

THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

A CHECKLIST FOR THE KENYAN POLICE AND THE PUBLIC



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1. What is freedom of peaceful assembly?

- Freedom of peaceful assembly is a fundamental human right. It allows persons and groups of people¹ to organize and participate peacefully together and publicly convey their positions and opinions and/or to protest and demand action by the authorities without fear of threat, harassment, intimidation, reprisal or arrest.
- It also gives persons power to gather publicly or privately and collectively express, promote, pursue and defend their common interests.
- The right includes participation in meetings, protests, strikes, sit-ins, pickets, petitions, processions, demonstrations and other temporary gatherings for a specific purpose. All of these are considered peaceful assemblies. The State has the obligation to respect, protect and fulfill the rights of those peacefully assembled (including by protecting them from third parties, e.g. agents, provocateurs or violent elements).

2. What does the Constitution say on freedom of peaceful assembly?

- Article 37 of the Constitution of Kenya provides for freedom of peaceful assembly and states that ‘every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities’.
- This right can only be ‘limited by law, and then only to the extent that the limitation is reasonable, justifiable in an open and democratic society’².
- Under the Public Order Act, an assembly may be stopped or prevented when there is clear, present or imminent danger of a breach of the peace or public order. Under international law, restrictions may only be placed “in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others³” and must be lawful, necessary and

¹ This includes individuals, groups, unregistered and registered associations, legal and corporate entities.

² Art 24 (1) Constitution of Kenya

³ Article 21 of the International Covenant on Civil and Political Rights

proportionate to the aim pursued⁴. International standards require open dialogue and transparency between the police and assembly organizers on any proposed restrictions. The latter should be put in writing, justified and communicated to the organizers⁵.

- The proper management of peaceful assemblies calls for the protection of a broad range of rights by everyone involved. This includes freedom of opinion and expression; freedom of association; freedom of thought, conscience, religion or belief; the right to life, bodily integrity (which includes the right to security), the right to be free from torture and cruel, inhumane and degrading treatment or punishment, and the rights to due process, fair trial, and effective remedy for human rights violations.

3. How can law enforcement officers effectively facilitate an assembly?

- Authorities are first and foremost required to facilitate assemblies. States should plan properly for assemblies, ensure decision-making is transparent, and put in place contingency plans and precautionary measures.
- Law enforcement officers should establish dialogue with the organizers regarding safety or security measures, and to create mutual understanding and reduce possible tensions. Use of tact and patience, while consistently and evenly applying the rules, are the most important elements of dealing with the public to facilitate peaceful protesting and prevent violence.⁶
- Officers should avoid threatening body language, confrontational appearances or the display of weapons or other equipment such as riot gear in a way that could be perceived as intimidating organizers and participants of an assembly.
- Facilitating assemblies entails offering protection throughout the route to be used by assemblers and protecting protestors from violent and criminal elements.

⁴ A/HRC/31/66, para 29

⁵ See A/HRC/31/66, para. 36 (b) and A/HRC/RES/31/37 (adopted by the Human Rights Council on 24 March 2016, including with a vote in favour by Kenya).

⁶ Chapter 51 (11) of Police Service Standing Orders

4. Do peaceful assemblies need authorization?

- Freedom of peaceful assembly is a right and as such organising an assembly should not be subject to prior authorization by the authorities. However, State authorities may request prior notification of the event. Where a system of prior notification is in place, which is the case in Kenya, there should be a presumption in favour of assemblies and their peacefulness.
- Kenyan law states that a regulating officer ⁷ has to be notified of an intended public assembly ⁸ at least 3 and at most 14 days before it is due to take place. A regulating officer can deny the assembly only if notice of another assembly at the same venue, time and date has already been received. ⁹ The notification of denial shall be in writing and shall be delivered to the organizer at the physical address specified. ¹⁰ Under international law, standards and best practices, the purpose of system of prior notification is to allow State authorities an opportunity to facilitate the exercise of assembly rights, to take measures to protect public safety and/or public order and to protect the rights and freedoms of others. Notification procedures should not function as a de facto request for authorization or as a basis for content-based regulation. Notification should not be expected for assemblies that do not require prior preparation by State authorities, such as those where only a small number of participants is expected, or where the impact on the public is expected to be minimal.¹¹

5. What about spontaneous assemblies?

- A spontaneous assembly takes place in response to an incident or a specific event, making it impossible to comply with the formal legal requirements for advance notification and/or where there is no formal organizer.

⁷ Section 2 Public Order Act: Regulating officer is the officer in charge of the police station in the area where the assembly is to take place or where it is to end.

⁸ Section 5 (2) Public Order Act

⁹ Section 5 (4) Public Order Act

¹⁰ Section 5 (5) public Order Act

¹¹ See A/HRC/31/66 para 21

- Spontaneous assemblies by definition cannot be subject to prior notification and international standards provide that they should exempt from notification requirements¹². Law enforcement authorities should protect and facilitate spontaneous assemblies as they would for any other assembly¹³.

6. What is the role of assembly organizers?

- Assembly organizers need to notify the authorities of an assembly in advance¹⁴ (read in conjunction with point n.4);
- They need to be present throughout the event;¹⁵
- They shall assist the police to maintain peace and order at the event¹⁶ and may appoint marshals.
- No person should be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest.

7. Can organizers be held accountable for violence committed during an assembly?

- While organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, they should not be held responsible criminally, civilly or administratively for the unlawful behaviour of others.¹⁷ Liability should be personal, that is against the person who committed the criminal acts.

¹² See European Court of Human Rights, *Bukta v. Hungary*, application No. 25691/04, 17 July 2007; A/HRC/22/28, para. 45

¹³ See A/68/299, para 22

¹⁴ Section 5 (2) Public Order Act

¹⁵ Section 5 (7) Public Order Act

¹⁶ Section 5 (7) Public Order Act; International standards (A/HRC/31/66, para. 49 (f)) provide that law enforcement should cooperate with marshals/stewards where organizers choose to arrange them for an assembly. Authorities should not require organizers to provide marshals/stewards.

¹⁷ See A/HRC/20/27, para. 31, and A/HRC/23/39, para. 78

8. What is the role of protestors?

- Demonstrate peacefully: they are not allowed to be armed ¹⁸ or to commit acts of violence against private citizens or state agents. It is an offence for any person to carry or possess any offensive weapon during an assembly ¹⁹.
- Avoid damaging public and private property.²⁰

9. What is the responsibility of police during assembly?

- Facilitate: It is important to identify the organizers' goals and to consider how to best organize the policing of the assembly in such a way that these goals can be met. It is also important to establish mutual trust between police and organizers of an assembly.
- Communicate: “No surprises” is the key term in regards to communication in the context of policing assemblies.²¹ Lines of dialogue between police and participants, at different levels and functions, should be established and kept open at all stages of the assembly. Police must always communicate clearly decisions and actions that are taken. Social media has proven to be one effective way of communicating such messages. Communication assists in fostering trust and confidence.
- Differentiate: Police should differentiate between individual participants on the basis of their behavior rather than on the basis of what group they belong to. Indiscriminate interventions must be avoided.
- Crowd Management: Police must proactively work towards helping to defuse tension and preventing dangerous escalations of the situation through interaction and dialogue. However, such engagement should never be used as a pretext to request the dispersal or the cancellation of the assembly. Police should engage with assembly organizers in an open manner with a view to finding common solutions to concerns raised by one another.

¹⁸ Art. 37 Constitution of Kenya and Section 6 of the Public Order Act

¹⁹ Section 6 (1) Public Order Act

²⁰ Damage to property is an offence liable to imprisonment of not more than 5 years (Section 96 of the Penal Code)

²¹ OSCE, Human Rights Handbook on Policing Assemblies, 2016, p. 26, 87.

- Maintain security and order: ²² This includes apprehending violent individuals; protecting protesters against persons who wish to disrupt or obstruct protest, such as agents provocateurs and counter-demonstrators.
- Protecting media and observers: Police should proactively engage with journalists and other observers before, during and after the public assemblies,²³ including by holding briefings where command officials explain how crowd control will be conducted. Such briefings should also explain the channels of communication for police, journalists and civil society observers/monitors.²⁴ A good practice is to establishing a safe area for journalists and monitors during public assemblies where they will be given information and will be able to observe the event.²⁵ Monitors and journalists should however not be restricted to this area.
- Protection of potentially vulnerable participants: Police must always assess if children, persons with disabilities or other persons in vulnerable situations are at the assembly and take necessary precautions in carrying out their duties during maintenance of public order.²⁶

10. What if a protestor turns violent?

- Under Kenyan law, violent protesters can be arrested for breach of peace ²⁷; they must be taken to court within 24 hours of their arrest²⁸ .
- Arrested and/or detained protesters must be treated in a humane manner and with respect for their rights and dignity ²⁹ as per the law ³⁰. They must not be subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Even if participants of an assembly are not peaceful and as a result forfeit their right to peaceful assembly, they retain all their other rights.

22 Section 54 (b) The National Police Service Act

23 A/HRC/31/66, para. 72 (b).

24 UNESCO, Freedom of Expression and Public Order - A Training Manual, p. 130, available from: <http://unesdoc.unesco.org/images/0023/002313/231305e.pdf>

25 UNESCO, 'Freedom of Expression and Public Order – A Training Manual', p.130

26 See Code of Conduct for Law Enforcement Officials, article 2

27 Section 94 of the Penal Code

28 Art. 49 (1)(f) of the Kenyan Constitution

29 See Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

30 Article 49 of the Kenyan Constitution

11. If some protesters become violent, does this make the assembly unlawful?

- If some protesters become violent, this does not make the entire assembly unlawful.³¹
- Police should isolate and arrest violent protesters and protect the right to peaceful assembly of others by letting the assembly continue as long as they remain peaceful.

12. What is the obligation of the police when using force³²?

- Force should only be used as a last resort, when all other methods of crowd control have failed.
- A police officer must always attempt to use non-violent means first³³. There are examples of positive police interventions that were instrumental in defusing tensions. For instance in 2007/8, police officer Joseph Musyoka Nthenge employed dialogue and negotiations four times to extinguish possible violent flare-ups³⁴. The policeman reasoned with an angry mob of demonstrators, and successfully convinced them to stop the destruction.
- A police officer must always attempt to de-escalate the situation before resorting to the use of force. In tense situations, a good practice is to “slow down” the situation to enable the police involved to think through tactics and not be provoked into situations that may escalate out of control.³⁵ In some situations, a tactical withdrawal may be considered.
- Force may only be used within the parameters of the law and when

31 A/HRC/31/66, para. 9

32 Sixth schedule, National Police Service Act

33 Sixth schedule, National Police Service Act

34 Mr. Nthenge was in charge of a unit of the paramilitary General Service Unit (GSU) assigned to patrol a part of the city which was smoldering with tension and violence. On December 29, 2007, the unit encountered a mob of angry young men marching towards the city centre, protesting the delay in announcing the presidential results (<https://kenvirenews.wordpress.com/2008/10/24/post-poll-skirmishes-un-honours-kenya-gsu-police-officer/>).

35 Police Executive Research Forum, An Integrated Approach to De-Escalation, and Minimizing Use of Force, August 2012. Available at http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%20approach%20to%20de-escalation%20and%20minimizing%20use%20of%20force%202012.pdf

non-violent means have proved ineffective.³⁶ If necessary, officers must be appropriately protected with equipment such as shields, helmets and stab- or bulletproof jackets, as this will decrease the need to use weapons³⁷.

- A clear and transparent command structure must be established to minimize the risk of violence or the use of force and to ensure accountability for unlawful acts committed by police officers.
- Protocols should be established, with clear guidance on when and under what circumstances law enforcement officers can use force, use fire arms, before, during or after assemblies,³⁸
- Officers' actions must be guided by the principles of precaution, legality, necessity and proportion:
 - **Precaution** requires that all feasible steps are taken in planning and conducting a police operation to avoid use of force or, where force is unavoidable, to minimize its harm.
 - **Legality** requires that States develop a domestic legal framework for the use of force that complies with international standards³⁹.
 - **Necessity** demands that the lowest possible level of force necessary to achieve a legitimate objective should be used.
 - Force used must be **proportional** to the objective (why it is being used), seriousness of the offence, and level of resistance of the person against whom it is being used. It should be used only when absolutely necessary and in accordance to the 6th schedule of the National Police Act and Service Standing Orders.
- Tools such as tear gas and water cannons by design tend to be indiscriminate methods for crowd control and must be used only if necessary and in a proportionate manner. Special care should be taken not to use them if uninvolved bystanders are nearby or in places with vulnerable populations such as schools. Safe distance should be maintained when firing tear gas.
- Where injuries occur as a result of force, medical assistance must be provided immediately and close relatives or friends of the injured person must be informed.

³⁶ Sixth schedule, National Police Service Act

³⁷ See A/HRC/31/66, para 54

³⁸ OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, para. 161.

³⁹ A/HRC/26/36, para. 56; A/HRC/31/66, para. 51

- Where force results in death or serious injury, it must be reported immediately to the officer in charge, his/her superior and to the Independent Policing Oversight Authority.
- Proper records must be kept of decisions made by commanding officers at all levels.
- Law enforcement officials must be clearly and individually identifiable, for example by displaying a nameplate or number to avoid blanket accusations against the police.
- There should be a clear system of record keeping or register of the equipment provided to individual officers in an operation, including vehicles, firearms and ammunition, all of which must be accounted for at all times.

13. Can police disperse an assembly?

- Dispersing an assembly carries the risk of violating the rights to freedom of expression and to peaceful assembly as well as the right to bodily integrity. Dispersing an assembly also risks escalating tensions between participants and law enforcement. For these reasons, it must be resorted to only when strictly unavoidable.
- International law allows for dispersal of a peaceful assembly only in exceptional circumstances. For example, a peaceful assembly that incites discrimination, hostility or violence⁴⁰ may warrant dispersal if less intrusive means of managing the situation have failed. Similarly, while some inconvenience to others⁴¹ or temporary disruption of traffic should be tolerated, where an assembly prevents access to essential services (e.g. blocking an emergency entrance to a hospital), or where interference is serious and sustained (e.g. a major highway being blocked for days), dispersal may be justified. Failure to notify authorities of an assembly cannot be a basis for its dispersal⁴².
- Dispersal of an assembly may also be considered where violence is serious, widespread and represents an imminent threat to safety or property of others, and where law enforcement officials have

⁴⁰ Such assemblies are in contravention of article 20 of the International Covenant on Civil and Political Rights.

⁴¹ See Inter-American Commission on Human Rights, Report on Citizen Security, para. 198

⁴² A/HRC/31/66, para. 61

taken all reasonable measures to facilitate the assembly and protect participants from harm. Before dispersing an assembly, law enforcement agencies should try and identify and isolate any violent individuals from the main assembly and differentiate between violent individuals in an assembly and other participants. This may allow the assembly to continue peacefully.

- If dispersal is deemed necessary, the assembly and participants should be clearly and audibly informed, and should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further.

14. When can a police officer use firearms in managing an assembly (see also point 12)⁴³ ?

- Firearms should never be used to disperse an assembly. Indiscriminate firing into a crowd is always unlawful.⁴⁴
- A police officer may use a firearm only when all other means have proven inadequate, and only for the purposes of saving or protecting the life of the officer or other persons and in self-defense or in defense of other person against imminent threat of life or serious injury⁴⁵.
- A police officer shall make every effort to avoid the use of firearms, especially against children.
- Lethal force cannot be used to defend property.⁴⁶ If violent protesters engage in looting, they must be confronted with non-lethal means.
- The officer must identify him/herself and give clear warning (proclamation) of the intention to use the firearm, except where it would place the officer or another person at risk of death or serious harm.

⁴³ Sixth schedule, National Police Service Act

⁴⁴ A/HRC/26/36, para. 75; A/HRC/31/66, para. 60

⁴⁵ Sixth schedule, National Police Service Act

⁴⁶ A/HRC/26/36, para. 72; UNODC/OHCHR Resource book on the use of force and firearms in law enforcement, 2017, page 24

15. What should be the minimum content of domestic regulations on the use of firearms by law enforcement officials?

- Such regulations should, at minimum,
- Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty⁴⁷.

16. What is the State's obligation if there are allegations of human rights violations during assemblies?

- Any human rights violation or abuse in the context of managing assemblies by police forces must be investigated promptly, thoroughly and impartially. Victims should be provided with access to a remedy and redress for such violations and abuses through judicial, oversight body or other national mechanisms, based on law in conformity with their international human rights obligations and commitments.
- Any use of firearms in the performance of duty should be reported.
- It should not be permitted to modify or disassemble firearms as it must be possible to trace who fired a gun.
- Liability should also extend to officers with command control where they have failed to exercise effective command and control.

⁴⁷ Sixth schedule, National Police Service Act

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