

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

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TWELFTH PARLIAMENT- THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

REPORT ON THE PUBLIC ORDER (AMENDMENT BILL (NATIONAL ASSEMBLY BILL NO. 14 OF 2019))	
THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 19 FEB 2020	WEDNESDAY (Am)
TABLED BY:	HON. PETER KALUMA FOR DC- ADMINISTRATION AND NATIONAL SECURITY
CLERK-AT-THE-TABLE:	

Approved  
19/2/20  
DSNA

DIRECTORATE COMMITTEESERVICES  
THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS  
NAIROBI

FEBRUARY, 2020

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## **FOREWARD**

The Bill was read for the first time on Wednesday 24<sup>th</sup> April, 2019 and subsequently committed to the Committee pursuant to the provisions of Standing Order 127 (1), it is on this basis that the Committee makes this Report. The Committee on Thursday 2<sup>nd</sup> May, 2019 put an advert on local dailies inviting for comments from the public on the Bill.

I take this opportunity to thank all Members of the Committee for their input in the consideration of the Public Order (Amendment) Bill, 2019. The Committee also takes this opportunity to thank the Offices of the Speaker and of the Clerk of the National Assembly for the logistical support accorded to it during the exercise. The Committee also appreciates the role played by the media following its coverage of the proceedings, thus enhancing accountability and transparency

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee on Administration and National Security, it is my pleasant privilege and honour to present to this House the Report of the Committee on the Public Order (Amendment) Bill, 2019.

**Hon. Paul Koinange, M.P. Chairperson**



## 1.0 PREFACE

The Departmental Committee on Administration and National Security was constituted on 14<sup>th</sup> December 2017 pursuant to provisions of Standing Orders 216(1).

1. The Committee executes its mandate in accordance with the provisions of Standing Order 216 (5), from which it draws its mandate to, inter alia;
  - a) investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; and
  - b) study and review all legislation referred to it;
  - c) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204.

### **Honourable Speaker,**

2. In executing its mandate, the Committee oversees the following Ministries and Departments:

- i) The Ministry of Interior & Coordination of National Government
  - a) State Department of Interior
  - b) State Department of Border Control, Immigration and Registration of Persons.
  - c) State Department of Correctional Services
- ii) The National Police Service Commission
- iii) The Independent Policing Oversight Authority
- iv) The Public Service Commission

3. According to Schedule II of the Standing Orders, the Committee is mandated to

Consider the following subjects:

- i) National Security;
- ii) Police Services;
- iii) Home Affairs;
- iv) Public Administration;
- v) Public Service,
- vi) Prisons;
- vii) Immigration

## 2.0 COMMITTEE MEMBERS

Hon. Paul Karuga Koinange, MP (**Chairperson**)

MP for Kiambaa Constituency

**Jubilee Party**

Hon. John Waluke, MP (**Vice-Chairperson**)

M.P for Sirisia Constituency

**Jubilee Party**

Hon. Wamunyinyi, Athanas Misiko  
Wafula, MP  
MP for Kanduyi Constituency  
**Ford Kenya Party**

Hon. Kaluma, George Peter Joseph, MP  
MP for Homa Bay Town Constituency  
**ODM Party**

Hon. (Dr.) Makali Mulu, MP  
MP for Kitui Central Constituency  
**Wiper Party**

Hon. Theuri George, MP  
MP for Embakasi West Constituency  
**Jubilee Party**

Hon. Joshua Aduma Owuor, MP  
MP for Nyakach Constituency  
**ODM Party**

Hon. Capt. (Rtd) Didmus Wekesa  
Barasa Mutua, MP  
MP for Kimilili Constituency  
**Jubilee Party**

Hon. Col. (Rtd) Geoffrey Muturi,  
King'ang'i, MP  
MP for Mbeere South Constituency  
**Jubilee Party**

Hon. Arbelle, Marselino Malimo, MP  
MP for Laisamis Constituency  
**Jubilee Party**

Hon. (Dr.) Tecla Chebet Tum, MP  
MP for Nandi County  
**Jubilee Party**

Hon. Josphat Kabinga Wachira  
Wathayu, MP  
MP for Mwea Constituency  
**Jubilee Party**

Hon. Nimrod Mbithuka Mbai, MP  
MP for Kitui East Constituency  
**Jubilee Party**

Hon. Martin Ngunjiri Wambugu, MP  
MP for Nyeri Town Constituency  
**Jubilee Party**

Hon. Abdi Omar Shurie, MP  
MP for Balambala Constituency  
**Jubilee Party**

Hon. Halima Mucheke Yussuf, MP  
Nominated Member  
**Jubilee Party**

Hon. Edward Oku Kaunya, MP  
MP for Teso North Constituency  
**ANC Party**

Hon. Peter Francis Masara, MP  
MP for Suna West Constituency  
**Independent Party**

Hon. Ahmed Kolosh Mohamed, MP f  
MP or Wajir West Constituency  
**Jubilee Party**

## **2.1 Committee Secretariat**

The Committee is facilitated by the following Secretariat:-

Mr George Gazemba, ACarb, CPM  
**Principal Clerk Assistant/Lead Clerk**

Mr. Joshua Ondari  
**Clerk Assistant**

Ms. Brigitta Mati  
**Legal Counsel**

Mr. Edison Odhiambo  
**Fiscal Analyst**

Mr. Donald Manyala  
**Research Officer**

Mr. Yaqub Ahmed  
**Media Officer**

Mr. Ian Otieno  
**Audio Officer**

## **2.2 ADOPTION OF THE COMMITTEE REPORT**

We, the undersigned Members of the Departmental Committee on Administration and National Security have, pursuant to Standing Order 199, adopted this report and appended our signatures to affirm our approval and confirm its accuracy and authenticity. (*See Attached Annexes*)

1. Hon. Paul Koinange, MP
2. Hon. John Waluke, MP (Vice-Chairperson)
3. Hon. Athanas Wamunyinyi, MP
4. Hon. George Theuri, MP
5. Hon. Peter George Kaluma, MP
6. Hon. Makali Mulu, MP
7. Hon. Didmus Wekesa Barasa Mutua, MP
8. Hon. Geoffrey Kingagi Muturi, MP
9. Hon. Marselino Malimo Arbelle, MP
10. Hon. Tecla Chebet Tum, MP
11. Hon. Josphat Kabinga Wachira, MP
12. Hon. Nimrod Mbithuka Mbai, MP
13. Hon. Martin Deric Ngunjiri Wambugu, MP

14. Hon. Abdi Omar Shurie, MP
15. Hon. Yussuf Mucheke Halima, MP
16. Hon. Peter Masara, MP
17. Hon. Ahmed Kolosh Mohammed ,MP
18. Hon. Aduma Owuor, MP
19. Hon. Edward Oku Kaunya,MP

### **3.0 BACKGROUND**

Article 109 of the Constitution states that “Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

The Public Order (Amendment) Bill, 2019 was read for the first time on Wednesday 24<sup>th</sup> April, 2019 and subsequently committed to the Committee pursuant to the provisions of Standing Order 127 (1) and report to the House.

The Bill seeks to amend the Public Order Act (Cap 56) to create an offence of destruction of property while picketing.

### **4.0 SITTINGS.**

The Committee considered the Public Order (Amendment) Bill, 2019 in its sittings held on Friday 16<sup>th</sup> August, 2019 and adopted its report on Tuesday, 29<sup>th</sup> October, 2019.

### **5.0 SUMMARY OF THE PUBLIC ORDER (AMENDMENT) BILL, 2019**

The Bill is a private Member Bill by the Hon. Simon King’ara, MP. It seeks to amend the Public Order Act (Cap 56) to create an offence of destruction of property while picketing.

**Clause 2 seeks** to insert new sub-sections to section 5 of the Act—

(11A)—creates the offence and the penalty to a person who cause grievous harm, damage to property or loss of earnings.

(11B) –proposes compensation to a victim of an offence under (11A) by a perpetrator of the offence and the organizers of a public meeting or public procession.

### **6.0 CONSIDERATION OF THE PUBLIC ORDER (AMENDMENT) BILL, 2019**

The committee considered the Public Order (Amendment) Bill, 2019 in a sitting held on Friday 16<sup>th</sup> August, 2019. Pursuant to Article 118 (1) (b) and standing order 127 (3) the committee invited the public to submit their comments on the Bill.

**Clause 2** seeks to insert new sub-sections to section 5 of the Act—

**(11A)**—creates the offence and the penalty to a person who cause grievous harm, damage to property or loss of earnings

**(11B)**—proposes compensation to a victim of an offence under **(11A)** by a perpetrator of the offence and the organizers of a public meeting or public procession.

**Observation**

- (a) That the right to picket is not an absolute right since demonstrators are required to picket peacefully and unarmed;
- (b) The proposed subsection (11A) creates an offence on a person who in the course of a public procession causes harm to property or loss of earnings and provides the penalty thereon. Whereas the Penal Code provides for a general offence of malicious damage to property under the provisions of Section 339—

*(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.*

**Observation**

This provision of the Penal Code provides expressly the causation of the offence; the intended is already provided for in the Penal Code and other alternative legal provisions.

“**11A.** A person who while at a public meeting or a public procession damages property or causes harm to another person commits an offence, and is liable, upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or to both.”

**Observation**

The proposed subsection (11A) creates an offence to a person whereas the proposed (11B) provides for compensation by the person and the organizer; there is disconnect between (11B) and (11A) to the extent of introduction of a new ‘person’ the ‘organiser’; Criminal act is a personal Act and, wrongful omission have to be proved on the part of the organiser.



## **6.0 PUBLIC PARTICIPATION**

Pursuant to Article 118 of the Constitution and Standing Order 127 (3) the committee invited memoranda from the public vide a notice in the local dailies.

One of the most important features of the Country constitutional framework is the requirement of public participation in governance and other administrative activities. Specifically, the provisions of the following Articles are pertinent.

- i) Article 10 recognizes public participation as one of the national values;
- ii) Article 27 provides for equal treatment of all persons, while affirmative action in governance is provided for in Articles 54 and 56 of the Constitution;
- iii) Article 35 provides for the right of access to information held by the State or another person which is necessary for the exercise of any right or fundamental freedom;
- iv) Article 118 requires Parliament to conduct its business in an open manner and to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. It also prohibits Parliament from denying the public and media access into its sittings unless there are any justifiable reasons.

The Constitution obligates the State and all State organs to ensure adequate public consultation on all public policies, legislation or any decision that is likely to impact on the people of Kenya. Failure to factor in the mandatory requirement of public participation exposes the legislative instrument or policy framework to constitutional challenges of legitimacy, hence making it actionable for unconstitutionality in a court of law.

Effective public consultation is based on principles of openness, transparency, integrity and mutual respect. The open process facilitates acceptability amongst the key stakeholders, subsequently facilitating efficient and effective implementation of the legislative instrument.

The committee put an advert on the Bill on the local dailies inviting for comments from the public.

### **6.1 MEETING WITH HON. SIMON KING'ARA, MP**

On Thursday 13<sup>th</sup> June, 2019, the Hon. Hon. Simon King'ara, MP appeared before the Committee and informed the Committee as follows:- That,

- a) The principal objective of the bill was to amend the Public Order Act to make provision for organizers of public meetings or public procession leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons; and
- b) The Bill did not concern county governments.

**6.3 SUBMISSION BY THE STAKEHOLDERS**

CLAUSE	PUBLIC ORDER MANAGEMENT (AMENDMENT)BIL L,2019	RATIONALE	PROPOSING BODY
5(11A) 2. The Public Order Act (Cap. 56) is amended in section 5 by inserting the following new sub-sections immediately after sub-section (11)— "(11A) A person who while at a public meeting or public procession causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand	Deletion of the provision	<ol style="list-style-type: none"> <li>1. The effect of the amendments is to increase criminal sanctions and introduce civil liability in public meetings and assemblies thereby directly creating a fresh layer of limitations to the right to peaceably assemble, to demonstrate, to picket, and to present petitions to public authorities and as such the amendments further limit the enjoyment of those rights and fundamental freedoms.</li> <li>2. The provision is grossly disproportionate to the prescribed crime. Moreover, the sanction is unnecessary as any criminal activity</li> </ol>	<b>Amnesty International</b>



<p>shillings, or both.”</p>		<p>within or without protests are already catered for under the Penal code</p> <p>3. Article 24 of the Constitution requires any person or entity seeking to limit a fundamental right must satisfy that the limitation factors in the nature of the right, the purpose of the limitation, nature and extent of the limitation, whether there is a less restrictive means to achieve the purpose and most importantly, imposes an obligation to the person seeking to limit such right to justify that the limitation abides by law</p> <p>Moreover, Article 19(3) of the International Convention on Civil and Political Rights which Kenya is a party to prescribes a three-part test which is that they must be: provided by law, necessary and proportionate and must pursue a legitimate aim with respect to the rights</p>	
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		<p>or reputations of others or the protection of national security or of public order, public health or morals</p> <p>Article 37 of the Constitution provides that every person has a right to peaceably and unarmed to assemble, to demonstrate, to picket and to present petitions to public authorities</p> <p>Article 21 of the ICCPR and Article 11 of the ACHPR protects the right to assemble, stating that the right may only be restricted in the interest of national security, the safety, the health, ethics and rights and freedoms of others.</p>	
	Deletion of provision	<p>This amendment is unconstitutional to the extent that it imposes strict liability on the organizers of a peaceful meeting or procession where the person responsible for causing havoc are not lawful participants of a procession. This provision poses a threat to the exercise of the right to peaceful assembly, demonstration, picketing and petition provided for under Article 37 of the Constitution of Kenya. In light of the provisions of</p>	<b>Natural justice</b>

		Article 24 of the Constitution of Kenya, the provision is unnecessary, unreasonable, unreasonable and not justifiable.	
		<p>a. Section 11A imposes liability for offences that are not well-defined and thus, difficult to discern. The offences listed are ambiguous worded and do not adequately disclose the elements of the offence thus allowing extensive discretion to law enforcement officials and is capable of abuse</p> <p>b. Section 11A unnecessarily threatens enjoyment of the right to freedom of assembly by allowing sanctions for actions conducted during public assemblies that are not prohibited. Liability imposed for loss of earnings does not necessarily disclose any prohibited act and may lead to persons being sanctioned for ordinary acts in the exercise of freedom of assembly.</p> <p>c. The sanctions in the provision are unnecessarily punitive since the Act already provides for a maximum one-year imprisonment sanction for holding unlawful assemblies as per Chapter IX of the Penal Code (Cap 63)</p> <p>d. The sanctions proposed by</p>	<b>Centre for Human Rights and Policy Studies</b>

		Section 11A are also manifestly excessive considering that overly-punitive sanctions in Section 85 and 86 of the Penal Code which prohibits property damage during assemblies and impose liability of life imprisonment for any destruction of a building, railway, machinery or structures.	
<p>CLAUSE 5(11B) (11B) Where a person is convicted of an offence under subsection (11A), the court may an order over and above the sentence imposed, that the person or the organizer compensates the affected persons on such terms as the court may deem proper to grant."</p>	<p>Revise the sub-section to include clear guidelines for determining compensation and encourage the aggrieved party to institute separate civil proceedings</p>	<ol style="list-style-type: none"> <li>1. The amendment does not provide a definition for who a affected person is.</li> <li>2. The offences state are vague, overbroad and undefined which allows law enforcement agents and judicial officers broad and unacceptable discretion to determine if an individual has violated the Act</li> <li>3. The law does not provide guidelines for calculating the compensation or limit civil damages in any way therefore leaving an undesirable and unlawful discretion to judicial officers to discriminatorily determine</li> </ol>	<p><b>Amnesty International</b></p>

		compensation.	
	Deletion of provision	<p>The amendment gives the court discretion to impose an order or penalty over and above the sentence prescribed in 11A. it therefore provides a leeway for the abuse or discretion which is contrary to the rule of law. Besides, in criminal law, only the person who is found culpable should compensate the affected person and not the organizers of the event.</p> <p>The provision should be amended to read:</p> <p><b>11A. A person who causes grievous harm, damage to property or loss of earnings, during a public meeting or public procession, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred shillings or both.</b></p> <p>11B. Where a person is convicted of an offence under subsection 11A, they court may make an order over and above the sentence imposed, <b>that the person convicted</b> compensates the affected person on such terms as the court may deem proper to grant</p>	<b>Natural Justice</b>
		a.Section 11B places a chilling effect on the right to	<b>Centre for Human Rights and Policy</b>

		<p>freedom of assembly by imposing liability on protestors and protest organizers to compensate for damage caused over and above the sentences that are already imposed. These will keep citizens from exercising their right for fear of the excessive punishment especially considering that the offences are ambiguous.</p> <p>b. Section 11B unfairly violates the right to freedom of assembly under Article 37 by constituting an unreasonable limitation on the right contrary to Article 24 through imposing liability on protest organizers without necessitating that they are proved to have been engaged in prohibited acts. Criminal liability should be personal such that only the person proven to engage in criminal acts should be held responsible. Organizers of protests and protestors should not be held responsible unless for personal acts that are criminalized.</p> <p>c. That section 11B undermines the important role of organizers in assisting police in the maintenance of peace and order during a public meeting or procession</p>	<p><b>Studies</b></p>
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		<p>as provided for under Section 5(7) of the Act . Requiring organizers to compensate for damage caused would undermine this role and affect their relationship and partnership with police officers in maintaining peace and order</p> <p>d.Both provisions are vague and unclear and thus contrary to Article 24(2) of the Constitution requiring that legislation limiting a right of freedom shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation</p> <p>e.Both sections provide for unjustifiable limitations on the right to freedom of assembly, contrary to Article 24 of the Constitution which permits limitation only to the extent that it is reasonable and justifiable in an open and democratic society.</p>	
	Rejection in totality	<p>a.The said amendment is unconstitutional by</p> <p>i)introducing spurious, vague, overly broad and undefined offences that allow law enforcement and judicial officials dangerously broad</p>	<b>Ukweli Party</b>



		<p>and unacceptable discretion to determine if an individual has violated the Act</p> <p>ii)embedding in Kenya's laws threats of civil and criminal liability on any person organizes or leads a public meeting, protest or picket even when it is known that it is the principal obligation of Kenya's law enforcement agencies to provide safety and security to both protesting and none-protesting citizens at the site of a procession of protest.</p> <p>b.The proposed amendment is in bad faith and feigns ignorance of the well-known and documented role of Kenya's law enforcement agencies of turning peaceful meetings, processions and protests violent on the orders and in the interest of powerful political actors who are often the subjects of peaceful assembly</p> <p>c.The proposed amendment is backward, retrogressive and it does not serve the public interest</p> <p>d.The amendment will introduce an additional weakness to the Public Order Act which does not fully comply with international standards on the freedom of assembly, particularly in</p>	
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		respect to imposing liability on any participant in public meetings or processions deemed to be unlawfully held.	
	Rejection in totality	The amendment is malicious and unconstitutional as it criminalizes Kenyans for exercising out constitutional right to gather with other citizens and express our opinion on governance. It also sacrifices citizens' rights for the profits of local and foreign rich people.	<b>Wandia Njoya</b>
	1. Deletion of the expression "loss of earnings" in sub-clause 11A  2. Removal of sub-clause 11B	1. The expression "loss of earnings" under sub-clause 11A lacks a clear definition and this vagueness and broadness offends Article 24 of the Constitution of Kenya since it may lead to subjectivity and misuse by national security agencies  2. Public meetings and processions are a constitutional right. The attempt to shift responsibility of an individuality who breaks the law to an individual who has exercised his/her constitutional right in the correct manner is a direct infringement on the latter's right to enjoy his/her rights. 3. it is principal duty of the police and other law	<b>Communist Party of Kenya</b>

		<p>enforcement agencies to enforce the law and to arrest those who commit crimes. This principal duty cannot be transferred to the organizers of public meetings/processions</p> <p>4. Criminal culpability is personal and not transferable</p> <p>5. The penal code already guides the courts on how to treat those convicted and it also includes compensation of victims.</p>	
		<p>The offences relating to destruction of property, or endangering lives are well provided for under the penal statutes. Replication of offences that target a specific group of people is not only suspect but also discriminatory contrary to Article 27.</p> <p>The Bill places no obligation or liability on the police, who often than not violate citizens' right by disrupting meetings, using force and arresting protestors.</p> <p>These offences as noted above undermine the Constitution by removing the guarantee of due process of the law. Attribution for any offence must be based on investigation, prosecution and determination of guilt by</p>	<p><b>Patricia Joseph</b></p>

		a court of law.	
	<p>Introduce sub-section (b) to state that liability shall be personal and shall not be extended to organizer nor fellow participants of protest.</p> <p>Removal of the entire set of criminal sanctions as such sanctions are in the penal code only</p>	<p>The Guideline 101 of African Commission on Human and People's Rights 2016 Guidelines on Freedom of Association and Assembly provides that liability shall be personal. Neither organizers nor fellow participants of a public assembly shall be subjected to sanctions of any kind on the basis of acts committed by others</p> <p>Guideline 99 of African Commission on Human and People's Rights 2016 Guidelines on Freedom of Association and Assembly provides that states shall not impose criminal sanctions in context of laws governing assemblies. All criminal sanctions shall be specific within the penal code and not elsewhere. Assemblies shall not be governed by provisions of criminal law different from the generally applicable provisions of the penal code</p>	<b>Article 19 Eastern Africa</b>
	Remove entirely for lack of clarity on what harm and or damage means	The provisions "Causing grievous harm, damage to property or loss of earnings" are broad and vague, leaving room for arbitrary	

	<p>Remove the sanctions entirely where definitions of harm and loss are unavailable</p> <p>Remove 11B entirely</p>	<p>interpretation by law enforcement officers that may be used against protestors and protest organizers</p> <p>In absence of definitions, the sanctions cannot be applied in a uniform manner and can be used to target particular protestors and organizers. Any available sanctions have to be seen to be applicable in a clear, uniform manner</p> <p>-does not conform to the guidelines stated above on liability being personal and involvement of criminal sanctions in laws regulating protests</p> <p>-if included in law, this provision will discourage people from expressing themselves through protests as they will fear the consequences of imprisonment and heavy sanctions as stated above</p>	
		<p>Clause 11A is acceptable in that it targets rogue individuals who take advantage of public meetings and processions to disturb public order and destroy property. In contradistinction, 11B shifts the liability for the</p>	<p><b>Kenya National Commission on Human Rights (KNCHR)</b></p>

		<p>damage incurred to the organizer of the meeting/procession if it deems fit and this poses a great threat to the freedom of assembly secured under Article 37 of the Constitution. Organizers cannot be held responsible for the actions of each person attending a given meeting. In the event that rogue individuals with bad intent use such meetings as an opportunity to damage property, loot businesses and cause chaos, it is the responsibility of the police to maintain law and order. The provision runs foul the well- grounded canons of criminal law by introducing vicarious liability for criminal liability for criminal offences. It purports to apportion blame and cause parties who are otherwise innocent to make good for claims arising from criminal actions of third parties. This is anti-ethical the protections on fair administrative action, but also the common law principles of equity and fairness.</p>	
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**7.0 COMMITTEE GENERAL OBSERVATIONS**

- a) The proposed amendment in **Clause 2** is already provided for in the Penal Code and other existing alternative legal provisions.
- b) The proposed subsection (11A) creates an offence to a person whereas the proposed (11B) provides for compensation by the person and the organizer; there is disconnect between (11B) and (11A) to the extent of introduction of a new ‘person’ the ‘organiser’; Criminal act is a personal Act and, wrongful omission have to be proved on the part of the organiser.

**8.0 COMMITTEE RECOMMENDATIONS**

The Committee having considered the Public Order (Amendment) Bill, 2019 it resolved that—  
**Clause 2**

THAT clause 2 of the Bill be deleted.

**Justification**

*The proposed amendment to the public Order Act is already provided for in the Penal Code. Offences relating to destruction of property, or endangering lives are provided for under the penal statutes.*

SIGNED.....



HON. (HON. PAUL KOINANGE, MP)  
(CHAIRPERSON)

DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

DATE.....

19/1/2020



1/1/01

1/1/01

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

ATTENDANCE SCHEDULE


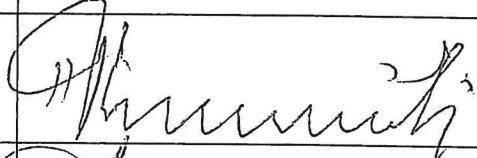
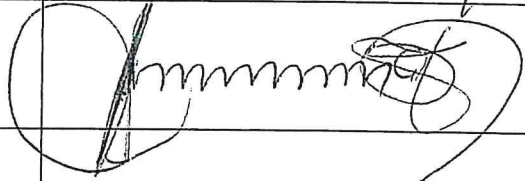


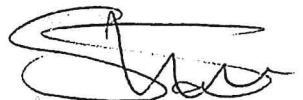

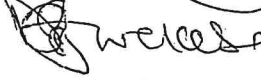

DATE: 29<sup>th</sup> October, 2019


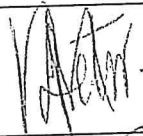

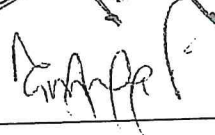
TIME: 11.00 a.m.

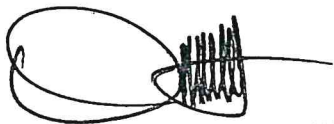
VENUE: Boardroom on 11<sup>th</sup> Floor, Protection House

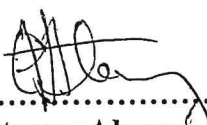
AGENDA: Adoption of the following reports on bills:

- a. The Public Service (Values & Principles) (Amendment) Bill, 2019
- b. The National Disaster Management Authority Bill, 2019
- c. The County Government (Amendment) Bill, 2018

NO.	NAME	SIGNATURE
1.	Hon. Paul Koinange, MP - Chairperson	
2.	Hon. John Waluke, MP - Vice Chairperson	
3.	Hon. Wafula Wamunyinyi, MP	
4.	Hon. George Peter Kaluma, MP	
5.	Hon. Dr. Makali Mulu, MP	
6.	Hon. George Theuri, MP	
7.	Hon. Aduma Owuor, MP	
8.	Hon. Didmus Wekesa Barasa Mutua, MP	
9.	Hon. Geoffrey Kingagi Muturi, MP	

10.	Hon. Marselino Malimo Arbelle, MP	
11.	Hon. Dr. Tecla Chebet Tum, MP	
12.	Hon. Josphat Kabinga Wachira, MP	
13.	Hon. Nimrod Mbithuka Mbai, MP	
14.	Hon. Ngunjiri Wambugu, MP	
15.	Hon. Abdi Omar Shurie, MP	
16.	Hon. Halima Mucheke, MP	
17.	Hon. Peter Masara, MP	
18.	Hon. Oku Kaunya, MP	
19.	Hon. Ahmed Kolosh Mohamed, MP	

Signed  Date 29/10/19  
George Gazemba, ACI Arb, CPM,  
Principal Clerk Assistant,  
Departmental Committee on Administration and National Security.

Signed  Date 21/11/19  
Florence Atenyo-Abonyo,  
Director, Committee Services.

**MINUTES OF THE FIFTIETH (50) SITTING OF THE DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY HELD ON TUESDAY, 29<sup>TH</sup> OCTOBER, 2019 AT 10.00 A.M. IN THE BOARDROOM ON 11<sup>TH</sup> FLOOR, PROTECTION HOUSE, PARLIAMENT BUILDINGS**

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**PRESENT**

1. Hon. Paul Koinange, MP - *Chairperson*
2. Hon. John Waluke, MP *Vice – Chairperson*
3. Hon. Wafula Wamunyinyi, MP
4. Hon. Peter George Kaluma, MP
5. Hon. Dr. Makali Mulu, MP
6. Hon. George Theuri, MP
7. Hon. Aduma Owuor, MP
8. Hon. Peter Masara, MP
9. Hon. Oku Kaunya, MP
10. Hon. Ahmed Kolosh Mohamed, MP
11. Hon. Dr. Tecla Chebet Tum, MP
12. Hon. Didmus Wekesa Barasa Mutua, MP
13. Hon. Geoffrey Kingagi Muturi, MP

**ABSENT**

1. Hon. Abdi Omar Shurie, MP
2. Hon. Ngunjiri Wambugu, MP
3. Hon. Josphat Kabinga Wachira, MP
4. Hon. Halima Muccheke, MP
5. Hon. Marselino Malimo Arbelle, MP
6. Hon. Nimrod Mbithuka Mbai, MP

**IN ATTENDANCE**

**COMMITTEE SECRETARIAT-**

1. Mr. George Gazemba - Principal Clerk Assistant II
2. Mr. Joshua Ondari - Clerk Assistant
3. Mr. Donald Manyala - Research Assistant
4. Mr. Josphat Bundotich - Senior Serjeant-At-Arms
5. Mr. Ian Otieno - Audio Officer
6. Mr. James Oloo - Support Staff

**MIN No.175 /2019:-**

**PRELIMINARIES**

The chairperson officially welcomed Members to the meeting at 10.30 a.m. after prayers were said.

**MIN No.176 /2019:-**

**CONFIRMATION OF MINUTES**

1. Minutes of the 42<sup>nd</sup> sitting held on Friday, 27<sup>th</sup> September, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. Peter Kaluma, MP and the Hon. Peter Masara, MP respectively.
2. Minutes of the 43<sup>rd</sup> sitting held on Friday, 27<sup>th</sup> September, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. John Waluke – Vice-Chairperson, MP and the Hon. Oku Kaunya, MP respectively.
3. Minutes of the 44<sup>th</sup> sitting held on Tuesday, 15<sup>th</sup> October, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. Peter Kaluma, MP and the Hon. Wafula Wamunyinyi, MP respectively.
4. Minutes of the 45<sup>th</sup> sitting held on Thursday, 17<sup>th</sup> October, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. Peter Kaluma, MP and the Hon. Peter Masara, MP respectively.
5. Minutes of the 46<sup>th</sup> sitting held on Saturday, 19<sup>th</sup> October, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. Oku Kaunya, MP and the Hon. John Waluke – Vice-Chairperson, MP respectively.
6. Minutes of the 47<sup>th</sup> sitting held on Tuesday, 22<sup>nd</sup> October, 2019 were confirmed as a true record of the deliberations having been proposed and seconded by the Hon. Dr. Tecla Tum, MP and the Hon. Peter Kaluma, MP respectively.

**MIN No. 177/2019:-**

**ADOPTION OF THE REPORTS ON BILLS**

**Report on the County Governments (Amendment) Bill (Senate Bill No. 13 of 2018)**



The report was unanimously adopted by the Committee after having been proposed and seconded by the Hon. Peter Masara, MP and the Hon. Peter Kaluma, MP respectively.

**Report on the National Disaster Management Authority Bill, 2019**

The report was unanimously adopted by the Committee after having been proposed and seconded by the Hon. John Waluke, MP –Vice-Chairperson and the Hon. Wamunyu Wamunyinyi, MP respectively.

**Report on the Public Service (Values & Principles) (Amendment) Bill, 2019**

The report was unanimously adopted by the Committee after having been proposed and seconded by the Hon. Oku Kaunya and the Hon. Peter Kaluma, MP respectively.

**MIN No.178 /2019:-**

**ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at noon until a date and time to be communicated to Members.

Signed.....  
Chairperson

Date.....5<sup>th</sup> Dec 2019







**THE INSTITUTION OF ENGINEERS OF KENYA**  
*(Engineering A Sustainable World)*

**SEMINAR INVITATION**

**VENUE: SAROVA WOODLANDS HOTEL, NAKURU**  
**DATES: TUESDAY 21<sup>ST</sup> MAY TO FRIDAY 24<sup>TH</sup> MAY, 2019**  
**SEMINAR CHARGES ARE KES 50,000/=**

**PLEASE NOTE THAT THE CHARGES WILL COVER THE SEMINAR MATERIAL AND EXPENSES, TEAS AND LUNCHES**

Participants are advised to pay the fees in full before the said date in order to qualify for registration. Cash payment MUST be made at any Standard Chartered Bank into IEK account No. 0102024134900 held at Kenyatta Avenue Branch and payment slip emailed to the secretariat for registration. Payment by Company cheques may be made directly to the secretariat. Personal payments may be made through M-pesa Paybill no. 976295 and account your name e.g AN other

For further details contact the IEK Secretariat at the following address,

P.O. Box 41346-00100 Nairobi: Tel 020-2716922

Mobile 0721-729-363, email: iek@iekenya.org

Our esteemed participants are encouraged to bring their laptops for seminar exercises and activities.

**ALL MEMBERS OF THE INSTITUTION OF ENGINEERS OF KENYA WHO HAVE NOT RECEIVED ANY COMMUNICATION FROM iek@iekenya.org ARE REQUESTED TO URGENTLY UPDATE THEIR EMAIL ADDRESS & MOBILE PHONE NUMBER BY EMAILING THESE TO THE SECRETARIAT.**

**REPUBLIC OF KENYA**



**THE NATIONAL ASSEMBLY**  
**TWELFTH PARLIAMENT - THIRD SESSION**

In the matters of consideration by the National Assembly:-

1. The Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019)
2. The County Governments (Amendment) Bill (Senate Bill No. 13 of 2018)

**SUBMISSION OF MEMORANDA**

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and of Parliament and its Committees". The National Assembly Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019) seeks to amend the Public Order Act to make provision for organizers of public meetings or public procession leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons.

The County Governments (Amendment) Bill (Senate Bill No. 13 of 2018) seeks to amend the County Government Act to provide for additional qualifications of the chairperson of a County Public Service Board.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the Departmental Committee on Administration and National Security for consideration and thereafter report to the House.

Pursuant to Article 118 (1)(b) of the Constitution and Standing Order 127, the Committee invites interested members of the public to submit any representations they may have on the said Bills. The Submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Building, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Wednesday 8<sup>th</sup> May, 2019 at 500 pm.

**MICHAEL SIALAL, EBS**  
**CLERK OF THE NATIONAL ASSEMBLY**



**NATIONAL OPEN TENDER**

National Hospital Insurance Fund (NHIF) invites interested and competent bidders from reputable firms to tender for the following items;

S/N	TENDER NO.	DESCRIPTION	ELIGIBILITY	CLOSING/ OPENING DATES
1	NHIF/060/2018-2019	Re-Tender Proposed Construction and Associated Infrastructure works for Modern ICT Equipment Room	Open	15TH MAY 2019
2	NHIF/074/2018-2019	Service Maintenance and Repair of Telephone Equipment	Open	15TH MAY 2019
3	NHIF/075/2018-2019	Design, Implementation and Commissioning of Enhanced Customer Experience Web/Mobile Portal	Open	15TH MAY 2019

Tender will be accessed from the NHIF Website - [www.nhif.or.ke](http://www.nhif.or.ke) and from the National Treasury IFMIS website <http://suppliers.treasury.go.ke> free of charge. Tenderers who download the tender documents and intend to submit a bid are required to submit their contacts details to [tenders@nhif.or.ke](mailto:tenders@nhif.or.ke) for reading. Bidders/Tenderers are advised to be checking our website on daily basis for any additional information, clarifications and/or addendum.

Completed tender documents in plain sealed envelopes and properly indicating the tender number as above should be addressed to:

**The Chief Executive Officer,**  
**National Hospital Insurance Fund,**  
**P.O. Box 30443,**  
**NAIROBI**

and be placed in the tender box provided at NHIF Building, 7th floor Reception so as to read him on or before 15<sup>th</sup> May 2019 at 10.00 a.m. The tenders will be opened immediately thereafter at the NHIF Auditorium 2nd floor, NHIF Building, in the presence of bidders or their representatives who wish to be present.

**AG. CHIEF EXECUTIVE OFFICER**  
**NATIONAL HOSPITAL INSURANCE FUND**



**3RD MAY 2019**

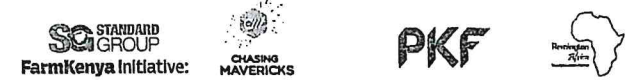
**Theme: Food Safety for Sustainable Agribusiness**

Venue: **Movian Park Hotel and Restaurants, Westlands, Nairobi**  
Time: **09:00 AM**



To book your ticket, call Sheila on 0702349664, or email : [sheila.waswa@aeawards.co.ke](mailto:sheila.waswa@aeawards.co.ke)/ [www.aeawards.co.ke](http://www.aeawards.co.ke)

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# Kenya National Commission on Human Rights

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Mobile: 0708271216/0786236683  
Email: northrift@knchr.org  
Twitter: @KNCHRKitale

**North Eastern Regional Office-Wajir**  
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Email: nothernkenya@knchr.org  
Twitter: @KNCHRWajir

OUR REF: KNCHR/PL/AB/VOL.2(6)

8<sup>th</sup> May, 2019

Clerk of the National Assembly  
Parliamentary Service Commission  
P. O. Box 41842 - 00100  
Nairobi

Dear Sir/Madam,

**RE: MEMORANDA ON THE PUBLIC ORDER (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 14 OF 2019)**

Reference is made to your call for memoranda on the Public Order (Amendment) Bill, 2019.

Kenya National Commission on Human Rights submits this advisory pursuant to the Commission's mandate under Articles 59(2) (a) of the Constitution of Kenya which mandates the Commission to 'promote respect for human rights and develop a culture of human rights in the Republic.' According to Article 59(2) (g) of the Constitution, the Commission is the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights.

The Commission concludes that the Public Order Amendment Bill, 2019 is misguided in its objects and reasons. No assembly organizer, whether individual or CSO should be held liable for damage caused during meetings and demonstrations. The Commission therefore strongly recommends that Clause 11B of the Proposed Amendment Bill be deleted.

The Commission further recommends that the entire Public Order Act, and in a participatory process, be repealed and a new legislation that complies with the peoples aspirations and the Constitution 2010 to address the various gaps identified above and more which the impugned amendment Bill fails to address.

The Commission further strongly recommends the enactment of the draft *National Police Service (Operational Standards for Public Order Policing) Regulations, 2016* (copy annexed) which aim to provide guidance on the procedure of maintaining public order and management of demonstrations and large scale disturbances by the National Police Service in accordance with Article 37 of the Constitution and the Public Order Act. These guidelines were enacted in

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**Commissioners:** Jedidah Wakonyo Waruhiu, Shatikha S. Chivusia

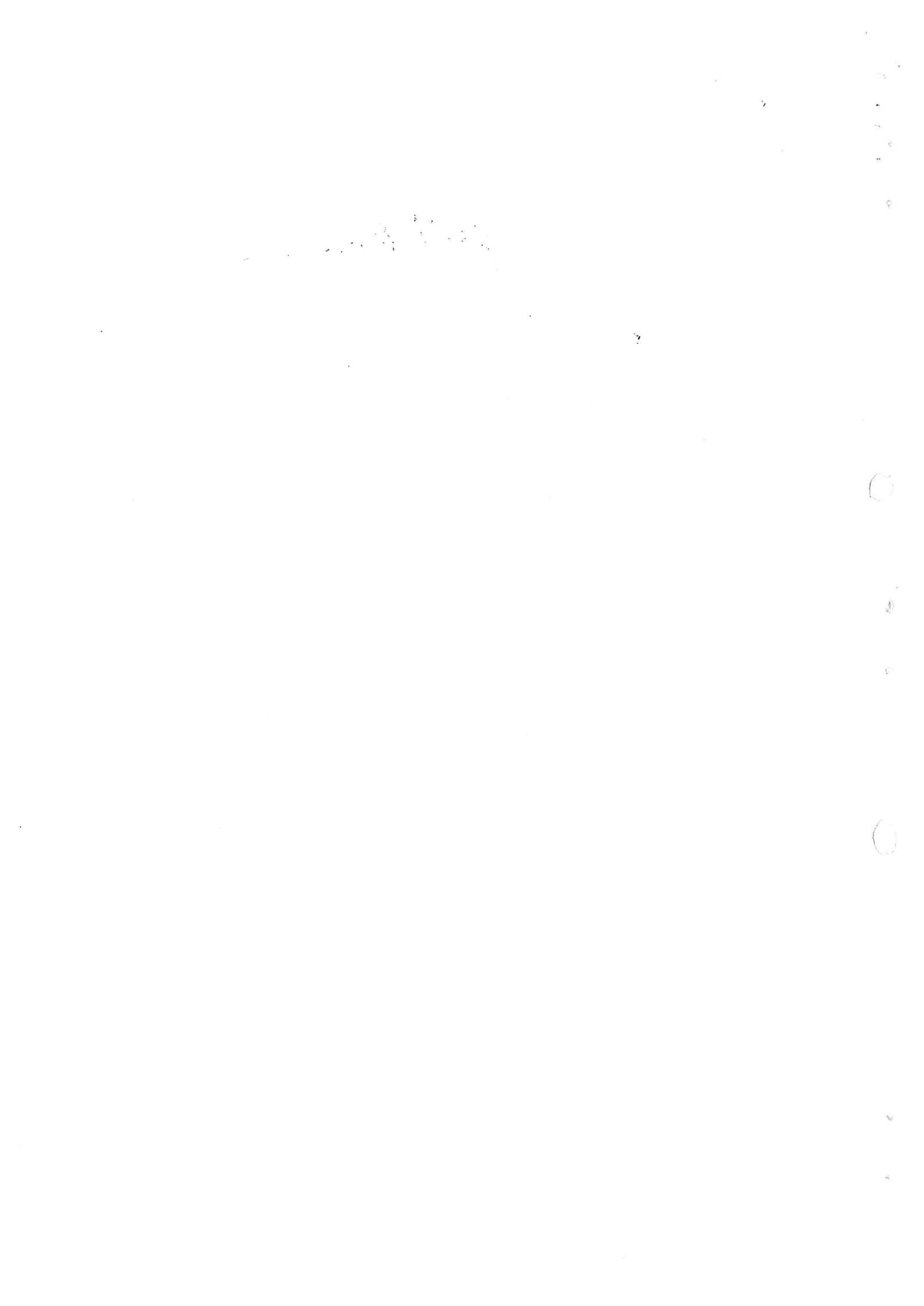
**Commission Secretary / CEO:** Dr. Bernard Mogesa, PhD, CPM

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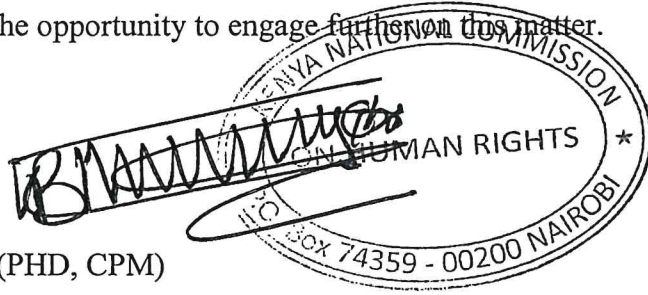
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10 MAY 2019  
CLERK'S OFFICE



consultation with members of the NPS in 2016/17.

We would welcome the opportunity to engage further on this matter.

Yours faithfully,



Dr. Bernard Mogesa (PHD, CPM)  
**Commission Secretary.**





① Diana  
Please deal.  
~~24/05/19~~

529

Zimbra

clerk@parliament.go.ke

**RE: Submission by Centre for Human Rights and Policy Studies on Public Order (Amendment) Bill 2019**

**From :** Melissa Mungai <melissamungai@chrips.or.ke>

Fri, May 17, 2019 01:21 PM

**Subject :** RE: Submission by Centre for Human Rights and Policy Studies on Public Order (Amendment) Bill 2019

1 attachment

**To :** clerk@parliament.go.ke

Dear Mr Sialai,

Pursuant to the invitation for submissions on any representations by interested members of the public on the Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019), Centre for Human Rights and Policy Studies is pleased to submit its analysis on the subject matter.

The Centre for Human Rights and Policy Studies (CHRIPS) is an independent think tank, research and policy development centre. CHRIPS invests in the generation and dissemination of knowledge that facilitates the development of innovative and effective policy solutions to the pertinent security challenges in Africa. Through its work, CHRIPS seeks to advance rights and social justice.

Kindly find attached the submission for your consideration.

Thank you.

Regards,

Melissa Mungai,

**Centre for Human Rights and Policy Studies,  
P.O. Box 23748-00100, GPO Nairobi, Kenya  
Tel: +254205270577  
Email: [info@chrips.co.ke](mailto:info@chrips.co.ke)  
Web: [www.chrips.or.ke](http://www.chrips.or.ke)**

② George Gwendu  
For Amendment  
by Committee  
27/5/19

**CHRIPS Comments on the Proposed Public Order (Amendment) Bill 2019**

 (17.5.19).docx

52 KB

③ Adan Kerna  
Please deal  
The Bill is for Adm  
and Security com  
12/06/19







## Comments on the Proposed Public Order (Amendment) Bill, 2019

By Centre for Human Rights and Policy Studies

E-mail: [info@chrips.or.ke](mailto:info@chrips.or.ke). Tel: +254 20 527 0577

Centre for Human Rights and Policy Studies is pleased to submit its analysis on the Public Order (Amendment) Bill, 2019 which was introduced through a Special Issue of the Kenya Gazette Supplement on 15 March 2019. The amendment reads as follows:

***The Public Order Act (Cap. 56) is amended in section 5 by inserting the following new sub-sections immediately after sub-section (11)—***

***"(11A) A person who while at a public meeting or public procession causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or both.***

***(11B) Where a person is convicted of an offence under subsection (11A), the court may an order over and above the sentence imposed, that the person or the organizer compensates the affected persons on such terms as the court may deem proper to grant."***

In our opinion, this proposed bill raises the following concerns.

1. THAT Section 11A imposes liability for offences that are not well-defined and thus, difficult to discern. These offences of causing ***grievous harm, damage to property, or loss of earnings*** are ambiguously worded and do not adequately disclose the elements of the offence. This will allow extensive discretion to law enforcement officials and is capable of abuse.
2. THAT Section 11A unnecessarily threatens enjoyment of the right to freedom of assembly by allowing sanctions for actions conducted during public assemblies that are not prohibited. Liability imposed for ***loss of earnings*** does not necessarily disclose any prohibited act and may lead to persons being sanctioned for ordinary acts in the exercise of freedom of assembly.
3. THAT sanctions contained in the proposed Section 11A are unnecessarily punitive since the Act already provides for a maximum one-year imprisonment sanction for holding unlawful assemblies as per Chapter IX of the Penal Code (Cap 63). Therefore, the suggestion for a six-year imprisonment term is unnecessarily punitive.

4. THAT the sanctions proposed by Section 11A are also manifestly excessive considering the overly-punitive sanctions in Section 85 and 86 of the Penal Code which prohibits property damage during assemblies and impose liability of life imprisonment for any destruction of a building, railway, machinery or structures.
5. THAT Section 11B places a chilling effect on the right to freedom of assembly by imposing liability on protesters and protest organisers to compensate for damage caused over and above the sentences that are already imposed. These will keep citizens from exercising their right for fear of the excessive punishment especially considering that the offences are ambiguously worded.
6. THAT Section 11B unfairly violates the right to freedom of assembly under Article 37 by constituting an unreasonable limitation on the right, contrary to Article 24, through imposing liability on protest organisers without necessitating that they are proved to have been engaged in prohibited acts. Criminal liability should be personal such that only the person proven to engage in criminal acts should be held responsible. Organisers of protests and protesters should not be held responsible unless for personal acts that are criminalised.
7. THAT Section 11B undermines the important role of organisers in assisting the police in the maintenance of peace and order during a public meeting or procession as provided under Section 5(7) of the Act. Requiring organisers to compensate for damage caused would undermine this role and affect their relationship and partnership with police officers in maintaining peace and order.
8. THAT therefore, the proposed sections 11A and 11B are vague and unclear and thus, contrary to Article 24(2) of the Constitution requiring that legislation limiting a right or freedom shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation.
9. THAT therefore, the proposed sections 11A and 11B provide for unjustifiable limitations on the right to freedom of assembly, contrary to Article 24 of the Constitution, which permits limitation only to the extent that it is reasonable and justifiable in an open and democratic society.
10. THAT therefore, the proposed amendments would excessively restrict enjoyment of the fundamental right to freedom of assembly and ought not to be adopted in line with Article 24(e) of the Constitution, which requires consideration of the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.



① D/Cmt/lor  
8/5/19 8<sup>th</sup> May 2019

TO: Clerk of the National Assembly,

Dear Michael Silai (EBS),

**MEMORANDUM OF COMMENTS TO THE PUBLIC ORDER MANAGEMENT (AMENDMENT) BILL 2019**

Amnesty International Kenya is pleased to attach these comments on Kenya's Public Order (Amendment) Bill, 2019 ("the Bill"). We are willing and prepared to appear before the Departmental Committee on Administration and National Security to represent and elaborate on these views.

Rest assured of our highest considerations for your office, the Departmental Committee and the National Assembly as a whole.

**Irūngū Houghton**

Executive Director | Amnesty International Kenya  
Mob: +254-733-635-354 | Skype: irungu.houghton | T: @irunguhoughton  
www.amnestykenya.org | Parkfield Place, 3rd Floor, Kanjata road off Waiyaki Way, Westlands, Nairobi, Kenya

We have a plan to cause Justice, dignity and rights for all Kenyans. Read it here and join the movement.



② Adm  
pls deal  
FA  
09/5/19

③ Emerg  
pls note  
FA  
09/5/19







## MEMORANDUM ON THE PUBLIC ORDER (AMENDMENT) BILL, 2019

8 May 2019

### Summary

Amnesty International Kenya is pleased to present these comments on Kenya's Public Order (Amendment) Bill, 2019 ("the Bill"). Published in a Special Issue of the Kenya Gazette Supplement on March 15, 2019, the Bill seeks to amend Kenya's Public Order Act (Cap.56) by adding clauses imposing both civil and criminal liability on any person who causes grievous harm, damage to property, or loss of earnings while at a public procession or meeting.

In our analysis, we find that the proposed amendments:

- a) offend principles of legality with vague, overbroad and undefined provisions;
- b) propose criminal sanctions that are unnecessary and disproportionate in an open and democratic society considering the value and nature of the right to protest and freedom of expression;
- c) create a legal lacuna with regards to guidelines in determining compensation for affected persons; and
- d) affect Kenyan's fundamental rights to freedom of expression (Article 33) the right to assemble, to demonstrate, to picket, and to present petitions to public authorities (Article 37) and would therefore require amendment of our constitution as per (Article 255 (e)).

We recommend that:

1. Delete offense created under sub-section 11A. The proposed offences are already properly catered for in the Penal Code. On the proposed treatment of 'loss to earnings', we propose that compensation be sought in separate civil proceedings.
2. Delete the sanction of imprisonment and punitive fines from Section (11A).
3. Revise Sub-section 11B to include clear guidelines for determining compensation and encourage the aggrieved party to institute separate civil proceedings.



## Proposed Amendments:

1. The amendments introduce Subsection 11A *“that persons participating in a public demonstration and who cause grievous harm, damage to property and/or loss of earnings will be liable upon conviction to imprisonment for a term not exceeding 6 years or to a fine not exceeding 100,000 or both”*
2. The law also inserts Subsection 11B which proposes that over and above the sentence imposed, that the person or organizer compensates the affected persons on such terms as the court may deem proper to grant.

*“Where a person is convicted of an offence under subsection (11A), the court may an order over and above the sentence imposed, that the person or the organizer compensates the affected persons on such terms as the court may deem proper to grant.”*

3. In the memorandum of objects, the Bill declares that the proposed amendments do not contain any provision that limit any fundamental rights or freedom

## Analysis of the proposed Amendments:

### A. Amendments are far-reaching and require constitutional review under Article 255(e)

It is noteworthy, that in its memorandum of objects, the Bill declares that the proposed amendments do not contain any provision that limit any fundamental rights or freedom. In reality, these amendments have far reaching implications on the enjoyment of the right to peaceably assemble, demonstrate and picket. It also has far reaching implications on public participation and freedom of expression.

The effect of the amendments is to increase criminal sanctions and introduce civil liability in public meetings and assemblies thereby directly creating a fresh layer of limitations to the right to peaceably assemble, to demonstrate, to picket, and to present petitions to public authorities. As such, the amendments further limit the enjoyment of those rights and fundamental freedoms.

The declaration erroneously attempts to avoid the implications of Article 255 (e) of the Constitution of Kenya which requires any amendment touching on human rights to be subjected to a referendum. This provision was ostensibly put in by the authors of the constitution to avoid situations where parliament interferes with enjoyment of fundamental rights and constitutional structures as was seen under the previous constitution.



## **B. Vague Provisions**

In accordance to the principle of legality, any law attempting to limit any right or fundamental freedom must be clear and concise.

Legality is a fundamental rule of criminal law that espouses that nothing is a crime unless it is clearly forbidden in law. The principle of legality is not only a core value of human rights but also a fundamental defense in criminal prosecution that ensures no crime exists without a legal ground.

It is a well-established principle that Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension.

The proposed Subclause 11B states that where a person is convicted of an offence under Subsection (11A), the court may make an order over and above the sentence imposed, that the person or the organizer compensates the *affected persons* on such terms as the court may deem proper to grant. The key concern here is that the amendment does not provide a definition for who an affected person is.

The offenses of *causing grievous harm, damage to property, or loss of earnings* are vague, overbroad, and undefined, which allows law enforcement agents and judicial officers broad and unacceptable discretion to determine if an individual has violated the Act.

It is for the above reasons that Amnesty International Kenya finds that the proposed amendments especially with regard to the meaning of the above words fails the legality test in that there is no legal definition nor standard understanding as to their meaning. If they are allowed to stand, they will be abused as it will rely on the individual judgment and discretion of a police officer, prosecutor or judicial officer thereby subject to discriminatory and irregular application.

## **C. Unnecessary and Disproportionate limitation on an open and democratic society**

Persons convicted of an offense under sub-section (11A) may be subject to imprisonment for up to 6 years, a fine not exceeding one hundred thousand or both.

Amnesty International Kenya finds the above provision to be grossly disproportionate to the prescribed crime. Moreover, the sanction is unnecessary as any criminal activity within or without protests are already catered for under the Penal Code. If a person beats up another person, he or she will be charged with assault; stealing will attract a charge of theft or robbery; and, so on and so forth.





#### **D. Lack of guidelines for court ordered compensation**

Sub-section (11B) permits a court to order compensation to the *affected persons* in addition to the criminal sanctions described in Sub-section (11A) on such terms as the court may deem proper. It is noteworthy that the law does not provide guidelines for calculating the compensation or limit civil damages in any way. This lacuna in law leaves an undesirable and unlawful discretion to judicial officers to discriminatorily and without legal basis to determine compensation. There is little clarity on rules of procedure, standard of proof and culpability.

Our four findings and three recommendations have to be seen in a broader national and international historical context. Freedom of expression, protest against injustice and petitioning authorities has been a key part of our country's democratic history during fight against colonization, post-colonial Kenya, the second liberation struggle and contemporary Kenya.

The ability to assemble has been historically of fundamental importance not only as a means of political expression but also for the safeguarding of other human rights. These proposed amendments seek to impede our freedoms and liberties to express ourselves through public expression, protests and petitioning authorities.

The right to protest is closely interlinked with the right to freedom of expression and the right to participate in public affairs. It is a legitimate and necessary part in democracy that sits next to the right to vote as a vital means to directly have a say in public life. As such, protests contribute to good governance, accountability and fighting government excesses and oppression. It is a critical part of Kenya's National Values and Principles of Governance.

Article 24 of the Constitution requires any person or entity seeking to limit a fundamental right must satisfy that the limitation factors in the nature of the right, the purpose of the limitation, nature and extent of the limitation, whether there is a less restrictive means to achieve the purpose and most importantly, imposes an obligation to the person seeking to limit such right to justify that the limitation abides by the law.

Moreover, Article 19 (3) of the International Convention on Civil and Political Rights, which Kenya is party to, prescribe the three-part test regarding the legal requirements for laws limiting freedom of expression which can be extended to the right to protest as a form of expression.

The amendments as currently formulated infringe on and offend national constitutional values and international human rights standards.

Article 37 provides that every person has a right to peaceably and unarmed to assemble, to demonstrate, to picket and to present petitions to public authorities.

Article 21 of the International Covenant of Civil and Political Rights (ICCPR) and Article 11 of the African Charter on Human and Peoples' Rights (ACHPR) which Kenya is party to by dint of Article 2 (5) and (6) if the Constitution - 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.

Moreover, Article 19 of the ICCPR guarantees the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds. Restrictions on this right are bound by a three-part test: they must be

- I. provided by law; and
- II. necessary and proportionate and
- III. must pursue a legitimate aim with respect to the rights or reputations of others or the protection of national security or of public order, or of public health or morals.

Should this amendment pass it will have far reaching effects on the application and enjoyment of Article 37. It will criminalize expression and legitimate protests of political parties, public interest organisations including those promoting the rights of consumers, women, youth, labor, landless and displaced people among others. For this reason, we petition the National Assembly to reject the amendments on the basis of incongruence with our constitution and further strengthening of an outdated and colonial relic, The Public Order Act.

We are willing and prepared to appear before the Departmental Committee on Administration and National Security to represent and elaborate on these views.

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Amnesty International Kenya  
Parkfield Place, 3<sup>rd</sup> Floor, off Waiyaki Way, Westlands, Kanjata Road, Opposite New Safaricom House, P.O  
Box 1527-00606 Nairobi, Kenya  
Tel: +254 020-2185905; +254 020-4283000, [www.amnestykenya.org](http://www.amnestykenya.org)



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**UKWELI  
PARTY**

NGUVU KWA MWANANCHI

Ukweli Party  
Kenya House Complex, 2<sup>nd</sup> Floor S25, Koinange Street  
P.O. Box 26543 – 00100 Nairobi  
Tel: 0797 878944 0799 973889  
Email: [info@ukweliparty.com](mailto:info@ukweliparty.com)  
Web: [www.ukweliparty.org](http://www.ukweliparty.org)

(1) DICT-11  
915

May 8, 2019

MICHAEL SIALAI, EBS  
CLERK OF THE NATIONAL ASSEMBLY  
P.O. BOX 41842 – 00100  
NAIROBI

Dear Sir:

**RE: UKWELI PARTY MEMORANDUM ON THE PUBLIC ORDER (AMMENDMENT) BILL, 2019  
(NATIONAL ASSEMBLY BILL NO. 14 OF 2019)**

Following your recent call for public submission of memoranda on the **Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019)** that seeks to amend the **Public Order Act** to make provision for organizers of public meetings or public processions leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons; Ukweli Party wishes to submit this memorandum to the **National Assembly Departmental Committee on Administration and National Security** for its consideration and action.

Ukweli Party is opposed to the said Public Order (Amendment) Bill, 2019 for the reasons stated hereunder:

1. **THAT** the said amendment to the Public Order Act is unconstitutional. Article 37 of the Constitution of Kenya unequivocally declares that *“Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.”* The proposed amendment falls short of upholding the fundamental right of citizens to these freedoms by:
  - a) introducing spurious, vague, overly broad and undefined offenses that allow law enforcement and judicial officials dangerously broad and unacceptable discretion to determine if an individual has violated the Act;
  - b) embedding in Kenya’s laws threats of civil and criminal liability on any person who organizes or leads a public meeting, protest or picket even when it is known that it is the principle obligation of Kenya’s law enforcement agencies to provide safety and security services to both protesting and non-protesting citizens at the site of a procession of protest - including their possessions and to detect, investigate, prevent or prosecute any acts of crime by individuals. It is unreasonable, uncalled for and mischievous for the amendment to seek to frivolously transfer or impose such obligation on citizens exercising their right to freedom of assembly and protest. Any



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@ukweliparty

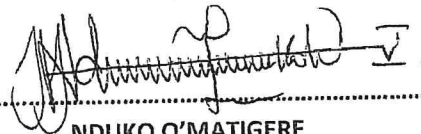


person caught destroying property or harming people during a meeting or procession should be charged individually according to the Criminal Procedure Code and other relevant laws. This does not require any additional law or amendment.

2. **THAT** the proposed amendment is in bad faith and feigns ignorance of the well-known and documented role of Kenya's law enforcement agencies of turning peaceful meetings, processions and protests violent on the orders and in the interest of powerful political actors who are often the subjects of peaceful assembly;
3. **THAT** the proposed amendment is backward, retrogressive and it does not serve the public interest. Indeed, it is our submission that its motivation is to serve the narrow interests of powerful political actors who have serially demonstrated intolerance to public censure and demands for accountability. The sole aim of the amendment is to embed in law threats and intimidation of citizens critical of the excesses of powerful public officials.
4. **THAT** the amendment will introduce additional weaknesses to the Public Order Act (Cap.56) which does not fully comply with international standards on the freedom of assembly, particularly in respect to imposing liability on any participant in public meetings or processions deemed to be unlawfully held (section 5(II) - which contravenes the principle that participants of an assembly should not be subjected to sanctions on the basis of acts committed by others (refer to African Commission on Human and Peoples' Rights – *Guidelines on Freedom of Association and Assembly in Africa*, para.101 and also United National General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association*, Maina Kia, U.N.DOC A/HRC/20/27(2012), para.31. Adoption of the proposed amendment would further undermine Kenya's human rights obligations under the international law.

It is therefore the submission of Ukweli Party that the **Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019)** is rejected in its totality and that instead, the National Assembly vests its moral, intellectual and political resources to cure the Public Order Act of its present weaknesses and deficits. To entertain the **Public Order (Amendment) Bill, 2019** is to condone that which is ill-spirited, ill-motivated, narrow, backward and against the public interest: considering the painful journey we have taken as a people to bestow upon ourselves the rights and freedoms guaranteed in the Constitution of Kenya.

Dated this 08<sup>TH</sup> day of APRIL 2019



NDUKO O'MATIGERE  
SECRETARY GENERAL



[www.facebook.com/ukweliparty](http://www.facebook.com/ukweliparty)



@ukweliparty



462

OUR REF : NJ/Public Order Amendment Bill/19/1  
YOUR REF : TBA

8.05.2019

Clerk of the National Assembly,  
P.O. Box 41842 - 00100,  
Nairobi, Kenya

① DICTATOR  
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copy sent to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke)

Dear Sir/Madam,

**REF: SUBMISSIONS ON THE PUBLIC ORDER (AMENDMENT) BILL, 2019**

We convey our sincere appreciation for the opportunity you have given the public to participate in the process of developing this law.

We hereby submit our views, comments, suggestions and recommendations on the proposed amendment to the Public Order Act, which we attach to this letter for your consideration.

Yours Sincerely,



Maryama Farah, Natural Justice  
[maryama@naturaljustice.org](mailto:maryama@naturaljustice.org)

② APPEND  
pls deal  
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13/5/19

③ EMEND  
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13/5/19



**Comment 1: Amendment of section 5 of the Public Order Act**

This bill proposes to amend the provisions of section 5 of the Public Order Act, to make provisions for organizers of public meetings and public processions leading to loss of property, life or earnings, to take responsibility for the loss and compensate the affected persons.

Sub-clause (11A) provides that a person who, while at a public meeting or public procession, causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or both. Clause 11B provides that where a person is convicted of an offence under subsection (11A), the court may [issues] an order over and above the sentence imposed, **that the person or the organizer compensates the affected persons** on such terms as the court may deem proper to grant.

This amendment is unconstitutional to the extent that it imposes strict liability on the organizers of a peaceful meeting or procession where the people responsible for causing havoc are not lawful participants of a procession. This provisions poses a threat to the exercise of the right to peaceful assembly, demonstration, picketing and petition provided for at Article 37 of the Constitution of Kenya. It is also in contravention of the provisions on the freedom of expression which people often seek to exercise during such processions and meetings. It is important to note that under Article 24 of the Constitution, a limitation can be imposed on a right and fundamental freedom only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The limitation imposed by this amendment, in our humble view, is unnecessary, unreasonable and not justifiable.

Secondly, this amendment gives the court the discretion to impose an order or penalty over and above the sentence prescribed in subsection (11A) including requiring the organizers of the procession to compensate affected persons. The problem with this provision is that it provides a leeway for the abuse of discretion which is contrary to the rule of law. Besides, in criminal law, only the person who is found culpable should compensate the affected person and not the organizers of the event.



In light of the reasons cited, we propose that this amendment is deleted to allow the free exercise of the constitutional right to demonstration and picketing. Alternatively, we propose the following amendment to the provisions as follows: -

“(11A) **A person who causes grievous harm, damage to property or loss of earnings, during a public meeting or public procession,** shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings or both.

“(11B) Where a person is convicted of an offence under subsection (11A), the court may make an order over and above the sentence imposed, **that the person convicted compensates** the affected person on such terms as the court deem proper to grant.”

### **Conclusion**

The above are our humble views on the amendment bill, which we hope will provide relevant insights during the consideration of this Bill.





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OUR REF : NJ/Public Order Amendment Bill/19/1  
YOUR REF : TBA

8.05.2019

Clerk of the National Assembly,  
P.O. Box 41842 - 00100,  
Nairobi, Kenya

copy sent to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke)

① DICTATOR  
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Dear Sir/Madam,

**REF: SUBMISSIONS ON THE PUBLIC ORDER (AMENDMENT) BILL, 2019**

We convey our sincere appreciation for the opportunity you have given the public to participate in the process of developing this law.

We hereby submit our views, comments, suggestions and recommendations on the proposed amendment to the Public Order Act, which we attach to this letter for your consideration.

Yours Sincerely,



Maryama Farah, Natural Justice  
[maryama@naturaljustice.org](mailto:maryama@naturaljustice.org)

② APPRO  
pls deal  
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③ EMERSON  
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13/5/19



**Comment 1: Amendment of section 5 of the Public Order Act**

This bill proposes to amend the provisions of section 5 of the Public Order Act, to make provisions for organizers of public meetings and public processions leading to loss of property, life or earnings, to take responsibility for the loss and compensate the affected persons.

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This amendment is unconstitutional to the extent that it imposes strict liability on the organizers of a peaceful meeting or procession where the people responsible for causing havoc are not lawful participants of a procession. This provisions poses a threat to the exercise of the right to peaceful assembly, demonstration, picketing and petition provided for at Article 37 of the Constitution of Kenya. It is also in contravention of the provisions on the freedom of expression which people often seek to exercise during such processions and meetings. It is important to note that under Article 24 of the Constitution, a limitation can be imposed on a right and fundamental freedom only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of the rights and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. The limitation imposed by this amendment, in our humble view, is unnecessary, unreasonable and not justifiable.

Secondly, this amendment gives the court the discretion to impose an order or penalty over and above the sentence prescribed in subsection (11A) including requiring the organizers of the procession to compensate affected persons. The problem with this provision is that it provides a leeway for the abuse of discretion which is contrary to the rule of law. Besides, in criminal law, only the person who is found culpable should compensate the affected person and not the organizers of the event.





In light of the reasons cited, we propose that this amendment is deleted to allow the free exercise of the constitutional right to demonstration and picketing. Alternatively, we propose the following amendment to the provisions as follows: -

“(11A) **A person who causes grievous harm, damage to property or loss of earnings, during a public meeting or public procession,** shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings or both.

“(11B) Where a person is convicted of an offence under subsection (11A), the court may make an order over and above the sentence imposed, **that the person convicted compensates** the affected person on such terms as the court deem proper to grant.”

### **Conclusion**

The above are our humble views on the amendment bill, which we hope will provide relevant insights during the consideration of this Bill.



② Anon  
pls deal  
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14/5/19

Office of the Clerk of the National Assembly  
Main Parliament Buildings, 1st Floor  
P.O. Box 41842 - 00100  
NAIROBI  
Tel: 254- 020-2848300

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14/5/19

① Dic-Mer  
9/10/19

**From:** "Wandia Njoya" <wmnjoya@gmail.com>  
**To:** clerk@parliament.go.ke  
**Sent:** Friday, May 10, 2019 3:25:07 AM  
**Subject:** OPPOSITION TO THE AMENDMENT OF THE PUBLIC ACT (clean copy)

As a Kenyan citizen residing in this country, I think the amendment to the public order act is malicious, unconstitutional and should not be passed by our elected representatives.

The amendment criminalizes Kenyans for exercising our constitutional right to gather with other citizens and express our opinion on governance. It also presumes that any crime that takes place during such a gathering is the fault of the organizers of the gathering, as if the Kenyans who committed the crimes were also not free beings themselves who made decisions on their own.

By holding organizers of a meeting responsible for any action that happens during the meeting, the government is turning citizens into imbeciles who cannot take responsibility for their own actions.

The amendment also sacrifices citizens rights for the profits of local and foreign rich people. Our lives and dignity are priceless and cannot compare to any amount of money which profiteers want to make.

It is also ironical that parliamentarians want to treat organizers of public gatherings as guilty by default, contrary the presumption of innocence until one is proven guilty after prosecution. It is also ironical that this would happen after the President and Deputy President were allowed to run for office while they were indictes of crimes against humanity, under the argument that they were innocent until proven guilty.

All citizens of Kenya are equal and the presumption of innocence should apply to all, not just to the rich.

Wandia Njoya  
Citizen of the REPUBLIC (not subject of the monarchy) of Kenya

NATIONAL ASSEMBLY  
RECEIVED  
10 MAY 2019  
SENIOR DEPUTY CLERK  
J. W. N.  
P. O. Box 41842-00100, NAIROBI



Office of the Clerk of the National Assembly  
Main Parliament Buildings, 1st Floor  
P.O. Box 41842 - 00100  
NAIROBI  
Tel: 254- 020-2848300

---

**From:** "Wandia Njoya" <wmnjoya@gmail.com>  
**To:** clerk@parliament.go.ke  
**Sent:** Friday, May 10, 2019 3:16:47 AM  
**Subject:** Opposition to the amendment to the public order amendment bill

As a Kenyan citizen residing in this country, I think the amendment to the public order act is malicious, unconstitutional and should not be passed by our elected representatives.

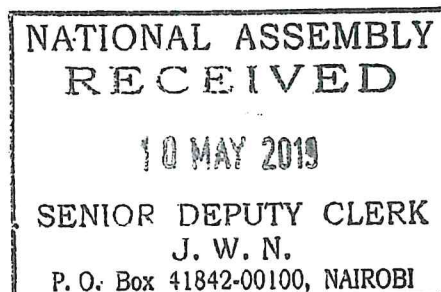
The amendment criminalizes our constitutional right to gather with other citizens and express our opinion on governance. It also presumes that any crime that happens during such a gathering is the fault of the organizers of the gathering, as if the Kenyans who committed the crimes were also not free beings themselves who made decisions on their own.

By holding organizers of a meeting responsible for any action that happens during the meeting, the government is turning citizens into imbeciles who cannot take responsibility for their own actions.

It is also ironical that parliamentarians want to treat organizers of public gatherings guilty by default, contrary to the presumption of innocence until one is proven guilty after prosecution. It is also that this would happen after the President and Deputy President were allowed to run for office while indicted for crimes against humanity, under the argument that they were innocent until proven guilty.

All citizens of Kenya are equal and the presumption of innocence should apply to all, not just to the rich.

Wandia Njoya  
Citizen of the REPUBLIC (not monarchy) of Kenya









CPK

# COMMUNIST PARTY OF KENYA

P.O BOX 4403 - 00100 Tel: 0729 497 009/ 0721 158 008  
Ring Road Kileleshwa, Swiss Cottages, House no. 8  
Website: [www.communistpartyofkenya.org](http://www.communistpartyofkenya.org)  
Email: [communistparty2019@gmail.com](mailto:communistparty2019@gmail.com)



CPK

Clerk of the National Assembly  
PO Box 41842-00100 Nairobi  
Email: [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke)

May 08, 2019

Dear Sir,

**RE: COMMUNIST PARTY OF KENYA MEMORANDUM ON THE PUBLIC ORDER AMENDMENT BILL NO. 14 OF 2019**

The Communist Party of Kenya (CPK)<sup>1</sup> wishes to make its representation concerning the intended amendment of the Public Order Act, through the Public Order (Amendment) Bill (National Assembly Bill No. 14 of 2019). The Bill intends to insert subsections 11A and 11B under section 5 of the Act.

**With regards to subsection 11A, we wish to state as follows:**

That while the subsection seeks to punish "grievous harm, damage to property or loss of earnings" that are caused during public meetings or public processions, the Party objects to the inclusion of the term "loss of earnings" since it lacks a clear definition, is vague and is too broad. This vagueness and broadness may cause interpretation that offends article 24 of the Constitution of Kenya since it may lead to subjectivity and misuse by the national security agencies.

The Party proposes that the term "loss of earnings" be deleted from subsection 11A.

**With regards to subsection 11B, the Party wishes to state as follows:**

That the subsection seeks to punish organisers of public meetings and processions if an individual who participated in the meeting/procession is convicted for offences mentioned in subsection 11A. The Party wishes to strongly oppose the shifting of any responsibility to the organisers of public meetings/processions for the following reasons:

1. Public meetings and processions are a Constitutional right. The attempt to shift responsibility of an individual who breaks the law to an individual who has exercised his/her constitutional right in the correct manner is a direct infringement on the latter's right to enjoy his/her rights. This shift of responsibility will have the effect of preventing patriotic Kenyans from exercising their civil/political rights for fear of being blamed for what they have not done.

<sup>1</sup> The Communist Party of Kenya (CPK), formerly known as the Social Democratic Party of Kenya (SDP) is a fully registered Political Party, established through Articles 4(2), 38, 91 and 92 of the Constitution of Kenya, as well as through the Political Parties Act 2011.

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2. It is the principal duty of the police and other law enforcement agencies (including the National Intelligence Service) to enforce the law and to arrest those who commit crimes. This principal duty cannot be transferred to the organisers of public meetings/processions. Furthermore, a crime only becomes a crime when it is being or it has been committed. This subsection seems to suggest that organisers of public meetings/processions can somehow get into the minds of potential criminals and therefore somehow prevent the crime from happening. This is not only absurd but is also unconstitutional.
3. Criminal culpability is personal. It is not transferable.
4. If such an absurd proposal was to become law, then it would be prone to misuse by political opponents, criminals, as well as rogue law enforcers. The Kenyan Police have been known to use *agent provocateurs* in attempts to turn peaceful demonstrations into violent ones. It is highly likely that the Police or political opponents would plant individuals to cause chaos so as to ruin the reputation, credibility, and now add criminal responsibility on their political opponents and patriotic citizens.
5. The Penal Code already guides the courts on how to treat those convicted, and this also includes compensation for the victims. The Penal Code, and rightly so, places this responsibility on the convict, and not on other people as this proposed amendment seeks to do.

**Our recommendation is that subsection 11B should be removed from the amendment altogether.**

Lastly the Party proposes that the National Assembly should pass a law that heavily punishes any police officer, police commander, public administrator or any Public/State Officer who violates the right to peaceably demonstrate, assemble, picket and present petitions as enshrined under article 37 of the Constitution. Other than violating the supreme law of Kenya; many peaceful meetings/processions become chaotic when the police violently break them up by use of tear gas, violence and bullets. It is during such chaos that criminal elements in the society take advantage of the confusion caused and go ahead to loot, rob and cause grievous harm both to the participants of the meeting/procession and to the members of the public.

Yours faithfully,



Benedict WACHIRA  
Secretary General  
Communist Party of Kenya  
0721 158 008





420

(1) O/Courts  
8/8/19

**Commentary on the Public Order (Amendment) Bill, 2019**

The proposed law goes against the spirit and provisions of the Constitution of Kenya., 2010. These concerns extend to the Public Order Act, Cap. 56 Laws of Kenya which is ripe for an overhaul.

No.	Provision	Comment
1.	Object: to make provision for organizers of public meetings or public procession leading to loss of property, life or earnings to take responsibility for the loss and compensate the affected persons	<p>The stated purpose indicates the effect of the intended law is to punish organizers of public meetings or processions. This is unconstitutional <i>ab initio</i>. A law that seeks to punish organisers has the chilling effect as deter them from organizing meetings. Any law that seeks to create prior censorship or censorship in any other form is contrary to the Constitution.</p> <p>Contrary to its statement, the effect of the Bill is to undermine the fundamental rights and freedoms to peacefully assemble, demonstrate, picket and present petitions (Article 37); expression (Article 33), information (Article 35) and fair hearing (Article 50(1))</p> <p>It also undermines the national values and principles of governance under Article 10 in particular:</p> <ul style="list-style-type: none"> <li>- The rule of the law</li> <li>- Democracy</li> <li>- Participation of the people</li> <li>- Transparency and accountability</li> <li>- Equality</li> </ul> <p>It also fails the Article 24 test for justification for limitation of any fundamental freedom and right. The chilling effect and criminalizing nature of the Bill amounts to a limitation which is not justified by Article 24 as: <i>reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom</i>. It does not honour the interrogation required by this provision including assessment of: (a) nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice those of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. In fact, the limitation contemplated by the Bill is to derogate from the very essence of the right, thus unconstitutional.</p>

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NATIONAL ASSEMBLY  
RECEIVED  
08 MAY 2019  
DEPUTY CLERK  
J.W.N  
P. O. Box 418422 - 00100

*Commentary on the Public Order (Amendment) Bill, 2019 and Public Order Act  
Submitted by Patriciah Joseph (patriciah.joseph@gmail.com)*

No.	Provision	Comment
		<p>The object of the Bill presumes that any loss of property, life or earnings that takes place in the context of a public gathering is attributable to the organiser. This presumption goes against firstly the fair hearing guarantee, that is the due process of the law to investigate into any unlawful activity and to determine who is liable for commission of any offence. This is how the chilling effect is engineered, to cower any intending organisers from planning a meeting which is already criminalized to their detriment.</p>
2.	<p>"(11A) A person who while at a public meeting or public procession causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or both.</p>	<p>In addition to the above, creation of new offences under a public order legislation, what I would call targeted offences, since they are targeted at those who seek to participate in public meetings and demonstrations, is highly suspect.</p> <p>This suspicion is heightened by the very fact that public meetings and demonstrations remain a key avenue for the public to express its dissent on public issues; it is an avenue for political expression and targeted offences seek to undermine this right. The Bill is couched in ulterior motives and should never see the light of the day.</p> <p>Furthermore, the offences relating to destruction of property, or endangering lives are well provided for under the penal statutes (Penal Code). Replication of offences that are target at a specific group of people is not only suspect but also discriminatory contrary to Article 27</p> <p>In fact, the Act and the proposed Bill should instead be promoting the right of</p>
3.	<p>(11B) Where a person is convicted of an offence under subsection (11A), the court may an order over and above the sentence imposed, that the person or the organizer compensates the affected persons on such terms as the</p>	<p>citizens to exercise their Articles 37 and 33 rights, which places both positive and negative obligations on the part of the state through the National Police Service. The (positive) duty to provide security to the public and participants of the meetings or demonstration. The (negative) duty to refrain from using force or attacking the participants. Their duty is to facilitate not undermine the holding of meetings.</p> <p>In the same light, it is notable that the Act places no obligation or liability on the police, who often than not violate citizens' rights by disrupting meetings, using force and arresting protesters. This further points to the ulterior motives of the law.</p> <p>These offences as noted above undermine the Constitution by removing the guarantee of due process of the law. Attribution for any offence must be based</p>



No.	Provision	Comment
	court may deem proper to grant."	on investigation, prosecution and determination of guilt by a court of law. These targeted offences inherently fail this purpose.
4.	Section 8 curfew orders	<ul style="list-style-type: none"> <li>- Unilateral power is vested on the responsible minister with respect to declaring, extending and lifting a curfew order. There is no provision for review of the minister's orders particularly if they were to be extended. This loophole however, does not stop anyone from seeking a judicial review of the order under the Constitution.</li> <li>- While subsection 3 proviso seeks to place time limitations on length of curfews, no guarantee is ensured since the Act is silent on extension. It is thus easy for the Minister to periodically extend the curfew orders, rendering these limitations ineffective.</li> <li>- Subsection 8 may be problematic to lawful holders of firearms.</li> <li>- The section presumes that the choice of communication chosen by the minister to enforce the curfew order is reachable to all affected persons, yet the orders can be enforced on the day or the day after the notice of the curfew (subsection 3). It is notable in the same line, that the provision creates offences, thus people who lack notice of the order may fall into criminal liability unknowingly. It is also not clear if the conditions of the curfew order would also include the conditions under the Act as to expect citizens to abide.</li> <li>- Curfew orders restrain free exercise of fundamental freedoms and rights, thus, should meeting the Article 24 test.</li> </ul>

**Commentary on the Public Order Act, Cap. 56 Laws of Kenya**

The above concerns must be read in the context of the Public Order Act which is itself against the spirit of the Constitution as highlighted below.

No.	Provision	Comment
1.	General observations	This is an old statute that has never been overhauled since pre-independence. It ought not to have survived the constitution. Any law on management of public order ought to be written afresh in line with the constitutional principles, and sufficient public participation. This patchwork of amendments denies the full participation the public and in fact cannot cure the inherent offensive nature of the Act which was historically used to undermine political dissent. The proposed amendments will

2.	Section 2	<p>aggravate the concerns already raised here. Parliament should be reconsidering the Act as whole to make it compatible with the Constitution.</p> <ul style="list-style-type: none"> <li>- Provides for excluded meetings - this seems to be meetings that are considered lawful thus do not need to go through the rigours of sections. By implication, it means that non-excluded meetings are considered illegal <i>ab ignition</i>.</li> <li>- This is actually unconstitutional, bearing in mind that a meeting is defined as <i>gathering of persons (not being an excluded meeting) convened and held for any purpose, including any political purpose</i>. This is a very broad category, that gives the government to control any form of meeting unless it is an excluded meeting - a very narrow category.</li> <li>- Note, the definition does not even protect private spaces, again giving the government a leeway to even invade the private spaces.</li> <li>- Note too the overbroad definition of a public gathering '<i>a public meeting, a public procession, and any other meeting, gathering or concourse of ten or more persons in any public place.</i>' Similar concern of implication of broad powers for the government to control the public space. It is also suspicious why the Act would need to define both a public meeting and a public gathering. The latter really narrows the public space by making it easy for meeting to be profiled by the government as unlawful.</li> <li>- It is also discriminatory as it treats different groups differently to their detriment, and without constitutional justification. Further, Section 5(12) presumes that the right to have police presence in a public meeting is available for the excluded meetings. The excluded meetings are presumed lawful and deserving of police protection while the others are unlawful until they comply with section 5 conditions. It thus violates the right to equal protection and equal benefit of the law (Article 27).</li> </ul>
3.	Section 3 Section 4 prohibition of wearing of uniforms	<ul style="list-style-type: none"> <li>- Can be abused as it is left to the opinion of the minister. It is not clear if the order referred to by section 4 is related to section 3</li> <li>- The two provisions need to be revisited and to ensure that they are not abused to take away the right to associate.</li> </ul>
4.	Section 5	<ul style="list-style-type: none"> <li>- This is one of the most perilous provisions in the Act. Its tenor is to the effect that any meeting (unless an excluded one) which does not meet the conditions it</li> </ul>

		<p>spells out, is unlawful <i>a priori</i>. It limits the freedom of assembly unless its conditions are met.</p> <ul style="list-style-type: none"> <li>○ Subsection 1 - <i>No person shall hold a public meeting or a public procession except in accordance with the provisions of this section. This is unconstitutional; any limitation should pass the Article 24 test.</i></li> <li>○ Subsection 8 - <i>The regulating officer or any police officer of or above the rank of inspector may stop or prevent the holding of— (a) any public meeting or public procession held contrary to the provisions of subsections (2) or (6)</i></li> <li>○ Subsection 10 - <i>Any public meeting or public procession held contrary to the provisions of subsections (1) and (5) shall be deemed to be an unlawful assembly.</i></li> <li>○ Subsection 10 - <i>it is an offence (under the Penal Code) to take part in, hold, convene, organise, or be concerned with the holding, convening or organizing of any public meeting or public procession deemed to be an unlawful assembly.</i> Notice the broad definition of this offence</li> </ul> <ul style="list-style-type: none"> <li>- Subsections 4 and 5 do not provide a timeline within which the authority should communicate to the conveners. Delays can be abused to defeat the right altogether</li> <li>- Subsection 7 - places the duty on the organisers not only to mandatorily be present at the meeting but also assist the police to maintain public order. The right to assembly is not encumbered by such conditions under the Constitution. Note however, that failure to comply is an offence under subsection 9 - <i>Any person who neglects or refuses to obey any order given or issued under subsection (7) shall be guilty of an offence</i></li> <li>- Subsection 12 - maintenance of public peace and order by the police is a duty that arises as a matter to course and should be availed for all kinds of meetings.</li> <li>- Subsection 14 &amp; 15: in the spirit of the right to information, the register ought to be availed digitally.</li> </ul>
5.	Section 9 curfew restriction orders	<ul style="list-style-type: none"> <li>- This section gives powers to the police office in charge of a county or police division. Similar concerns as highlighted concerning section 8 apply here as well. It is even more concerning that a curfew restriction order can last up to 28 days unless rescinded earlier.</li> </ul>
6.	Section 14 restrictions on use of force	<ul style="list-style-type: none"> <li>- Needs to be aligned to the Constitution and the National Police Service Act</li> </ul>

7.	Section 19	<ul style="list-style-type: none"><li>- Needs to be aligned to the Constitution on rights of arrested persons to be released on bail as a right (unless the police can demonstrate with evidence the existence of compelling reasons); nevertheless, the section should comply with the requirement of production of a person in court within 24 hours of arrest, whether or not the DPP has issued consent.</li></ul>
8.	Section 20	<ul style="list-style-type: none"><li>- Needs to be repealed - it is unconstitutional</li><li>- Firstly, it is vague - (1) <i>Where it is an offence for a person to instigate another to do or omit to do any act or thing, it is immaterial whether or not the instigation succeeds in its purpose</i> - no such offence has been created under the Act. What is the meaning of '<i>to do or omit to do anything?</i>'</li><li>- Secondly, it places the initial burden of proof on the accused person (2) - <i>the burden of proving lawful or reasonable excuse or lawful authority shall be upon the person alleging the same, and accordingly in any proceedings for an offence under this Act or any regulations made thereunder it shall not be incumbent on the prosecution to prove the lack of any such excuse or authority.</i> The prosecution must always bear the burden, the accused should enjoy the right to present any defence including <i>lawful or reasonable excuse or lawful authority.</i></li></ul>

### Some Comparative Jurisprudence

Kenya has borrowed heavily from South Africa's constitution. Recently, the Constitutional Court of South Africa dealt with a similar issue in the case of *Mlungwana and Others v The State and Another*<sup>1</sup> declared section 12 of Regulation of Gatherings Act *unconstitutional* for criminalizing the failure by the convener of a gathering to give notice of an assembly which right to assemble peacefully and unarm through deterrence. The Act and proposed amendments have a similar effect.

Similar position is held in Ghana: Supreme Court in *New Patriotic Party vs. Attorney-General* (2004) nullified provisions which gave police officers wide powers to halt and dismiss meetings which contravened the Act. It also nullified a provision which created the offence of holding a procession, meetings and public celebration without permission.

Legislature has a duty to only make those laws allowed by the constitution.

<sup>1</sup><http://www.saflii.org/za/cases/ZACC/2018/45.html>



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**ARTICLE 19 Eastern Africa MEMORANDUM TO THE NATIONAL ASSEMBLY**  
**DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY.**

**07/05/2019.**

In Kenya's past and recent history, protests have served as an important medium and platform for achieving social, economic, and political change. It is however discouraging that the police have always resorted to unlawful restrictions and thwarting of protests through excessive force leading to an escalation of the potentialities of violence. In 2018, as reported by the media, 6 people died in the course of protests as a result of violence that ensued from police action. Recently on 30<sup>th</sup> April 2019, police arrested a peaceful protester, Beatrice Waithera who had committed no offence and was simply addressing the media on the reasons for the anti-corruption protests. Lastly, on 1<sup>st</sup> May 2019, a group of peaceful and harmless paralympians staging a sit-in protest on Thika road were harassed and beaten up by the police.

While Article 37 of the Constitution of Kenya guaranteed the right to protest, the Public Order Act 1950 (Cap 56 of the Laws of Kenya) is currently the cardinal legislation regulating the exercising of this right. **From the onset, it is important to state that as it is, largely, the Public Order Act is not in conformance with the letter and spirit of Article 37 of our constitution and international best standards and needs to be significantly amended.**

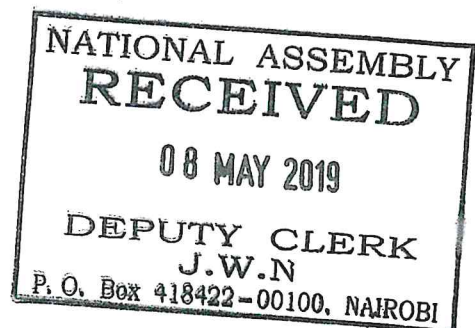
On 15<sup>th</sup> March 2019, the government of Kenya published in the Kenya Gazette Supplement under the bills to be introduced into the National Assembly, *The Public Order (Amendment) Bill, 2019*.

**This memorandum sets out briefly, our analysis of the proposed amendments as measured against constitutional, regional and international best standards on freedom of assembly.**

**While there is general need to revise the legal framework for freedom of assembly in Kenya, we submit that the proposed amendments<sup>1</sup> are in fact against the letter and spirit of the Constitution of Kenya (CoK) 2010 provisions for freedom of assembly under Article 37 and should be scrapped entirely for the following reasons:**

1. The amendments seek to shift the responsibility of safety and security during protests from the police to the people exercising their right to protest. This is against established regional and international standards on right to protest, most directly, guideline 101 of the African

<sup>1</sup> The main substance of the amendment is the introduction of two sub-sections immediately after sub-section (11) as below under Section 5 of the Public Order Act 1950 Cap 56 of the laws of Kenya.



Commission on Human and People's Rights *Guidelines on Freedom of Association and Assembly.*<sup>2</sup>

2. The amendments, in the offences stated, will serve to discourage people from organizing and participating in protests in fear of being sanctioned and imprisoned as stated, for largely malpractices that it wasn't in their control to mitigate, and law enforcement agencies should be in control of.
3. The broad and vague nature of the offences create a lot of room for arbitrary interpretation by the law enforcement officers, and the judiciary, therefore creating possibilities for sanctions being applied in a way that targets certain actors towards total abandonment of protests.

Clause	Provision	Proposal	Justification
11(a)	<i>A person who while at a public meeting or public procession causes grievous harm, damage to property or loss of earnings, shall be liable upon conviction to imprisonment for a term not exceeding six years or to a fine not exceeding one hundred thousand shillings, or both.</i>	<p>a. Introduce sub-section (b) to state that liability shall be personal and shall not be extended to organizer nor fellow participants of protest.</p> <p>b. Remove entirely the criminal sanctions in context of laws governing protests. Such sanctions are to be in the penal</p>	<p>a. Guideline 101 of African Commission on Human and People's Rights 2016 Guidelines on Freedom of Association and Assembly – 'Liability shall be personal. Neither organizers nor fellow participants of a public assembly shall be subjected to sanctions of any kind on the basis of acts committed by others.'</p> <p>b. Guideline 99 of African Commission on Human and People's Rights 2016 Guidelines on Freedom of Association and</p>

<sup>2</sup> Going by Article 2 of CoK 2010, and that Kenya is a signatory to the African Charter on Human and People's Rights, these guidelines are part of the legal framework for protests in Kenya.



		<p>code only.</p> <p>c. Remove entirely for lack of clarity on what harm and or damage means.</p>	<p>Assembly –  ‘States shall not impose criminal sanctions in context of laws governing assemblies. All criminal sanctions shall be specific within the penal code and not elsewhere. Assemblies shall not be governed by provisions of criminal law different from the generally applicable provisions of the penal code.’</p> <p>Having these sanctions in the Public Order Act is in direct contravention of this important guideline.</p> <p>c. Causing grievous harm, damage to property or loss of earnings not defined and are broad and vague, leaving room for arbitrary interpretation by law enforcement officers that may be used against protesters and</p>
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		<p><b>crime, for the protection of health or for the protection of the rights and freedoms of others. Any restriction of the freedom of assembly provided for must be proportionate to pursued goals and to reach the goal such a restriction must not exceed necessary and sufficient limits.”</b></p>	
Spontaneous assemblies	The law does not make provisions for spontaneous assemblies and counter demonstrations	<p>The Act should define spontaneous assemblies and make provisions for them. The definition could be, “<b>An assembly, that has been initiated and organized as a direct and immediate response to social events and which, in the opinion of participants, cannot be postponed and, as a result, for</b></p>	<p>Spontaneous assemblies take place in response to an incident or a specific event, making it impossible to comply with the formal legal requirements for advanced notification and/or where there is no formal organizer.</p> <p>Such assemblies ought to be protected by the state as long as</p>

		<p><b>which the usual notification procedure is not possible”</b></p> <p>The Act could further make an exception for such from giving prior notification to read, “<b>With the exception to spontaneous assemblies, organized peaceful assemblies and public processions may be conducted only after notifying the regulating officer as is in accordance with the provisions of the Public Order Act”</b></p>	<p>they are peaceful in nature.</p>
<p>Right of the Child to freedom of Association and right to protest.</p>	<p>The Public Order Act, does not make provision for the Right of the Child to freedom of Association and right to protest</p>	<p>The Act could add the following words, “<b>The Act recognizes the rights of the child to freedom of association and to freedom of peaceful assembly. No restrictions may be placed on the exercise of these rights</b></p>	<p>Kenya ratified the UN Convention on the right of a child in 1990. The convention makes provision for the right of the child to freedom of association and right to protest.</p>

		<p><b><i>other than those imposed in conformity with the law and which are necessary in a democratic society.”</i></b></p>	
<p>Definition, responsibilities and liabilities of the assembly organizers.</p>	<p>The Public Order Act has not defined an assembly organizer and/or clearly stated his responsibilities and liabilities.</p>	<p>The Act could define an organizer as <b><i>“A person or persons or any legal entity which organizes, holds and supervises a peaceful assembly as defined in the Act. This is to ensure that the right to freedom of association is enjoyed both by individuals and groups.”</i></b></p>	<p>The organizers of assemblies should not be held liable for failure to perform their responsibilities if they have made reasonable efforts to do so. The organizers are not to be held liable for the actions of individual participants or for the actions of non-participants or agents of provocateurs. Instead, there should be individual liability for any individual who personally commits an offence or fails to carry out the lawful directions of law-enforcement</p>

			officials in the course of protests.
The role of the Media in Protests	The Public Order Act has failed to make provisions for the role of the media during protests.	The authorities should recognize and respect the right of assembly monitors (media and civil society organizations) to observe the manner in which the assembly is policed. The Public Order Act should make provisions for the media during protests.	The role of the media as a public watchdog is to impart information and ideas on matters of public interest – information that the public also has a right to receive. Media reports can thus provide an otherwise absent element of public accountability for both organizers of assemblies and law-enforcement officials. Media professionals should, therefore, be guaranteed as much access and protection as is possible to an assembly and to any related policing operation. There should be a provision in the Act to that effect.

