



Joint Memorandum on the Assembly and Demonstrations Bill, 2024

Submitted to:

Clerk of the National Assembly

By:

Access Now

and

Kenya ICT Action Network (KICTANet)

9 September 2024

9 September 2024,

Clerk of the National Assembly,
Main Parliament Buildings, Nairobi,
P.O. Box 41842-00100,
Nairobi

Submitted via email to clerknationalassembly@parliament.go.ke

Dear Sirs,

Re: Joint Memorandum on the Assembly and Demonstrations Bill, 2024

Greetings from [Access Now](#) and [KICTANet!](#)

We submit this memorandum jointly as Kenyan non-government and civil society organisations with expertise on human rights and Information and Communication (ICTs).

We submit this memorandum in response to the call for input on the Assembly and Demonstrations Bill, 2024. We have included herein a matrix presentation that captures our concerns, and highlights our proposals on relevant provisions of each of the Regulations for your review and consideration. We would be glad to provide further input and perspectives on the Regulations, as and when required.

We have included herein a matrix presentation that captures our concerns, and highlights our proposals on relevant provisions of the Bill for your review and consideration. We would be glad to provide further input and perspectives on the Bill, as and when required.

We look forward to your response.

Regards,

Access Now

Kenya ICT Action Network (KICTANet)

MATRIX OF ISSUES AND PROPOSALS WITH THE ASSEMBLY AND DEMONSTRATIONS BILL, 2024

Clause No.	Provision	Issue or Concern	Proposal/Recommendation	Impact and Justification for Proposal
General	Duplication of Provisions	<p>The Assembly and Demonstration Bill, 2024, shares several provisions with existing laws such as the Public Order Act and Penal Code that regulate assembly and demonstration.</p> <p>Both the Bill and the existing laws provide the police with wide-ranging powers to regulate assemblies, including stopping, dispersing, or prohibiting gatherings on vague grounds such as "public safety" and "public order." These provisions lack clear criteria and safeguards, making them susceptible to abuse and arbitrary enforcement.</p> <p>In Kenya, provisions of these laws have historically been misused to suppress opposition and civil society activities.¹ Police frequently use these laws</p>	<p>Abolish the Assembly and Demonstration Bill, and amend the Public Order Act, and the Penal Code to decriminalise participation in peaceful assemblies, even where procedural requirements like notification have not been met.</p> <p>Introduce administrative measures rather than criminal penalties.</p> <p>Clearly define what constitutes a threat to public order or safety.</p> <p>Restrict police powers to disperse or prohibit assemblies only in cases of direct and imminent danger.</p> <p>Introduce mandatory guidelines for de-escalation and proportional use of force.</p>	<p>The UN Human Rights Committee, in its General Comment No. 37, emphasises that restrictions on assemblies must be clearly defined, necessary, proportionate and subject to judicial review. Arbitrary restrictions undermine the core of the right to peaceful assembly.</p> <p>Participants in a peaceful assembly should not face criminal sanctions unless their conduct poses a genuine threat to public safety or order.</p> <p>Parliament should adopt non-punitive, facilitative approaches rather than suppression of assemblies</p>

¹Civicus, Monitor Tracking Civic Space, <<https://monitor.civicus.org/country/kenya/>>, accessed 5th September 2024.

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		<p>to disrupt rallies, arrest activists, and violently disperse peaceful demonstrations, resulting in numerous injuries and deaths. This pattern of abuse illustrates how these laws are wielded as tools of state control rather than mechanisms to protect public order.</p> <p>The criminalization of assemblies discourages public participation, which is a constitutional right, as individuals fear arrest, prosecution, and violent reprisals. Also, the broad discretionary powers granted to police have as was seen during #RejectFinanceBill2024 protests, led to excessive use of force during protests, contributing to extrajudicial killings and human rights violations.²</p>	<p>Provide clear channels for participants to challenge restrictions or penalties imposed on assemblies.</p>	
2 (10)	A person who takes	The blanket restriction on	Clearly define what	This provision will create a

² Kenya Human Rights Commission, ‘Tax protests: Why state must be accountable, provide reparations for atrocities’, <<https://khrc.or.ke/press-release/tax-protests-why-state-must-be-accountable-and-provide-reparations-for-the-atrocities/>>, accessed 5th September 2024.

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	<p>part in an unlawful assembly or demonstration or holds, convenes or organises or is concerned in holding, convening or organising of any such assembly or demonstration commits the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year.</p>	<p>freedom of assembly is disproportionate, as restrictions do not align with the exemptions on limitations of rights and fundamental freedoms stipulated in Article 24 (2) of the Constitution of Kenya.</p> <p>While the Bill provides definitions for the terms “assembly” and “convener” “organiser” it does not define the meaning of “concerned in holding” this therefore gives the provision a lack of specificity that is required to enable people to regulate their conduct accordingly, it also fails to provide guidance to law enforcement authorities on the specific conduct that is to be regulated. This provides broad room for interpretation that will give authorities sweeping powers to crack down on</p>	<p>constitutes an "unlawful assembly" to avoid vague interpretations that can be used arbitrarily against peaceful protesters. An assembly should only be deemed unlawful if there is a direct, imminent threat of violence, and not merely for failing to meet administrative requirements.</p>	<p>chilling effect on people’s ability to engage in peaceful assemblies online, which have been found to include activities such as crowd-funding, using social media for mobilisation of protests³, as well as using online spaces as places of assembly to strategize on organising protests.⁴</p> <p>These fears are not unfounded, as the government recently deployed the Kenya Defense Forces during the #RejectFinanceBill2024 protests due to purported “threats to national security planned and orchestrated through various platforms in the cyberspace”</p>

³ U.N. Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Voule U.N. Doc. A/HRC/41/41 <<https://undocs.org/A/HRC/41/41>> accessed 5th September 2024.

⁴ Association for Progressive Communications, ‘Digital protests, access and freedoms in Kenya’, <<https://www.apc.org/en/news/digital-protests-access-and-freedoms-kenya>> accessed 5th September 2024.

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		organising and protests.		
7	Application to hold assembly or demonstration	<p>Clause 7 requires prior notification to hold an assembly or demonstration, with a timeline of 3 to 14 days in advance. This clause also grants the police authority to prohibit an assembly if another event is scheduled at the same location and time.</p>	<p>Amend Clause 7 to provide for a notification system for peaceful assemblies, where organisers simply inform authorities in advance to help facilitate the event and protect public safety.</p> <p>This system should not be used to suppress assemblies or require permission. It should be simple, transparent, non-bureaucratic, and free of charge.</p> <p>The lack of notification should not make an assembly unlawful or justify dispersal, arrests, or penalties.</p> <p>Spontaneous and low-impact assemblies should not require notification. Also, such spontaneous assemblies should not be automatically disbanded simply because prior notification was not</p>	<p>The Kenyan Parliament should adopt a notification system for peaceful assemblies, where organisers simply inform authorities in advance to help facilitate the event and protect public safety.</p> <p>This notification requirement has historically been misused as a tool to deny assemblies, creating an effective "permission" regime. Kenyan authorities have used similar provisions under the Public Order Act to arbitrarily deny opposition rallies, suppress dissent, and restrict spontaneous demonstrations. The overly broad discretion given to the police also increases the risk of abuse, potentially violating the right to peaceful assembly.</p> <p>Under the UN Human Rights Committee's General Comment No. 37 on Article 21 of the ICCPR: notification requirements should not amount to a request for</p>

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			<p>given.</p> <p>Any restrictions should be communicated promptly to allow for legal challenges. Parliament should ensure that authorization regimes operate as notification systems, allowing assemblies by default unless there are clear, compelling reasons for restrictions.</p>	<p>permission.</p> <p>Authorities must facilitate assemblies unless there is a genuine threat to public order.</p>
8	Conditions for the conduct of assembly and demonstration	Clause 8 empowers police to impose conditions on assemblies, including financial costs for clean-up and logistical arrangements, under the guise of maintaining public order and safety.	<p>Amend Clause 8 to limit the imposition of conditions only to those that are strictly necessary to protect public safety, order, or the rights of others.</p> <p>Remove any financial obligations on organisers unless directly related to damages caused by unlawful acts proven in court.</p>	<p>Imposing financial burdens on organisers could deter participation and penalise individuals for exercising their constitutional rights.</p> <p>Additionally, vague conditions such as “maintaining public order” can be used to impose restrictive measures that infringe on the freedom of assembly.</p> <p>The Special Rapporteur on the rights to freedom of peaceful assembly and association has</p>

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				<p>emphasised that financial conditions should not be used as a deterrent to the right of assembly.</p> <p>Also, such conditions imposed on assemblies must be necessary and proportionate.</p>
11	<p>A person shall not at any assembly or demonstration -</p> <p>(a) By way of a banner, placard, speech or singing or in any other manner incite hatred of another persons or any group of persons on account of differences in</p>	<p>This clause prohibits wearing disguises or masks and inciting hatred during demonstrations. It also restricts the wearing of uniforms that resemble those of security forces.</p> <p>In Sub-Clause 11 (a) and (b) protection against incitement to violence, is provided as the justification for the limitation of the rights to freedom of peaceful assembly and freedom of expression.</p> <p>In order to ensure that the limitations on freedom of expression align with human</p>	<p>Amend the clause to delete clause 11(c) and allow masks and disguises unless they are directly used to commit unlawful acts. The law must differentiate between the peaceful wearing of masks and masks used in criminal activity. Anonymity in protest is protected unless linked to unlawful actions.</p> <p>Include a provision to ensure all police officers deployed to manage assemblies are clearly identifiable by wearing official uniforms, visible identification badges, and</p>	<p>The blanket criminalization of speech and conduct during protests will create a chilling effect on people’s ability to exercise their right to freedom of assembly.</p> <p>Authorities are already weaponizing trumped up charges of incitement to violence to crack down on activists that have spoken out against state-sanctioned violence during protests.⁶</p> <p>This will also constitute a divergence from the High Court’s holding in In <u>Ngunjiri Wambugu v</u></p>

⁶ NTV, ‘Boniface Mwangi freed on Sh20,000 cash bail’ <<https://ntvkenya.co.ke/news/boniface-mwangi-released-on-sh20000-cash-bail>> accessed 5th September 2024.

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	<p>culture, race, sex, language or religion;</p> <p>(b) Perform any act or utter any words that are calculated or likely to cause or encourage violence against any person or group of persons;</p> <p>(c) Wear a disguise or mask or any other apparel or item which obscures his face or prevents his identification ;</p>	<p>rights standards, states must ensure that the severity of the potentially violating speech is assessed according to the six part test set out in the <i>Rabat Plan of Action</i>.</p> <p>Violating conduct should thus be assessed on an individualised basis rather than imposing blanket restrictions, which are inherently disproportionate.</p> <p>In this case, while the grounds justifying the limitation of rights has been provided, the draft law has failed to demonstrate how the restrictions respond to a pressing public or social need, pursues a legitimate aim; and is proportionate to that aim as provided in the <i>General Comment No. 37 (2020) on the right of peaceful assembly (article 21)</i> and the <i>Siracusa Principles</i>.</p>	<p>strictly prohibit the wearing of masks, concealment of officers’ identities, vehicles, etc.</p> <p>Restrictions should only target conduct that incites imminent violence rather than broad bans on expression.</p> <p>Introduce provisions that strictly regulate, and where necessary prohibit, the use of surveillance technologies during assemblies. The use of surveillance technologies, such as facial or biometric recognition, in public spaces not only has a chilling effect on freedom of assembly, but has been declared by the European Data Protection Board and European Data Protection Supervisor to be fundamentally incompatible with the rights to data</p>	<p><i>Inspector General of Police, & 2 others [2019] eKLR</i> where it was held that limitations on the constitutional right to freedom of assembly ought to be guided by the <i>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</i>.</p> <p>The prohibition on wearing masks or disguises may infringe on privacy and safety, especially where participants seek anonymity to protect against retaliation. Restrictions on attire could be misused to target specific groups, infringing on freedom of expression and assembly and puts protestors at risk.⁷ This is especially so in contexts where authorities have access to technology that enables biometric identification in publicly accessible spaces.</p>

⁷ Access Now, ‘Open letter calling for a global ban on biometric recognition technologies that enable mass and discriminatory surveillance’, <<https://www.accessnow.org/wp-content/uploads/2022/08/BanBS-Statement-English.pdf>>, accessed 5th September 2024.

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		<p>This therefore violates Article 24 (1) of the Constitution of Kenya which states that the limitations on rights and fundamental freedoms must be reasonable and justifiable in an open and democratic society.</p> <p>Further, sub-clauses (a) and (b) do not specify the definitions of the terms “incite” “hatred” “calculated” “likely to cause” or “encourage” which provide room for broad interpretations to sanction speech that is not criminally punishable. Thus failing to meet the test of legality as provided for in General comment No.34 on Article 19: Freedoms of opinion and expression.</p>	<p>protection and privacy.⁵</p> <p>Prohibit any restriction of digital rights, including the imposition of internet disruption or shutdowns during periods of protests or elections.</p>	<p>In Kenya, the telecommunications provider Safaricom not only operates the Public Safety Communication and Surveillance System (IPSCSS)⁸ implemented in Nairobi and Mombasa, which includes almost 2000 CCTV cameras with facial recognition capabilities that enable real-time 24-hour mass surveillance. It also stores a large database⁹ of mobile subscribers’ facial biometric data.</p> <p>This enables invasive one-to-many matching that can be used to target protestors. This is particularly dangerous given recent reports of abductions and extrajudicial killings of protestors.¹⁰</p>

⁵ European Data Protection Supervisor, ‘EDPS’ Final Recommendations on the AI Act’,

<https://www.edps.europa.eu/press-publications/press-news/press-releases/2023/edps-final-recommendations-ai-act_en>, accessed 9th September 2024.

⁸ Bulelani Jili, ‘The Rise of Chinese Surveillance Technology in Africa (part 4 of 6),

<<https://epic.org/the-rise-of-chinese-surveillance-technology-in-africa-part-4-of-6/>>, accessed 5th September 2024.

⁹ Access Now, ‘Why Kenyans should say no to biometrics for SIM card registry’, <<https://www.accessnow.org/kenya-sim-card-biometrics/>>, accessed 6th September, 2024.

¹⁰ Human Rights Watch, ‘Kenya: Witnesses Describe Police Killing Protesters’,

<<https://www.capitalfm.co.ke/news/2018/05/big-brother-watching-movements-police-command-centre/>>, accessed on 5th September 2024

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		<p>Sub-clause (c) fails the test of necessity as the drafters of the law have failed to provide grounds justifying the need to ban face coverings, and whether such limitations are proportionate to warrant the restrictions, which would violate the constitutional right to privacy in Article 31.</p>		
13	Powers of the Police During Assembly or Demonstration	<p>Clause 13 grants police the authority to direct, restrict, and disperse assemblies based on perceived threats to public safety or order. This includes stopping assemblies that deviate from pre-approved routes or conditions.</p>	<p>Limit police powers to disperse assemblies to situations where there is an immediate and credible threat to public safety. Introduce mandatory de-escalation procedures.</p> <p>Ensure that dispersal of assemblies is a measure of last resort, used only when there is a clear and present danger that cannot be addressed through less restrictive means.</p>	<p>Such broad powers increase the risk of arbitrary enforcement and excessive force, which has been historically abused in Kenya, leading to extrajudicial killings during protests. The discretionary nature of these powers often results in violations of the right to peaceful assembly.</p> <p>The African Commission's Guidelines on Freedom of Association and Assembly stress that force should only be used as a last resort and must be</p>

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			<p>The law should mandate independent oversight of any dispersal orders to prevent abuse. Any dispersal orders must be clearly justified, documented, and subject to oversight and review by independent bodies such as KNCHR and IPOA.</p>	<p>proportional.¹¹ The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials outline clear protocols for managing assemblies without resorting to violence.¹²</p>
14	Offences and Penalties	<p>The clause criminalises participation in "unlawful assemblies" with penalties including fines and imprisonment. It broadly defines unlawful participation, making it easy for authorities to prosecute individuals arbitrarily.</p>	<p>Decriminalise and remove criminal penalties for participation in assemblies in this Bill, Penal Code (s.78) and Public Order Act, unless directly linked to acts of violence or serious unlawful conduct.</p> <p>Introduce administrative remedies and warnings before considering prosecution.</p>	<p>This criminalization disproportionately impacts the public, especially marginalised groups and activists, discouraging civic engagement and public participation due to the fear of legal repercussions.</p> <p>No one should be prosecuted simply for attending or organising an assembly that does not pose a real threat to public safety or order.</p>

¹¹ African Commission's Guidelines on Freedom of Association and Assembly see:

<https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa>

¹² UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, see:

<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-use-force-and-firearms-law-enforcement>

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			Replace criminal sanctions for failure to notify or comply with administrative conditions with proportionate, non-criminal penalties, such as warnings or administrative fines, where necessary. Participation in peaceful assemblies should not be grounds for arrest, detention, or severe penalties.	