

**CONTEMPORARY CHALLENGES AND PROSPECTS
OF HUMAN RIGHTS CIVIL SOCIETY
ORGANIZATIONS IN ETHIOPIA: FREEDOM OF
ASSOCIATION TOO QUALIFIED?**

By

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EXECUTIVE SUMMARY

Associational life in Ethiopia existed since time immemorial in a form of traditional community based organizations. The emergence and growth of modern civil society organizations is, however, a recent phenomenon. Even though the Ethiopian Constitution guarantees the right to freedom of association, a comprehensive and up-to-date legislation was lacking, for so long, that would effectively regulate the steadily advancing civil society organizations that have evolved to partaking in more complex arenas such as advancement of human rights. The normal relationship between the government and civil society organizations was strained following the contested 2005 election that gave rise to the enactment of an infamous Charities and Societies Proclamation in 2009. The law contains a number of restrictive provisions that proscribe civil society organizations from engaging in human rights, thus, falling short of international standards on the right to freedom of association.

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS.....	v
INTRODUCTION	1
CHAPTER ONE: THEORETICAL UNDERPINNINGS OF FREEDOM OF ASSOCIATION.....	4
1.1 PRELIMINARY NOTIONS OF FREEDOM OF ASSOCIATION	4
1.1.1 WHY DO PEOPLE ASSOCIATE?.....	4
1.1.2 DIFFERENT KINDS OF ASSOCIATIONS	8
1.2 FREEDOM OF ASSOCIATION AS A BASIC RIGHT	10
1.2.1 THEORIES OF FREEDOM OF ASSOCIATION	10
1.2.2 DEFINITION OF FREEDOM OF ASSOCIATION	14
1.3. THE RISE OF CIVIL SOCIETY ORGANIZATIONS	16
1.3.1 THE EMERGENCE AND GROWTH OF CIVIL SOCIETY ORGANIZATIONS	16
1.3.2 UNDERSTANDING CIVIL SOCIETY ORGANIZATIONS	22
1.4. CIVIL SOCIETY ORGANIZATIONS, HUMAN RIGHTS AND FREEDOM OF ASSOCIATION	28
CHAPTER TWO: NORMATIVE STANDARDS FOR PROTECTION OF FREEDOM OF ASSOCIATION .	32
2.1 UNITED NATIONS STANDARDS	32
2.1.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)	32
2.1.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	34
2.1.3 UN DECLARATION ON HUMAN RIGHTS DEFENDERS	37
2.1.4 ADDITIONAL GUARANTEES IN OTHER MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	39
2.2 REGIONAL STANDARDS	40
2.2.1 EUROPE.....	40
2.2.2 AFRICA.....	48
2.2.3 OTHER REGIONAL STANDARDS.....	52
2.3 STANDARDS FOR PROTECTION OF FREEDOM OF ASSOCIATION IN ETHIOPIA.....	53
2.3.1 OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK GOVERNING FREEDOM OF ASSOCIATION IN ETHIOPIA	53
2.3.2 FREEDOM OF ASSOCIATION IN THE FDRE CONSTITUTION	55
2.3.3 THE PLACE OF INTERNATIONAL AND REGIONAL NORMS OF FREEDOM OF ASSOCIATION UNDER THE ETHIOPIAN LEGAL SYSTEM.....	59

2.3.4 THE ETHIOPIAN CHARITIES AND SOCIETIES PROCLAMATION.....	63
CHAPTER THREE: CHALLENGES OF FREEDOM OF ASSOCIATION AND CIVIL SOCIETY IN ETHIOPIA.....	67
3.1 BACKGROUND ABOUT ETHIOPIAN CIVIL SOCIETY ORGANIZATIONS	67
3.2 GOVERNMENT JUSTIFICATIONS FOR RESTRICTING FREEDOM OF ASSOCIATION	73
3.2.1 COMMON JUSTIFICATIONS FOR RESTRICTION OF FREEDOM OF ASSOCIATION OF CSOS	73
3.2.2 JUSTIFICATIONS BY THE ETHIOPIAN GOVERNMENT.....	80
3.3 LEGAL BARRIERS IN THE LIFE CYCLE OF CIVIL SOCIETY ORGANIZATIONS IN ETHIOPIA	87
3.3.1 ENTRY BARRIERS	87
3.3.2 BARRIERS ON OPERATIONAL ACTIVITY AND ACCESS TO RESOURCE.....	92
3.3.3 DISSOLUTION AND OTHER PUNITIVE SANCTIONS	96
3.4 IMPACT ON HUMAN RIGHTS ACTIVITIES OF CSOS	98
CONCLUSION AND RECOMMENDATIONS	101
BIBLIOGRAPHY	104

LIST OF ABBREVIATIONS

AChHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of Children
CBO	Community Based Organizations
CEDAW	Convention on Elimination of All forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CSO	Civil Society Organization
ECHR	European Convention on Human Rights
EHRCO	Ethiopian Human Rights Council
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
EWLA	Ethiopian Women Lawyer's Association
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
NGO	Non-governmental Organizations
UDHR	Universal Declaration of Human Rights

INTRODUCTION

Though Ethiopia has a longstanding tradition of informal community associations organized for meeting diverse social-economic needs of their members, the concept of modern civil society is a recent phenomenon. Gradually, formal civil society organizations emerged and supplemented the informal community associations as they no more suffice to address the growing and complex needs of the society. Consequently, civil society organizations have been providing meaningful contribution in various arenas, *inter alia*, including advancement of human rights, democracy, good governance and rule of law. However, the state did not come up with a standard legislation that regulates the work of CSOs until the coming into effect of the controversial Proclamation to provide for the Registration and Regulation of Charities and Societies on 13th February, 2009.

International human rights law standards dictate that freedom of association is a qualified right in which states are allowed to impose some permissible restrictions. However the restrictions have to be legally prescribed pursued for a legitimate aim and necessary in a democratic society. This thesis analyzes whether the limitations imposed by the Ethiopian Charities and Societies law meets such standards. In particular, it examines whether the law violates such international standards by putting barriers in the life cycle of Ethiopian human rights CSOs by creating mandatory registration requirement; allowing excessive state control in their operational activities; providing punitive sanctions; prohibiting human rights work and precluding them from accessing resources.

The finding of the thesis shows that even though the Charities and Societies law in its preamble declares that it has the objective of realizing freedom of association and facilitating the role of CSOs in enhancing the country's overall development, a closer scrutiny of its provisions reveals that it puts undue restrictions on free exercise of freedom of association

especially on human CSOs. It contains provisions that are constraining and punitive with virtually few procedural safeguards that opens a room for arbitrary government interference. Thus, it is the overall finding of this research that law is short of international standards for free exercise of freedom of association as well as promotion and protection of human rights

The thesis starts by stating preliminary theoretical notions that lay down foundation for analysis of the normative and practical frameworks in subsequent chapters. The first chapter examines the theoretical and philosophical underpinnings of freedom of association and its evolution as a fundamental right as well as its co-relation with civil society. The chapter further analyzes the emergence of human rights CSOs and their contribution for global human rights movement as well as the roles they play and the challenges they face in the promotion and protection of human rights across in different countries.

In the second chapter, the normative framework of freedom of association in major international and regional human rights instruments will be discussed. Particular emphasis will be placed on the international treaties that Ethiopia has adopted. Regional human rights protection mechanisms that guarantee freedom of association and jurisprudence of regional human rights courts will be considered with the view to setting a benchmark of comparison with the level of protection in Ethiopia. The chapter will go on exploring the Ethiopian national legal framework governing freedom of association. A particular focus will be made on the place of international instruments in the Ethiopian legal system, and the guarantee of freedom of association in Ethiopian Constitution and subsidiary legislations.

A brief account of the emergence and growth of Ethiopian civil society organizations will be provided at the beginning of the third chapter. This chapter will discuss the common justifications provided by repressive governments to infringe freedom of

association of CSOs. Thus, in light of the benchmarks provided in the second chapter the declared and inferred justifications of the Ethiopian government to come up with the Charities and Societies Proclamation will be scrutinized. Further, the chapter will identify and evaluate substantive provisions of the Proclamation with the view to assessing whether the law could be deemed as restrictive of freedom of association compared with international standards and best practices. Finally, the practical impact of the law on human rights CSOs will be looked at based on impact assessment studies conducted post the enforcement of the law.

The research methodology heavily relies on review and examination of the existing literature on civil society and freedom of association; international, regional and national legal instruments on freedom of association; and available documents, records and reports on the impact of the legislations on the operation of CSOs in Ethiopia. Due to limited access, information about the impact of the CSO legislation on human rights CSOs was not obtained directly from government sources. Thus, parallel information from local NGOs and other credible sources such as independent researchers, media outlets and international human rights monitoring organizations were used.

CHAPTER ONE: THEORETICAL UNDERPINNINGS OF FREEDOM OF ASSOCIATION

1.1 PRELIMINARY NOTIONS OF FREEDOM OF ASSOCIATION

Humans, being associating animals, are always in the process of organizing themselves. Society itself is the product of the continuous culture of human association. The political, economic, cultural and social development of contemporary society is inconceivable without associations of varying kinds that have evolved over time. In fact, the history of the world is the history of human association.¹ Francis Fukuyama noted that “...there was never a period in human evolution when human beings existed as isolated individuals.”² Even though society is seen as the result of social interaction among individuals, many agree that association itself arises from society. Accordingly, the social interaction of individuals with similar values, attitudes, capacities and resources helps them to pull together their assets to form associations.³ Thus, the bond that exists between society and associations is a mutual and reciprocal relationship.

1.1.1 WHY DO PEOPLE ASSOCIATE?

People may come together for a variety of reasons. But a mere social gathering of people with the simple objective of sharing each other's company may not be enough to call it an association. An association, distinguished from mere assembly, presupposes “some degree of organizational development” and “stability of duration” to distinguish it from informal or

¹ Jos C.N. Raadschelders, Local Associational Life: Continuity in the Rise and Fall of Political Regimes, John Glenn School of Public Affairs, The Ohio State University, Paper presented at the Workshop in Political Theory and Policy Analysis, Indiana University, November 28, 2011, p.3

² Francis Fukuyama, The Origins of Political Order, From Prehuman Times to the French Revolution, New York, Farrar, Straus and Giroux, 2011, p.30

³ For detailed analysis of how social interaction is essential for formation of associations See Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community, Simon & Schuster, New York, 2000

temporary gatherings of people.⁴ Such orderly and organized forms of human association may have various importances to the members of the association as well as the society at large.

The importance of association is multifaceted. Association could have insurmountable value to the individual by encouraging self-gratification, which could not be attained by a person alone, unless collaborating with others.⁵ Individuals could find value in the association itself without it necessarily being an instrument to achieve other values. As Amy Gutmann articulated;

In pursuing their ends, and needing to associate in order to do so, people discover numerous sources of pleasure apart from the pleasure of success in their specific pursuits. They discover numerous opportunities for many diverse kinds of experience. Associations of every form provide accommodation for experience, much of its pleasure.⁶

Association helps individuals develop intimate relationship with others. Through association people are able to create and maintain friendships and love relationships, which for their own sake are valuable and pleasurable.⁷ Freedom of association as a value by itself has the advantage of enabling individuals participate in various kinds of communal activities such as charities, professional life, religious practices, art and music, sport and other types of leisure and entertainment activities.⁸ People find value in the mere acts of associating with others as associational life contains diverse activities that enhance the quality of life such as “...camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and

⁴ See McBride, Jeremy, *International Law and Jurisprudence in Support of Civil Society, Enabling Civil Society*, Public Interest Law Initiative, 2003, PP. 25-26.

⁵ Stephen B. Presser, *Freedom of Association in Historical Perspective*, *Social Philosophy and Policy*, Vol. 25, No. 2, Cambridge University Press, Summer 2008, pp. 166-167

⁶ Amy Gutmann, *Freedom of Association*, New Jersey, Princeton University Press, Princeton, New Jersey, 1998, p.37

⁷ *Id.* pp.3-4

⁸ *Id.* p. 4

the kinds of self-expression and self-sacrifice that are possible only in association with others.”⁹ Therefore, association could be taken as an end by itself as it helps the individual pursue happiness through the relationships they create within the association and the diverse experience they accumulate.¹⁰

The importance of association is not limited to the individual alone. It goes beyond the individual as “associational life becomes a breeding ground for civic virtues and a crucial support for a viable democratic order.”¹¹ One hundred years ago, Alexis de Tocqueville observed that democratic societies are composed of independent but powerless individuals who need to voluntarily assist one another in order to achieve great things.¹² Though they may endure in preserving their economic life, it would ultimately be endangered unless they adopt the habit of forming associations in ordinary life.¹³ With no inclination to associate for political purposes, their independence would also be compromised.¹⁴ Hence, Associational life is an essential component of a democratic life.

Moreover, according to Tocqueville, unlimited freedom to associate would help prevent social and political unrest by helping people develop their own solutions, without necessarily depending on authorities, through the means of cooperation and deliberation in different areas of concern such as public safety, industry, commerce, morality and religion.¹⁵

⁹ Id.

¹⁰ Id. p.38

¹¹ Id. p.177

¹² Alexis de Tocqueville, *Democracy in America*, Trans. Henry Reeve Electronic Edition Deposited and Marked-up by ASGRP, the American Studies Programs at the University of Virginia, June 1, 1997, p. 2

¹³ Id.

¹⁴ Id.

¹⁵ Aurelian Craiutu, *From the Social Contract to the Art of Association: a Tocquevillian Perspective*, Social Philosophy and Policy, Vol. 25. No. 2, Summer 2008, Cambridge University Press, pp.275-276

No doubt, the increase in the complexity of the society increases the importance of associational life. In modern times, as Thomas Emerson noted;

More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives. His freedom to do so is essential to the democratic way of life.¹⁶

Associations do play crucial functions in modern democratic societies. As such freedom of association is widely viewed as one of the fundamental freedoms that are essential to a democratic society.¹⁷ It is considered so basic that a genuinely free society can not be conceived without it. As rightly noted by Tocqueville in his famous book, *Democracy in America*, associations have the function of healing the fragmentation created by the conditions of modern society by neutralizing the effects of social anomalies and civic apathy through promotion of civic solidarity by helping individuals go beyond their unenlightened self interest and act in concerted manner with others.¹⁸ Most contemporary democratic theorists believe that having a vibrant associational life in a society is indispensable for building an orderly and viable democratic system.¹⁹ Indeed, the proper functioning of democratic system is unthinkable without active organized civic participation and open public deliberation that is dependent on the existence of civil associations such as trade unions, religious organizations, business enterprises, non-profit organizations and other

¹⁶ Thomas I. Emerson, Freedom of Association and Freedom of Expression, The Yale Law Journal, Vol. 74, No. 1, Nov., 1964, p.1

¹⁷ Stuart White, Freedom of Association and the Right to Exclude, The Journal of Political Philosophy, Vol. 5, No. 4, 1997, p. 386

¹⁸ Supra Note. 15, pp. 285-286

¹⁹ Id, p.263

involuntary associations.²⁰ Hence, it would not be an exaggeration to say that associational life is a pre-condition for a democratic order in a society.

Association as a science has also instrumental purposes of helping endure modern civilization. This happens as “the very survival of modern civilization ultimately depended on people developing the habit of forming associations in order to pursue common projects.”²¹ Without developing the culture of collaboration through association, past achievements would vanish and the society will relapse to barbarism.²²

1.1.2 DIFFERENT KINDS OF ASSOCIATIONS

Associations are of different kinds. Different authors identify different categories of associations. For instance, Larry Alexander divided associations in to various classifications such as intimate associations, political and voting associations, creedal associations including religious groups, clubs and other voluntary associations, games and activities, and market place associations.²³ On the other hand, Amy Gutmann preferred to provide long lists of types of associations rather than engaging in the daunting and usually confusing task of categorizing associations. She noted that the following are the types of associations that made significant contributions to the lives of Americans and American democracy.

Churches, synagogues, and mosques, colleges, universities, and museums, corporations, trade unions, and lobby groups, sports leagues, literary societies, sororal and fraternal orders, environmental groups, national and international charitable organizations, and self-help groups, parent-teacher associations, residential associations, and professional associations...²⁴

²⁰ Id, p.263

²¹ Id, pp. 276-277

²² Supra Note 12, p. 2

²³ Larry Alexander, What is Freedom of Association, and what is its Denial? Social Philosophy and Policy, Vol. 25, No. 2, Cambridge University Press, Summer 2008, pp. 1-12

²⁴ Supra Note 6, p. 3

However, categorizations of associations are not necessarily rational and proper. Larry Alexander himself admitted that his classification of associations is arbitrary and sometimes misleading as many of associations may fall into more than one of the classifications.²⁵ For instance, he illustrated, social clubs and creedal groups may fall within various categories such as close friendship, recreational activities, and commercial intercourse.²⁶ On another instance, in the US, the Supreme Court created categories of “intimate” and “expressive” association in order to solve the tension between group autonomy, which includes the right to exclude, on one hand and the principle of equality and non-discrimination on the other.²⁷ However, this categorization is criticized for being less entrenched and indefensible.²⁸

Even though the categorizations do not give adequate picture of the actual nature of associations or reflect their differences and similarities, it is inevitably necessary to adhere to some for the purposes of studying them. Hence, it is common nowadays to make broad differentiated categories as commercial and industrial organizations on one hand and what is broadly termed as civil society on the other. Thus, in this paper, we will focus on civil society organizations as opposed to other commercial or industrial organizations such as trade unions and chambers of commerce. Moreover, the scope of the paper is limited to classical forms of CSOs such as NGOs and CBOs, without including political parties.

²⁵ Supra Note 23, p. 13

²⁶ Id. p. 13

²⁷ John D. Inazu, The Unsettling “Well-Settled” Law of Freedom of Association, Connecticut Law Review, V. 43, No. 1, November 2010, pp. 151-155

²⁸ Id, p.153

1.2 FREEDOM OF ASSOCIATION AS A BASIC RIGHT

1.2.1 THEORIES OF FREEDOM OF ASSOCIATION

Freedom of association is perceived as a product of liberalism. Both classical and contemporary liberals, though they differ on the need and extent of government interest on the enjoyment of the right, agree that it is a cherished liberal value.²⁹ Individuals are free to make a choice with whom to associate and not to associate and the purpose of their association, be it social, economic, recreational or intimate.³⁰ Their obligation is limited to providing public good and material support to their fellow citizens and to refrain from violating rules as well as defending the liberal framework from infringement.³¹ Freedom to associate is even proposed to be one among the most fundamental liberal freedoms as a free society is defined by a variety of associations formed with a view of pursuing individual ends.³² This is also supported by the belief that the effect of deprivation of freedom of association is more destabilizing than other liberties³³. In fact, liberalism and freedom of association is inseparably linked that, as the contemporary political theorist George Kateb noted “to be a free individual necessarily means one has the right to choose those with whom one wants to associate (or not to associate).”³⁴

Be that as it may, classical and contemporary liberals have different stands as to the status that need to be accorded to freedom of association and regarding the corresponding

²⁹ Ellen Frankel Paul et al., *Freedom of Association*, Cambridge University Press, 2008, p.vii

³⁰ *Supra* Note 23, p. 14

³¹ *Id.* p.14

³² Richard Boyd, *The Madisonian Paradox of Freedom of Association*, *Social Philosophy and Policy*, Vol. 25, No. 2, Cambridge University Press, Summer 2008, p. 235

³³ *Id.* p.236

³⁴ *Id.* p.236

interference the government should make on individuals.³⁵ Classical liberals understood the status of freedom of association from the point of view of the liberty of individuals to be able to come together and form an association in order to “fulfill their desires and, if necessary, oppose the actions of government or other vested interests in the society.”³⁶ Their focus is therefore individual liberty. However, due to the belief that association involves within itself a destabilizing tendency that could harm other individuals, groups or even political authority, classical liberals are not very enthusiastic about the existence of independent right to freedom of association.³⁷ As a result, freedom of association is not included in their list of liberal freedoms.³⁸ No wonder freedom of association is understood by classical liberals in instrumental terms having only a function to protect the exercise of other rights that are constitutionally protected.³⁹

Even though there is skepticism about the possible disruptive nature of associations among classical liberals, they differ as to the limits of associational freedom. Hobbes strongly agreed with the irrational and disruptive tendencies of individuals in groups and, as a result, suggested that the role of associations should be limited to maintaining peace and security.⁴⁰ On the other hand, though Locke agreed with Hobbes on the existence of some groups with seditious behaviors, he believed that such behaviors have nothing to do with the activities in which groups are formed but are often the results of oppression and state discrimination.⁴¹

³⁵ Supra Note 29

³⁶ Supra Note 32, p.236

³⁷ Id.

³⁸ Id. p.237

³⁹ Sheldon Leader, *Freedom of Association: A study in Labor Law and Political Theory*, New Haven and London, Yale University Press, 1992, pp. 22 -23. This is the approach followed by the US Supreme Court as freedom of association has no explicit constitutional protection.

⁴⁰ Supra Note 32, pp. 238-240

⁴¹ Id. p.240

He, however, is in favour of placing limits on freedom of associations in order to discourage fanatic and totalitarian tendencies in groups.⁴² Similarly, Hume distinguishes between different kinds of associations according to the level of danger they entail. While acknowledging the existence of the divisive tendencies of some groups with ideological, political or religious orientations, he emphasized the general benefit of civil society.⁴³ All in all, though they argue that the freedom to associate emanates from individual liberty, classical liberals do not wholeheartedly embrace freedom of association as one of the fundamental independent rights in sharp contrast to Madison, who in Federalist 10, saw factionalism as a beneficial and inherently valuable benign.

According to contemporary liberals freedom of association is an independent right just like the other fundamental liberties necessary for a democratic society. However it is not considered as an absolute right that emanates from the absolute liberty of an individual unlike classical liberals but a right less than absolute but having heavy weight when a conflict between important values occurs.⁴⁴ In contrast to classical liberals, contemporary liberals view it as an independent right that could stand by its own, separate from other rights.⁴⁵

The main proponent of this conception of freedom of association John Stuart Mill stated in his book, *On Liberty*, that “from the liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others.”⁴⁶ By this Mill recognizes the liberty to combine with others as an

⁴² Eric R. Claeys, The Private Society and the Liberal Public Good in John Locke’s Thought, Social Philosophy and Policy, Vol. 25, No. 2, Cambridge University Press, Summer 2008, p.234

⁴³ Supra Note 32, p. 241

⁴⁴ Supra Note 26

⁴⁵ Supra Note 39, p. 23

⁴⁶ Id.

independent liberty along with other liberties essential for a democratic society, such as speech, conscience or property. For Mill, freedom of association as an independent liberty involves the freedom to unite with others for any purpose except when such freedom is used to the detriment of others. Therefore, based on this conception it is possible to deduce that the limitation on groups should only arise in relation to the lawfulness of their activities and the state may not interfere in their freedom apart from the purpose of preventing harm to others. Mill also justifies state interference made with the purpose of protecting the interests of associations “against some form of damaging dissociation.”⁴⁷ For Rawls, freedom of association is not entirely a basic right that falls short of being an absolute liberty.⁴⁸ He understood it as a complex right as could be seen from his complex and ambiguous construction of the right including it in his list of basic personal liberties while at the same time combining it with economically oriented liberties.⁴⁹ Thus, for Rawls, freedom of association is composed of both personal and economic liberties.

To conclude, there is no doubt that freedom of association is an important liberal value that is necessary in a free society. Despite the differing conceptions as to its status by different liberal thinkers whether as a derivative right, instrumental for enforcing other values, or an independent right, free from other interests, many agree that, as an indispensable component of a free and democratic life, it deserves to be accorded constitutional protection as a fundamental right and the limitations imposed on the condition of its exercise should be constitutionally safeguarded.⁵⁰

⁴⁷ Id., p. 49

⁴⁸ Kevin A. Kordana and David H. Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, *Social Philosophy and Policy*, Vol. 25, No. 2, Summer 2008, p. 306

⁴⁹ Id., p. 290

⁵⁰ Supra Note 16

1.2.2 DEFINITION OF FREEDOM OF ASSOCIATION

The best approach to understand the meaning of freedom of association is by breaking it up into its constitutive elements and analyzing each of the elements with a view to combining them again for meaningful reconstruction. Hence, freedom of association has positive freedom of association and negative freedom of association as its constitutive elements. These components of freedom of association are also referred to by different authors as the “right to associate” and “the right not to associate” or “refuse to associate”⁵¹; or the “freedom to associate” and the “freedom to exclude”.⁵² However, this has to be differentiated from the positive and negative rights dichotomy which is based on the types of obligation a state has—whether positive, that requires a state to take steps for realization of a right or negative, which requires the state to refrain from violating the right.

Positive freedom of association refers to the freedom to “combine with some other party or parties in a shared activity or status.”⁵³ In its weakest form it may refer to an association formed with the consent of all parties, whereas in its strongest form it may denote the situation where members are empowered to join the association even if others refuse to associate or are opposed to it.⁵⁴ Thus, positive freedom of association is said to be strongly asserted when a person’s membership is asserted against anyone who may object it or when the will of someone to associate can be satisfied without being required to secure the consent of others.⁵⁵ For instance, it can be said that the right of Mr X, who is a teacher, is strongly

⁵¹ Supra note 39. p.13

⁵² See generally Stuart White, Freedom of Association and the Right to Exclude, *The Journal of Political Philosophy*, Vol. 5, No. 4, 1997 and John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993

⁵³ Loren E. Lomasky, *The Paradox of Association*, *Social Philosophy and Policy*, Vol. 25, No. 2, Cambridge University Press, Summer 2008, p. 182

⁵⁴ Id.

⁵⁵ Id.

guaranteed if he is allowed to join the trade union in his school with out obtaining the consent of other members or even regardless of their opposition to his membership.

The freedom to associate also implies the right to be free not to associate. This negative freedom of association refers to the liberty one has to dissociate him/her self from unwanted relationships.⁵⁶ The nature of rights dictates that the liberty not to associate is conceptually derived from the liberty to associate as freedom of association as a conceptual matter has within itself the right to dissociate.⁵⁷ Consequently, it suffices that freedom of association is firmly established in order to be easily contented that the freedom not to associate is guaranteed.⁵⁸ As Lomasky pointed out “the strongest version of negative freedom of association is the power to withdraw regardless of the assent of others. Less strong forms of negative freedom permit withdrawal subject to the concurrence of certain others.”⁵⁹ Negative freedom of association does not only encompass the liberty to refuse to associate, it also implies the liberty to voluntarily terminate an already established association unless an otherwise obligation to maintain the relationship is voluntarily assumed.⁶⁰

Thus, by combining the foregoing analysis of its constitutive elements, we can deduce that freedom of association is a concept that contains the liberty of a person to enter into a relationship with others for any purpose and the liberty to refuse to enter into any relationship with others for whatever purpose. This conceptual understanding will guide us in our subsequent discussion of different aspects of freedom of association.

⁵⁶ Supra Note 53, p.182

⁵⁷ Supra Note 39, p.27

⁵⁸ Id. pp. 27-28

⁵⁹ Supra Note 53, p. 182

⁶⁰ Supra Note 23, p. 1

1.3. THE RISE OF CIVIL SOCIETY ORGANIZATIONS

In the past few decades, the world has seen a growing interest in a dramatically rising sector that comprises a range of institutions that function outside the state apparatus and the market.⁶¹ Lester M. Salamon described this phenomenon as “associational revolution”, a process that could be equated as the rise of the nation state in the 19th century.⁶² It is the upsurge of the civil society organizations that consists of different organizations involved in diverse areas of interest but serving common purposes of providing social and public services to the society.⁶³ These organizations are part of the umbrella concept of civil society- that “...proved to be... very elusive, escaping conceptual grasps and evading surefooted negotiation...”⁶⁴ concept, gives a varying meaning to different people.⁶⁵ However, even though civil society taking its current form is a relatively recent phenomenon, an impressive body of literature has been produced in the past few decades. Below the emergence, meaning and current status of civil society by giving special emphasis on civil society organizations will be discussed.

1.3.1 THE EMERGENCE AND GROWTH OF CIVIL SOCIETY ORGANIZATIONS

Even though the concept of civil society has been historically linked with the rise of democracy in Europe and North America, it could be traced back to the times of ancient

⁶¹ Lester M. Salamon, *Global Civil Society: Dimensions of the Nonprofit Sector*, The Johns Hopkins Center for Civil Society Studies, Baltimore, MD, 1999, p.3

⁶² Lester M. Salamon, *The Rise of the Nonprofit Sector*, Council on Foreign Relations, Vol. 73, No. 4, Jul. - Aug., 1994, p.109

⁶³ Primož Pevcin, *Third Sector/Civil Society Development in Global Perspective, Challenges of Europe: Growth & Competitiveness - Reversing Trends: Ninth International Conference Proceedings*, University of Ljubljana, 2011, p. 567

⁶⁴ Neera Chandhoke, *Civil Society, Development in Practice*, Vol. 17, No. 4/5, Taylor & Francis, Ltd. on behalf of Oxfam GB Stable, Aug., 2007, p. 607

⁶⁵ Goran Hyden and Mahlet Hailemariam, *Voluntarism and Civil Society Ethiopia in Comparative Perspective*, Africa Spectrum, Vol. 38, No. 2, Institute of African Affairs at GIGA, Hamburg, 2003, p.216

Greece and Rome but not distinguishable from the state.⁶⁶ Consequently, before the emergence of the nation state, civil society served as an important social force that provided the basis for science, technology, culture, art, music, education, etc.⁶⁷ However, the current notion of civil society as a domain separate from the state and the market where people associate to pursue broad societal interests emerged in the period of enlightenment.⁶⁸ The changes in the society, precipitated by modernization such as urbanization, industrialization and the rise of modern capitalism, contributed a lot to the evolution of civil society.⁶⁹ Classical theorists like Hegel and Thomas Paine contributed to the emerging discourse on civil society.⁷⁰ It was one of the subjects of discussion in the writings of de Tocqueville, John Lock and John Stuart Mill.⁷¹ The development of the notion of Civil Society during this time was part of the struggle to create a social space free from the influence of the state and the church. As Dwayne Woods noted;

[a] modern civil society began to appear in Europe in the 18th Century with the decline of absolutism and the development of new normative assumptions about the separation of public/private spheres between state and society...These principles were manifested sharply in the struggle to separate from the domination of both the patrimonial state and the church.⁷²

The political theorists were not the only actors responsible for the development of the concept of civil society in 18th C Europe; the state also played a key role in connection with its own process of secularization. According to Dwayne Woods, the Western European State “in its

⁶⁶ Thomas Carothers and William Barndt, Civil Society, Foreign Policy, No. 117, Washingtonpost Newsweek Interactive, LLC, Winter 1999-2000, p.18

⁶⁷ Rajesh Tandon, Civil Society, The State & Roles of NGOs, IDR Reports, Vol. 8, No. 3, 1991, p. 4

⁶⁸ Supra Note 66

⁶⁹ Supra Note 65, p. 216

⁷⁰ Supra Note 66

⁷¹ Dwayne Woods, Civil Society in Europe and Africa: Limiting State Power through a Public Sphere, African Studies Review, African Studies Association, Vol. 35, No. 2, Sep., 1992, p.77

⁷² Id. p. 84

effort to supplant the traditional socializing influences of the church with secular state structures...contributed to the rise of Civil Society.”⁷³

After having been neglected in the subsequent period from political discourse due to the shift in interest towards the effects of industrialization, the prominence of civil society revived again after the Second World War, in particular after 1970s and 80s due to Central and Eastern European activists who used civil society as in impetus to their fight against political dictatorships.⁷⁴ It was rediscovered due to the work of Hungarian and East European intellectuals in the context of the struggle against authoritarian regimes depriving their citizens of fundamental rights⁷⁵ aiming at achieving broader economic, social and political transitions in the region⁷⁶. It was also taken up in Latin America by activists in their struggle against military governments suppressing the people to cling to power.⁷⁷

Soon, the concept became part of the main societal discourse in different parts of the world including North America, Western Europe, East Asia and elsewhere as a tool to criticize the decline of civic virtues in the capitalist system, and a drive for social movements and political transitions in different countries.⁷⁸ As part of the renewed interest in social and cultural discourses, civil society was mainstreamed in political theories.⁷⁹ Owing to the accommodation it has obtained in the global trend towards democracy, civil society did not take too long to be part of everyday vocabulary assisted by the global information technology

⁷³ Id.

⁷⁴ Supra Note 66, pp.18-19

⁷⁵ Supra Note 64, p. 607

⁷⁶ Craig Calhoun, *Civil Society and the Public Sphere*, Public Culture, The University of Chicago 1993, pp. 267-268

⁷⁷ Supra Note 64, p. 607

⁷⁸ Michael Bratton, *Civil Society and Political Transition in Africa*, IDR Reports Vol. 11, No. 6, 1994, p.1

⁷⁹ Supra Note 76, pp. 267-268

revolution.⁸⁰ Hence, due to this “associational revolution” that took place in the 1970s and 80s, the concept of civil society was brought forward as the center of discourse, policy and program of numerous local, regional and international organizations.⁸¹

One may be keen to know the factors responsible for the emergence and rapid development of civil society. According to the literature, the emergence of civil society is generally attributed to the exponential increase in the democratic and capitalist development of society. In particular, the most responsible factors are the failure of the government and the market to satisfy the needs and interest of the society in the provision of goods and services, the growing plurality of the society, the emergence of individual freedom and the increased pressures on solidarity among the people.⁸² The pressures stemming from various sources including individuals, institutions and government themselves seeking for alternative ways of addressing the human needs as well as accommodating the changes in society contributed to the emergence and growth of the civil society.⁸³

Citizen activism played a key role in the growth and expansion of civil society through the action of proactive individuals who organized themselves in order to solve their problems or seek their basic rights through the formation of complex set of networks of mutual assistance. This was seen largely in developing and Eastern and Central European countries. In addition, external organizations like churches, aid agencies and voluntary organizations fostered the growth and the expansion of the sector by assisting the formation of numerous non-profit organizations in developing countries, and through exertion of pressures, provision of moral

⁸⁰ Supra Note 66, pp.18-19

⁸¹ Supra Note 67, p. 2

⁸² Supra Note 63, p. 567

⁸³ Supra Note 62, p. 110

support, direct assistances and subsidies.⁸⁴ Governments themselves have been instrumental in the rapid emergence and growth of civil society organizations through the support they have been providing as part of their strategies to reduce government social spending.⁸⁵

Besides external pressures, Lester Salamon identified four crises that have considerably reduced the role of the state and opened the way for the growth of the civil society sector. The first one is the perception that the welfare state has failed to effectively discharge the responsibilities bestowed entrusted to it by its citizens due to task overload and bureaucratization that have, allegedly, crippled the citizens' sense of personal responsibility and hence encouraged dependency.⁸⁶ The second crises is development crisis that was associated with the sharp decline in the economic performance of the least developing countries and has caused a changing perception about the role of the state in economic development and the benefits of the civil society as an alternative.⁸⁷ The third one is an environmental crisis that was caused by the people's frustration about the reluctance and incompetence of their governments to deal with environmental degradation and their eagerness to take the matter in their own hands.⁸⁸ The last crises is related with the failure of socialism to address the socio-economic needs of the people and the desire that has developed towards the civil society as an alternative way to satisfy those needs.⁸⁹

⁸⁴ Id. pp. 112-114

⁸⁵ Id. pp. 114-115

⁸⁶ Id. pp.115-117

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

On the other hand, the adaptability and flexibility of civil society organizations facilitated the quick growth of the civil society sector as an alternative to the state and the market. The following quote adequately describes this attribute of fittingness that they possess.

Because of their unique position outside the market and the state, their generally smaller scale, their connections to citizens, their flexibility, their newly rediscovered contributions to building “social capital,” civil society organizations have surfaced as strategically important participants in this search for a “middle way” between sole reliance on the market and sole reliance on the state that now seems to be increasingly underway.⁹⁰

Not only are civil society organizations seen as a “middle way” between the state in the quest for alternative solutions to the gap created by the state and the market, they are also seen as important to fill this gap. As Salamon noted, “with their small scale, flexibility and capacity to engage grass-root energies, private non-profit organizations have been ideally suited to fill the resulting gap.”⁹¹ Moreover, in addition to their flexible and simple nature the relatively less bureaucracy in their administration makes them adaptable to technological advancement which in turn has contributed to the rapid development of the civil society.⁹²

Currently, the Civil Society Sector is playing crucial roles in the economic, political and social life of the society at local, national and international level. It is steadily complimenting the market and the government in the provision of goods and services, especially in health, education and social fields.⁹³ The practical importance of the Civil Society Organizations is also tested in crises situations. Rather than diminishing, the importance of Civil Society Organizations is actually boosting under the current global economic crisis due to their special characteristics which enable the demand for their products and services to increase

⁹⁰ Supra Note 61, p.5

⁹¹ Supra Note 62, p.110 Here he is referring to the gap created as a result of the inadequate capacity of the state and the market to address the increasing demands of citizens

⁹² Id.

⁹³ Supra Note 63, p. 571

during times of crisis and as a result of their lesser sensitivity to economic downturns largely owing to the diversified resources they administer and their inherent ability to mobilize resources in such adverse situations.⁹⁴

1.3.2 UNDERSTANDING CIVIL SOCIETY ORGANIZATIONS

Probably related to its diversity, various alternative labels, often used as synonyms, are used to refer to what we are referring as “Civil Society” in this paper. The most common labels, *inter alia*, include “civil society”, “non-profit”, “third sector”, “voluntary sector”, “independent sector”, and “social economy.” Each label has a different origin and represents a different understanding of the meaning of civil society. For instance, the label “voluntary” has ideological basis reflecting the struggle between associations and the state during the period of industrialization in the 19th Century Europe.⁹⁵ The label “third sector” was the result of the outlook held in the 1970s that it could potentially serve as an alternative to the expanding state and market based welfare.⁹⁶ Whereas the label “non-profit” evolved in the 1980s “to describe the sector as the one with existing non-distribution constraints and differentiated demand as the form of distinction from government and business (for-profit) sector.”⁹⁷

Perhaps the most popular and commonly used label is “Civil Society” which has got its roots since 1980s “...as it was associated with new evolutionism and the need for an autonomous civil sphere outside the state, which was particularly relevant in totalitarian regimes as well as in the circumstances of state- controlled reforms.”⁹⁸ The current popularity of the use of the

⁹⁴ Id. p.572

⁹⁵ Id. p.568

⁹⁶ Id

⁹⁷ Id.

⁹⁸ Id.

label “Civil Society” may have to do with the normative implications that it contains, namely civility, as something that need to be encouraged.⁹⁹

But what is civil society? The meaning of civil society has been contested and debated for a long time. Classical and contemporary political thinkers including Aristotle, de Tocqueville, Locke, Hegel, Gramsci, and others have given different meanings to civil society but have often failed to reach a consensus.¹⁰⁰ The meanings attributed to it are often based on the conceptual framework and the background of the scholar. Still today, the search for a comprehensive understanding of civil society is ongoing. This lack of consensus is mainly attributable to the diverse and amorphous nature of civil society itself. Civil society is not a single and identifiable empirical concept¹⁰¹ but an “illusive” and “vague” theoretical one without a clear structure.¹⁰²

Hence, civil society is understood in various ways such as “an arena”, “a social space”, “a sphere of interaction”, “a participation” etc. Despite these varied understandings, civil society can be broadly taken as “the space in society where collective, citizen action takes place.”¹⁰³ These organized societal collective actions may be expressed either in an informal and temporary assembly of people or in a permanent institutional form, broadly known as “Civil Society Organizations”. Civil society in its institutionalized form “...encompass[es] all the organizations and associations that exist outside of the state...and the market.”¹⁰⁴ Hence, civil

⁹⁹ Id.

¹⁰⁰ To see how Civil Society is understood by different political thinkers See Stephan, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton University Press, 1988, Princeton, P.3-4

¹⁰¹ Supra Note 78, p. 2

¹⁰² Carmen Malena and Volkhart Finn Heinrich, *Can We Measure Civil Society? A Proposed Methodology for International Comparative Research*, Development in Practice, Vol. 17, No. 3, Taylor & Francis, Ltd. on behalf of Oxfam GB, Jun., 2007, p.338

¹⁰³ Id. p. 338

¹⁰⁴ Supra Note 66, pp.19-20

society may be defined as an “...arena, outside the family, the government, and the market, where people associate to advance their interest.”¹⁰⁵

“Arena”, refers to a space where people come together to discuss, associate, and seek to influence the broader society through the interaction of diverse social values and interests.¹⁰⁶

This conception of civil society as an arena may, however, be difficult to enable us to fully understand civil society organizations due to their complex body of actors, wide range of activities, and differing values.¹⁰⁷ Hence, it might be helpful to understand their common institutional features.

Bratton identified the three most distinguishable institutional features of Civil Society Organizations. The first feature is the norm of *civic community*, which he considered as the basic value of the Civil Society, involving trust, reciprocity, tolerance and inclusion.¹⁰⁸ Trust enables individuals to associate freely and voluntarily; reciprocity is an important tool of reducing costs of collective action and tolerance and inclusion are associated with promoting plurality and diversity within the association.¹⁰⁹ The second institutionalized feature of civil society is the advancement of common purposes and interests through organized form, which is commonly known as “*associational life*”.¹¹⁰ Finally, people need to communicate to one another in order to pursue the goals of their organizations through *networking* of communication.¹¹¹ Moreover, civil society organizations are distinguished from other

¹⁰⁵ Supra Note 102, p.340

¹⁰⁶ Id.

¹⁰⁷ Id. p. 338

¹⁰⁸ Supra Note 78, p.2

¹⁰⁹ Id.

¹¹⁰ Id

¹¹¹ Id

organizations based on their sources of support which includes voluntary donations of time and other similar contributions.¹¹²

According to Salamon, civil society organizations have the following characteristics.¹¹³

- Organizations* i.e., they have an institutional presence and structure;
- Private*, i.e., they are institutionally separate from the state;
- Non-profit distributing*, i.e., they do not return profits to their managers or to a set of “owners”;
- Self-governing*, i.e., they are fundamentally in control of their own affairs, and
- Voluntary*, i.e., membership in them is not legally required and they attract some level of voluntary contribution of time or money.

From the definition we can also discern that civil society is a collective action that takes place in an associational form outside the family, the state and the market. Civil Society lies outside the household because even though private interest could be a motivational factor behind its activities, serving public purpose is its main objective.¹¹⁴ Civil society is also different from the state as the function of the state involves use of force and the exercise of political power by elites, while civil society is a consensual voluntary organization of citizens that does not promote the use of force or seek to exercise political power.¹¹⁵ Finally, civil society is distinguishable from the market as it does not promote individual consumerism and inequality between the poor and the rich. However, there are types of civil society that promote economic interest, such as trade unions, chambers of commerce and consumers’ associations.¹¹⁶

¹¹² Supra Note 63, p. 567

¹¹³ Supra Note 61, pp. 3-4

¹¹⁴ Supra Note 78, pp. 3-4

¹¹⁵ Id.

¹¹⁶ Id.

Also, it is worth noting that civil society is a diverse sector comprising of different kinds of organizations with different legal structures according to which national law they are constituted. Civil society organizations are engaged in various services to the public including in the area of human rights, health, arts, culture, education, research, religious services, fund raising and advocacy activities.¹¹⁷ Not only is their organizational structure and function diverse but also their names, types and the treatments they receive from their respective governments.¹¹⁸ As such, Civil society organizations may include wide range of organizations including, *inter alia*, human rights NGOs, sport clubs, religious organizations, environmental groups, self-help groups, chambers of commerce, clubs, community based organizations (CBOs), labor unions, professional associations, student groups, etc.

Despite its rapid growth and development the civil society sector suffers from considerable challenges and constraints. The challenges and constraints are mostly in the form of misperceptions about its true nature and due to excessive expectations that have been placed up on it in connection with its past and present achievements. According to Salamon, one of the main misperceptions plunging into the civil society include the “*myth of pure virtue*” in which the civil society is portrayed as a saintly romanticized persona that changes the life of the people.¹¹⁹ Based on the achievements civil society brought in connection with the collapse of communism in Eastern Europe, it is elevated by some enthusiasts to a mystical level “as only consisting of noble causes, earnest well intentioned actors,” while its true nature remains being “a bewildering array of the good, the bad, and the outright bizarre.”¹²⁰

¹¹⁷ Supra Note 63, p. 567

¹¹⁸ Supra Note 62, p. 110

¹¹⁹ Id. pp.118-120

¹²⁰ Supra Note 66, p.20

The other misperception is what Salmon calls a “*myth of volunteerism*,” that the civil society is portrayed as if it solely relies on private voluntary action and philanthropic support though actually the sector benefits from wide range of support sources including the state and corporations.¹²¹ This has no inherent contradiction with the neutrality and institutional independence of civil society organizations. Indeed, in many countries, especially western countries many civil society organizations receive funding from the government while at the same time maintaining their institutional autonomy and independence.¹²² Studies revealed that the government is the main source of funding for numerous civil society organizations.¹²³

The other related misperception about civil society is its representation as if it inherently stands for the wider public interest. However, that may not normatively be true as the concept of public interest is a very much contested domain and because there are civil society organizations that work relentlessly to advance private interests, be it their own members or other private groups.¹²⁴ Trade unions, chambers of commerce and other similar organizations could be good examples of civil society organizations that may not necessarily have a broader public agenda but further the interest of their members.

Finally, perhaps a very troubling misconception about civil society is the belief that the growth of civil society marks the decline of the power of the state. By that it is believed that civil society and the state are mutually exclusive. In fact, as Neer Chandhoke noted, there has never been evidence- any point in time, that the state and civil society are independent to each other. She said;

¹²¹ Supra Note 62, pp. 118-120

¹²² Supra Note 66, p.26

¹²³ Id.

¹²⁴ Id. p.21

[f]or de Tocqueville (1835-1840), civil society limits the state; for Hegel (1821), civil society is a necessary stage in the formation of the state; for Marx, civil society is the source of the power of the state, and for Gramsci (1835-1840), civil society is the space where the state constructs its hegemony in alliance with the dominant classes. Not only are the state and civil society a precondition each for the other, but the logic of one actually constitutes the other.¹²⁵

Indeed, the relationship between civil society and the state is mutual, in which a strong democratic state is conducive for the flourishing of a vibrant civil society and a strong civil society helps the state to build a more transparent, functional and effective political system. The state and the civil society can develop together by supporting each other through a strong partnership, without each others expense.¹²⁶

1.4. CIVIL SOCIETY ORGANIZATIONS, HUMAN RIGHTS AND FREEDOM OF ASSOCIATION

The past half a century has witnessed a dramatic human rights movement. The movement has reached its momentum after 1970s due to the contribution of the growing number of human rights NGOs that operate at the national, regional and international level seeking to check the activities of the state in line with the international human rights norms and standards.¹²⁷ The movement has now spread across the globe spearheaded by thousands of rights civil society organizations that more or less took the institutional model of non-governmental organizations (NGOs).¹²⁸ This widespread global and national movement of non-

¹²⁵ Supra Note 64, p.609

¹²⁶ Supra Note 66, pp.26-27

¹²⁷ Laurie S. Wiseberg, Protecting Human Rights Activists and NGOs: What More Can Be Done?, Human Rights Quarterly, Vol. 13, No. 4, The Johns Hopkins University Press, Nov., 1991, pp. 528-529

¹²⁸ Id, p.529

governmental organizations has resulted in an estimated number of around 18,000 to 20,000 NGOs currently operating on various fields worldwide.¹²⁹

This growth of human rights civil society organizations is the result of the global “associational revolution” that took place in 1970s and 80s in the civil society sector. This is an evidence of the strong relationship that exists between freedom of association and the protection and promotion of human rights. Gail M. L. Mosse eloquently explained this link in the following manner.

Freedom of association is crucial to the efficacy and vitality of a human rights system based on the work of NGOs. Association rights enable human rights defenders to pool their ideas, energy, and resources in order to work more effectively through collective organizations. Because of the centrality of NGOs to human rights protection for all, they create a special concern for the right of the human rights community itself: ensuring the human right of others is dependent on the freedom of association possessed by human rights NGOs.¹³⁰

Of course, the human rights movement is not solely owned and driven by civil society organizations. There are also other human rights actors including, *inter alia*, individuals, states, political parties, international and regional organizations that are separate and independent from human rights civil society organization but involved in human rights debates, issues and struggles. What distinguishes human rights NGOs from these other human rights actors is that the former advance the interest of the wider society and do not involve the use of the political process to achieve their objectives.¹³¹

As such, a human rights civil society organization, distinct from other human rights actors, is defined as “a private association which devotes significant resources to the promotion and protection of human rights, which is independent of both governmental and political groups

¹²⁹ Claude E. Weich, Jr., *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organization*, University of Pennsylvania Press, Philadelphia 1995, p. 45

¹³⁰ Gail M. L. Mosse, *US Constitutional Freedom of Association: Its Potential for Human Rights NGOs at Home and Abroad*, *Human Rights Quarterly*, Vol. 19, No. 4, The Johns Hopkins University, Nov., 1997, p. 740

¹³¹ *Supra* Note 127, p. 529-530

that seek direct political power, and which does not itself seek such power.”¹³² However, this does not mean that civil society organization have no relationship with other human rights actors, such as the state. The relationship, however, is not of dependence but that of interdependence. On this regard, the world conference held in Vienna in 1993 described civil society organizations, including those engaged in human rights promotion, as entities “independent of state power structures-which does not necessarily exclude state funding-nonprofit oriented, and devoted to the realization of relevant sociopolitical goals, such as... human rights...”¹³³

Hence, though human rights civil society organizations may not have total autonomy and independence due to funding, membership base and ideology, their main pillar is political non-partisanship. This is because the credibility of a human rights NGO is largely dependent on its objectivity, in its fact finding works and integrity in relation to its adherence to international human rights norms and standards. Human rights work itself inherently requires non-alliance with political powers or absence of political aspirations and primacy of human rights from other competing objectives.¹³⁴

So today, local and international human rights civil society organizations have become indispensable and prominent actors in the promotion and protection of human rights everywhere in the world.¹³⁵ The important function of human right civil society organizations is nicely summarized as bellow.

Above all, human rights NGOs bring out the facts. They also contribute to standard setting as well as to the promotion, implementation and enforcement of human rights

¹³² Id., p.529

¹³³ Manfred Nowak, Introduction: The Contribution of Non-Governmental Organizations, in World Conference on Human Rights: Vienna, June 1993, p. 3 (Cited in supra note 130, p. 739)

¹³⁴ Supra Note 127, p.529

¹³⁵ Supra Note 130, p.739

norms. They provoke and energize. Decentralized and diverse, they proceed with a speed and decisiveness and range of concerns impossible to imagine for most of the work of bureaucratic and politically cautious intergovernmental organization.¹³⁶

However, the task of human rights NGOs is not a one-time mission to be completed as there has been a continuous persistent transgression of human rights everywhere. Even countries with developed human rights protection mechanism suffer from this unfortunate reality and the magnitude of the problem is rising.¹³⁷ The importance of NGOs in the promotion of human rights is largely due to their insistence for recognition. Hence, they have become important element of public life everywhere despite insufficient practical support and limited availability resources. Even worse, many human rights civil society organization suffer from attacks by governments everywhere violating international norms, such as their right to freedom of expression, privacy and liberty as well as their freedom of association.¹³⁸

¹³⁶ Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 1996, p.456

¹³⁷ *Supra* Note 130, p.739

¹³⁸ *Id.*, p.740

CHAPTER TWO: NORMATIVE STANDARDS FOR PROTECTION OF FREEDOM OF ASSOCIATION

Under this chapter, the legal framework for the protection of freedom of association at the international, regional and national level is explored and examined. When discussing international and regional human rights instruments a particular emphasis is made on those instruments that lay down obligations on Ethiopia. A closer scrutiny of provisions of these instruments is made with the view to understand and compare the level of protection accorded to freedom of association with the corresponding Ethiopian national standards. The constitutional and statutory standard of protection of freedom of association in Ethiopia is also briefly analyzed.

In line with the theme of the thesis, a special focus is made on civil society organizations (CSOs) even though the concept of association is broad encompassing trade unions, political parties etc. Hence, provisions of international and regional human rights instruments that regulate freedom of association in its labour context and related ILO Conventions and legal instruments as well as their national equivalents are excluded from the scope of this and subsequent chapters.

2.1 UNITED NATIONS STANDARDS

2.1.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The main sources of international legal standards for the protection of freedom of association are embodied in international human rights instruments, of both general and specialized nature. The pioneer instrument that laid down the basis for establishing international norms of freedom of association is the Universal Declaration of Human Rights (UDHR).

By proclaiming a general right to freedom of association, UDHR has played a pivotal role in elevating freedom of association to the status of a right and establishing principles and values which were elaborated in subsequent legal instruments. As such, UDHR "...is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and many other organizations since then..."¹³⁹ Though, initially, its provisions were not intended to be binding when declared in 1948, many of them were later incorporated into binding legal instruments and have acquired binding status. Moreover, the human right provisions of UDHR were incorporated in to the Constitution and national laws of many countries.¹⁴⁰

The UDHR, under Art 20(1) provides a general guarantee that "[E]veryone has the right to freedom...of association." This provision guarantees a general right of freedom of association-albeit without laying down specific conditions up on which the right may be exercised. By this, UDHR guarantees the right to freedom to associate for "everyone" without having regard to any distinction of any kind. Further, under sub-article 2 of Article 20, UDHR guarantees the negative right of freedom of association which reads as "[N]o one may be compelled to belong to an association." The negative aspect of freedom of association implies the right not to be forced to associate with others. This aspect of the right, generally, protects individuals from compulsory membership to any associations.

Finally, Article 29(2) of UDHR states that limitations may be not be placed up on the exercise of human rights, including freedom of association, unless such is "...determined by

¹³⁹ ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries, Report III (Part 1 A), International Labour Conference, 86th Session, 1998, Geneva, pp. 16-17, Paras. 56-58

¹⁴⁰ For instance, Art 9(4) and 13(2) of the Constitution of the Federal Democratic Republic of Ethiopia explicitly provided that international instruments ratified by Ethiopia are integral part of the law of the land and hence fundamental rights and freedoms contained in the Constitution must conform with principles of UDHR, International human rights Covenants and instruments ratified by Ethiopia.

law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This provision indicates that UDHR does not regard freedom of association as an absolute right and limitations may be placed up on its exercise. However, the limitations have to be prescribed by law with the sole purpose of protecting the rights and freedoms of others, morality, public order and general welfare in a democratic society. As the provision states that the limitation has to be "solely" for the purposes mentioned above, it is possible to understand that the lists of grounds for which the right may be restricted are exhaustive and any other grounds are not acceptable.

2.1.2 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) further solidified freedom of association as a distinct body of human rights going well beyond its labour context.¹⁴¹ It is thus considered as the most important international human rights instrument governing freedom of association as its provisions clearly and unambiguously affirm the right and lay down binding obligations on state parties.¹⁴² ICCPR recognized and protected freedom of association under Art 22 which reads as:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms

¹⁴¹ International service for Human Rights (ISHR), Right to Freedom of Association, Human Rights Defenders Briefing Papers Series, April 2009, p.3

¹⁴² L. E. Irish, K.W. Simon, Freedom of association, recent developments regarding the 'neglected right', International Journal of Not-for-Profit Law, Vol. 3 Issue 2, 2000 , p.4

of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

ICCPR guarantees the right to freedom of association for everyone with others including the right to form and join trade unions. And no ground of distinction among individuals that would impede their enjoyment of the right is justifiable. Article 2 supports this by stating that no distinction of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status may be placed on the rights recognized in the Covenant. ICCPR makes specific mention of trade unions as one form of associations. It is not, however, intended to limit the scope of freedom of association by excluding other forms of associations.¹⁴³ So clearly, freedom of association extends to other forms of association such as human rights civil society organizations (CSOs).¹⁴⁴

Similar with UDHR, ICCPR does not regard freedom of association as an absolute right. It permits clear limitations on its exercise. It provides that no other restrictions are allowed except those provided under sub article 2 of Art 22. It is, thus, important to discuss the restrictions in order to assess whether laws and regulations issued by states are compliant with international standards. The first restriction is that any limitation placed by states on the enjoyment of freedom of association has to be "prescribed by the law." This means that the limitation has to be provided in legislation, which could be a parliamentary act or its equivalent common law norm.¹⁴⁵ Restrictions can not, however, be placed on any one exercising freedom of association by way of administrative laws.¹⁴⁶

¹⁴³Enabling Civil Society: Practical Aspects of Freedom of Association, A Source Book, Public Interest law Initiative, 2nd Ed, 2003, pp.23-24

¹⁴⁴ Supra note 142, p.15

¹⁴⁵Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, N.P Engel, 2005, pp. 271-272 (Cited in Supra note 141, p.7)

¹⁴⁶ Id., p. 274

The other requirement is that the limitation has to be "necessary in a democratic society". "Necessary in a democratic society" implies that the limitation has to be proportional and necessary "in light of the basic values of democratic societies, including pluralism, tolerance, broadmindedness and people's sovereignty."¹⁴⁷ The proportionality element is adequately elaborated by the jurisprudence of European Court on European Convention on Human Right (that has similar provisions on freedom of association)¹⁴⁸ which states that the severity of the restriction has to be proportional with the reasons for it.¹⁴⁹ The principle of proportionality is an essential element of freedom of association that needs to be carefully weighed when there is interference in the exercise of the right.¹⁵⁰ Finally, the restriction has to be pursued in the interest of national security, public safety, public order, public health or morals, and freedom of others. Without justifying that the association would jeopardize any one of the above interests, the state is not permissible to restrict freedom of association. The restriction on freedom of association is permissible upon the complete satisfaction of the above requirements.

Moreover, freedom of association may be temporarily derogated under certain circumstances during state of public emergency that threatens the life of a nation as it does not fall under

¹⁴⁷ Id., p. 505

¹⁴⁸ The right to freedom of association under ICCPR is not well elaborated due to absence of General Comments of the Human Rights Committee. This has certainly created a gap in the jurisprudential development of freedom of association at the international level exacerbated by absence of sufficient case law of the Human Rights Committee. Hence, the Declaration on Human Rights Defenders (which mostly expound provisions of ICCPR) and the jurisprudence of European Courts of Human Rights (due to similarity in both instruments how the rights are framed) provide better understanding of the right to freedom of association under ICCPR.

¹⁴⁹ European Court of Human Rights (ECHR), Handy side case, 7 Dec 1976, Series A No. 24. For further general understanding of ECHR jurisprudence on freedom of associations, See *supra* note 142

¹⁵⁰ Abigail Hansen, Freedom of Association in the African and European Union: Study on Legislative and Administrative Frameworks having an Impact on Freedom of Association, and More Particularly on The Capacity for Human Rights Civil Society Organisations to Freely Conduct their Activities, in Europe and Africa, Draft Study Report, Sep. 2010-Jan. 2011, p.45

one of the non-derogable rights enumerated under Art 4 of ICCPR.¹⁵¹ Along with freedom of association states are also permitted to derogate other related rights such as freedom of expression and assembly during a state of emergency.

2.1.3 UN DECLARATION ON HUMAN RIGHTS DEFENDERS

With the purpose of ensuring the right to freedom of association of human rights defenders, the UN General Assembly adopted the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" in 1998. Unlike UDHR and ICCPR which regulate freedom of association in general terms this is the only instrument specifically devoted to human rights defenders. Although the Declaration of the Rights of Human Rights Defenders lack binding nature as it is just a UN resolution- not a treaty or convention, "it provides a sound basis for gauging the consensus of considered opinion on the meaning of the rights conferred under applicable multilateral treaties, such as ICCPR and the regional conventions."¹⁵² The Declaration makes reference to rights contained in international instruments such as the ICCPR and stipulates how those rights could be interpreted and applied in relation to human rights defenders. Hence,

“...rather than creating new rights, the Declaration on human rights defenders provides guidance on the interpretation of rights contained in binding human rights treaties with respect to human rights defenders. The Declaration on human rights defenders constitutes the framework for the protection of human rights defenders and is therefore relevant to define the full scope of the right to freedom of association.”¹⁵³

The Declaration is also important as it clearly established a link between the right to freedom of association and protection and promotion of human rights. Article 1 of the Declaration

¹⁵¹ Public emergency needs to be officially proclaimed and the derogation of the rights notified to all State parties. Derogations are allowed to the extent strictly required by the exigencies of the situation provided that they are not discriminatory and inconsistent with other obligations under international law.

¹⁵² Supra note 142, p.5

¹⁵³ Supra note 141, p. 3

states that “[E]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” This provision explicitly recognizes that protection and realization of human rights is a legitimate objective that an association may be established to achieve. This becomes significant in situations where states restrict human rights organizations from engaging in promotion and protection of human rights to exonerate themselves from being accountable. By affirming the right of everyone to promote and strive for the protection of human rights, the Declaration of Rights of Human Rights Defenders has become the pioneer international instrument to recognize the right to engage in human rights work.¹⁵⁴

Also, a cursory look at this article reveals that the Declaration of Rights of Human Rights Defenders not only affirm the right of individuals to freely associate but, the association itself is also entitled to the full enjoyment of the right to pursue its objectives of promoting and realizing human rights without hindrances.¹⁵⁵ Thus, freedom of association has both individual and collective aspects. Moreover, the article does not make distinction between individuals and associations working at national or international level. Accordingly, it tacitly implies that differential treatment between human rights organizations on their engagement in promotion and realization of human rights based on the place where they are constituted and the level where they are engaged infringes freedom of association.

The Declaration of Rights of Human Rights Defenders further provides in Art 5 that:

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: [...]

¹⁵⁴ Id., pp.9-10

¹⁵⁵ Id., p.7

b) to form, join and participate in non-governmental organizations, associations or groups.

The Declaration in this provision clarifies what is not explicitly covered in earlier human rights instruments such as ICCPR by stating that the right to freedom of association not only includes the right to form a new association or join an existing one but also to participate in its effective functioning and operation.¹⁵⁶ It also unambiguously embraced non-governmental organizations as one forms of associations with respect to which freedom of association should be guaranteed.

2.1.4 ADDITIONAL GUARANTEES IN OTHER MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In addition to the above mentioned human rights instruments, provisions guaranteeing freedom of association are also found in other major international human rights instruments of generalized nature such as in Articles 1 and 2 of First Optional Protocol to the International Covenant on Civil and Political Rights;¹⁵⁷ or specialized nature, such as Article 5 of International Convention on the Elimination of All forms of Racial Discrimination (CERD)¹⁵⁸, Article 7 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁵⁹ and Article 15 Convention on the Rights of the Child (CRC)¹⁶⁰.

¹⁵⁶ Id., P.5

¹⁵⁷ Entry into force 23 March 1976 and adopted by the United Nations General Assembly Resolution 2200a (XXI) of 16 December 1966. The First Optional Protocol to ICCPR, under Article 1, provides that the Human Rights Committee has the competence to receive communications from individuals whose rights under ICCPR including their right to freedom of association, are violated by states. Article 2 stipulates that such individuals are required to exhaust all available local remedies and submit their communications in a written form.

¹⁵⁸ Entry into force 4 January 1969; adopted by the United Nations General Assembly Resolution 21066(XX) 2 of 21 December 1965. Art 5 of CERD provides that in the exercise of civil rights such as the right to freedom of peaceful assembly and association, states undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law for their enjoyment without any distinction based on race, colour, or national or ethnic origin.

¹⁵⁹ Entry into force 3 September 1989; adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979. CEDAW, under Art 7, guarantees the right of women to be free from discrimination in their participation in the political and public life of their country and ensures their right to participate in non-governmental organizations and associations concerned with the public and political life of their country, in equal terms with men.

¹⁶⁰ Entry into force 2 September 1990; adopted by the United Nations Resolution 53/144 of 9 December 1998. Article 15(1) CRC recognizes the rights of the child to freedom of association and to freedom of peaceful

The United Nations General Assembly has also passed a number of resolutions relative to freedom of association. Recently, concerned with the limitations which states impose legislating and acting to restrict freedom of peaceful assembly and of association, the UN Human rights council adopted resolution no. 15/21 on 27 September 2012 on "the rights of freedom of assembly and of association" affirming the importance of the rights to freedom of peaceful assembly and association for all people.

2.2 REGIONAL STANDARDS

In addition to the body of international human rights instruments, regional human rights instruments such as the European Convention on Human Rights, The African Charter on Human and Peoples' Rights and the American Convention on Human Rights do also provide a number of guarantees of freedom of association. These regional instruments do not only affirm the importance of freedom of association but also help to elucidate how the standards relating to freedom of association are to be implemented in the particular regional contexts.

2.2.1 EUROPE

In Europe, the pioneer and important human rights instrument that protects the right to freedom of association is the "European Convention for the Protection of Human Rights and Fundamental Freedoms" (shortly know as the "European Convention on Human Rights" (ECHR)).¹⁶¹ ECHR accords similar protection to freedom of association, under Article 11, like the UN human rights instruments and essentially uses similar language with that of Article 22 of ICCPR.

assembly. Under sub-article 2 of the same provision CRC guarantees that these freedoms of the child may not be restricted except in conformity with the law, and unless they are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

¹⁶¹ Entry into force 3 September 1953; adopted 4 November 1950 The Convention has been ratified by more than 40 states in the Council of Europe until the present.

Article 11 of ECHR gives equal protection to both the right to freedom of peaceful assembly and association. Both rights do have similarities as they refer to the coming together of people to "collectively express, promote pursue and defend common interests."¹⁶² However, freedom of association is distinguishable from freedom of assembly in that the former "...requires a certain institutional character, i.e., minimum degree of organization as well as duration"¹⁶³ while the later is associated with the right to peacefully protest or demonstrate in public places without necessarily having an institutional arrangement. This does not mean, however, that the two rights are not interrelated. In fact, once an association is formed, it enjoys a number of other rights enshrined in the ECHR including freedom of assembly.¹⁶⁴

The right to freedom of association guarantees the capacity of all persons to join with others for the protection of their particular interest including by forming or joining trade unions. The provision makes only a specific reference to the right to form and to join trade unions. However, the language usage "including" suggests that the protection also extends to other types of associations in a form of "private and voluntary grouping– regardless of its legal status (informal association or a legal entity) –for a common goal (political parties, religious associations, association of employees, etc)."¹⁶⁵ This issue has been directly addressed in *Sidiropoulos and Others v. Greece case*.¹⁶⁶ In this case, emphasizing that freedom of

¹⁶² Jeremy Mc Bride, Freedom of Association, in the Essentials of Human Rights, Hodder Arnold, London, 2005, pp.18-20

¹⁶³ Report of NGO Law Monitor: Council of Europe, Research Center, International Center for Not-for-Profit Law (ICNL), 5 July, 2012 (Available at <http://www.icnl.org/research/monitor/coe.html>, Accessed on 7/5/2012 1:10:12 PM)), p.6

¹⁶⁴ Id, p.6 An established association do also additionally enjoy a number of rights and privileges guaranteed in ECHR such as the right to privacy, freedom of speech, prohibition of discrimination, the right to fair hearing and effective remedy.

¹⁶⁵ Id.

¹⁶⁶ *Sidiropoulos and others v. Greece*, Eur. Ct. H.R. 57/1997/841/1047, (1998), par. 40

association is an inherent part of the right set forth in Article 11 even though the article makes specific reference to trade unions, the European Court of Human Rights held:

That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. . . .¹⁶⁷

Impliedly provided in the right to freedom of association under Article 11 of ECHR is the notion that freedom of association entails both the right to join or establish an association as well as the right not to join association (a negative right of individuals not to be compelled to join an association).¹⁶⁸ The negative freedom of association requires that individuals should be free from unduly coerced into joining an association.¹⁶⁹ This requirement was upheld by the European Court in the *Chassagnou and Others v. France* case deciding in favor of small landholders who complained that they were forced to belong to a hunting association and allow hunting in their farmland despite their opposition.¹⁷⁰ However, there is no prohibition as to the requirement of mandatory membership to professional organizations such as Bar Associations and Chambers of Commerce, as long as individual members retain the right to form their own associations in order to be able to voice their opinion in the relevant sphere and influence police making accordingly.¹⁷¹

We have discussed earlier that the language used in ECHR concerning freedom of association is similar to that of ICCPR. Not only the language used is similar, the protection accorded to

¹⁶⁷ Id

¹⁶⁸ Supra note 163

¹⁶⁹ Supra note 143, p.45

¹⁷⁰ *Chassagnou and Others v. France*, Application Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999

¹⁷¹ Supra note 143, pp.45-46

the right is also essentially identical.¹⁷² Hence, some contend that because ECHR has established an elaborate dispute resolution mechanism (i.e. the European Court of Human Rights, that has expertise on and specifically deals with human rights issues, including freedom of association¹⁷³,) with a significant body of law,¹⁷⁴ the decisions of the court should be used in interpreting and applying provisions of ICCPR including Article 22. Even though the decisions of the European court do not establish precedent outside the Council of Europe, its expertise and rich blend of cases on human rights issues- being the oldest international court dealing specifically with human rights issues,¹⁷⁵ can greatly address the jurisprudential dearth afflicting ICCPR, if used to interpret identical provisions. Hence, some landmark decisions of the European Court of Human Rights that have established fundamental principles and norms in relation to the right to freedom of association are briefly discussed below.

Landmark decisions of European Court of Human Rights have entrenched that "...there is a right under international law to form legally registered associations and that, once formed, these organizations are entitled to broad legal protections."¹⁷⁶ This has been elaborated in different cases involving political parties and other forms of associations. In *United Communist Party of Turkey and Others v. Turkey (UCP)*, a case that is deemed as important for creating a fundamental breakthrough, the court held that:

¹⁷² Report on Freedom of Association in ACP and EU countries, ACP-EU Joint Parliamentary Assembly Bureau, 12 November 2007, pp.3-4

¹⁷³ Supra note 142, pp.2-3

¹⁷⁴ Supra note 143, p.24

¹⁷⁵ Supra note 142, pp.16-17

¹⁷⁶ See, e.g., *Sidiropoulos and others v. Greece*, judgment of 10 July 1998, Reports of Judgments and Decisions 1998-IV; *United Communist Party of Turkey and others v. Turkey*, judgment of 30 January 1998, Reports 1998-I (Cited in infra note 192, par.13)

"..The right guaranteed by Article 11 would be largely theoretical and illusory if it were limited to the founding of an association, since the national authorities could immediately disband the association without having to comply with the Convention. It follows that the protection afforded by Article 11 lasts for an association's entire life and that dissolution of an association by a country's authorities must accordingly satisfy the requirements of paragraph 2 of that provision..."[Emphasis added]¹⁷⁷

By establishing that freedom of association lasts for an association's life, the court "effectively conferred the protections of the right to freedom of association on legal entities."¹⁷⁸ In *Sidiropoulos and Others v. Greece*¹⁷⁹ the court affirmed that it is the right of individuals inherent in their right to freedom of association to register legally recognized associations. In *Freedom and Democracy Party (ÖZDEP v. Turkey)*, the European court affirmed the nexus between freedom of association and the freedom of speech (Article 10 of ECHR) by establishing that "...the protection of opinions and the freedom to express them is one of the objectives of the freedoms of...association enshrined in Article 11."¹⁸⁰

To sum up, the aforementioned three cases are considered as groundbreaking because they elucidated that the right to freedom of association includes that right of individuals to establish a legally registered association and once the association is formed it enjoys full protection of the convention throughout its entire life. This does not mean, however, that the right to freedom of association may not be limited or restricted. Rather, there are situations in which a state is allowed to impose the restrictions albeit by strictly adhering to the grounds the Convention has clearly provided, as discussed below.

¹⁷⁷ *United Communist Party and Others v. Turkey*, Eur. Ct. H.R. 133/1996/752/951, (1998), par. 33

¹⁷⁸ *Supra* note 142, p.8,

¹⁷⁹ *Supra* note 166

¹⁸⁰ *Freedom and Democracy Party v. Turkey (OZDEP)*, Eur. Ct. H.R (93 1998/22/95/784) (Grand Chamber decision, December 8, 1999) See also *Refah Partisi (The Welfare Party) and Others v. Turkey*, Eur. Ct. H.R. 41340/98/, (July 31, 2001)

ECHR provides exhaustive list of legitimate grounds for restriction of the right to freedom of association, under paragraph 2 of Article 11¹⁸¹. No other grounds could be justifiably invoked to make interference with the right and the convention has provided a framework that helps to determine whether the interference with the right meets the legitimate grounds. Hence, an interference with freedom of association has to be (1) prescribed by law; (2) serve a legitimate aim; and (3) be necessary in a democratic society. The state carries the burden to prove that the restriction it has made on the rights meets the above three requirements.

Before a determination is made whether a given restriction on freedom of association meets the above criteria and hence constitute a violation, it must be resolved that such restriction amounts to "interference". But what constitutes a given restriction as "interference"? Unfortunately, there is no clear judicial guidance as to what kinds of restrictions constitute interference on the right to freedom of association. However, the European Court case law provides some indicative factors. For instance in *Sidiropoulos v. Greece* case, refusal to register an association could be a restriction unless the refusal was effected because of inability of the association to meet some formality requirements such as providing complete application, declaring legally permissible objectives or appropriate choice of name.¹⁸² In other cases, UCP and OZDEP, involuntary dissolution of an association could not amount to interference if it is made in accordance with bankruptcy proceedings or as a result of a repeated and serious breach of applicable laws.¹⁸³ In general, it could be logically deduced that legitimate requirements of national laws that do not have chilling effect on the formation or operation of associations may not constitute "interference" in the sense of Article 11 of ECHR.

¹⁸¹ Supra note 163, p.7

¹⁸² Supra note 142, p.9

¹⁸³ Id.

Once the court decides that the restriction amounts to interference, the next step to be looked up on is whether such interference is "prescribed by law". If such restriction is an act of unauthorized interference by public authorities made without having the legal backing to do so, the restriction could not be upheld under international law.¹⁸⁴ In the aforementioned three cases, the European court has decided that the public authorities that made interference in the applicants' right of freedom of association acted pursuant to promulgated national laws satisfying requirements of "prescribed by law." From the cases, it is possible to deduce general principles that:

...an interference is only "prescribed by law" if it derives from any duly promulgated law, regulation, decree, order, or decision of an adjudicative body. By contrast, acts by governmental officials that are *ultra vires* would seem not to be "prescribed by law," at least if they are invalid as a result.¹⁸⁵

In the European Court of Human rights analysis of whether a given interference by public authorities amounts to a violation of Article 11, the next issue to be resolved is whether the interference constitutes "a legitimate aim." The requirement of "legitimate aim" requires that the interference, which is prescribed by law, needs to be carried out; (i) in the interests of national security or public safety, (ii) for the prevention of disorder or crime, (iii) for the protection of health or morals, or (iv) for the protection of the rights and freedoms of others.

These four grounds of "legitimate aims" are exhaustive and exclusive. The court uses an approach of clarifying their meaning and scope using a subjective test on a case by case basis in light of the spirit of the convention and principles and values embodied therein.¹⁸⁶

For that, the court, as a last step, analyzes whether the interference made by the national

¹⁸⁴ Id.

¹⁸⁵ Id., p.10

¹⁸⁶ For instance, in OZDEP case, the court underscored that espousing unpopular opinions does not constitute a justifiable reason to dissolve a political party. In UCP case, the court found that restricting a political party with a secessionist agenda may amount to a legitimate aim on a ground of national security.

authorities in order to achieve those "legitimate aims" must be "necessary in a democratic society." This requirement helps to address situations where the goals of state interference may be legitimate but the means used to achieve the goals may be disproportionate or do not lead to attaining the desired goals.¹⁸⁷ By employing the "necessary in a democratic society" test, the Convention ensures that:

"...The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society." Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."¹⁸⁸

Hence, democracy and democratic principles requires that the state, when making an interference with the right to freedom of association, has the onus to prove that it employed the minimum measures needed to secure the legitimate aim. This is what is referred to as the "proportionality test". In many cases where the state interference is already found to be prescribed by law and pursuing legitimate aim by the court, the proportionality test is crucial to ultimately decide whether the interference amounts to the violation of Article 11.

To sum up, the relatively well developed jurisprudence of the European Court of Human Rights entrenched the notion that individuals have the right under international law to establish and operate legally recognized associations benefiting from broader legal protections that shield them from arbitrary state intrusions that is contrary to the exercise of freedom of association in a democratic system. In addition, freedom of association is embodied in a range of legal instruments¹⁸⁹, Conventions¹⁹⁰ and parliamentary resolutions¹⁹¹

¹⁸⁷ Supra note 150, p.45

¹⁸⁸ Supra note 170, par. 45

¹⁸⁹ For instance, in the context of labour law, the European Social Charter(1996) protects the right of workers and employers to form and join associations for the protection of their economic and social interests.

¹⁹⁰ For instance, the European Convention on the Recognition of the Legal Personality of International Non-governmental Organizations (1986) was adopted with the aim of laying down the conditions for recognition of

that complement the European Convention on Human Rights protecting the fundamental right of freedom of association and affirm, in the European Context, that "...CSOs, as legal entities expressive of the right to freedom of association have rights in and of themselves." ¹⁹²

2.2.2 AFRICA

In Africa, the key provision relative to the protection of the rights to freedom of association is embodied in the African Charter on Human and Peoples' Rights (1981) ('AChHPR', 'Banjul Charter')- which is considered as the real cornerstone in the protection of human rights in the region and milestone for the development of the African human rights system.¹⁹³ The Banjul Charter is by large viewed as an original legal instrument, in terms of content and presentation, which took into account the specificities of Africa by reflecting the African conception of human rights and philosophy of law, designed with the aim of addressing the needs of Africans.¹⁹⁴ However, while focusing on African specificities, the Charter was prudently devised "... not to deviate much from the international norms solemnly adopted in various universal instruments by the different member states of the OAU"¹⁹⁵

the legal personality of non-profit oriented associations, foundations and other private institutions operating in the Council of Europe member states.

¹⁹¹ The parliamentary assembly of the Council of Europe has passed a range of resolutions aimed at protecting freedom of association and facilitating civil society engagement including Recommendation 14(2007) on the legal status of non-governmental organizations in Europe, Opinion No.246(2003) on the Relations between the Council of Europe and non-governmental organizations and Declaration of The Third Summit of the Council of Europe making reference to the role of NGOs in contributing to shaping the transparency and accountability of democratic government.

¹⁹² The Role of Legal Reform in Supporting Civil Society: An Introductory primer, International Center for Not-For-Profit-Law and UNDP, August 2009, p.14

¹⁹³ Entry into force 21 October 1986; adopted by the eighteenth Assembly of Heads of State and Government, June 1981, Nairobi, Kenya. Currently, 53 States are parties to the Charter.

¹⁹⁴ B. Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, Human Rights Quarterly, Vol. 6, No. 2, The Johns Hopkins University Press, May 1984, p. 145

¹⁹⁵ Id., p. 152

Despite being original in its approach and content, the Charter's support for some rights is not far from ambiguity. A clear example for that is freedom of association which is provided under Article 10. It reads as follows:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

Under this provision, the AChHPR guarantees the right of individuals for free association. However, the right is not without further qualification. The Charter states that in order to be able to exercise the right, individuals are required to be abided by the law. This qualification is quite ambiguous and susceptible to manipulation by the state as it confers up on it the discretion to issue an arbitrary law that would tamper with the exercise of freedom of association. One write adequately expressed this concern as:

...[T]his is a particularly strongly worded qualification and fear has been expressed that the term "law" in this provision would be interpreted to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with "law".¹⁹⁶ (Emphasis added)

However, this concern was later fully addressed in the year 1992 at the 11th Ordinary Session¹⁹⁷ of the African Commission on Human and Peoples' Rights. The Commission, following a pragmatic approach, expanded the meaning and application of freedom of association. The Commission strongly underscored that the Banjul Charter does not deviate

¹⁹⁶ Heyns, C., *Human Rights Law in Africa* (1977) p. 89. (Cited in Freedom of Association And Assembly – Unions, NGOs and Political Freedom in Sub-Saharan Africa, Report by Dr. Bonaventure Rutinwa, Article 19 (2001),p.6)

¹⁹⁷ Resolution on the Right to Freedom of Association, ACHPR /Res.5(XI)92, 1992

from the international standards of protection of human rights, in general, and freedom of association, in particular, by providing as follows.¹⁹⁸

Taking into consideration the provisions of the African Charter on Human and Peoples' Rights, in particular article 10(1), guaranteeing every individual the right to free association provided that he abides by the law;

1. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards.
2. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom.
3. The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights.

The above statements show that the resolution has the purpose of expanding AChHPR's standards of protection of freedom of association. Specially, by calling up on states "...not to enact provisions which would limit the exercise of this freedom," the Commission laid the fear held by many that the Charter's provision is prone to state manipulation to rest.¹⁹⁹ After clarifying the true meaning of Article 10(1) of the Banjul Charter and in line with such interpretation, the Commission called up on states to harmonize national laws they pass concerning the exercise of freedom of association with their obligation under the Charter.²⁰⁰

Moreover, the African Charter on Human and Peoples' puts forward another limitation distinct from other international and regional instruments. Under Articles 10(2), while espousing the negative aspects freedom of association by affirming that individuals have the

¹⁹⁸ The African Commission on Human and Peoples' Rights is a regional body established by the African Charter on Human and Peoples' Rights with a mandate to promote and protect human and peoples' rights in the AU, and interpret the Charter.

¹⁹⁹ Freedom of Association And Assembly – Unions, NGOs and Political Freedom in Sub-Saharan Africa, Report by Dr. Bonaventure Rutinwa, Article 19, 2001, p.6

²⁰⁰ See Heyns, C., *Human Rights Law in Africa, 1977*, p. 104(Cited in Id)

right not to be compelled to join an association, the Charter puts limitation on this aspect of the right by subjecting it to the obligation of solidarity embodied in Article 29 of the Charter. In addition to such limitation, the Charter lays down a general limitation that applies to all provisions. That is, during state of public emergency, states are allowed to derogate from their obligations with respect to the rights enshrined in the Charter including freedom of association.²⁰¹

Besides, mandated, by the Charter, with the power to promote and protect human rights and interpret the Charter²⁰², the African Commission on Human and Peoples' Rights has made numerous pertinent resolutions, communications and decisions relative to freedom of association even though it is often criticized for failing to provide effective implementation mechanism for its decisions and being soft on States on the violations they commit.²⁰³ Despite these, the Commission has been instrumental in promoting and protecting human rights in Africa. In one case involving freedom of association, for instance, the Commission has made a bold move by finding Nigeria in violation of Article 10 of the African Charter on Human and Peoples' Rights for alleged harassment and persecution of employees of a human rights organization-which is engaged in human rights promotion and awareness raising activities, and raiding of its offices in an attempt to undermine its ability and thwart its functions.²⁰⁴

²⁰¹ Supra not 199

²⁰² The Commission has the power, *inter alia*, to monitor, investigate, and report allegations of human rights violations; give its views or make recommendations to governments when cases arise; and prepare submissions to the African Court on Human and Peoples' Rights.

²⁰³ Supra note 150, p.62

²⁰⁴ Huri-Laws v Nigeria (2000) AHRLR 273 (Available in <http://www.chr.up.ac.za/index.php/browse-by-subject/402-nigeria-hurilaws-v-nigeria-2000-ahrlr-273-achpr-2000.html>)

The Charter is also complemented by other specialized regional instruments such as the African Charter on the Rights and Welfare of the Child (also known as the "ACRWC")²⁰⁵ which provides in Article 8 that "every child shall have the right to free association and freedom of peaceful assembly in conformity with the law". Also, under Article 12, the African Charter on Democracy, Election and Governance²⁰⁶ provides that:

State Parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace. To this end, State Parties shall:

...4. create conducive conditions for civil society organizations to exist and operate within the law.

In addition to these regional human rights instruments setting standards for protection of the right to freedom of association at the regional level in Africa, member states of the AU do also have obligations emanating from international human rights instruments each has ratified and national laws they have promulgated.

2.2.3 OTHER REGIONAL STANDARDS

Other regional instruments such as the American Convention on Human Rights (ACHR)²⁰⁷ and the Arab Charter on Human Rights²⁰⁸ support and lay down standards for the protection of the right to freedom of association. These instruments more or less provide similar protection to the right like the other international human rights instruments we have discussed earlier.

²⁰⁵ Entry into force 29 November 1999; adopted on 11 July 1990 in Addis Ababa, Ethiopia. As of now, 46 member states of the AU have ratified the Children Charter.

²⁰⁶ Adopted by the Eighth Ordinary Session of the Assembly of AU in Addis Ababa, Ethiopia on 30 January 2007

²⁰⁷ Entry into force 18 July 1978; adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Currently 24 States are parties to the Convention.

²⁰⁸ Adopted by the Council of the League of Arab States in its resolution 5437 (102nd regular session) on 15 September 1994.

The American Convention on Human Rights (ACHR) supports the right to freedom of association in Article 16 as follows.

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

Unlike the international and regional instruments we have discussed earlier, the American Convention on Human Rights "...provides a broad and non-exhaustive list of possible purposes for which an association may be formed."²⁰⁹ It also stipulates permissible restriction on the right similar with ICCPR.

A similar regional instrument, the Arab Charter on Human Rights²¹⁰ also supports the right to freedom of association for every citizen under Article 24 which provides that every citizen has the right to freely form and join associations with others and to freedom of association. However, using similar language as ICCPR and ECHR, the Charter places restriction on freedom of association under Article 24(7).

2.3 STANDARDS FOR PROTECTION OF FREEDOM OF ASSOCIATION IN ETHIOPIA

2.3.1 OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK GOVERNING FREEDOM OF ASSOCIATION IN ETHIOPIA

Ethiopia saw the first modern legal framework regulating freedom of association during the Emperor Haile Selassie regime in the 1960 Civil Code.²¹¹ The Civil Code recognized civil non-profit associations and provided provisions for their registration, control and

²⁰⁹ Supra note 141, p.8

²¹⁰ Adopted by the Council of the League of Arab States in Resolution 5437 (102nd regular session) on 15 September 1994

²¹¹ Civil Code of the Empire of Ethiopia, 1960

administration. The responsible organ for the registration of CSOs was the Ministry of Interior until this mandate was later transferred to the Disaster Prevention and Preparedness Commission (DPPC). Based on provisions of the Civil Code, the Ministry of Interior issued Associations Registration Regulation No. 321/1966 to provide detailed procedures for registration of associations. After these two laws, no other piece of legislation has been enacted for a long time even though they were found to be inadequate to effectively regulate associations, particularly CSOs, taking into account their level of development, changes in their objectives and activities, and complicated participation in the overall social and economic development.²¹²

In 1995, the government came up with Guidelines for NGO Operations that "updated those procedures, outlines major classifications for the sector, and defines areas for programmatic activities."²¹³ The government organ responsible for the registration of CSOs was shifted from the Disaster Prevention and Preparedness Commission (DPPC) to the Ministry of Justice by virtue of the Definition of the Powers and Duties of the Executive Organs of the FDRE Proclamation No.4/1995 amended as Proclamation No.471/2006.

The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE)²¹⁴ guaranteed human and democratic rights and explicitly recognized that international instruments ratified by Ethiopia are integral part of the law of the land²¹⁵. Hence, international and regional human rights instruments guaranteeing freedom of association which Ethiopia has ratified are

²¹² Commentary on the Charities and Societies Draft Proclamation, Ministry of Justice, Addis Ababa, September 2008, p.1

²¹³ Jeffery Clark, Civil Society, NGOs, and Development in Ethiopia: A Snapshot View, The International Bank for Reconstruction and Development/THE WORLD BANK, Washington DC, June 2000, p.19

²¹⁴ Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Addis Ababa

²¹⁵ Id. Art.9(4)

considered as part of Ethiopian laws.²¹⁶ And, the Constitution recognizes such international treaties as standards of interpretation of fundamental rights and freedoms enumerated in the Constitution. Moreover, freedom of association is explicitly incorporated in the Constitution as one of the fundamental rights and freedoms. Detailed analysis of provisions of the Constitution related with freedom of association is provided in the following section.

As stated earlier, no law has been enacted after the 1960 Civil Code and the Associations Registration Regulation No. 321/1966 to regulate CSOs. And, the existing laws were inadequate to properly regulate the complex development of CSOs in Ethiopia. Intending to address the inadequacy of the existing laws, therefore, the Ministry of Justice came up with various drafts of legislations at different times (for example in 2002, 2003 and 2004) to regulate the registration and regulation of CSOs. Consequently, a controversial CSO law, the Proclamation to Provide for the Registration and Regulation of Charities and Societies²¹⁷ was promulgated on 13th February, 2009. The new law is Ethiopia's first detailed and comprehensive legislation governing the registration and regulation of CSOs. It has established an Agency (an executive branch having its own legal personality) with a wider power to license, register, control, supervise, and dissolve CSOs. Detailed analysis of this law is made in section 2.3.4 and the third chapter.

2.3.2 FREEDOM OF ASSOCIATION IN THE FDRE CONSTITUTION

In Ethiopia, the supreme law of the land is the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) which was adopted in 1994.²¹⁸ The Constitution asserts its supremacy not only by declaring that it is the supreme law of the land but also by

²¹⁶ For detailed analysis see Section 2.3.3 of this paper.

²¹⁷ Proclamation to Provide for the Registration and Regulation of Charities and Societies, Proclamation No. 621/2009, Addis Ababa

²¹⁸ Supra note 215

proclaiming that "[A]ny law, customary practice or a decision of any organ of the state, or a public official which contravenes this constitution shall be of no effect."²¹⁹ The Constitution is placed at the apex of all federal or state laws. Ethiopia is a federal state composed of nine regional states and two chartered cities administered by the Federal Government.²²⁰ The regional states have parallel executive, legislative and judicial power.

The Constitution provides the regional states with residual power in which powers not expressly given to the federal government alone or concurrently with the States are reserved for the States.²²¹ The federal government has exclusive power to negotiate and ratify international instruments.²²² Concerning administration of associations (including CSOs), Article 51 of the FDRE Constitution, which defines the power of the Federal Government, does not give the Federal government exclusive power. States can issue their own law to regulate CSOs and the power of the Federal Government, on this regard, is restricted to the two chartered cities-Addis Ababa and Dire Dawa. However, the constitution prescribes that all organs of the state at every federal and state level have the responsibility and duty to respect and enforce provisions of the constitution that provide fundamental rights and freedoms.²²³ This duty to respect and enforce implies that states "...must in the exercise of their functions be deemed not only to be bound by state laws and constitutions, but also by the federal bills of rights."²²⁴

²¹⁹ Id. Art 9(1)

²²⁰ Id., Art 47

²²¹ Id., Art 52

²²² Id., Art 51(8)

²²³ Id., Art 13(1)

²²⁴ Leonard F.M Besselink, The protection of Human Rights in Federal Systems, Draft paper for the Law and Politics Panel of the XIVth International Conference of Ethiopian Studies, Addis Ababa, Nov 2000, p.10

Chapter three of the Constitution, which constitutes one-third of the provisions of the Constitution, is devoted to fundamental rights and freedoms comprising of individual and group rights. The constitution divides the fundamental rights and freedoms section in two parts namely, human rights and democratic rights. In the democratic rights section the Constitution guarantees, *inter alia*, freedom of thought opinion and expression; freedom of association; and the right of assembly, demonstration and petition which are crucial for the operation of association in a democratic society.

Freedom of association is enshrined under Article 31 which provides that:

Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited.

The constitution guarantees freedom of association to every person without distinction on any ground. Article 25 of the Constitution affirms this claim by providing that "the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status." However, some argue that as freedom of association is a democratic right, according to the FDRE Constitution, it is restricted to citizens. Hence, non-citizens may not claim the right to freedom of association as of right. In fact, this was the official position of the government during the promulgation of the Charities and Societies Proclamation- which will be discussed later.²²⁵ This, however, is contrary to international and regional standards of protection of freedom of association in which Ethiopia is obligated to adhere to that prohibit any discrimination in the exercise of the right on the ground of nationality. Moreover, the wording of Article 31 which uses "Every person" instead of "Every

²²⁵ Supra note 212, p.11

citizen" shows that this argument is not inline with the intent of the Constitution which guarantees for everyone irrespective of their nationality.

Article 31 of the Constitution guarantees the right to establish or join associations for any cause or purpose. It does not explicitly guarantee the negative freedom not to be compelled to join an association. Rather the protection seems to be limited to the positive aspect of the right of individuals to freedom to associate. But, this provision should be construed in light of international and regional standards as to give it a wider meaning that includes the negative freedom not to associate.²²⁶

Even though the constitution recognizes freedom of association for any cause or purpose, it permits some grounds of state restriction on the exercise of the right. It allows state interference or limitation of freedom of association when organizations are formed in violation of appropriate laws or the intent in which the organizations are formed is to illegally subvert the constitutional order or promote such activities. The first permissible ground of restriction is similar with what is provided in the African Charter on Human and Peoples' Rights. This ground of limitation-"in violation of appropriate laws"-is overbroad and open to subjective interpretation permitting wide latitude of state discretion.²²⁷ Also, the provision does not provide a guideline on what grounds and to what extent the "appropriate laws" may restrict freedom of association.²²⁸

The Constitution also makes reference to international and regional instruments ratified by Ethiopia. Ethiopia has ratified a number of international and regional human rights

²²⁶ See supra note 214, Art 13(2)

²²⁷ International Journal of not-for-Profit law(ICNL), Vol. 12, No. 2, Washington DC, Feb 2012, p. 10

²²⁸ Id

instruments providing freedom of association.²²⁹ Under Article 9(4), the Constitution provides that "all international agreements ratified by Ethiopia are an integrant part of the law of the land." This provision integrates the international and regional standards of freedom of association in to the body of Ethiopian laws by declaring that they constitute part of the Ethiopian legal system up on ratification²³⁰.

Moreover, Article 13(2) of the Constitution obliges everyone enforcing the provisions of the constitution to interpret the fundamental rights and freedoms enumerated in Chapter Three of the Constitution "in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." Article 13(2) gives prominent place for provisions of international instruments governing freedom of association as it designated them to serve as standards for interpretation of Article 31 of the Constitution (freedom of association). In other words, it means that Article 31 of the Constitution needs to be interpreted in conformity with human rights treaties guaranteeing freedom of association that Ethiopia has ratified such as ICCPR and ACHPR.

2.3.3 THE PLACE OF INTERNATIONAL AND REGIONAL NORMS OF FREEDOM OF ASSOCIATION UNDER THE ETHIOPIAN LEGAL SYSTEM

Ethiopia ratified a number of regional and international instruments guaranteeing freedom of association. The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) makes

²²⁹ Ethiopia adopted International Covenant on Civil and Political Rights (ICCPR) in 1993; African Charter on Human and Peoples' Rights (ACHPR) in 1998; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1976; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC) in 1991; African Charter on the Rights and Welfare of the Child in 2002

²³⁰ Even though this provision talks about "ratified" treaties, the binding Amharic version shows that what is intended is both treaties acceded and ratified. Amharic is the official working language of the Federal Government and Article 106 of the constitution provides that the Amharic version of the constitution shall have binding legal authority.

reference to these international instruments ratified by Ethiopia. Article 9(4) of the Constitution provides that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land." However, it is not clear, from this provision, what the word "ratify" signifies; whether it refers to the act of the executive to be bound by the treaty in the sense of public international law and hence such instruments automatically assume a status of "integral part of the law of the land"; or whether the instruments have to go through further domestication in the sense of Article 55(12) of the Constitution. Article 55(12) of the Constitution states that the House of Peoples' Representative "shall ratify international agreements concluded by the executive." Though it is clear from Article 55(12) of the Constitution that international instruments concluded by the executive must pass through approval process by the parliament- House of Peoples' Representative, it still does not solve the question when exactly the international instruments are deemed to be ratified according to Ethiopian law (in the sense of public international law at the moment concluded by the executive or at the moment the parliament endorses such executive act). If ratification is understood in the sense of the first interpretation, it suggests that Ethiopia follows a "monist" approach.²³¹

This argument seems to be consolidated by Article 13(2) of the Constitution which states that "the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia." As per this provision, the Constitution automatically recognizes international

²³¹ See supra note 224, p.24. Concerning the place of international treaties in national legal systems, international law practically leaves it to be determined by national constitutional law. Accordingly, some countries endorse a "Monist" Approach in which a binding international treaty automatically becomes part of the national order; whereas others follow a "Dualist" approach in which the treaty becomes part of the law of the land after passing through a domestication or incorporation process by national laws. For further understanding of the monist and dualist approaches please see Oppenheim L, International Law of Treaties, 8th Edition, Vol. 1, Longmans, Green and Co, 1986, pp 37-38

treaties as a litmus paper against which the fundamental guarantees contained in the human rights chapter of the constitution are measured²³² and seems to make international treaties not only as integral part of the national law but also place them equally with the Constitution in the hierarchy of norms. However, one might rightly argue that resort to international instruments for interpretation could only be made when the constitutional provisions guaranteeing fundamental rights are ambiguous.²³³

On the other hand, others who contend that Ethiopia follows a "dualist" approach raise more arguments in addition to the incorporation requirement provided under Article 55(12). Firstly, Article 9(4), read together with Article 9(1) - that proclaims the constitution as the supreme law of the land, shows that as "treaty provisions do not have a status which is supra-constitutional; they are not of higher rank than the Constitution."²³⁴ Also, the Negarit Gazeta Establishment Proclamation No. 3/1995 requires all federal laws including international treaties ratified by Ethiopia to be published in the Official Negarit Gazette and translated into Amharic, the working language of the Federal Courts.²³⁵ Without passing through such procedure, the Courts are not obliged to interpret and apply the treaties. Hence, it could be argued that this domestication requirement proves that Ethiopia follows a dualist approach.

From the above debates, it is possible to understand that there is no clear and solid theoretical basis for Ethiopia's approach concerning incorporation of international treaties.²³⁶ This

²³² Id.

²³³ Seyoum Yohannes and Aman Assefa, Harmonisation of laws relating to Children: Ethiopia, The African Child Policy Forum, __, p. 6

²³⁴ Supra note 224, p.24

²³⁵ See Article 2(2) and 2(4) of the Proclamation to Provide for The Establishment of the Federal Negarit Gazeta, Proclamation No. 3/1995. The Federal Negarit Gazeta is a federal gazette that publishes federal laws.

²³⁶ See also Getachew Assefa, The Making and Status of Treaties in Ethiopia as Envisaged by the 1994 Constitution of the FDRE: A Comparative Approach, Unpublished, Faculty of Law, Addis Ababa University, 1996, p.64

problem, however, is not only theoretical. The practice reveals that Ethiopia follows more or less a monist approach (though not certainly) in which international treaties are incorporated in to the national law by a single ratification process without their content published in the official Negarit Gazeta.²³⁷ This practice, however, creates confusion and reluctance on the part of the judiciary to interpret and apply international human rights treaties as the contents of the treaties would not be available in the working language of the courts and the courts are required to take judicial notice only of the letters of laws published in the official Gazette.²³⁸ Thus, the theoretical confusion and practical problems associated with domestication of treaties render the Ethiopian Courts unwilling and unable to apply international human rights norms in their decisions. As a result, the courts rarely invoke provisions of international instruments in their decisions.²³⁹

Despite and within this disputed theoretical framework and the practical challenges, however, the legislature as well as the courts could still find avenues through which they could apply international human rights instruments including those providing for freedom of association. As such, the legislature should clearly establish a system that resolve Ethiopia's theoretical stand concerning incorporation of international treaties and publish the contents of these instruments in the official Gazette for application by the courts. On the other hand, the courts should employ a flexible and proactive approach towards making interpretation and application of provisions of these human rights instruments possible in the Ethiopian legal system.

²³⁷ Supra note 233, p.8. The only international agreement so far reproduced in the Negarit Gazeta is the OAU Establishment Charter, OAU Establishment Proclamation No. 202/1963

²³⁸ Supra note 235, Art 2(3)

²³⁹ See generally Getachew Assefa, Problems of Implementing International Human Rights Laws by Ethiopian Courts: Proceeding of the Symposium on the Role of Courts in the Enforcement of the Constitution, 2000

To sum up, international instruments ratified by Ethiopia including those providing freedom of association do have a solid place in the national legal system as they are part and parcel of the law of the land as per Article 9(4) of the Constitution. Moreover, Article 13(2) of the Constitution makes international human rights instruments, including those providing freedom of association, standards for the interpretation of the fundamental rights and freedoms specified in the Constitution. However, there are theoretical and practical problems associated with the hierarchy of norms, translation and publishing of the contents of the instruments in the official gazette as well as their interpretation and application by the courts, which need to be addressed by the legislature and the judiciary so that Ethiopia can properly discharge obligations it has assumed by virtue of ratifying these international and regional human rights treaties.

2.3.4 THE ETHIOPIAN CHARITIES AND SOCIETIES PROCLAMATION

As stated earlier, the "Proclamation to Provide for the Registration and Regulation of Charities and Societies" is the first Ethiopian comprehensive legislation that regulates the registration and regulation of CSOs. The aim of the law, as stated in its preamble, is thus to "ensure the realization of citizen's right to association enshrined in the Constitution of the Federal Democratic Republic" and "to aid and facilitate the role of Charities and Societies in the overall development of Ethiopian peoples."²⁴⁰ As could be understood from the preamble, the law is promulgated in order to address the inadequacies of existing laws in terms of effectively regulating CSOs taking into account their level of development, a change in their objectives and activities, and their complicated participation in the overall social and economic development.²⁴¹

²⁴⁰ Supra note 217, Preamble

²⁴¹ See supra note 212, p.5

The commentary issued by the Ministry of Justice on the proclamation identified gaps of the existing laws regulating freedom of association and provided detailed justifications for the need to come up with the law.²⁴² Among these, the need to facilitate for CSOs to become development partners of the government, create a conducive environment for the exercise of citizens' constitutionally guaranteed right to associate, identify illegal activities within CSOs and penalize the offenders were some of the reasons provided to justify the need for enacting the law.²⁴³

The Proclamation employs terms like "Charity" and "Society" instead of the commonly used terms such as NGO or CSO or Association. In the 1960 Civil Code, a general term "association" was used to register CSOs without having regard to the differences and peculiarities that existed among them.²⁴⁴ The justification provided for this change in naming is that the existing laws do not adequately cover Charities and Societies and the definitions given in the laws do not reflect the true nature of associations in reality.²⁴⁵ Thus, the proclamation recognizes two types of CSOs namely, Charities and Societies. And each of them has sub-categories.

There are four kinds of Charities recognized by the proclamation: charitable endowments, charitable institutions, charitable trusts, and charitable societies. A charitable endowment is an organization through which certain property is perpetually and irrevocably designated by donation or will or the order of the agency for a purpose that is solely charitable.²⁴⁶ A charitable institution is a charity formed by at least three persons exclusively for charitable

²⁴² Id., pp.5-6

²⁴³ Id.

²⁴⁴ See supra note 211, Arts 404, 483, 507 and 516

²⁴⁵ See supra note 212, p.5

²⁴⁶ Supra note 217, Art 16

purposes.²⁴⁷ A charitable trust is an organization by virtue of which specific property is constituted solely for a charitable purpose to be administered by persons, the trustees, in accordance with the instructions given by the instrument constituting the charitable trust.²⁴⁸ A charitable society is a society which is established for charitable purposes.²⁴⁹ (Article 46 of the CSP) Societies are associations or persons organized on a non-profit making and voluntary basis formation of the rights and interests of their members and to undertake other similar lawful purposes as well as to coordinate with institutions of similar objectives.²⁵⁰

Charities and Societies are designated in three ways as Ethiopian Charities or Societies, Ethiopian Resident Charities or Societies or Foreign Charities, based on place of establishment of the organization, its funding sources, composition of membership, and membership residential status.²⁵¹

Ethiopian Charities or Societies are Charities or Societies formed under the laws of Ethiopia, whose members are all Ethiopians, generate income from Ethiopia and are wholly controlled by Ethiopians. These organizations may not receive more than 10% of their resources from foreign sources.²⁵² Ethiopian Resident Charities or Societies are Ethiopian Charities or Societies that are formed under the laws of Ethiopia, and which consists of members who reside in Ethiopia and who receive more than 10% of their resources from foreign sources.²⁵³

Foreign Charities are Charities formed under the laws of foreign countries, or whose

²⁴⁷ Id., Art 27

²⁴⁸ Id., Art 30

²⁴⁹ Id., Art 46

²⁵⁰ Id., Art 55

²⁵¹ Id., Art 2

²⁵² Id., Art 2

²⁵³ Id., Art 2

membership includes foreigners, or foreigners control the organization, or the organization receives funds from foreign sources.²⁵⁴

The proclamation applies to Charities and Societies that operate in and draws members from more than one regional state; Foreign Charities and Ethiopia Resident Charities and Societies; and Charities and Societies operating in Addis Ababa or Dire-Dawa.²⁵⁵ And, it excludes from its application religious organizations, international or foreign organizations operating in Ethiopia by virtue of an agreement with the Ethiopian government, and Societies governed by other laws.²⁵⁶

Be this at it may, the Charities and Societies Proclamation has been a subject of controversies and its various provisions has been described as restrictive of the right of freedom of association falling short of international standards with a high tendency to stifle human rights work in Ethiopia. A through investigation and Analysis is made in the following chapter to determine whether the law is restrictive of freedom of association and the restrictions it put in place, if any, do not meet the international and national standards of protection of freedom of association.

²⁵⁴ Id., Art 2

²⁵⁵ Id., Art 3(1)

²⁵⁶ Id., Art3(2)

CHAPTER THREE: CHALLENGES OF FREEDOM OF ASSOCIATION AND CIVIL SOCIETY IN ETHIOPIA

3.1 BACKGROUND ABOUT ETHIOPIAN CIVIL SOCIETY ORGANIZATIONS

Despite the claim by some authors that civil society is a new phenomenon in Ethiopia,²⁵⁷ the socio-economic and political history of the nation reveals that it has a rich tradition of association life in a form of informal community based organizations(CBOs).²⁵⁸ Before the advent of the first modern CSOs in 1930s, community based organizations (CBOs) have been operating at the local level, as informal CSOs, to encourage community solidarity, and enhance the self-reliance and address the diverse socio-economic needs of their members.²⁵⁹ Some among the many community based organizations in Ethiopia include *Idir* (community association for burial), *Iqub* (community saving and credit association) and other self-help associations such as *Debo* (voluntary community labour groups), *Mahiber*, *Juigge* and *Seddaqa*.²⁶⁰ These CBOs are resilient organizations that have managed to survive various political, social and economic challenges for several centuries and still remain "credible institutions to which people turn in times of needs, hardship and affliction."²⁶¹

These voluntary CBOs were considered as the "breeding grounds of the country's modern NGOs."²⁶² For instance, the first workers movement that paved the way for the establishment

²⁵⁷ Fatoumtta M'boge and Sam Gbaydee Doe, African Commitments to Civil Society Engagement: A Review of Eight NEPAD countries, *African Human Security Initiative* (AHSI paper) 6, August 2004, p.3

²⁵⁸ Wondwosen Teshome B., Civil Society and Democratization in Africa: The Role of the Civil Society in the 2005 Election in Ethiopia, *International Journal of Human and Social Sciences* Vol. 4, No.2, 2009, p.83

²⁵⁹ Final Evaluation of Ethiopian NGO Sector Enhancement Initiative (ENSEI), The Mitchell Group, Inc, Washington DC, August 2002, p.5

²⁶⁰ Supra note 257, pp.83-84

²⁶¹ Supra note 259, p. 5

²⁶² Id.

of labour associations in the country were first organized and initiated by '*iddirs*'.²⁶³ The Ethiopian Teachers association, one of the strongest CSO in Ethiopia today with thousands of members, was also first established by few school teachers as a traditional self-help association.²⁶⁴ Moreover, without being moved by the effects of modernization, these CBOs still fully and effectively operate in larger part of the country along with NGOs.²⁶⁵ Some NGOs have been recently trying to engage these CBOs in developmental and advocacy works including promotion and protection of human rights.²⁶⁶

The emergence of modern formal civil society organizations- with legal personality, is however a recent phenomenon. Modern civil society organizations in a form of NGOs started to emerge in the modern history of Ethiopia during 1930s following the upsurge of urbanization and economic development.²⁶⁷ These earliest NGOs were faith-based organizations that were engaged in providing missionary services in various provinces.²⁶⁸ The early development of modern civil society organizations in the empire at the time however was slow and gradual. Hence, the start of modern civil society organization in Ethiopia could accurately be traced back to the 1950s and 60s where a number of chartered bodies such as the National Boy Scout Association, the Ethiopian Red Cross, Ethiopian women's

²⁶³ Sisay Gebre-Egziabher, The Role of Civil Society Organisations in Democratisation Process in Ethiopia, Paper Presented at the Fifth International Conference of the International Society for the Third-Sector Research (ISTR), "Transforming Civil Society, Citizenship and Governance: The Third Sector in an Era of Global (Dis)Order", Cape Town, July 7-10, 2002, p.5

²⁶⁴ Id.

²⁶⁵ Kassahun Berhanu, The Role of NGOs in Promoting Democratic Values: The Ethiopian Experience; Ethiopia The Challenge of Democracy from Below, Nordiska Afrikainstitutet, Uppsala and Forum for Social Studies, Addis Ababa, 2002, p.121

²⁶⁶ For instance, Action Professionals' Association for the People (APAP), a local NGO that has been working in the promotion and protection of human rights until the introduction of the recent CSO law- which has caused a change in its mandate to capacity building activities, has been closely working with CBOs particularly '*idirs*' in its human rights promotion work. I had worked in APAP as a trainer in a child protection project aimed at enhancing the capacity of CBOs so as to engage them in child protection activities at the local level.

²⁶⁷ Supra note, 213, p.11

²⁶⁸ Supra note 258, p. 84

associations, and the Family Guidance Association of Ethiopia as well as professional membership based associations such as the National Bar Association, Chamber of Commerce and the Ethiopian Teachers Association were formed.²⁶⁹ The emergence and growth of these NGOs were part of the attempt to fill the perceived void caused as a result of the inability of the government and the traditional CBOs to meet the needs of the growing population and quest for advancement and development.²⁷⁰ These CSOs enjoyed relative autonomy and credibility for their works until the collapse of the Emperor Haile Selassie regime and the coming in to power of the Derg -a military junta (1974-1991).²⁷¹

Very repressive and restrictive laws and regulations during the Derg era caused a regression in the development of CSOs.²⁷² During this era, even though some NGOs focusing on relief and humanitarian services emerged as a result of the 1973-74 and 1984-1985 famines, their development was arrested and "virtually all these organizations effectively became tools of the state or ceased operations entirely. Many of those remaining in existence lost credibility, professionalism, and, ultimately, much claim to legitimacy."²⁷³ Hence, by the time the Derg regime collapsed in 1991, "virtually all civil society entities had been co-opted or barred from meaningful existence by the regime."²⁷⁴

After the collapse of the Derg regime and the installment of the current EPRDF government, re-emergence of an independent civil society sector began to appear.²⁷⁵ Their sphere of

²⁶⁹ Supra note 259, p.5

²⁷⁰ Supra note 213

²⁷¹ Id.

²⁷² Supra note 258, p.84

²⁷³ Supra note 213

²⁷⁴ Id, p.1

²⁷⁵ Id.

engagement started to expand from mere humanitarian and service delivery to various sectors including community development, environmental protection, basic education, and human rights.²⁷⁶ During this period, the civil society sector has sought a significant boost in number and capacity to play a relevant role in addressing the country's complex socio-economic and political agenda. A vibrant civil society that strives to bring about national political and economic revitalization was in a course of making.²⁷⁷ A favorable legal framework created in accordance with the guarantee of freedom of association by the FDRE constitution fostered the emergence and development of CSOs.

In 2009 there were around 3,500 NGOs registered according to the statistics by the Ministry of Justice.²⁷⁸ And just before the enactment of the Charities and Societies Proclamation in January 2009, 3822 NGOs were registered to operate on a variety of issues such as conflict resolution, human rights, development, service delivery, poverty eradication, rights based and integrated community development.²⁷⁹ This is however insignificant considering the size of the population of 80 plus million and comparing it to the number of NGOs operating in other African countries such as South Africa, Nigeria and Kenya.

The Ethiopian CSOs have made significant contribution to agricultural and rural development, human development and provision of social services (including promotion of health services, education, child protection and welfare, and institution building and empowerment), promoting good governance and human rights, alleviation of poverty etc.²⁸⁰

²⁷⁶ Id.

²⁷⁷ Id.

²⁷⁸ Business Daily Africa, Ethiopia now clips wings of NGOs, 07 January 2009 (Cited in supra note, p.84)

²⁷⁹ Newsletter of the Charities and Societies Agency, Vol. 1 No. 1, February-March 2011

²⁸⁰ The Ad Hoc CSO/NGO Task Force, CSOs/NGOs IN ETHIOPIA: Partners in Development and Good Governance, Summary of Main Report, Addis Ababa, November 2008, pp.4-5

They have also been making significant contributions in resource mobilization. According to the Ethiopian Ministry of Foreign Affairs around 20% of external assistance is brought through NGOs, that may amount to around \$40 to \$50 million p/a.²⁸¹ In addition, they have been striving to positively affect the country's national policy and program directions. To achieve this, the CSOs have been engaging in several activities such as strengthening the capacity of government bodies, strengthening partnership and collaboration with government organs, providing alternative or complimentary strategies, engaging in new operational areas, promoting the activity of non-state actors such as community institutions, promoting the efficiency and accountability of public institutions and providing emergency responses.²⁸² Despite their achievements however, civil society organizations in Ethiopia are young and fragile with little cohesion occupying an insignificant space in the national policy discourse.²⁸³

This period also sought the appearance of right based advocacy organizations. These organizations were mainly concerned with protection and promotion of rights by engaging in activities including "...enhancing civic awareness through civic education, promoting respect for the rule of law, and protecting the rights of women."²⁸⁴ Prominent human rights advocacy organizations like the Ethiopian Human Rights Council (EHRCO) and the Ethiopian Women Lawyers Association (EWLA) working on the area of human rights, rule of law and democratization were set up garnering considerable popular support.²⁸⁵ Even though they were not sometimes free from government hostilities and facing punitive measures as a result,

²⁸¹ Supra note 258, p.84

²⁸² Id.

²⁸³ Supra note 257

²⁸⁴ Dessalegn Rahmato, *Civil Society Organizations in Ethiopia*, Ethiopia The Challenge of Democracy from Below, Nordiska Afrikainstitutet, Uppsala and Forum for Social Studies, Addis Ababa, 2002, p.109

²⁸⁵ Id.

such and similar advocacy organizations mushroomed in the following decade until the straining relationship ensued following the contested 2005 election.²⁸⁶

During the 2005 election, civil society organizations in Ethiopia played an active role in the democratization process through engagement in the electoral process in what is otherwise considered as unprecedented.²⁸⁷ As the Carter Center- one of the chief international observers of the election, commented, “Civil society organizations contributed greatly to the electoral process by organizing public forums, conducting voter education, training, and deploying domestic observers.”²⁸⁸ Due to the engagement of the civil society in the electoral process a higher voter turn out was registered resulting in a landslide win for opposition parties that stunned the incumbent.²⁸⁹ This active participation of the civil society in the election, however, brought a rift with the ruling party that since then contemplated various measures to control the CSOs and restrain their operation.²⁹⁰

Consequently, the government arrested two prominent civil society leaders and individuals working for different NGOs²⁹¹. Moreover, wanting for more control and determined to neutralize CSOs from further intruding in the politics, the government came up with a new law in 2009 that is infamous for containing provisions that has the effect of stifling CSOs and crippling their political and human rights activities. This proclamation, better known as the "Charities and Societies Proclamation" is discussed in detail in subsequent sections.

²⁸⁶ Supra note 258, p.88

²⁸⁷ Id., p.84

²⁸⁸ The Carter Centre, Final Statement on the Carter Centre Observation of the Ethiopia 2005 National Elections, September 2005 (Cited in id)

²⁸⁹ Supra note 258, p.91

²⁹⁰ Id.

²⁹¹ Daniel Bekele and Netsanet Demissie, leaders of NGOs engaged in monitoring and observing the electoral process were arrested together with many other opposition leaders and journalists. They were later released after convicted due to effort by elders that led to apology and signing of pleading for clemency. See Civil Society and Democratization in Africa, p.86

3.2 GOVERNMENT JUSTIFICATIONS FOR RESTRICTING FREEDOM OF ASSOCIATION

3.2.1 COMMON JUSTIFICATIONS FOR RESTRICTION OF FREEDOM OF ASSOCIATION OF CSOS

In recent years, the world has seen a growing regulatory backlash on civil society organizations in different countries particularly against human rights CSOs. The governments proffer range of justifications for the backlash as diverse as the types of restrictions they impose.²⁹² But the common supporting rationales presented by governments for imposing strict regulatory control over CSOs include "calls for increased accountability and transparency of CSOs; preventing foreign interference with domestic political processes; protecting national security; combating terrorism and extremism; and the coordination and harmonization of foreign aid and CSOs implementing foreign aid programs."²⁹³

However, these justifications are broadly framed and are "are malleable and prone to misuse, providing convenient excuses to stifle dissent, whether voiced by individuals or civil society organizations."²⁹⁴ In fact, reports reveal that the justifications are not more than rationalizations of repression under the pretext of which governments have subjected human rights CSOs to harassment, intimidation and suspension of their works.²⁹⁵ This has been attested by reports that under the guise of these justifications "[o]rganizations are closed down under the slightest of pretexts; sources of funding are cut off or inappropriately limited;

²⁹² International Journal of not-for-Profit law(ICNL), Vol. 12, No. 3, Washington DC, May 2010, p. 8

²⁹³ Id.

²⁹⁴ World Movement for Democracy and International Center for Not-for-Profit Law (ICNL), *Defending Civil Society: A Report of the World Movement for Democracy* World Movement for Democracy, February 2008, p.21

²⁹⁵ Id.

and efforts to register an organization with a human rights mandate are delayed by intentional bureaucracy.”²⁹⁶

Indeed, there are wider claims against CSO accountability and transparency and these are the main focus of debates surrounding CSO regulations. Generally, the claims revolve around deficit of accountability and transparency, internal democracy and problem of un-coordinated and organized contributions they make.²⁹⁷ Specially, with regard to transparency and accountability, it is often difficult to ascertain whom the CSOs represent and benefit, whether they are genuinely rooted in the society and who truly is behind them.²⁹⁸ Moreover, it is difficult to determine if the CSOs do really have legitimacy especially when they are not membership based, unless they exercise internal democratic elections.²⁹⁹ The public accountability of CSOs is also usually questionable when there is no authority to which they report to or held accountable for their actions and when adequate internal self-regulation mechanisms are not put in place.³⁰⁰ The fact that some CSOs take unresearched and unsubstantiated positions towards some issues makes their institutional competence questionable exacerbated by lack of co-ordination and collaboration among them so as to put a concerted effort in addressing the issues.³⁰¹ Hence, the government has indeed a legitimate vested interest to ensure accountability and transparency with in the activity of CSOs.

However, this does not grant the government a blank check to prescribe what ever it wants with the fate of these organizations. Some governments take the need to take regulatory

²⁹⁶ Fact Sheet No. 29: Human Rights Defenders: Protecting the Right to Defend Human Rights, p. 12 (Cited in id.)

²⁹⁷ Jan Wouters & Ingrid Rossi, Human Rights NGOs: Role, Structure and Legal Status, Institute for International Law, K.U. Leuven, Leuven, 2001, PP.11-12

²⁹⁸ Id.

²⁹⁹ Id.

³⁰⁰ Id.

³⁰¹ Id.

measures to ensure the accountability and transparency of CSOs beyond what is necessary with the hidden motive of weakening their institutional autonomy and thereby violating the standards of freedom of association enshrined in international, regional and national laws. For instance, Afghanistan, Russia and Uzbekistan issued or proposed legislations that constrain the operation of CSOs under the pretext of ensuring transparency and accountability.³⁰² Even if the 2006 regulation issued in Russia heavily premised up on ensuring "enhanced transparency and increased efficiency of registration and supervision" of CSOs statements by politicians indicate that the underlying motive is that the state believes CSOs pose subversive threat to the state as a Trojan horse of foreign politics unnecessarily meddling in its internal politics.³⁰³

National security or fighting terrorism or extremism has also been used as a banner to impose impediment on freedom of association of CSOs. For instance, in relation to the above mentioned Russian restrictive regulation, the head of the state was heard accusing of foreign hands engaging in subversive acts using foreign funded CSOs.³⁰⁴ Similarly, Robert Mugabe has accused of Western governments trying to use Western NGOs to advance their colonial interests in Zimbabwe.³⁰⁵ The Uzbek government has also blamed the CSOs of falling as Trojan horse of democratization.³⁰⁶

Harmonization or coordination of NGO activities were also used as excuse to subject CSOs to conform to government guidelines as is the case in the 2006 draft Venezuelan International

³⁰² Supra note 294

³⁰³ Supra note 292, p.33

³⁰⁴ Supra note 294

³⁰⁵ Carothers, Thomas, *The Backlash Against Democracy Promotion*, Foreign Affairs, March/April 2006 (Cited in id.)

³⁰⁶ Id.

Cooperation Bill.³⁰⁷ This justification is also used in a broad and vague manner without even clearly defining what is expected of CSOs such as in the NGO bill in Nigeria.³⁰⁸ These and other similar justifications to restrict civil society organizations, in particular human rights CSOs, are frequently invoked. Below we will see if these justifications are justifiable under international standards and best practices concerning freedom of association.

In Chapter two of this paper, we have seen the normative framework of protection of freedom of association. In particular, discussing about legitimate restrictions that states are permitted to put on the enjoyments of freedom of association, we have said that state interference must find legal justification and the restrictions placed on the rights must be subjected to rigorous tests defined by international human rights instruments. These requirements as set out in Article 22 of ICCPR are the only justifiable grounds for interference in freedom of association. These are: the restriction must be prescribed by law; must be in the interest of legitimate grounds of protecting national security or public safety, maintenance of public order; protection of public health or morals and protection of the rights and freedom of others; and the restriction has to be necessary in a democratic society.

In the context of CSOs, the requirement of "prescribed by law" not only requires the law to be duly legislated but it must also be:

...sufficiently precise for an individual or NGO to assess whether or not their intended conduct would constitute a breach and what consequences this conduct may entail. The degree of precision required is that which sets forth clear criteria to govern the exercise of discretionary authority.³⁰⁹

³⁰⁷ Supra note 294

³⁰⁸ Id.

³⁰⁹ OSCE/ODIHR, Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, p.4(Id., pp.21) Moreover, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information -Adopted on 1 October 1995 by a group of experts in international law, national security, and human rights, Principle 1.1(a) states that "[T]he law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

State harassments, intimidations and restrictions on the operation of CSOs by state agents without having legal backing, such as mentioned in the above examples, are definitely derelict of state obligations on protection of freedom of association. Moreover, restricting freedom of association of CSOs by passing a vague legislation that uses ambiguous language authorizing government officials to exercise arbitrary decisions against CSOs can't be deemed as prescribed by law.³¹⁰ In short, the law has to be unambiguous, precise and narrowly tailored and the application of the law has to be foreseeable to be considered as prescribed by law.³¹¹ Failure to meet this initial requirement by itself may be deemed as a violation of international standards.

The second requirement is whether the government restriction which is prescribed by law meets one of the four legitimate grounds. These four legitimate grounds are exhaustive and should be strictly construed. As we said above, some of the common justifications invoked by the states to support their restriction of freedom of association are national security, state sovereignty, accountability and transparency of CSOs, the need for harmonization and coordination of CSO activities. It is difficult to place the "need for harmonization and coordination of CSOs" under any of the four legitimate grounds and should thus be suspect.³¹² Even though this rationale may seem justifiable from logical stance, it may be used to "conceal the government intent to control or direct the activities of NGOs" which in itself is incompatible with the right to organize for any purpose.³¹³

³¹⁰ Supra note 294, p.23

³¹¹ Id.

³¹² Id.

³¹³ Id.

A blanket claim for "state sovereignty" *per se* is not automatically admissible under international law to constitute as a legitimate ground for restricting freedom of association.³¹⁴ Hence, infringing the freedom of association of CSOs claiming that they have become Trojan horse of foreign politics, democratization or "colonial interest" does not serve any of the legitimate purposes and hence constitutes a violation of international law. On the other hand, national security is one of the legitimate aims under ICCPR. However, national security should be narrowly interpreted justifying restriction of freedom of association only when it is "...taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force."³¹⁵ Hence, states are not free to tamper freedom of association of CSOs by enacting any legislation they want under the guise of protecting national security. Besides, a mere local threat to law and order does not fall under the purview of national security.³¹⁶

The last prong test is whether the restrictions which are prescribed by law and serve legitimate governmental interest are necessary in a democratic society. As we have discussed in Chapter Two, this test requires that the measure adopted by the government has to be proportionate with the legitimate aim pursued. Besides, the measure has to be "imposed to the extent which is no more than absolutely necessary; there must be a pressing social need for the interference."³¹⁷ In this regard, it is important to see whether such imposed restrictions are proportionate and whether less intrusive method are available to peruse the legitimate aim pursued. In relation to CSOs, the following measures are not generally considered as proportionate so as to be considered as necessary in a democratic society;

³¹⁴Neier Aryeh, Open Society Institute, "Asian Values vs. Human Rights", (Cited in id.)

³¹⁵ See OSCE/ODIHR, Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, p.5

³¹⁶ Id.

³¹⁷ Id., p.4

- arrest of individuals simply for participating in the activities of an unregistered organization;
- the restriction of the right to register an NGO to citizens only;
- denial of registration to an NGO dedicated to cultural preservation of minority group or to human rights;
- granting of unlimited authority to the state to inspect NGO premises or attend any NGO meeting or event;
- harassment, arrest and imprisonment of peaceful critics of the government;
- closure of international NGOs for engaging in peaceful, lawful activities;
- arrest of local NGO representatives for meeting with foreign students;
- requirement that NGOs receive advance permission from the state before meeting or participating in foreign NGO networks; and/or
- placement of stifling restraints on the ability to access resources.³¹⁸

International best practice shows that regulation of CSOs should be the shared practice of the government, CSOs themselves and other stakeholders such as donor agencies. Indeed the state has a legitimate interest to ensure that CSOs comply with highest standards of accountability and transparency and vindicate other governmental legitimate interests that may result in restriction of freedom of association so far as the measures it take comply with the standards under international law. In doing so, however, it should not jeopardize the operational and institutional autonomy of CSOs and should always strike a balance between accountability and independence. As the best practices reveal, the best way to ensure that is by encouraging CSOs to engage in self-regulation and other internal mechanisms of self control.³¹⁹ Towards that, government regulations should lean towards promoting self-regulation by using regulatory tools such as requiring submission of reports than resorting to control and sanction which has the effect of jeopardizing institutional autonomy of CSOs.³²⁰

³¹⁸ Supra note 294, p.25

³¹⁹ Supra note 192, pp.22-23

³²⁰ Id., p.22

Enabling legal framework that grants freedom for CSOs to exercise self regulation can play instrumental role in ensuring their compliance with highest standards of accountability and transparency. Voluntary self-regulation includes a wide variety of mechanisms which are being used in different countries such as endorsing voluntary code of conduct, performance rating by watchdog agencies, internal control mechanism (such as by boards or general assembly of members), setting financial and property administration guidelines etc.³²¹ These mechanisms "improve internal governance and outward accountability; to strengthen NGO capacity and coalition building; to pre-empt government regulatory intervention; and/or to improve credibility among constituents, donors and the general public."³²² According to reports, in the sub-Saharan Africa region, including Ethiopia, there is a growing realization for the need of and a nascent trend in establishing self-regulation initiatives by CSOs.³²³

3.2.2 JUSTICIATIONS BY THE ETHIOPIAN GOVERNMENT

The Charities and Societies proclamation declared in its preamble that the rationale behind the enactment of the law is to ensure the realization of citizens' right to association enshrined in the Constitution of Federal Democratic Republic of Ethiopia (FDRE) and to aid and facilitate the role of Charities and Societies in the overall development of Ethiopian Peoples.³²⁴ A cursory look at this stated objective shows that the Charities and Societies law governs only the right of association of Ethiopian citizens and the FDRE constitution guarantees freedom of association only for Ethiopian citizens.

³²¹ David Moore, The 2009 NGO Sustainability Index for Sub-Saharan Africa, Legal Trends in Sub-Saharan Africa, 2009, p.22

³²² Id.

³²³ See Shana Warren et al, *The growth of CSO self-regulation*, December 1, 2009 (Cited in Supra note 321, p.22)

³²⁴ Supra note 217, Preamble

The Commentary on Charities and Societies draft Proclamation prepared by the Ministry of Justice in Amharic language underscores these possible interpretations of the preamble of the proclamation.³²⁵ The commentary reflects the official position of the government regarding the purpose and intent of the proclamation. As per the commentary, the constitution fully guaranteed freedom of association only to Ethiopian citizens' even though the government may allow non-citizens to organize without having a claim to the right of freedom of association. It further states that freedom of association is a democratic right but not a human right. And, it further elaborated that while human rights are guaranteed for all human beings, democratic or political rights are limited to citizens and to be progressively realized. According to the government, the nature of freedom of association as a democratic right is also inferred from the structure of FDRE Constitution.³²⁶ Besides, according to the commentary the citizens' right of freedom of association is a non-justiciable right in which citizens have no right for judicial recourse.

However, under international law there is no sharp distinction between human and democratic rights. The nature of freedom of association as a fundamental human right is not contestable. To be more precise, freedom of association constitutes part of civil and political rights enshrined under major international human rights instruments such as ICCPR, UDHR and ACHPR. Unlike, Economic, Social and Cultural rights, the nature of Civil and Political rights as human rights is never subjected to doubt. Besides, the guarantee of freedom of association under international law is not limited to citizens of nations but, rather, conferred up on all persons regardless of their nationality.³²⁷

³²⁵ Supra note 212

³²⁶ Id. p.11

³²⁷ See the discussion in Chapter Two concerning the nature of freedom of association

The FDRE Constitution does not preclude the enjoyment of freedom of association by non-citizens. Indeed, the structure of the FDRE Constitution puts freedom of association under the sub-section entitled democratic rights. However, nowhere in the text of the Constitution are there provisions that restrict democratic rights to citizens. Article 10 of the Constitution which talks about human and democratic rights requires the respect of the rights of citizens and peoples without making a differentiation in the application of the two genres of rights between citizens and non-citizens. Nor does the placement of freedom of association under the democratic rights section in Chapter Three (articles 29-44) indicate that it is not a human right, as other core human rights such as the right of women (article 35) and the right of Children (article 36) are also placed under this section. Moreover, the wording of Article 31(the right to freedom of association) which uses "every person" is clearly indicative of the fact that the application of the right is not intended to be restricted to citizens.

In addition, freedom of association being a civil and political right mostly laying down negative obligation on State parties, arguments forwarded by the Ethiopian government that freedom of association is a right that requires progressive realization is not acceptable. Similar with other civil and political rights such as the right to life, the government has the immediate obligation to realize freedom of association and failure to do so amounts to violation of obligations arising from international instruments.

Confounding enough the government alleges that citizens do not have a right to access to justice with respect to their right to freedom of association. Conversely, Article 37 of the Constitution clearly stipulates that "everyone have the right to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power." And, Article 13(1) of the Constitution elucidates that provisions of Chapter Three shall be respected and enforced by all organs of the state including the judiciary.

Hence, freedom of association is a justiciable right with respect to which judicial remedy may be sought by both citizens and non-citizens as per the Ethiopian Constitution.

The proclamation also limits the application of the right to freedom of association with respect to Ethiopian citizens. As per article 2(2) of the proclamation, those Charities and Societies who receive more than 10 % of their funding from foreign sources are not considered as Ethiopian "Charities" and "Societies" and they are restricted from working on advancement of human rights and democratic rights, conflict resolution, promotion of equality of nations, nationalities and peoples and that of gender and religion.³²⁸ In effect, the proclamation is stripping of the citizenship of Ethiopian nationals by the mere fact that they obtain more than 90% of their funds from abroad. This not only contravenes the constitutional right of freedom of association but also that of nationality embodied in Article 33 which affirms that Ethiopian nationals may not be deprived of their nationality without their consent. Nationality confers up on Ethiopian nationals the right to enjoyment of all rights, protection and benefits derived from Ethiopian nationality which includes the right to organize for whatever legal purpose.

Moreover, under UDHR and other international and regional human rights instruments that Ethiopia has ratified, freedom of association is inarguably a fundamental human right for all. These instruments are part and parcel of the law of the land as per Article 9(4) of the Constitution. The human rights section of the FDRE Constitution shall thus be interpreted in light of these instruments which declare freedom of association as a human right.³²⁹ Hence, by virtue of the above reasons it is easy to understand that the Charities and Societies proclamation violated the FDRE Constitution and contravenes international human rights

³²⁸ Supra note 217, Art 14(5)

³²⁹ See supra note 214, Art 13(2)

standards by limiting the right of freedom of association to citizens and depriving Ethiopian citizens and non-citizens from enjoying their fundamental entitlement. At this juncture, it is important to make reference to Article 9(1) of the Constitution which renders any law that contravenes the Constitution void.

In addition, the preamble of the proclamation states that the aim of the law is to aid and facilitate the role of Charities and Societies in the overall development of Ethiopian peoples. This stated objective emanated from the view of the government that Ethiopian CSOs have not been positive development actors. The ruling party, Ethiopian Peoples' Revolutionary Democracy Front (EPRDF), affirmed this in its policy documents that branded Ethiopian CSOs as 'rent seekers' which constitute "patronage networks distributing-policy rents, receiving big salaries and benefits without bringing concrete results, spending 60% of their budget on administrative matters, strengthening a rent seeking political economy, and thereby negatively affecting the development of the country."³³⁰

The policy document further describes the CSOs as "organizations...established by individuals mainly for personal benefits, accountable to and advancing the interests of foreign agencies." Thus, it considers it pertinent to restrict foreign funding of CSOs working on human rights, conflict resolution, good governance and efficiency of the justice sector so as to curb advancement of foreign interests through them.³³¹ In this respect, the government has been hostile towards local NGOs as well as international NGOs such as Amnesty

³³⁰ Press release issued by the Cairo Center for Human Rights Studies, 1 May 2009(Cited in supra note 292, p.10)

³³¹Id.

International and Human Rights Watch who have been critical of its human rights records after the 2005 election.³³²

This, therefore, strongly points out that the motivation behind the proclamation is to stifle the operation of human rights and advocacy CSOs from engaging in protection and promotion of human rights, good governance and advocacy by restricting their funding sources. In other words, protection of national interest is the underlying reason behind the enactment of the law. However, as explained in the previous section, protection of national interest does not constitute part of the exhaustive legitimate aim for restriction of freedom of association under international law, notably ICCPR in which Ethiopia is a party.

On the other hand, "ensuring the efficiency, transparency and accountability of CSOs and controlling corruption in order to make CSOs development partners with the government" are the other stated objectives of the law.³³³ Additionally, the government stated that the law aims to address the need to:

- provide varieties of measures to be taken against CSOs in case of fault.
- provide the legal basis for the relationship between CSOs and sector administrators, and
- determine the amount of money CSOs spend for administrative purposes and project activities³³⁴

However innocuous those state objectives may seem, the substantial provisions of the proclamation reflects the otherwise. The provisions contain "extraordinary measures that would thwart the work of individuals and independent civil society organizations and which are aimed at putting the operation of non-governmental organizations directly under the

³³² Supra note 258, p.88

³³³ Supra note 212, pp.5-7

³³⁴ Id.

control of the government."³³⁵ Also, through the provision of the law, the government labels legitimate human rights protection activities as "illegal acts and illegal activities", with the aim of silencing human rights of CSOs that are critical of the human rights record of the government.³³⁶

This, however, doesn't mean that Ethiopian CSOs are free from shortcomings and should not be controlled by a regulatory legal framework. Financial mismanagement and absence of transparent practices that blot the public image of CSOs have been occasionally observed.³³⁷ However, the majority of CSOs have been complying with strict rules of reporting to the Ministry of Justice and donor agencies as well as observing the Code of Conduct for NGOs, developed in 1998 and endorsed by all most all NGOs.³³⁸

Even though it may have an understandable interest to ensure accountability and transparency in the activities of CSOs, the government, in its approach, should have strived to maintain a delicate balance between institutional autonomy of CSOs and their accountability. Thus, instead of coming up with a law that tilts towards control and punitive sanctions, the law should have aimed at encouraging self-regulation by CSOs. But the Charities and Societies proclamation, labeled by some as a "draconian law" and one of the most repressive legislations in the world³³⁹, does not serve such purpose. According to Georgette Gagon, African Director of Human Rights Watch, the only reason to have such a law in Ethiopia is to

³³⁵ Amnesty International, Ethiopia: *Comments on Draft Charities and Societies Proclamation*, London, June 2008, p.3

³³⁶ Id.

³³⁷ Dessalegn Rahmato et al., CSOs/NGOs IN ETHIOPIA, Partners in Development and Good Governance, A Report Prepared for the Ad Hoc CSO/NGO Task Force, Addis Ababa, 2008, p.31

³³⁸ See id, and supra note 321, p.23

³³⁹ Lotte Leicht, *EU should not tolerate Ethiopia's repression*, Ethiopian Review, February 18, 2009, <http://www.ethiopianreview.com/forum/viewtopic.php?f=2&t=20560>(Cited in supra note 321, p.18)

"strangle...few remaining independent voices."³⁴⁰ The provisions of the proclamation, which are discussed in subsequent sections, cast doubt about Ethiopia's commitment to uphold its obligations to protect freedom of association under international and regional human rights instruments.³⁴¹

3.3 LEGAL BARRIERS IN THE LIFE CYCLE OF CIVIL SOCIETY ORGANIZATIONS IN ETHIOPIA

In the above section, we have seen that the justifications provided by the Ethiopian government for coming up with the restrictive Charities and Societies Proclamation do not live up to the standards set by international human rights instruments such as ICCPR regarding permissible restrictions of freedom of association of CSOs. Even if some of the justifications may at face value seem innocuous and in compliance with international standards, the substantive provisions of the proclamation show the otherwise, as discussed in this section.

3.3.1 ENTRY BARRIERS

Governments obstruct the freedom of association of human rights CSOs by placing cumbersome barriers at the entry stage by using various measures such as "prohibitions against unregistered groups, complex registration procedures, vague grounds for denial, re-registration requirements, and barriers for international organizations."³⁴² This phenomenon is better summarily explained in the following statement.

“Many governments closely guard the process by which NGOs can register, i.e., become a legal entity with the associated legal rights and prerogatives.

³⁴⁰ Human Rights Watch, “Ethiopia: Draft Law Threatens Civil Society,” 13 October 2008, <http://www.hrw.org/en/news/2008/10/13/ethiopia-draft-law-threatens-civil-society> (Cited in footnote 3, *infra* note 344, p. 2)

³⁴¹ *Supra* note 335, p.3

³⁴² Jeanne Elone, *Backlash Against Democracy: The Regulation of Civil Society in Africa*, Democracy and Society, Volume 7, Issue 2, p.4

Governments insist that groups, even some as small or informal as a neighborhood association, must register, allowing authorities to monitor groups' activities. Regimes make registration difficult, impeding the ability of civil society organizations, particularly advocacy groups, to function effectively or even to exist. Tactics include making registration prohibitively expensive and/or unduly burdensome in terms of the type and amount of information required; excessive delays in making registration decisions; and requiring frequent re-registration, giving authorities the right to revisit organizations' licenses to operate.”³⁴³

By enacting restrictive laws, states require informal associations to undergo formal registration and hence preclude them from engaging in some activities unless they are registered. This renders the CSOs incapable of participating even in simple social gatherings to discuss basic issues such as politics- violating their right to free association guaranteed in ICCPR and other human rights instruments.³⁴⁴ For instance, the 2006 Ugandan NGO registration (Amendment) Act prohibits organizations from operating in Uganda unless they are duly registered and secure valid permit.³⁴⁵ In Belarus, according to the Presidential Decree, activities by unregistered public associations are prohibited.³⁴⁶ A Macedonian Law on Citizen Associations and Foundations obliges CSOs to submit application for registration within 30days from the day the deed of establishment is enacted and failure to do so is punishable with fine.³⁴⁷

Similarly, the Ethiopian Charities and Societies Proclamation creates barrier to the establishment of CSOs by placing mandatory registration requirement and granting excessive

³⁴³ NED (National Endowment for Democracy), *The Backlash against Democracy Assistance: A Report prepared by the National Endowment for Democracy for Senator Richard G. Lugar, Chairman Committee on Foreign Relations United States Senate*, 8 June p.19 (Cited in supra note 258, p.87)

³⁴⁴ *NGO Laws in Sub-Saharan Africa, Global Trends in NGO 2006, Law, Vol.3, Issue 3, p.3*

³⁴⁵ Section 2.1, Ugandan NGO Registration (Amendment) Act, 2006. The Ethiopian Charities and Societies proclamation has admittedly drawn inspiration from this Ugandan legislation. (See supra note 212, p.9)

³⁴⁶ Section 3, Belarusian Presidential Decree, no.2 of 01, 26-99,

³⁴⁷ Macedonian Law on Citizen Associations and Foundations, 1998, Arts 6, 44, 74

discretion to the Charities and Societies Agency³⁴⁸ during the registration process. The law makes registration a mandatory precondition requiring a Charity and Society formed fulfilling the minimum requirements to apply for registration within three month of its formation.³⁴⁹ Failure to register within three months up on formation is a ground for cessation of the formed Charity or Society.³⁵⁰ Though the law permits late registration up on demonstrating good cause, there are no clear requirements provided by the law showing what constitutes good cause leaving it to the discretion of the Agency.³⁵¹ Violation of the mandatory registration requirement may entail criminal sanction as per Art 102 of the proclamation creating a fear and insecurity for groups which have not yet received legal status. Merely formed Charity and Society does not have legal personality and is not allowed to solicit money and property exceeding fifty thousand birr before its registration.³⁵² Such requirements undermine the civil society sector by making prohibitions on unregistered groups from carrying out their activities. The limitations on the amount of money or property CSOs may solicit before registration precludes CSOs from starting their activities up on formation, forcing them to seek for registration.

However, international best practice shows that CSOs should not be subjected to compulsory registration requirement.³⁵³ In fact, legal personality is a "right to be demanded by CSOs for their own advantage but not a duty to be imposed upon them."³⁵⁴ Even the experience of

³⁴⁸ The Charities and Societies Agency is a Federal Government institution established by Art.4 of the Charities and Societies proclamation with the mandate to license, register, and supervise Charities and Societies.

³⁴⁹ Supra note 217, Art. 64

³⁵⁰ Id., Art 65

³⁵¹ Id., Art. 64

³⁵² Id., Art 65

³⁵³ See Ethiopian Civil Society Organizations Ad-hoc Taskforce, Commentaries and Recommendations on the Latest Draft Charities and Societies Proclamation, Addis Ababa, October 2008

³⁵⁴ Id.

governments who make registration a requirement shows that it is often aimed at monitoring whether the established association is working within the law or not or to accord them with benefits associated with acquiring legal personality such as entering into contract, acquiring property etc.³⁵⁵ Repressive regimes, however, use mandatory registration as a tool to crack down on CSOs that are critical of government's human rights handling.³⁵⁶ Likewise, the Ethiopian Charities and Societies proclamation allows the government to use the mandatory registration process to censor the Statutes and activities of human rights CSOs before they start operation.³⁵⁷

Further, the proclamation requires foreign CSOs to obtain letter of recommendation from the Ethiopian Ministry of Foreign Affairs.³⁵⁸ Because of this, international human rights organizations such as Amnesty International and Human Rights Watch are effectively barred from operating in Ethiopia because of the mandatory registration which grants power to the government to inspect their constitutive documents before registration and licensing, and due to the requirement to secure recommendation from foreign affairs.³⁵⁹ Indeed, the proclamation forbids foreign CSOs like these from working in the area of protection and promotion of human rights as will be discussed in subsequent sections. Upon refusal for registration, foreign CSOs have no right for appeal to courts against the decision of the Agency.³⁶⁰ This right is restricted to Ethiopian Charities only.

Moreover, article 57(6) suggests that a society that has a Federal character and nomenclature is required to have its work place and composition of its members represented in at least five

³⁵⁵ Assessment of the Operating Environment for CSO/NGOs in Ethiopia, CRDA, December 2006, p.11

³⁵⁶ Supra note 344

³⁵⁷ Id.

³⁵⁸ Supra note 217, Art 68(4)

³⁵⁹ Sounding the Horn: Ethiopia's Civil Society Law Threatens Human Rights Defenders, Center for International Human Rights Northwestern University School of Law, November 2009, p.6

³⁶⁰ Supra note 217, Art 104

Regional States. According to the commentary by CSOs during the drafting process, this requirement is arbitrary and unreasonable because:

[E]veryone has the right to form associations with those like minded persons and organize for lawful purposes. Just because individuals cannot find others who share their views and work with them in other regions, this should not be a ground to deny them of their right to association.³⁶¹

The CSOs allege that this provision poses unnecessary restriction on freedom of association as it is unreasonable to expect a CSO to open offices in five or more regions before they are registered and even when they are not allowed to solicit substantial amount of fund.³⁶² Moreover, as will be discussed later, as the administrative cost for CSOs is limited to 30% of their total funding, requiring CSOs to open branch in more than five regions is too cumbersome.³⁶³

In addition, application for registration may be denied when the Charity or Society to be established is likely to be used for "unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia".³⁶⁴ This provision is vague leaving considerable discretion to the Agency to refuse registration of CSOs. There is a strong likelihood that broad, vague and poorly defined terms like public peace, welfare or good order may be used to proscribe human rights works of CSOs.³⁶⁵ Also, the Agency would refuse registration of a Charity or Society if the name under which it is registered resembles an existing Charity or Society or any other institution or is contrary to public morality or is illegal.³⁶⁶ Even though

³⁶¹ Supra note 353

³⁶² Id.

³⁶³ Id.

³⁶⁴ Supra note 217, Art 69

³⁶⁵ Supra note 342, p.5

³⁶⁶ Supra note 217, Art 69(4)

this seems a legitimate ground, the Agency could practically use it to target some CSOs. For instance, the Agency suspended the Ethiopian Bar Association on April 13, 2010 on the ground that its name is already taken by another association, the Ethiopian Lawyers Association, even though it has been using the name for a long time.³⁶⁷ The proclamation further provides that license of Charities and Societies has to be renewed every three year.³⁶⁸ The renewal requirement further empowers the registration authorities with the discretion to refuse to re-register unfriendly CSOs.³⁶⁹

3.3.2 BARRIERS ON OPERATIONAL ACTIVITY AND ACCESS TO RESOURCE

Registration alone can not guarantee the full exercise of free association by CSOs. Once the registration process is successfully exhausted legal constraints could surface on the types of activities CSOs could participate in. The common operational barriers that CSOs face include "direct prohibition of certain spheres of activity, intrusive government oversight, criminal sanctions against individuals, and the threat of termination or dissolution."³⁷⁰ The Ethiopian Charities and Societies Proclamation contain provisions that place barriers on the operational activity of CSOs. Generally, we can classify these provisions into those that prohibit foreign CSOs from engaging in certain sphere of activities; grant invasive supervisory power to the Charities and Societies Agency; and provide for allocation of 30% of the expenses of CSOs to administrative costs.

Firstly, the Charities and Societies Proclamation prohibit foreign Charities from operating some activities. A Foreign Charity is a charity that is formed under the laws of foreign

³⁶⁷ Agency Suspends Ethiopian Bar Association, www.addisfortune.com, Volume 10, No.521,(Published on April 25,2010 , Accessed on 05/03/2010)

³⁶⁸ Supra note 217, Art 76

³⁶⁹ Supra note 335, p.3

³⁷⁰ Supra note 342, pp.5-6

countries or which consists of members who are foreign nationals or are controlled by foreign national or receive funds from foreign sources.³⁷¹ Also, Charities and Societies formed by Ethiopians who receive more than 10% of their funds from foreign sources are not treated as Ethiopian Charities or Societies.³⁷² Foreign Charities and Ethiopian Resident Charities and Societies are prohibited from taking part in advancement of human and democratic rights; the promotion of equality of nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation; and the promotion of the efficiency of the justice and the law enforcement services.³⁷³ Hence, foreign Charities and Ethiopian CSOs raising more than 10% of their funds from abroad are relegated to developmental and service delivery activities such as relief of poverty or disaster, environmental protection, health and capacity building and are effectively barred from partaking in substantive issues like human rights and good governance.

Secondly, the Charities and Societies Proclamation confer up on the Charities and Societies Agency with virtually unlimited powers to control the operation of CSOs with few procedural safeguards set in place for the protection of their right to freedom of association. Articles 84-94 of the proclamation give wide range of discretionary powers to the Agency. Among these, the following are some of the most intrusive powers of the Agency that infringe the free exercise of freedom of association of CSOs.

- The Agency can institute inquiries with regard to Charities and Societies or a particular Charity or Society or class of charities or societies, either generally or for a particular purpose(Art 84(1))

³⁷¹ Supra note 217, Art 2(4)

³⁷² These categories of CSOs are known as Ethiopian Resident Charities or Societies according to Art.2(3) of the Charities and Societies Proclamation

³⁷³ Supra note 217, Art 14(5)

- For the purposes of the inquiry, the Agency may require a charity or society, or its officers or employees, to produce accounts and statements in writing on any matter at issue in the inquiry, produce documents, and to attend at a specified time or place to give evidence or produce documents (Article 84(2))
- The Agency may require a charity or society or its officers or employees to provide orally or in writing “any information” relating to any charity or society, or to produce documents (Article 85(1))
- A Society is required to notify the Agency in writing of the time and place of any meeting of the General Assembly of the Society not later than seven working days prior to such meeting.(Art 86)

These provisions accord arbitrary power to the Agency to unjustifiably intrude into the internal activities of Charities or Societies crippling their institutional autonomy and thereby infringing their right to freedom of association.

Lastly, Art 88(1) of the proclamation provides for the percentage of expenses in a budget year that charities and societies should allocate for administrative and operational purposes. Accordingly, the article requires that a charity or society shall allocate 70 percent of the expenses for the implementation of its purposes and an amount not exceeding 30 percent for its administrative activities. It further provides that a charity or society that allocates more than 80 percent of its total income for its operational purposes may be given various incentives. And failure to allocate funds according to the 30-70 rule results in a criminal punishment.³⁷⁴

In July 2012, the Ethiopian Charities and Societies Agency issued a directive on Determining the Administrative and Operational Costs of Charities and Societies No. 2/2012, which is applicable to all charities and societies (foreign and local). The directive limits administrative costs for all charities and societies to 30% of their budgets and detailed list of expenses that will fall under administrative and operational expenses.

³⁷⁴ Id., Art 102(2)(d)

The 30-70 rule has caused great concern among CSOs as well as the donor community as ‘administrative cost’ is widely defined including a range of expenses such as salary, allowance, benefits, purchasing goods and services, transportation and entertainment costs.³⁷⁵ This provision distresses CSOs that do not engage in direct aid or developmental activities as most of their program expenses would fall under the definitions of ‘administrative cost’. This requirement specifically cripples human rights and advocacy CSOs as it does not take in to account the nature of their activities, most of which such as conducting meetings, workshops and research will fall under administrative expenses.³⁷⁶ There are also concerns that this requirement suffers from inconsistent interpretation and double standard in its application.³⁷⁷

Though the law allows CSOs to make public collection of funds, it is subjected to the approval of the Agency and that the activities have to be incidental to the achievement of their purposes.³⁷⁸ It is not clear however what kind of activities can be considered as incidental to achieving the stated purpose. Having discretion to approve or disapprove of the activities based on vague grounds, the Agency may use the opportunity to incapacitate any Ethiopian Charity and Society working on human rights and governance.

Consequently, added with the dire economic condition Ethiopian people are forced to live in and the lack of culture of charity in the country, the restriction of Ethiopian Charities and Societies from benefiting in foreign funding and the incorporation of tight control on income generating activities, hampers local CSOs from conducting their activities and even threatens their very

³⁷⁵ Report of NGO Law Monitor: Council of Europe, Research Center, International Center for Not-for-Profit Law (ICNL), 6 September, 2012 (<http://www.icnl.org/research/monitor/ethiopia.html>, Accessed on 9/11/2012 2:12:19 PM), pp.4-5

³⁷⁶ Directive on Determining the Administrative and Operational Costs of Charities and Societies No. 2/2012, Addis Ababa, Art 8

³⁷⁷ CSO Taskforce for Enabling Environment, Assessment of the Charities and Societies Regulatory Framework on Civil Society Organizations in Ethiopia, Addis Ababa, June 2011, p.34

³⁷⁸ See supra note 217, Arts 98-101

existence. Hence, these barriers on operational activity of CSOs and their access to resource infringe the right to freedom of association of foreign and Ethiopian CSOs.

3.3.3 DISSOLUTION AND OTHER PUNITIVE SANCTIONS

In addition to the regular intrusive supervisions and regulations on the operational activity of CSOs, the Agency is entrusted with the power to conduct investigation and take administrative measures on CSOs when it finds misconduct or mismanagement. Accordingly, based on the result of inquiries, which may be initiated by information obtained from the CSOs themselves or the Agency itself, the Agency has the powers to order the appropriate organ of the Charity or Society to remove or suspend an officer or order his/her replacement;³⁷⁹ cancel the license of a Charity or Society if, *inter alia*, it has been used for unlawful purposes or for purpose prejudicial to public peace, welfare or security;³⁸⁰ and dissolve the Charity or Society.³⁸¹ The drastic measure to dissolve a Charity or Society could be taken by the Agency is either consequent to its decision to cancel or suspend the license of the Charity or Society or when the Charity or Society has become insolvent.³⁸² The decision to resolve Ethiopian Charities and Societies has to be effected by the decision of the Federal High Court.³⁸³ However, Foreign Charities and Ethiopian Resident Charities and Societies have no right for judicial recourse to seek for remedy appealing against the decision of the Agency.³⁸⁴ Hence, the Agency is endowed with broader coercive powers including the power to take a drastic measure of closing up CSOs using overbroad grounds such as public peace, welfare, security and legality (which per se are not permissible grounds of restriction as

³⁷⁹ Id., Art 91

³⁸⁰ Id., Art 92(2)

³⁸¹ Id., Art 93

³⁸² Id., Art 93(1)

³⁸³ Id., Art 93(2)

³⁸⁴ Id., Art 93(2)

discussed in the previous chapter) without a judicial oversight in violation of the international standard of freedom of association.

According to the Charities and Societies proclamation, violation of the provisions of the Proclamation entails severe criminal and administrative sanctions, including imprisonment and payment of fines.³⁸⁵ Art 102(1) of the proclamation states that "any person" who violates the provisions of the Proclamation shall be punished in accordance with the Criminal Code. The law is vague as it does not clearly specify the provisions of the criminal code that will be applied to determine the level of culpability and punishment individuals could face.³⁸⁶ Moreover, according to this provision any person (individual or legal) who violated the law may be punished. This is not confined to the faulty officers of the CSO or the CSO itself but the criminal responsibility may be extended to members, employees, volunteers or even recipients of service of the CSO³⁸⁷ further jeopardizing the right to free association and other related human rights of persons such as the right to work, freedom of expression. Criminal responsibility of a CSO is also a ground for cancellation of license of a Charity or Society as per Art 92(2)(e) of the Proclamation. By providing punitive criminal sanctions, that law "...fails to provide adequate notice regarding...the actions that could result in imprisonment, and...the extent of criminal liability for offenses. The vagueness of these provisions opens the door to arbitrary criminal prosecutions."³⁸⁸

What is more, in addition to the criminal sanctions, the law permits the Agency to impose a variety of administrative fines on Charities or Societies, their officers or employees.

³⁸⁵ Id., See Art 102

³⁸⁶ Supra note, 359, p.6

³⁸⁷ Id.

³⁸⁸ Id.

Accordingly, the law stipulates payment of excessive fines for violation of the proclamation, which are outlined below.³⁸⁹

- Failure of the duty to Keep Accounting Records (Article 79); fine not less than birr 20,000.00 (Twenty thousand birr) and not exceeding Birr 50,000.00 (Fifty thousand Birr).
- Failure to submit Annual Statements of Accounts (Article 80); fine not less than Birr 10,000.00 (Ten thousand birr) and not exceeding birr 20,000.00 (Twenty thousand Birr).
- Failure to notify particulars of Bank Accounts; fine not less than birr 50,000.00 (Fifty thousand birr) and not exceeding Birr 100,000.00 (hundred thousand Birr)
- Failure to allocate Administrative and operational Costs according to the 30-70 rule; fine not less than Birr 5,000.00 (Five thousand Birr-) and not exceeding birr 10,000.00 (Ten thousand Birr).
- Any officer, employee or person who participates in the criminal acts shall be punishable with fine not less than Birr 10,000.00 (Ten thousand Birr) and not exceeding birr 20,000.00 (Twenty thousand Birr) or imprisonment not less than five years and not exceeding ten years or both.

The fact that these excessive punitive fines are to be imposed by the Agency without judicial oversight authorizes it to be a sole investigator, judge and executioner of CSOs, tampering the right to access to justice and eroding the power vested in the courts. As a result, it would create a climate of fear on part of many who would like to exercise their freedom of association and engage in human rights promotion and protection activities.

3.4 IMPACT ON HUMAN RIGHTS ACTIVITIES OF CSOS

The above discussed barriers that the Charities and Societies proclamation impose on CSOs have far reaching impact on human rights protection and promotion endeavors in Ethiopia. The impact of the law is far more felt by human rights CSOs than other kinds. Research conducted by the CSO Task Force for Enabling Environment,³⁹⁰ in June 2001, on the impact of the new Charities and Societies Proclamation reveals that the law has affected CSOs engaged on human rights, conflict resolution and advocacy more than those of development

³⁸⁹ See Supra note 217, Art 102(2)

³⁹⁰ The CSO Task Force for Enabling Environment was established in October 2007 by a group of Ethiopian CSOs in order to work for the creation of enabling environment for CSOs in Ethiopia. (See www.ccrdaethiopia.org for more information)

CSOs.³⁹¹ Accordingly, CSOs engaged in human rights and advocacy faced huge challenge that threatened their existence, hamper their activities, and forced them to change their status to Ethiopian resident Charities and Societies and their organizational mandate shift to development and service delivery activities.³⁹²

According to a report by the Charities and Societies Agency, 2094 Charities and Societies have been registered after the implementation of the Charities and Societies law until March 2011.³⁹³ Among these, only 112 organizations have been registered as Ethiopian Charities which constitutes only 5.3% of the total CSOs registered.³⁹⁴ And we have already discussed that it is only Ethiopian Charities which are allowed by the law to work on advancement of human rights. Moreover, according to the report of the Agency, around 2000 organizations that have existed before the promulgation of the law have not been re-registered until then.³⁹⁵

The aforementioned research also highlighted that the new law adversely affected the financial sustainability of most of human rights CSOs.³⁹⁶ Accordingly, the total budgets of the CSOs, under the study, dramatically decreased by 83% while their access to foreign funds declined by 80%.³⁹⁷ Due to the restrictions on access to foreign funding, many human rights CSOs are forced to change their visions, missions and activities and as a result they had to reduce their programs, shut down their branch offices, and restructure their departments.³⁹⁸

³⁹¹ Supra note 377, p.30.

³⁹² Id.

³⁹³ Report of the Charities and Societies Agency, March 2011(Available at www.chsa.gov.et)

³⁹⁴ Id.

³⁹⁵ Id.

³⁹⁶ Supra not 377, p.38

³⁹⁷ Id., p.39

³⁹⁸ Id., p.44

According to the Agency report, 484 CSOs have changed their name-which is strongly indicative of a change in their identity.³⁹⁹ These organizations have to abandon their programs related to human rights and advocacy and shift to development and service delivery. Those human rights CSOs who decide to stick to their identity are faced with struggling for their survival and financial sustainability.⁴⁰⁰ This is exacerbated by the fact that the Agency freezes the account of some human rights CSOs such as EWLA and EHRCO on the ground that the fund is obtained from foreign sources while they are Ethiopian Charities working on human rights and good governance.⁴⁰¹

The new law has also its toll on the internal capacity of human rights CSOs in which some NGOs have faced a reduction of a substantial number of their work force. For instance, Human Rights Council has reduced its employees from 66 to 13; RCDE from 50 to 7; and Zega Le'Idget remains with 4 employees.⁴⁰² The reduction of the workforce is either the result of voluntary resignation of employees after learning that the law came to effect or a measure by the organizations to ensure their survival.⁴⁰³ The human rights CSOs have also suffered from a decline in their membership base. For instance, members of HRCO's declined from 300 to 60 which may be attributable to diminishing moral and commitment of members as a result of a weakening of the organization following the enforcement of the new law.⁴⁰⁴ Lastly, the research indicates that human rights CSOs have registered a significant decline in the size of their beneficiaries. Hence, for instance, Transparency Ethiopia-human rights CSO

³⁹⁹ Report of Charities and Societies Agency, 9 December 2011, P. 34 (Cited in Id., p.46)

⁴⁰⁰ Supra note 377, p.45

⁴⁰¹ Id., p.57

⁴⁰² Id., p.47

⁴⁰³ Id., p.48

⁴⁰⁴ Id.

that has been working on combating corruption reported that it has lost about 60% of its beneficiaries due to lesser program outreach and fewer activities following the enactment of the new law.⁴⁰⁵

Therefore, in light of these predicaments that human rights CSOs are facing, it is possible to conclude that implementation of the Charities and Societies Proclamation as well as directives and manuals issued by the Agency is causing a far reaching negative consequence both on the existence and growth of Ethiopian human rights CSOs and also on the benefits they bring to the Ethiopian society at large.

CONCLUSION AND RECOMMENDATIONS

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) explicitly guarantees the right to freedom of association. Additionally, it recognizes that international human rights instruments relative to freedom of association are integral part of the law of the land and they serve as a tool for interpretation for similar constitutional provisions. These instruments guarantee the right for all persons without distinction and set standards for its protection. However, according to such standards, freedom of association is a qualified right the exercise of which may be legally limited by a state on a legally prescribed grounds which are aimed at pursuing one or more of the enumerated legitimate aims and are necessary in a democratic society. Scrutiny of the justifications of the government and substantive provisions of the Charities and Societies law in light of the international standards and comparative best practices reveals that the laws is too restrictive beyond the acceptable international standards and constrain the human rights works of Ethiopian CSOs.

⁴⁰⁵ Id., p.50

Hence, the law puts Ethiopian human rights CSOs at crossroads with difficult choices to make. Firstly, they are constrained with the hard choices of being either Foreign Charity/Ethiopian Resident Charity which allows them to maintain their access to foreign funding but forces them to abandon their engagement in promotion and protection of human rights changing their institutional mandate to development and service delivery; or Ethiopian Charity or Society in which they may preserve the right to participate in human rights work but may be confronted with resource constraints. Secondly, once they choose the option of remaining as human rights CSO, they face numerous challenges such of working in a non-enabling legal environment, including but not limited to, bureaucratic hindrances, the need to make careful allocation of funds in to program and administrative expenses, unwarranted interference by the Agency, facing arbitrary and excessive sanctions including dissolution. According to one prominent human rights lawyer and activist, Ethiopian human rights CSOs are doomed in either ways.⁴⁰⁶

Therefore, in light of the above findings, the following key policy and strategic recommendations that are believed to defend human rights CSOs from the oppression of the law are forwarded.

- CSOs, donors and relevant stakeholders should make a concerted effort for the creation of an enabling regulatory legal and policy framework for CSOs by engaging in dialogue and negotiation with the government with the ultimate objective of achieving the suspension, repeal or amendment of the CSO law or its particular restrictive provisions.
- At the national level, the CSOs may contest the constitutionality of the CSO law by submitting it to the House of Federation for constitutional review. And, at the

⁴⁰⁶ Geoffrey York, *New Ethiopian law cripples NGOs*, Ethio Quest News, November 20, 2009, http://www.ethioquestnews.com/Spotlight/Food_Security/Update-16.html (Cited in Supra note 321)

international level, they may challenge the compliance of the law with regional and international human rights standards by taking making communications to the African Commission on Human and Peoples' Right or the Human Rights Committee.

- CSOs should make strong partnership, networking and collaboration so as to adapt to the existing situation and devise coping up strategies to mitigate the impact of the law on their operational activities.
- CSOs should strive to establish a robust self-regulation system that ensures accountability, and transparency of CSOs while preserving their institutional autonomy thereby helping them restore their public image, and build trust and confidence on the part of the government.
- Ethiopian CSOs which are allowed to engage in advancement of human rights by the proclamation should strive to maintain their institutional identity by enhancing their capacity to mobilize local resources and explore fund raising and income generating options within the existing legal framework.

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