

09 September 2024

The Clerk of the National Assembly  
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*Sent via e-mail*

**Re: The Assembly and Demonstration Bill (National Assembly Bill No. 28-- of 2024)**

### **Background**

Katiba Institute (KI) is a research and litigation institution established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally assisting in developing a culture of constitutionalism in Kenya.

KI received a request to comment on and discuss the Assembly and Demonstration Bill 2024. This letter represents KI's comments on the Bill.

### **Summary and General Remarks**

The bill is yet another state's attempt to frustrate the democratisation journey. Although the bill is described as regulating the right to assemble and demonstrate, it kills the right.

It increases the cost of organising a protest and employs both the deterrent effects of criminal and civil liability. Further, the possibility of criminal sanctions prevents, discourages, and inhibits freedom of assembly. Additionally, the 'limitations' imposed in the Bill do not distinguish between adult and minor conveners. This means that children – who may not even know about the notice requirements in the Act or have the resources to adhere to it – are indiscriminately held criminally liable if they fail to give notice before convening a demonstration or assembly.

<b>Item</b>	<b>Reference</b>	<b>Comment/observation</b>	<b>Recommendation</b>
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<p>1.</p>	<p><b>Section 6 (2)</b>          ‘The Right contemplated in subsection (1) may not be exercised by any person where such assembly or demonstration may affect</p> <p>(a) Public Safety          (b) Public Order, and          (c) the protection of the rights and freedoms of other persons</p>	<p>Whereas section 6(1) of the bill states that the purpose of the section is to limit the right to peaceful assembly and demonstration, the provision goes beyond limiting and extinguishes the entire right. Article 24 commands that a right can be limited, but a limitation cannot derogate from its core essentials.</p> <p>The use of the word may not be exercised, suggesting that the right to demonstrate cannot be enjoyed in those three circumstances. This violates article 24 (2)(c)- see <b>Peter Solomon Gichira v Independent Electoral and Boundaries Commission &amp; another [2017] Eklr Constitutional Petition 234 of 2017 at para 72</b></p>	<ol style="list-style-type: none"> <li>1. Deletion of the provision; or</li> <li>2. An amendment listing procedural requirements in exercising the right in the listed situations but not wholly denying the exercise of the right and</li> <li>3. An amendment removing the vague terms but listing down easily understood situations or descriptions of those situations.</li> </ol>
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		<p>The court, for instance, struck down sections 78 and 87 of the Labour Relations Act for violating Article 24(2)(c), the provisions provided that there ‘shall be no strike in essential services’- <i>Kenya Ferry Services Limited v Dock Workers Union</i>.</p> <p>Second, the section violates Article 24(1), which requires a right to be limited by law. In this instance, law does not mean the existence of legislation alone; it means that the law limiting the right must be clear and specific (sufficient precision). It cannot be vague. The employment of vague terms fails the test, and courts have nullified legislation using the void for vagueness doctrine— see <i>Geoffrey Andare v</i></p>	
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		<p><i>Attorney-General &amp; 2 others</i> [2016] eKLR.</p> <p>The terms public safety and public order are overly vague and ambiguous. The bill does not even attempt to define them.</p> <p>As such, the bill's enforcers have much discretion in determining what constitutes public safety and public order.</p>	
2.	<p><b>Section 7(7)</b></p> <p>The assembly organiser must be present throughout the assembly and shall assist the police in maintaining peace and order.</p>	<p>There is a constitutional principle that constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them (<i>S v Zuma and Others</i>)</p> <p>Article 37 does not impose any obligation on a rights holder other than being peaceful and unarmed. It is the sole responsibility of the state to maintain peace and order. (<b>Onguto J in Agnes Wacera Macharia &amp; another v Raila Amolo</b>)</p>	Deletion of the requirement

		<b>Odinga &amp; 2 others [2017] eKLR para 30)</b>	
3.	<b>Section 7(8)</b> Authorisation of regulating officer or any police officer to stop or prevent the holding of a demonstration or assembly	The provision is problematic because even after complying with the procedural requirements under the bill, the police officer is empowered to stop the demonstration if it poses a present or imminent danger of breaching the peace or public order.  The provision uses vague terms whose interpretations are subjective and dependent on the enforcer. Further, contrary to the rule of law and good governance, the police are granted excessive and unchecked discretionary powers.	Deletion of the provision
4.	<b>Section 7(9) and (10)-creation of an offence</b>	Failure to obey an order stopping a demonstration is an offence, and anyone who participates in such a	<ul style="list-style-type: none"> <li>- Removal of the criminal sanctions; or</li> <li>- Amendment to ensure that the</li> </ul>

		<p>demonstration commits the offence of participating in an unlawful assembly and is liable to imprisonment for one year.</p> <p>The provision is problematic on two levels. First, it removes the magistrate's discretion by fixing the sentence to one year. Despite the mitigation, the magistrate is bound by the provision.</p> <p>Second, the restriction is not proportional and has a chilling effect on the right. For this reason, Article 24 requires the state to adopt the least restrictive measure when limiting a right.</p> <p>The language of human rights does not favour the imposition of criminal sanctions to limit a right. Most citizens, for instance,</p>	<p>magistrate has discretion.</p> <p>- Reducing the penalties.</p>
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		<p>will avoid exercising their rights in fear of criminal sanctions.</p> <p>The offence, if any, can be punished by using fines.</p> <p><i>(Cyprian Andama v Director of Public Prosecutions &amp; another; Article 19 East Africa (Interested Party) [2019] eKLR)</i></p>	
5.	<p><b>Section 8- Empowering the regulating officer to impose unnamed conditions</b></p>	<p>The regulating officer is empowered to impose conditions in a matter concerning public safety, maintenance of public order, and protection of rights.</p> <p>Again, the regulating officer is left to define what these matters entail. It is simply based on what they interpret the terms to mean.</p> <p>Besides being vague, the regulating officer is empowered to impose any</p>	- Deletion

		<p>condition; those powers are unlimited. This offends Article 10.</p> <p>Further, the regulating officer is empowered to impose costs of cleaning up that may arise. This condition implicitly imposes obligations on the right holder that are not in the Constitution.</p>	
6.	<b>Section 10- Onerous obligations on the convenor</b>	<p>The provision imposes an obligation on the convenor of an assembly to appoint marshals and take steps to ensure that the assembly or demonstration always proceeds peacefully.</p> <p>This is an unknown obligation in the Constitution. It is onerous to expect every convenor to hire marshals and ensure that the</p>	



		<p>demonstration is peaceful.</p> <p>The state cannot transfer its obligation to maintain peace and order to rights holders.</p> <p>Second, the provision does not consider the position of ‘spoilers’ in the demonstration. A convenor cannot be expected to control all the demonstrators and <i>spoilers</i>.</p>	
7.	<p><b>Section 11- Prohibitions during an assembly or demonstration</b></p>	<p>The provision infringes on the freedom of expression under Article 33. Whereas the provision might be intended to prevent incitement and threats to violence, the provision uses terms subject to the interpretation of the enforcer.</p> <p>The phrase any words ‘that are calculated or likely to cause or encourage violence against any person or group of persons’ is not only broad but leaves much discretion</p>	Delete this section.

		to the enforcers. It is the enforcer who determines if the speech is offensive.	
8.	<b>Section 12- Liability for damage</b>	<p>The provision makes the convenor and participants in a demonstration jointly and severally liable for any property damage. Further, it is insufficient proof that the person or organisation forbade an act of the kind in question.</p> <p>Creating an excessive burden on right holders severely limits exercising a right.</p> <p>Additionally, the civil liability threat creates a chilling effect on the right.</p>	Delete this section
9.	<b>Section 14- offences and penalties</b>	<p>The provision creates a general criminal provision. The offences are punishable by either a fine not exceeding one hundred thousand shillings, imprisonment for a period not exceeding one year, or both.</p>	Delete this section

		<p>The principle of proportionality would favour the retention of the fine but the deletion of the imprisonment.</p> <p>The criminalisation of the failure to give notice is an unjustifiable violation of the right to demonstrate. The HRC, for instance, held in <i>Kivenmaa v Finland</i> Communication No. 412/1990 UN Doc CCPR/C/50/D/412/1990 (1994) at para 9.2;</p> <p><i>Sergei Androsenko v Belarus</i> Communication No 2092/2011 UN Doc CCPR/C/116/D/2092/2011 (2016) at para 7.6;</p> <p><i>Margarita Korol v Belarus</i> Communication No 2089/2011 UN Doc CCPR/C/117/D/2089/2011 (2016) at para 7.6;</p> <p><i>Bakhytzhan</i></p>	
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		<p><i>Toregozhina v Kazakhstan</i></p> <p>Communication No 2137/2012 UN Doc CCPR/C/112/D/2137/2012 (2014) at para 7.6.</p>	
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**Note:** In 2018, the South African Constitutional Court rendered an essential decision on interpreting the right to demonstrate and assemble. The Court in *Mlungwana and Others v The State and Another* [2018] ZACC 45 considered whether criminalising the failure to give notice is a justifiable limitation of the right to demonstrate. The court answered the question in the negative.

### **Conclusion**

For the above reasons, we believe the Bill should be fundamentally revised to reflect our proposed amendments. In doing so now, we expect that the Bill will allow for the enjoyment of the right to peaceably and unarmed assemble.

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