment in regard to assembly that is most useful -- especially to the police and the State -- in terms of understanding what limitation will be countenanced or not. Without elaborate assessment based on real scenarios where the State prohibited or interfered with the right to assembly, the police will continue to exercise unbridled, and often excitable discretion, to interfere with Article 37 rights and worse sometimes to use the exercise of right as a sword to trigger criminal sanctions. At least, these fears must have been in the mind of the court in *Wilfred Olal* where the court warned that the "machinery of criminal justice cannot to be allowed to become a tool for the police [to] violate constitutional rights of citizens."

Conclusion

Kenya's transformative constitution has cemented the right to assembly, demonstration, picketing and presentation of petitions to authorities; courts have been quick to insist that the right must be protected. However, Kenya's government and the police in particular have continued to interfere with the exercise of this right in an intensely worrying way. It seems that the police still embrace a colonial attitude which was based on a knee jerk and irrational urge to use the coercive instruments of state power to inhibit on people's exercise of rights, especially those of assembly. It is disturbing that nine years after the promulgation of the 2010 constitution the police have done little to come up with constitutionally required approach to ensure it facilitates the enjoyment of the right to the extent possible.

Worse, this incorrigibility by the police is a direct affront of the constitution's provision that establishes the values that governs state security under Article 243 of the Constitution including,

- (c) comply with constitutional standards of human rights and fundamental freedoms;
- (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity

Court's pushback against police excesses on its – too predictable - response to those exercising the right to assembly has been instrumental in ensuring that the police are not left untamed in their eagerness to frustrate a right that anchors or gives great potency to other foundational rights in the constitution. PIL may not have done enough, but it has ensured that the police are constantly reminded that the right to assembly is non-negotiable in the constitutional democracy that the 2010 Constitution sought to establish in Kenya.

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The South African Experience of Policing Public Gatherings

Dr Irvin Kinnes

Introduction

Policing any public order demonstrations in Africa is fraught with complexity. Indeed, the business of policing crowds whether spontaneous gatherings or planned marches requires much planning from police officers and marchers themselves. In a democracy, there are key policy and operational imperatives that have to be respected and implemented by the police and marchers prior to such marches taking place. It remains a requirement for the police to protect the marchers, especially if the protests are peaceful. Their stance necessarily changes when the protest or march turns violent.

Does this mean that the policing of demonstrations, pickets and protests in South Africa are democratic? The answer to that question is the subject of much discussion and the purpose of this chapter is to discuss the processes that police in South Africa use to manage demonstrations. It hopes to address the question in the process of dealing with policing of crowds in South Africa.

Protest is a common feature of the South African democracy and groups of people who protest, march and express their views on any issue peacefully are protected in terms of the South African Constitution. Police management of public order protests requires a professional approach otherwise their actions can be seen to be serving the wishes of unpopular governments. This is the basis of political policing and was the role played by the old Apartheid police. This is especially true in States where the relationship between political parties, governments, supporters and opposition are tense. Policing is subject to contestation from the people they are meant to police.⁴⁶

Across Africa, there are many situations of political instability where political parties in power seek to use the police as instruments of the State and of coercion to deal with political opponents. Invariably, supporters of political parties align themselves to their party manifestos and demonstrate when they feel their views are disregarded. In such situations, the police are expected to provide demonstrators the protection they require from the police, especially when they apply for the necessary permissions.

The measure to determine whether the policing of a protest is democratic or not depends on the role, posture and communication by the police officers towards the protestors and their adherence to the provisions of the Constitution. The legislators who developed the South African Constitution made sure that the country never returns to a situation where the police are unsure of the role they are expected to play during service delivery protests.

⁴⁶ Kinnes, I. (2017). *Contested Governance: Police and Gang Interactions*, unpublished PhD Thesis, UCT.

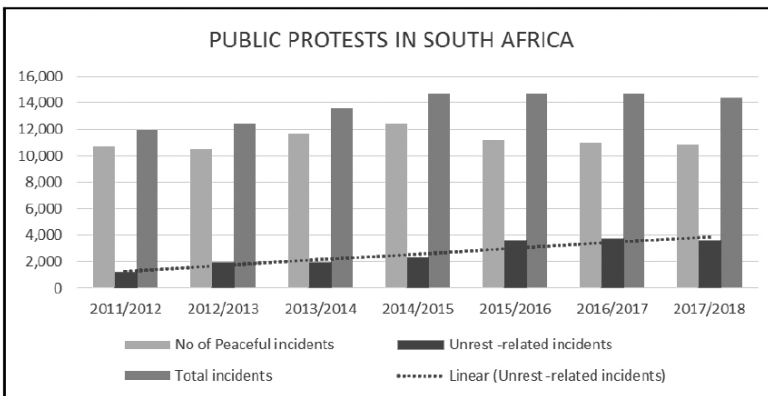
However, recent events such as the Marikana⁴⁷ massacre -- where the police killed 34 miners and seriously injured 78 -- appears to have been a setback to this approach. Police officers who ordered the killings and those who actually shot are on trial in South African courts. Several authors (Bruce2019; Duncan2016; Kinnes2013) made clear, in the wake of the Marikana massacre, that the role of the police in policing protest actions have to be unambiguous and in line with the South African Constitution.

This chapter looks at South Africa as an example of how protests are managed in a developing democracy from a policing perspective. To start with, it will provide a background to protests in South Africa before discussing the legal framework, oversight mechanism and how police have governed demonstrations.

Background on Protests in South Africa

Thousands of protests have taken place in post-Apartheid South Africa and the police have been able to mostly manage the crowds whether they have been violent or not. In fact, the majority of protests in South Africa are peaceful (Duncan: 2016). However, different bodies monitoring protests do not have similar statistics because they monitor different definitions of what is called protests, demonstrations and marches.

Lancaster (2016: 3) suggests that all the public order protests are captured on the South African Police Service (SAPS) Incident Registrations Information System (IRIS). According to Lancaster, the SAPS monitored 14,740 'crowd-related events' (including recreational, religious, cultural or sports events) between April 2014 and March 2015. The SAPS IRIS system records 15.5 per cent of the protests as unrest-related, according to Lancaster. From 2011, however, a clear trend-line can be seen that shows the number of unrest-related incidents increasing exponentially.



Source: SAPS Annual Reports

47 The SAPS opened fire on protesting mineworkers in Marikana on August 16th 2012, and killed over 34 miners and injured 78 in two sites in the hill they were occupying. This became known as the Marikana massacre. For more information, see: <https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>

It is clear that the number of protests fluctuates and incidents that appear to have an element of violence are increasing. Lancaster, however, has raised concerns on the reliability of the IRIS data, including the manner in which it is captured. The data is also not audited, raising credibility questions. Further, what is defined as unrest-related protests is not clearly defined. It remains to be seen how the number of protests will increase or decrease depending on the type of policing deployed on assemblies.

There is no other better guarantee for people to express themselves in a democracy than having that right enshrined in the country's constitution. South Africa's right to protest is protected and enshrined in Section 17 of the Bill of Rights: Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

Protests in South Africa occur on a daily basis and given South Africa's robust civil society, there are strong oversight mechanisms to make sure that the police are accountable for their actions when managing assemblies. The need to recognise the right to peacefully assemble was as a result of a long period of police violence on demonstrators opposed to Apartheid and the basis of any intervention in crowd control is now laid out in the South African Constitution (108 of 1996).

Irvin Kinnes (Kinnes2013) has noted that the structure of the SAPS responsible for dealing with public order events has not radically changed since 2013. The Public Order Policing (POP) Unit is a national unit and accounts to the Divisional Commissioner of the Operation Response Service (ORS).

Provincial Commissioners have a say over the deployment of the provincial POP units and they could be over-ruled by the Divisional Commissioner of the ORS with respect to deployment in terms of the legislation.

Nationally, public order policing resides under the Divisional Commissioner: Operational Response Services (ORS). He reports to the Deputy National Commissioner: Operations. The ORS Division is responsible for the POP units, the National Intervention Unit (NIU), the Special Task Force (STF) and the Tactical Response Teams (TRT). All the units report to the Divisional Commissioner for ORS.

These are all specialised and highly-trained units of SAPS that have responsibility for hostage situations, hijackings, high-level interventions and terrorist incidents. POP units in the provinces have the responsibility for policing crowds.

The basis of the work of POP units in the provinces is the division of POP members into platoons which consist of 36 members each. The platoons are the core units of the POP Unit meant to engage demonstrators, and they have to work and train together. The platoons are further subdivided into sections with eight members in each. The National Divisional Commissioner for ORS can call up any number of the POP Unit members in the provinces to assist with any national operation.

Management of Assemblies: The Legal Framework The South African Police Services Act (68 Of 1995)

The SAPS Act (68 of 1995) reinforces the Regulation of Gatherings Act (ROGA 205 of 1993) ROGA provision, and Chapter 6, Section 17 establishes a national public order policing unit. Significantly, the provision is subject to section 218(1) (k) of the Interim Constitution (1993) which stated:

the establishment and maintenance of a national public order policing unit to be deployed in support of and at the request of the Provincial Commissioner: Provided that the Act referred to in section 214 (1) shall provide that the President, in consultation with the Cabinet, may direct the National Commissioner to deploy the said unit in circumstances where the Provincial Commissioner is unable to maintain public order and the deployment of the said unit is necessary to restore public order.

The relevant provision has been moved to the SAPS Act (1995) in part and was not included in the final Constitution. The Public Order Policing (POP) Unit is responsible for policing public order protests, demonstrations, sports events and spontaneous crowd disorder. The POP units have recently been beefed up with additional personnel and have added responsibilities for policing major crowd-related events such as big sports events (for example the 2010 FIFA World Cup), major national big events such as high-profile court cases, music concerts, international conferences and for the protection of judges. The public order policing policy⁴⁸ from the Ministry of Police in 2011 states that the objectives of public order policing are to: promote ideal crowd control and management capacity within the police in order to secure public trust and maintenance of safety during public gatherings; provide a framework and facilitate the development of appropriate guidelines by the SAPS on the use of force in relation to crowd control and management that adheres to internationally accepted standards; establish the principle of intervention in controlling public protest in order to proportionate the means of force that can be applied by the police; and facilitate the introduction of appropriate training initiatives which must, amongst others, address the principle of ‘first responder’, guide SAPS operational planning and response, resource deployment and physical execution.

More recently, the establishment of the Tactical Response Team (TRT) in 2009 has had the effect of complimenting the role of the POP units. The TRT is established as a national unit dealing with medium to high-level threats. It appeared that during the management of the Marikana massacre, members of the TRT were involved in the police actions against miners.

⁴⁸ Civilian Secretariat for Police, *Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events* dated 29 August 2011.

The Regulation of Gatherings Act (ROGA 205 Of 1993)

The legislation which regulate right to protest is encapsulated in the ROGA). ROGA is the culmination of the work of an international panel led by Dr Peter Waddington, appointed by the Goldstone Commission (which was appointed to investigate political violence in South Africa) to advise on the policing of demonstrations, protests and pickets.⁴⁹

One of the key recommendations of the Waddington Report was for police to allow protests to occur while protecting marchers at the same time. Significantly, there is no requirement for marchers to apply for permission to demonstrate and march. Section 3(1) provides for notification to be provided to the municipality:

“The convener of a gathering shall give notice in writing signed by him of the intended gathering in accordance with the provisions of this section: Provided that if the convener is not able to reduce a proposed notice to writing the responsible officer shall at his request do it for him”.

Notification of the demonstration to the municipality is not seeking “*permission*” to hold a demonstration. Many municipal mayors and municipal police agencies sometimes erroneously “*ban*” marches under the mistaken premise that organisers have to apply for permission to march. The misapplication of the ROGA by municipalities according to Duncan,⁵⁰ closed the space for peaceful protests. It had the effect of changing the notification to a permission-seeking bureaucratic process. This shift increased the already-onerous bureaucratic obstacles municipalities put on protests, many of which already shared an assumption that the notification process in terms of the ROGA was actually a permission-seeking exercise, and that they had the right to grant or deny ‘permission’ to convenors to engage in a gathering or protest.

The importance of the requirement relates to a democratic right of protestors to express themselves. According to Heyman et al (1992: ix): The right to demonstrate is as fundamental a right of democratic citizenship as the right to take part in political campaigns. Where the purpose of the demonstration is protest, the demonstration is at the core of free expression in a democracy. One of the central responsibilities of the police is to facilitate the right to demonstrate.

One of the key questions at the end of the Apartheid era was how the police who had lost legitimacy had to regain trust of the people. The revision of the policing policy with respect to management of protests, and policing thereof assisted greatly in cooling off tempers with respect to the illegitimate police shooting at protestors. It engendered a healthy tolerance of demonstrators within the occupational cultures of the police. Equally, it had the effect of building trust between demonstrators and police.

The police service had no choice in the face of changes to the South African Constitution and

⁴⁹ Heyman, P. et al (1992). *Towards Peaceful Protests in South Africa: Testimony of multi-national panel regarding lawful control of lawful demonstrations in the Republic of South Africa, Goldstone Commission of Inquiry, HSRC Publishers.*

⁵⁰ Duncan, J. (2016). *Is South Africa reverting to a repressive State? Jane Duncan, Inaugural professorial lecture, Council Chambers, University of Johannesburg, July 13th 2016.*

the implementation of the ROGA but to train its members in managing demonstrations. In many respects, the critical innovation for policing was what became known as the “golden triangle” meeting, prior to the demonstration between the police, the local municipality and the organisers of the demonstration. The purpose of the meeting was for the parties to get together and discuss responsibilities after notification to the local municipality and the police and prior to the march.

However, there have been challenges to the ROGA by a number of actors in South Africa. The Social Justice Coalition (SJC) has challenged provisions of the law, specifically Section 12(1)(a) which some municipalities argued required protestors to seek their permission before marching (Duncan2016: 182). The Constitutional Court declared provisions of Section 12(1) (a) unconstitutional and inconsistent with the Constitution on 19 November 2018.

The Court ruled that:

The declaration by the High Court that section 12(1) (a) of the Regulation of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence.

Much of the implementation of the Court’s rulings with respect to marches and demonstrations is to be implemented by the SAPS POP unit, which is legislated for in the SAPS Act.

South African Police Procedures for Managing Crowds: National Instruction 4 of 2014 Standing Order 262 which regulated crowd control prior to the Marikana massacre has since been replaced with the SAPS National Instruction 4 of 2014 which provides for public order police crowd management during public gatherings and demonstrations. The National Instruction provides for a management process for all officers managing crowds during public gatherings and demonstrations. One of the key criticisms against the police was political interference by senior officers in the operational command of officers managing the protest and control over demonstrations (Kinnes 2014:32).

Some members argued that control should rest with the officer on the scene and the member in charge. Often this member is undermined by senior officers not on the scene, who give instructions through telephone calls, which cause the officer to lose authority. This is echoed by the Farley Commission recommendations when dealing with operational control of the demonstrations.

Control over operational decisions

While it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy and not make any operational

51 Constitutional Court Judgement: *Mlungwana and Others v The State and Another* [2018] ZACC 45, case number CCT 32/18.

decisions and that such guidance should be appropriately and securely recorded. The Commission recommends further that in Public Order Policing situations operational decisions must be made by an officer in overall command with recent and relevant training, skills and experience in Public Order Policing.

National Instruction 4 of 2014 appears to echo this issue of control by police personnel while managing a demonstration. Section 13 of the National Instruction points to the overall command of a peaceful crowd management. The overall commander must designate a member, trained in POP operational tactics and techniques, as operational commander. The commander must at least have the rank of Warrant Officer or a higher rank in order to meet the criteria set out in section 9 of the Act.

Process for Designating Threat Levels in Crowds

Threats to public safety during events and crowd management processes are clearly designated and defined according to Section 9(a)-(c) of the National Instruction.

Level One: A peaceful gathering and less significant sport, entertainment or social event which can be policed by members of Visible Policing at station level or the Metro Police (trained in basic Crowd Management skills) where there is no threat or need for the use of force is envisaged. The POP unit must be on standby: Provided that the POP unit may take over control of the management of the crowd, if the commander of the POP unit deems it necessary. Members doing crowd management must form part of a unified command structure and must work in sections, platoons or companies. All members trained in basic crowd management (even Metro police officers) must be in possession of the necessary crowd management equipment.

Level Two: Unconfirmed information regarding a possibility of a threat against lives and property. Members of Visible Policing at station level and the Metro police service, that are trained in basic crowd management skills, must be the primary role-players, with the relevant POP unit in reserve at the scene. Members doing crowd management must form part of a unified command structure and must work in sections, platoons or companies. All members trained in basic crowd management (even Metro police officials) must be in possession of the necessary crowd management equipment.

Level Three: Confirmed information regarding a likely threat to lives and property. The POP unit must take operational command. (Visible Policing at station level and the Metro Police service may be utilised to assist in policing the event).

The National Instruction designates threat levels and operational control to different levels of police officers when dealing with crowd management incidents, both peaceful and violent. It is only at level three where members of the POP units become involved in policing the crowd. There are 12 planning steps that must be followed by the overall commander which should be implemented prior to the protest or march after notification

has been made. Further, there are clear procedures for tactical and operational decisions by the officer in command.

The overall commander must designate a member, trained in POP operational tactics and techniques, as operational commander. The commander must at least have the rank of warrant officer or higher to meet the criteria set out in Section 9 of the National Instruction. One of the reasons why this provision was included appears to be the real interference from senior officers who are not on the scene of a protest or march and while based in their offices, give commands to officers on the ground. In this respect, the SAPS have noted that the individual police officer in command of policing a protest must be trained in public order operational tactics and techniques and must be the rank of warrant officer.

Farlam Commission of Inquiry into the Marikana Massacre

The Farlam Commission of Inquiry into the Marikana Massacre has redefined how the SAPS should deal with protests and what equipment should be used for the policing of mass marches. The Commission also recommended that police officers should be held accountable for the deaths of the miners. Accountability of police officers became an important thread that ran through the pages of the Farlam Commission Report.⁵² It is useful to note the key findings and recommendations for policing crowds as it has contributed substantially to the reform of public order policing.

The Commission made findings with respect to a number of areas for policing crowds and in particular the deaths of miners at Scene 1 and Scene 2⁵³. The Commission recommended a full investigation, under the direction of the Director of Public Prosecutions (DPP), with a view to ascertaining criminal liability on the part of all members of the SAPS who were involved in the events at Scene 1 and 2.

Significantly, the Commission recommended that SAPS stop using sharp pointed ammunition at crowd control scenes. It further recommended that all police officers should be trained in first aid and specialist firearms officers should receive additional training in basic first aid skills needed to deal with gunshot wounds. The Commission found that the police leadership at the highest level had misled the public in its submission and press release. It recommended that a Board of Fitness be constituted to investigate the National Commissioner's fitness to hold public office.

The Commission found that the Independent Police Investigative Directorate (IPID) was not in charge of the scenes, was not permitted to access them immediately and did not properly warn people in taking their statements. The Commission recommended that a panel of Public Order Police experts (including international experts) be constituted to advise the SAPS on policing crowds.

⁵² *Farlam Commission of Inquiry was established by Proclamation No. 50 of 2012, published in Government Gazette No. 35680 of September 12th 2012.*

⁵³ *These were the reconstructed scenes where miners were killed by the police.*

The Commission recommended that police at operational levels be the only persons who make operational decisions on crowds and that such decisions not be interfered with. Such an officer must have recent and relevant training, skills and experience in Public Order Policing. To date, SAPS has implemented all of the recommendations except investigations of the deaths at Scene 1 and 2 by the IPID. The police have been held accountable for implementation of the recommendations by the Parliamentary Portfolio Committee on Police. Some have however taken issue with the manner in which SAPS attempted to conceal the shootings at Scene 2 in particular. According to the Amnesty International report (2014: 9): “Of serious concern, however, is the evidence indicating what appears to have been a systematic attempt by the police authorities, with possibly higher-level involvement or influence, from the start to conceal or falsify evidence and to mislead the inquiry”.

Bruce (2018) confirms this account through interviews with surviving Marikana miners who were part of the strike. His investigation into the Marikana shooting shows that some of the miners were shot at Scene 2 while surrendering to the police. Bruce (2018:19), critical of the Commission’s findings, argues that although it made no findings about the reach at least one significant set of conclusions about the events at Scene 2, namely that there was no effective command and control of the police.

The question of police accountability is clear when it comes to them implementing the necessary laws, policies, regulations and standing orders. One of the critical procedures for what the police were to do is spelt out in Standing Order 262. This order sets out terms under which police officers can engage and regulate the management of crowds. Section 3(2) places a responsibility on station commissioners to engage in conflict resolution practices when they are informed of such threats, which also must be reported to the provincial commissioner if public safety is threatened.

Oversight of Policing

The question of accountability of police members for their actions is guided by Section 49 of the Criminal Procedure Act, which governs when the police can use deadly force against criminals. However, there are many other oversight agencies that play a role in the oversight of policing. These include the IPID, the Parliamentary Portfolio Committee on Police, the Civilian Secretariat for Police, the Western Cape Provincial Police Ombudsman, civil society organisations and the media.

Independent Police Investigative Directorate (IPID)

The SAPS is subject to oversight by IPID. The mandate of the IPID is regulated through the IPID Act (1 of 2011), which is established in terms of Section 206(6) of the Constitution. The objectives of the IPID Act are to, amongst others: ensure independent oversight of the SAPS and Municipal Police Services; provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the SAPS and Municipal Police Services; make disciplinary recommendations in respect of members of the SAPS

and Municipal Police Services resulting from investigations conducted by the Directorate; and enhance accountability and transparency by the SAPS and Municipal Police Services in accordance with the principles of the Constitution.

Investigators of IPID have the same powers as police officers with respect to investigations in terms of Section 28 (1) and (2) of the IPID Act. The Directorate must investigate:

- (a) any deaths in police custody;
- (b) deaths as a result of police actions;
- (c) any complaint relating to the discharge of an official firearm by any police officer;
- (d) rape by a police officer, whether the police officer is on or off duty;
- (e) rape of any person while that person is in police custody;
- (f) any complaint of torture or assault against a police officer in the execution of his or her duties;
- (g) corruption matters within the police initiated by the Executive Director on his or her own, or after the receipt of a complaint from a member of the public, or referred to the Directorate by the Minister, an MEC or the Secretary, as the case may be; and
- (h) any other matter referred to it as a result of a decision by the Executive 40 Director, or if so requested by the Minister, an MEC or the Secretary as the case may be, in the prescribed manner.

(2) The Directorate may investigate matters relating to systemic corruption involving the police.

The IPID is also responsible for investigating deaths caused by police officers managing protests. IPID was responsible for investigating the deaths of Andries Tatane⁵⁴ and Mido Marcia,⁵⁵ protestors who were killed by the police during protests. During the Marikana massacre investigations, however, the IPID complained of a lack of resources to enable it conclude its work. The agency reported that it received poor co-operation and experienced difficulties from both the police and National Prosecutions Authority.⁵⁶ IPID's investigations into police officers and police leaders over the Marikana massacre faced serious challenges with the clash with SAPS spilling out in public.

IPID has also investigated senior police officers who allegedly were involved in systemic corruption, further testing the relations with the police. An institutional fight between the National Police Commissioner and the Executive Director of IPID ended up in the courts.

⁵⁴ Andries Tatane was killed by police after a service delivery protest in Ficksburg, Free State in 2011 and eight police officers were arrested for his death. They were all found not guilty.

⁵⁵ Mido Marcia died in police custody after a crowd of witnesses saw police drag his body behind their vehicle in Daveyton in February 2013. Eight police officers were convicted of his murder.

⁵⁶ See Thamm, M. (2018). *Marikana Massacre – IPID investigates massacred miners' deaths, and SAPS' lies, without the promised funding*, Daily Maverick, available at: <https://www.dailymaverick.co.za/article/2018-08-30-marikana-massacre-ipid-investigates-massacred-miners-deaths-and-saps-lies-without-the-promised-funding/>, accessed 26 May 2019.

In addition, the Minister of Police in 2016, tabled a complaint against the IPID Executive Director⁵⁷ in Parliament. This too ended up in the Constitutional Court which confirmed the position and independence of the Executive Director. The Court's judgement made clear that the Executive Director was not accountable to the Minister of Police, but to Parliament. The Executive Director's contract was eventually not renewed as the dispute with the second Minister of Police raged on. The matter is now under investigation by the court.

Parliament of The Republic of South Africa

The oversight of policing is undertaken at parliamentary level by its committees in the National Assembly and the National Council of Provinces. The Portfolio Committee on Police in the National Assembly and the Select Committee on Security and Justice in the National Council of Provinces have oversight over the police.

The SAPS budget, Annual and Strategic Plans are scrutinised by the two committees of Parliament to align it with the delivery plan of government, the National Development Plan. Regular oversight visits are undertaken to different provinces and police stations throughout the country to look at service delivery. Parliament, in terms of Section 55(2) (a) of the Constitution, must ensure that all Executive organs of State in the national sphere of government are accountable to it and --as per Section 55(2) (b) -- must maintain oversight over the national Executive authority, including the implementation of legislation, and any organ of State.

Interactions with the police department in Parliament are robust and police leaders are often called to account on any matter in the public domain. The Portfolio Committee on Police in particular has been driving the agenda with respect to the police's implementation of the Farlam Commission recommendations on public order protests.

The Civilian Secretariat for Police Service

The Civilian Secretariat for Police Service (CSPS) has the responsibility to develop policy and advise the Minister of Police on any matters. The mandate of the CSPS⁵⁸ is to:

- a) Provide the minister with policy advice and research support
- b) Develop departmental policy through qualitative and evidenced based research
- c) Provide civilian oversight of the Police Service through monitoring and evaluating overall police performance
- d) Mobilise role-players, stakeholders and partners outside the department through engagements on crime prevention and other policing matters, and
- e) Provide other support services to the Minister in pursuit of achieving his/her mandate.

⁵⁷ *Constitutional Court of South Africa, Robert McBride v Minister of Police and Another, CCT 255/15, 6 September 2016.*

⁵⁸ *According to the Civilian Secretariat for Police Service Act (2 of 2011).*

Section 5(a) of the Civilian Secretariat for Police Act provides for civilian oversight over the police. An important feature of the oversight process is that it must be civilian driven, given the history of Apartheid-police-controlled policy making. There are mechanisms where the CSPS co-operates with the IPID in order to monitor police implementation of the Domestic Violence Act, for instance.

The CSPS also produces performance reports of the SAPS with respect to the implementation of certain Acts.

Western Cape Provincial Police Ombudsman

The Western Cape Province has established a provincial Police Ombudsman whose responsibility is to investigate complaints against the police. The mandate of the Police Ombudsman originates from Section 206(3) of the Constitution which entitles provinces to: monitor police conduct; oversee the effectiveness and efficiency of the police service and promote good relations between the police and any community and assess the effectiveness of visible policing. It should be noted that the Western Cape Police Ombudsman functions at a provincial level.

Civil Society and The Media

South Africa has a vibrant civil society that engages robustly on policing. Civil society and the media routinely challenge the policies on policing and have always expressed strong statements especially with respect to opposing restrictive legislation and policy. In fact, it was civil society organisations that challenged the IPID and the ROGA legislation which allowed the changes by the Constitutional Court.

Given the transparency of policing, the media in particular have been reporting critically on measures that are seen as threatening human rights. A case in point was the return of the police to military ranks which caused a furore in the South African media. The police were accused of being militarised against the vision of the democratic order.

Conclusion

Policing crowds requires that the police have a long-term vision of protests. This necessitates that such a view must incorporate the understanding that protests are part of the social glue that holds democracies intact. The police cannot proceed to blindly carry out apparent illegal orders such as shooting peaceful demonstrators. There are opportunities where the police as an institution should seek dialogue with those protesting to lower the temperature and prevent the demonstration or march from turning violent.

Therein lies the test for effective, professional public order policing: What to do when protests turn violent. How far should the police go when attempting to quell violent protests? In some countries, it has been observed that if violent protests are allowed to continue unchecked, it could threaten the very foundations of the State.

Training the police in professional methods together with strong and effective legislation must be complimented with strong oversight agencies that ensure that professionalism of the police always triumphs against coercive methods. South Africa has many innovations in the policing of crowds, demonstrations and protests and the operating theatre of managing such protests and demonstrations are constantly evolving, which impacts on policing methods.

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