

COMMENTS: KENYA

On The Assembly and Demonstration Bill, 2024

Introduction

ICNL is pleased to submit these comments on Kenya’s Assembly and Demonstration Bill, 2024 (the Bill), published on April 25, 2024. The Bill seeks to “give effect to the provisions of Article 37 of the Constitution which provides for the right of any person to assembly, demonstration, picketing and petition.”¹ If enacted, the Bill will repeal Sections 5 and 6 of the current Public Order Act and replace them with more detailed provisions.²

Below we identify various provisions that fall short of international standards protecting the right to freedom of peaceful assembly. By using this opportunity to address these provisions, drafters and legislators will engender public confidence in the new law and ensure the Government respects its national and international legal obligations.

International Law

Article 21 of the International Covenant on Civil and Political Rights (ICCPR) protects the right of peaceful assembly.³ Restrictions on this right must be (1) in conformity with the law, (2) necessary in a democratic society; and (3) in the interests of national

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ICNL works closely with several international and continental institutions, including the African Commission on Human and Peoples’ Rights; private foundations; and scores of in-country colleagues. For more information on our work, please visit www.icnl.org.

¹ The Assembly and Demonstration Bill, 2024, Memorandum of Objects and Reasons.

² Section 5 of the Public Order Act relates to Regulation of Public meeting and Processions; Section 6 relates to Prohibition of offensive weapons at public meetings and processions.

³ Kenya acceded to the ICCPR on 1 May 1972.

security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Article 11 of the African Charter on Human and Peoples' Rights (ACHPR) similarly protects the right to assemble, stating that the right may only be restricted in the interest of national security, the safety, health, ethics and rights and freedoms of others.⁴

In order to be “in conformity with” or “provided by” the law,” a provision must be sufficiently precise to enable an individual to assess whether his or her conduct would be in breach of the law, and to foresee the likely consequences of any such breach.⁵ For it to be “necessary,” the restriction must be proportionate to one of the enumerated legitimate aims. A restriction is proportionate where it is the least restrictive means required to achieve the purported aim.⁶

The African Commission on Human and Peoples' Rights (African Commission) has established as a general principle that “Government[s] should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law.”⁷ It has since reinforced this principle in its *Guidelines on the Freedom of Association and Assembly in Africa* (the FoAA Guidelines) which provide that, “Where states enact laws on freedom of assembly, those laws shall aim primarily at the facilitation of the enjoyment of the right.”⁸ This is in line with the “presumption in favor of holding peaceful assemblies,” which essentially means that an assembly should be presumed lawful and deemed not to constitute a threat to public order.⁹ The African Commission has also issued relevant guidance for States in its *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa* (the Policing Guidelines).¹⁰

The right to freedom of expression is implicit in and supplements the freedom of peaceful assembly, as participants in a procession inevitably impart and receive information and ideas. Thus, even when a law specifically governs public meetings and processions, it will affect the exercise of free expression. This freedom is protected under Article 19 of the ICCPR and Article 9 of the ACHPR.

⁴ Kenya ratified the ACHPR in 1992.

⁵ See United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai*, U.N.DOC. A/HRC/20/27 (2012), para. 28. See also United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, U.N. DOC A/HRC/17/27 (2011), para. 69.

⁶ See *id.*

⁷ African Commission on Human and Peoples' Rights, Communication 102/93, *Constitutional Rights Project & Civil Liberties Organisation v Nigeria*, para 58.

⁸ African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa* (2017), para. 66.

⁹ United Nations General Assembly, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai*, U.N. DOC. A/HRC/23/39, para. 50.

¹⁰ African Commission on Human and Peoples' Rights, *Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa* (2017).

ICNL has also produced a **Freedom of Assembly Checklist**¹¹ that law reform advocates can use as a tool to further assess the compliance of the Bill (and future iterations) with international legal standards, specifically the ACHPR's FoAA Guidelines.

Positive provisions

Several provisions in the Bill accord with international legal standards and good practice in relation to the protection and promotion of the freedom of assembly:

- The Bill recognizes that a “peaceful” assembly includes “conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote and includes conduct that temporarily hinders, impedes, obstructs the activities of third parties and temporarily blocking traffic;”¹²
- The number of people that constitute a public gathering for purposes of regulation under the Bill is fairly high (100 people);¹³
- The Bill recognizes the right of peaceful assembly and demonstration¹⁴ and ensures that the right of persons to participate in assemblies; it also provides that demonstrations may be exercised without payment of a fee;¹⁵
- The Bill limits the right to assembly on the grounds of (a) public safety, (b) public order, and (c) the protection of the rights and freedoms of other persons;¹⁶ these limitations conform to the standards set out in the ICCPR and the ACHPR – although we note below several other provisions in the Bill that may unjustifiably limit the right;
- The Bill obliges law enforcement agents to protect gatherings by ordering any participant interfering or attempting to interfere with an assembly or demonstration to cease and to remain at a distance from the assembly or demonstration;¹⁷ and
- A convener can seek judicial redress through the High Court where a regulation officer prohibits or specifies a condition for an assembly or demonstration. However, the timelines for the hearing and adjudication of the case remain undefined, which is a shortcoming of the Bill.

¹¹ Available at <https://www.icnl.org/post/tools/achpr-checklists-for-law-reform-advocates> (last accessed May 29, 2024).

¹² Section 2 – Interpretation.

¹³ As above.

¹⁴ Section 3(a).

¹⁵ Section 3(d).

¹⁶ Section 6(2).

¹⁷ Section 13(c).

Provisions whose reform would help protect the right to peaceful assembly

SPONTANEOUS ASSEMBLIES ARE NOT PROTECTED

ISSUE: While the Bill acknowledges spontaneous assemblies in its definition of an assembly,¹⁸ the Bill prohibits assemblies without prior notification.¹⁹ This effectively prevents spontaneous assemblies.

DISCUSSION: It is considered a best practice to permit spontaneous assemblies without requiring prior notification.²⁰ Spontaneous assemblies are a means for individuals and groups to react to and express their views on current events in a timely fashion. In fact, some assemblies are most meaningful because they represent real-time reactions to developing events. For example, a gathering in a public square to protest a law about to be voted on in parliament would lose its relevance if the participants had to first submit a notification, and wait several days before gathering, such that the bill was already passed.

RECOMMENDATION: Add a provision that specifically protects the right of individuals to gather spontaneously. A spontaneous assembly should be defined broadly in the Bill to include assemblies that occur as immediate reactions to events, and planned assemblies that necessarily occur within a tighter deadline than that required relative to notification.²¹ An example of a previously restrictive law that now protects spontaneous assemblies is Eswatini's (Swaziland).

NOTIFICATION REQUIREMENTS FOR PUBLIC GATHERINGS

ISSUE: Section 7(2) of the Bill requires conveners of an assembly or demonstration to notify the regulating officer at least three days before the planned gathering or else the assembly or demonstration cannot proceed.

DISCUSSION: Because organizing and participating in assemblies is a right, such activities should not require state authorization.²² Although advance notification is a fairly common regulatory requirement, international law is clear that notification requirements should not constitute a request for permission.²³ The purpose of a notification regime should be to allow law enforcement officers to facilitate the

¹⁸ Section 2 interprets an “assembly” as “the intentional gathering of number of people in a publicly accessible place for expressive purpose and includes planned and organised assemblies, unplanned and spontaneous assemblies and static and moving assemblies.”

¹⁹ Section 7 and Section 14(1)(a).

²⁰ *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, U.N. DOC. A/HRC/20/27 (2012), at paras. 29 and 91. *Guidelines on Freedom of Association and Assembly in Africa*, supra note 8, at para. 75.

²¹ *Guidelines on Freedom of Association and Assembly in Africa*, supra note 8, at para 75.

²² *FoAA Guidelines*, Principle 71.

²³ See *Report of the Special Rapporteur*, U.N.DOC. A/HRC/20/27, supra note 5, at para. 28

exercise of the right to assembly and to take necessary measures to protect public safety and the rights of other citizens, rather than to grant the state the power to allow or refuse a public gathering. By retaining provisions that empower the regulating authority to attach conditions to an assembly or demonstration (covered in more detail below), amend the date, route, and time, or even prohibit it, the result is that the regulating authority effectively retains the right to authorize the gathering, procession, or demonstration, contrary to international law.

RECOMMENDATION: Where notification is required, ensure that the law clearly states that public gatherings may proceed once the required notification has been provided, and that the public gathering will not be prohibited if its organizer fails to meet the notification requirement.

TIMELINE FOR NOTIFICATION

ISSUE: Section 7(2) of the Act requires the convener of an assembly or demonstration to provide notice to the police at least three days before the planned gathering.

DISCUSSION: This requirement falls short of the best practice for notice periods to be as short as possible, ideally no more than 48 hours.²⁴ Shortening the notification period lessens the burden for organizers and allows demonstrators to react in a timely manner to current events.

RECOMMENDATION: Shorten the required notification period to 48 hours.

BROAD DISCRETION OF POLICE TO PREVENT, STOP OR DISPERSE A GATHERING

ISSUE: Section 7(8) allows law enforcement officers to stop or prevent an assembly or demonstration if it “poses a present or imminent danger of a breach of the peace or public order.” The regulating officer may, in such instances, disperse the gathering. A convener may apply for relief to the High Court where an assembly or demonstration is prohibited. However, the prohibition remains in place until the High Court sets it aside, and there is no timeline for this judicial process.

DISCUSSION: The state may only prohibit and disperse assemblies in exceptional cases, which might include where an assembly is no longer peaceful, or if there is clear evidence of an imminent threat of serious violence that cannot be addressed through other means, such as targeted arrests. The African Commission notes that where participants in an assembly act non-peacefully or unlawfully, law enforcement should attempt to contain or remove those particular individuals before dispersing the assembly.²⁵ When monitoring public gatherings, law enforcement should implement this practice, to ensure that peaceful participants in a public gathering do not

²⁴ FoAA Guidelines, Principle 72(a).

²⁵ *Id.* at para. 22(3).

experience restrictions on their right to freedom of assembly because of the actions of a rogue participant or agent provocateur.

While the ability to challenge state decisions to the High Court provides a check to executive power and is a best practice, the Bill does not set a deadline for the High Court to make a decision. Setting a firm and timely deadline for the High Court's decision or setting a process for the High Court to streamline the decision will help to ensure that gatherings may react in a timely manner to contemporary events. Without a deadline for the decision, a lengthy High Court deliberation process could postpone the gathering until the focus issue of the gathering is no longer relevant.

RECOMMENDATION: Add a provision in Section 7 that requires law enforcement to first attempt in good faith to contain or remove individuals who constitute a danger to persons or property before dispersing the entire gathering.

Remove the provision that the prohibition remains in place until the High Court sets it aside, and include clear, short timelines for the hearing and resolution of an appeal, which are timely enough to ensure that the gathering may proceed on the planned date if the High Court considers the application favorably.

BROAD POWER TO IMPOSE CONDITIONS FOR ASSEMBLIES

ISSUE: The Bill empowers the regulating officer to specify in writing a range of conditions for the holding of an assembly or demonstration. In addition to conditions relating to public safety, maintenance of public order and protection of the rights and freedoms of others, the regulating officer can specify conditions like payment of the costs of cleaning up arising from the holding of the assembly or demonstration; the “recognition of any inherent environmental or cultural sensitivity of the place of assembly or demonstration” and “the application to the place of assembly or demonstration of any resource management practice of a delicate nature.”²⁶ Again, a convener may apply for relief to the High Court where a condition is imposed, but the condition remains in place until the High Court sets it aside, and there is no timeline for this judicial process.

DISCUSSION: The African Commission states that organizers shall not be held liable for the public costs of assemblies, including costs of clean-up.²⁷ These restrictions on the freedom of peaceful assembly, particularly Section 8(2)(c) and (d), fail the “provided by law” test because they are so vaguely worded that it is impossible to predict a regulating officer's powers under these provisions. While there are certainly situations where powers granted under these provisions are legitimate, such as if an officer needs to direct protestors to stay on the opposite side of the street from

²⁶ Section 8(2) (a), (b), (c) and (d) respectively.

²⁷ FoAA Guidelines, Principle 102(b).

counter-protestors to prevent a clash, these two provisions grant a regulating officer too much discretion to regulate public gatherings. For example, a regulating officer might prevent a group from demonstrating in Uhuru Park, which is a politically significant gathering place for Kenyans, on the basis that it has “inherent environmental sensitivity.” Not only would such a decision be an abuse of discretion, but also it would impose restrictions on place for assemblies or demonstrations, which is a further violation of freedom of assembly.²⁸

One way to help ensure that a regulating officer does not abuse the power to specify conditions is to require the officer to ensure that any directions that may limit the right to assemble are grounded in a clear evidence base and calculation of risk, and that the proposed directions are the least restrictive means to protect legitimate aims such as national security, public safety, public health, public morals, and the rights and freedoms of others, as is required under international law.²⁹

The issue relating to High Court applications has been addressed above regarding prohibitions, and applies equally to conditions.

RECOMMENDATION: Remove the conditions set out in Section 8(2) (b), (c) and (d). Where a regulating officer may impose limitations on a gathering, such as under Section 8(2)(a), require the officer to justify this need and to collaborate with the organizer to agree upon limitations that will further a public purpose.³⁰ Require regulating officers to ensure that any limitations on public gatherings take the least restrictive means to protect public safety, maintain public order and protect the rights and freedoms of others.

Remove the provision that the condition remains in place until the High Court sets it aside, and include clear, short timelines for the hearing and resolution of an application, which are timely enough to ensure that the gathering is not postponed.

OBLIGATIONS AND PERSONAL LIABILITY OF ORGANIZERS, CONVENERS AND PARTICIPANTS

ISSUE: The Bill obliges an organizer of an assembly or demonstration, or his authorized agent, to be present throughout the assembly or demonstration, and to “assist the police in the maintenance of peace and order at the assembly or demonstration.”³¹

Section 7(10) criminalizes any person who organizes, convenes, takes part in, or is “concerned in the holding, convening or organizing” of an unlawful assembly or

²⁸ FoAA Guidelines, Principle 90.

²⁹ See *Policing Guidelines*, Principles 1.2 and 19.1.4.

³⁰ The African Commission’s *Policing Guidelines* recommends a similar process for negotiating limitations on the right to assemble imposed through conditions on public gatherings in Principle 19.

³¹ Section 7(7).

demonstration” with a maximum sentence of one year’s imprisonment under the Penal Code.

The Bill also imposes joint and several liability for damage³² to property arising “as a result of the assembly or demonstration” unless (a) the person or organization did not permit or connive at the act or omission which caused the damage, (b) the act or omission did not fall within the scope of the objectives of the assembly or demonstration in question and was not reasonably foreseeable, or (c) the person or the organization took all reasonable steps within the person’s or the organization’s power to prevent the act or omission, and the person or organization took “all reasonable steps to prevent the act in question.”³³

DISCUSSION: The requirement for an organizer to assist in maintaining law and order violates the best practice for liability to be personal, and to refrain from holding organizers responsible for the actions of individual participants in a gathering.³⁴

Holding organizers, conveners and even participants individually liable for any harm arising out of a gathering because, for example, the conveners failed to comply with the proper notification procedure, deters individuals or groups from exercising their right to peaceful assembly due to the risk of liability for the harmful actions of others. This can have a chilling effect on assemblies as organizers hesitate to convene public gatherings because they might be held accountable for the individual offenses of other participants.

The liability provision is open to abuse, especially where it does not appear to be limited to damage or injury intentionally or negligently inflicted as a result of the organizer or convenue or participant’s actions. It is not beyond the realm of possibility that these provisions would allow authorities to place responsibility on the convenue when a gathering is intentionally disrupted and damage caused by agents provocateurs or counter-demonstrators, including those affiliated with the state or acting on its behalf. To mitigate the risk of holding organizers, conveners or participants of a procession liable for the unlawful actions of others, the African Commission on Human and Peoples’ Rights (the African Commission) recommends that law enforcement officials “be trained to differentiate between individual and group behavior, and to identify and remove specific persons identified as acting in an

³² The Bill in Section 2 interprets “riot damage” as “any loss suffered as a result of any injury to or death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering.”

³³ Section 12.

³⁴ *FoAA Guidelines*, Principle 101: “Liability shall be personal. Neither the organizers nor fellow participants of a public assembly shall be subjected to sanctions of any kind on the basis of acts committed by others.”

unlawful or violent manner while continuing to facilitate the enjoyment of the right to assemble freely with others for all other persons.”³⁵

RECOMMENDATION: Sections 7 and 12 should be amended to provide for individual liability only if a person intentionally commits an offence or fails to carry out the lawful directions of law-enforcement officials.

CRIMINAL SANCTIONS FOR VIOLATIONS OF THE ACT

ISSUE: Several of the provisions in the Bill impose criminal liability on organizers and participants of gatherings. For example, Section 7(10) criminalizes an assembly or demonstration held without notice with a one year term of imprisonment. Section 14 makes it an offence to hinder, interfere with, obstruct or resist a police officer, and to possess a “weapon or any object unlawfully” during an assembly. The penalty may be up to KES 100,000 (\$760) or one year’s imprisonment, or both.

DISCUSSION: Criminal sanctions are disproportionate punishment for violations of civil law and can result in a chilling effect on the exercise of the freedom of assembly as individuals fear that participation in public gatherings could lead to high fines or imprisonment if they fail to correctly follow procedure.³⁶ This restriction fails the proportionality requirement because applying criminal sanctions is not the least restrictive means to ensure a legitimate aim, such as protecting public order. Rather, the Bill could include some procedural safeguards, such as requiring the regulating authority to notify the conveners of a public meeting or gathering of a mistake in procedure, and provide the conveners with an opportunity to correct that mistake before levying any punishment. The punishment could also be lessened from imprisonment to a modest administrative fine. These amendments balance the need to protect public order by ensuring conveners follow notification and negotiation procedures with Kenya’s obligation to protect and promote the freedom of assembly under international law.

RECOMMENDATION: Amend all sections that impose criminal sanctions to impose a small fine rather than imprisonment. Include provisions that require the regulatory authority to notify the organizer or convener of any mistakes made during the procedures, and provide an opportunity for the organizer or convener to rectify those mistakes before applying a punishment.

PROHIBITION OF OFFENSIVE SPEECH, DISGUISES, MASKS AND DEFENCE FORCE UNIFORMS

ISSUE: Section 11 broadly prohibits offensive conduct during an assembly or demonstration, such as banners, placards, speech or singing that “incite[s] hatred of

³⁵ *Guidelines on Policing Assemblies in Africa*, supra note 8, at para. 20(3).

³⁶ See *Guidelines*, supra note 1, at Principle 99.

other persons or any group of persons on account of differences in culture, race, sex, language or religion;³⁷ and acts or words that “are calculated or likely to cause or encourage violence against any person or group of persons.”³⁸

Section II also prohibits the wearing of a disguise or mask that obscures one’s face and prevents identification,³⁹ or apparel resembling any of the uniforms worn by Kenyan security forces.⁴⁰ The Bill also prohibits the possession of “any offensive weapon.”⁴¹

DISCUSSION: Expression aimed at in and through assemblies is protected by the right to freedom of expression, and includes expression that may give offense or be provocative, so long as such speech does not amount to hate speech.⁴² The prohibitions on various forms of expression are vaguely worded and could cover a broad range of legitimate speech, thus providing the state with wide discretion to censor participants at public gatherings. Such provisions can have a chilling effect on the legitimate exercise of the right to peacefully assemble because individuals may fear that participating in a public gathering could result in penalties if something they say is deemed to be inciting hatred or encouraging violence.

The African Commission has similarly warned against prohibiting the wearing of uniforms as it violates the international best practice of protecting the right to the freedom of expression during assemblies, including through protecting symbols displayed during a procession.⁴³

RECOMMENDATION: Remove the sections prohibiting offensive conduct at public gatherings. Apply existing criminal laws to conduct at gatherings that arises to an offense. Protect the right of participants in public meetings to wear uniforms or display banners as long as the symbols are not intrinsically or exclusively associated with acts of hate speech, and respecting any laws regulating active military officers’ wearing of uniforms while participating in protests.

³⁷ Section 11(a).

³⁸ Section 11(b).

³⁹ Section 11(c).

⁴⁰ Section 11(d).

⁴¹ Section 11(e).

⁴² FoAA Guidelines, Principles 77 – 79. See also *International Pen and Others (on behalf of Ken Saro-Wira) v. Nigeria*, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), para. 110. For more on the standards on hate speech in international law, see the Office of the High Commissioner for Human Rights, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (2012). Resort to hate speech by individuals may be appropriately dealt with, where there is no imminent threat of violence, by removal of the person in question, where possible and necessary, and by charges brought against them after the event.

⁴³ FoAA Guidelines, Principle 81.

Conclusion

ICNL appreciates the opportunity to comment on the Bill and stands ready to discuss these issues further as necessary.