



Commonwealth Human Rights Initiative

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Policing of Public Assemblies in Tanzania

Analysis of the Legal Framework

2012

This is a summary document. For a full analysis, including more detail on the relevant case law, please email sarah@humanrightsinitiative.org.

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1. Summary

The right to peaceful assembly is a fundamental human right, and is enshrined in international law, African regional law and Tanzanian national law. The purpose of this document is to explain the laws regarding freedom of assembly and policing of public assemblies in Tanzania, and to consider whether these laws are constitutional. CHRI hope that this brief will assist lawyers, civil society organisations and the police in understanding the laws regarding policing of public assemblies in Tanzania and the principles the police should abide by, to ensure that the constitutionally enshrined right to freedom of assembly is not arbitrarily denied.

This brief will outline:

- The legal framework regarding the right to assemble in Tanzania;
- The powers and responsibilities of the police relating to public assemblies and riots in Tanzania;
- The law regarding use of force in policing public assemblies;
- Offences and penalties relating to breach of public assembly laws; and
- International and regional case law regarding policing of protests – to gain an understanding of how the Tanzanian laws may be interpreted by the court.

In **summary**, to determine whether the provisions of the Tanzanian *Police Force and Auxiliary Service Act 2002* are constitutional the court would need to consider:

- Are the sections of the Act that limit the freedom to assemble so broad as to allow the arbitrary denial of rights by the police?
- Are the powers given to the police prohibitive rather than regulatory?
- Are the relevant sections reasonably necessary to achieve a legitimate outcome?

On the basis of both African and international case law, there is a possibility a Tanzanian Court could find sections of the Tanzania Police Act unconstitutional. If the Court were to make such a finding, the likely basis would be the broad discretion given to the police to prohibit public assemblies. We note that Tanzania is in the process of Constitutional review, and it is our view that this should include a review, and reform of, the security forces and relevant legislation.

In relation to specific protests, to determine if the police acted appropriately in using their powers, the following questions should be asked:

- Was the public assembly likely to breach the peace or public order? In deciding this, the court may consider whether the breach of the peace was imminent.



- Was the action that the police took necessary, reasonable and proportionate? For example, could the police have placed conditions on the public assembly instead of prohibiting it?
- Did the police take the least intrusive action necessary to prevent the breach?

The police in Tanzania need to ensure that when they use their discretion to prohibit public assemblies, they are using it objectively, and not arbitrarily. The police in Tanzania should be reminded of the Zambian case of *Christine Mulundika and 7 Others v The People*, where the Supreme Court noted that the discretion afforded to the Zambian police to prohibit public assemblies has been used unlawfully at times to “muzzle critics and opponents”. This is a clear misuse of the discretion in the Act, and a violation of constitutionally enshrined rights and freedoms.

If a particular protest is deemed likely to breach the peace, the police should take the least intrusive form of action possible, to ensure the people can exercise their freedom to assemble in public, whilst still ensuring public order and safety. The Tanzanian police should also be careful in exercising use of force at public assemblies, and ensure that all actions taken are necessary and proportionate to the threat posed, and that the minimum amount of force that is necessary is used. Use of firearms should be a last resort, and only used to when less dangerous means cannot be used, or to protect others from the threat of serious injury or death.

We acknowledge that policing of public assemblies can be a difficult area for the police, and that, at times peaceful assemblies can escalate into violent protests or riots. However, the police should remember that if they are facilitating people to publically express their views to the greatest degree possible, in accordance with their constitutional rights, peaceful public assemblies are less likely to escalate into conflicts. After all, the role of the police is to ensure the rights and freedoms of the citizens of Tanzania are upheld, including the right to freedom of assembly and expression.

2. Right to assemble

Article 20 of the *Constitution of The United Republic of Tanzania 1977* enshrines the rights of every person in Tanzania to “freely and peaceably assemble, associate and cooperate with other persons, express views publicly and more specially to form or join associations or organizations formed for the purposes of preserving or furthering his beliefs or interests or any other interests.” However,



this right can be limited by other laws, if those laws are for the purpose of, among other matters, ensuring public safety and public order.

International law states that the right of peaceful assembly can only be restricted in accordance with the law and when it is **necessary in a democratic society** in the interests of, among other things, public order.¹ The *African Charter of Human and Peoples Rights* also states that individuals have the right to assemble freely with others, and that this right can only be subject to “necessary restrictions provided for by law.”²

Hence, in Tanzania, all people have a right to peacefully assemble, but this right can be limited by other laws for the purpose of maintaining public order.

3. Policing of public assemblies – powers of police

The *Police Force and Auxiliary Service Act 2002* (“Police Act”) outlines what procedures the police must follow in the policing of public assemblies and processions.

The terms “assembly” and “procession” are not defined in the Police Act. The Act does state that an assembly of three or more people, who do not obey orders to disperse when requested, would be classified as an “unlawful assembly”. Presumably the police would make an assessment based on the purpose of the gathering and number of people attending. It is only assemblies and processions held in a public place that are policed. A public place is defined in the Police Act as:

“any highway, public park, common or garden, any sea, beach, or lake shore, and any public bridge, road, street, lane, footway, square, court, alley or passage, whether a thoroughfare or not; and includes any place, whether a building or not, to which for the time being the public have or are permitted to have access, whether on payment or otherwise”.

Before the assembly or procession - notification

A written notification must be provided to the police 48 hours before holding an assembly or procession in a public place. The notification must be provided to the police officer in charge of the area where the assembly is proposed to take place. The notice must specify:

- Place of assembly
- Time

¹ Art 21, *International Covenant on Civil and Political Rights*; Art 20, *Universal Declaration on Human Rights*

² Article 11, *African Charter of Human and Peoples Rights*



- Purpose; and
- Other relevant particulars of the assembly or procession that the Minister may specify in the *Gazette* need to be provided.³

A police officer who receives such a notification can **deny** a public assembly if he/she believes the assembly **is likely to**:

- cause a breach of the peace
- prejudice the public safety
- prejudice the maintenance of public order
- be used for any unlawful purpose⁴
- if the requirements of notification above are not met⁵

If the police officer does not respond to the notification, the assembly/procession is allowed to proceed.⁶ A person can appeal to the Minister regarding the decision of the police officer to deny a public assembly. The decision of the Minister is then final.⁷ The Minister responsible for matters relating to the Police Force can also override these rules and declare that the rules do not apply to particular assemblies.⁸

Whilst a public assembly is happening

The officer in charge of police in the area where the public assembly or procession is occurring may stop or prevent an assembly in a public place if a notice was not provided. The officer in charge of Police may also stop or prevent the holding of any assembly or procession in any place if it is deemed:

- to be breaching the peace; or
- to be prejudicing the public safety; or
- to be prejudicing the maintenance of public order; or
- the organizer did not meet the notification requirements.

The officer may give or issue such orders as he considers necessary, including orders for the dispersal of any such assembly or procession.⁹ If the police officer does order the dispersal of

³ s43(1) *Police Force and Auxiliary Services Act 2002*

⁴ s43(3), s44 *Police Force and Auxiliary Services Act 2002*

⁵ s43(4) *Police Force and Auxiliary Services Act 2002*

⁶ s43(2) *Police Force and Auxiliary Services Act 2002*

⁷ s43(6) *Police Force and Auxiliary Services Act 2002*

⁸ s43(5) *Police Force and Auxiliary Services Act 2002*

⁹ s44 *Police Force and Auxiliary Services Act 2002*



an assembly or procession of 3 or more persons, they must obey the order. If the order is not obeyed, the assembly becomes an “**unlawful assembly**”.¹⁰

Music, speeches and routes

A superintendent or any officer in charge of police may, in such manner as s/he thinks appropriate, make orders regarding the amplification, broadcasting, reproduction, relaying or playing of music, speech, or any other sound in public places.¹¹ The same applies for making orders to direct the conduct, or the route of all assemblies and processions in public places.¹²

Penal Code – unlawful assemblies and riots

The *Tanzania Penal Code 1981* (“Penal Code”) also includes a definition of unlawful assembly, with different penalties. Unlawful assembly is defined as the assembly of three or more people “with the intent of committing an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in a way which causes people in the neighborhood to reasonably fear that the assembly is committing a breach of the peace, or will by such an assembly needlessly and without any reasonable occasion, provoke others to commit a breach of the peace”¹³. This is the case even if the persons were originally lawfully assembled.

Riots are also defined under the Penal Code: “When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot and the persons assembled are said to be riotously assembled”¹⁴. A magistrate, or if a magistrate is not available, an inspector of police or police officer of a higher rank, or any commissioned officer in the military forces, in whose view twelve or more persons are riotously assembled or about to be assembled, may make a proclamation commanding the rioters or assembled persons to peacefully disperse.¹⁵ It is unclear from this section if this just refers to riots, or also unlawful assemblies as defined under the Penal Code.

Use of Force – Penal Code

If:

- the making of such proclamation (referred to above) has been prevented by force; or

¹⁰ s45 *Police Force and Auxiliary Services Act 2002*

¹¹ s42(1)(a) *Police Force and Auxiliary Services Act 2002*

¹² s42(1)(b) *Police Force and Auxiliary Services Act 2002*

¹³ s74 *Tanzania Penal Code 1981*

¹⁴ s74 *Tanzania Penal Code 1981*

¹⁵ s77 *Tanzania Penal Code 1981*

- after making such a proclamation, and allowing reasonable time for people to disperse, 12 or more persons continue to be riotously assembled together

any person authorized to make a proclamation, or any police officer, or any other person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them.

If a person resists, force that is reasonably necessary for overcoming such resistance may be used. Also, the Police Act states that a person who uses force lawfully within the provisions, is not liable in any criminal or civil proceeding for having, by the use of such force, caused harm or death to any person.¹⁶

These sections seem to say that force can be used:

- to disperse a riot, if after being told to disperse, 12 or more people continue to gather; or
- if the warning to disperse a riot cannot even be given due to use of force.

It appears that force is not sanctioned for assemblies that are not “riotously assembled”. Force can only be used when judged necessary in the circumstances.

Use of Force – International Principles

The international *Basic Principles on use of Force and Firearms* state that:

- Force must not be used on unlawful assemblies that are non-violent. If this is not practicable then police must only use the minimum amount of force necessary.¹⁷
- Police may use firearms, to the minimum extent necessary, to disperse violent assemblies only in the following circumstances:
 - when less dangerous means cannot be used
 - in self-defence
 - in defence of another against the imminent threat of death or serious injury
 - to prevent the perpetration of a particularly serious crime involving a grave threat to life
 - to arrest, or prevent the escape of, a person presenting such a danger (i.e. a grave threat to life presumably) and resisting their authority¹⁸

¹⁶ s78 Tanzania Penal Code 1981

¹⁷ Principle 13, *Basic Principles on use of Force and Firearms*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990

¹⁸ Principle 14 and 9, *Basic Principles on use of Force and Firearms*



- Use of firearms cannot be used to intentionally kill someone unless it is strictly unavoidable to protect life.¹⁹

The United Nations *Code of Conduct for Law Enforcement Officials* also states that law enforcement officials (so including police) may only use force “when strictly necessary and to the extent required for the performance of their duty”.²⁰ The commentary to the Code of Conduct explains that use of force should only be used in rare situations when strictly necessary. The Code also states that use of firearms is an extreme measure and should be a last resort, especially when children are involved.²¹

4. Offences and Penalties

There are offences and penalties relating to unlawful assembly in both the Police Act and the Penal Code, including fines or a prison sentence, or both. There are many offences, but one that is worthy to note is that it is an offence to hold a procession without meeting the notification requirements.

5. Interpretation of the laws – what have the courts said?

What is a reasonable limitation on rights for the sake of preserving public order?

CHRI could not find any Tanzanian case law considering whether these sections of the Police Act are a reasonable limitation on constitutional rights. However, in the case of *Pumbum and Another v Attorney General and Another*²², the Tanzanian Court of Appeal held that a law that seeks to limit rights of the individual on the grounds of public interests, will only meet section 30(2) of the Constitution if:

- a) The law provides effective controls against arbitrary abuse of the law; and
- b) The limitation in the law must be reasonably necessary to achieve a legitimate objective.

The Court also held that “any law that seeks to limit the fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements”. Arguably the Tanzanian Police Act does not place enough controls in the law to prevent arbitrary prohibition of public assemblies by the police. For example, a breach of the peace, or a breach

¹⁹ Principle 9, *Basic Principles on use of Force and Firearms*

²⁰ Article 3, *Code of Conduct for Law Enforcement Officials*, Adopted by General Assembly resolution 34/169, 1979

²¹ Commentary to Article 3, *Code of Conduct for Law Enforcement Officials*, Adopted by General Assembly resolution 34/169, 1979

²² *Pumbum and Another v Attorney General and Another* (1993) 2 L.R.C. 317



of public order, may be interpreted very broadly by the police to allow prohibition of many public assemblies.

The Supreme Court of Zambia used this Tanzanian case to guide their ruling in *Christine Mulundika and 7 Others v The People*²³. In this case the Court considered section 5(4) of the *Public Order Act*, which is very similar to the current Tanzanian provisions. The provision stated that a person who wishes to hold an assembly must notify the regulating officer who shall issue a permit, with conditions if applicable, if the officer is satisfied the assembly will not breach to the peace. The Court held that, although the section itself may be within constitutional limits, it did not have sufficient controls to prevent officers making arbitrary decisions. The interpretation by the police was “highly subjective” and there were “no adequate guidelines” to prevent arbitrary decisions. Further, the Court held that making it an offence to hold any procession in public without a permit, similar to the Tanzanian law of it being an offence to hold a procession without meeting notification requirements, is unconstitutional.²⁴

The Court distinguished between attaching conditions to the holding of “serious” public gatherings, and the refusal of permission to hold them. In Tanzania, a police officer can deny the holding of an assembly that, in the view of the officer, is likely to cause a breach of the peace/public order – the police officer is not required to consider attaching conditions first, or distinguish between “serious” breaches of the peace or public order.

The Constitutional Court of Uganda found in the 2008 case of *Muwang Kivumbi vs Attorney General*²⁵ that subsection 32(2) of the Police Act that empowered the Inspector-General of Police to prohibit a public assembly if the Inspector-General “has reasonable grounds for believing that, the assembly or procession is likely to cause a breach 'of the peace’”, was unconstitutional and hence null and void. The Court held that the subsection “clearly empowers the inspector general of police to prohibit the convening of an assembly or forming of a procession in any public place, on subjective reason.” Again this case is directly relevant to Tanzania, where the current Police Act allows the police officer in charge of an area to deny a proposed assembly if the police officer believes it is likely to breach the peace, or if the assembly has already happened, to prohibit the assembly, if in the view of the police officer, the assembly is breaching the peace.

²³ *Christine Mulundika and 7 Others v The People* (S.C.Z. Judgment No. 25 of 1995) [1996] ZMSC 26

²⁴ See *Thappar v State of Madras S.C.R* (1950) 594 Supreme Court of India 603

²⁵ *Muwang Kivumbi vs Attorney General* (Constitutional Petition No. 9 of 2005) [2008] UGCC 4 (27 May 2008)

In this Ugandan case, the Constitutional Court held that, similar to the Zambia Supreme Court that it was important that the power given was prohibitive rather than regulatory - it prohibited assemblies rather than attached conditions.

If the laws are found to be constitutional, what amounts to a “breach of the peace”?

The High Court of Uganda has ruled on the meaning of this term in the case *Uganda v Tibemanzi Deus*.²⁶ In this case, Mr Tibemanzi Deus photographed the President of Uganda. Lugayizi J considered what an actual breach of the peace was, and whether photographing the President is likely to cause such a breach of the peace. In his ruling, Lugayizi J referred to Byrnes Law Dictionary and decided that a breach of the peace means “causing an unnecessary disturbance of the peace by engaging in riotous and unlawful assembly or a riot or affray or instilling fear or terror by sending challenges or provoking others to a fight or going about armed in public with unusual weapons or attendance with lawful excuse etc”. The Judge found that Mr Deus had “certainly not!” breached the peace in taking a photograph of the President.

From this case we can presume that a breach of peace may include:

- A riotous and unlawful assembly
- Riots, affrays, forcible entry
- Instilling fear or terror by sending challenges or provoking others to a fight
- Going about armed in public without lawful occasion
- Going about armed in public with unusual weapons, with the aim of alarming the public

In relation to the first bullet point above, we note that the use of the word “and” in this definition implies that the assembly must be unlawful and riotous, not just unlawful. However this is not entirely clear – the courts would need to provide greater clarity.

What amounts to “prejudicing public safety” or “public order”?

In the Zambian case of *Kaira v Attorney-General*²⁷ Cullinan J referred to the Indian “Basu’s Commentary on the Constitution of India”, for the definition of public safety and public order:

“Public Order also includes public safety in its relation to the maintenance of public order... offences against public safety would include - creating internal disorder or rebellion, interference with the supply or distribution of essential commodities or services, inducing members of the Police to

²⁶ *Uganda v Tibemanzi Deus* [2006] UGHC 47 (2 November 2006)

²⁷ *Kaira v Attorney-General* [1980] ZMHC 17; (1980) Z.R. 65 (H.C.) (8 August 1980)



withhold their services or inducing public servants engaged in services essential to the life of the community to withhold their services..."²⁸

This definition implies that prejudicing the public safety would include relatively serious matters such as creating a rebellion; interference with the supply or distribution of commodities or services; inducing the police to withhold their services.

When is an assembly “likely to” cause a breach of the peace or prejudice public order?

In the 2011 English case of *R (on the application of Moos and another) v Commissioner of Police of the Metropolis* case clarified when it is possible for a police officer to limit rights in order to prevent a breach of the peace:

- a) the apprehended breach must be imminent;
- b) what is considered imminent depends on the circumstances;
- c) if steps taken by the police are to be justified, they must be necessary, reasonable and proportionate;
- d) depending on the circumstances, where it is necessary in order to prevent an imminent breach of the peace, action may lawfully be taken which affects people who are not themselves going to be actively involved in the breach.

This case also clearly says that the police can only take the least intrusive action, which is necessary and proportionate, to prevent a likely breach to the peace.

Cases on Use of Force by police at public assemblies

The English case of *R (on the application of Moos and another) v Commissioner of Police of the Metropolis* clarifies that police can infringe on the rights of others “only when the police reasonably believe that there is no other means whatsoever to prevent an imminent breach of the peace”. The case further clarifies that the “test of necessity is met only in truly extreme and exceptional circumstances” and the action taken by the police must be “reasonably necessary and proportionate and taken in good faith”.

²⁸ Basu's Commentary on the Constitution of India Vol. I at p. 627.