

Guidelines to Operationalise the Right to Protest at the University of the Free State (UFS)

1. Purpose and problem statement

The purpose of these guidelines is to protect and enable the right to protest of UFS staff and students. The guidelines describe the boundaries within which protest may occur on UFS campuses. It also explains the extent to which protest may not be limited or curtailed. The guidelines do so, by indicating both to protesters what they may not and should not do; and to staff and students who do not participate in protests, what protesters may do and what should and cannot be objected to.

For purposes of these guidelines protest is understood to be any assembly, demonstration, picket, presentation of a petition, concourse, procession or performance with the purpose of promoting, discussing, criticising, opposing or supporting the principles, policy or conduct of any person, group or institution; or highlighting an issue or the plight of a person or group. This understanding is in line with section 17 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') and the Regulation of Gatherings Act 205 of 1993 ('the Gatherings Act').

The need for these guidelines arises from the experience that protest at the UFS, but also other universities in South Africa over the last several years has often been conducted in such ways that it has resulted in its own limitation and curtailment. This has happened in two ways.

First, in some cases, protest action was accompanied by intimidation, vandalism and even violence, or the academic activities of universities were disrupted to such an extent that the project of teaching and learning and of research was effectively brought to a standstill. In such cases, university authorities were obliged to intervene and oppose the protest action, in order to protect staff, students and facilities and to ensure that the academic project could continue.

Second, in cases where protest was peaceful and not excessively disruptive, it was often nevertheless experienced by some as so discomfiting, unsettling or even frightening that it led to calls from staff or students, alumni and members of the public for intervention or curtailment.

It is against this background that it becomes necessary to describe to non-protesting staff and students what level of disruption, discomfort and unsettling they are required to tolerate before they can legitimately call for intervention in protest action; and to protesters how they should conduct themselves in order to avoid legitimate intervention in protest action.

The guidelines create no new rules for protest at the UFS – the purpose is to explain the existing rules to the institution itself and her staff and students, so that from all sides they may direct their conduct accordingly.

In that light, the guidelines must be read together with **the Constitution**; the **Gatherings Act**; and the **UFS Rules on Student Discipline** and the **Disciplinary Code and Proposed Action (Staff)** that together comprise the existing regulation of protest at the UFS.

In addition the guidelines operate alongside a package of other guidelines or protocols related to protest on campus. These include the **Protocol on Management of Political Activity at the UFS** (that describes the approach, premised on different levels of engagement first, with intervention left as last resort, that the UFS Rectorate takes to managing protest action when it occurs); and the **Protocol for Students and Staff not Involved in Protests on How to Conduct themselves during Protests at the UFS** (a do's and don'ts list for those experiencing rather than participating in protest, to deescalate conflict and prevent injury and damage).

Below, first, several points of departure or basic principles are outlined. Thereafter, the existing regulatory framework concerning protest at the UFS is described in a summary fashion and elucidated in light of the basic principles.

2. Points of departure

2.1 The UFS is committed to not only allowing or tolerating, but also protecting, enabling and indeed fostering protest.

2.1.1 This is so in the first place because the UFS, as a public institution, is legally obliged to respect, protect, promote and fulfil the constitutional right of all members of its community, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions – that is, to protest. It is also obliged to do the same for their constitutional rights to freedom of expression, including academic freedom; freedom of conscience, religion, thought, belief and opinion; freedom of association; and freedom of political choice, all of which are often exercised through protest.

2.1.2 This is so in the second place, because the UFS as an educational institution must provide the opportunity to the members of its community to develop as engaged citizens, which entails in part learning how to protest responsibly, creatively and effectively when the need arises; but also what the nature, importance, significance and place is of protest as a form of democratic and political engagement in South Africa.

2.1.3 This is so finally, because engagement in protest action by members of the university community indicates a student and staff body that is socially and politically aware, engaged and active – something that is essential to the UFS being a university in the real sense.

2.2 At the same time, the UFS is committed to ensuring the safety of its students and staff and the integrity of its facilities and infrastructure and to maintaining the academic project – teaching and learning, and research.

2.2.1 This so in the first place because, as a public institution, the UFS is legally obliged to prevent and address criminal conduct on its campuses and to respect, protect, promote and fulfil the constitutional rights of its staff and students to education, academic freedom, dignity, safety and security of the person and bodily integrity and freedom of movement, speech, expression and conviction.

2.2.2 This is so also because the UFS regards itself as a community based on care as a basic ethic, in which all members have a sense of belonging and safety, and feel that they can flourish and reach their potential.

2.3 Against this background, the kind of protest welcome at the UFS is peaceful protest. Peaceful here denotes two things:

2.3.1 Non-violence. Protest in which physical violence on the body of another or physical violence against the facilities of the University or private property is employed as a tactic is not only illegal, but also the antithesis of the idea of the university. Such protest is not welcome at the UFS.

2.3.2 Non-coercion. The lifeblood of the university is contestation, engagement and discussion around ideas, points of view, positions and convictions. Force and coercion have no place at a university. The same is true for protest at the UFS. Protest that amounts to an attempt at engagement with others, to persuade others to your point of view or convince them of your position, whether through argument, bargaining or negotiation is welcome at the UFS, however robust, challenging or discomfiting that persuasion or engagement may be in form and style. Protest that is intended to force others to accept your position or point of view or to follow you, whether through the threat of violence or otherwise, is not.

2.4 Peaceful protest is in no way placid, calm or sedate protest only. Protest is per definition disruptive, unsettling, discomfiting and challenging, both at an intellectual or conceptual level and physically. To allow, welcome, enable and foster protest means to allow, welcome, enable and foster disruption, discomfort, challenge and being unsettled. Peaceful protest denotes only protest sans violence, with violence defined as physical violence against the body of another or university facilities or private property (vandalism).

2.5 The UFS community is committed to managing and dealing with protest as an autonomous community; that is, to do so as far as possible without being directed by institutions or persons from outside the community.

3. Regulation of protest

Basic rules

Protest at the UFS is currently regulated in the first place by the Constitution (in particular its sections 16 – freedom of expression; 17 – freedom of assembly and the right to protest; and 18 – freedom of association); the criminal law of the Republic; and the Gatherings Act.

Although this regulation, particularly as set out in the criminal law and the Gatherings Act, manifests as a set of prohibitions and legal duties, it is intended in the first place to describe the space within which protest may occur without interference and limitation: to give effect to the right to protest. That is, protesters may during the course of a protest do anything except that which is prohibited.

The UFS as institution is subject to this regulation and the rules imposed by it, in the sense that

- it may not itself contravene these rules in the way that it deals with protest action;
- it must as far as possible prevent and address contravention of these rules on its campuses; and
- as public institution, it may not regulate protest in a more onerous or limiting fashion than protest is regulated in the criminal law and the Gatherings Act as expressions of the Constitution, without a particular and additional, context-specific justification to do so. That is, protest is a form of constitutionally protected political activity and as such, the UFS must promote and respect it.

Of course, the UFS as a juristic person is also ‘subject’ to these rules in the sense that it also holds the constitutional right to protest, and may exercise it to the full within the space created by these rules.

The UFS’ students and staff are of course subject to these rules as they are to any rules of law –

- where the rules prohibit something, they may not do that which is prohibited; and
- where the rules impose obligations, they must fulfil those.

However, more importantly, all UFS students and staff are also ‘subject’ to these rules in the sense that they hold the constitutional right to protest, and may exercise it to the full within the space created by these rules. That is, when protesting, they may do anything that is not prohibited here; however unsettling, irritating, discomfiting or even frightening others might find that.

For both the UFS as institution and its staff and students these rules, as rules of law, are enforceable. Should they not be complied with, consequences follow inevitably, such as, in some cases, criminal sanction such as fines or imprisonment. In addition, neither the UFS as institution nor its students or staff can escape these rules – they bind us all, whether we like it or not.

In a summary fashion, the following is prohibited during protest by the criminal law and the Gatherings Act:

- 3.1 Physical violence** (that is, violence against the body of another). Any form of physical violence during protest, whether visited by protesters on others, by security personnel on protesters and bystanders or by staff or students not participating in protest on protesters, is prohibited in principle. Here it is important to note that it is the violence itself that is prohibited. If incidents of violence occur during the course of a protest that does not mean that the protest action as a whole is prohibited. Violent protest, which is prohibited, is only protest that is intentionally violent, ie where violence is used as a protest tactic, on purpose. Under some circumstances, in terms of the Gatherings Act, planned protest action that shows a high likelihood of turning violent or causing violence may be prohibited by the police, prospectively.
- 3.2 Vandalism** (that is, damage intentionally inflicted on things, such as university facilities or private property). The same applies as in 3.1 above with respect to the effect of incidents of vandalism on the lawfulness of a protest.
- 3.3 Holding anyone captive or hostage.** This would include preventing (not simply trying to persuade, but actually physically preventing) anyone from leaving a building or room.
- 3.4 Inciting hatred or harm, or acting in such a way as to cause or encourage violence, or be hurtful.** Inciting hate or violence is prohibited not only specifically in the context of protest by the Gatherings Act, but also more generally through the criminal law and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which also prohibits conduct that incites harm, or is hurtful. PEPUDA also prohibits the dissemination and publication of any information that is unfairly discriminatory.
- 3.5 Carrying a firearm or other dangerous weapon.** This prohibition applies only to offensive weapons and does not cover defensive weapons (such as shields) or weapons that qualify as cultural weapons.
- 3.6 Intimidation** – defined in the Intimidation Act 72 of 1982 as compelling someone to do or not do something or to assume or abandon a standpoint through violence or the threat of violence or through other conduct that can reasonably be perceived as a threat to a person's safety or property.
- 3.7 Intentionally blocking a public road.**
- 3.8 Failure by convenors of a protest to take reasonable steps to prevent the blocking of anyone's reasonable access to or egress from a building.**

3.9 By any means to compel or attempt to compel anyone to join or participate in a protest.

3.10 Wearing a mask or disguise or in another way obscuring your identity during a protest.

3.11 Where a protest has been prohibited, it is illegal to request or incite people nevertheless to proceed with it.

It is important to understand that these prohibitions apply *during protest* and not only to protesters. That is, unless specifically indicated otherwise these rules bind anyone present during protest, whether participating in them or not.

In addition to these different prohibitions, certain conduct is also required of protesters by the Gatherings Act.

The most important of these is that conveners of a protest that in terms of the Gatherings Act constitutes a 'gathering' (broadly any protest involving more than 15 people) must give prior notice of a planned protest to a 'designated official'. Because the UFS is a public entity, protests on its premises are subject to the Gatherings Act in general and this requirement in particular.

Failure to give notice has no hard legal consequences (ie if organisers of a protest fail to give notice, they do not commit an offence, and the protest is not as a result automatically barred), but it is advisable to comply with this requirement particularly in the case of larger protests. In the absence of prior notice, the SAPD has the authority to prohibit a planned gathering if it has credible information that it is likely to lead to major traffic disruption, violence or vandalism. Should a protest cause damage to university facilities or private property, the failure to give prior notice will be seen as a failure to take reasonable steps to prevent the damage, which could lead to delictual liability being attributed to the conveners of the protest. Finally, giving notice creates the opportunity for proper arrangements for the safety of protesters and bystanders to be ensured by Protection Services and the police and, in fact, for the protest itself to be protected.

Currently there is no general process or requirement for prior notice of planned protest in the UFS' own regulation of protest, apart from certain ad hoc arrangements that apply, for instance in the run up to SRC elections. Until such process is put in place, it is nevertheless strongly advisable for conveners of a protest to give prior notice to the UFS' Protection Services of a planned protest when that is possible, so that appropriate arrangements can be made to avoid conflict and damages and to ensure the safety of protesters and bystanders and protection of the protest itself.

Additional rules

The UFS Rules on Student Discipline, and for personnel, the Disciplinary Code and Proposed Action determine that any criminal conduct, which would include transgression of any of the rules

above is also misconduct for purposes of the university's internal disciplinary processes. In short, any UFS student or staff member who commits a criminal act during the course of protest on UFS premises in addition to criminal prosecution also exposes him or herself to internal disciplinary charges and sanctions such as suspension, expulsion or dismissal.

In addition to this, the respective disciplinary codes for students and staff also impose other rules for protest, not directly derived from the criminal law or the Gatherings Act.

The most important of these is that disruption of the university's activities and good order is prohibited in seemingly extensive and general terms, even where that disruption is not accompanied by violence, vandalism or any of the other offences listed above. The best example of this can be found in the Rules on Student Discipline, which simply declare 'any action that impairs or may impair the good name, order, rights, discipline or the proper continuation of the activities of the University' misconduct and any such conduct 'in respect of lectures, tests, examinations, assignments or any other academic matters' serious misconduct. In short, on its face, this provision prohibits any disruption in a blanket fashion.

Given the UFS' duty to respect, protect, promote and fulfil the right to protest, and that, in terms of the points of departure listed above, even peaceful protest is per definition disruptive, this prohibition cannot lawfully be read and applied in the blanket fashion that it is formulated, as an absolute prohibition of disruption.

Instead, the prohibition of disruption should be understood as not absolute – the question is not whether disruption (also disruption of the academic programme) should or should not be allowed – it clearly must be - but instead to what degree university activities may be disrupted.

This distinction must be determined in line with the points of departure listed above – disruption must be allowed as long as it is consonant with the points of departure.

In terms of these points of departure protest is not only per definition disruptive - it is also welcome at the UFS only up to the point where it becomes coercive, an attempt to force others to accept your point of view or position, to join in your protest or to do what you want them to do. As long as disruption is not coercive in this manner – as long as, for example, it remains an attempt at engagement with others, or not absolute, so that those who want to avoid it can do so – it is allowed.

Although the application of this guiding principle in practice and the specific conclusions to be drawn from it will of course be very much context-determined, below follows some elucidation of its practical implications in specific kinds of situations that often arise in the context of university protests:

Class disruptions:

It must be accepted that the ability to withhold participation in academic activities such as classes is often the only form of leverage that protesting students have to bring across their point of view or participate effectively in bargaining. It must also be accepted that it is in the interest of protesting students who themselves participate in a class boycott to persuade other students to join in their boycott. For protesting students in an attempt at such persuasion for example to form a picket line in front of a classroom where they can engage with fellow students to persuade them not to go to class, or even to enter into a lecture and momentarily to disrupt that lecture by exhorting fellow students to join them is not only lawful, but acceptable – even if the disruption is robust or aggressive in style of engagement. However, the moment that the picket line becomes a blockade, so that unpersuaded fellow students physically cannot enter the lecture venue safely; or the request inside the venue for fellow students to join continues and is of such a nature that it becomes impossible to continue with the lecture, persuasion and engagement has turned into force and the class disruption is no longer lawful and may be prohibited.

Test and exam disruption:

Disruption of tests and exams is more complex, because the effect of such disruption on students who prefer not to participate in a proposed boycott is inevitably more severe and more difficult to correct after the fact. Whereas a short delay in the commencement of a lecture can be countenanced, the same is not true for a test or exam, as it will irretrievably affect the performance of students who prefer not to boycott the exam. A picket line in front of a test or exam venue, however vociferous the picketing might be, would be acceptable as long as it remains physically permeable; entering into a test or exam venue to try to persuade students before the commencement of a test to join the boycott would be less likely acceptable, depending on circumstances.

Disruption of meetings, seminars, conferences:

Meetings, seminars or conferences may be disrupted in whatever way, as long as the disruption is not absolute in the sense that it makes it impossible for the event to continue. Singing or clapping that delays the start of a public lecture or seminar, for example must be accepted, as long as the event can then start and be completed in the time set aside for it and is not absolutely derailed. During question time at public lectures or conferences, questions may be asked in a robust, conflictual and even aggressive or confrontational manner, as long as a response is still invited and allowed to be given.

Blocking access to campus:

It is legitimate for protesters who are advocating a campus shutdown to try to persuade everyone else on campus to join in the shutdown and to do so by trying to persuade others not to enter onto campus. However, any absolute blockade of entrances to the university that makes it impossible

for others to enter is not acceptable (it would also amount to the intentional blocking of a public road and as such be illegal).

Disrupting administrative activities:

Any temporary or partial disruption of administrative activities such as registration is acceptable – where the disruption is absolute (such as the handing over of a petition that results in the blocking of access to a building for administrative staff, or a sit-in, in administrative offices) it is acceptable if it is temporary. Where the disruption is long term (again, for example, a sit-in with placards etc), it is acceptable if it is only partial, allowing the administrative activity to continue.