

UNDER THE POLITICAL MICROSCOPE: THE RIGHT TO PEACEFUL  
ASSEMBLY

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Degree

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By

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**DECLARATION**

I, KATEE SALLY MUENI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

Ms. Emma Senge

## **ABSTRACT**

Freedom of peaceful assembly is a fundamental human right that can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. This right allows individuals to publicly convey their positions and opinions without fear of threat, harassment, intimidation, reprisal or arrest. The state has an underlying obligation to put in place adequate mechanisms and procedures that ensure the freedom of peaceful assembly is practically enjoyed and not subject to undue bureaucratic regulation. The right to freedom of peaceful assembly is often exercised by way of protests, strikes, sit-ins, pickets, petitions, processions and demonstrations. Peaceful assemblies serve many purposes, including the expression of diverse, unpopular, minority opinions and sometimes they may be used to serve a political agenda. Unfortunately, most of the political assemblies that have been held in Kenya result in outbreaks of violence. In the wake of these events, numerous lives are lost and a lot of property is destroyed. The constant abuse of power by regulatory authorities has also been a serious bone of contention when addressing the nature of political assemblies in Kenya. This research seeks to establish the nature of political assemblies in Kenya and the proportionality of legal restrictions imposed by the regulatory authorities and the law.

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Finally, I want to thank the Lord Almighty because that's who I look up to. He has graced my life with opportunities that I know are not of my hand or any other human hand.

## **DEDICATION**

This Research paper is dedicated to the numerous Kenyans who have not been afforded the opportunity to understand their right to peaceful assembly. This paper is also dedicated to the numerous Kenyans whose lives have been affected by various violations of their right to peaceful assembly.



## **LIST OF ABBREVIATIONS**

1. **NASA** - National Super Alliance.
2. **KNCHR** - Kenya National Commission on Human Rights.
3. **NCIC** - National Cohesion and Integration Commission.
4. **IEBC** - Independent Electoral and Boundaries Commission.
5. **GSU** - General Service Unit.
6. **MP** - Member of Parliament.
7. **UN** – United Nations.
8. **UNHRC** - United Nations Human Right Council.
9. **CSO** – Civil Society Observer.
10. **EU** – European Union.
11. **OCPD** – Officer Commanding Police Division.

## **LIST OF CASES**

1. Austin & Others v The UK [ECHR] 2012
2. Boniface Mwangi v Inspector General of Police & 5 Others [2017] eKLR.
3. Eugene Wamalwa v Minister for State for Internal Security & Another [2011] eKLR.
4. Ferdinand Ndung'u Waititu & 4Others V Attorney General & 12 Others [2016] eKLR.
5. South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town Intervening; Freedom of Expression Institute as Amicus Curiae) [2012] ZACC 13
6. Wilson Olal & 5 Others v Attorney General & 2 Others [2017] eKLR.

## **LIST OF LEGAL AND INTERNATIONAL INSTRUMENTS**

1. The Constitution of Kenya.
2. The Penal Code of Kenya.
3. The Public Order Act.
4. The National Police Service Standing Orders..
5. The National Police Service Act of Kenya.
6. The United Nations Declaration of Human Rights.
7. International Covenant on Civil and Political Rights.

# **CHAPTER ONE**

## **1.1 INTRODUCTION**

Citizens are increasingly turning to mass protests and assemblies to address grievances that they have faced and are still facing as a result of poor administration.<sup>1</sup>The right to peaceful assembly is a constitutional guarantee, catered for in article 37 of the Kenyan constitution. This is a right that is also largely recognized by the international community.

With close reference to the on-going political stalemate in the country, it was not too long ago that the National Super Alliance (NASA) leaders, called for countrywide demonstrations to stop the repeat presidential election that was held on 26th October 2017.<sup>2</sup> As these demonstrations were on-going, there was a turn towards violence and this called for intervention by the police, due to the lack of order and peace that disrupted normalcy in the country.<sup>3</sup> It was during this intervention that a lot of lives were lost and a lot of property was destroyed.<sup>4</sup>

A report by the KNHCR indicates that intervention by the police always results in gross violation of human rights.<sup>5</sup> The 2007 post-election violence serves as a perfect example of these human rights violation. Shortly after 2007 election, within minutes of the announcement of the former President, Mwai Kibaki's victory, protestors took to the streets alleging that Kibaki had rigged the election and "stolen" votes.<sup>6</sup> These protests soon turned violent. The protests were banned and police moved to quash the unrest.<sup>7</sup> These protests continued for some time. As many as 1,400

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<sup>1</sup> Voices in the streets, Mass Social Protests and the Right to peaceful Assembly, 12 Country Special Report, Freedom House, January 2015.

<sup>2</sup> Benjamin Muriuki, NASA to hold countrywide demos on October 26, Citizen Digital, October 18, 2017. <https://citizentv.co.ke/news/nasa-to-hold-countrywide-demos-on-october-26-raila-178991/> Accessed on 1<sup>st</sup> March 2018

<sup>3</sup> Benjamin Muriuki, NASA to hold countrywide demos on October 26, Citizen Digital, October 18, 2017. <https://citizentv.co.ke/news/nasa-to-hold-countrywide-demos-on-october-26-raila-178991/> Accessed on 1<sup>st</sup> March 2018

<sup>4</sup> <https://www.hrw.org/news/2017/08/27/kenya-post-election-killings-abuse> Accessed on 1st March 2018

<sup>5</sup> <http://www.chrips.or.ke/commentary/kenya-election-violence-and-the-police-response/> Accessed on 1<sup>st</sup> March 2018

<sup>6</sup> James Brownsell, Kenya: What went wrong in 2007, Dismissing the violence that followed Kenya's previous election as mere 'tribalism' is too simplistic an explanation, Aljazeera News (US & CANADA), 3rd March 2013, <https://www.aljazeera.com/indepth/features/2013/03/201333123153703492.html> Accessed on 1<sup>st</sup> March, 2018.

<sup>7</sup> Brownsell, Kenya: What went wrong in 2007, Dismissing the violence that followed Kenya's previous election as mere 'tribalism' is too simplistic an explanation

people died in the span of 59 days, while 600,000 people were displaced from their homes.<sup>8</sup> The state of affairs in the country at the time led to the killing of 115 people in Kisumu as police used live ammunition unnecessarily to quell the riots.<sup>9</sup> These killings were never adequately investigated or prosecuted.<sup>10</sup>

Another recent example of these violations of human rights was when the Kenyan police used batons to forcibly move protesters, including civil society activists, who brought live pigs to parliament to protest parliamentarians' efforts to raise their own salaries.<sup>11</sup> In May 2013, riot police hit protesters and fired tear gas to disperse the crowd, which had marched from Nairobi's Freedom Corner.<sup>12</sup> The protestors released a pig and about a dozen piglets outside parliament to show their anger at newly elected MPs demanding higher salaries.<sup>13</sup>

The aforementioned scenarios are an increasingly common narrative in Kenya that displays most politically affiliated assemblies as violent insurgencies, sporadic violence and even crimes against humanity.<sup>14</sup> Political assemblies in Kenya often tend to manifest themselves as widespread or systematic attacks that are directed against one another or certain group of people.<sup>15</sup> Deportation and forceful transfer of population have long been results of these violent outbreaks in political assemblies.<sup>16</sup>

As a result of the unwarranted violation of human rights and the continuous abuse of power by the police, there is a need to understand the nature of the right to peaceful assembly and the restrictions that come with it. Therefore, this paper examines the legal framework of the right to peaceful assembly in Kenya in close conjunction with the administration of this right, especially regarding

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<sup>8</sup> Brownsell, Kenya: What went wrong in 2007, Dismissing the violence that followed Kenya's previous election as mere 'tribalism' is too simplistic an explanation.

<sup>9</sup> Brownsell, Kenya: What went wrong in 2007, Dismissing the violence that followed Kenya's previous election as mere 'tribalism' is too simplistic an explanation.

<sup>10</sup> Brownsell, Kenya: What went wrong in 2007, Dismissing the violence that followed Kenya's previous election as mere 'tribalism' is too simplistic an explanation.

<sup>11</sup> Kenya's Nairobi city hit by pig protest over MPs pay, BBC NEWS AFRICA, 14th May 2013 <http://www.bbc.com/news/world-africa-22522846> Accessed on 2nd March 2018.

<sup>12</sup> Kenya's Nairobi city hit by pig protest over MPs pay, BBC NEWS AFRICA, 14<sup>th</sup> May 2013.

<sup>13</sup> Kenya's Nairobi city hit by pig protest over MPs pay, BBC NEWS AFRICA, 14<sup>th</sup> May 2013.

<sup>14</sup> Kenya West, Mass Action Misconceptions in Kenya, A Civil Right Criminalized, August 23, 2017. <https://www.kenyainsights.com/mass-action-misconceptions-in-kenya-a-civil-right-criminalized/> accessed on 9th February 2018.

<sup>15</sup> Kenya West, Mass Action Misconceptions in Kenya, A Civil Right Criminalized, August 23, 2017. <https://www.kenyainsights.com/mass-action-misconceptions-in-kenya-a-civil-right-criminalized/> accessed on 9th February 2018.

<sup>16</sup> Kenya West, Mass Action Misconceptions in Kenya, A Civil Right Criminalized.

political forums. Off the bat, there are two things that are clear, political demonstrations in Kenya are highly prone to violence and the regulatory authorities often abuse their powers by using lethal force against opposition supporters or demonstrators. The author attempts to succinctly trace the links between violent outbreaks and violation of human rights in politically affiliated assemblies.

## **1.2 STATEMENT OF THE PROBLEM**

All assemblies, gatherings, strikes and demonstrations are meant to be peaceful.<sup>17</sup> However, this is not the case in Kenya, as regards the political assemblies. The electoral process in Kenya stands at the forefront when looking at scenarios of violence outbreaks in peaceful assemblies.<sup>18</sup> Political assemblies often result in violence, creating a picture of angry lawless opposition engaging in jungle justice.<sup>19</sup> In 2007, the outbreaks of violence in political demonstrations claimed the lives of more than 1,000 people and left more than 500,000 displaced from their homes.<sup>20</sup> Despite a predominantly peaceful electoral process in 2013, the 2017 electoral process largely involved violent protests and disruptions of normalcy in most areas of the country.<sup>21</sup>

The Presidential election on August 8, 2017 was marred by serious human rights violations, including unlawful killings and beatings by police during protests and house-to-house operations in the Western parts of Kenya and least 12 people were killed and over 100 badly injured.<sup>22</sup> Unfortunately, in all the instances of violence outbreaks in political assemblies in Kenya, intervention by police leads to the use of excessive force and violation of human rights.<sup>23</sup>

Martin Luther King Junior once said that:

*“We must not allow our creative protest to degenerate into physical violence.”*

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<sup>17</sup> The Right to Freedom to Peaceful Assembly, a Checklist for the Kenyan Police and the Public, Kenya National Commission on Human Rights. <http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 25th February 2018.

<sup>18</sup> Kenya West, Mass Action Misconceptions in Kenya, A Civil Right Criminalized.

<sup>19</sup> Kenya West, Mass Action Misconceptions in Kenya, A Civil Right Criminalized.

<sup>20</sup> Canter for Human Rights and Policy Studies (CHRIPS), Commentary on Kenyan Election and the Police response, <http://www.chrips.or.ke/commentary/kenya-election-violence-and-the-police-response/> Accessed on 1st March 2018.

<sup>21</sup> Canter for Human Rights and Policy Studies (CHRIPS), Commentary on Kenyan Election and the Police response.

<sup>22</sup> Canter for Human Rights and Policy Studies (CHRIPS), Commentary on Kenyan Election and the Police response.

<sup>23</sup> Canter for Human Rights and Policy Studies (CHRIPS), Commentary on Kenyan Election and the Police response.

It is therefore, in that accord that this paper seeks to establish the meaning of the right to peaceful assembly. In addition to, this paper seeks to enquire into the “use of force” in peaceful assemblies.

### **1.3 STATEMENT OF OBJECTIVES**

The main objective of the study is to debunk the meaning of the right to peaceful assembly and thoroughly examine the use of force in peaceful assemblies.

This study will also focus on the following specific objectives:

- a) To analyse the nature of political assemblies in Kenya and the proportionality of legal restrictions imposed by the regulatory authorities and the law.
- b) To understand the liability of the state when the rights of participants are violated as a result of bureaucratic action.
- c) To establish the cause of violence in political assemblies in Kenya
- d) To recommend ways in which the right to peaceful assembly can be enjoyed and regulated without the active violation of other basic human rights.

### **1.4 HYPOTHESES**

Common assumptions reveal that:

- a) There is heavy division and ethnic polarization of the Kenyan communities.
- b) Politicians use ethnicity for their personal gain and create a divide that breeds tribalism.
- c) Hate speech and incitement is often orchestrated by the politicians, the local elites and the media.
- d) Ethnicity, tribalism, hate-speech and incitement heavily contribute to the violence in political assemblies.

### **1.5 RESEARCH QUESTIONS**

The study intends to answer the following research questions:

- a) What is the legal test to be applied when establishing an abuse or misuse of power by regulatory agencies when controlling violent assemblies?
- b) What is the cause, effect and legal implication of violence in peaceful assemblies?
- c) How can the right to peaceful assembly be regulated without the active violation of other basic human rights?

## **1.6 LITERATURE REVIEW**

Maina Kiai (2012), in a UNCHR report beautifully described an assembly as, “an intentional yet temporary gathering in a private or public space for a specific purpose which includes demonstrations, inside meetings, strikes, processions, rallies, or even sits-in that play a vibrant role in mobilising the population, formulating grievances, aspirations and lastly, facilitating the celebration of events and influencing public policy.”<sup>24</sup> It is important take note of the fact that, the year 2011 was widely viewed as an year of mass social protest around the world.<sup>25</sup> People took to the streets to voice their grievances and aspirations in the unexpected Arab Spring, the anti-austerity backlash in Europe, and the occupation of public spaces and financial districts in the United States.<sup>26</sup> Assemblies and protests are and still continue to be a very important part of our lives.

In Kenya, assemblies are greatly associated with politics.<sup>27</sup> Political assemblies are however prone to violence and the causes of this violence are unknown. Dissatisfaction with election results has often been the cause of violence in political assemblies.<sup>28</sup>

Machira (2010), postulates that since 1992 Kenya general elections have been characterized by sporadic violence and ethnic conflicts.<sup>29</sup> He says that there were no free and fair elections in Kenya as there were manipulations from all quarters struggling to ensure political dominance.<sup>30</sup> Other causes of violence in political assemblies have been attributed to ethnic polarization.<sup>31</sup>

Richard Jenkins examined the concept of ethnicity beyond Africa looking at the way in which it is understood and its significance<sup>32</sup>. Jenkins examines the debates on whether any such

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<sup>24</sup>Maina Kiai, United Nations Human Right Council Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 21 May 2012.

<sup>25</sup> Voices in the streets, Mass Social Protests and the Right to peaceful Assembly, 12 Country Special Report, Freedom House, January 2015.

<sup>26</sup> Voices in the streets, Mass Social Protests and the Right to peaceful Assembly.

<sup>27</sup> Voices in the streets, Mass Social Protests and the Right to peaceful Assembly.

<sup>28</sup> <http://aceproject.org/electoral-advice/archive/questions/replies/438369727> accessed on 26th March 2018.

<sup>29</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008, Thesis Submitted to The School of Humanities and Social Sciences in Partial Fulfilment of The Requirements for The Award of The Degree of Master of Arts of Kenyatta University, July 2015

<sup>30</sup> Sheila Gakii Mwiandi, Political Violence and Ethnicity in Kenya, University of Nairobi Faculty of Arts Department of Political Science, A Research Proposal Submitted in Partial Fulfilment of The Requirement for The Award of Post Graduate Diploma in Strategic and Security Studies in The Department of Political Science, , October 2014.

<sup>31</sup> Sheila Mwiandi, Political Violence and Ethnicity in Kenya, October 2014.

<sup>32</sup>. Sheila Mwiandi, Political Violence and Ethnicity in Kenya, October 2014.



categorization as ‘ethnic group ‘actually exists and if ‘ethnicity’ matters. Jenkins argued that ethnicity does exist and it is a social construct.<sup>33</sup> He argued that our conceptualization of ethnicity should continue to be re-examined in the face of changing social contexts.<sup>34</sup>

Edward Miguel notes that ethnic identities remain a salient aspect of identity in Africa. Miguel puts across the argument that explains that this saliency comes from ethnicity reflecting traditional loyalties to kith and kin. The connection between ethnicity and blood links indicates that it is not an aspect of identity that can easily be overcome.

Jean-François Bayart further established in his works postulates that, in the contemporary African states, ethnicity mainly exists as the mechanism for accumulating wealth and political power.<sup>35</sup> In this sense, control of the state is core to political competition because it means access to and disposal of resources and patronage through which ethnic elites can remain in power.<sup>36</sup>

Where the Kenyan context is concerned, these points of view become an important point of reference. This is mainly because when analysing the causes of violence in political assemblies in Kenya, key features of the violence can be traced back to different ethnic communities constantly engaging in conflict.<sup>37</sup> The issue of loyalty and allegiance to ethnic communities as postulated by Edward Miguel ideally comes into play.<sup>38</sup> In the quest to achieve political dominance, politicians have been known to mislead the public.<sup>39</sup>

Prior to the 2017 elections, the National Cohesion and Integration Commission (NCIC), publicly gave warning to politicians who would be found inciting members of their public to violence during the electoral period.<sup>40</sup> This warning came a day after the European Union (EU) election observers and the Kenya National Commission on Human Rights (KNCHR) had issued a prior warning.<sup>41</sup>

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<sup>33</sup>Sheila Mwiandi, Political Violence and Ethnicity in Kenya, October 2014.

<sup>34</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008

<sup>35</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>36</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>37</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>38</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>39</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>40</sup> Fred Mukinda, Electoral violence likely in a month's time, NCIC warns, Online Daily Nation, Wednesday 5<sup>th</sup> July 2017, <https://www.nation.co.ke/news/politics/Poll-violence-likely-in-a-month--NCIC-warns-/1064-4000446-orf4ar/index.html> Accessed on 8<sup>th</sup> March, 2018.

<sup>41</sup> Fred Mukinda, Electoral violence likely in a month's time, NCIC warns, Online Daily Nation.

NCIC vice-chairperson, Irene Wanyoike, during a press conference revealed that,

*“There is a serious risk of violence because politicians are beating the drums of war but we can stop this if all of us discharge our responsibilities as required under the law,”*

Among the things NCIC has flagged as the causes of violence in political related assemblies are widening ethnic and political polarization and increased use of inflammatory language characterized by inter- and intra-ethnic profiling by the political class and their supporters.<sup>42</sup>

Other scholars have associated the causes of violence with economic factors.<sup>43</sup> Economic factors are particularly acute when they are associated with patterns of discrimination between groups.<sup>44</sup> Economic factors in this case refer to land injustices, landlessness, squatter problem, forceful displacement of persons, unsecure land ownership, competition over land use e.g. farming and pastoralism or indigenous people disputing with the wildlife and forest service, land resettlement problems, inequality based on distribution of economic resources and opportunities.<sup>45</sup> The presence of such economic injustices have been known to agitate individuals and drive them to violence. In Kenya, on countless occasions, we have seen assemblies turn violent, on the mere account of dissatisfaction with economic status/situation.<sup>46</sup>

However, this isn't the only issue that comes into play when discussing the cause of violence in political assemblies. Violence or any form of unrest in political assemblies has a ripple effect that leads to the use of lethal force by state actors. The Kenyan Penal Code describes force as a lawful method of dispersing a protest after dispersal orders and other means have failed.<sup>47</sup> Jones et al 2017; MSJC 2017; van Stapele 2016 explore the persistent use of illegal force by police against citizens revealing the extent to which law enforcement practices are predisposed to for excessive and more often than not, illegal violence.<sup>48</sup> This study attempts to complement existing literature by defining, acknowledging and highlighting on the current state of affairs regarding the right to peaceful, violence and the use of force. In addition to, this study attempts to examine the possibility

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<sup>42</sup> Fred Mukinda, Electoral violence likely in a month's time, NCIC warns, Online Daily Nation.

<sup>43</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>44</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>45</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nauru 1992-2008

<sup>46</sup> Osman Omar Mohamed, Election Violence in Kenya: A Case Study of Nakuru 1992-2008.

<sup>47</sup> Section 82, The Penal Code, The Penal Code of Kenya, CAP 63, 2009.

<sup>48</sup> Mutuma Ruteere, Policing Protests in Kenya, Centre for Human Rights and Policy Studies, 2019,

<https://www.chrips.or.ke/wp-content/uploads/2019/08/CHRIPS-Policing-Protests-in-Kenya-full-book.pdf> Accessed 25<sup>th</sup> October, 2019.

of the enjoyment of the right to peaceful assembly uninterrupted by violence and the use of lethal force by state actors.

## **1.7 THEORETICAL FRAMEWORK**

Since time immemorial, theories have been used as the conceptual basis for understanding, analysing or even designing ways to investigate relationships within various social systems.<sup>49</sup> Right off the bat, when discussing the ideologies behind the right to peaceful assembly, there is a prima facie assumption that some theories cannot be ignored. The Liberalism theory, the Social Contract theory and the theory of Justice, in my personal opinion, are theories that can be used to contribute heavily in discussions relating to the right to peaceful assembly.

### **1.7.1 LIBERALISM THEORY**

Liberalism is an expansive concept that carries a variety of meanings. Liberals have typically maintained that humans are naturally in a state of perfect freedom to order their actions, as they think fit, without asking leave, or depending on the will of any other man.<sup>50</sup> Liberals embraces a number of principles that mainly advocate for freedom and equality.<sup>51</sup> These principles support the ideologies of freedom of speech, freedom of the press, freedom of religion, free markets and civil rights. According to John Locke, individual liberty is believed to be a natural right.<sup>52</sup> Bentham on the other hand uses the utilitarian approach to state that each individual is the best judge of his or her interests.<sup>53</sup>

There is a vast array of literature discussing the theory of Liberalism. However, for the purposes of this paper, the position of John Stuart Mill is of great importance. John Stuart Mill looks at the concept of individual freedom in regards to history and the state.<sup>54</sup> In his book “On Liberty,” Mill relies on the idea that society progresses from lower to higher stages and that this progress

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<sup>49</sup> Organizing Your Social Sciences Research Paper: Theoretical Framework, Research Guides, University of South California, <http://libguides.usc.edu/writingguide/theoreticalframework>, Accessed 23<sup>rd</sup> November, 2018.

<sup>50</sup> Liberalism, Stanford Encyclopaedia of Philosophy, Nov 28, 1996; substantive revision Mon Jan 22, 2018.

<sup>51</sup> Liberalism, Stanford Encyclopaedia of Philosophy, Nov 28, 1996.

<sup>52</sup> Liberalism, Stanford Encyclopaedia of Philosophy, Nov 28, 1996.

<sup>53</sup> Jim Powell, John Locke: Natural Rights to Life, Liberty, and Property, 1<sup>st</sup> August 1996.

<https://fee.org/articles/john-locke-natural-rights-to-life-liberty-and-property/> accessed on 2<sup>nd</sup> March 2018.

<sup>54</sup> John Stuart Mill, On Liberty, London: Longman, Roberts & Green, 1999, [www.bartleby.com/130/](http://www.bartleby.com/130/),

John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes,

<https://www.sparknotes.com/philosophy/mill/section3/> Accessed on 23<sup>rd</sup> November, 2018.

culminates in the emergence of a system of representative democracy.<sup>55</sup> It is within the context of this form of government that Mill envisions the growth and development of liberty.<sup>56</sup>

In Chapter 2 of his book, Mill identifies and examines the question of whether one or more persons should be able to curtail another person's freedom to express a divergent point of view.<sup>57</sup> He argues that any such activity is unwarranted, no matter how beyond the pale that individual's viewpoint may be.<sup>58</sup> He further presents the idea that opinions should not be silenced, because such censorship is morally wrong.<sup>59</sup>

Mill points out that a viewpoint's popularity does not necessarily make a view correct and this fact is the basis for freedom of opinion.<sup>60</sup> Dissent is vital because it helps to preserve truth, this is mainly due to the fact that the truth can often be drowned in sources of prejudice and dead dogma.<sup>61</sup> Lastly, he defines dissent as the freedom of the individual to hold and articulate unpopular views.<sup>62</sup>

Liberalism can therefore be used to justify the freedom of peaceful assembly. This is because the theory of Liberalism denotes that individuals are free to act in a manner consistent with what they have reasonably perceived as their best interests. The act of gathering together to protest and express opinions is one of the means and ways in which individuals pursue what they believe serves them and their interests. This theory ideally justifies the mens rea of an individual who decides to engage in the process of peaceful protests. Furthermore, in the event of violence outbreaks, individuals engaging in violent activities are at liberty to do so by virtue of the premise that they are acting in their best interests.

### **1.7.2 SOCIAL CONTRACT THEORY**

The Social Contract Theory, like many theories has been discussed at length by a wide range of philosophers. Jean-Jacques Rousseau, in 1762 published a book titled "On the Social Contract-

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<sup>55</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes.

<sup>56</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes.

<sup>57</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

<sup>58</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

<sup>59</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

<sup>60</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

<sup>61</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

<sup>62</sup> John Stuart Mill (1806–1873) Summary, On Liberty, Spark Notes

Principles of Political Rights”.<sup>63</sup> In this book, Rousseau theorized the best way to establish a political community in the face of the problems of a commercial society, which he had already identified in a different publication titled “Discourse on Inequality”.<sup>64</sup>

*"Man is born free, and everywhere he is in chains. One man thinks himself the master of others, but remains more of a slave than they are."*

Rousseau, in the dramatic opening of his book, writes that man was naturally good but becomes corrupted by the pernicious influence of human society and its institutions.<sup>65</sup> With close reference to the aforementioned quote, he identifies the “chains” as the constraints that are placed on the freedom of citizens in modern states.<sup>66</sup> The stated aim of this book was to determine whether there can be legitimate political authority, whether a state can actively exist whilst upholding liberty as opposed to constraining it.<sup>67</sup>

Rousseau rejects the idea that legitimate political authority is found in nature.<sup>68</sup> The only natural form of authority, in his opinion is the authority a father has over a child and even in that instance, this authority exists solely for preservation of the child.<sup>69</sup> Political thinkers, particularly Hugo Grotius and Thomas Hobbes have asserted that the relationship between ruler and subject is similar to that between father and child.<sup>70</sup> This is discussed in the sense that, the ruler will care for his subjects and therefore have unlimited rights over them.<sup>71</sup> This kind of reasoning assumes the natural superiority of rulers over the ruled and such superiority according to Rousseau is perpetuated by force, not by nature, therefore, political authority has no basis in nature.<sup>72</sup> Rousseau thereafter continues to paint a vivid picture on the illegitimacy of political authority that is founded

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<sup>63</sup> Jean-Jacques Rousseau, *The Essential Rousseau: The Social Contract, Discourse on the Origin of Inequality, Discourse on the Arts and Sciences, The Creed of a Savoyard Priest*. New York, New American Library, 1974.

<sup>64</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes, <https://www.sparknotes.com/philosophy/socialcontract/section2/> Accessed 1<sup>st</sup> December, 2018.

<sup>65</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>66</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>67</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>68</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>69</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>70</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>71</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

<sup>72</sup> Jean-Jacques Rousseau, *The Social Contract Summary*, Spark Notes.

on force.<sup>73</sup> He posits the solution to this illegitimacy as the development of a social contract forged between the members of a given social system.<sup>74</sup>

The various positions on the social contract can be described as nuanced, as some of Rousseau's predecessors have conveyed very dissenting opinions. For example, according to Grotius, by virtue of the social contract, there is a covenant between the king and his people, where the people agree to surrender their freedom to the king.<sup>75</sup>

Based on the above discussion, when the ideologies behind the Social Contract theory are unpacked, an issue that comes out clearly is the analogy of the relationship between individuals and a sovereign power. The Social Contract theory, ideally presents the idea that a persons' moral and political obligations are dependent upon a contract or agreement among them to form the society in which they live.<sup>76</sup> Pursuant to the view presented by Hobbes, there is the aspect of the need for individuals in a certain social system to submit to a sovereign, which for purposes of this paper, shall be assumed to be the government.<sup>77</sup> According to Hobbes, the justification for political obligation is based on the fact that men are naturally self-interested, yet they are rational, they will choose to submit to the authority of a sovereign in order to be able to live in a civil society, which is conducive to their own interests.<sup>78</sup> This point of view shows the obligations of the state and individual that would arise from the social contract theory.

Submission to a sovereign involves the active process of regulation, control and limitation. It can be concluded that the social contract presents a situation that gives birth to regulatory authorities that, have the ability to limit and intervene, especially where freedoms and rights of individuals in a social system are concerned. Undoubtedly, it is of great importance to have individual liberties regulated, limited and controlled. This is mainly due to the fact that, limitation and regulation are indispensable to the proper functioning of social systems.

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<sup>73</sup> Jean-Jacques Rousseau, The Social Contract Summary, Spark Notes.

<sup>74</sup> Jean-Jacques Rousseau, The Social Contract Summary, Spark Notes.

<sup>75</sup> Jean-Jacques Rousseau, The Social Contract Summary, Spark Notes.

<sup>76</sup> Social Contract Theory, Internet Encyclopaedia of Philosophy. <https://www.iep.utm.edu/soc-cont/> accessed on 3rd March 2018.

<sup>77</sup> Hobbes's Moral and Political Philosophy, Stanford Encyclopaedia of Philosophy, Feb 12, 2002.

<sup>78</sup> Hobbes's Moral and Political Philosophy, Stanford Encyclopaedia of Philosophy, Feb 12, 2002.

It is important to note that, important rights often clash with each other, so that some must necessarily give way, at least partly, to others.<sup>79</sup> Freedom of movement, for example, does not give a person unlimited access to another person's private property, and murderers must generally lose their liberty to protect the lives and liberties of others.<sup>80</sup> Individual rights and freedoms will also sometimes clash with a broader public interest such as public health or safety, or national security.<sup>81</sup> Liberties and freedoms cannot operate in a vacuum. Therefore, the submission to a government through the social contract theory caters for a situation where, different individuals can peacefully co-exist in a social system.

### **1.7.3 THEORY OF JUSTICE**

In the book, "A Theory of Justice", John Rawls argues that the concepts of freedom and equality are not mutually exclusive.<sup>82</sup> His assessment of the justice system leads him to conclude that for justice to be truly just, everyone must be afforded the same rights under the law.<sup>83</sup> In the first part of the book, Rawls posits the possibility of a social system where everyone is stripped of their privileges and social status and made entirely equal.<sup>84</sup> He continues to investigate the implications of such possibilities on the justice system.<sup>85</sup> He adds on that the only logical choice is for a social system to pick a justice system that treats people equally, regardless of their race, class, gender, etc.<sup>86</sup>

In the second part, he discusses how his theory of justice would affect institutions today.<sup>87</sup> Without pointing fingers, he makes it clear that no one is living up to his standards.<sup>88</sup> Towards the conclusion of the book, Rawls makes his final comments in regards to the Theory of Justice. He identifies two main principles that make the flesh of this theory.<sup>89</sup> The first principle is the "greatest

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<sup>79</sup> Justifying limits on rights and freedoms, The Inquiry in Context, Australian Law Reform Commission, <https://www.alrc.gov.au/publications/justifying-limits-rights-and-freedoms> Accessed on 15th December, 2018.

<sup>80</sup> Justifying limits on rights and freedoms, The Inquiry in Context, Australian Law Reform Commission.

<sup>81</sup> Justifying limits on rights and freedoms, The Inquiry in Context, Australian Law Reform Commission.

<sup>82</sup> John Rawls, A Theory of Justice Summary, E-notes, <https://www.enotes.com/topics/theory-justice> Accessed on 17th December, 2018.

<sup>83</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>84</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>85</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>86</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>87</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>88</sup> John Rawls, A Theory of Justice Summary, E-notes.

<sup>89</sup> John Rawls, A Theory of Justice Summary, E-notes.

equal liberty principle”. The second principle is “the difference principle” and in the final addendum “the equal opportunity principle”.<sup>90</sup>

The greatest equal liberty principle provides that, “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>91</sup> This principle is mainly concerned with distribution of rights and liberties, the basic liberties of citizens are the political liberty to vote and run for office, freedom of speech and assembly, liberty of conscience, freedom of personal property and freedom from arbitrary arrest. <sup>92</sup>The difference principle posits that, “social and economic inequalities are to be arranged so as to facilitate the greatest benefit to the least-advantaged members of society, consistent with the just savings principle.”<sup>93</sup>

For the purposes of the discussion regarding the right to peaceful assembly, the first principle established in this theory shall be the main area of focus. Based on the assumptions that have been discussed in the previous chapter of this paper, there is an assumption that the state should be held liable when there is a fundamental breach, enacted through an abuse of power, when limiting and regulating the right to peaceful assembly. One issue that ought to go unnoticed is the fact that, when the government fundamentally breaches the rights of its citizens by acting ultra vires, they go against the principles of equality established in the theory of Justice. Individuals acting on behalf of the government must and should be brought to task when they abuse their powers. This theory is mainly directed to issues pertaining to government officers who are never held liable for abuse of power when quelling riots and assemblies that have turned violent.

#### **1.7.4 CONCLUSION**

In a nutshell, the theories discussed above attempt to paint a picture that analyses the voluntary behaviour of an individual, living in a social system with other individuals under the governance of a sovereign. With close reference to the right to peaceful assembly, the issue of violence outbreaks in political assemblies and the issue of the state abusing its power when quelling violent

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<sup>90</sup> John Rawls, A Theory of Justice, page 266, Belknap, 1971.

<sup>91</sup> John Rawls, A Theory of Justice, page 53, Revised Edition, Harvard University Press, 1999.

<sup>92</sup> John Rawls, A Theory of Justice, page 53, Revised Edition, Harvard University Press, 1999

<sup>93</sup>Stephen O Sullivan and Philip A. Pecorino, The Theory of Justice as Fairness, Ethics, Social Sciences, Queensborough Community, College, 2002,

[http://www.qcc.cuny.edu/SocialSciences/ppecorino/ETHICS\\_TEXT/Chapter\\_9\\_Rawls\\_Theory/Rawls\\_Theory.htm](http://www.qcc.cuny.edu/SocialSciences/ppecorino/ETHICS_TEXT/Chapter_9_Rawls_Theory/Rawls_Theory.htm)



assemblies and the theories mentioned above, a line of thought explaining the course of events and actions of the various parties involved can be established.

Liberalism justifies voluntary actions of protestors who are free to act in manner consistent with their perceived best interests. The Social Contract theory establishes the link between the government and individuals, conferring different responsibilities of both parties. The Justice theory on the other hand, allows to evaluate on a scale of equality and reasonableness the actions of government representatives who choose to act ultra vires.

## **1.8 RESEARCH DESIGN & METHODOLOGY**

The study will rely on secondary data sources which include books, peer reviewed articles, relevant online sources and newspapers articles.

## **1.9 CHAPTER BREAKDOWN**

- Chapter 1: Introduction.
- Chapter 2: Causes, Effects and Legal Implications of Violence in Peaceful Assemblies.
- Chapter 3: The Legal Test Applicable to Force used in a Peaceful Assembly.
- Chapter 4: A review of the Regulation of the Right to Peaceful Assembly.
- Chapter 5: Recommendations and Conclusions.

## **CHAPTER TWO**

### **CONCEPTUALISING ‘PEACEFUL ASSEMBLIES’ IN KENYA**

#### **2.1 INTRODUCTION**

In the preceding chapter, we were able to have an overview of the right to peaceful assembly in Kenya, briefly highlighting how violence and the use of force have taken the centre stage when it comes to defining the manner in which this right is enjoyed in Kenya. In light of the aforementioned, a hypothesis has been put forward attempting to explain the situation that is on the ground. Chapter two aims at conceptualizing the right to peaceful assembly and testing the hypothesis whilst unearthing the causes, effects and legal implications of violence in political assemblies in Kenya.

#### **2.2 WHAT IS THE RIGHT TO PEACEFUL ASSEMBLY?**

The right to freedom of peaceful assembly is the right to gather publicly or privately and collectively express, promote, pursue and defend common interests.<sup>94</sup> The freedom of peaceful assembly can be an important strand in the maintenance and development of culture, and in the preservation of minority identities.<sup>95</sup> This right is also recognized as one of the foundations of a functioning democracy, and its protection is crucial for creating a tolerant society in which groups with different beliefs, practices, or policies can exist peacefully together.<sup>96</sup> In reference to the legislation here in Kenya, the freedom of assembly is derived from the Constitution.<sup>97</sup> The Constitution out rightly declares that sovereignty vests in the people of Kenya.<sup>98</sup> Article 2 of the Constitution states that, “the people may exercise their sovereign power either directly or through their democratically elected representatives.”<sup>99</sup> The aforementioned establishes the principle of a

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<sup>94</sup> Former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, What are the rights to freedom of peaceful assembly and of association, <http://freeassembly.net/about/freedoms/> on 15<sup>th</sup> February 2018.

<sup>95</sup> Former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, What are the rights to freedom of peaceful assembly and of association.

<sup>96</sup> Alan Tuli, The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya [https://www.academia.edu/6539898/The\\_Right\\_and\\_Freedom\\_of\\_Peaceful\\_Assembly\\_A\\_Short\\_Case\\_Study\\_of\\_Ke\\_nya?auto=download](https://www.academia.edu/6539898/The_Right_and_Freedom_of_Peaceful_Assembly_A_Short_Case_Study_of_Ke_nya?auto=download) on 15<sup>th</sup> February 2018.

<sup>97</sup> Article 37, Constitution of Kenya, 2010.

<sup>98</sup> Article 1, Constitution of Kenya, 2010.

<sup>99</sup> Article 2, Constitution of Kenya 2010.

proper government.<sup>100</sup> A proper government is expected to respect and protect the rights and freedoms of its people.

Freedom of assembly is one of the ways in which citizens communicate with the government. Peaceful assemblies can be used to express objection or lack of contentment. Any government that habitually attempts to govern over objections of even a small minority embarks on a path to establishing unjust government, a direct and short path to tyranny.<sup>101</sup>

The right to peaceful assembly is defined in the Kenyan constitution as the right to peaceably and unarmed to assemble, to demonstrate, to picket and to present petitions to public authorities.<sup>102</sup> Article 37 of the Kenyan Constitution basically provides for the right to assembly, demonstration, picketing and petition, however, it also sets out conditions that disallow threat of violence.<sup>103</sup> These conditions include protecting national security or public safety, preventing disorder or crime, protecting health and morals and protecting the rights and freedoms of other people.<sup>104</sup> The primary role of the state is to protect its citizens and these conditions are set out to ensure that the right to peaceful assembly is enjoyed in a controlled and safe environment.

International treaties and conventions also cater for this right. It is considered to be the foundation of democracy.<sup>105</sup> These treaties and conventions include the United Nations Declaration on Human Rights Defenders, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Right, among others.<sup>106</sup> These are but a few of the international pieces of legislation that cater for this right. Kenya is subject to these treaties and conventions by virtue of ratification. International conventions and treaties form part of the Kenyan law once ratified and to that extent Kenya is bound by those laws and regulations.<sup>107</sup>

However, just like every other right, the right to peaceful assembly has limitations. International standards certainly offer a clear general framework; however, little guidance is available to

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<sup>100</sup>Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>101</sup>Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>102</sup> Article 37, Constitution of Kenya, 2010

<sup>103</sup> Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>104</sup> Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>105</sup>Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>106</sup> United Nations Human Rights, Office of the High Commissioner, Cambodia, Freedom of Peaceful Assembly and Association, <http://cambodia.ohchr.org/en/civil-society-fund-freedoms/freedom-peaceful-assembly-association>  
Accessed on 4<sup>th</sup> March, 2018.

<sup>107</sup> Article 2(6), Constitution of Kenya, 2010.

legislators and executive branches on how the exercise of freedom of peaceful assembly may be regulated in law and practice at the national and county level in Kenya. <sup>108</sup>

### **2.3 GUIDING PRINCIPLES OF THE RIGHT TO PEACEFUL ASSEMBLY**

The right to peaceful assembly presents itself as a very unique right, just like all rights and freedoms, it has guiding principles.<sup>109</sup> There are mainly four guiding principles for the right to peaceful assembly. These are: legality, non-discrimination, good administration, proportionality, the state's positive obligation to facilitate and protect peaceful assembly, the presumption in favour of holding assemblies and the liability of regulatory authority.<sup>110</sup>

There is a presumption in favour of holding assemblies because the right to peaceful assembly is a fundamental freedom.<sup>111</sup> As a result of this presumption, it is expected that this right should be enjoyed without regulation.<sup>112</sup> Anything that is not expressly forbidden by the law should be presumed to be permissible.<sup>113</sup> The state's underlying obligation to facilitate and protect peaceful assembly is another guiding principle of the right to peaceful assembly.<sup>114</sup> The state has a primary responsibility to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed.<sup>115</sup>

The right to peaceful assembly can only be limited by law, and then only to the extent that the limitation is reasonable, justifiable in an open and democratic society.<sup>116</sup> Any restrictions imposed must have a formal basis in law and be in conformity with the law.<sup>117</sup> The Public Order Act serve

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<sup>108</sup>Alan Tuli, *The Right and Freedom of Peaceful Assembly: A Short Case Study of Kenya*.

<sup>109</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), 2010, <https://www.osce.org/odihr/73405?download=true> Accessed on 4<sup>th</sup> March, 2018.

<sup>110</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>111</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>112</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>113</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>114</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>115</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>116</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

<sup>117</sup> *Guidelines on Freedom of Peaceful Assembly, Second Edition*, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR).

is one of the pieces of legislation that limits the right to peaceful assembly. This act, for example states that an assembly may be stopped or prevented when there is clear, present or imminent danger of a breach of the peace or public order.<sup>118</sup>

Proportionality speaks to the manner in which regulatory authorities should handle restrictions when it comes to the right to peaceful assembly. Restrictions ought to be proportional and non-intrusive. A blanket application of legal restrictions tends to be over-inclusive and, thus, will fail the proportionality test, because no consideration has been given to the specific circumstances of the case.<sup>119</sup>

Regulatory agencies must be compliant with their legal obligations and they ought to be accountable.<sup>120</sup> The public should be informed which body is responsible for taking decisions about the regulation of freedom of assembly, and this must be clearly stated in law.<sup>121</sup>

## **2.4 WHY IS THE RIGHT TO PEACEFUL ASSEMBLY IMPORTANT?**

The right to peaceful assembly is of great importance mainly due to the fact that this right is the cornerstone and the foundation of any democratic governance system. The right to peaceful assembly is the way in which the people communicate with their government. This right advocates for the personal development, dignity and fulfilment of every individual and overall progress and welfare of society.<sup>122</sup> The right to peaceful assembly is essential especially in relation to political, trade union and civic matters.<sup>123</sup> This is mainly because those who seek to defend and advance

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<sup>118</sup> European Commission for Democracy Through Law (Venice Commission) OSCE/ODIHR, Venice Commission Guidelines on Freedom of Peaceful Assembly (2<sup>nd</sup> edition), Prepared by The OSCE/ODIHR Panel on Freedom of Assembly and By the Venice Commission, 4 June 2010  
[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e) Accessed on 25th February 2018

<sup>119</sup> European Commission for Democracy Through Law (Venice Commission) OSCE/ODIHR, Venice Commission Guidelines on Freedom of Peaceful Assembly (2<sup>nd</sup> Edition)

<sup>120</sup> Guidelines on Freedom of Peaceful Assembly, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), 2010

<sup>121</sup> European Commission for Democracy Through Law (Venice Commission) OSCE/ODIHR, Venice Commission Guidelines on Freedom of Peaceful Assembly (2<sup>nd</sup> Edition)

<sup>122</sup> European Commission for Democracy Through Law (Venice Commission) OSCE/ODIHR, Venice Commission Guidelines on Freedom of Peaceful Assembly (2<sup>nd</sup> Edition)

<sup>123</sup> European Commission for Democracy Through Law (Venice Commission) OSCE/ODIHR, Venice Commission Guidelines on Freedom of Peaceful Assembly (2<sup>nd</sup> Edition)

socio-economic and developmental interests rely on this right heavily as it provides an avenue for them to publicly convey their opinions and dissatisfactions.<sup>124</sup>

## **2.5 THE CAUSES AND EFFECTS OF VIOLENCE IN ASSEMBLIES IN KENYA**

Before delving into the discussion of violence in assemblies in Kenya, it is imperative to that we have a general outlook of the global situation relating to violence in assemblies. The world currently has its eyes on France, as the Yellow Jackets Movement (Gilets Jaunes) continue to protest about the cost of fuel and the ever-rising cost of living. As it currently stands, there have been about 10 deaths linked to the Yellow Jackets Movement.<sup>125</sup> A little closer to home, Sudan undoubtedly carries the day whenever discussions about violent protests come into play. Demonstrations in the capital city of Khartoum gained intensity quite rapidly as the situation turned violent and security forces killed at least 14 people in the month of April 2019 alone.<sup>126</sup>

A brief look at the Kenyan situation seems to present an interesting set of facts. In 2015, ARTICLE 19, a company registered in England and dealing with the protection of human rights and freedoms, documented 140 protests in Kenya.<sup>127</sup> These protests were as a result of a wide range of issues.<sup>128</sup> These issues included but were not limited to the lack of adequate security, corruption, land-grabbing, unemployment, political reform, and poor road conditions.<sup>129</sup> Out of the 140 protests, 36 were violent. With close reference to the research conducted by ARTICLE 19, out of the 36 violent protests, the infographics reflect that 31 protests were initiated by state actors.<sup>130</sup> This was mainly through the use of lethal force by the police.

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<sup>124</sup> Guidelines on Freedom of Peaceful Assembly, Published By (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), 2010

<sup>125</sup> Antoine Cruin and Laura Smith-Spark, 10th death linked to France's 'yellow vest' protests, CNN News, 22<sup>nd</sup> December 2018, <https://edition.cnn.com/2018/12/22/europe/france-yellow-vest-protest-intl/index.html> Accessed 15<sup>th</sup> April, 2019.

<sup>126</sup> BBC World News, Omar al-Bashir ousted: How Sudan got here, BBC World News, BBC Africa, Sudan Crisis, 11<sup>th</sup> April 2019, <https://www.bbc.com/news/world-africa-47892742> Accessed 15<sup>th</sup> April, 2019.

<sup>127</sup> ARTICLE 19, Country Report: Protest in Kenya 2015, 12<sup>th</sup> April, 2016, <https://www.article19.org/resources/country-report-protest-in-kenya-2015/> Accessed on 3<sup>rd</sup> February, 2019.

<sup>128</sup> ARTICLE 19, Country Report: Protest in Kenya 2015.

<sup>129</sup> ARTICLE 19, Country Report: Protest in Kenya 2015.

<sup>130</sup> ARTICLE 19, Infographics, Country Report: Protest in Kenya 2015, 12<sup>th</sup> April, 2016, [https://www.article19.org/data/files/medialibrary/38331/Screenshot-\(389\).jpg](https://www.article19.org/data/files/medialibrary/38331/Screenshot-(389).jpg) Accessed on 3<sup>rd</sup> February, 2016.

The use of lethal force during protests continues to be a major concern in Kenya. During the 2015 protests, police used excessive force, including the firing of live bullets and firing tear gas into crowds so as to disperse demonstrators.<sup>131</sup> A large number of police officers involved in violently dispersing protesters are yet to be held to account. At the time, ARTICLE 19 recorded only 5 people being charged with killing and assaulting protestors, suggesting a high level of impunity regarding attacks on right to protest.<sup>132</sup>

As it currently stands, a lot of these situations remain unexplained and unaccounted for. A clear example of this is the recent inquest into the murder of baby Samantha Pendo, a 6-month-old baby, who was clobbered by anti-riot police officers, deployed to quell protests in Kisumu's Nyalenda Estate.<sup>133</sup> In an attempt to exonerate themselves from the baby's murder, the constables who were deployed to ensure security in the estate, told an inquest investigating the child's death that they had already left the scene on the fateful night.<sup>134</sup> Months after the inquest was concluded there is still no concrete information on who was responsible for the death of baby Pendo.

The Kenyan police force has a history of repressive response to peaceful protests, with interventions by police characterized by death, indiscriminate use of force, serious injury, abuse of firearms, unlawful arrests and detention under the pretext of maintaining law and order.<sup>135</sup> These repressive responses came under sharp focus following the violence that ensued after the announcement of the presidential election results in 2007.<sup>136</sup> Thereafter, a commission of inquiry was established to investigate the violence. It was revealed that the police management of the demonstrations was inconsistent in its basic legal provisions, jeopardized the lives of citizens and was in many cases characterized by grossly unjustified use of deadly force.<sup>137</sup> All factors

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<sup>131</sup> ARTICLE 19, Infographics, Country Report: Protest in Kenya 2015.

<sup>132</sup> Victor Otieno, We were asleep when Baby Pendo was clobbered, police officers tell probe team, Daily Nation Online, 19<sup>th</sup> October, 2018, <https://www.nation.co.ke/counties/kisumu/Officers-fight-claims-in-Baby-Pendo-case/1954182-4813266-cxld1m/index.html> Accessed on 3<sup>rd</sup> February, 2019.

<sup>133</sup> Victor Otieno, we were asleep when Baby Pendo was clobbered, police officers tell probe team, Daily Nation Online, 19<sup>th</sup> October, 2018.

<sup>134</sup> Victor Otieno, we were asleep when Baby Pendo was clobbered, police officers tell probe team, Daily Nation Online, 19<sup>th</sup> October, 2018.

<sup>135</sup> Martin Mavenjina, Protest in Kenya: repressive and brutal policing has become normalised, Open Democracy, 3<sup>rd</sup> December, 2017, <https://www.opendemocracy.net/protest/repressive-policing-kenya>, Accessed on 3<sup>rd</sup> February, 2019.

<sup>136</sup> Martin Mavenjina, Protest in Kenya: repressive and brutal policing has become normalised, Open Democracy.

<sup>137</sup> Martin Mavenjina, Protest in Kenya: repressive and brutal policing has become normalised, Open Democracy.

considered, an issue that comes out clearly after the discussion above is the fact that, one of most predominant causes of violence in assemblies in Kenya is the use of lethal force by the police.

In line with the aforementioned, as we continue to discuss issues pertaining to elections and politics, an issue that cannot be overlooked is violence resulting from ethnic-based incitement. Shortly after the re-introduction of multiparty politics in 1991, the country has often experienced periodic conflicts.<sup>138</sup> In the course of the analysis of these conflicts, there is an evolving tendency to perceive their causes are merely, or mainly, manifestations of negative ethnicity.<sup>139</sup> The aforementioned is an idea that has been postulated by numerous political analysts and various authors. The failure to address substantive extra-ethnic factors which have historical, structural, institutional, legal, and cultural standpoints has constrained the pursuit of positive peace in the country.<sup>140</sup>

Based on the aforementioned discussion, it can be deduced that there is heavy impunity and disregard for protocol embedded in the state actors as they have failed to observe and fully implement the laws revolving around peaceful assembly as required.

## **2.6 JURISPRUDENCIAL EXAMINATION INTO THE CHALLENGES FACING THE RIGHT TO PEACEFUL ASSEMBLY**

A quick review of the case law that deals with the right to peaceful assembly shockingly reveals that the police have often invoked illegal procedures to frustrate or attempt to deny individuals the right to peaceful assembly.<sup>141</sup> In the case of Boniface Mwangi v Inspector General of Police, the court held that the Officer Commanding Police Division (OCPD) had no legal authority to bar an

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<sup>138</sup> Muema Wambua, The Ethnification of electoral conflicts in Kenya: Options for positive peace, African Journals Online, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiiiNeNq73gAhVpA2MBHRcHBfQQFjACegQICBAC&url=https%3A%2F%2Fwww.ajol.info%2Findex.php%2Fajcr%2Farticle%2Fdownload%2F167168%2F156605&usg=AOvVaw3BLfb\\_rPkuvKZ6AvuYDaxH](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiiiNeNq73gAhVpA2MBHRcHBfQQFjACegQICBAC&url=https%3A%2F%2Fwww.ajol.info%2Findex.php%2Fajcr%2Farticle%2Fdownload%2F167168%2F156605&usg=AOvVaw3BLfb_rPkuvKZ6AvuYDaxH), Accessed on 3<sup>rd</sup> February, 2019.

<sup>139</sup> Muema Wambua, The ethnification of electoral conflicts in Kenya: Options for positive peace, African Journals Online.

<sup>140</sup> Njeri Kimani, Kenya: Hate speech as a political tool risks inciting more violence, Daily Maverick, 15<sup>th</sup> June, 2016 <https://www.dailymaverick.co.za/article/2016-06-15-kenya-hate-speech-as-a-political-tool-risks-inciting-more-violence/> Accessed on 3<sup>rd</sup> February, 2019.

<sup>141</sup> Marion Muringe Ogeto & Waikwa Wanyoike, Judiciary and Public Interest Litigation in Protecting the Right to Peaceful Assembly, Paper 5 in Policing Protests Compilation, 2019, <https://www.chrips.or.ke/wp-content/uploads/2019/09/5.-Judiciary-and-Public-Interest-Litigation-in-Protecting-the-Right-of-Assembly-in-Kenya.pdf> Accessed 25<sup>th</sup> October, 2019.



assembly and demonstration that was intended to present a petition on corruption to the President.<sup>142</sup>

The case of Boniface Mwangi is not the first instance in which the police have acted ultra vires as in the Wilson Olal case, the applicants among other civil society members, organised a demonstration but found heavy police presence at the venue of the demonstration.<sup>143</sup> Regardless of the fact that the applicants had followed the due process and were peaceful, they were openly denied the opportunity to exercise their rights as the police asked them to leave the premises.<sup>144</sup> The Police offered no explanation and the moment Olal and a few others persisted they were arrested.<sup>145</sup> In this case, the court ruled in the petitioners favour as it was established that the arrest and prosecution of the petitioners were unconstitutional, an abuse of process and not in public interest.<sup>146</sup>

Other examples of cases where assembly was unjustifiably interrupted or completely denied include:<sup>147</sup>

1. Ferdinand Ndung'u Waititu & 4 others v. Attorney General.
2. Eugene Wamalwa v. Minister for State for Internal Security.

In these cases, an issue that manifests itself is the duty of the police to facilitate an assembly whilst maintaining law and order thus facilitating the enjoyment of this right to the fullest extent possible.<sup>148</sup> However, a look at the jurisprudence in Kenya relating to peaceful assembly displays an outright neglect for procedures and protocol.

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<sup>142</sup> Boniface Mwangi v Inspector General of Police & 5 Others (2017) eKLR.

<sup>143</sup> Wilson Olal & 5 others v Attorney General & 2 others (2017) eKLR.

<sup>144</sup> Wilson Olal & 5 others v Attorney General.

<sup>145</sup> Wilson Olal & 5 others v Attorney General.

<sup>146</sup> Wilson Olal & 5 others v Attorney General.

<sup>147</sup> Marion Muringe Ogeto & Waikwa Wanyoike, Judiciary and Public Interest Litigation in Protecting the Right to Peaceful Assembly, Paper 5 in Policing Protests Compilation, 2019.

<sup>148</sup> Marion Muringe Ogeto & Waikwa Wanyoike, Judiciary and Public Interest Litigation in Protecting the Right to Peaceful Assembly, Paper 5 in Policing Protests Compilation, 2019, <https://www.chrips.or.ke/wp-content/uploads/2019/09/5.-Judiciary-and-Public-Interest-Litigation-in-Protecting-the-Right-of-Assembly-in-Kenya.pdf> Accessed 25<sup>th</sup> October, 2019.

## **2.7 THE LEGAL IMPLICATIONS OF VIOLENCE IN PEACEFUL ASSEMBLIES IN KENYA**

The issue of liability during protests and assemblies has always proved to be a bit of a grey area, especially when addressing outbreaks of violence, some of the legal issues that tend to present themselves are the:

1. Use of Lethal Force.
2. Insurance Liabilities
3. Public Order.

Riots erupt quite frequently in different places across the world and often in the wake of tensions created by police activities. More often than not, protests begin peacefully. Demonstrations, however, sometimes degenerate into violent riots, people and property suffer harm, leaving innocent people to pick up the pieces. In the United States (US), there are four plausible solutions to this issue of liability. These are, payment by insurance, liability assigned to rioters, liability assigned to the government and lastly liability assigned to the private organizations.<sup>149</sup>

The South Africans have embraced an approach similar to the Americans when it comes to this issue, especially in regard to the insurance aspect.<sup>150</sup> Based on an article written by Telesure Investment Holdings in 2016, it was reported that, the incidents of civil unrest in South Africa have been on the rise. Violent protests were reported in Hammanskraal in Pretoria, among other areas.<sup>151</sup>

It ought to go unnoticed that what was common in these incidents was that they were all politically driven by members of the public, who at the time, wished to express their dissatisfaction with the various government departments.<sup>152</sup> Another common aspect of these protests is that they involve theft and damage to property. Shop owners suffered losses due to looting and motorists incurred

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<sup>149</sup> HG Legal Aid, After a Riot, Who Pays for the Damage? <https://www.hg.org/legal-articles/after-a-riot-who-pays-for-the-damage-35437> Accessed 3rd Feb,2019.

<sup>150</sup> Telesure Investment Holdings, Riots And Strikes: Who Is Liable For Damages? 7<sup>th</sup> July, 2016, <https://www.telesure.co.za/press-releases/hippo/riots-and-strikes-who-is-liable-for-damages/> Accessed 3<sup>rd</sup> February, 2019.

<sup>151</sup> Telesure Investment Holdings, Riots And Strikes: Who Is Liable For Damages?

<sup>152</sup> Telesure Investment Holdings, Riots And Strikes: Who Is Liable For Damages?, 7<sup>th</sup> July,2016, <https://www.telesure.co.za/press-releases/hippo/riots-and-strikes-who-is-liable-for-damages/> Accessed 3<sup>rd</sup> February,2019

damages to their vehicles during the unrest in Hammanskraal. In regard to the issues of civil unrest, The South African Special Risk Insurance Association (SASRIA) is the only South African insurer that offers a cover for loss or damage to insured property as a direct result of civil unrest, including rioting, strike action and public disorder. However, the case of *SATAWU v Garvas*, discusses the manner in which trade unions may be held liable for destruction of property and injuries resulting from protests or demonstrations that they organized.<sup>153</sup>

The Kenyan context takes a slightly different approach. In Kenya, organizers of protests are expected to make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly.<sup>154</sup> Despite the prima facie expectation of organizers to ensure full compliance with the law, they should not be held responsible criminally, civilly or administratively for the unlawful behaviour of others.<sup>155</sup> Liability should be personal, that is against the person who committed the criminal acts.<sup>156</sup> The Kenyan Penal Code provides for unlawful assemblies, riots and other offences against public tranquillity. The Penal Code expressly defines an unlawful assembly, thereafter assigning criminal liability to participants of such assemblies.<sup>157</sup> This form of liability extends further to demolishing and destruction property that results from unlawful assembly occurring after proclamation.<sup>158</sup> Therefore, in terms of the Kenyan context, the burden of liability, in the event of a violent assembly resulting in loss of lives and destruction of property, lies with the individual committing the criminal acts.

It is also important to note that, violent protesters arrested for breach of peace must be taken to court within 24 hours of their arrest.<sup>159</sup> In addition to the above, arrested or detained protesters must be treated in a humane manner and with respect for their rights and dignity.<sup>160</sup> They must

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<sup>153</sup> *South African Transport and Allied Workers Union and Another v Garvas and Others (City of Cape Town Intervening; Freedom of Expression Institute as Amicus Curiae)* [2012] ZACC 13.

<sup>154</sup> *The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public*, Kenya National Commission on Human Rights.  
<http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287>

<sup>155</sup> *The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public*, Kenya National Commission on Human Rights

<sup>156</sup> Section 79, The Penal Code of Kenya, CAP 63, 2009.

<sup>157</sup> Section 78, The Penal Code of Kenya, CAP 63,2009.

<sup>158</sup> Section 79, The Penal Code of Kenya.

<sup>159</sup> *Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police*, RoGGKenya, <https://roggkenya.org/areas-for-media-coverage-in-good-governance-and-corruption-in-kenya/securitypolice/police-use-of-force-rules-in-kenya/>, Accessed on 4<sup>th</sup> February,2019.

<sup>160</sup> *Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police*, RoGGKenya.

not be subjected to torture or cruel, inhuman or degrading treatment or punishment as their only forfeited right is the right to peaceful assembly.<sup>161</sup>

However, in an interesting twist of events, in 2018, the High Court in Nairobi ordered the Government to pay 16 Ugandan and Rwandese firms Ksh. 6.3 billion for goods destroyed during the 2007-2008 post-election violence.<sup>162</sup> Justice Mbogholi Msagha, in a landmark ruling, observed that the Government had reached out to the affected traders to settle the case out of court in 2010 but later turned around to deny liability.<sup>163</sup> The case had been filed by Kampala City Traders Association, KATRACO Uganda, Intraspeed Logistics and Mugenga Holdings, claiming that their 22 trucks which were on transit to Nairobi were destroyed in chaos.<sup>164</sup> This award is currently the largest in regards to post-election violence compensation.<sup>165</sup> According to Justice Msagha, the Attorney General wrote to the Permanent Secretary in the office of the President at the time, notifying him that it was impossible to escape liability as two commissions had found that the police failed to protect businesses during the 2007 polls chaos.<sup>166</sup> In 2016, the High Court in Mombasa awarded a Tanzania dealer Ksh. 860 million after finding Kenya Ports Authority in fault for withholding 21 containers of juice and water due to the election violence.<sup>167</sup> The aforementioned basically shows that there are instances when liability can be assigned to the state. However, it is important to take note of the fact that, more often than not, the state and state actors will go scot free for injuries occasioned by the use of lethal force.

## **2.8 CONCLUSION**

Based on the conversation that has been presented in the chapter above, we have been able to unpack and understand in depth the right to peaceful assembly, the principles that guide the right

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<sup>161</sup> Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police, RoGGKenya.

<sup>162</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018, <https://www.standardmedia.co.ke/article/2001289565/state-ordered-to-pay-sh6-3-b-to-businesses-over-post-election-violence> Accessed on 15<sup>th</sup> April, 2019.

<sup>163</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018.

<sup>164</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018, <https://www.standardmedia.co.ke/article/2001289565/state-ordered-to-pay-sh6-3-b-to-businesses-over-post-election-violence> Accessed on 15<sup>th</sup> April, 2019.

<sup>165</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018.

<sup>166</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018.

<sup>167</sup> Kamau Muthoni, High Court awards two firms Sh 6.3 billion in a poll violence claim, Standard News Digital, 26<sup>th</sup> July 2018.

this right, the discrepancies and visible challenges. A brief look at jurisprudence relating to the right to peaceful assembly not only reveals the failure to observe protocol on the part of the state actors, furthermore, it reveals an inclination to the interference of the right to peaceful assembly and the tendency to use of force. Unfortunately, this should not be the case as the state is obligated to facilitate the active enjoyment of this right and not unjustly interfere with it. In the subsequent chapter we shall examine in its entirety the scope of legality in relation to abuse of power and the use of force.

## **CHAPTER 3**

### **THE LEGAL TEST APPLICABLE TO FORCE USED IN A PEACEFUL ASSEMBLY.**

#### **3.1 INTRODUCTION**

Keeping in mind the discussion presented in the previous sections of this paper, this chapter shall explore the limitations of the right to peaceful assembly with the aim of establishing a legal test applicable to the use of force.

#### **3.2 WHAT ARE THE LIMITATIONS ON THE RIGHT TO PEACEFUL ASSEMBLY?**

The word “limit” has been defined as “confining within limits, set bounds to, restrict”.<sup>168</sup> In the case of Wilson Olal, borrowing from the Canadian Charter of Rights, it was established that the power to limit rights does not go beyond the power to restrict rights.<sup>169</sup> The limitation of the right to peaceful assembly in the first instance is discussed in the constitution.<sup>170</sup> The Constitution succinctly states that a fundamental freedom shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable.<sup>171</sup> The Public Order Act on the other hand does not expressly limit the right to peaceful assembly, however, it regulates the same by ensuring order is maintained at all times.<sup>172</sup> The act creates provisions for individuals and organizations intending to demonstrate to notify the police service of the intention to assemble.<sup>173</sup>

Based on these provisions, the National Police Service have the authority to stop or prevent assemblies that are in contravention the goals of our constitution.<sup>174</sup> The same part of this act prohibits the possession weapons during these assemblies.<sup>175</sup> Generally speaking, subsidiary legislation that handles the right to peaceful assembly places a huge responsibility on the police

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<sup>168</sup> Wilson Olal & 5 others v Attorney General & 2 others (2017) eKLR.

<sup>169</sup> Wilson Olal & 5 others v Attorney General.

<sup>170</sup> Article 24, Constitution of Kenya, 2010.

<sup>171</sup> Article 24, Constitution of Kenya.

<sup>172</sup> Part III, Public Order Act of Kenya, CAP 56, 2012.

<sup>173</sup> Part III, Public Order Act.

<sup>174</sup> Section 5, Public Order Act of Kenya, CAP 56, 2012.

<sup>175</sup> Section 6, Public Order Act of Kenya, CAP 56, 2012.

who act on behalf of the state. The National Police Service Standing Orders for example, requires that officers also carry themselves in a manner that upholds the rights of all people.<sup>176</sup> The use of force is limited to extra ordinary circumstances highlighting that firearms must be used to defend oneself and preserve life in situations of imminent threat to life.<sup>177</sup>

In the unfortunate event of injury occurrence as a result of use force, medical assistance must be provided immediately and close relatives or friends of the injured person must be informed.<sup>178</sup> 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(IPOA).<sup>179</sup> It is also imperative that proper records must be kept of decisions made by commanding officers at all levels.

### **3.3 WHAT IS THE LEGAL TEST TO BE APPLIED WHEN ESTABLISHING MISUSE OF POWER BY REGULATORY AGENCIES QUELLING VIOLENT RIOTS?**

Borrowing from a paper written by the Kenya National Human Rights Commission (KNHRC), the use of force should always be a last resort, when all other methods of crowd control have failed.<sup>180</sup> The rules are very distinct and clear. Section 61 of the National Police Service Act together with schedule 6 of the same act delve into the power to use firearms,<sup>181</sup> as well as the conditions to use force.<sup>182</sup>

A clear example of positive police interventions that was instrumental in defusing tension is when, acting Senior Superintendent of the Police, Joseph Musyoka Nthenge employed dialogue and

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<sup>176</sup> Mutuma Ruteere, Policing Protests in Kenya, Centre for Human Rights and Policy Studies, 2019, <https://www.chrips.or.ke/wp-content/uploads/2019/08/CHRIPS-Policing-Protests-in-Kenya-full-book.pdf> Accessed 25<sup>th</sup> October,2019

<sup>177</sup> Mutuma Ruteere, Policing Protests in Kenya, Centre for Human Rights and Policy Studies, 2019.

<sup>178</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

<sup>179</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

<sup>180</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

<http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 4<sup>th</sup> February,2019.

<sup>181</sup> Section 61, National Police Service Act, No. 11A of 2011.

<sup>182</sup> Schedule 6, National Police Service Act, No. 11A of 2011.

negotiations, four times to extinguish possible violent flare-ups in the 2007 and 2008 post-election violence.<sup>183</sup> The policeman reasoned with an angry mob of demonstrators, and successfully convinced them to stop the destruction.<sup>184</sup> A police officer must always attempt to de-escalate the situation before resorting to the use of force.

In an attempt to unpack the legally established test that determines if at all the government is acting ultra vires, we shall use the situation of Mr. Nthenge as a point of reference. Mr. Nthenge, at this particular time, was in charge of a unit of the paramilitary General Service Unit (GSU) assigned to patrol a part of the city that was smouldering with tension and violence after the 2007 Kenyan election. On 29<sup>th</sup> December, 2007, the unit encountered a mob of angry young men marching towards the city centre, protesting the delay in announcing the presidential results.<sup>185</sup> They had already burnt some vehicles and were poised to burn down a petrol station.

Within a 48-hour period, Mr. Nthenge employed dialogue and negotiations four times to extinguish possible violent flare-ups.<sup>186</sup> In addition to being seen on TV persuading a mob away from their destructive behaviour, he convinced two other mobs in the city, as well as dissuading a group of Members of Parliament (MPs) to call off a march to challenge the banning of public gathering inside the city's largest park (Uhuru Park) by the police.<sup>187</sup> Seventeen years earlier, in 1991, Nthenge had used reason and words to effectively quell inter-communal violence in a part of the Rift Valley Province.<sup>188</sup> Amidst the scenes of bloodshed and mayhem that marked some of Kenya's darkest days following this particular presidential election, the image of peace and

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<sup>183</sup> Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24<sup>th</sup> October,2008, <https://kenvironews.wordpress.com/2008/10/24/post-poll-skirmishes-un-honours-kenya-gsu-police-officer/> Accessed on 4<sup>th</sup> February,2019.

<sup>184</sup> Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog.

<sup>185</sup> Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24<sup>th</sup> October,2008, <https://kenvironews.wordpress.com/2008/10/24/post-poll-skirmishes-un-honours-kenya-gsu-police-officer/> Accessed on 4<sup>th</sup> February,2019.

<sup>186</sup>Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24<sup>th</sup> October,2008.

<sup>187</sup> Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24<sup>th</sup> October,2008

<sup>188</sup> Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24<sup>th</sup> October,2008



judiciousness practiced by Nthenge undoubtedly stands out. Mr. Nthenge was later recognized as “UN in Kenya Person of the year” on 2008.<sup>189</sup>

The act sets out the following conditions:<sup>190</sup>

1. If the use of force is 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 weapons.
2. 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.
3. Protocols should be established with clear guidance on when and under what circumstances law enforcement officers can use force, use firearms, before, during or after assemblies.

In addition to the above, the act sets out a four-part test that guides the officers’ actions when using force. The actions of the officers, in the event of an unavoidable requirement to use force must be guided by the principles of:<sup>191</sup>

1. Precaution
2. Legality
3. Necessity
4. Proportion

Precaution requires that all feasible steps are taken, in planning and conducting a police operation to avoid use of excessive force or, where force is unavoidable, to minimize its harm.<sup>192</sup> Legality requires that states develop a domestic legal framework for the use of force that complies with

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<sup>189</sup>Post Poll Skirmishes : UN Honours Kenya GSU Police Officer, Governance and Insecurity, Kenya Environmental & Political News Weblog, 24th October,2008

<sup>190</sup> Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police, RoGGKenya, <https://roggkenya.org/areas-for-media-coverage-in-good-governance-and-corruption-in-kenya/securitypolice/police-use-of-force-rules-in-kenya/> , Accessed on 4th February,2019

<sup>191</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

<http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 4<sup>th</sup> February,2019.

<sup>192</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

international standards.<sup>193</sup> Necessity demands that the lowest possible level of force necessary to achieve a legitimate objective should be used.<sup>194</sup> The 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.<sup>195</sup> In the event that these conditions are not fulfilled, the government can be argued to be acting ultra vires. Furthermore, the use of tear gas and water cannons tend to be indiscriminate methods for crowd control by design and must only be used if absolutely necessary.<sup>196</sup> Special care should be taken to ensure that they are not used in the presence of uninvolved bystanders or in places with vulnerable populations such as schools<sup>197</sup>

### **3.4 CONCLUSION**

Based on the discussions presented in Chapter 3, it is apparent that Kenya has clear legislation and policies that captures generally the limitation of rights and specifically on right to peaceful assembly. The law is also very clear about the manner in which State Actors and Agencies should conduct themselves in regard to peaceful assembly, case law and previous experiences supplements further the aforementioned. In the subsequent chapter, we shall attempt to make a comparison between Kenya and France, highlighting the areas in which Kenya can emulate France in regard to the right to peaceful assembly.

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<sup>193</sup> Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police, RoGGKenya, <https://roggkenya.org/areas-for-media-coverage-in-good-governance-and-corruption-in-kenya/securitypolice/police-use-of-force-rules-in-kenya/>, Accessed on 4<sup>th</sup> February, 2019.

<sup>194</sup> Police Use of Force Rules in Kenya, Toolbox, Areas of Reporting, Security and Police, RoGGKenya

<sup>195</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights

<sup>196</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

<http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 5<sup>th</sup> February, 2019.

<sup>197</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights.

## **CHAPTER 4**

### **A REVIEW OF THE REGULATION OF THE RIGHT TO PEACEFUL ASSEMBLY**

#### **4.1 INTRODUCTION**

This chapter will attempt to do a brief comparison between France and Kenya briefly analysing the way the right to peaceful assembly is handled in both these jurisdictions. To clearly distinguish the differences in these countries, this chapter will base its comparison on:

1. Limitation of the right to peaceful assembly in Kenya and France.
2. Adherence to best practices in regard to the right to peaceful assembly in both Kenya and France.
3. The “Use of force” in both countries.
4. The Legal Test of force applicable to demonstrations in both jurisdictions.

Before delving into this review, it is prudent to understand what exactly is encompassed in the term civic space. A civic space can loosely be defined as the leeway or headroom societies are given by their governments, allowing them to enjoy their rights to the freedom of expression.<sup>198</sup> CIVICUS has put in place a strategy that is used to measure public freedoms and the manner in which these rights are enjoyed and limited around the world.<sup>199</sup> This information is primarily based on statistics monitored by Civil Society Organizations (CSO) using the markers:<sup>200</sup>

1. Closed
2. Repressed
3. Obstructed
4. Narrowed
5. Open

In light of the above it is important to note that France and Kenya are both in different civic spaces and this largely influences the way the right to peaceful assembly is enjoyed in both jurisdictions.

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<sup>198</sup> CIVICUS Monitor, Civic Space Definition, <https://monitor.civicus.org/whatis-civicspace/> Accessed on 25<sup>th</sup> October, 2019.

<sup>199</sup> CIVICUS Monitor, Civic Space Definition,

<sup>200</sup> CIVICUS Monitor, Civic Space World Map, <https://monitor.civicus.org/> Accessed on 25<sup>th</sup> October, 2019.

## **4.2 A REVIEW OF THE RIGHT TO PEACEFUL ASSEMBLY IN FRANCE**

Pursuant to the discussion posited by CIVICUS France exists in a narrowed civic space meaning that despite the fact that the state actively allows individuals to exercise their freedoms, violations and interruptions occur significantly.<sup>201</sup> Kenya on the other hand exists in a obstructed civic space where those in power foist legal and practical restrictions on the enjoyment of rights.<sup>202</sup>

### **4.2.1 OVERVIEW OF THE CURRENT SITUATION IN FRANCE**

As the situation currently stands, violence and protests has been the order of the day in France. On 17<sup>th</sup> November, 2018, there were massive eruptions of violence in France, as yellow vests took to the streets to protest against French President Emmanuel Macron's economic policies.<sup>203</sup> Thousands of protesters marched noisily but peacefully through the Grands Boulevards shopping area in northern Paris.<sup>204</sup> The city centre was locked down as a result of fear of another eruption of violence by radical elements in the Yellow Vest movement.<sup>205</sup> Police in Paris have used various means to quell the protests. Some of these methods include the firing of water cannon and tear gas to repel gilets jaunes (yellow vest) demonstrators.<sup>206</sup> Looking back at the early stages of the protests, it is important to highlight the fact that, Paris was put on lockdown and over 80,000 police deployed nationwide, with 5,000 officers in capital.<sup>207</sup> 11 months later, the protests are still ongoing and in an unfortunate twist of events violence has ensued in these protests. The number of casualties presently stands at over 4000 people injured including police officers and less than 15 deaths total and over 12000 people being arrested.<sup>208</sup>

It is important to take note of the fact that through the course of this protest period, President Marcon decided to give audience to the protestors and create a platform for the citizens to air their grievances. However, these attempts at dialogue were futile as the riots erupted forcing the French

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<sup>201</sup> CIVICUS Monitor, Civic Space World Map, <https://monitor.civicus.org/> Accessed on 25<sup>th</sup> October,2019.

<sup>202</sup> CIVICUS Monitor, Civic Space World Map.

<sup>203</sup> Violence erupts in France as yellow vests take to the streets, Irish Times, 12<sup>th</sup> January,2019, <https://www.irishtimes.com/news/world/europe/violence-erupts-in-france-as-yellow-vests-take-to-the-streets-1.3756277> Accessed 9<sup>th</sup> February,2019.

<sup>204</sup> France: Thousands of police mobilize for 9th 'yellow vests' protests, Deutsche Welle, 12<sup>th</sup> January,2019. <https://www.dw.com/en/france-thousands-of-police-mobilize-for-9th-yellow-vests-protests/a-47053247> Accessed 9<sup>th</sup> February 2019.

<sup>205</sup> Violence erupts in France as yellow vests take to the streets, Irish Times

<sup>206</sup> Violence erupts in France as yellow vests take to the streets, Irish Times

<sup>207</sup> Violence erupts in France as yellow vests take to the streets, Irish Times

<sup>208</sup> France 24 News, Six months of 'yellow vest' protests in France, 16<sup>th</sup> May, 2019

<https://www.france24.com/en/20190516-six-months-yellow-vest-protests-france> Accessed 25<sup>th</sup> October 2019.

police to respond forcefully.<sup>209</sup> Human rights bodies across the world have been triggered by this forceful response urging the French authorities to dial it down a notch, among these bodies are the Council of Europe, Amnesty International and the United Nations.<sup>210</sup> The UN Commissioner for Human Rights demanded that an investigation be conducted to establish the legality of the use of force by the French authorities.<sup>211</sup> However, in their defence, the French authorities have come forward stating all protocol was adhered to and further emphasising that force was not used until the moment the protestors engaged in physical violence towards the police and serious damages were occasioned.<sup>212</sup> It was also pointed out that at that juncture the protests had automatically become unlawful.<sup>213</sup>

### **4.3 RELEVANT LAWS AND PRACTICES IN FRANCE**

Generally speaking, the French Constitution in its preamble unequivocally safeguards the right to protest. However, there is no clear-cut protection of the right to peaceably assemble. Nevertheless, the Declaration of the Rights of Man and of the Citizen, which is incorporated into the current French Constitution caters for the right to peaceful assembly.<sup>214</sup> The Declaration succinctly states that “no one should be bothered for his opinions, even religious ones, so long as their manifestation does not disturb the public order established by Law.”<sup>215</sup> The European Convention on Human Rights further enforces the right to peaceful assembly and France is a party.<sup>216</sup>

The Internal Security Code gives directions stating that notification is an important facet of peaceful assembly in France siting that demonstrators must give at least three days, and no more than fifteen days to the town hall before the date of the demonstration or assembly.<sup>217</sup> Where the

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<sup>209</sup>The Guardian, President Emmanuel Macron tries to quell ‘yellow vest’ unrest with 2,330-word letter to France, 14<sup>th</sup> January 2019, <https://www.scmp.com/news/world/europe/article/2181940/president-emmanuel-macron-tries-quell-yellow-vest-unrest-2330-word> Accessed 25<sup>th</sup> October,2019.

<sup>210</sup> Pauline Bock, The Yellow Jackets blinded by police weapons, Politico, 20<sup>th</sup> May 2019, <https://www.politico.eu/article/yellow-jackets-blinded-police-weapons-france-protests/> Accessed 25<sup>th</sup> October,2019.

<sup>211</sup> Pauline Bock, The Yellow Jackets blinded by police weapons, Politico, 20<sup>th</sup> May 2019.

<sup>212</sup> Pauline Bock, The Yellow Jackets blinded by police weapons, Politico, 20<sup>th</sup> May 2019.

<sup>213</sup> Pauline Bock, The Yellow Jackets blinded by police weapons, Politico, 20<sup>th</sup> May 2019.

<sup>214</sup>. Library of Congress, Right to Peaceful Assembly in Foreign Jurisdictions, <https://www.loc.gov/law/help/peaceful-assembly/foreign.php> Accessed 25<sup>th</sup> October,2019.

<sup>215</sup> Article 4, Declaration of the Rights of Man and the Citizen, 26 August 1789.

<sup>216</sup> Library of Congress, Right to Peaceful Assembly in Foreign Jurisdictions, <https://www.loc.gov/law/help/peaceful-assembly/foreign.php> Accessed 25<sup>th</sup> October,2019

<sup>217</sup> Article L211-2, Internal Security Code of France, Law No. 2019-290 of 10 April 2019, [https://translate.googleusercontent.com/translate\\_c?depth=2&hl=en&prev=search&rurl=translate.google.com&sl=fr&sp=nmt4&u=https://www.legifrance.gouv.fr/affichCodeArticle.do%3FidArticle%3DLEGIARTI000038382528%26cidTexte%3DLEGITEXT000025503132%26dateTexte%3D20190412&xid=17259,15700022,15700186,15700190](https://translate.googleusercontent.com/translate_c?depth=2&hl=en&prev=search&rurl=translate.google.com&sl=fr&sp=nmt4&u=https://www.legifrance.gouv.fr/affichCodeArticle.do%3FidArticle%3DLEGIARTI000038382528%26cidTexte%3DLEGITEXT000025503132%26dateTexte%3D20190412&xid=17259,15700022,15700186,15700190)

prohibition of demonstrations is concerned, the mayor has the mandate to prohibit a demonstration if there is reason to believe that the public order is in jeopardy.<sup>218</sup>In addition to, France heavily embraces international best practices in relation to public international laws.

#### **4.4 SIGNIFICANT DIFFERENCES BETWEEN FRANCE AND KENYA**

As previously highlighted in the previous sections of this paper, the Kenyan state actors have a proclivity to use force in a bid to quell demonstrations as opposed to following the requisite protocol. Despite the fact that state of affairs in France are not entirely rosy, one thing that comes out quite clearly is the fact that the authorities try to follow the due protocol and result to violence as a last resort. This is strongly evidenced by the fact that President Marcon even offered the demonstrators an opportunity to vocalize their frustrations through the “Great National Debate”, albeit his efforts bore no fruits. There is a clear effort on the part of the government to avoid using violence which is quite commendable.

#### **4.5 CONCLUSION**

The discussion above proves that most European countries observe, manage and limit the right to peaceful assembly in a more suitable way in comparison to Kenya. Relying on the fact that a state has the duty to promote and protect the right to peaceful assembly, Kenya ought to borrow a leaf from France as it has been able to observe and limit the right to peaceful assembly without engage in wanton violence and acting ultra vires.

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g Accessed on 25<sup>th</sup> October,2019.

<sup>218</sup> Article L211-2, Internal Security Code of France, Law No. 2019-290 of 10 April 2019.

## **CHAPTER 5**

### **5.1 INTRODUCTION**

Based on the findings in the preceding chapters of this paper, an issue that comes out clearly is the fact that Kenya has legislation that has effectively catered for the right to peaceful assembly, the implementation is what is lacking.

In this chapter we shall touch on the possible recommendations and considerations that the Kenyan government can embrace so as facilitate better and further enjoyment of the right to peaceful assembly.

### **5.2 RECOMMENDATIONS AND CONCLUSIONS**

As it previously mentioned, many human rights defenders are still facing threats to their lives and freedom while exercising right to freedom of assembly. This threat is actively brought to life by the use of lethal force by state actors. There is an apparent deviance from the principles outlined in statute and this is the genesis of the problem. If at all, the armed forces can act within the parameters of the law and embrace the approach used by Mr. Joseph Nthenge in 2007, things would be much better.

Incidents that have been previously recorded suggest that the Kenyan government is quick to classify a protest as “unlawful” even when the vast majority of individuals remain peaceful and compliant with the laws.<sup>219</sup> It is important to highlight the fact that despite some protesters becoming violent, this does not make the entire assembly unlawful.<sup>220</sup> These classifications are used to justify a wide range of repressive state measures, including use of lethal force.<sup>221</sup> The right to peaceful assembly must be interpreted in a way that ensures that individuals who are exercising their fundamental peaceful assembly rights continue to receive protection, even when other individuals within a crowd commit acts of violence.<sup>222</sup> Despite the fact that the right to peaceful

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<sup>219</sup> ARTICLE 19, Country Report: Protest in Kenya 2015, 12<sup>th</sup> April, 2016, <https://www.article19.org/resources/country-report-protest-in-kenya-2015/> Accessed on 3<sup>rd</sup> February, 2019.

<sup>220</sup> The Right to Freedom to Peaceful Assembly, A Checklist for The Kenyan Police and The Public, Kenya National Commission on Human Rights. <http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 4<sup>th</sup> February, 2019.

<sup>221</sup> ARTICLE 19, Country Report: Protest in Kenya 2015.

<sup>222</sup> The Right to Freedom to Peaceful Assembly, a Checklist for the Kenyan Police and the Public, Kenya National Commission on Human Rights.

assembly is limited to peaceful demonstration or protest, it is imperative that all other rights are upheld, regardless of the on-going state of affairs.

A wide array of recommendations have been put forward by a large pool of authors in regard to the topic in discussion. This paper, however, presents the following recommendations to the revealed facts that use of lethal force by police is the leading cause of violence in assemblies in Kenya.

### **5.2.1 LEGAL RECOMMENDATIONS**

1. Police should first and foremost 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.
2. Police should always ensure that in the event of quelling of riots and protests, the use of force should always be a last resort and should follow the requisite protocol.

### **5.2.2 POLICY RECOMMENDATIONS**

1. In the event of violation or abuse of human rights in the circumstances of managing assemblies, these violations should be investigated in a prompt, thorough and impartial manner. In addition to the above, victims should be given a form of redress for such breaches and violations. These remedies can be sought either by way of judicial remedies or under organizational oversight working in the parameters of national and international standards of human rights.
2. Introduction of free speech zones to allow designated areas to be set aside for public protest, similar to the United States. This would aid state actors in ensuring the right to peaceful assembly is adequately enjoyed and controlled.

### **5.2.3 INSTITUTIONAL RECOMENDATIONS**

1. The Kenyan Government actively has an obligation to put in place measures that enable an environment for demonstrations and protests to operate freely without undue restriction and interruptions enabling environment for associations to operate safely and for protests.

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<http://www.knchr.org/Portals/0/PressStatements/The%20Right%20To%20Freedom%20of%20Peaceful%20Assembly.pdf?ver=2017-07-27-112500-287> Accessed on 5<sup>th</sup> February, 2019.



2. The Kenyan Government should also take measures to report any use of firearms by officers within the performance and execution of duties. Under no circumstances should police officers be permitted to modify or disassemble their firearms as this interferes with tracking of firearms
3. In addition to the above, liability should also extend to officers with command control where after investigations it is revealed that protocol was not followed and the officers were acting ultra vires.
4. The Kenyan Government should make an active effort to ensure that the Kenyan citizens understand the parameters of the right to peaceful assembly in its entirety.
5. It is imperative to the enjoyment of the right to peaceful assembly that the Kenyan Government, the National Police specifically, embrace a compassionate and humanitarian approach towards the promotion of the right to peaceful assembly. In the event all other rights and fundamental freedoms are given utmost respect, use of force will always remain to be a last resort.
6. Lastly, the Kenyan government is under the obligation to always ensure that authorities prepare and plan for assemblies with a view to ensuring the best possible conditions for the exercise that is underway. The priority of the government should always be to protect protestors from active threats of violence as well as establish the best ways to ensure that there are no abrupt eruptions of violence during demonstrations.
7. Co-operation and co-ordination between the state actors and other agencies so as to facilitate accountability.

### **5.3 CONCLUSION**

In conclusion, the right to peaceful assembly is a right that all individuals should be actively able to enjoy. By virtue of the fact that this right is an important facet of the democracy, governments should ensure that the right is interpreted in a way that guarantees protection to all, even in the wake of eruptions of violence.

The enjoyment of this right should not infringe on the rights of by-standers. In addition to, the limitation of this right should not violate the other fundamental rights of the protestors. Governments should endeavour to ensure that all requisite protocol is upheld, especially when attempting to limit this right.

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