

**RECLAIMING THE RIGHT TO FREEDOM OF ASSEMBLY IN ETHIOPIA:
A COMPARATIVE STUDY ON THE UN HUMAN RIGHTS SYSTEM AND KENYA**

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Abstract

The main objective of this paper is to identify the major problems responsible for the terrible state of realization of the right to freedom of assembly in Ethiopia and to come up with potential solutions to address them. With this end in mind, the paper undertakes a comparative study of the Ethiopian system in relation to the adequate implementation of the right to freedom of assembly, with those standards developed/endorsed by the UN Human Rights System and Kenya. Accordingly, the paper argues that normative lacunas at constitutional and sub-constitutional level, coupled with inadequate judicial and administrative review have primarily crippled the realization of the right to freedom of assembly in Ethiopia.

Acknowledgment

I would like to express my immense gratitude to Central European University, Department of Legal studies, for offering me a place to study in its prestigious LL.M program in Comparative Constitutional Law with full funding. Further, the assistance I received from its dedicated academic and administrative staff has also made my whole learning journey smooth and exciting.

I also wish to extend my heartfelt appreciation to my thesis supervisor Dr. Gedion T. Hessebon for his invaluable guidance, feedbacks and encouragement, at every stage of the research project.

Finally, I would like to offer a special thanks to my mother Wubalem Melaku and to my friends Bisrat Mulugeta, Elsabet Fekadu, Kassahun Habtewold, Altayesh Tadesse, Cynthia Mbamalu, Abdulnasir Bereket and Asrat Adugna for their assistance and encouragement throughout my study.

Acronym

FDRE-	Federal Democratic Republic of Ethiopia
ICCPR-	International Covenant on Civil and Political Rights
KANU-	Kenya Africa National Union
ODIHR-	Office for Democratic Institutions and Human Rights
OSCE-	Office for Security and Cooperation in Europe
UDHR-	Universal Declaration of Human Rights
UN-	United Nations
UPR-	Universal Periodic Review
KPU-	Kenyan People Union
ECHR-	European Court of Human Rights
“Medrek”-	The Ethiopian Federal Democratic Unity Forum

Introduction

The right to freedom of assembly is one of the key political rights that nourish democracy. At its center, it safeguards individual's right to gather, discuss and voice their stance on issues that matter to them and their polity. If we take away this right arbitrarily and deprive people of having a say on the affairs of their polity collectively, democracy and protection of other rights would become unrealistic. In due recognition of its immense importance, the right to freedom of assembly is enshrined in various international and regional human rights treaties. It is also rare to find a national constitution that fails to incorporate the right directly or indirectly. Ethiopia is no exception in this regard and the present constitution of the country adopted in 1995 has recognized this right as one of the political rights worthy of protection. The country has also ratified all international and regional treaties acknowledging this right which further reinforce its obligation to respect the right to freedom of assembly. Moreover, other subsidiary laws were also enacted prior to the adoption of the constitution with the objective of facilitating the implementation of the right on the ground.

Yet, the right remains one of the most repressed political rights in the country as witnessed in the practice. Severe suppression of the right has led some including the author, to regard the right as illusory devoid of any practical significance. To illustrate, one can mention the fact that for eight years subsequent to the 2005 controversial election, no demonstration was held in the capital Addis Ababa.¹ Even after 2013, a number of notifications for undertaking public demonstrations or political meetings were either denied by the authorities regulating assemblies from the very

¹ Solomon Goshu, 'Peaceful Political Rallies: The Right Besieged by Hurdles', *The Reporter*, 31 January 2015 <<http://allafrica.com/stories/201502020437.html>> accessed 31 March 2016, Human Right Watch, World Report 2015: Ethiopia, < <https://www.hrw.org/world-report/2015/country-chapters/ethiopia>> accessed 27 May 2016

outset or dispersed by force subsequently.² Many people also died and sustained bodily injury in the course of exercising this right.³

Here it must be noted that, the right to freedom of assembly is not an absolute right. Hence, limitations could be placed upon it to safeguard other legitimate interests such as public security, public order or respect for the rights of others. Nonetheless, this does not mean that the right could be restricted arbitrarily by invoking every ground. Hence, the restriction of the right to freedom of assembly becomes problematic only when those restrictions are arbitrary and unreasonable. This will be determined by applying the test of proportionality which includes legitimate aim, necessity and balancing.

It is within this frame that this research tries to find out an explanation for the reality in Ethiopia that relegated the right to freedom of assembly to the point of non-existence and to find ways for reclaiming the right. Notably, a considerable body of literature, on the state of freedom of assembly in other jurisdictions is available. However, to the best of the author's knowledge, no study has made an in-depth inquiry and examination of the reasons that caused the poor state of the realization of the right in Ethiopia thus far. By and large, the problems associated with freedom of assembly in Ethiopia are largely reported by the media and international human rights organizations. But their focus is on exposing violation instead of explaining why the violation is caused and why it is not properly redressed.

² Neamin Ashenafi, 'Cancellation of Planned Demonstration Annoys Medrek' <<http://www.thereporterethiopia.com/content/cancellation-planned-demonstration-annoys-medrek>> accessed 1 April 2016 'Ethiopia Arrests 43 Anti-Graziani Statute Protesters in Addis Ababa' <<http://www.awrambatimes.com/?p=13407>> accessed 31 March 2016, Ethiopian Police Crackdown On Anti-Saudi Protest' <<http://bigstory.ap.org/article/ethiopian-police-crackdown-anti-saudi-protest>> accessed 31 March 2016

³ 'UN Experts Urge Ethiopia To Halt Violent Crackdown On Oromia Protesters, Ensure Accountability For Abuses' <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16977&LangID=#sthash.veMqExX4.dpuf>> accessed 1 April 2016

Hence, this research aims to address this lacuna by seeking to answer three central questions. How adequate is the existing constitutional and legal framework for implementing the right to freedom of assembly in Ethiopia compared with international and national standards of selected jurisdictions in the area? To what extent do the limitations imposed upon the right to freedom of assembly in Ethiopia by law and practice take in-to account tests of legitimate aim, necessity and proportionality which seek to limit arbitrariness? How active are courts and bodies with judicial power in enforcing the constitutionally entrenched right to freedom of assembly and safeguarding it from arbitrary restriction? In the course of finding answers to these questions, the research aims to contribute to the existing discourse on the area by bringing in the Ethiopian experience. Further, the finding of the study could also be relevant for other countries where democratic culture and protection of rights is at its rudimentary stage.

To find answers for the questions framed above, the researcher mainly employs qualitative and comparative research methods. Thus, relevant international human rights treaties, documents, reports and guidelines of human rights bodies will be examined. Books, scholarly journals, case laws, news papers and other relevant sources will also be consulted. Further, two jurisdictions i.e. the UN Human Rights System and Kenya are selected by the author for undertaking a comparative study. The author has chosen the UN Human Right System because Ethiopia has ratified almost all human rights treaties under the auspices of the UN. Further, the Federal Democratic Republic of Ethiopia constitution explicitly state that the interpretation of the human rights articles should be in conformity with international human rights instruments adopted by the country. Kenya was chosen as a second jurisdiction for the comparative study because of its 2010 constitution. It has incorporated clear criteria of determining the appropriateness of limitation on fundamental rights, such as prescription by law, legitimate aim, necessary in a

democratic society and more importantly a step by step proportionality test to balance conflicting interests. Kenyan courts have also issued judgments demonstrating how these criteria should be applied in practice in the context of the right to freedom of assembly.

The thesis will have the following structure. In chapter one, the meaning of the right to freedom of assembly, its rationale and relation with other rights as well as the historical development of the right in the selected jurisdictions of the study will be discussed. In the second chapter, the study will mainly analyze the content and the limitations of the right to freedom of assembly in the Ethiopian constitution through a comparative lens. It also explores the presence or absence of standards in the constitution for preventing arbitrary limitation of the right and their adequacy from a comparative perspective. In the third chapter, the focus will be on examining the propriety of laws enacted to ensure the implementation of constitutional right to freedom of assembly in Ethiopia and challenges associated with its practical application from a comparative angle. Accordingly, procedural limitations such as notification, place, time, manner restriction as well as substantive limitations such as public order, public security and the rights of others will be examined in depth comparatively. In the fourth chapter, the lessons that Ethiopia should take from the comparative study will be discussed and potential solutions to the identified problems will be suggested. Finally, the thesis finishes by summarizing the main findings and providing some recommendations for improvement.

Chapter One: Meaning, Rationale and Historical Development of the Right to Freedom of Assembly

1.1. Defining Freedom of Assembly and Its Forms

In our day to day life, we encounter so many instances where we find ourselves sitting or standing together with others without even realizing that we are doing so. Our routine activities like using public transportation, attending classes in school, doing our regular jobs, watching cinema and exchanging goods in the market would necessitate our presence with others at the same spot and time. These gatherings are often incidental happening without the purposeful act of the individuals to assemble. Hence, they are created accidentally while each individual is pursuing his own interest.

Thus, if we construe assembly in the broad sense of the term it is an everyday phenomenon and we spend a considerable part of our time in the company of others. The important point however is whether we are referring to such kinds of assemblies of people when we talk about the individual's right to freedom of assembly. A considerable number of literatures on the issue address this question in the negative, making a distinction between protected and unprotected kinds of assemblies.¹ Nonetheless, they diverge to a small extent when they try to define the constitutive elements of a protected assembly.

For this research, I will use the definition of an 'assembly' provided by the a group of experts from the Office for Democratic Institutions and Human Rights (ODIHR)/ Organization for

¹ O Salat, *The Right to Freedom of Assembly a Comparative Study* (Hart , Oxford 2015) 3, Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, (N.P. Engel, Arlington 1993) 373, Solyom Peter (tr), 'The Constitutional Principles of Freedom of Assembly in Hungary', (2008) 12 *Fundamentum*, 37, Article 19, *The Right to Protest: Principles on the Protection of Human Rights in Protest, Policy Brief*, (London, 2015), 13

Security and Co-operation in Europe (OSCE) and the Venice commission of the council of Europe as a working definition.² In my view, it is the most comprehensive and widely accepted definition of ‘assembly’ which encapsulates the key elements constituting an assembly with express and latent contents. It defines an assembly to mean an ‘intentional and temporary presence of a number of individuals in a public place for a common expressive purpose’.³ The express and implied elements of the definition will be elaborated in subsequent paragraphs as follows.

Accordingly, the first essential element of an assembly is what Salat calls ‘common presence’ of at least two individuals in the same place and at the same time.⁴ As such, any form of assembly presupposes the company or attendance of a minimum of two persons in an identical location and period. In the absence of these requisites, the very meaning of assembly would be an absurdum. This would lead us to the other crucial element of an assembly which refers to the state of mind of persons and the ‘commonality of the purpose’ they pursue. Thus, only deliberate gathering of individuals interconnected with a certain common motive constitutes an assembly for the purpose of the right.⁵ This requirement excludes persons who find themselves standing together with a crowd without sharing or knowing the very purpose of the assembly.

An arguable issue here is, the doctrinal understanding of a protected assembly requiring not only unity of purpose among the assembled but also their physical appearance in some identified area.⁶ The advancement of technology and internet is challenging this understanding, since

² OSCE/ODHIR, *Venice Commission Guideline on Freedom of Assembly* (2nd 2010)

³ *ibid* 7

⁴ O Salat, *The Right to Freedom of Assembly a Comparative Study* (Hart, Oxford 2015) 3

⁵ *ibid*

⁶ Human Rights Council, ‘The Rights to Freedom of Peaceful Assembly and of Association’, (11 October 2012) A/HRC/RES/21 para.1

people can now express and deliberate on an important matters public concern with others by just sitting on their computers. Hence, some are calling for the extension of freedom of assembly to cover ‘virtual gathering’ since they share considerable feature of ordinary assemblies apart from the physical presence.⁷

Yet, in some jurisdictions such as Germany an issue of freedom of assembly only arises if the participants are occupying a real space not a digital one.⁸ Further, the law regulating assemblies exclude online gatherings from its ambit of protection and limitation regime designed for ordinary assemblies.⁹ The rationale for doing so seems to be the consideration of physical presence as an indispensable component of a protected assembly and the thinking that the advancement in technology could not effectively replace or alter this crucial aspect. Further, issues of notification, location and time restrictions which are common for ordinary assemblies are not relevant for online gatherings since the modality of their undertaking is totally different from the ordinary ones.

My take on the issue favors confining the protection of freedom of assembly primarily to actual gatherings of peoples in real places like parks, squares or halls instead of a virtual gathering. This is because ‘physical presence’ lies at the core of an assembly protected by the right to freedom of assembly, since it is this element that gives greater visibility and strength to the cause of the assembled. In its absence assembly will lose its essence and distinguishing mark. Further, despite sharing some features, virtual gathering are qualitatively different from real assemblage of people. So, one cannot be regarded as the equivalent of the other. For this reason, I endorse the

⁷ Committee of Experts on Cross Border Flow of Internet Traffic and Internet Freedom, (MSI-INT) Draft Report on ‘Freedom of Assembly and Association on the Internet’ (30 September 2015) 2&10

⁸ Venice Commission, ‘Comparative Study on National Legislation on Freedom of Peaceful Assembly’, opinion No.769/2014 (19 June 2014) para.146

⁹ *ibid*

view that virtual assemblies should primarily be protected by freedom of expression than freedom of assembly.¹⁰ Hence, whenever I am talking about assembly in this paper, I am referring to assemblies that require the gathering of people in physical space.

Accordingly, if a protected assembly presuppose physical gathering of people, determining the place for such congregation is also very crucial. This is particularly important since there is an issue on whether the protection of freedom of assembly entitles participants, to come together in private as well as public places. The crux of the matter is that, if individuals are allowed to assemble in private places as a matter of right, the property right of the individual owning the place will seriously be curtailed and an issue of trespass might arise.¹¹ Taking note of this concern, the expert opinion of the Venice commission has only included ‘public places’ as a defining component of protected assemblies.¹² Courts have also ruled against the extension of protection of freedom of assembly in private places.¹³ In contrast, some authorities have argued the right entitles individuals to assemble in private spaces as well.¹⁴ My position on the issue is that, freedom of assembly should protect individual’s right to gather in certain private spaces such as halls, hotels or molls and the like to a certain extent. Since these places are primarily designed for the service of the public including for purpose of gathering. Further, states must also discharge their positive obligation by facilitating the undertaking of gathering in private spaces by exploring various options including the provision of incentives or imposing a legal duty not discriminate on the owners of private spaces for gathering based on the content of the message.

¹⁰ Committee of Experts (n7) *ibid*

¹¹ *Eileen Appleby and Others against the United Kingdom ECHR, Application no. 44306/98*

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*

Also, a protected assembly is also qualified in terms of its ultimate purpose of enabling individuals to collectively express their view points and positions on matters which are of interest to the general public.¹⁵ In other words, freedom of assembly protects gatherings which provide individuals to discuss and deliberate on issues or affecting the public. Hence, at its core freedom of assembly aims at enhancing the collective expression of ideas on public affairs. There is no hard and fast rule for determining what constitutes ‘public affairs’. Rather this is something to be resolved on a case by case basis. Nonetheless, this criterion helps to exclude to gatherings of individuals formed with the aim of furthering their own personal gain or ‘commercial interest’ from the ambit of protection by the right to freedom of assembly.¹⁶

Ephemeral nature and peacefulness are also other distinguishing attributes of an insulated assembly.¹⁷ Its ephemeral nature is associated with the time the assembled people require for transmitting their message. Normally, an assembly is a short lived activity undertaken within a fixed time frame.¹⁸ Once the gathered individuals accomplish the purpose they are gathered for i.e. making their voice heard on a public issue, they are expected to disperse and return to their day to day chores. However, it is important to note that there is no universal standard that limits the timeframe for how long assemblies can stay. Thus, it could last from few minutes to days depending on the domestic laws, type of the assembly and other equally competing considerations.

¹⁵ Solyom Peter (tras), ‘The Constitutional Principles of Freedom of Assembly in Hungary’, (2008) 12 *Fundamentum*, 38

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ *ibid*

Further, we are now witnessing assemblies that challenge the temporary nature of protected gatherings i.e. ‘occupy movements’.¹⁹ These kinds of assemblies are conducted by occupying a public building or road for a relatively longer period of time, with the intent of disseminating a cause which they think is important and pressure the government to do something about it. They may also go to the extent of camping in the street for a number of months.²⁰ Notably, the mere fact that they are held for longer period of time does not *per se* deprive them protection under the right to freedom of assemblies. Nonetheless, as these gatherings proceed for extended period of time the strain they cause on the exercise of rights such as freedom of movement will become too much and they might make the relevance of these rights for others doubtful. Hence, there should be a point beyond which an occupy assembly must not continue. In other words, it could not be held forever. The jurisprudence of national and regional courts on the matter shows that freedom of assembly does not entitle to assemble indefinitely at the expense of other people right to freedom of movement and the like.²¹ As such, once those people were given sufficient time to reasonably communicate their point of view or express what they seek from the government; they must leave the public space for other legitimate uses by other people.²² Further, the claim to stay in the streets until their demands are met might not always be an acceptable or reasonable demand in a democracy since it requires reconciling various complex interests.

Last but not least is the peacefulness requirement. The right to freedom of assembly only safeguards assemblies which are nonviolent.²³ This requirement is implied in every definition of a protected assembly and unanimously recognized in international human rights instruments as

¹⁹ Hayley J. Hooper: ‘A Case without Precedent’: City of London v Samede and Others [2012] EWHC 34 (QB) <<https://ukconstitutionallaw.org/2012/05/01/hayley-j-hooper-a-case-without-precedent-city-of-london-v-samede-and-others-2012-ewhc-34-qb/>> Accessed 30 March 2016

²⁰ *ibid*

²¹ *ibid*

²² *ibid*

²³ OSCE/ODHIR (n2), 25-26

well as the domestic constitutions of states. But the important question here is how we determine whether an assembly is peaceful or not. Scholars have provided some parameters to address this issue. For instance, Solyom noted that the carrying of weapons by the people assembled would deprive gathering its peaceful nature.²⁴ Likewise, if the gathered individuals commit acts which amount to an offence in their domestic law during the course of the assembly, such acts could raise doubts as to the pacific precondition. Furthermore, statements that incite others for violence and hate made while the assembly is proceeding are also inimical to peace.

What is more, peacefulness precondition must be construed restrictively. Particularly, the attitude of taking messages communicated in assemblies which differ from the one held by the government or the majority in the society as non-peaceful is not acceptable in a constitutional democracy since it has no relation what so ever with peacefulness unless it is a clear call for violence. More importantly, ‘‘peaceful’’ should be understood to include acts that may annoy or give offence, and even conduct that temporarily hinders, impedes, or obstructs the activities of third parties’²⁵. Thus, freedom of assembly is primarily designed to protect such kind of statements which challenge the status quo while facing a significant risk of attack from different directions. The solution is not to ban such assemblies under the guise of non-peacefulness, but to allow the public to determine whether they are worthy or not through a democratic process.

Besides defining assembly in the manner noted above, some authorities have also tried to classify assemblies in to different groups. The basis for their classification is mainly revolves around the style adopted by the assembled for communicating their causes and the difference in targeted audience. Accordingly, Salat categorizes assemblies as declarative and deliberative.²⁶

²⁴ *Solyom* (n15) 39

²⁵ OSCE/ODHIR (n2), para.25-26

²⁶ *Salat* (n4) 5-6

By declarative assemblies he is primarily referring to ‘demonstrations’ conducted with the objective of proclaiming the position of the demonstrators on the issue they gathered for to the general public and the government.²⁷ Their ultimate goal is to exert pressure on the government or decision maker to take in to account their concerns and positions on the matter. Further, the use of material objects as well as bodily symbols and gestures for the purpose of transmitting their messages is common in this form of assembly.²⁸

Contrary to declarative assemblies, the targeted audience in the case of a deliberative assembly is neither the government of nor the general public. Instead, the assembly primarily aims at the individuals assembled. Moreover, its objective is more of exchanging views on the issue among the assembled for the sake of understanding the issue better and reach at a decision.²⁹ Likewise, the usage of symbols and body gestures is also unusual in these kinds of assemblies.³⁰ As an illustration, Salat mentions public meetings. Apart from this, assemblies could also be grouped as stationary or ‘moving’ both of which are protected by freedom of assembly. Hence, the former includes ‘meetings, mass actions, rallies, sit-ins, pickets and flash mobs’.³¹ Gatherings like ‘parades, marches and processions’³² would fall under the latter.

1.2. Rationale or Function of the Right to Freedom of Assembly

The legal recognition of the right to freedom of assembly by law and its proper realization in practice contributes for the well being of individuals and society in a number of ways. As such, one of the key functions of the right is its facilitative role of empowering human beings to express

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ OSCE/ODHIR, *Handbook on Monitoring the Right to Freedom of Assembly* (Warsaw 2011) 11

³² *ibid* 12

their views on various issues of public importance in an effective manner.³³ The right achieves this objective through different mechanisms. First, by protecting people's right to gather around a common cause, it creates the venue or the platform for them to meet and thoroughly discuss their ideas on the matter. The ideas could also be effectively communicated to a large number of people within a short period of time.

Second, an assembly could also improve the 'expressive potential' of an individual participant.³⁴ This happens when an individual refrains from speaking his mind or expressing his opinion thinking that his idea will not get support or the cause that he would like to talk about is not that much importance. The presence of people in the assembly having similar concerns will motivate the individual to speak his/her mind since the gathering of lots of people in support of the matter reaffirms the significance of the matter without fear of serious disapproval or rejection.

Third, the manner of expressing ideas in assemblies like demonstration often involves the use of actions, body gestures and symbols beside verbal communication.³⁵ This will help to get the attention of the audience and the addressee to the message conveyed. They could also appreciate its content without much difficulty.³⁶ Fourth, in some countries the freedom of the press and media is seriously constrained. In such systems freedom of assembly might be the only channel of voicing concerns³⁷. This assertion is however seems naïve since a regime that represses the presses freedom will hardly tolerate expression through assemblies.

All the rationales for preserving freedom of assembly discussed so far have primarily focused on its immense importance as a channel for dissemination of various points of views by individuals

³³ *OSCE/ODHIR* (n2) 13

³⁴ *Salat* (n4) 45

³⁵ *ibid* 46

³⁶ *ibid*

³⁷ *OSCE/ODHIR* (n2) 14

in a collective manner. This has led some to contend that if the ultimate objective of freedom of assembly is ‘expression’, individuals should utilize other options of communicating their concerns through mass Medias such as news papers, radio, TV or internet.³⁸ The justification they offer in support of their contention is that, since ordinary assemblies create inconvenience for the public by disrupting the flow of traffic and operation of businesses, individuals should resort to less disruptive channels of communication.³⁹ What such critics ignore is that, expression through mass medias and physical assemblies is qualitative different. As we noted in the preceding paragraphs, the gathering of people in support of a common cause indicate how important the issue is which has the power to influence the government.⁴⁰ Further, the dramatic nature of expression also enables participants in to express their position in a vivid and influential manner. Moreover, all sections of the society do not have equal access to various means of communication because of poverty or marginalization. Hence, ‘freedom of assembly provides opportunities for public expression of those with less power, wealth or status.’⁴¹

Another crucial function of the right to freedom of assembly is its contribution for the preservation of genuine democratic system. Some authors argue that in the absence of the right to freedom of assembly it is impossible to imagine a ‘well functioning democracy’.⁴² More importantly, freedom of assembly would bring the sovereign holders of power in a democracy i.e. the people, to the center of attention by making the abstract sovereigns in the constitution real

³⁸ Eric Barendt, ‘Freedom of Assembly’, Chapter 9 in Jack Beatson and Yvonne Cripps(eds.), *Freedom of Expression and Freedom of Information* (OUP:2000) 161

³⁹ Ibid, 164

⁴⁰ Ibid, 166

⁴¹ N Jarman and M Hamilton, ‘Protecting peaceful protest: The OSCE/ODHIR and Freedom of Peaceful Assembly’ (2009) 1 *Journal of Human Rights Practice* 2, 208

⁴² *OSCE/ODHIR* (n2) para.2

and visible.⁴³ This is particularly important for people which do not actively engage in activities of political parties or election to communicate their stance⁴⁴. Further, freedom of assembly has an irreplaceable role in safeguarding ‘pluralism’ and tolerance of diverse point of views which is a core element democracy by creating the forum for their display. Using these forum individuals in support or against a certain cause could both gather and collectively communicate their positions. In addition, freedom of assembly also guards the rights of the minorities from the tyranny of the majority. Any democratic system aspires to rule/implement the wishes of the majority of the people while protecting the rights of the minorities. Freedom of assembly pursues this aspiration of democracy by allowing minorities to assemble together and voice their concerns and interests.⁴⁵ At times, freedom of assembly could be the only way to make their voice heard since they do not have the power to influence the political process using the normal system of election since they would be out numbered. It would also enhance their right to self determination enabling them to promote their culture, way of living and identity.⁴⁶

Moreover, freedom of assembly is also regarded as ‘early warning’ instrument for democracies that something is going wrong with the system.⁴⁷ Protests against the government expressed in the form of demonstration would indicate that some sections of the society are dissatisfied with the way the government is handling certain matters. In a democratic system, governments are expected to be responsive to the demands of the people.⁴⁸ As such, when the people express their displeasure, the government must seriously consider those issues and address them properly

⁴³ Andars Sajo, ‘Free to Protest Constituent Power and Street Demonstration’ (eds), Daniel Similov, *The power of the Assembled People: The Right to Assembly and Political Representation* (Eleven International Publishing, Utrecht 2009) 85 & 89

⁴⁴ *ibid*

⁴⁵ *Solyom* (n15)37 & *OSCE/ODHIR* (n2) 7

⁴⁶ *ibid*

⁴⁷ *Salat* (n4) 49-50

⁴⁸ *ibid*

before they are exacerbated. Ignoring the early warning might make it difficult for the government to handle issues after they become out of control.

Furthermore, freedom of assembly also serves as an ‘agenda setting’ instrument in a democracy.⁴⁹ Here, the assumption here is that a democratic government strives to address the concerns of the people. As such, through their act of gathering in numbers in an assembly the people will notify what they want from the government and set the agenda for it. What is more, freedom of assembly also serves as a channel communication between candidates and the electorate during the time of election.⁵⁰ This is very crucial since people would not be in a position to make informed decision regarding who should represent them which constitutes the cornerstone of democracy. Some authorities even analogize freedom of assembly with forms direct democracy like referendum.⁵¹ The reason for this is that the through demonstrations and meetings the participants will directly manifest their approval or disapproval of a certain measures. In other words, they will make decisions about the issue directly without going through representatives. The weight to be given for this function of freedom of assembly is nonetheless contingent upon the presence of considerable number of the society in those assemblies. If only few people participated its use as a venue of direct democracy could seriously be questioned.⁵²

⁴⁹ *ibid* 47-48

⁵⁰ *OSCE/ODHIR* (n2) 14

⁵¹ *Salat* (n4) 47-48

⁵² *ibid*

1.3. The Relationship between Freedom of Assembly, Speech and Association

The interrelated and interdependence of human rights is a notion that has been long recognized since the Vienna program action of 1993.⁵³ A good illustration of this idea is relationship between the right to freedom of assembly, freedom of expression and freedom of association. According to Manfred Nowak, all of these rights ‘are not only essential for our quality of life as a free human beings, but for the well functioning of democracy as well’⁵⁴. Hence, the commonality or singularity of aim is a crucial force that binds them together. As such, one needs the assistance of the other in order to achieve its purpose in a meaningful manner. Thus, it is impossible to imagine effective expression of opinions while banning people from assembling together. Likewise, to allow to people to assemble deprive their right to express their concerns will also make the whole matter futile. Similarly, an association cannot attain the purpose it is established for if its members are denied of their right to assemble or speak up their mind. Freedom of expression and assembly will also be curtailed in a system that bans the formation or the operations of associations established for various purposes.

However, the right to freedom of assembly has its own unique attributes that distinguishes it from the right to freedom of expression and association, which needs appreciation. This assertion is nonetheless strongly contested by some people. For instance, during the drafting process of the US Constitution some senators argued that there is no need for the recognition of the right to freedom of assembly as an autonomous right since it could be fully covered under the right to

⁵³ ‘Vienna Declaration and Program of Action’ (25 June 1993) para.5

⁵⁴ Manfred Nowak *et al* (eds) , *All Human Rights for All: Vienna Manual on Human Rights*, (antewarp, Intersentia; Vienna : NW Verlag Recht, 2012) 380

freedom of expression or speech.⁵⁵ In other words, they are saying that to recognize the right to freedom of assembly as a free standing right is an unnecessary duplication. In addition to this, some author argue that the right to freedom of assembly has currently ‘subsumed by the right to freedom of association’.⁵⁶ Thus, courts in the US are particularly accused of ignoring freedom of assembly and treating it under freedom of association. In subsequent paragraphs, I will make an attempt to uncover features that distinguish freedom of assembly from freedom of expression and association.

Concerning freedom of expression and assembly, one must underscore the undisputed fact that any form of assembly ultimately has a communicative or expressive purpose. As such, the expression aspect of freedom of assembly would be within the purview of protection of the right to freedom of expression.⁵⁷ Since, demonstration and meeting constitute one of the mechanisms available for disseminating ones view. Then, what does freedom of assembly specifically protects which is not covered by freedom of expression? According to Michel Rosenfeld, an assembly is primarily ‘characterized by physical presence of multitude of individuals who are aligned by a common purpose to collectively communicate a cause to the general public’.⁵⁸ What made the collective expression of concern in the in the first place is the coming together of many individuals with a shared interest. Hence, what an assembly distinctly safeguards is the ‘bodily togetherness of a group of people’.⁵⁹ In the absence of the right to freedom of assembly, individuals could not gather in the first place for voicing matters affecting public interest. And this attribute is not addressed by freedom of expression.

⁵⁵ John D. Inazu, ‘The Forgotten Freedom of Assembly’, (2010) 84 Tulane Law Review 575

⁵⁶ Ibid, 606-610

⁵⁷ Nowak (n54) 382

⁵⁸ Michel Rosenfeld and András Sajó (ed), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 951

⁵⁹ ibid

Further, the underlying goal of the two rights is also different. Freedom of expression is characterized by some scholars as civil right primarily because its prime focus is to allow the individual fulfill himself by speaking his mind.⁶⁰ In addition, the ‘discovery of truth’ through the exchange of different ideas is also mentioned as an additional aim of the right.⁶¹ In contrast, the right to freedom of assembly is characterized as political right since its principal target is the governing of the polity and democratic process.⁶² Hence, assemblies primarily promote collective interests rather than individual ones. Besides, the contribution of assemblies for discovery of truth is also minimal since the prime concern of the participants in demonstration is not discovering the truth but making their voice heard and taking a position.⁶³

With respect to the link between the right to freedom of assembly and the right to freedom of association, both of them are characterized as associative rights.⁶⁴ The reason for this is that both rights seek to protect the association or gathering of individuals on matters of shared interest. What distinguishes an assembly from an association? According to Salat, the core difference between the two sets of rights is that in case of assembly the association of people lasts for a very short period of time. As we noted in section one of the paper, the assembly will dissolve after the people finished communicating the cause they gathered for. This is why assembly is often addressed as ‘temporal’ gathering of people.⁶⁵ In contrast, the bond between people is somewhat ‘permanent’ in case of freedom of association.⁶⁶ There union would last for a relatively long period of time.

⁶⁰ Nowak (n54) 371

⁶¹ Barendt (n38) 166

⁶² Nowak (n54) 371

⁶³ Barendt (n38) 166

⁶⁴ *ibid*, 948

⁶⁵ Timothy Zick, ‘Recovering the Assembly Clause’ (2012) 91 *Texas Law Review*, 381

⁶⁶ *Salat* (n4) 4

In addition to this, the purpose of the two rights is also another point of difference in my view. As I said time and again, assemblies always have an expressive purpose to a varying degree. However, freedom of association incorporates ‘expressive’, ‘instrumental’ and ‘intrinsic’ union of people.⁶⁷ According to Rosenfeld, what binds the first group together is commonality of ‘religious or ideological beliefs’.⁶⁸ Manifesting these values is the underlying reason for the formation of such associations. Political parties could be a good example of such expressive associations. Conversely, the prime objective of instrumental associations is to ensure adequate provision of goods and services to their members.⁶⁹ Consumer associations and trade unions could be mentioned as an illustration. On the other hand, the intrinsic associations are concerned with intimate connections among people which are strongly intertwined with individual autonomy.⁷⁰ Relationships like ‘friendship’ and ‘marriage’ would fall under this categorization.

1.4. The Protection of the Right to Freedom of Assembly in the UN Human Rights System, Kenya and Ethiopia: a historical account

1.4.1. Freedom of Assembly in the UN Human Rights System

1948 is an important year for human rights in general and their protection under the United Nations system in particular. This is because one of the key instruments in the United Nations human rights system i.e. the Universal Declaration of Human Rights (UDHR) was adopted in this year. Among the 30 rights recognized by the UDHR included the right to freedom of assembly. It provides ‘Everyone has the right to freedom of peaceful assembly and association’⁷¹

⁶⁷ Rosenfeld, (n58)

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ United Nations Universal Declaration of Human Rights 1948

without further detail. Despite an overwhelming support for UDHR across the board it lacks the force of law and it does not impose mandatory obligations on state parties.⁷²

To fill this lacuna in the UN Human right system, the two corner stone treaties i.e. the International Covenant on Civil and Political Rights (ICCPR) and International Covenant economic Social and Cultural rights (ICESCR) were adopted in the year 1966. In particular, article 21 of the ICCPR acknowledges the importance of the right to freedom of assembly together with the various restrictions that could be imposed on the right.⁷³ In addition, the covenant establishes the Human Rights Committee an organ responsible for monitoring the implementation of the right by state parties.⁷⁴ The committee furthers the enforcement of the right to freedom of assembly by issuing General Comments which expound the content of the right and receive communications from individuals alleging the violation of the right in states which recognize the competence of the committee to receive individual complaint by ratifying optional protocol one of the covenants.⁷⁵

The committee has not issued a General Comment on elaborating the right to freedom of assembly so far. However, the committee has considered a number of communications submitted by individuals whose right to freedom of assembly was violated by states.⁷⁶ Most of this communications were submitted against Belarus. The committee examined the alleged facts in light of article 21 of the ICCPR and other standards developed on the right and found a violation

⁷² *The United Nations Human Rights System: How To Make It Work For You* (2008) 3

⁷³ International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

⁷⁴ *ibid* 28

⁷⁵ Optional Protocol the International Covenant on Civil and Political Rights 1976

⁷⁶ *Aleksandr Komarovsky v. Belarus* Communication No. 1839/2008 Views , *Alexander Protsko v. Belarus* Communications Nos. 1919-1920/2009, *Bakhytzhan Toregozhina v. Kazakhstan* Communication No. 2137/2012 , *Kivenmaa v. Finland* Communication No. 412/1990 , *Denis Turchenyak v. Belarus* Communication No. 1948/2010, *Igor Bazarov v. Belarus* Communication No. 1934/2010 , *Vladimir Sekerko v. Belarus* Communication No. 1851/2008 , *Sergey Kovalenko v Belarus* Communication No. 1808/2008

in all of the communications. Beside the human rights committee, other organs are also playing a key role in safeguarding the right to freedom of assembly. The UN Human Rights Council and the UN Special Rapporteur on the right to freedom of assembly and association are the main ones. To begin with the UN Human Rights Council, it issues Universal Periodic Report (UPR) which assesses the overall performance of states in realizing various human rights incorporated in different international human rights *inter alia* the right to freedom of assembly and gives recommendations. To illustrate, the working group of the Human Rights Council in making a UPR review expressed its concern over the violation of the right to freedom of assembly in Ethiopia and recommended the government to respect and protect the right.⁷⁷

That said regarding UPR, the UN special Rapporteur on the right to freedom of assembly and association was established in the year 2007. The main function of the special procedures is to promote state compliance with human rights by responding to serious violations of human rights urgently, conducting country visits to assess the level of protection, preparing reports, conducting research and setting international standards.⁷⁸ In line with his mandate, the current Special Rapporteur on the right to freedom of assembly Maina Kiai received lots of complaints alleging the violation of the right to freedom of assembly, wrote letters to governments demanding explanation for these violations, and conducted a number of visits in countries which extended invitations to him.⁷⁹

He also submitted his report on the status as well as the protection of the right to freedom of assembly to the Human Right Council with best practices in implementing the right taken from

⁷⁷ Human Right Council Twenty seven session item 6 agenda 'Universal Periodic Review Report of the working group on Universal periodic Report Review-Ethiopia', A/HRC/27/14 para. 155.104, 155.106

⁷⁸ Special Rapporteur on the rights to freedom of peaceful assembly and of association
<<http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx>>
accessed 20 January 2016

⁷⁹ *ibid*

different jurisdiction and recommendations.⁸⁰ He has also prepared standards for monitoring assemblies in consultation with other experts on the area which will be presented to the Human Right Council in March 2016. An in depth examination of the UN human rights system in the context of the safeguarding the right to freedom of assembly will be examined in subsequent chapters greater depth.

1.4.2. Freedom of Assembly in Ethiopia

Ethiopia adopted its first written constitution in 1931. The constitution mainly defines the overwhelming powers of the emperor and contain handful of human rights such as the right to freedom of movement, the right to fair trial, the right to liberty, the right to privacy and the right to petition the government.⁸¹ Hence, the right to freedom of assembly is among numerous missing rights from the 1931 constitution at least expressly. The right was expressly included for the first time in the 1955 revised constitution of Ethiopia which contained many human rights unlike the 1931 constitution. It provides that ‘Ethiopian subjects shall have the right in accordance with the condition prescribed by law, to assemble peaceably and without arms’.⁸²

Beside constitutional recognition, the right had also a practical existence in relative terms. To illustrate, one can mention the frequent demonstrations held by the university students against the emperor and his administration demanding ‘land to the tiller’ and recognition of fundamental rights and freedoms.⁸³ The administration of the emperor by and large tolerated those assemblies at the beginning but it started to take serious measure against them at later stages. Hence, the

⁸⁰ Human Rights Council Twentieth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association’, Maina Kiai A/HRC/20/27 2012

⁸¹ Ethiopian Constitution of 1931, 22-28

⁸² The 1955 Revised Constitution of Ethiopia, 45

⁸³ Andargachew Tiruneh, *The Ethiopian Revolution 1974-1987 A Transformation From an Aristocratic to a Totalitarian Autocracy* (Cambridge University Press 1993) 98

frequent demonstration of students and other members of the society demanding change were regarded as among the decisive factor which led for the downfall of the imperial regime.⁸⁴ Finally, the imperial regime completely collapsed following the 1974 revolution and a military dictatorship junta called Derg which is the equivalent of committee in amharic assumed political power.⁸⁵

The first priority on the job list of the military junta was the suspension of the 1955 constitution and a clear prohibition on conducting any kind of assembly by promulgating a law.⁸⁶ Derg was not tolerant of any dissent and it massacred a number of people who demanded for the reinstatement of human rights and called for the establishment of a civilian government.⁸⁷ So Derg scrapped the right to freedom of assembly during its rule by taking lesson from what happened to the previous regime. From the year 1974-1987 the Derg ruled the country without a codified constitution.⁸⁸ It was only in the year 1987 Derg adopted a new constitution tuned with Marxist ideology which theoretically reinstated the right to freedom of assembly by recognizing the right as well as by demanding the state to take facilitative role by creating enabling conditions for their exercise.⁸⁹ The suppression of fundamental rights by the Derg and its brutal measures against dissidents ignited a bloody civil war in the country.

After years of protracted civil war, the Ethiopian socialist military regime which officially outlawed any demonstration contrary to its ideology was finally defeated in the year 1991. The victors of the war together with other political groups drafted the Transitional Charter of Ethiopia that established the transitional government with the objective of facilitating the shift of the

⁸⁴ ibid 38

⁸⁵ ibid 64

⁸⁶ ibid 71

⁸⁷ ibid 211

⁸⁸ Fasil Nahum, 'Socialist Ethiopia's Achievements as Reflected in Its Basic Laws', (1980) 11 JEL

⁸⁹ The Constitution of the Peoples Democratic Republic of Ethiopia 1987, 47

country from military dictatorship to democracy.⁹⁰ The government also adopted a temporary proclamation laying down the procedure for undertaking peaceful demonstration and public political meeting.⁹¹ This was followed by Ethiopia's ratification of different international and regional human rights treaties including the International Covenant on Civil and Political Right.

Subsequently, the Constitution of the Federal Democratic Republic of Ethiopia was adopted in the year 1995 by dedicating a substantial number of its provisions for human rights including the right to freedom of assembly.⁹² Further, it stipulated for the interpretation of fundamental rights of the constitution in accordance with the country's obligations under international human rights treaties. All these developments were considered by the people as promising initially opening a new chapter in the nation's history. The big question however is whether a real progress was made in safeguarding fundamental rights primarily the right to freedom of assembly in Ethiopia following the adoption of the constitution.

Twenty years have passed since the constitution was promulgated, yet the practical implementation of political rights entrenched in constitution particularly the right to freedom of assembly is still an immense challenge. Severe repression of the right has led so many to regard the right as illusory devoid of any practical significance. Specially, a number of problems have constrained the right to freedom of assembly in Ethiopia mainly after the brutal response of the government to demonstrations conducted subsequent to the 2005 general election entailing the death of hundreds of people and the imprisonment of thousands.⁹³ Following that incident no single demonstration was held until 2013 and subsequent efforts of the organizers to exercise

⁹⁰ Transitional Charter of Ethiopia, No.1/1991 Fed Negarit Gazzeta 50th year no.1 1991 Addis Ababa 22 July 1991

⁹¹ The Proclamation to provide for Public Demonstration and Political Meeting(hereinafter Demonstration Proc.), Proclamation No.3/1991 Fed Negarit Gazzeta 50th year no.4 1991 Addis Ababa 12 august 1991

⁹² The Federal Democratic Republic of Ethiopia Constitution, (1995)

⁹³ Human Right Watch, 'World Report 2006', <[http:// www.hrw.org/legacy/wr2k6/wr2006.pdf](http://www.hrw.org/legacy/wr2k6/wr2006.pdf)> accessed on 27 May 2016

their right to peaceable assembly by and large were futile.⁹⁴ Even at the time of writing this paper number of people are dead and others languishing in prison in connection with the protest by the Oromo people opposing the implementation of the integrated master plan to Addis Ababa and surrounding cities of the Oromia regional state.⁹⁵ The government characterizes the act of the protestors as an act of terrorism and others condemn the actions of the government as rampant violation of the constitutionally enshrined right to freedom of assembly. These and other critical problems associated with the right to freedom of assembly in Ethiopia will be explored in detail in the following chapters.

1.4.3. History of the Right to Freedom of Assembly in Kenya

In 1920 Kenya joined the list of British colonies in Africa which lasted until 1963. Throughout the colonial period the authorities denied people's right to freedom of assembly and other political rights. Their justification was that, if the people are allowed to assemble or gather together they might plot to remove the colonial rule.⁹⁶ So they regarded the recognition of the right to freedom of assembly suicidal which threatens British hegemony in Kenya. The serious repression of rights forced the people to organize underground and rebel against the system. Armed resistance by the 'mau mau' movement also played its part in pressurizing the British government to end its colonial rule in Kenya.⁹⁷ Accordingly, Kenya obtained its independence in the year 1963 and Jommo Kenyatta of the Kenyan African National Union (KANU) party became

⁹⁴ Solomon Goshu, 'Peaceful Political Rallies: The Right Besieged by Hurdles', *The Reporter*, 31 January 2015 <<http://allafrica.com/stories/201502020437.html>> accessed 31 March 31, 2016

⁹⁵ 'Oromo Protests Set to Continue in Ethiopia' <<http://www.dw.com/en/oromo-protests-set-to-continue-in-ethiopia/a-18937401>> accessed 20 January 2016

⁹⁶ Diane Ciekawy, 'Constitutional and Legal Reform in the Post Colony of Kenya' (1997) 25 *Journal of Opinion* 1, Vol. 25, 16

⁹⁷ 'British Kenya' (1920-1963), <<http://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/british-kenya-1920-1963/>> accessed on 20 January 2016

Kenya's first president.⁹⁸ Then, the independence constitution of 1963 was adopted which *inter alia* recognizes the right to freedom of assembly. It provides '...no person shall be hindered in the enjoyment of his freedom of assembly...'⁹⁹

The independence from British rule and the adoption of the constitution gave a new hope for the people that better days are coming. However, their expectations were met with great disappointments. The persons who assumed political power started taking drastic measures immediately which would undermine democracy and human rights paving the way for authoritarian rule.¹⁰⁰ To illustrate, in the year 1966 the ruling KANU party instructed the authorities to issue permits of conducting peaceful assembly only for its members or supporters.¹⁰¹ This was followed by the outlawing of the opposition Kenyan People Union (KPU) party which dawned the era of a *de facto* single party rule which continued until the year 1982.¹⁰² In 1982 through constitutional amendment one party rule by KANU was officially proclaimed.

Kenya continued along this path until 1991 which reinstated multi-party system once again as a result of intense pressure from inside as well as from international donors.¹⁰³ During this period, 'attacks on the news media, the denial of permits for opposition public speaking events, the disruption of opposition party meetings, and the arrest and incarceration of reformist political and religious leader'.¹⁰⁴ Even after 1991, protection of the right to freedom of assembly did not show too much improvement for long. According to Mutua, a number of parliament members

⁹⁸ 'Kenya Profile –Timeline' <<http://www.bbc.co.uk/news/world-africa-13682176>> accessed 20 January 2016

⁹⁹ 1963 Kenya Constitution (Independence Constitution) 24(1)

¹⁰⁰ Makau Wa Mutua, 'Human Rights and State Despotism in Kenya: Institutional Problems' (1994) 41 *Africa Today* 4, 50

¹⁰¹ Ciekawy, (n96) 16

¹⁰² Mutua, (n100) 50

¹⁰³ *ibid*, 51

¹⁰⁴ Ciekawy, (n96) 16

representing the opposition were arrested by the government in the year 1993 alone with intention of preventing them from organizing demonstrations among others.¹⁰⁵ The government has also used the Public Order Act to effectively crack down the voice of the opposition.¹⁰⁶ This act was introduced during the colonial period to control the political participation of the people by tightly regulating the gathering of people.¹⁰⁷ This law is still partly applicable for governing the exercise of the right to freedom of assembly in Kenya though it has been subjected to various amendments.

Despite all this hurdles, in the year 2002 opposition candidate Mwai Kibaki won the election for the presidency which marked the beginning of a major era of constitutional and legal reform.¹⁰⁸ One of the promises by the new government was to adopt a new constitution that primarily aims to reduce the overwhelming power of the president which paved the way authoritarianism in the past. The draft constitution failed to secure the support of the people in the referendum conducted in 2005.¹⁰⁹ This was followed by the controversial 2007 election which resulted violence and bloodshed claiming the lives of thousands of peoples.¹¹⁰ After the resolution of election related problems, the process of constitutional reform continued and on August 4, 2010 the new constitution of Kenya was approved by the people through referendum. According to many scholars, this constitution is a new dawn in the history of Kenya. Besides ensuring the accountability of the president to the parliament, it also contains a number of fundamental rights

¹⁰⁵ Mutua, (n100) 52

¹⁰⁶ *ibid*, 53

¹⁰⁷ Ciekawy, (n96) 16

¹⁰⁸ 'Removing the Perennial Road Block: New Constitution of Kenya' <<https://www.wilsoncenter.org/sites/default/files/A%20new%20Dawn%20for%20Kenya.pdf>> accessed 20 January 2016

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

including the right to freedom of assembly.¹¹¹ Further, it thwarts arbitrary limitations of constitutional right by incorporating tests of legality and proportionality¹¹² which will be discussed in subsequent chapters of this paper.

¹¹¹ The Constitution of Kenya 2010, 37

¹¹² *ibid* , 24

Chapter Two: The Content of the Right to Freedom of Assembly and its Scope of Protection: a Comparison between the Constitutions of Ethiopia, Kenya and Instruments under the UN Human Rights System

Introduction

This chapter seeks to identify entitlements that the right holders would have from the recognition of the right to freedom of assembly in the three Jurisdictions and delineate the horizon of the right by differentiating what is protected from what is not. It further examines the relative strength and weakness of each system in terms of the breadth of protection it afford to freedom of assembly. After accomplishing this, the discussion proceeds to consider the nature and extent of legitimate limitations placed on the right to freedom of assembly in the selected jurisdiction study from a comparative point of view. As such, the merits and demerits of each jurisdiction in relation to limitations on the right to freedom of assembly will be analyzed. Here, it is important to bear mind that the discussion in this chapter by and large would be general as the focus will mainly be on constitutions and treaties which are generic in nature. A detail examination of specific issues and problems pertaining to the implementation of the right to freedom of assembly in Ethiopia will be conducted in the third chapter of the thesis. Yet, cross reference to assembly legislations Ethiopia and Kenya would be made whenever necessary.

2.1. Right to Freedom of Assembly and its Ambit of Protection

For any discourse that assesses the adequacy of a restriction place upon a right, the starting point should be identifying the contours of the right and its substance.¹ Its only after determining what falls within the protective realm of the right that one proceeds to examine the legitimacy of limitation on the right. These is also true for the right to freedom of assembly, enshrined in the constitution of the Federal Democratic Republic of Ethiopia (FDRE)², the Constitution of Kenya³ and in the International Covenant on Civil and Political Rights⁴ (ICCPR) which is one of the key treaties in the UN Human Rights system. Yet, there exists a similarity as well as difference among the three systems with respect to the content of the right and its scope.

2.1.1. Forms of Protected Assembly

To begin with the FDRE constitution, it provides that all person have the ‘right to assemble’ ‘to demonstrate’ and ‘to petition’.⁵ Besides stating so the constitution does not define what each of them mean. This will take us to the discussion we made in chapter one of this thesis regarding the different forms of freedom of assembly. Hence, we could infer that when the constitution talks about the ‘right to assemble’ it is primarily referring about public meetings conducted with the purpose of deliberating on certain important matters.⁶ This could be contrasted with the ‘right to demonstrate’ that has the principal objective of proclaiming the position of the assembled on

¹ Aharon Barack, *Proportionality Constitutional Rights and their Limitations*, (Cambridge University Press, 2012) 19-20

² Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Federal Negarit Gazeta, Year 1, No. 1(hereinafter referred to as the FDRE Constitution), art 30

³ Constitution of Kenya, 2010 art 37

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (hereinafter ICCPR) art 21

⁵ FDRE Constitution (n2)

⁶ O Salat, *The Right to Freedom of Assembly a Comparative Study* (Hart , Oxford 2015) 6

an essential matter to the external audience concerned.⁷ Hence, the target of demonstration is getting attention of an outsider rather than discussing the issue within among the assembled.

This line of interpretation also conforms to the stipulations of the Proclamation on Public Demonstration and Public Political Meeting⁸ which is serving as implementing legislation in Ethiopia for the constitutional provision that enshrines the right to freedom of assembly. Accordingly, the proclamation makes a distinction between ‘peaceful demonstration’ and ‘public political meeting’ and defines them separately. By peaceful demonstration the proclamation refers to ‘any public and orderly procession in which a group of people express their ideas through speech, songs, mottos, placards etc...’⁹ This definition of the proclamation also fits to the declaratory nature of assemblies noted in chapter one. The usage of symbols, songs and placards is also a distinguishing feature of demonstrations. With respect to ‘public political meetings’ the proclamations explicate its meaning in the following manner ‘any meeting in which a group of people discuss political and politics oriented issues’.¹⁰ From this, one can observe that the focus of meetings is more on deliberation and discussion than expression of stance.

The tricky part in the Ethiopian constitutional provision recognizing freedom of assembly is the ‘right to petition’. What is it doing here? Does it provide something which is not covered either by right to assembly or demonstration? Or is it a needless duplication? To address this question, it might be of assistance to examine the interpretation given to such formulations in early constitutions that included the right to assemble and the right to petition in the same provision. A good example in this regard is the first amendment of the US constitution adopted in 1791. It provides ‘Congress shall make no law.... abridging ...the right of the people peaceably to

⁷ *ibid*, 5

⁸ The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, Federal Negarit Gazzeta 50th Year No. 4, Addis Ababa, 12 August 1991 (hereinafter Demonstration and Political meeting Proclamation)

⁹ *ibid*, 2(1)

¹⁰ *ibid*, 2(2)

assemble, and to petition the Government for a redress of grievances’¹¹. According to El-Haj, the framers of the US constitution saw a strong intersection between the two set of right and that explains why they paired them.¹² Hence, he reiterates that some of the founders of the constitution argued that in the normal course of things submission of grievances by the public to the government are preceded by the assembly of the people to seriously deliberate on the issue and it is only logical to place the two rights together. However, it is important to note that not all assemblies have the ultimate purpose of communicating discontent or petition. They might be convened for deliberation or celebratory purpose. Likewise, the right to petition is not necessarily tied to the right to freedom of assembly since protest could be expressed using various channels of communication without the need to assemble.

Having this in mind, the same logic could be used explain the pairing of the right to freedom of assembly with the right to petition under the Ethiopian constitution. Hence, it could be argued that the constitution made reference right to petition in this provision, to underscore that the right to freedom assembly or demonstration is not only confined to the mere deliberation on an issue or demonstration. Rather, it could go to the extent of demanding the government to address their grievances deliberated and expressed through demonstration. As such, the presence of the right to petition in the provision recognizing freedom of assembly further enhances the exercise of the right to assembly by explicitly informing the people about their entitlement to express their dissatisfactions with the measures or actions of the government and demand redress by using demonstration as a channel.

Thus, people might not see the point of assembling or demonstrating if they were deprived of their right to submit their complaints to government ultimately which makes the whole process

¹¹ U.S. Const. amend. I

¹² El-Haj Tabatha Abu, ‘The Neglected Right to Freedom of Assembly’, (2009) 56 UCLA Law Review 560-566

futile. This way of understanding the link between the right to assembly and petition is also consistent with the ‘safety valve’ function¹³ freedom of assembly serves in a democracy discussed in chapter one of the paper. The core idea here is to give people the venue to ventilate their displeasure against the government and to allow the latter to fix the problem before it is gets serious, which is beneficial for both.

One can note only a minor difference when he/she compares the forms of assembly recognized in the FDRE constitution with the stipulations in the constitution of Kenya. Like its Ethiopian counterpart, the Kenyan constitution has also dedicated a single provision for enshrining freedom of assembly as a freestanding right. It provides ‘every person has the right...to assemble, to demonstrate, to picket, and to present petitions to public authorities’¹⁴. The only visible difference being the inclusion of ‘picket’ as one form of protected assembly. Its definition is neither provided in the constitution nor in the Public order act of Kenya, a legislation regulating freedom of assembly in Kenya.¹⁵

The definition of picket formulated by experts of the OSCE/ODIHR could offer us a guidance here to understand what form of assembly it envisages. Accordingly, they have defined Picket as ‘a gathering outside premises that are specifically linked to the objective of this protest activity’.¹⁶ To illustrate this point, a demonstration conducted before the UN head quarter opposing its handling of certain issue of global concern could be regarded as good example of a

¹³ Statement by the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association at the Conclusion of his Visit to the Republic of Kazakhstan
<<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15517&LangID=E#sthash.SzndOnLy.dpuf>> accessed 29 April 2016

¹⁴ Constitution of Kenya (n3) art 37

¹⁵ The Public Order Act Chapter 56 of the Laws of Kenya (hereinafter Public Order Act)

¹⁶ OSCE/ODIHR, Guidelines for Drafting Laws Pertaining to The Freedom of Assembly, (Warsaw 2004) 7

picket, since the venue of the demonstration is directly connected to the premise of the organization against which the protest is organized.

The other notable difference between the two jurisdictions with respect to the forms of assembly is the requirement of at least ‘ten or more’ participants for considering a certain assembly a ‘public gathering’ in the Kenyan public order act.¹⁷ As we will see, in chapter three of this paper, the characterization of an assembly as a ‘public gathering’ in Kenya will entail compliance with certain conditions *inter alia* giving notice.¹⁸ Hence, a logical reading of the public order act suggests that, if the number of people attending the assembly is below ten, they are exempted from notifying the authorities about their gathering.

This interpretation is also sound from pragmatic point since requiring notice from a very small number of people for undertaking an assembly will not serve the purpose of notice which is primarily to facilitate the smooth undertaking of assembly by addressing in advance issues of traffic and public order¹⁹, since the threat of disruption is very negligible. Beside the minimum threshold for participants in public gathering, the Kenyan public order act further divides public gatherings in to ‘public meeting’ and ‘public processions’.²⁰ The former is a static kind of assembly stationed in a certain public place. In contrast, the latter is a moving assembly that marches ‘to or from a public place’.²¹

The discussion made in the preceding paragraphs is also applicable to the protection of the right to freedom of assembly in the UN human rights system by and large. This is because; both Ethiopia and Kenya are state parties to the International Covenant on Civil and Political Rights

¹⁷ Public Order Act (n15) s 2

¹⁸ Public Order Act (n15) s 5(2)

¹⁹ OSCE/ODHIR, *Venice Commission Guideline on Freedom of Assembly* (2nd 2010) para.115

²⁰ Public Order Act (n15) s2

²¹ *ibid*

through ratification in 1993 and 1972 respectively.²² Further, the constitutions of the two states consider international treaties ratified by their respective parliaments as integral part of their constitutional bloc.²³ Even more, the FDRE constitution affirms that ‘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’.²⁴ The right to freedom of assembly being one of the fundamental freedoms enshrined in the constitution, its interpretation and application is expected to be consistent with international covenants ensuring its protection one of which is the ICCPR. This being said as an introduction, the content of the right to freedom of assembly as envisaged in the ICCPR will be examined in subsequent paragraphs.

Unlike the constitutions of Kenya and Ethiopia, the way the right to freedom of assembly was crafted in the ICCPR is somehow different. Both constitutions begin the article dedicated to freedom of assembly with similar statements i.e. ‘everyone has the right to assemble...’²⁵ and ‘all persons have the right to assemble...’²⁶ In contrast; the ICCPR states that ‘the right of peaceful assembly shall be recognized.’²⁷ The latter formulation is regarded by some as problematic in terms of right protection, since it emphasized more on state duty instead of individual’s right.²⁸ This duty centric approach seems less assertive and it is rare to find similar formulations in other provisions of the ICCPR addressing other rights. However, the drafting history of the covenant suggests otherwise.

²² United Nations Human Rights Office for High Commissioner, <<http://indicators.ohchr.org/>> accessed 19 April 2016

²³ FDRE Constitution(n2) 9(4) & Constitution of Kenya (n2) 2(6)

²⁴ FDRE Constitution(n2) 13(2)

²⁵ *ibid* 30

²⁶ Constitution of Kenya (n3) 37

²⁷ ICCPR (n4) 21

²⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, (N.P. Engel, Arlington 1993) 372

According to Manfred Nowak, the term ‘shall recognize’ is inserted by the drafters to affirm the characterization freedom of assembly as a natural right.²⁹ As such, what the states are required is not to create the right but recognize its existence in their constitutional and legal framework. The fear seems to be what the states can give can easily take. Yet, Nowak questions this reasoning by arguing that there is nothing that makes freedom of assembly unique to require such kind of formulation.³⁰ I also endorse his view since we find other natural rights in the covenant whose provisions are crafted in a right centric manner. To illustrate, one can see the right to freedom of speech which is coined as ‘everyone shall have the right to freedom of expression.’³¹

In addition, the seemingly duty centric approach adopted in formulating the right to freedom of assembly in the covenant, does not make reference to demonstration, picket or petition. This stands in a stark contrast with the manner of formulation of freedom of assembly in Ethiopia and Kenya as discussed in previous paragraphs of the chapter. The approach of the covenant seems to impliedly encompass demonstration, meetings and picket under the umbrella of freedom of assembly which is not problematic in and itself. Further, given the international nature of UN human rights system in general and the ICCPR in particular, it may not be logical to expect same level of specificity as national systems. Moreover, the generic formulation of the right in the covenant could also be a deliberate design to give certain margin of appreciation to states, to specify matters taking in to account their context observing the basic minimum guarantees stipulated in the covenant.³² It is also important to understand that the covenant is a compromise

²⁹ *ibid*

³⁰ *ibid*

³¹ ICCPR (n4) 19

³² Nowak (n28) 373

between various interests of state, so a general formulation might be opted to endure the subsequent ratification of the treaty.

2.1.2. Peacefulness Requirement

As noted, in chapter one of this paper the right to freedom of assembly only safeguards ‘peaceful’ gathering of people. This is true for the three jurisdictions of comparative study as well. Each of them explicitly states that freedom of assembly is only applicable to the assemblage of people which is entirely peaceful. To start with ICCPR, it provides that only peaceful assembly is worthy of respect.³³ Similar statements are reiterated in the FDRE constitution ‘everyone has the right to assemble...peaceably and unarmed’.³⁴ Likewise, the Kenyan constitution says ‘every person has the right, peaceably and unarmed, to assemble’.³⁵ The implementing legislation on freedom of assembly which are applicable at the moment, have also given a further emphasis to the pacifist nature of an assembly. As such, the Ethiopian Demonstration and Public Political Meeting Proclamation, makes peacefulness as definitional element of lawful demonstration by clearly requiring the participants to refrain from ‘carrying arms’ and disturbing public peace if they want their gathering to be lawful.³⁶ The Kenyan Public Order Act even goes further by giving the police the power to disperse an assembly which is creating a ‘clear, present or imminent’ danger to peace.³⁷ It also has a provision that criminalizes persons bearing arms while participating in assembly.³⁸

It is also crucial to note that ‘peacefulness’ is a constitutive element of a protected assembly as noted in chapter one rather than an external limitation upon it. Thus, peacefulness qualifies the

³³ ICCPR (n4) 21

³⁴ FDRE Constitution(n2) 30

³⁵ Constitution of Kenya (n3) 37

³⁶ Demonstration and Political Meeting Proclamation, (n8) 2(1)

³⁷ Public Order Act(n16) s5(8) b

³⁸ Ibid s 6

right to freedom of assembly³⁹ and we talk about limitations on a gathering that is peaceable. Further, when we speak of ‘peaceful assembly’ our principal focus is on the ‘manner’ of undertaking it not on the peacefulness of the ‘content’ or message disseminated by it.⁴⁰ If the message conveyed in the assembly calls for war or disturbance it will be regulated under legitimate limitations placed on the right. Beside these issues, the meaning attributed to peacefulness is also controversial to a certain extent. There is a consensus among the three jurisdictions regarding the obvious instance that deprives an assembly its peaceful character which is the involvement of arms or weapons.⁴¹ The Kenyan Public Order Act has even gave a definition for ‘offensive weapon’ as ‘any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use’.⁴²

According to Nowak, ‘an assembly whose participants are armed (stones and sticks also count as weapons) is not peaceful even when the weapons are not employed’.⁴³ Such gatherings he argues cannot claim a refuge under article 21 of the ICCPR. Here, it is important to note that mere possession of weapons is sufficient condition to take away protection for an assembly. Nowak, further contends that violent assemblies could be ‘prohibited and broken up without having to observe the requirements for interference in the second sentence of art 21’.⁴⁴ By ‘requirements of interference’ he is referring to the legality and proportionality tests which will be examined in detail in the third section of this chapter. Beside the use of weapons, an assembly could also be regarded as violent if certain acts of violence are committed by attendees of the gathering

³⁹ Woolman Stuart, ‘Freedom of Assembly’, 2 Revision Service (1998)

<http://www.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/12-Limitation.pdf>accessed 30April 2016

⁴⁰ Nowak (n28) 374

⁴¹ Public Order Act (n15) s 6, Demonstration and Political meeting Proclamation, (n7) art 2(1) and Nowak (n28) 374

⁴² Public Order Act (n15) s 2

⁴³ Nowak (n28) 375

⁴⁴ Ibid

without carrying arms. This could include physical attacks on persons or property.⁴⁵ What is important here is the use of force or violence not the means.

Another very crucial issue in connection with peaceable assemblies is the concept of ‘presumption of peacefulness’ recognized by the UN Special Rapporteur on freedom of assembly and association’ by referring to the opinion of the expert opinion of OSCE/ODIHR.⁴⁶ The gist of this notion is that the determining factor for peacefulness of an assembly is the intention of the organizers/participants. Thus, the motive on their part to undertake the gathering free of violence creates the presumption that the assembly is peaceful until it is rebutted by sufficient evidence to the contrary.⁴⁷ Accordingly, in the absence of strong evidence that suggests otherwise, every assembly organized with peaceful intention is presumed to satisfy the test of peacefulness and it must be allowed to proceed. This presumption should not also be rebutted easily by observing the conduct of few individuals acting in a violent manner. As much as possible, such individuals should be removed from the gathering and without affecting the presumption of peacefulness for other participants.⁴⁸

2.1.3. Context of Protection

As noted in chapter one of the paper, people may gather in various contexts. They may assemble for religious, commercial, private, political, social or other purposes. The issue here is which one of these purposes is protected by the right to freedom of assembly since there is a potential for other rights such as the right to freedom of religion, the right to freedom of association and the right to privacy to cover some of these gatherings. On this issue, the constitutions of Ethiopia and

⁴⁵ *ibid*

⁴⁶ *Report Of The Special Rapporteur on The Right to Freedom of Peaceful Assembly and of Association , Maina Kiai, A/HRC/20/27 (2012) Par. 25-26, & OSCE/ODIHR , Venice Commission Guidelines On Freedom Of Assembly, (2ed Venice, 2010) par.2, 26 & 30*

⁴⁷ *ibid*

⁴⁸ *ibid*

Kenya as well as the ICCPR are silent and they do not explicitly state the specific context of protection. The Public Order Act of Kenya however has an interesting provision which talks about ‘excluded meetings’.⁴⁹ This provision of the act secludes certain gatherings from the ambit of public gathering. The excluded assemblies include meetings for internal purposes of ‘public bodies’ ‘registered organization’, ‘trade unions’ and ‘political parties’.⁵⁰ This shows that the right to freedom of association covers most of the gatherings undertaken for discussing issues related to the organization or the institution itself. The law however does not talk about religious or other assemblies.

The position of the Kenyan Public Order Act conforms to a certain extent to the commentary of Nowak on article 21 of the covenant. His argument is that, religious, private and organizational gatherings are not the primary targets of protection under the right to freedom of assembly since they are principally protected by freedom of religion, the right to privacy and the right to association.⁵¹ Hence, the protection afforded to such assemblies by the right to freedom of assembly is only subsidiary or additional which merely cover their gathering aspect to the extent that they are public. Accordingly, he argues that ‘the specific protection of freedom of assembly aims at the discussion or the proclamation of information and ideas within the meaning of Art. 19(2) that is not dealt or guaranteed elsewhere’.⁵² Here, it important to note that article 19 of the ICCPR deals with freedom of expression. For him freedom of assembly is ‘an institutional form of freedom of expression conditioned by its specific, democratic meaning’.⁵³

⁴⁹ Public Order Act (n15) s 2(a-f)

⁵⁰ *ibid*

⁵¹ Nowak (n28) 374

⁵² *ibid*

⁵³ *Ibid* 370-371

I also concur with his contention that religious and associational gatherings should be treated principally under the right to freedom of religion and association, since those gatherings are constitutive elements of those rights in the absence of which the presence of the very right itself might be meaningless. However, we must also note the fact that human rights are ‘interrelated and interpreted’⁵⁴ that no human right stands on its own in the absence of support from other rights. Hence, I do not see any problem if temporary religious gatherings or meetings of political parties in public places, get an additional protection from the right to freedom of assembly so long as our intention is to offer the maximal protection of human rights as much as possible.

The Jurisprudence of the European Court of Human Rights (ECHR) and the expert opinions of the OSCE/ODHIR also support this line of argument. In the case *Barankevich v. Russia*⁵⁵, which concerns the denial of a minority religion in Russia from undertaking a religious gathering in one of the public parks on the ground that it would make the majority following another religion unhappy and create risk for public order was found to violate the right to freedom of religion and assembly by the ECHR.⁵⁶ With respect to meetings by political parties, the experts of OSCE/ODHIR noted that ‘all political parties should be able to fully exercise the right to peaceful assembly, particularly during the election period’.⁵⁷ This suggests that the right to assembly provides an additional layer of protection to meetings of political parties which are associations beside the one afforded to them principally by the right to freedom of association. To sum up, it is sound to understand freedom of assembly in three jurisdiction of study as a right

⁵⁴ Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993

⁵⁵ *Barankevich v. Russia* (App no 10519/03) ECHR 26 July 2007

⁵⁶ *ibid*

⁵⁷ OSCE/ODHIR, Guidelines on Political Party Regulation (Warsaw, 2011) para.153

with prime focus on political expression of ideas not primarily addressed by other rights to avoid duplication and inconsistency. Yet gatherings principally dealt by other rights also have an additional safeguard under freedom of assembly to the extent necessary.

2.2. Freedom of Assembly and Obligations of States

Like all other human rights, the right to freedom of assembly requires states to honor both negative and positive obligations.⁵⁸ The key legal documents of the three jurisdictions of the study also reinforce this fact. To begin with ICCPR, it explicitly requires states to recognize the right in their domestic legal system.⁵⁹ The covenant specifically demands states ‘to respect and to ensure to all individuals’ of the rights included in it *inter alia* the right to freedom of assembly. The duty to respect is normally understood as an obligation on the part of the state to contain itself from arbitrarily denying the right to freedom of assembly to individuals. Beside the obligation to respect which is a negative duty, states has also have a positive duty under the covenant to safeguard the violation of the right to freedom of assembly by non-state actors or other individuals.⁶⁰ The covenant further requires states to enshrine the right to freedom of assembly in their constitution and national laws.⁶¹ It is also important to note that the level of protection afforded to the right to freedom of assembly by states should not be below standards set by the covenant.

Concerning the obligation of states in relation to freedom of assembly, the Kenyan constitution provides ‘it is a fundamental duty of the State and every State organ to observe, respect, protect,

⁵⁸ *Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association , Maina Kiai*, (hereinafter report of the special rapportuer) A/HRC/20/27 (2012) para.33-42

⁵⁹ ICCPR (n4) art 21

⁶⁰ *ibid* art 2(1)

⁶¹ *ibid* art 2(2)

promote and fulfill the rights and fundamental freedoms in the Bill of Rights.’⁶² The constitution also underscores Kenya’s obligation ‘enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms’⁶³ one of which is the right to freedom of assembly. One may consider the adoption of the Public Order Act of Kenya as an instance where this obligation is fulfilled.

A similar provision also exists in the FDRE constitution which talks about human rights obligation of Ethiopia including the right to freedom of assembly. Accordingly, the constitution states that ‘all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce’⁶⁴ human rights and fundamental freedoms which also includes freedom of assembly. Unlike its Kenyan counterpart, the FDRE constitution does not specifically dictates for the adoption of legislation to implement rights protected by treaties ratified by Ethiopia including ICCPR. However, since the constitution requires the legislature to respect and protect human rights, it is only logical for it to enact an implementing law and discharge its constitutional obligation. The adoption of the procedure for demonstration and public political meeting in Ethiopia could be seen as one example where this duty is discharged.

This being the general picture of state obligation in the context of the right to freedom of assembly in the three jurisdictions, it will be ideal to see what these duties mean in concrete terms. In this regard, the UN Special Rapportuer on freedom of assembly and association has identified certain illustrations of state positive and negative duties in his report to the UN Human Rights Council. Accordingly, one negative obligation of states for ensuring the respect of the

⁶² Constitution of Kenya (n3) art 21(1)

⁶³ *ibid* art 21(4)

⁶⁴ FDRE Constitution(n2) art 13(2)

right to assembly is preventing capricious restriction on it by observing requirements of ‘necessity and proportionality’⁶⁵ which will be dealt in subsequent section with greater depth. With respect to positive obligations of states in the sphere of freedom of assembly, the Special Rapporteur mentions the state duty to protect the peacefulness of an assembly from individuals seeking to create havoc and ultimate dispersion of the assembly.⁶⁶ This will help others to maintain the peaceful nature of the assembly and convey the message they want without running the risk of disruption. The positive obligation of state could even extend to providing adequate training for people in charge of regulating of as an administrative and law enforcement officers to ensure adequate protection of the right.⁶⁷

2.3. Limitations on the Right to Freedom of Assembly

On the basis of their limitability, literatures classify human rights as absolute, limited and qualified.⁶⁸ As their name suggests, rights grouped under absolute rights will not entertain any restriction. Any infraction of these rights for whatever purpose erodes their core and it make their whole existence absurd. A clear illustration of these rights is provided in the constitution of Kenya. Accordingly, the constitution explicitly lists ‘freedom from torture and cruel, inhuman or degrading treatment or punishment’, ‘freedom from slavery or servitude’, ‘the right to a fair trial’ and ‘the right to an order of habeas corpus’ as non-limitable.⁶⁹ One can observe that the right to freedom of assembly is missing from the list. Yet, the Kenyan approach of vividly listing absolute rights is beneficial because it avoids any controversy of determining whether a limitation is allowed or not.

⁶⁵ Report of the special Rapporteur (n59) para.40

⁶⁶ *ibid* para.33

⁶⁷ *ibid* para.43

⁶⁸ The International Institute for Democracy and Electoral Assistance (hereinafter International IDEA), *Limitation Clauses* (November 2014) 4

⁶⁹ Constitution of Kenya (n3) art 25(a-d)

That said the same genres of rights were also exempted from any limitation in the ICCPR⁷⁰ and FDRE constitution⁷¹ with the exception of the right to fair trial. In addition, unlike the Kenyan constitution, the two jurisdictions neither did nor dedicate a single provision for absolute rights. Rather, the absolute rights were found in a scattered manner identified by the absence of any limitation string attached to them. Yet, the non-appearance of a limitation condition in a provision recognizing a right, should not lead to the automatic inference that the right is absolute.⁷² Instead, such constitutional provision might be reserving the task of determining the conditions of restrictions to the courts or legislature.⁷³ A good example of such formulation could be the FDRE constitution recognizing freedom of movement. It provides ‘any Ethiopian or foreign national lawfully in Ethiopia has, within the national territory the liberty of movement....’⁷⁴

The provision does not incorporate any explicit limitation on this right of a person and on its face it might seem an absolute right without any qualification. Yet, the constitution does not only enshrine the right to freedom of movement. It rather contains a number of rights which might conflict with it one of which is the right to property.⁷⁵ To illustrate, on the one hand the right to property at its center entitles the owner the right to exclude any person from entering his premise without his consent. On the other hand, the right to freedom movement seems to allow a person a right to move anywhere he wants including another person’s house. It is only possible to reconcile the two rights by construing that the right to freedom of movement is impliedly limited by the existence of other rights such as the right to property. To quote Barack, such limitations

⁷⁰ ICCPR (n4) art 7

⁷¹ FDRE Constitution(n2) art 18

⁷² International IDEA, (n68) 2

⁷³ *ibid*

⁷⁴ FDRE Constitution(n2) art 32

⁷⁵ *ibid* art 40

‘are written in to the constitution with an invisible ink.’⁷⁶ Hence, they will be actualized by restrictions imposed by laws subsidiary to the constitution such as the criminal code or civil codes deriving their authority to restrict to restrict freedom of movement from the constitution by prescribing civil and criminal liability on a person who trespasses on the property of another. This shows that even if limitation is not provided in a provision recognizing a right, this fact alone would not transform the right to an absolute one.⁷⁷ Rather, absoluteness of the right is determined by looking at the nature of the right and its relationship with other rights and interests. Particularly, when we reach the conclusion that, given the importance and nature of the right, any extent of limitation on it would be unjustified.

Conversely, limited rights are susceptible to ‘specific’ restrictions.⁷⁸ To illustrate this point, one can take the right to liberty. The only instance where this right is deprived in many jurisdictions is when a person commits a crime and subsequently found guilty by a court of law.⁷⁹ Here, it is crucial to note the specific instance which triggered limitation i.e. commission of crime. This fact could be contrasted with qualified rights where the right to freedom of assembly belongs. Unlike limited rights, qualified rights allow the imposition of limitations on various and general grounds.⁸⁰ For instance, the right to freedom of assembly is subjected to a number of restrictions on it, on account of public order, peace, security and right of others.⁸¹ Further restraints on its exercise include, notice, time, place and manner *inter alia*.⁸² Here one may raise a logical question, why do we need to limit rights in the first place? This could be answered generally by

⁷⁶ Aharon Barack, *Proportionality Constitutional Rights and their Limitations*, (Cambridge University Press, 2012) 137

⁷⁷ *ibid*

⁷⁸ International IDEA, (n68) 4

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ ICCPR (n4) art 21

⁸² Salat (n6) 55

saying that, it is the utter impossibility of exercising ones right to the fullest extent without impairing other rights or interests that necessitated limitation. Hence, leaving absolute rights aside others must be limited or qualified ‘in order to prevent conflict with other rights or with certain general interests’.⁸³ To what extent should rights be limited is an issues addressed in greater detail in subsequent sections of the paper.

2.3.1 The Right to Freedom of Assembly as a Qualified Right

As noted above, the right to freedom of assembly is one of the most qualified political rights with a number of restrictions attached to it. These restrictions are normally found in limitation clauses of human rights treaties, national constitutions and domestic implementing legislations. In general, limitation clause could be understood as a device that partially restrict human rights ‘to a specified extent and for certain ’.⁸⁴ Accordingly, it serves two seemingly opposing or contradictory objectives. On the one hand, limitation clause gives mandate to the legislature and the judiciary, to put ‘specific limitations’ on a right in particular freedom of assembly.⁸⁵ On the other hand, limitation clauses constrain the same organs of government, from imposing capricious restrictions on human rights by ‘placing limits on such limitations’.⁸⁶ Thus, the adequacy of any limitation clause of freedom of assembly at international, regional or national level must be assessed in line with its ability to achieve these two important goals. Hence, the three jurisdictions of comparative study will be scrutinized accordingly in subsequent parts of the paper.

Before proceeding further, it is important to note one common feature among the three jurisdictions concerning limitations on freedom of assembly is that all of them contain limitation

⁸³ International IDEA, (n68) 1

⁸⁴ *ibid* 2

⁸⁵ *ibid*

⁸⁶ *ibid*

clauses that are applicable to the right to freedom of assembly. Yet, the designs of their limitation clauses are different. For instance, one cannot find a claw back clause in article 37 of the Kenyan constitution governing the right to freedom of assembly. Rather, a general limitation clause applicable for all limitable human rights is enshrined in the constitution.⁸⁷ Conversely, the limitation clauses of the ICCPR and the FDRE constitution are embodied in within the articles recognizing freedom of assembly.⁸⁸ Each approach of designing limitation has its own merits and demerits. Thus, general limitation clauses are preferred in some jurisdictions because they are ‘flexible and allow for interpretation’ by courts of law.⁸⁹

The problem with their formulation is that, they place the limitations on rights including freedom of assembly at the mercy of courts and judges. Thus, if the attitude of the judge or court towards freedom of assembly is positive, they would make an exalting scrutiny to any limitation and interpret it restrictively. In contrast, if their attitude concerning freedom of assembly is negative, they might broadly interpret the abstract limitation clause of the constitution weaken the protection afforded to the right.⁹⁰ As general limitation clauses are flexible, their specific counterparts are rigid. Their advantage being the inclusion of a limitation ground that is more relevant or appropriate to the right concerned.⁹¹ That said, let us go back and see whether the limitation clauses applicable to the right to freedom of assembly in the three jurisdictions of comparative study meet the first objective i.e. specifying the instances where the right could be limited.

⁸⁷ Constitution of Kenya (n3) art 24

⁸⁸ ICCPR (n3) art 21& FDRE Constitution(n2) art 30

⁸⁹ International IDEA, (n68) 6

⁹⁰ *ibid* 9

⁹¹ *ibid*

In this regard, one can observe striking differences between the grounds for restricting freedom of assembly in the ICCPR and Kenyan constitution on the one hand and the FDRE constitution on the other hand. To begin with ICCPR, it lists ‘national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’.⁹² These grounds are often addressed in human rights literatures and jurisprudence of courts as ‘legitimate aims’ for restricting a right. The Siracusa principles on limitation of rights and derogation have explicated what each of these grounds mean under the Covenant. Let briefly discuss each of them as follows.

To begin with ‘national security’, it is provided that not every kind of disorder or level of violence meets this threshold. Rather, national security must be invoked only when ‘the existence of the nation or its territorial integrity or political independence’ is at stake.⁹³ Manfred Nowak, also gives emphasis to the seriousness of the threat that an assembly must pose, for it to be restricted on account of national security by referring to ‘political or military threat to the entire nation.’⁹⁴ Hence, whenever the authorities seek to justify the restriction imposed on freedom of assembly on the ground of national security, they carry the burden of proving that the danger created by the assembly is so grave going beyond ordinary breaking of law. Thus, national security cannot be cited for combating ‘merely local or relatively isolated threats to law and order.’⁹⁵

⁹² ICCPR (n4) art 21

⁹³ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (hereinafter Siracusa principles) Annex, UN Doc E/CN.4/1984/4 (1984) art vi para.29

⁹⁴ Nowak (n28) 380

⁹⁵ Siracusa Principles (n93) art vi para.30

With respect to public safety, it is generally understood as safeguard ‘against danger to the safety of the persons, their life or physical integrity, or serious damage to their property.’⁹⁶ In the context of freedom of assembly, its purpose is to ensure the protection of this interest from the danger created by violent assemblies. Such assemblies might create several problems that range from damaging the property of others to causing bodily injury and loss of life. Hence, public safety gives a legitimate ground for authorities to control assemblies from creating such kind of harms. This ground has a lot in common with ‘protection of the right of others’ which is another legitimate aim for restricting freedom of assembly as violent assemblies could potentially violate the right to life and property of others.⁹⁷ Yet, the latter covers additional rights such as the right to freedom of movement or the right to honor and reputation. Since, gatherings short of being violent may block pedestrians from moving, affecting their right to freedom of movement or may affront the reputation of others through messages communicated by the assembled.⁹⁸ Hence, it would be reasonable to put a proportionate level of restriction on gatherings to prevent the violation of rights of others in exercising the right to freedom of assembly.

The ground ‘public order’ is more tricky because of its relative broadness. According to the Siracusa principles, it refers to ‘sum of rules which ensure the functioning of the society or set of fundamental principles on which the society is founded.’⁹⁹ Hence, violation of any applicable law by the assembled could theoretically raise the issue of public order as the ultimate objective of any law is the maintenance of societal order. Beside law, ‘public order’ also includes some values of which are of immense to the society. Identifying what these principles seems to be a task left for legislature and courts. The problem with this ground is that its relative vagueness

⁹⁶ *ibid* art vii para.33

⁹⁷ *ibid*, para.35

⁹⁸ Nowak (n28) 382

⁹⁹ Siracusa principles(n92) para.22

added to its broadness could give authorities a broad margin of discretion for restricting freedom of assembly. Thus, courts must subject them to the test of proportionality to prevent arbitrary invocation of ‘public order’ as a justification to put restraint on assemblies.

Compared to ‘public order’, the content of ‘public moral’ or ‘public health’ objective of restricting right is narrower. As such, for an assembly to threaten public health it must pass a certain level of threshold and considered as grave. Further, authorities must demonstrate that the purpose of limitation on assembly is ‘preventing disease or injury’ by showing how it actually or potentially cause such harms.¹⁰⁰ Likewise, whenever authorities invoke public moral as legitimate aim for limiting freedom of assembly they are at the same time required to show that preserving the alleged moral concern is *sine qua non* for ‘maintenance of respect for fundamental values of the community.’¹⁰¹ Yet, in the absence of judicial oversight over the adequacy of these grounds, they could also be abused to impair the right to freedom of assembly.

That aside, a similar category of limiting grounds are also found in the FDRE constitution dealing with freedom of assembly. Hence, the constitution provides freedom of assembly could be limited on account of ‘public convenience’, ‘protection of democratic rights’, ‘public morality’ and ‘peace’.¹⁰² The terms ‘public convenience’ and ‘democratic rights’ are somewhat strange. This is because it is uncommon to found such kind of formulations in other jurisdictions including those subjects of this study. The constitution seems to allow the consideration of ‘public convenience’ as ground for restricting the venue and route for conducting assembly or demonstration. In its essence, the ground resembles ‘public order’ stipulated under the ICCPR since its ultimate objective is to ensure the smooth functioning of society. Interpreting public

¹⁰⁰ *ibid*, para.25

¹⁰¹ *ibid*, para.27

¹⁰² FDRE Constitution(n2) art 30

convenience as such might also be logical since the FDRE looks up to international treaties like ICCPR for interpreting fundamental rights recognized by it.¹⁰³

Concerning, the ‘protection of democratic rights’ one may find it as an absurd limitation, since the constitution has made a weird classification of human rights enshrined in it as ‘fundamental rights and freedoms’ on the one hand and ‘democratic rights’ on the other hand, without providing the criteria for classifying them as such. Under the first group, rights like right to life, liberty, freedom of religion and the right to fair trial are included *inter alia*.¹⁰⁴ The second category includes freedom of speech, association, assembly, right of women, right to vote, right of children etc...¹⁰⁵ A textual reading of the FDRE constitution leads to the conclusion that, freedom of assembly is susceptible to limitation only where democratic rights listed above are threatened which does not make any sense. Hence, the broad stipulation of ‘rights of others’ envisaged in the ICCPR sounds more logical and inclusive.

By and large, it could be concluded that the limitation grounds provided in the ICCPR are specific. This conclusion makes more sense when one examines how the Kenyan constitution addresses the issue of grounds for limiting the right to freedom of assembly. Unlike the two jurisdictions discussed above, the Kenyan constitution does not provide an explicit list of grounds for limiting rights. Instead, it just states that any limitation shall take in to account ‘the importance of the purpose of the limitation’.¹⁰⁶ Thus, the approach adopted by Kenya is to emphasize on the significance of the ground cited for limiting freedom of assembly instead of specifically outlining what this grounds would include. The task of explicating what these grounds are seems to be left to the lawmakers and courts. In my view, the Kenyan approach is

¹⁰³ *ibid*, art 13(1)

¹⁰⁴ *ibid*, art 15, 17, 20& 27

¹⁰⁵ *ibid* art 29-44

¹⁰⁶ Constitution of Kenya (n3) art 24(b)

per se is not problematic, as long as they have a judiciary that subjects the significance of the ground cited for restricting freedom of assembly to a strict scrutiny. This happens to be the case in Kenya so far, particularly after the adoption of the 2010 constitution.

Some illustrative decision of Kenyan courts pertaining to freedom of assembly will be examined in the third chapter of this paper. Besides, exhaustive list of limiting grounds by the constitution in and itself will not also guarantee better protection freedom of assembly in the absence of judicial oversight and limit to arbitrariness. This could be evident when one examines the situation in Ethiopia concerning freedom of assembly. Despite the vivid catalogue of concerns that justify restriction on freedom of assembly, they are often interpreted in a discretionary manner by the administrative officials without meaningful control propriety by the judiciary which is dangerous for the right. This problem will be treated in a greater depth in the next chapter.

2.4. Qualifying Limitations on Freedom of Assembly

As noted in the preceding section, the second criteria for assessing the adequacy of a limitation clause of any right including freedom of assembly is the safeguard it put in place to prevent discretionary restrictions by holding legislature and executive to certain minimal standards. It is also noteworthy that ‘the protection of fundamental rights against arbitrary or excessive infringements is an essential feature of constitutional government’¹⁰⁷ These guarantees could generally be classified under two themes of ‘legality’ and ‘proportionality’. In the following sub sections we will examine their presence or absence as well as their extent recognition in the three jurisdictions of comparative study.

¹⁰⁷ International IDEA, (n69) 2

2.4.1. Legality of Limitation on Freedom of Assembly

Legality in the jurisprudence of limitation of rights refers to the crucial requirement of having a legal backing for putting a restraint on fundamental rights, in our case freedom of assembly.¹⁰⁸

This requirement is deeply intertwined with the notion of rule of law. In a society that upholds rule of law every measure that has a restraining impact on individual right must be backed by law. This is crucial not only to deter public officials from acting capriciously but also it will give the addresses of the measure i.e. citizens the opportunity to adjust their conduct beforehand.¹⁰⁹

But for all this to happen the law needs to be equally applicable for everyone and it must be as precise as possible.¹¹⁰ It is in light of these principles where one can assess the extent of legality of restrictions imposed on freedom of assembly.

Accordingly, the three jurisdiction of comparatives study have gone different degree of length in ensuring legality of limitations on freedom of assembly. The weakest of all is the approach adopted by FDRE constitution. Hence, it does not explicitly state the necessity of having a legal base for constraining the right to freedom of assembly. The constitution only goes as far as proclaiming the possibility of restraining the right by ‘appropriate regulation’.¹¹¹ From this statement one cannot envisage what the constitution had in mind. It does not also specify who and by what means the right is regulated? Is it by a legislation adopted by the parliament or a regulation by the executive? This partly explains the absence of an implementing legislation for freedom of assembly following the adoption of the constitution. The country is still using a proclamation adopted prior to the constitution that is intended to serve temporary purpose

¹⁰⁸ Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) , 7 University of Toronto Law Journal,383 & Aharon Barack, *Proportionality Constitutional Rights and their Limitations*, (Cambridge University press, 2012) 107

¹⁰⁹ Stuart(n39) 28

¹¹⁰ ibid

¹¹¹ FDRE Constitution(n2) art 30

without any improvement or modification.¹¹² Thus, it is only through constructive interpretation that one can say the right to freedom of assembly is limited only by a proper law.

Compared to the Ethiopian constitution, the stipulation of the ICCPR regarding legality of limitation is much better. The covenant clearly provides that the right to freedom of assembly is only curtailed by actions that are ‘in conformity with the law’.¹¹³ The phrase is further elaborated in the Siracusa principles on the limitation and derogation clauses of the ICCPR adopted in 1984. Accordingly, it qualifies the legality requirement adding non-retroactivity, reasonableness, clarity and the inclusion of provisions that provide means of redress against arbitrary deprivation of rights.¹¹⁴ This approach to legality is found in a more developed form in the constitution of Kenya which stipulates a step by step analysis of legality for restricting the right to freedom of assembly.

As such, the constitution begins by stating that ‘a right or fundamental freedom in the Bill of Rights shall not be limited except by law’.¹¹⁵ Hence, it bans any restriction on freedom of assembly without the support of the law. The constitution goes further by imposing a duty on a law maker to state it explicitly whenever it adopt a law that restrict any right freedom of assembly.¹¹⁶ Failure to do so will make the legislation inapplicable. This is indeed a positive measure to curtail arbitrary limitation of right. Such a law must also be clear and understandable for everyone having a prospective application.¹¹⁷ Most importantly, the degree of limitations inculcated in the law for restricting freedom of assembly should also provide the nature and

¹¹² Demonstration and Political Meeting Proclamation, (n8)

¹¹³ ICCPR (n4) art 21

¹¹⁴ Siracusa principles (n91) para.15-17

¹¹⁵ Constitution of Kenya (n3) art 24 (1)

¹¹⁶ *ibid*, art 24(2) a

¹¹⁷ *ibid*, art 24(2) b

extent’ of limitation without touching the center of the right.¹¹⁸ These requirements are directly related to the proportionality requirement which plays a key role in restrain irrational restriction on freedom of assembly. The meaning of proportionality and its relevance will be dealt in the following subsection.

2.4.2. Proportionality of Limitations on Freedom of Assembly

The term ‘proportionality’ as applied to the human rights discourse refers to the step by step analysis of limitations imposed on a right with the objective of with the objective of determining whether they are adequate or not in light of safeguarding other important concerns be it the protection of individual right or the interest of the public in general.¹¹⁹ In other words, it could be understood as a mechanism of combating arbitrary restrictions of right like freedom of assembly by subjecting the limitation to various layers of tests. Literatures and court decisions categorize the constitutive elements of proportionality in to four with some variation in ordering them.¹²⁰ The most widely accepted arrangement being one that goes as follows ‘legitimate aim’, ‘suitability of means’, ‘necessity’ and ‘proportionality.’¹²¹ As I have noted above in the section dealing with freedom of assembly as a qualified right, grounds like ‘public order’, ‘peace’ and ‘right of others’ are often invoked for putting a restraint freedom of assembly. Hence, we are referring to these grounds when we talk about the ‘legitimate aim’ element of proportionality. Accordingly, to limit freedom of assembly one must prove that its unrestrained exercise will

¹¹⁸ Ibid, art 24(2) c

¹¹⁹ Bernhard Schlink , ‘Proportionality in Constitutional Law: Why Everywhere But Here?’ (2012) 22 Duke Journal of Comparative & International Law, 295 & Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: a Theoretical and Comparative Study* (Groningen: Europa Law Publishing, 2013) 16

¹²⁰ Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: a Theoretical and Comparative Study* (Groningen: Europa Law Publishing, 2013) 15

¹²¹ ibid

threaten these or other concerns of similar degree.¹²² The corollary of the first element is that in the absence of a legitimate aim a right cannot be subjected to limitation. Yet, the legislature has a relative liberty to determine whether the concern is legitimate or not.

The second element of proportionality i.e. ‘suitability’ determines whether the limitation placed on a right assists in some way to alleviate the harm justifying limitation.¹²³ If our conclusion shows the measure contributes to successful aversion of the feared danger then we can say that the limitation imposed on the right is suitable. For instance, if some of the protestors in a political rally start throwing stones and damaging property, dispersal of the demonstration or arrest of all participants or ban on future demonstrations by the police could be regarded as suitable measure since all of them assist in stopping the destruction of property and maintenance of public order. These measures however, might not meet the third and the fourth tests of proportionality. The third element of proportionality is often addressed as ‘necessity’. It provides that, if any limitation on a right is to be acceptable it must cause as little impairment as possible to the essence of the right.¹²⁴ The gist of the necessity requirement is that among all the suitable means of dealing with a threat posed by the exercise of a right the one that is ‘less intrusive’ should be chosen. In our example above, affecting the arrest of those few individuals that are causing the disturbance and allowing the rest to continue demonstration seems to be the least restrictive means of avoiding the danger.

The fourth test of proportionality i.e. ‘proportionality in the narrow sense’¹²⁵ which is very much intertwined with the necessity test. Accordingly, assuming that the measure adopted is necessary,

¹²² Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) , 7 University of Toronto Law Journal, 387

¹²³ Pirker (n120) 26

¹²⁴ Grimm(n122) 387 & Schlink(n 119) 292

¹²⁵ Pirker (n120) 31 & Grimm(n122) 387

it compares the loss for the right from the limitation as well as the benefit accruing from it. If the cost of restricting the right overwhelmingly outweighs the gain from it, the limitation will fail the last test of proportionality and it will not be acceptable.¹²⁶ For instance, let us take the case of individuals who cause damage to a public street by painting various stuffs on it in the course of participating in assembly were barred by law from participating in similar demonstrations for two years. The cost restriction on freedom of assembly as a result of the blanket ban is irreparable and it significantly exceeds the damage done to public property by its exercise which could easily be made good. This being the general proportionality jurisprudence in the context of the right to freedom of assembly, the subsequent paragraphs treat its status in the three jurisdiction of the study.

Accordingly, a closer look of the FDRE constitution indicates that, among the jurisdictions considered in this study, it is the one that gave the least possible recognition to the principle of proportionality in limiting fundamental rights particularly the right to freedom of assembly. The constitution does not go beyond stating freedom assembly could be subjected to ‘appropriate regulations’.¹²⁷ No implementing legislation or decision of Ethiopian court has elaborated what makes a regulation appropriate and the parameters for saying so. It is only through an extended constructive interpretation and reference to international human rights instruments ratified by the country that one may arguably contend that appropriateness is referring to proportionality.

The provisions of the ICCPR on proportionality of limitations on freedom of assembly are much clearer than the Ethiopian constitution. Hence, the covenant provides that limitations on freedom of assembly must be ‘necessary in a democratic society.’¹²⁸ The phrase has been expounded

¹²⁶ *ibid*

¹²⁷ FDRE Constitution(n2) art 30

¹²⁸ ICCPR (n4) art 21

further in the Siracusa principles on limitation of rights. Accordingly, for any limitation to be considered ‘necessary’ it must be justified by those legitimate aims provided in the provision recognizing freedom of assembly i.e. ‘national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.’¹²⁹

Any ground outside listed ones will not justify limitation. Beside, mere invocation of these concerns is not in and itself sufficient. Rather, whoever is citing this concerns must sufficiently demonstrate the existence of ‘pressing public or social need’¹³⁰ sought to be safeguarded in point of fact. Thus, efficiency, desirability and convenience concerns will not pass this threshold. Furthermore, necessity under the ICCPR also implies proportionality in the restricted sense which requires balancing between limitation and aim.¹³¹ The term ‘in a democratic society’ is also important here since what is regarded might be a necessarily limitation on freedom of assembly in authoritarian regimes might not be considered in necessary in a society that uphold democracy and rule of law. A society that respect and protect human rights is generally regarded by democratic under the UN human rights system.¹³²

A more detailed and comprehensive analysis of proportionality is provided in the Kenyan constitution for examining all limitations on fundamental rights recognized in the constitution including freedom of assembly.¹³³ Its content is similar to the limitation clause of South African constitution which served as a source in the drafting process.¹³⁴ The Kenyan constitution lays the

¹²⁹ Siracusa Principles (n91) para.10

¹³⁰ *ibid*

¹³¹ *ibid*

¹³² *Ibid*, para.21

¹³³ Constitution of Kenya (n3) art 24 (1)

¹³⁴ M. K. Mbondenvi, *The New Constitutional Law of Kenya. Principles Government and Human Right* (African books collective, Oxford 2012)

ground work for the proportionality analysis by expressly stating that, restrictions are tolerated ‘to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’¹³⁵ Here, we can see that the constitution further elaborated the necessity in a democratic society by pointing out its important elements. The constitution even goes further and provides the factors than need to be considered to determine the reasonableness of a limitation. This stands in stark contrast with its Ethiopian counterpart which is totally silent.

The first factor considered is ‘the nature of the right or fundamental freedom’ and whether it allows limitation or not.¹³⁶ As we discussed, in previous sections some rights were made explicitly absolute and such rights will not entertain any limit. But rights like freedom of assembly do not fall in such category and they are amenable to limitations. The next criterion considered is ‘importance of purpose of limitation.’¹³⁷ This is similar to the pressing social or public need requirement of the ICCPR or ‘legitimate aim’ element of proportionality discussed above. Hence, the constitution does not allow for restriction of freedom of assembly unless an interest of crucial importance is at stake. Further, the limitation must aim at pursuing ‘values of openness, democracy, human dignity, freedom.’¹³⁸ If the restriction instead erodes these values underlying the constitution, it will not be enforced.

Assuming that the restriction on freedom of assembly has met the two conditions mentioned above, its ‘nature and extent’¹³⁹ would further be scrutinized. This is done to determine whether the limitation is reasonable and necessary. To elaborate this, the constitution adds another test by

¹³⁵ Constitution of Kenya (n3) art 24 (1)

¹³⁶ Ibid art 24 (1) a

¹³⁷ Ibid art 24 (1) b

¹³⁸ Ibid art 24 (1)

¹³⁹ Ibid art 24 (1) c

requiring a link between ‘limitation and its purpose’.¹⁴⁰ This test is often known in literatures as test of ‘rational relation’¹⁴¹ or ‘suitability.’¹⁴² Its purpose is to filter and exclude limitations on freedom of assembly if they have no connection whatsoever with legitimate aims sought to be safeguarded. Finally, the constitution checks limitation on freedom of assembly by checking whether the means chosen are ‘less restrictive’ or not.¹⁴³ Whoever is restricting freedom of assembly is expected to discharge its burden of demonstrating that the means chosen for limiting freedom of assembly is the only least damaging and suitable available compared with other alternative means of attaining the objective. These tests under the Kenyan constitution play a critical role in safeguarding the right to freedom of assembly from discretionary restrictions.

¹⁴⁰ Ibid art 24(1) e

¹⁴¹ Stuart(n38) 50 & Grimm(n122) 387

¹⁴² ibid

¹⁴³ Constitution of Kenya (n3) art 24 (1)e

Chapter Three: Specific Limitations on the Right to Freedom of Assembly in Ethiopia: a Comparative Proportionality Analysis

Introduction

In the previous chapter, an attempt has been made to examine the general limitations imposed on the right to freedom of assembly in the jurisdictions of comparative study. The tests of Legality and proportionality as mechanisms of qualifying limitations were also considered. Yet, the discussion there principally focused on limitations as regulated in constitutional and treaty level. Hence, this chapter takes the discussion further by concentrating on the adequacy of specific restrictions placed on the right to freedom of assembly by taking the Ethiopian regime as a focal point. To this end, a detailed analysis of implementing legislation as well as practical cases pertaining to the right to freedom of assembly will be undertaken by using proportionality as a benchmark

3.1. Notification Requirement of Assemblies in Ethiopia

Unlike most fundamental freedoms, the exercise of the right to freedom of assembly needs compliance with certain procedural requirements set by the legislature.¹ This is almost a universal reality and it is difficult to find a jurisdiction which does not attach any procedural precondition for its realization. The main procedural requirement that organizers have to comply with in many systems is that of ‘giving notice’ to or ‘seeking authorization’ from the authorities.² It is sometimes difficult to point out what the real difference is between ‘notice’ and ‘permission’ is, since the authorities regulating freedom of assembly could prohibit the undertaking of the assembly on the basis of facts stated in the notice. For instance, the UN Special Rapporteur

¹ O Salat, *The right to Freedom of Assembly a Comparative Study* (Hart , Oxford 2015) 55

² *ibid*, 58& 72

mentions that despite the absence of a legal requirement seeking permission for organizing an assembly in some systems, in practice the state often refuses to grant permits to assemblies critical of the government.’³ Yet, the requirement of giving notice of ‘intent’ to conduct an assembly is regarded as sufficient and ideal measure than the duty of asking permission from the authorities to exercise the right. The requisite of permission will relegate the right to freedom of assembly to a privilege dependent on the good will of those regulating it.⁴

As a matter of theory Ethiopia follows the notification procedure for regulating assemblies which made it to the Ethiopian legal system through the Demonstration and Public Political Meeting Proclamation.⁵ This law predates the current constitution of the country and it was initially designed to resurrect the exercise of political rights in the country after their total demise during the military derg regime. A glance at its preamble makes this assertion vivid by providing that the objective of the law is to enable people ‘start enjoying their democratic rights forthwith, until detailed laws are worked out and promulgated’.⁶ Yet, the promise of the proclamation is still unfulfilled even long after the adoption of the constitution with lots of problems and controversies surrounding its application.

The key provision in this regard is article 4 of the proclamation which stipulates the procedure of submitting notice. Accordingly, it says ‘any individual, group or organization that organize a peaceful demonstration or public political meeting has the obligation to give written notice 48

³ African Commission on Human and Peoples Right (ACHPR), *Report of the Study Group on Freedom of Association & Assembly in Africa*, (2014) 61

⁴ ‘Factsheet: Recommendations on Managing Assemblies Joint Report of Special Rapporteurs Maina Kiai and Christof Heyns to the Human Rights Council’, March 2016 (A/HRC/31/66)

⁵ The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings, Proclamation No. 3/1991, Federal Negarit Gazzeta 50th Year No. 4, Addis Ababa, 12 August 1991 (hereinafter Demonstration and Political meeting Proclamation)

⁶ *ibid*, Preamble

hours before the intended peaceful demonstration or public political meeting to take place’.⁷ The notice is addressed towards the administration of the municipality or local administration in rural areas. A similar provision is found in the Kenyan Public Order Act as it provides ‘any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.’⁸ Here, it is important to note that both systems indoor and outdoor assemblies are subjected to the requirement of notice.

Nonetheless, there are some notable differences between the two provisions. First, the period of advance notice in the Kenyan law is 72 hours which is longer than the one provided under Ethiopian law. In this aspect, the Ethiopian law might be regarded as more assembly friendly regime. Second, the Kenyan Public Order Act seems to require notice only for assemblies with at least ten or more participants since it defines public gatherings in such a way.⁹ Relatively speaking the Kenyan approach sounds more friendly towards freedom assembly, yet the threshold 10 persons is still small. Concerning this, the UN Special Rapporteur on freedom of assembly and experts of OSCE/OECD argue for the exemption of assemblies with insignificant number of participants from observing notification pre-condition.¹⁰

Their argument centers on the very purpose of notification which is ‘facilitate’ the undertaking of an assembly by addressing possible concerns such as traffic and security issues in advance.¹¹ If the number of the assembled individuals is very few, it is highly unlikely for them to cause

⁷ Ibid, art 4(1)

⁸ The Public Order Act Chapter 56 of the Laws of Kenya 2003 (hereinafter Public Order Act) s 5(2)

⁹ Ibid s2

¹⁰ ‘Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association’, *Maina Kiai*, A/HRC/20/27 (2012) par.28, & OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) par.115

¹¹ *ibid*

disruption to traffic or societal order. Hence, to require notice for such assemblies might defeats the underlying rationale of notification and it will be disproportionate restriction to the right. Yet, what constitute a small assembly is still controversial. Third, in the case of Kenya notification is given to ‘regulating officers’ or police in the area where the assembly is to be conducted.¹² This could be contrasted with city administrative officials who are competent to receive such notice in Ethiopia. This difference in and itself is not problematic so long as the responsible persons discharge their duty according to the law.

That aside, the Ethiopian law regulating assemblies also provides what a letter of notification should contain. Accordingly, whenever organizers submit their notice they have to make sure the presence of the following elements in it i.e. objective of the assembly, place of conducting it, routes it goes through, date, time, estimation of possible attendees and finally the kind of assistance they expect from the city administration in the course of undertaking the assembly.¹³ Its Kenyan counterpart however excludes the purpose of the assembly from being included in the notice of prospective assemblies as well as the request for kind of support required from government.¹⁴ In my view, the Kenyan approach of not requiring statement of purpose is sounder since it deprives the authorities the discretion to deny the undertaking of an assembly by mere consideration purpose which might not be agreeable to them. Further, unlike its Ethiopian counterpart the Kenyan public order seems to obviate the need on the part of organizers to seek government support to maintain law and order while the assemblage is taking place.

¹² Public Order Act(n8) s 5(2)

¹³ Demonstration and Political meeting Proclamation(n5) 5(1)

¹⁴ *ibid*

Such a request is only necessary for ‘excluded gatherings’ which do not fall under the purview of freedom of assembly as applied in Kenya.¹⁵ This shows that the law has taken governments duty to cooperate in protecting the assembly and security for granted. However, the UN Special Rapporteur underscores the need to go beyond presuming the government’s duty of cooperation in facilitating assemblies. Rather, a clear statement of this duty in a legislation that regulates assembly is necessary for the effective protection of the right.¹⁶ As such, the explicit obligation imposed on the administrative officials by the Ethiopian assembly law to ensure the peace and security¹⁷ might be considered as a step in the right direction, if it is implemented properly.

Once the notification is received, the Ethiopian assembly law gives 12 hours for the authorities to make a decision on it.¹⁸ The inclusion of time limit for decision making is also a positive step since it helps to ensure timeliness of decision and accountability of authorities which is not found in Kenyan law. Then, the verdict of the administrative officials could either be to give the green light for the assembly to proceed as planned or to make a suggestion for the undertaking of ‘the public demonstration or public political meeting to be held at some other time or place.’¹⁹ The grounds for postponing the assembly to another venue or time must relate to concerns of safeguarding peace, security or preventing the disruption of the day to day activities of the public.²⁰ These grounds seem to give authorities broader power and discretion for postponing assemblies compared to their Kenyan counterpart. This is because, under Kenyan assembly law the only ground that justifies the postponement or relocation of a planned assembly is the prior reservation of the place selected for the gathering by another assembly to be conducted at the

¹⁵ Public Order Act(n8) s 5(12)

¹⁶ *Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association*, Maina Kiai, (hereinafter report of the Special Rapportuer) A/HRC/20/27 (2012) par.27

¹⁷ Demonstration and Political meeting Proclamation(n5) art 6(1)

¹⁸ *ibid*, art6 (2)

¹⁹ *ibid*

²⁰ *ibid*

same time.²¹ Thus, the law does not allow the undertaking of two assemblies having different objectives at the same place and time. The same seems true for Ethiopia even if the law is silent about that issue. Such practice of banning counter demonstrations is however regarded by the UN Special Rapporteur as unjustified restriction on freedom of assembly.²² The ideal solution is to find a means of conducting both assemblies without prejudicing each other.

3.2. Loopholes and Practical Challenges in the Ethiopian Notification Regime for Assemblies

In the preceding paragraphs, an attempt has been made to provide a general outline of the Ethiopian notification regime through a comparative lens. The focus of this section is more on the gaps existing in the law and challenges of implementation as envisaged in different practical cases. Here, it is important to bear in mind that most of the assemblies in Ethiopia fail at this stage. The discretionary interpretation of the notification provision of the Ethiopian assembly law also gives a partial explanation for the absence of a single demonstration in the Ethiopian capital in between 2005-2013.²³ It is also cited as an explanation for the failure of majority of assemblies subsequent to 2013. One could only find handful of assemblies conducted successfully since then.

3.2.1. Issues Related to Receipt of Notification, Decline and Silence

The problem begins with the refusal on the part of the administrative officials to receive the letter of intent to conduct assembly by the organizers. This happens often when the place, time or purpose of the assembly is not agreeable to the authorities for various reasons. A good example

²¹ Public Order Act(n8) s 5(12)

²² Report of the Special Rapportuer (n16) para.30

²³ Solomon Goshu, 'Peaceful Political Rallies: The Right Besieged by Hurdles', *The Reporter*, 31 January 2015 <<http://allafrica.com/stories/201502020437.html>> accessed on 31 March 31, 2016

of such a case could be the demonstration organized by Semayawi Party (Blue party) in Addis Ababa, on September 7, 2013.²⁴ The press release of the party indicate that it approached the Addis Ababa City Administration Peaceful Demonstration and Meetings Notification Department on September 5, 2013 with letter of notification to conduct a demonstration on the said date but the latter declined to receive the notification. The party also sent the same letter via Ethiopian Postal Service but the notification department of the municipality was still defiant to receive the letter according to the party.²⁵ This matter was later resolved after leaders of the party discussed the matter with office of the mayor and got the explanation that it is impossible to conduct the assembly on the planned date since various public places in the city will be occupied by sale exhibition of small micro enterprises in the city which forced the party to postpone the demonstration for another time.²⁶

The decline of the authorities to receive letter of notification is an arbitrary exercise of their power. If they have a problem with the undertaking of the assembly on the planned day and time, what they should do is accept the notification and give whatever decision they think is appropriate by taking in to account the principle of proportionality. This problem is partly because of the gap in the implementing legislation as it failed to clearly order authorities to accept any notification that meets the formality requirement set by the law. Further, there is no mechanism of ensuring whether the authorities have received notification of an assembly or not. This is often a cause for evidentiary controversy between the organizers of an assembly and the authorities in Ethiopia. To address this problem, the experience of Kenya and recommendations UN human rights bodies are insightful. Accordingly, the Kenyan Public Order Act provides that

²⁴ ‘Blue Party Demonstration Postponed to 22 September 2013’ (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed 31 March 2016

²⁵ *ibid*

²⁶ *ibid*

‘the regulating officer shall keep a public register of all notices received.’²⁷ It also gives the public the right to examine or inspect the register of notifications in the opening hour of office.²⁸ This practice is also regarded by the UN Special Rapporteur as a measure on the right track that ensures transparency and accountability. He further endorses the suggestion of Venice commission of experts requiring the inclusion of a provision that forces authorities to immediately issue receipt of acceptance of notification.²⁹ Had such a provision been incorporated in the Ethiopian legal regime regulating assemblies, it would have helped in resolving some of the issues related to that.

Another related problem concerns the failure on the part of the Ethiopian authorities to communicate their decision on a status of received notification to the organizers within the prescribed period set by the law. In some cases, the organizers have considered the silence of the municipality administration office as acceptance or recognition and suffered the consequence which is imprisonment and violent dispersal of the assembly. A good example that illustrates this problem is the demonstration organized by Blue party, Baleraey Wetatoch Mahiber (visionary youth association) and private initiative committee for defense of Ethiopian people dignity and heritage for March 17, 2013.³⁰ The notice dated march 4, 2013 was addressed to the Addis Ababa City Administration Peaceful Demonstration and Meeting Notification Department. It states that the purpose of the demonstration is to oppose the construction of a museum and

²⁷ Public Order Act(n8) s 5(14)

²⁸ *ibid*

²⁹ OSCE/ODIHR, ‘Joint Opinion on the Draft Law on Peaceful Assemblies of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR’, Opinion no. 525/2009 (22 June 2009) s37

³⁰ Ethiopia arrests 43 anti-Graziani statute protesters in Addis Ababa’
<<http://www.awrambatimes.com/?p=13407>> accessed 31 March 2016

memorial park in Italy for Rodolfo Graziani who is regarded as fascist war criminal by the organizers as he massacred thousands of Ethiopians during the 5 years of Italian occupation.³¹

The form of the assembly planned is a procession that starts at Yekatit 12 square where the statue of martyrs of Graziani massacred is located, the final destination being the Embassy of Italy in Addis Ababa. According to the organizers, the municipality accepted the notification and kept silent. They took its silence as a tacit approval and went on to conduct the demonstration as planned. However, the police dispersed the assembly as illegal for failing to get recognition from the administration and arrested 43 individual who participated in the demonstration.³² Such kind of problems could easily be resolved had the Ethiopian assembly law clearly provided the consequence of inability or unwillingness of administrative officials to make decisions available within the time frame set by the law. According to the UN Special Rapporteur and Venice committee of experts, the principle silence amounts to acceptance shall govern such situations and the law should allow demonstrators to ‘to proceed with the planned assembly in accordance with the terms notified and without restriction.’³³

3.2.2. Treatment of Spontaneous Assemblies in Ethiopia

The other troublesome issue in the Ethiopian regime governing notification of gatherings is that of ‘spontaneous assemblies’. According to the Venice committee of experts, such assemblies refer to those ‘organized in response to some occurrence, incident, other assembly, or speech, where the organizer (if there is one) is unable to meet the legal deadline for prior notification, or

³¹ *ibid*

³² *ibid*

³³ Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, Opinion no. 596/2010 (22 December 2010) s.40

where there is no organizer at all.³⁴ As their name suggests, this form of assemblies are accidental and not planned in advance. What ignites their formation usually is the happening a certain unforeseen event which is of interest to the public. Such incidents might initiate the public to react immediately by going out to the streets without observing the notification requirement for normal assemblies. Various authorities including the UN Special Rapporteur on freedom of assembly recognize such kind of assemblies as exceptional in nature deserving a special treatment.³⁵ Thus, a state is expected to devise a mechanism of allowing such assemblies in its implementing laws from going through the ordinary process of notifying assemblies which might take some time. Further, demanding spontaneous assemblies to go through similar notification procedure deprives their immediate nature and undermines their value.³⁶

Yet, the Ethiopian proclamation regulating freedom of assembly does not leave a room for making any exception for spontaneous assemblies regarding notification requirement. The law treats spontaneous assemblies as any other form of assembly and does not provide a special treatment. This lacuna in the law has created a serious problem for exercising the right to freedom of assembly in Ethiopia as it deprived spontaneous assemblies from any protection. To illustrate this problem, I will discuss two cases of spontaneous assemblies which were dispersed by security personnel for failing to give advance notice. The first concerns, a spontaneous demonstration that took place in the capital Addis Ababa on November 15, 2013 in front of the Saudi Arabia embassy. What triggered the demonstration was the killing of three Ethiopians by the Saudi police and the decision of the Saudi government to deport around 23,000 illegal

³⁴ OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) par.126

³⁵ Report of the Special Rapporteur (n16) para.29

³⁶ *ibid*

workers of Ethiopian origin.³⁷ The release of a video showing ‘a crowd dragging an Ethiopian from his house and beating him’ at the same time created grievance in the public. Banners carried during the demonstration show the disappointment of the people on the government careless handling of the problem and its failure to safeguard the interest of Ethiopian citizens working abroad.³⁸ The reaction of the police was to disperse the demonstrators and arrest some of the participants on the allegation that they have conducted a demonstration without getting the approval of the city administration. In his response to the AFP broadcasting agency the then spokes person of the government Shimeles Kemal noted that the demonstration was terminated because ‘it was an illegal demonstration, they had not got a permit from the appropriate office.’³⁹

The second case, demonstrates another instance of spontaneous assembly dispersed by Ethiopian police. It was triggered by a video released by the ISIS which shows the beheading of 28 Ethiopian Christians in Libya.⁴⁰ The statement of the then government spokes person Redwan Hussein who said ‘it was not clear if the victims were Ethiopian and the Ethiopian embassy in Cairo was investigating the matter’ further added fuel to the fire.⁴¹ Aggrieved with the reaction of the government on the incident thousands went out to the streets on April 21, 2015 without any organizer carrying banners with statement saying ‘where is our government’, ‘justice for the dead’, ‘sovereignty is the safety of citizens everywhere in the world’ and ‘don’t tell us they are

³⁷ ‘Police crackdown on demonstrations against targeted attacks on Ethiopian migrant workers in Saudi Arabia’ <<http://www.aljazeera.com/news/africa/2013/11/arrests-at-anti-saudi-protest-ethiopia-201311151464025832.html>> accessed March 31, 2016

³⁸ ‘Ethiopian Police Crackdown on Anti-Saudi Protest’ <<http://bigstory.ap.org/article/ethiopian-police-crackdown-anti-saudi-protest>> accessed on March 31, 2016

³⁹ ‘Police Crackdown on Demonstrations against Targeted Attacks on Ethiopian Migrant Workers in Saudi Arabia’ <<http://www.aljazeera.com/news/africa/2013/11/arrests-at-anti-saudi-protest-ethiopia-201311151464025832.html>> accessed March 31, 2016

⁴⁰ ‘Police Forcefully Disperse Protests Held by Ethiopians Against ISIS Killings’ <<http://addisstandard.com/police-forcefully-disperse-protests-held-by-ethiopians-against-isis-killings/>> accessed 31 March 2016

⁴¹ *ibid*

not ours.’⁴² The city administration reacted by deploying members of Addis Ababa and federal police forces and successfully stopped the protestors from heading to the headquarter of the African union and national place.⁴³ Like the Saudi protest discussed above, no violence on the part of the protestors was reported in this case as well. Such practice of dispersing spontaneous assemblies by administrative officials and police forces stands in direct contrast with the position of the UN Human Rights Committee.⁴⁴ This will lead us to the discussion of another crucial issue which is the fate of assemblies conducted without giving notice.

3.2.3. Fate of Assemblies sans Notice

Under Ethiopian assembly law nothing is clearly provided regarding the measures to be taken against gatherings that are being conducted with no prior notification. Its Kenyan counterpart is plain on this point and it gives the police the mandate to prevent or stop public gatherings which defied notification procedure.⁴⁵ In practice, the same measure is taken by security personnel in handling such assemblies in Ethiopia. Further, as the practice in Ethiopia shows, any public demonstration or public political meeting which failed to comply with the requirement of notification is by definition illegal and forbidden. As such, it usually ends up with dispersion and with filing of criminal charges against participants of such assembly.⁴⁶ The Criminal Code of Ethiopia also contains provision that penalizes persons who take part in an assembly prohibited by law which will include gatherings undertaken in the absence of notification.⁴⁷ It also extend criminal liability to those who made available their land, property or hall for such assemblies.⁴⁸

⁴² *ibid*

⁴³ *ibid*

⁴⁴ Igor Bazarov v Belarus, Human Rights Committee (Communication No. 1934/2010) 29 august 2014

⁴⁵ Public Order Act(n8) s 5(8)a

⁴⁶ Ethiopia arrests 43 anti-Graziani statute protesters in Addis Ababa’

<<http://www.awrambatimes.com/?p=13407>> accessed 31 march 2016

⁴⁷ The Criminal Code of Ethiopia 2004, art 482(1) a

⁴⁸ *ibid* art 482(1) b

On this issue, the position of the UN Human Rights Committee is totally different. In several cases before it the committee has decided that mere failure of organizers to notify authorities does not give the latter an automatic power to disperse the assembly and arrest participants so long as the assembly is peaceful. I will discuss two of these cases as follows.

The first case is between *Igor Bazarov v Belarus*⁴⁹. The case concerns the dispersal of a street procession conducted by the applicant and his subsequent liability for administrative offences. Igor is a citizen of Belarus and he conducted a street procession on March 25, 2009 with two other participants without getting permission from the appropriate organ of the city. Their march began at independence square and they were waving a ‘white, red, white’ flag which they think is ‘symbol of revival for Belarus.’⁵⁰ After conducting the procession for 10 minutes, police stopped their march and took custody of Igor on the ground that he conducted the procession without getting authorization which is required by law. He was later found guilty of committing an administrative offence of undertaking a procession lacking permission and fined 70, 000 Belarusian rubles.⁵¹ Aggrieved with the decision of Belarusian courts, the applicant approached the UN Human Rights Committee alleging the infringement of the right to freedom of assembly recognized by the ICCPR and Belarusian constitution.

In its decision of 2014, the committee found violation of the right to freedom of assembly by Belarusian authorities. The reasoning of the committee emphasized the fact that the right to freedom of assembly is enshrined in the constitution of Belarus and the state is also a party to the ICCPR which recognizes the right under article 21. Accordingly, the committee noted that in restricting the right to freedom of assembly, Belarus must comply with safeguards of necessity

⁴⁹ *Igor Bazarov v Belarus, Human Rights Committee*(Communication No. 1934/2010) 29 august 2014

⁵⁰ *ibid* para.2.8

⁵¹ *ibid* para 2.1

and proportionality incorporated in the covenant. It particularly it rejected the contention of Belarus that the measure has a legal backing since the law requires any procession to be conducted after getting permission. The argument of the committee was that Belarus ‘has not attempted to explain why it was necessary — under domestic law and for one of the legitimate purposes set out in ... the second sentence of article 21 of the Covenant — to obtain authorization prior to holding a peaceful street march in which only three persons intended to participate.’⁵² In addition to that, for such restriction to be justified the state must go beyond citing a law that demands authorization by showing how ‘the movement of the author and his two acquaintances movement with a flag along the pavement down a pedestrian street during daytime would have violated the rights and freedoms of others or would have posed a threat to public safety or public order (ordre public)’⁵³ practically. In other words, the committee is demanding states to strictly observe the requirement of proportionality whenever they restrict the right to freedom of assembly by law or its application. Hence, they must discharge their burden of establishing link between the legitimate aim and restriction as well as the non-availability of other less prejudicial means for the right sought to be limited.

A similar pronouncement was made by the committee in the case, *Sergey Kovalenko v Belarus*.⁵⁴ On October 30, 2007 the applicant was joined by thirty other people who also lost their families during the Stalin era which they characterize as repressive. Their plan was to move around the various places in town of Vitebesk where their relative were killed or buried and pay tribute to them particularly ‘to lay wreaths and flowers and to erect a cross.’⁵⁵ By these gestures they also wanted to show their disapproval of any form of political suppression or the silencing of

⁵² *ibid*, para.7.5

⁵³ *ibid*

⁵⁴ *Sergey Kovalenko v Belarus*, Human Rights Committee(Communication No. 1808/2008) 26 September 2013

⁵⁵ *ibid*, para.2.1

dissent.⁵⁶ This event was organized without seeking authorization from the city administration. Accordingly, after they finished their first commemoration in one of the places and boarding a bus to move to other places, the police arrested everyone on the allegation that they took part in a picket or stationary assembly which is not permitted by city officials. Subsequently, the organizer of the event Sergey was ordered by court to pay 620,000 Belarusian rubles for his violation of the administrative law that requires seeking permission from authorities before conducting any form of assembly.⁵⁷ Being upset with the finding of the court the applicant submitted a case to the UN Human Rights Committee claiming violation of the right to freedom of assembly enshrined in the ICCPR.

After a careful consideration of arguments of both parties the committee held in favor of the applicant and found Belarus responsible for violation of the right to freedom of assembly *inter alia*.⁵⁸ The committee reiterated its reasoning in the Igor case discussed above by saying that no evidence is adduced by state which shows how the commemoration event actually endanger ‘national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.’⁵⁹ These decisions of the committee also conform to the position held by the UN Special Rapportuer on the right to freedom of assembly as well as by the Venice commission of experts. As such, they require states to refrain from dispersing spontaneous assemblies or gatherings with negligible number of participants by

⁵⁶ *ibid*

⁵⁷ *ibid*, para.2.1

⁵⁸ *ibid*, para.8.7

⁵⁹ *ibid*

mere invocation of failure to comply with notification requirement as it violates the principle of proportionality.⁶⁰

The decisions of the committee also have serious implications for Ethiopia as state party to the ICCPR. This is because, the country has a bad reputation of dispersing gatherings conducted without compliance with the notification procedure and subjecting participants to criminal liability as we noted in several cases discussed above. Further, the recent protest of few Addis Ababa University students in front of the US embassy shows⁶¹, the level of intolerance of Ethiopian authorities towards assemblies conducted without notice irrespective of whether they pose security risk or not. This protest was held on March 8, 2016 by disregarding the notification requirement set by the Public Demonstration Proclamation and the number of participants is 20. As the video footage of the demonstration shows, the students were expressing their disapproval of the government handling of the recent crisis in Oromia regional state in entirely peaceful manner.⁶² They were even carrying a white flag to demonstrate their peaceful intention. Further, since their number was few they did not block the road or prevented the free from of cars and people. Yet the authorities immediately arrested the students and criminal charges were pressed against them. The first charge accuses the students of violating article 486(1) (a) of the FDRE criminal code which proscribes assemblies conducted in a violation of law. Here, the contention of the prosecutor is that the students violated this article by failing to notify the city

⁶⁰ 'Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association', Maina Kiai, A/HRC/20/27 (2012) par.28, & OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) para.115

⁶¹ *Public Prosecutor v Sorresa Demme et al*, Federal First Instance Court Menagesha bench Reference no. GJBPPFNO 01716/08, 16 march 2016 (criminal charge)

⁶² *ibid*

administration and for carrying out a demonstration in front of an embassy prohibited by the Public Demonstration proclamation.⁶³

In the second charge, the prosecutor alleges that the students are responsible for spreading false rumors against the government and inciting the public by carrying placards⁶⁴ such as “Schools are Knowledge Camps, not Military Camps”, “Stop the Genocide Against the Oromo People”, “The Government should take Responsibility for those Killed”, “Stop the Killings and Evictions”, “The Government should Withdraw its Military from Oromia Region”, “The Ethiopian Defense Force is terrorizing the Oromo People”, ‘Stop giving Lands to Investors while Citizens are Starved’, “The Government of America Should be aware of Ethiopia’s Pseudo Democracy”⁶⁵ in violation of article 486(1) (a) of the FDRE criminal code. Further, the third charge incriminates the students of infringing article 487(b) of the FDRE Criminal Code which prohibits inciting ‘others to disobey orders issued by a lawful authority or to disobey laws or regulations duly promulgated’.⁶⁶ The allegation of the prosecutor here is that students carried a placard which says “the Government of Ethiopia Should Amend the Anti Terrorism Law” and “Dissent is not Terrorism”⁶⁷ with the intent of disobeying the law.

The criminal proceeding against the students is undergoing during the write up of the paper. Yet, few remarks could be made on the rationality of the charges brought against them in light of their right to freedom of assembly and other related constitutional rights. Accordingly, had their case been approached from the perspective of the right to freedom of assembly recognized by the constitution, none of the allegations made by the prosecution would hold water. To begin with,

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ Federal Democratic Republic of Ethiopia Criminal Code, 2004 art

⁶⁷ *Public Prosecutor v Sorresa Demme* (n61)

the first charge of violating the public demonstration proclamation for demonstrating without giving notice in a prohibited place, the proper question we should ask is whether the restriction provided by law is appropriate. Specifically, the issue would be if the law is reasonable to require notification for assemblies of few participants i.e. 20 in the case at hand posing no danger to public peace, order or free flow of traffic. The purpose of notification being the facilitation of assemblies, such requirement would be cumbersome to uphold seen from the perspective of the right to freedom of assembly. Blanket ban on demonstration before embassies without further qualification is unduly burdensome to demonstrators especially where their target audience is the officials in the premise of the embassy.

Regarding the second accusation against them which is inciting the public and spreading false rumors against the government, it also does not make much sense. As stated in various sections of this paper, content based limitation on participants exercising their right to freedom of assembly is only allowed if it is proved that they made an unequivocal call for war or hatred. Apart from such cases, demonstrator's right to criticize the actions or policies of the government is fully protected by their right to freedom of assembly and freedom of expression. The prime existence of such rights is for protecting such kind of views from unnecessary attack so long as they are expressed in a democratic and peaceful manner which seems to be the case. Further, none of the messages included in the placards they carried even remotely make call for violence or hatred. The sole claim for the prosecutor to charge is that what they are stating is false. For instance they are saying 'Ethiopia's democracy is pseudo'. By stating so they are expressing what they genuinely believe to be the case based on their observation.

The government may believe that it is exercising a genuine democracy and it might consider the statements of the students as false. But is it fair to criminalize expression on contestable issue

like democracy solely because they are false from the government's point of view? Is it not too cumbersome to demand citizens to keep quiet unless they are hundred percent sure that what they are saying is true from the government's point of view? Would this ever be possible be possible in constitutional democracy that upholds fundamental right? In my view this should not be the case. Citizens must be allowed to say what they genuinely believe without being required to prove it absolute veracity. Government may not agree with what they say but it should not criminalize them for saying so. Otherwise, recognizing freedom of assembly and expression would lose their meaning.

The third charge of the prosecution is even hard to swallow. It accuses of the students of inciting for non-observance of the anti- terrorism law by openly calling the government for its amendment.⁶⁸ One does not see the link between how the request for amendment of the law could be equated with a call for its disobedience. A number of important questions might ensue. Is it fair to criminalize citizens just for calling an amendment of a law on anti-terrorism? What is wrong with even asking for the amendment of the constitution or its replacement with another one so long as it is done in democratic and peaceful manner? In my view, the third charge of the prosecutor seems to fail even basic level of rationality. Overall, the outright criminalization of assemblies conducted in the absence of notification without risk of public order or peace in Ethiopia is troubling and inconsistent the interpretation of the human rights committee of freedom of assembly as envisaged in the ICCPR. Accordingly, it is time for Ethiopia to revisit its laws and practices on freedom of assembly to ensure conformity with its obligation under international human rights treaties such as the ICCPR.

⁶⁸ *ibid*

3.3. ‘Place, Time and Manner Restrictions’ on Assemblies in Ethiopia

The other cluster of limitation that is frustrating the exercise of the right to freedom of assembly is one connected with place, time and manner. Two forms of restrictions are envisaged in the proclamation concerning the venue of conducting assembly. The first is an outright or blanket restriction of undertaking demonstrations or political meetings within 100 meters distance of places identified as prohibited.⁶⁹ A long list of such venues is provided in the proclamation which includes embassies, international organizations, hospitals, grave yards, churches, mosques, prayer houses, electric power houses, dams and ‘unsuitable’ market places on market days *inter alia*.⁷⁰ Such kind of blanket venue restriction is not found in the Kenyan assembly law nor seen as adequate by the UN Special Rapporteur on the right to freedom of assembly.⁷¹ Further, no assembly could be conducted within 500 meter radius of detention centers, offices belonging to the military, or security personnel.⁷² One may need to go to the wilderness to conduct an assembly if these restrictions are to be applied strictly without any proportionality considerations.

Beside the automatic restriction of conducting an assembly in prohibited places, the proclamation also gives a wide range of power to municipalities to seek postponement of time or relocation of place by citing concerns of peace, security and of ensuring the continuation of people’s ‘daily life’ without any ‘disruption’ the daily life of the people.⁷³ The manner the provision is crafted by itself is tricky specially the Amharic version of the proclamation. On the one hand, it says the municipalities may recommend that it is preferable to undertake the

⁶⁹ Demonstration and Political meeting Proclamation(n5) art 7(1)

⁷⁰ *ibid*

⁷¹ Report of the special Rapportuer (n16) para.39

⁷² Demonstration and Political meeting Proclamation(n5) art 7(2)

⁷³ *ibid*, art 6(1)

assembly in another time or place as by stating their justifications.⁷⁴ Here, it is important to bear in mind the distinction between a decision and a recommendation the latter being non-binding. According to this interpretation organizers could disregard the suggestion of the administration as it lacks binding force.

On the other hand, the provision which talks about recommendation in the beginning, talks about decision in the end saying what the municipalities cannot do is banning the conducting of an assembly at any time or place.⁷⁵ A logical interpretation of the second part of the provision leads to the conclusion that, the city administration is at liberty to decide on postponement of time or changing of venue as often as it wants save for total prohibition of an assembly. The second line of interpretation seems to be the one agreeable to the municipalities of Ethiopia. What they frequently do is ask organizers to relocate place or postpone date of the assembly upon receipt of notification by raising several concerns.⁷⁶ If the decision is not accepted by the organizers they will refuse to endorse submitted notification which makes their planned assembly illegal. Practical cases which demonstrate this problem will be examined in the subsequent paragraphs of the paper.

Accordingly, the first case concerns an open sky demonstration organized by Semayawi Party (blue party) together with other opposition parties on November 25, 2014.⁷⁷ The organizers submitted their notification to Addis Ababa City Administration. However, it declined to allow the assembly to proceed by alleging shortage of ‘security force shortage as there are other

⁷⁴ *ibid* (Amharic version of the law)

⁷⁵ *ibid*

⁷⁶ Daniel Berhane, ‘Semayawi’s Foiled Rally: A Reminder of Ethiopia’s Deeper Problems’, <http://hornaffairs.com/en/2014/12/16/ethiopia-blue-party-democratic-deficit/> accessed on April 1, 2016

⁷⁷ *ibid*

scheduled events.’⁷⁸ It further advised the organizers to conduct an indoor assembly as an alternative. The organizers were not convinced with the justifications provided by the authorities after the expiry of the 12 hour period set by the law and proceeded with the assembly as planned.⁷⁹ Then, the city administration quickly broke the gathering by deploying police force immediately.⁸⁰ It also characterized the event as ‘anti-constitutional activity’.⁸¹

Undeterred with the response of the administration to the previous notice, the coalition of parties submitted another notification to conduct a 24 hour demonstration at Meskel square set to begin begins on December 8, 2014 and finishes on December 9, 2014 mid day.⁸² What makes this demonstration interesting was the day selected for its undertaking i.e. November 8 which coincides with nations and nationalities day celebrated nationally. Some contend that the organizers chose this date on purpose to irritate the current ruling regime of the country that reveres this day yet others say it accidental.⁸³ That aside, the city administration rejected to approve the notification as it did in the past. Its justification this time was ‘the increased traffic [in the square] due to ongoing construction activities.’⁸⁴ This was followed by a statement by the government on national TV that warns the organizer to refrain from conducting the assembly as planned. Nonetheless, they defied the decision of the city administration and proceeded with the gathering until the police put in to custody more than 75 participants including the leaders of

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*

different opposition parties.⁸⁵ They were later accused of ‘outrage against the constitution’ ‘rioting’ and ‘inciting terror and chaos.’⁸⁶

A recent controversy between the Ethiopian Federal Democratic Unity Forum (Medrek) which is a consortium of several opposition parties and the Addis Ababa city administration further illustrate the magnitude of the problem. What caused the dispute was the refusal of the city administration to approve notification submitted by the party for conducting demonstration on three separate occasions.⁸⁷ The party first notified the authorities of its intent to organize a peaceful procession on Sunday December 27, 2015. It also indicated the route that starts at a place called *Afencho Ber* passing through *Ras Mekonnen* Bridge, Churchill road and commencing at *tiglachen* statute or Ethio-Cuba Friendship Park. The purpose of the march was to condemn the killing of protestors in the Oromia regional state and pay tribute for the dead.⁸⁸ As we have noted time and again, the city administration refused to acknowledge the undertaking of the procession. Its justification for cancelling the procession was the presence of several higher learning and government institutions in the route chosen for the march, traffic congestion and the current situation of the country.⁸⁹ These grounds were not convincing for the leaders of the party and they characterized them as ‘irrelevant and petty.’⁹⁰ Nonetheless, the

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ Neamin Ashenafi, ‘Cancellation of Planned Demonstration annoys Medrek’

< <http://www.thereporterethiopia.com/content/cancellation-planned-demonstration-annoys-medrek>> accessed 1 April 2016

⁸⁸ *ibid*

⁸⁹ ‘Addis Ababa City Administration Turns Down MEDREK’s Request for Demonstration Permit’ <http://addisababaonline.com/addis-ababa-city-administration-turns-down-medreks-request-for-demonstrationpermit/?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=@aababaonline> accessed 1 April 2016

⁹⁰ Neamin Ashenafi (n79)

administration noted that it will give for approval demonstration that will be organized in another place ‘with no traffic congestion.’⁹¹

Accordingly, MEDREK presented another letter of notification to the city administration to conduct a procession on January 17, 2016. This time they have chosen another place as per the instruction of the administration but the objective of the march was the same as the one rejected earlier. The planned procession was set to start from Ginfle River and commences at a place usually called Yeka Epiphany celebration place.⁹² Yet again, the city administration rejected the undertaking of the procession as the time and place chosen by the organizer is not agreeable to it because of the upcoming epiphany holiday celebrated at the place chosen for demonstration. It further said that several international meetings including that of the African Union would be held in the same time and the timing of the procession is not convenient.⁹³ After hearing the response of the administration, the organizers noted that such decisions could only be explained by the absence of good faith on the part of the authorities and their unwillingness to allow them to exercise their constitutional right to freedom of assembly.

They particularly underscored the fact that the day chosen for procession in both cases was Sunday where there is no traffic congestion and the public institutions and schools are closed on that day.⁹⁴ Concerning the epiphany holiday, they said it was going to be celebrated three days after the planned demonstration and it is difficult to imagine how it could be a sufficient reason for banning the procession. The same is true for the said African Union meeting as it was due to

⁹¹ ‘Addis Ababa City Administration Turns Down MEDREK’s Request for Demonstration Permit’ <http://addisababaonline.com/addis-ababa-city-administration-turns-down-medreks-request-for-demonstrationpermit/?utm_source=twitterfeed&utm_medium=twitter&utm_campaign=@aababaonline> accessed on 1 April 2016

⁹² VoA Radio Amharic News 19 February 2016

⁹³ Neamin Ashenafi (n87)

⁹⁴ *ibid*

be held fifteen days after the planned date of procession.⁹⁵ Despite successive rejections, Medrek submitted another notification to conduct a peaceful gathering on Meskel square on Sunday February 14, 2016. According to the organizers, the administration kept quiet this time but they received a threat from the police and they had cancelled the gathering subsequently. They further noted their frustration with the decision of the administration noting that its existence as a political party would be meaningless without freedom of assembly. It particularly said ‘if we are prevented from all this then what instrument is left for us to remain politically active and visible as a political organization.’⁹⁶

The problems discussed in the preceding paragraphs raise will raise several issues the first being whether the authorities should have an unlimited power to postpone time or change the venue for a planned assembly. To address this issue, it is important to bear in mind that one component of the right to freedom of assembly is its entitlement of organizers to choose a place and time they think is appropriate for achieving their purpose unless there is an overriding concern. A corollary of such entitlement is that authorities cannot arbitrarily make time and place restrictions as they wish by mentioning insignificant concerns. On this issue, the UN Special Rapporteur and Venice commission of experts note that time and place restriction should take in to account the principle of proportionality which requires legitimate aim, suitability, necessity and weighing cost –benefit of restriction.⁹⁷ As such, decision to postpone the assembly to another time or place must be made at the end after due consideration of several factors only when it is not possible to address the concern by using other measure which is less restrictive.

⁹⁵ *ibid*

⁹⁶ *ibid*

⁹⁷ ‘Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association’, Maina Kiai, A/HRC/20/27 (2012) par.40, & OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) para.101

Further, they noted that organizers are not obliged to comply with the suggestion of the authorities regarding alternative place and time for conducting the assembly if it undermines the essence of the ‘essence’ of the gathering.⁹⁸ A good example in this regard could be the suggestion of the Addis Ababa city administration to semayawi party to conduct an indoor meeting in a hall instead of undertaking a demonstration in Meskel square. Such kind of alternatives will obviously erode the essence of the gathering since the purpose and effect of an open sky demonstration and a meeting in a closed hall cannot be equivalent. What is more, freedom of assembly includes the right of the assembly to take place within ‘sight and sound’ of its target object.⁹⁹ Hence, whenever the administration seeks to place time and place restriction including postponement or relocation, it must go through every step of proportionality scrutiny to ensure the legitimacy of the measure.

The same position is reflected in the jurisprudence of the UN Human Rights Committee. For the sake of further clarification, I will discuss the decision of the committee in *Denis Turchenyak v Belarus*.¹⁰⁰ In this case, the applicants sought the permission of Brest city administration for conducting a picket of 10 people for three days from 1 pm - 3 pm in an area reserved for pedestrians. The city administration rejected their application by citing a bylaw which designate ‘lokomotive stadium’ as the only place of undertaking a picket.¹⁰¹ Courts also affirmed the decision of the authorities as appropriate. This forced the applicants to approach the committee alleging the violation of their right to freedom of assembly. Their main contention was, the alternative place available for them is an ‘isolated location in a stadium that is surrounded by a concrete wall’ which detaches them from their targeted audience making their whole activity

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ *Denis Turchenyak v Belarus*, Human Rights Committee(Communication No. 1948/2010) 10 September 2013

¹⁰¹ *ibid*, para.2.4

futile.¹⁰² The committee endorsed their argument by reasoning that the place restriction of the authorities on the applicants is capricious and disproportionate since it was imposed without showing ‘how a picket held in the said location would necessarily jeopardize national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.’¹⁰³

This would take us to another related question, should there be a hierarchy among different uses of public spaces like streets, parks or squares? Is the utilization of public places for conducting gatherings of a secondary importance compared to other uses such as traffic, trade fairs or celebration of religious festivals? Addressing these issues is very crucial since the practice in Ethiopia seems to favor the use of public places for other purposes than for conducting demonstration and public political meetings. As we have discussed time and again, the Addis Ababa administration has repeatedly cancelled various notifications for conducting by raising concern of smooth flow of traffic or the occupation of these places by other activities such as trade exhibition of micro-enterprises and giving priority for the latter.¹⁰⁴

Such practice is contrary to the recommendation of the UN Special Rapporteur on the right to freedom of assembly and Venice committee of experts. Accordingly, both underscore the need to give equal value for utilization of public spaces for assemblies by stating that ‘the free flow of traffic should not automatically take precedence over freedom of peaceful assembly.’¹⁰⁵ The committee of experts further notes that ‘assemblies are as much a legitimate use of public space

¹⁰² *ibid*, para 3.1

¹⁰³ *ibid*, para. 7.5

¹⁰⁴ ‘Blue Party Demonstration Postponed to 22 September 2013’ (Amharic),

<<http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/>> accessed on March 31, 2016

¹⁰⁵ ‘Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association’, Maina Kiai, A/HRC/20/27 (2012) par.41, & OSCE/ODIHR, *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) par.3.2& 20

as commercial activity and the movement of vehicular and pedestrian traffic.’¹⁰⁶ As such, administrative officials must not consider assemblies having secondary importance which could be easily forfeited them whenever a competing use arises. Such approach would be an utter violation of the proportionality that must be observed whenever a freedom of assembly is restricted. Hence, the municipality is duty bound to come up with a mechanism to reconcile various uses instead of always choosing to sacrifice the undertaking of assemblies for the sake of other uses. For instance, concerns of traffic flow could easily be addressed by ‘rerouting pedestrian and vehicular traffic in a certain area.’¹⁰⁷

It is also important to bear in mind that, any restriction imposed on freedom of assembly should be in line with ideals of democracy as enshrined in the ICCPR and Constitution of Kenya.¹⁰⁸ The hallmark of a democratic society is its tolerance of minor inconveniences and its ability to accommodate various legitimate interests without imposing unnecessary burden on some for the sake of others. As such, authorities regulating freedom of assembly need to appreciate that ‘in a democratic society, the urban space is not only an area for circulation, but also for participation.’¹⁰⁹ If this is the case, provision of the Ethiopian assembly law that gives municipalities the power to restrict assemblies as they wish on account of preventing ‘disruption of ordinary life of the people’¹¹⁰ must be qualified as it is inherently disproportionate. This is because it is impossible to imagine how it would be possible to conduct gathering free from any inconvenience to the public in some way. The consideration must rather be whether such nuisance is bearable in a democratic society founded on respect for fundamental freedoms. Thus,

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ Constitution of Kenya, 2010 art 37& International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) (hereinafter ICCPR) art 21

¹⁰⁹ Report of the Special Rapportuer (n16) para.41

¹¹⁰ Demonstration and Political Meeting Proclamation(n5) art 6(1)

unless the participants of the assembly resort to violence ‘it is important for public authorities to show a certain degree of tolerance towards peaceful gatherings.’¹¹¹

This would take us to another related issue which is the manner restriction on freedom of assembly. It is noted throughout the paper that peacefulness constitutes a definitional of the right to freedom of assembly that bestow the right a protected status. So it is only logical if authorities take measure against assemblies that are imminent threat to peace and security. It is also acceptable if the law regulating assembly ban gatherings that incite racial hatred or discrimination on illegitimate grounds which undermine the right of other as stipulated in Ethiopian assembly law.¹¹² Yet, manner restrictions imposed by administrative officials need to be subjected to proportionality test to avoid unnecessary limitations. A good example could be the practice of Ethiopian municipalities that seek organizers to secure the peacefulness of assembly in advance as a pre-condition for allowing the gathering to proceed.¹¹³ Such restriction is too cumbersome on organizers. According to the UN Special Rapportuer on freedom of assembly, what organizers need to demonstrate is their intention to conduct the assembly in a peaceful manner.¹¹⁴ Hence, asking them to guarantee the peacefulness in advance does not also make much sense because it is the state that has the primary duty as well as power to do so. If any duty is to be imposed on organizers it should be that of assisting state security officers in ensuring the smooth running of the assembly.

The state positive obligation of facilitating assemblies to ensure its peaceful completion is particularly relevant for Ethiopia. This is because; most demonstrations are dispersed by the

¹¹¹ Case of Balçık and Others v. Turkey ECHR (Application No. 25/02) 29 November 2007 para. 52

¹¹² Demonstration and Political Meeting Proclamation(n5) art 8(1)

¹¹³ ‘Blue Party Demonstration Postponed to 22 September 2013’ (Amharic),
<<http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/>> accessed 31 March 2016

¹¹⁴ Report of the special rapportuer (n16) para.25-26

police citing incidence of violence.¹¹⁵ Often, few individuals participating in the demonstration will start throwing stones or provoke the crowd to take violent action. It is difficult to know whether these people are sent by the state itself or not. The usual approach of security personnel is to disperse the assembly immediately irrespective of the magnitude of violence.¹¹⁶ Such kind of blanket dispersion violates the principle of proportionality. Hence, instead of dispersing the whole assembly, security personnel should react by singling out provocateurs or disturbers as recommended by the Special Rapporteur and Venice committee of experts.¹¹⁷ Such measures will help peaceful participants of the assembly to proceed with their demonstration until the very end.

3.4. Public Peace, Public Safety and Public Order Restrictions

As we have discussed in chapter two of this paper, these grounds are considered legitimate for limiting the right to freedom of assembly in all jurisdictions chosen for this study. However, the application of the each of these ground needs to be scrutinized properly to prevent their unjustified restrictions on peaceful gatherings. Yet, so far the involvement of Ethiopian courts in this task is not yet visible compared to their Kenyan counterparts. The latter courts are becoming active in discharging their constitutional duty ‘to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights’,¹¹⁸ including the right to freedom of assembly. Two cases pertaining to freedom of assembly demonstrate how Kenyan courts are utilizing the proportionality test incorporated in

¹¹⁵ Aaron Maasho ‘Ethiopian Police Tear-Gas Crowds Protesting Against Libya Killings’ <<http://www.reuters.com/article/2015/04/22/us-mideast-crisis-islamicstate-ethiopia-idUSKBN0ND0QW20150422>> <<http://www.reuters.com/video/2015/04/22/ethiopian-police-tear-gas-crowds-protest?videoId=363951067&mod=related&channelName=worldNews>> accessed on April 1, 2016

¹¹⁶ *ibid*

¹¹⁷ Report of the Special Rapporteur (n16) para.33

¹¹⁸ Constitution of Kenya, 2010 art 23(1)

the constitution for reviewing restriction imposed by the assembly be it by the legislative or the executive organ.

The first is the case between *Eugene Wamalwa v. Minister for State for Internal Security*.¹¹⁹ In this case, the applicant Mr. Wamalwa was an elect of the Kenyan national assembly from the Saboti constituency who is also interested in running for presidency in the 2012 presidential election. Accordingly, he chose 'Kamukinji Grounds' as a place to officially begin his election campaign.¹²⁰ Subsequently, as per the requirement of the Kenyan Public Order Act, he submitted a notice of intent of organizing such event on 'Kamukunji grounds' on January 29, 2011 from 10 am-6pm.¹²¹ He further sought the cooperation of the security personnel to ensure the peaceful undertaking of the political meeting. In the mean time, the applicant continued to make other necessary arrangements such as advertisement and preparation of posters by spending around 1 million Kenyan shillings.

The response of the authorities came fifteen days after submission of the notice and four days before the undertaking of the planned event. Their decision was to ban the planned political meeting by expressing their fear that 'members of an unlawful group known as "the Mungiki"' may attend the meeting and disrupt public order in Nairobi.'¹²² They further noted that allowing the political meeting to proceed will also endanger 'the rights and fundamental freedoms of others'.¹²³ Hence, the planned gathering is cancelled.

Upset with the verdict of the police, the applicant approached the High Court at Nairobi alleging the violation of his right to freedom of assembly enshrined under article 37 of the Kenyan constitution. Before it proceeds to resolving the dispute, the court underscored the fact that the

¹¹⁹ *Eugene Wamalwa v Minister for State for Internal Security & Another* [2011] eKLR

¹²⁰ *ibid*

¹²¹ *ibid*

¹²² *ibid*

¹²³ *ibid*

right to freedom of assembly could not be restricted in the absence of proportionality considerations laid down in article 24 of the Kenyan supreme law.¹²⁴ More importantly, the court said ‘state should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons.’¹²⁵ It further suggested that if people are denied their right to assemble peacefully and express their view, they might be pushed to resort to other violent means.¹²⁶ Then it held that the reason provided by the state for cancelling the gathering were not convincing and sufficient. This is because the alleged threat by said the organized group is something which is within the capacity of the state to be averted. The court further stated that the cancellation of the assembly on ground of security ‘is tantamount to admitting that the State is incapable of dealing with members of outlawed groups or sects, which is not the case.’¹²⁷ From this, decision we can see that the court made an en exalting scrutiny to determine whether the ground mentioned by the authorities for restricting freedom of assembly is proportional or not. It particularly shows the failure of states to meet necessity element since the security issue could be addressed by less restrictive means than cancelling the assembly totally which causes significant impairment to the right.

The second case involves *Randu Nzai Ruwa & 2 Others v. Internal Security Minister*.¹²⁸ These applicants were members of Mombasa Republican Council which was declared by the Kenyan government as a criminal organization in accordance with the law regulation organized crime.¹²⁹ The justification provided by the government for taking the measure was that, the council is not registered as an association and it propagates a secessionist agenda which is contrary to the

¹²⁴ *ibid*

¹²⁵ *ibid*

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ *Randu Nzai Ruwa & 2 others v Internal Security Minister & another* [2012] eKLR

¹²⁹ *ibid*

Kenyan constitution which proclaim Kenya as ‘one indivisible sovereign state.’¹³⁰ The application challenges the decision of the Kenyan government to dissolve the association as incompatible with their right to freedom of association and assembly recognized under the Kenyan constitution.

Before giving the verdict, the court noted that the right to freedom of association and assembly are indispensable tools for exercising all political rights.¹³¹ Then, they went on to determine whether these rights are violated or not. The court noted that measure of outlawing the association clearly infringes the right to freedom of assembly and association.¹³² However, since these rights are not absolute the court went further to assess whether the infringement was justified and reasonable. To arrive at the conclusion the court referred to the limitation clause of the constitution which says that any restriction must be ‘reasonable and justifiable in an open and democratic society.’¹³³ It further underscored the fact that ‘democracy is meaningless without tolerance.’¹³⁴ Here, the court was expressing the importance of having tolerance towards hearing different viewpoints including secession, no matter how much the majority disagrees with them.

Then, the court said advocating a secessionist agenda is not in and itself a threat to public security or peace so long as the advocates want to achieve their end through peaceful and democratic means.¹³⁵ Further, since secession is not entertained under the current constitutional framework, executing such idea needs constitutional amendment which has to follow the necessary procedure.¹³⁶ Yet, promoting such idea alone does is not a sufficient reason to

¹³⁰ Constitution of Kenya, 2010 preamble

¹³¹ *ibid*

¹³² *ibid*

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ *ibid*

eliminate the association. Hence, the measure taken by the Kenyan government violates the principle of proportionality since it chose the most restrictive method of dealing with the problem which is a total ban.¹³⁷ Instead of such measures, the court suggested for controlling the activities of the organization through appropriate registration or imposition of criminal liability of members of the association who engage in violence as less restrictive means of preventing the feared risk to national security.¹³⁸ This decision is very instructive for countries like Ethiopia which take serious measures against political organizations having a different stance on matters stipulated in the present constitution. As long as they utilize peaceful means and abide by rules of democracy, any individual or association should be allowed to assemble and express ideas which are not favored by the current constitutional framework. The public must be left to decide whether these ideas are beneficial or not without unnecessary involvement of the government.

3.5. Decision Making Procedure

Most of the problems associated with the notification of assemblies in Ethiopia and restrictions related to place, time and manner could easily be resolved had the existing implementing law on freedom of assembly provided for a clear, transparent and inclusive procedure of decision making. Conversely, the proclamation governing public demonstration and political meetings rather makes the municipalities or authorities sole decision makers in the process without the need to involve organizers.¹³⁹ Hence, organizers are not allowed to have a say in the decision making process pertaining to assemblies or restrictions imposed upon them as of right. What the law entitles them is just to get reasoned decision within the time prescribed by law.¹⁴⁰ This

¹³⁷ *ibid*

¹³⁸ *ibid*

¹³⁹ Demonstration and Political Meeting Proclamation(n5) art 6(2)

¹⁴⁰ *ibid*

would make the decision unfair from procedural point of view since it is made without adequate hearing.

Such kind of practice and procedure is also regarded as inappropriate by the Venice committee of experts. Accordingly, they underscore the importance of ensuring ‘that the decision-making and review process is fair and transparent.’¹⁴¹ In addition, they contend that the right to freedom of assembly bestow upon the organizers the ‘full rights to participate in any hearings that take place which are required if any limitations or a prohibition are being proposed.’¹⁴² Hence, any decision rendered without involving the organizers of the gathering is in itself a violation of the right to freedom of assembly. The committee of expert has also given an illustration of what constitutes an adequate participation in decisions having limiting implication for assemblies. These include the right of organizers to be represented by a lawyer in the decision making process and to adduced any evidence that support their claim be it an oral testimony or documentary evidence.¹⁴³ In my view, these entitlements are very crucial to ensure the decision making proceedings applicable to assemblies since they ensure the fairness of the process and enhance the possibility of making the right decision. Hence, Ethiopia should consider incorporating these procedures in its law regulating assemblies.

3.6. Judicial or Administrative Review

Another big lacuna in the Ethiopian law of assemblies is the absence of any administrative or judicial mechanism that reviews the decision of authorities imposing imitations on peaceful demonstrations or political meetings. As far as the proclamation is concerned, the decision of the

¹⁴¹ OSCE/ODHIR, Opinion on the Draft Law on Meetings, Rallies and Manifestations of Bulgaria, Opinion no. 532 / 2009 (5 June 2009), s39

¹⁴² OSCE/ODHIR, Interim Joint Opinion on the Draft Law on Assemblies of the Republic of Armenia by the Venice Commission and OSCE/ODIHR, Opinion no. 596/2010 (22 December 2010) ss56-57

¹⁴³ *ibid*

municipalities on accepted notifications or related limitations thereof is final. This is very dangerous because it gives lots of discretionary power for authorities to restrict freedom of assembly for whatever reason they think is appropriate since there is no mechanism to hold them accountable. What is striking here is that, despite numerous problems and denial of notifications for assemblies in Ethiopia discussed in the preceding paragraphs, no single application for the review of such decisions is submitted to courts. The extent that organizers have gone so far is to threaten authorities with statements that they will challenge their decisions in a court of law without actually doing so.¹⁴⁴ They have also made few attempts to seek review of such decisions by higher official of the city administration in an informal manner.¹⁴⁵

There are also other complex issues concerning the role of courts in the interpretation of constitutional rights in Ethiopia including the right to freedom of assembly. On the one hand, the constitution obliges courts at federal and state level ‘to respect and enforce’ fundamental rights and freedoms enshrined in the constitution.¹⁴⁶ On the other hand, the constitution reserves the power of interpreting the ‘constitutional disputes’ to the House of Federation which represents the nation, and nationalities of Ethiopia.¹⁴⁷ This stipulation has been misconceived by members of the judiciary as precluding courts from entertaining any claim that is principally based on the constitution.¹⁴⁸ Hence, judges subscribing to this view have opted to send every case that invokes the constitution as its primary legal basis.¹⁴⁹

¹⁴⁴ Blue party Demonstration Postponed to 22 September 2013’ (Amharic), <http://hornaffairs.com/am/2013/09/05/ethiopia-blue-party-statement-demonstration/> accessed 31 March 2016

¹⁴⁵ *ibid*

¹⁴⁶ Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Federal Negarit Gazeta, Year 1, No. 1 (hereinafter FDRE Constitution), art 13(1)

¹⁴⁷ *ibid*, art 83

¹⁴⁸ Takele Soboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory,’ (2011) 19 African Journal of International and Comparative Law vol.1 (2011) 107-110

¹⁴⁹ *ibid*

Such line of argument is strongly criticized by some scholars whom the author concurs with. For instance, Takele argues that it is a ‘literal’ and extended interpretation of the term ‘constitutional dispute’ that led to an absurd scenario where courts have a little say in entertaining cases of constitutional importance.¹⁵⁰ Hence, the right approach he says is to appreciate the constitution is to interpret it in a harmonious manner by avoiding contradictions between various provisions of the constitution in a manner that gives effect for all. Accordingly, he argues for a restrictive understanding of ‘constitutional disputes’ which fall under the jurisdiction of the House of Federation.¹⁵¹ Such a dispute arises only when the judge in whose bench a constitutional case appeared, faced with two or more constitutionally sound interpretations of a certain constitutional clause or article then he/she must refer the case to the House of federation for decision.¹⁵²

Here we need to understand two things. First, not every dispute or controversy raised by the parties over the meaning of a constitutional provision or clause in concrete cases will automatically deprive the court its mandate to entertain the case. If the judges could easily resolve the difference in understanding by undertaking a coherent scrutiny of the constitution, then there is no constitutional controversy and the case ends there. The remedy for the parties will be appeal. Second, a constitutional case reaches the level of constitutional dispute only when after due consideration of several factors the judges is of the opinion that there are more than one equally appealing interpretations of the constitutions which are in line with the spirit, then that case is a real constitutional controversy and it fall under the realm of the House of Federation.¹⁵³

¹⁵⁰ ibid

¹⁵¹ ibid

¹⁵² ibid

¹⁵³ ibid

This way of interpretation is in line with the duty of the court stipulated under the constitution to ensure the observance and enforcement of human rights recognized by it including the right to freedom of assembly. It would also make the provision of the constitution that provides all people ‘the right to bring justiciable matters to court of law’ meaningful.¹⁵⁴ Hence, decisions restricting freedom of assembly being a justiciable matter that could be resolved by courts by examining national and international standards as the constitution commands courts to interpret the human rights provision of the constitution in handling concrete cases before them. Further, the duty of the judiciary to enforce human rights recognized by the constitution should include an obligation on their part to explicate the content of the right to freedom of assembly by referring to treaties ratified by Ethiopia. Such duty should also be extended to determining the appropriateness of restrictions imposed on the right to freedom of assembly by authorities in Ethiopia in light of constitutional and international standards. In the absence of such court the courts cannot claim to be guardians of fundamental rights enshrined in the constitution.

The proclamation establishing federal courts in Ethiopia also recognize the power of courts to enforce fundamental rights incorporated in the constitution since it gives them a material jurisdiction to entertain any case ‘that arising from the constitution or federal law’.¹⁵⁵ Hence, a person claiming the violation of his right to freedom of assembly by arbitrary decision of municipalities could rightly approach courts as his claim is founded on the constitution. They also have a duty to hear and decide cases. The tricky part of the proclamation is the part saying ‘cases arising from the federal law’. This is a little problematic because the current legal regime applicable for regulation of assemblies is one that is adopted during the transitional period and

¹⁵⁴ FDRE Constitution (n146) art 37

¹⁵⁵ Federal Courts Proclamation No. 25/1996 2nd year No. 13 Federal Negarit Gazzeta Addis Ababa - 15th February, 1996 art 3(1)

before the adoption of the present constitution and the federal structure. However, considering its application at the national level we can regard it as federal law and say that federal courts or regional courts by way of delegation have the right to entertain cases pertaining to the right to freedom of assembly.

The next question would be which kind of courts i.e. administrative or ordinary courts should resolve assembly related cases. On this issue, the practice of other countries show that some have chosen the former and others the latter as mentioned by the study of the UN Special Rapportuer and Venice committee experts.¹⁵⁶ What is important for both bodies is having an opportunity to ‘appeal before an independent and impartial court, which should take a decision promptly’.¹⁵⁷ It is also important to clearly state this right in the law regulating freedom of assembly. Hence, should fill the lacuna in its assembly law by clearly incorporating the right to appeal of organizers of an assembly against any decision they thing is an arbitrary restriction of the right to freedom of assembly. The nature of the remedy could be an injunction order or a monetary compensation if civil damage is sustained. Besides, national human rights institutions such as the Ethiopian Human Rights Commission and the Ethiopian Institution of Ombudsman should also provide an additional oversight over discretionary administrative decisions pertaining to the right to freedom of assembly. As they also have the obligation to ensure protect the violation of the right to freedom of assembly by authorities.

¹⁵⁶ ‘Report of the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association’ , Maina Kiai, A/HRC/20/27 (2012) para.42 & OSCE/ODIHR , *Venice Commission Guidelines on Freedom of Assembly*, (2ed Venice, 2010) para.66

¹⁵⁷ *ibid*

3.7. Use of Force

Peacefulness is an indispensable component of a protected assembly which requires cooperation between of persons attending the gathering and security personnel whose obligation is to ensure the smooth undertaking of the assembly and prevent violence. Yet, some participants of peaceful gatherings might engage in acts of violence or demonstrate disruptive conduct. The technique that police uses to handle such participants could exacerbate the violence further or assist in bringing the disruption under control easily.¹⁵⁸ As such, the most recommended handling of assemblies is called ‘negotiated management’.¹⁵⁹ It requires the police to sit in with organizers of the gathering prior to the undertaking the assemblies and plan on how to effectively handle security risks. This is primarily achieved by gathering necessary information regarding potential threats which might disturb the assembly in advance and make the necessary preparation to ensure the smooth completion of the gathering. The only criticism of this approach is that in the name of negotiating it may give the police the chance to influence the content of the message conveyed by the assembly.¹⁶⁰ Yet, the benefit of this approach outweighs its limitations if it is exercised in good faith.

Unfortunately, the usual way the Ethiopian police handles disruptive assemblies stands in stark contrast with the approach of negotiated management which shows greater degree of tolerance towards demonstrators. The technique often utilized by the Ethiopian police is what is known as ‘escalated forces’.¹⁶¹ It involves the heavy utilization of ‘arrest, beatings, tear gas, bullets and other’¹⁶² mechanisms in a disproportionate manner. To illustrate this point, one could mention the

¹⁵⁸ Clifford Stott *et al*, ‘Advance in Liaison Based Public Order Policing in England: Human Rights and Negotiating the Management of Protest?’ (2013) 7 Policing 2, 213

¹⁵⁹ *ibid*

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

¹⁶² *ibid*

protests undertaken following the 2005 Ethiopian general election¹⁶³, and the various protests recently held in several areas of the Oromia regional state¹⁶⁴ could be mentioned as example. The first protest was triggered by the announcement of the election result which proclaims the ruling party Ethiopian people Revolutionary Democratic front (EPRDF) as the winner of the 2005 general election. Supporters of the opposition ruling parties accused the ruling party of ‘rigging votes’ and went to the streets in the capital and other parts of Ethiopia which culminated with the death of 193 people and 6 police officers.¹⁶⁵ The government argues the number of dead is 65 including 5 security personnel.¹⁶⁶ In connection with the protest, the late prime minister Meles Zenawi said that ‘we regret the death but it was not a normal demonstration’.¹⁶⁷ He further noted ‘understandable that police had panicked when facing protesters with hand grenades and guns’¹⁶⁸ which seems an attempt to justify the measure.

Subsequently the federal parliament established a commission of inquiry to investigate whether the force used by security personnel to control the protest was proportional.¹⁶⁹ The commission presented its report to the parliament and it concluded that ‘government had not used excessive force.’¹⁷⁰ However, the statement of chairman and deputy chair of the commission, who fled the country before the commission submits its final report, cast a significant shadow of doubt on the credibility of the ultimate finding. According to them, the commission of inquiry had decided

¹⁶³ Ethiopia PM Regrets Protest Dead <<http://news.bbc.co.uk/2/hi/africa/4413128.stm>> ‘Ethiopian Protesters ‘massacred’” <http://news.bbc.co.uk/2/hi/africa/6064638.stm> accessed 1 April 2016

¹⁶⁴ UN Experts Urge Ethiopia to Halt Violent Crackdown on Oromia Protesters, Ensure Accountability for Abuses <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16977&LangID=#sthash.veMqExX4.dpuf> >accessed 1 April 2016

¹⁶⁵ Ethiopia PM Regrets Protest Dead <<http://news.bbc.co.uk/2/hi/africa/4413128.stm>> ‘Ethiopian protesters ‘massacred’” <http://news.bbc.co.uk/2/hi/africa/6064638.stm> accessed 1 April 2016

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ *ibid*

¹⁶⁹ *ibid*

¹⁷⁰ Exiled Inquiry Commission officials Brief U.S. Congress Ethiopia in turmoil after May 2005 elections Ethiomedia November 18, 2006

< http://www.ethiomedia.com/addfile/ethiopian_inquiry_commission_briefs_congress.html> accessed April 1, 2016

against the government initially and found that ‘excessive force’ is used against the protestors with a majority vote of 8-2.¹⁷¹ They also failed to find a single protestor carrying a gun or bomb as claimed by the government officials.¹⁷² As a result, they received advice and threat from the government to modify the report which forced them to leave the country with all the evidence they collected.¹⁷³ Hence, they argue that the allegedly ‘final’ report of the commission is totally different from the initial one and totally orchestrated by the involvement of the government. Confirming which version of the story is true requires an in-depth study. Yet, one can see that the use of force by police and military against protestors was a serious point of contention.

The second example which illustrates the issue of use of force in regulating assemblies is the protests held in various places of the Oromia regional state of Ethiopia. It began in November 2015 opposing the ‘Addis Ababa Integrated Development Master Plan’ which was seen as a plan to expand the territory of the capital city into Oromia regional state by expelling the farmers from their lands and source of livelihood.¹⁷⁴ Some claim that the number of people who have been killed during these protests reaches 140 by January 2016.¹⁷⁵ The Ethiopian government has not yet officially announced how many people died in the protests so far. It rather opted to state that the matter is under investigation by the Ethiopian human rights commission and it will be released soon. Nonetheless, human rights organizations such as the Human Rights Watch noted that ‘security forces, including military personnel, have fatally shot scores of demonstrators.’¹⁷⁶ It has further accused the Ethiopian government of ‘excessive use of force by the security forces’

¹⁷¹ *ibid*

¹⁷² *ibid*

¹⁷³ *ibid*

¹⁷⁴ *ibid*

¹⁷⁵ *ibid*

¹⁷⁶ *ibid*

by noting that the protests by and large were peaceful.¹⁷⁷ Conversely, the government spokes person Getachew Reda noted that what caused such reaction is ‘an organized and armed terrorist force aiming to create havoc and chaos has begun murdering model farmers, public leaders and other ethnic groups residing in the region.’¹⁷⁸ The controversy between the government and the protesters is something which must be investigated by a genuinely independent organ following internationally set standards. The important issue for our purpose is what should be the appropriate use of force by security personnel in dealing with assemblies.

On this matter, the UN Special Rapportuer on the right to freedom of assembly has made reference to the jurisprudence of the Inter-American court on human rights which demands state to ensure that ‘members of its armed forces and its security bodies will use only those means that are indispensable to control such situations in a rational and proportional manner, and respecting the rights to life and to humane treatment.’¹⁷⁹

Concerning the type of weapon that should be utilized by security personnel, the recommended standard is that ‘the only circumstances warranting the use of firearms, including during demonstrations, is the imminent threat of death or serious injury.’¹⁸⁰ Hence, security forces should not start firing whenever they see some degree of violence in undergoing protest. They are rather expected to show more tolerance towards the demonstrators by considering the immense importance of the right to freedom of assembly and other fundamental rights. As such, what they should do primarily is to facilitate the peacefulness of the assembly by picking out those who are utilizing violent means by using the least effective force possible.¹⁸¹ Implementing

¹⁷⁷ ‘Human Right watch, ‘Ethiopia Use Lethal Force Against Protestors’

<<https://www.hrw.org/news/2015/12/18/ethiopia-lethal-force-against-protesters>> accessed 1 April 2016

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ Report of the Special Rapportuer (n16) para.35

¹⁸¹ *ibid*

negotiated management strategy could be very handy to accomplish this task. This would make the measure legitimate, suitable, less intrusive and proportional. However, if their life or body is subjected to a serious danger that is about to happen, the use of more force on their part would be tolerated so long as it meets all the tests of proportionality.

Conclusion

The comparative study undertaken in this paper has identified various factors that contributed to the poor state of realization of the right to freedom of assembly in Ethiopia. Among them, three are critical. First, at the constitutional level the absence of an explicit and full-fledged proportionality requirement in the FDRE constitution for assessing the acceptability of limitations on freedom of assembly is noted as a problem. This quagmire could not be fully addressed by pointing to the provision of the constitution which demands the interpretation of human rights incorporated in to accordance with international treaties. The reason for this is that, the reference there is too generic and proportionality is not immediately evident. This will make the task of enforcement and application unrealistic given the bad track record of the country in democracy, rule of law and human rights protection. Hence, there is a good reason to be skeptical about this approach. Instead, an explicit incorporation of proportionality in the constitution like Kenya is a better approach for protecting freedom of assembly rather than merely relying on international treaties as an interpretive guide.

Second, at the sub-constitutional level the existing Ethiopian legislation governing assemblies contains so many lacunas. Particularly, its provisions regulating the notification procedure for assemblies and the decision making process are deeply flawed giving too much discretionary power for authorities to do whatever they want. The non-existence of a provision that guarantee the accountability of the authorities through judicial and administrative review has further made the right to freedom of assembly defenseless and authorities unaccountable. Thus, an Ethiopian assembly law that meets the test of proportionality must be enacted without delay to fill significant gaps in the existing law and to make it compatible with international standards set by the UN Special Rapporteur on freedom of assembly and association, UN Human Rights

Committee and the Venice commission of experts. However, it is important to bear in mind that adopting adequate legislation applicable for freedom of assembly is not a panacea for all problems associated with the realization of the right in Ethiopia. It is rather a starting point for the process.

Third, at the institutional level Ethiopian Courts and national human Rights institutions such as the Ethiopian Human Rights Commission and Office of the Ombudsman are so far passive bystanders when the right to freedom of assembly is restricted arbitrarily. As noted above, no ideal law on freedom of assembly would bring a better protection for the right in the absence of strong and democratic institutions like courts which take rights and fundamental freedoms seriously and stand in their defense from a capricious limitation. Even in cases where the implementing law has some deficiencies, democratic institutions could adequately safeguard freedom of assembly from arbitrary encroachment by construing the constitution in manner that is friendly to the right as it is happening in Kenya. This requires in turn the political will and genuine commitment of those in power to democracy, rule of law and respect for human rights. To sum up, better constitutional guarantees, adequate implementing legislations and guardianship of constitutional rights by strong democratic institutions is necessary to reclaim the right to freedom of assembly in Ethiopia. If any of these elements is missing freedom of assembly in Ethiopia will remain an illusion. Further, addressing these three issues in a proper manner will also contribute to improve the realization of the right to freedom of assembly in other countries with short history democratic culture, respect for fundamental freedoms and rule of law.

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