

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

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

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.