Judiciary and Public Interest Litigation in Protecting the Right of Assembly in Kenya

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Introduction

Despite it being one of the earliest universally acclaimed rights, the exercise of freedom of assembly continues to face daunting challenges in many parts of the world. As a trend sets in for populist and extremist illiberal regimes (Rodrick and Mukand 2015; MacDowall 2014),[34] freedom of assembly becomes highly sacrosanct as a facilitator of other civil and political rights, especially those of expression and association.

Kenya, since promulgation of its transformative and rights-based 2010 Constitution, has struggled significantly with its implementation. One of those contests is in the implementation of the freedom of assembly. Not strange given that Kenya's history before the passage of the 2010 Constitution was characterised by serious incidents of repression, including criminalisation of public gatherings particularly by those perceived as opponents of the government. The 2010 Constitution marked the liberalisation of rights in Kenya, including those relating to assembly. First was the provision on an expanded freedom of assembly that also expressly provided for the right to demonstrate, picket and present petitions to public authorities. Second was the requirement that the right could not be limited, except under a set out and strenuous constitutional criteria (Constitution of Kenya 2010: Article 24). Regardless, the State has continued to stifle the freedom of assembly, with the police and other State security agencies occasionally disrupting assemblies, sometimes in a violent manner, more so where such assemblies are convened to express dissatisfaction with the political regime in power.

However, unlike under the periods governed by 1963 and 1969 constitutions, Kenyans have, since the coming into force of the 2010 Constitution, used Public Interest Litigation (PIL) as a means of enforcing their right to freedom of assembly. The strategy of using PIL to vindicate the right to assemble has significantly succeeded because of the relative independence of Kenya's Judiciary. This Chapter looks at the role that the Judiciary and PIL have played in promoting and protecting the freedom of assembly, demonstration as well as the right to picket and present petitions to public authorities.

First, the chapter looks at what PIL is and draws its historical development including in England, USA, India and South Africa, demonstrating the potency of PIL in protecting and promoting rights. Second, it looks at a number of PIL cases brought in Kenyan courts in relation to Article 37 rights and demonstrates that the Judiciary has been keen at protecting the right to assembly. Moreover, the case law discussed shows that, more often than

34 *See also an earlier prophetic piece by Fareed Zakaria, "The Rise of Illiberal Democracy," Foreign Affairs, 76, November–December 1997: 22–43.*

not, Kenyan courts take a fairly progressive view in the protection of the rights, including imposing obligations on police to ensure that, even for assemblies that may turn violent, they act to facilitate rights of those peacefully gathering. However, it is observed that courts need to do more to develop further nuanced jurisprudence on Article 37 especially given the complexity of the context under which the rights therein are to be protected.

The chapter concludes by noting that, despite the relatively progressive jurisprudence from Kenyan courts, the police seem incorrigible in adapting to the use of best global practices of facilitating the right to assemble, demonstrate, picket and present petitions to public authorities.

What is Public Interest Litigation?

Definitions of public interest litigation (PIL) are fairly diverse and most times rarely helpful. The diversity of definition is occasioned by varying jurisdictional practices, rules of standing as well as socio-political and economic issues of priority that each jurisdiction tends to focus on. It is also as a result of use of different, often interchangeable phrases, to describe what PIL is, such as social impact litigation, strategic litigation and even more precisely strategic human right litigation (Reventlow 2018).

Regardless, PIL can be broadly defined as litigation which focuses on issues of importance to the public at large (KPTJ et al 2015: 1), or for a major section of the public and whose outcome is likely to impact not only the individual litigant but a larger section of the society. One way of understanding PIL is by looking at the factors of the case such as the nature of the issues, the reason why the case is being initiated and the possible impact the case might have (Duffy 2018: 3).[35] These become the parameters of labeling a case as PIL (Martin 200).[36]

There is ubiquitous literature that credits the USA for inventing PIL. The case of Brown v. Board of Education [1954], 347 US 483 is often cited as the first PIL case. The import of the case in regard to PIL has been aptly captured:

It is the classic model of public litigation: no private injury was asserted, no dollars in redress were sought, no individual person was prosecuted as a wrongdoer, and no past focus limited the remedy or the role of the Court (LaFrance 1988: 336).

However, there is subliminal evidence that PIL was practiced as early as the 18th century when it was used to expose the malaise of slavery in England (Harlow and Rawlings 1992).

Traditionally, the law in many jurisdictions around the world discouraged PIL, especially cases brought by those not directly affected by an issue. For example, Joe Oloka-Onyango argues that because of the historical private law conceptual nature of access to courts,

35 *Helen Duffy interrogates what makes strategic litigation including whether it is the goals pursued, or the way the litigation is conducted or the difference that the litigation makes in practice.*

36 *For example, the Public Interest Law Clearing House in Victoria and the Public Interest Law Clearing House Inc in New South Wales in Australia use certain quantitative and qualitative criteria to determine which cases to support: "The matter must require a legal remedy and be of public interest, which means it must; a) affect a significant number of people not just the individual or; b) raise matters of broad public concern or; c) impact on disadvantaged or marginalized group, and d) it must be a legal matter which requires addressing pro bono publico ('for the common good').*

common law was inimical to litigation being anchored in public interest (Oloka-Onyango, 2017: 26-34). Initially, it was not any different at the supranational level (Duffy 2018:13). However, there have been changes in many countries, in rules of standing, costs, remedies and in other respects that have made PIL more useful as a tool of social change.

Many jurisdictions in the world have now adopted PIL in one form or another. These jurisdictions have done so by expanding the rule of standing, which historically made it difficult for individuals and groups to litigate public interest cases.[37] Some are also encouraging PIL by eliminating costs[38] or minimising the possibility that those who bring the matter will be punished with costs if they are successful.[39] Yet, other jurisdictions have become even more liberal by allowing litigation to be initiated through informal means, such as writing a letter to the court or orally complaining of systemic violations to judicial officers. This is mostly the experience in India, undoubtedly the leading jurisdiction in expanding the scope and extent of PIL.[40] This has been possible because of a combination of factors, including judicial activism, relaxed rules of standing[41] and the growth of a civic engaged population (Narayana 2007). Similarly, South Africa has seen a robust growth of PIL, especially as a factor to correct most of the structural historical injustices of apartheid as well as post-apartheid economic and social injustices (Amit 2011; Marcus and Budlender 2008).

PIL in Kenya before 2010 Constitution

Before the passage of the Constitution of Kenya of 2010, it was difficult, if not nearly impossible to bring and sustain a PIL case in Kenyan courts. This was largely because of strict rules of standing which required that anyone approaching courts had to demonstrate how he/she was directly connected to the complaint being filed. For example, in El-Busaidy v. Commissioner Of Lands & 2 Others (2002) 1KLR, the court held that for any person to qualify to file a case in court, he or she needed to show that his /her own interest had been or was about to be affected and the effect went beyond what was suffered by the rest of the public. In that case, the court held that matters of public interests could only be litigated upon by the Attorney-General. A similar approach was seen in Wangari Maathai v Kenya Times Media Trust Ltd (1989) eKLR where the petitioner had applied for an injunction to restrain the respondent from constructing a building at Uhuru Park. The court ruled that Wangari Maathai could not be allowed to proceed with the case because it did not affect her personally.

37 *Some include but are not limited to the United States, South Africa, India and Kenya.*

38 *In Republic v Independent Electoral and Boundaries Commission & 2 others Ex-Parte Alinoor Derow Abdullahi & others [2017] eKLR, Justice G. V. Odunga noted the following about award of costs: "26. It is therefore clear that where a person is genuinely advancing public interest under the Constitution as he is obliged to do under Article 3(1) of the Constitution he ought not to be penalised in costs."*

39 *See for example the Judgment of South Africa Constitutional Court Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).*

40 *For PIL in India, one can file a petition in the Supreme Court under Art.32 of the Constitution or in the High Court under Art.226 of the Constitution or before the Court of Magistrate under Sec. 133 of the Code of Criminal Procedure, 1973. Two Indian cases are credited with generating the initial enthusiasm on PIL in that country. The first was the case of Peoples Union for Democratic Rights – AIR 1982 SC 1473 (Peoples Union) and the second was S.P. Gupta vs. President of India, AIR 1982 SC 149 and popularly known as Judges Transfer Case.*

41 *In the Peoples Union case, the Supreme Court recognised for the first time that a third party could directly petition, whether through a letter or other means, the court and seek its intervention in a matter where another party's fundamental rights were being violated. Not only was this decision significant for expanding the scope of standing but also in revolutionising the manner in which impecunious parties could approach the court. A similar trend was also set in the Judges Transfer case where the court indicated that third parties could approach the court in order to litigate violations of rights of persons who may not be able to bring a case of violation before the courts. Now India courts entertain thousands of PIL cases each year following the efforts by the Supreme Court to encourage PIL.*

The Supreme Court of Kenya has commented on the contrast between the former and 2010 Constitution in regard to the right to institute cases in public interest:
"Locus standi had operated, in the earlier constitutional dispensation, to limit the scope for litigants to pursue causes in the public interest. Articles 22 and 258 of the current Constitution opened the doors for such litigants to lodge causes on constitutional matters." (Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2014) eKLR)

Standing and Constitution Reforms

The Constitution has now settled issues relating to standing on matters relating to human rights and any other violations of the Constitution. Both Articles 22 and 258 allow those affected by a justiciable action or persons acting on behalf of those affected to go to court to contest the violations. What is justiciable has also been expanded by the Constitution and it is hard now to argue that there is any aspect of government action or an action of a public official that is not justiciable.

Article 22 is contained within Chapter Four of the Constitution, which relates to the Bill of Rights. There are a number of key and common elements within Articles 22 and 258 of the Constitution which promote the use of litigation as a means of protecting and enforcing rights. This includes ability to act on behalf of other persons who are unable to act for themselves, litigating on behalf of a class or most commonly, initiating cases in public interest. Courts have indicated that these constitutional criteria are important to facilitate bringing cases in public interest but also ensuring that the expanded right to sue is not abused (John Wekasa Khaoya v. Attorney-General [2013] eKLR).

Article 37 and Public Interest Litigation

Article 37 is the premier provision in the Constitution that provide for the rights to assembly and demonstration. In its entirety, Article 37 states:
Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

From the outset, two critical aspects relating to Article 37, (which will be elaborated later on) are notable; first, the clear need to be expansive on the type of activities permitted – assembly, demonstration, picketing and presentation of petitions to public authorities; and secondly, the inbuilt internal qualifier, that is, those activities are constitutionally-protected when those engaging in them conduct themselves peacefully and do so while unarmed.

However, it is important to decipher what is an *assembly*? The United Nations Special Rapporteur on Freedom of Assembly defines an assembly as *"an intentional and temporary gathering in a private or public space for a specific purpose (HRC 2012: 10)."* He argues that assembly includes "demonstrations, inside meetings, strikes, processions, rallies or even sits-in." Perhaps a much more pragmatic understanding is one that looks at demonstrations, meetings, strikes, protests as the modes of exercising the freedom of assembly. Understood this way, freedom of assembly is expressed through, among other ways, the different actions reflected in Article 37.

Yet, this expansive style of constitutional drafting was not without a rationale. Because of the pervasive abuse of rights[42] by the State before the 2010 Constitution and frequent use of technicalities to minimise on rights, the drafters of the 2010 Constitution chose to be deliberately detailed. This, and a constitutional drafting trend for new constitutional democracies then, may offer the twin explanation for the expansive nature of Article 37.[43]

This elaboration of Article 37 is critical to courts when it comes to resolving disputes that touch on it. It offers the courts the basis to interpret the right in a more robust and purposeful way – the purpose here being to promote and protect the right to the greatest extent possible taking into account the varying nature of activities that traditionally may never have been understood to come within the realm of right to assembly.

Kenyan Cases under Article 37

Though the Constitution provides great clarity on Article 37 rights, Kenyan courts have not done much to provide an in-depth interpretation and application of these rights beyond what is apparent from the wording of the Constitution. Granted, though the courts have tended to err on the side of protecting rights of assembly and demonstration, they however continue to show unnecessary deference to the State and at times even seem to arrogate themselves the need to justify some of the excessive State actions that undermine the exercise of the rights. Regardless, courts have often intervened at critical times to ensure an interpretation of the law that mostly facilitates the right and to ensure that the State understands that it has a twin obligation in regard to right to assembly - to facilitate the observance of the right and not to interfere with those exercising the right within the peaceful confines defined by the Constitution.

Cases on Denial/Stoppage of Assembly

One of the first cases on Article 37 to come before courts after the promulgation of the 2010 Constitution was the Eugene Wamalwa v. Minister for State for Internal Security & Another (2011) eKLR. This case presented a good test case for the court to show its pulse on right of assembly under the 2010 Constitution. Essentially, Eugene Wamalwa, a prominent politician, had notified police of his intention to hold a political rally to launch his 2013 presidential bid. One of the noted attendees was formerly the head of Mungiki Sect – a group proscribed by the government for being an organised criminal group (BBC 2007). The police gave Wamalwa notice that they would not approve the meeting, alleging they had intelligence that criminal groups intended to infiltrate and violently disrupt the meeting. Wamalwa disagreed and asked the court to compel the police to allow the meeting and provide the necessary security.

Kenyan courts had been presented with a classic case to resolve the competing issues between the rights of a peaceful unarmed person to exercise their right to assembly in

42 *Because courts under the former constitution took a minimalist approach in interpreting rights, the Bill of Rights was often colloquially referred to as the Bill of exceptions. See Orengo J (2000) 'Constitution and the crisis of governance in Kenya', Address given to the Kenya Community Abroad Conference, Concordia University, Minnesota, 30 June – 3 July 2000.*

43 *See South African Constitution, Section 17: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."*

a situation where, ostensibly, there was evidence of possible disruption. Justice Musinga presented this dilemma thus:
'It is agreed that a right or a fundamental freedom in the Bill of Rights can be limited as provided under Article 24 of the Constitution. However, in interpreting the provisions of Article 24, this court is not oblivious of the political background that gave rise to the crave for a new Constitution. The State should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons. By repressing such freedom the State will be encouraging people to look for alternative ways and means of ventilating their ideas. Such repression of the fundamental right of assembly may also amount to breach of the freedom of expression as guaranteed under Article 33 of the Constitution which grants every Kenyan the freedom to, inter alia, seek, receive or impart information or ideas.

That notwithstanding, all Kenyans and especially politicians, ought to be reminded that the right to freedom of expression does not extend to advocacy of hatred or any negative words that may constitute ethnic incitement, vilification of others on the basis of tribe, age, gender or economic status. See Article 33 (2) (d) and (3) of the Constitution.' (Eugene Wamalwa v. Minister 2011:7>)

Justice Musinga would go on to underline what the dual-duty of the State was in such a situation, of facilitating assembly and securing those exercising it from any violence or disruption. He noted:
'In this matter, I believe the State is well able to use its wide resources and machinery to prevent the occurrence of any violence in the planned meeting. The State is capable of ensuring that every person who attends the planned meeting is unarmed. Refusing to allow the planned meeting to proceed on the pretext of security concerns as aforesaid, is tantamount to admitting that the State is incapable of dealing with members of outlawed groups or sects, which is not the case.' (Ibid: 7)

The judge's view was that courts must be cautious in quickly agreeing with State's argument to limit a right on the basis of national security. Additionally, his view was that for the court to bar freedom of assembly on account of national security, the State's claim must be subjected to a fairly high degree of proof to ensure that the State does not use "national security" as a cloak to deny a fundamental right."(Ibid: 7) This express prohibition is critical since States – and Kenya in particular - are known to dangle the vague concept of State security to deny rights where it is apparent they cannot objectively rationalise such denials.

The role of police in facilitating freedom of assembly came up again in Ferdinand Ndung'u Waititu & 4 others v Attorney General & 12 others 2016 (eKLR). This case has an interesting history. The Coalition for Reforms and Democracy (CORD) -- a coalition of political opposition formed in 2013 -- started a mass action campaign marked by weekly demonstrations and picketing outside the Independent Electoral Boundaries Commission (IEBC) with the intention of putting pressure on IEBC commissioners to vacate office. Though the demonstrations and picketing would start peacefully, police intervention would render them violent. Ferdinand Waititu and four other Members of Parliament from the

Jubilee Coalition – a rival political coalition to CORD – moved to court to request it to stop the demonstrations and picketing, citing the occurrence of violence and the inconvenience occasioned to the public.

Justice Louis Onguto heard the interlocutory motion to stop the demonstration. Taking cue from the jurisprudence developed in Wamalwa's case, he held that it would be unconstitutional for the court to interfere with the right of assembly, demonstration and picketing, where there was no evidence that the demonstrators would not conduct themselves peacefully. Instead, he noted that it was incumbent on police to facilitate the assembly and picketing and maintain law and order to facilitate the right to the fullest possible extent. On this he wrote:
"55. In these respects consequently, it would be appropriate for the court to intervene, not to draw any picket lines but to ensure that the 9th Respondent [The National Police Service] is not derelict in the performance of his duties (Ibid: 55)." Furthermore, the court recognised that Article 37 is a foundational right since it has direct bearing on enjoyment of freedom of expression and opinion as well as the freedom of association (Ibid: 27).

Courts have also found that police cannot invoke illegal processes to frustrate or constructively deny the right to freedom of assembly, demonstration and picketing. In Boniface Mwangi v Inspector General of Police & 5 Others (2017) eKLR the court found that the Officer Commanding Police Division (OCPD) had no legal authority to bar an assembly and demonstration that was intended to present a petition on corruption to the President. The court, found that the Public Order Act only recognised the Officer Commanding Station (OCS) to be the appropriate officer to receive and advice on a notification of a demonstration. This helps to enhance individual responsibility especially in a police force that so often likes citing "superior commands" when restricting rights.

Moreover, the Boniface Mwangi case raised another fundamental issue which the court prevaricated on, that is the intertwining between the freedom of assembly and demonstration and the sponsor of the assembly's right to choose a venue for such assembly or demonstration. In this case, given that the sponsors intended to present a petition to the President, they had chosen to bring the petition to the gate of State House, ordinarily used as the delivery point in the place where the President conducted State business. The Attorney-General opposed the choice of venue on the assertion that State House was a protected area. While the court agreed that freedom of assembly encompasses the right and ability to choose the time, place and modalities of any assembly. It, however found, that there were laws that stipulated State House as a protected place. Thus, the refusal of the demonstration taking place at Gate A of State House was deemed justified on the basis of national security since the proposed venue is a protected area and in the court's view that was a reasonable limitation to Article 37 (Ibid: 55-59).

Article 37 and Criminal Prosecution

Often, the State uses criminal law to penalise those engaged in the exercise of the right to assembly, demonstration and picketing. The intention of the police in invoking criminal law sanctions is to instill a chilling effect on anyone who intends to exercise those rights. In such circumstances, those accused have at times asked the court to determine whether criminal law is being used to frustrate or deter the exercise of their constitutional rights – and hence for an illegitimate purpose.

Courts have found it problematic in working out when to stop criminal prosecution brought against persons participating in an assembly. Often, the difficulty arises because the police would create an atmosphere of confrontation – as a means to frustrate the assembly - then use that to justify that those arrested were being violent and disorderly. This trend is highlighted in the Wilson Olal case as explained below.

Two cases that have brought to fore the intersection between criminal law and the right to assemble, demonstrate and picket are worth discussing. In Wilson Olal & 5 others v Attorney General & 2 others (2017) eKLR, the applicants among other civil society members, organised a demonstration but found heavy police presence at the venue of the demonstration. Despite having followed the right procedure and being peaceful, the police asked them to leave the venue of assembly even before they could hold their demonstration. Police did not explain why they were not allowed to engage in the demonstration.

When Olal and a few others insisted on an explanation, they were arrested. Importantly, the police failed to inform them of the reason for the arrest until very late in the day. The petitioners challenged the criminal prosecution at the High Court on the basis that the arrest was a violation of their Article 37 rights among other rights.

In the judgment, the High Court underlined the importance of Article 37 rights by stating that it is the responsibility of the State to ensure that citizens can effectively enjoy these rights because they are basic features of a democratic system (Ibid: 6). Furthermore, citizens have a right to express approval or lack thereof of the decisions of the Government on any subject of social or national importance (Ibid). The court also appreciated the link between Article 37 rights and freedom of speech, noting that these were among the bundle of rights which must be fostered in a democratic State.

"The importance of freedom of speech and expression must be examined from the point of view of the liberty of the individual and from the point of view of our democratic form of government. Freedom of speech lay at the foundation of all democratic organisations. Freedom of speech and expression of opinion is of paramount importance under a democratic constitution and must be preserved. The freedom of speech is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions." (Ibid: 7>)

As per the limitation of Article 37 rights, the court highlighted the internal limitation -- that the demonstration must be peaceful (Ibid: 8). However, it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection (Ibid). The court further interpreted the limitation under Article 24 by relying on the three-prong test noting that the limitation applied only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society; based on openness, justice, human dignity, equality and freedom and in deciding whether any limitation meets this criterion a number of relevant factors must be taken into account (Ibid). Relying on Human Rights Committee, General Comment No 31, The Nature of General Obligations Imposed on State Parties to the Covenant, the court held that restrictions of a right must never impair the essence of the right (Ibid: 9).

Critically, the court prohibited and permanently stayed the criminal prosecutions brought against the petitioners. On this, the court stated:
"The machinery of criminal justice cannot to be allowed to become a tool for the police [to] violate constitutional rights of citizens. The invocation of the criminal law, in unsuitable circumstances or for the wrong ends must be stopped and this court has the mandate to stop such proceedings. In the instant case, the criminal prosecution is in my view tainted with ulterior motives, namely, to curtail the rights of the petitioners to exercise their fundamental right to assemble, associate, demonstrate and exercise their freedom of expression. It would be a travesty to justice, a sad day for justice system should the criminal process be allowed to be used to stifle fundamental rights and freedoms guaranteed under the Constitution."
(Ibid: 13)
Moreover, the court awarded the petitioners damages because it found that the arrest and prosecution were unconstitutional, an abuse of process and not in public interest.

The assertiveness of the court in its role as a defender of rights is palpable throughout the judgment. The court is especially apt at recognizing the deleterious and chilling effect the use of criminal sanctions would have in discouraging people's urge to exercise such basic right as freedom of assembly. Given that often expression inherent in assemblies and demonstrations are directed at the State, it is encouraging that the court recognised that the State could not be allowed to use its monopoly of criminal law to criminalise dissent.

Hussein Khalid & Others v AG & Others (2014) eKLR, is another case where criminal law was invoked by the police to frustrate persons exercising Article 37 rights. Hussein Khalid and fifteen others who brought the case were arrested when a demonstration they were participating in - to condemn Members of Parliament (MP) for demanding a hefty pay increase - took a rowdy turn after police confronted them. The demonstration had dramatically featured live pigs to symbolise the greed of MPs.

At the High Court, the petitioners argued, among other grounds, that the arrest and prosecution were a violation of their rights to assembly, demonstration and presenting petitions to Parliament. Unlike in Wilson Olal (which was decided later), the High Court did little to analyse whether there was a relationship between the right to assembly and the

arrest. Instead, the High Court made a general statement and finding that the stoppage of the demonstration was not unconstitutional as it was in accordance with Article 24 (limitation of rights clause) of the Constitution (Ibid: 59-63). Even then, the court did not undertake a thorough analysis of Article 24. Moreover, the Court claimed that the determination of whether the police acted unconstitutionally by stopping the demonstration is to be determined by the Magistrate's Court during the trial of the criminal case. This presented a dilemma, because the magistrate had earlier rejected to hear constitutional complaints raised asserting that such questions could only be determined by the High Court.

At the Court of Appeal (Hussein Khalid & Others v Attorney General & Others, [2017] eKLR.), there was some analysis and emphasis of the correlation between freedom of expression, freedom of association, and freedom of assembly, demonstration, picketing and petition. The court underlined the import of Article 37 rights:
"Article 37 may be exercised by a lone individual without vocal expression as in the case of a lone demonstrator with a placard, it is normally meaningful when exercised in association with others and through expression which may be by pure speech or symbolic speech such as placards, handbills, leaflets, T-shirts, and possibly, without deciding, even messages on the bodies of pigs. Thus, freedom of assembly, demonstration, picketing and petition will be emasculated if it is not underpinned by freedom of association and freedom of expression."(Ibid: 5)

Ultimately, the Court of Appeal stated that although the High Court did not conduct a proper analysis of Article 24, it nevertheless failed to engage in an analysis and determination on when the use of criminal law may be considered an unjustifiable limitation to the freedom of assembly, necessitating the termination of criminal prosecution. Instead, the court emphasised on the internal limitation of Article 37 by stating that the demonstration or assembly must be held peacefully; and that the provisions of the Public Order Act as well as the Penal Code are reasonable and justifiable to ensure that there is peace - more presumably to avoid disorder, violence to citizens, damage to property (Ibid: 8). The court, however, avoided a nuanced analysis of when absence of peace in a demonstration is not attributable to the demonstrators, what is the fate of their ability to exercise the right as happened in this case. Subsequently, the court dismissed the appeal. The matter was appealed to the Supreme Court and judgment is pending. It is the first matter raising the use of criminal law in controlling assembly to reach the Kenya's apex court.

Article 37 – Some Depth Kenya's Jurisprudence Should Examine

As noted, Article 37 provision on freedom of assembly is highly permissive and expansive. In determining whether Article 37 rights have been violated, courts are expected to carry out a three-part test. First, courts must inquire whether the activity falls within those described in Article 37, that is, an assembly, a demonstration, picketing and presenting petitions to public authorities. Second, the provision has an internal qualifier in that even where an activity may fall within one of the clusters provided for in Article 37 it will not be protected

if those participating in it are armed or not conducting themselves peacefully. Third, even where the activity is peacefully conducted, it is still possible to limit it by recourse to Article 24 on limitation of rights.

The Scope of Article 37 Rights

Article 37 seems to have been borrowed from the equivalent provision in the South African Constitution. Section 17 of the South African Constitution, which is similarly worded, provides that "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions." The only variation is the addition of the phrase "public authorities" in the Kenyan provision.

It is instructive that Kenya has preferred such an expansive provision given how central the South African provision was to its constitution-making because of the many years of apartheid where the regime criminalised assembly, demonstrations and protests. Although the repression in Kenya, especially on freedom of assembly, never rose to the levels witnessed in apartheid South Africa, the drafters of Kenya's Constitution saw the need to follow the South African trend to build in a more expansive provision that ensured there was no vagueness on the scope of protected activities.

The Constitution of Kenya Review Commission (CKRC), which provided the bulk of the language used in the Bill of Rights, explained that its approach to rights was informed by among others the *"expanding horizon" in respect of rights, where the conventional approach was to provide more in a right than limitation (CKRC 2005: 107-126). This included not only provision of new rights not otherwise in the former constitutions such as socio-economic rights, but expanding civil and political rights. This was done to make rights "comprehensive"* (Ibid: 108) because under the then constitution, CKRC noted that *"some of the rights are rather narrowly defined and would be clearer and perhaps more effective if they were more detailed."* (Ibid: 110)

However, in Kenya, courts have not done much to nuance the elements of the expanded rights, instead choosing to explain the purpose more than the content of the right. Additionally, courts have also tended to emphasise more on the utility of the right especially it's interlink with or its facilitative nature to other rights (Wilson Olla Case). Ideally, courts should provide what the scope or the elements of each component of Article 37 entails. For example, is assembly a superordinate word encompassing all other components of Article 37 - that is, demonstration, picketing and presentation of petitions? Do these phrases mean something different in the constitutional context, as contrasted to other components, for example the meaning of picketing in labour law context? Does the protection available differ depending on what component those exercising the right are engaged in such that perhaps the police duty to protect is heightened in a demonstration as compared to a spontaneous assembly? Do spontaneous assemblies require notification?

Defining the relevant contextual factors and scope of each component also helps to indicate to those seeking enjoyment of the right, the greatest extent to which they may enjoy that right but equally clarifies to those with obligation to protect and promote the right the parameters within which to operate in order not to impose undue restriction to the enjoyment of the right.

Article 37's Internal Limitation

Article 37 has an internal qualifier providing that the right is available to anyone who is "unarmed" and "demonstrates peaceably." Kenya's courts have engaged to some extent with what the implication of this qualifier is. In the Waititu case, Justice Onguto noted the following about the internal qualifier, which he referred to as a constitutional "claw-back": "34. It certainly would be an antithesis of constitutional values and principles if picketers and demonstrators are allowed to participate in non-peaceful demonstrations or pickets whilst armed with implements set to stimulate aggression. It is therefore no surprise when the Constitution itself limits the right to assemble, to demonstrate, to picket and to present petitions." (Waititu case: 34)

Similar findings were made in the Wilson Olal case, where Justice Mativo noted:
"I must point out that the right under Article 37 must be exercised peacefully. And it is important to emphasise that it is the holders of the right who must assemble and demonstrate peacefully. It is only when they have no intention of acting peacefully that they lose their constitutional protection. This proposition has support internationally. As the European Court of Human Rights noted: '[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'"

But given the common occurrence in Kenya of police or security forces often violently disrupting assemblies or demonstrations, the fundamental question is whether every type of violence extinguishes the demonstrators' constitutional right. Though courts have attempted to give clarity on this, they have shied away from drawing parameters or providing concise indicators as to when the blame for violence is to be borne by the police and hence the right to assemble and demonstrate remains preserved by the Constitution. However, as already discussed, perhaps a better exposition was by the High Court in the Eugene Wamalwa case (2013: 6) where the court noted that the "State should not be allowed to suppress the freedom of assembly without sufficient and genuine reasons."

The clarity we argue for above accords significance on the government's negative obligation not to interfere with the exercise of the right and the concomitant positive obligation to promote and protect the right by providing those exercising it with the most conducive atmosphere to do so. Equally, where a sole participant or part of the group decides to engage in violence or where an opposing group engages in a confrontation that is violent, the police must, to the extent possible, try to protect those still peacefully engaging in peaceful assembly.

On this, Kenyan courts may wish to take cue from regional and international tribunals and UN specialist mechanisms. For example, the European Court on Human Rights (ECHR) has adopted the test of the intention of the demonstrator as the criteria to be used to determine whether the assembly or some part of it is protected when violence occurs. If the intention and action of the demonstrator is peaceful, that person preserves the right (Shwabe and M.G. v Germany (2011) ECtHR: 103). Even in a situation where the intention of the group is peaceful and later on the intention or action of some members of the group changes, the right of those who are still beholden to a peaceful intention is preserved (Ziliberberg v. Moldova (2014) ECHR: 4).

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has elaborated this by indicating that the State's obligation to protect the right of those peaceful in order that they may continue with the assembly still remains and requires the State to separate those who are not peaceful from the assembly (HRC 2012: 25). A similar approach has also been urged by the African Commission on Human and Peoples' Rights: "Where an individual bad actor is involved in violent or unlawful activity, the authorities should remove him rather than breaking up the assembly." (ACHPR 2014)

This obligation is not diminished when counter-demonstrations occur. The ECHR explained that genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere: A purely negative conception would not be compatible with the object and purpose of the right (Plattform "Ärzte für das Leben" v. Austria (1988) ECHR: 31). The police must, in such situations, make all efforts to separate the demonstrators by allowing each group, to the extent possible, to exercise its right to assembly and demonstration (HRC 2012: 30, 33). It is the responsibility of law-enforcement officials to facilitate assemblies by facilitating a peaceful atmosphere during the assembly and protecting the demonstrators from counter-demonstrators (HRC 2016: 37-49).

It is therefore prudent that the police prepare to facilitate an assembly with an expectation that a counter-assembly or demonstration may occur. In its Policing Assemblies in Africa: Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa, the African Commission of Human and Peoples Rights advises that even in the event where it is impossible for the police to facilitate the counter or simultaneous assemblies "preference should be given to the facilitation of the first notified assembly and alternatives must be provided to the other assemblies." (ACHPR 2017: 18.3)

The obligation on and manner of handling multiple assemblies, counter or simultaneous demonstrations is especially instructive for Kenya police, because often political demonstrations attract counter-demonstrations and police are quick to stop or disperse a peaceful demonstration on the pretext that violence is likely. Worse, at times, police are quick to secure or protect counter-demonstrators largely on the motivation that the

counter-demonstrators support the government of the day while dispersing the initial assembly.[44] The State also often cites possible violence from counter-demonstrations as a justification to limit the right to assembly. Luckily, courts in Kenya have been quick to reject this explanation observing instead that the State has the obligation and abilities to anticipate and deal legally with such situations with a view to facilitating the right to assembly (Eugene Wamalwa Case 2011: 14).[45]

In summation, this means that the police must be better equipped at crowd control, employing a much more disciplined and objective approach in policing to allow for better isolation of rogue characters in order to minimise compromising on the right of those who have chosen and are practicing peaceful assembly.

Interaction between Article 24 and 37

Additionally, regional human rights tribunals and courts have established a consistent criterion as to when a right or freedom can be limited. In a nutshell, a three-prong test is used. First, the decision maker must inquire whether the limitation is by law. Second, the limitation must be for a legitimate purpose. Finally, the limitation must be such that can be justified in a free and democratic society.

Not every piece of law qualifies, for purposes of assessing limitation, as law. For example, a law that is too vague as to fail to give a clearly discernible indication of what is prohibited or not is not law. More critical is the question of what constitutes legitimate purpose. Too often, police and government in general have a high propensity to interfere with the exercise of freedom of assembly, especially where the reason is to register discontent with government action or policy. In such cases, an analysis on whether what is proffered by government as the reason for limiting the right is a reasonable one, is critical in order to establish whether the stated reason is legitimate. The notion of a free and democratic society is built on the foundational expectation that in such a democracy, individuals should enjoy rights to the greatest extent possible and hence governments have to have legitimate and justifiable reasons when limiting the enjoyment of a right.

Article 24 is a codification of the foregoing criteria on limitation of rights except in a much more detailed manner. A critical element of such elaboration is the requirement that even where the court finds that there is a legitimate purpose to limit the right, it must still conduct a proportionality assessment founded on the question of whether the limitation proposed is the least restrictive means of limiting the right that is available to the State (Constitution of Kenya 2010: Article 24).

44 *For example, during the period the National Super Alliance (NASA) was undertaking demonstrations to push for the disbandment of the Independent Electoral and Boundaries Commission (IEBC), Moses Kuria, a leading Member of Parliament for the ruling Jubilee Party was quoted as having proposed that a concerted recruitment for The Nairobi Business Community members (a group that countered NASA demonstrators) be done in order that they assist the police in disruption of the NASA demonstrations. See, Gachane, N. (2017) 'More Business Community Coming Soon: Moses Kuria,' Daily Nation, 5 October, https://www.nation.co.ke/news/More-business-communities-coming-soon-says-Moses-Kuria/1056-4126600-vmyd8/index.html (Accessed on 15 February 2019).*

45 *Eugene Wamalwa v Ministry of State Affairs, Petition No 9 of 2011; [2013] eKLR.*

Though Kenya courts have now developed fairly elaborate jurisprudence on the assessment required by Article 24, no court has conducted a systematic and detailed assessment of Article 24 limitation in the context of Article 37 rights. Yet, while jurisprudence on Article 24 in regard to other rights is a relevant guide in conducting a right's limitation assessment for Article 37 rights, given the complexity of possible issues under that right, jurisprudence on Article 24 in regard to other rights cannot offer complete guidance on how Article 24 limitation should operate in regard to the right to assembly.

Yet, it is how the courts nuance Article 24 assessment in regard to assembly that is most useful -- especially to the police and the State -- in terms of understanding what limitation will be countenanced or not. Without elaborate assessment based on real scenarios where the State prohibited or interfered with the right to assembly, the police will continue to exercise unbridled, and often excitable discretion, to interfere with Article 37 rights and worse sometimes to use the exercise of right as a sword to trigger criminal sanctions. At least, these fears must have been in the mind of the court in Wilfred Olal where the court warned that the "machinery of criminal justice cannot to be allowed to become a tool for the police [to] violate constitutional rights of citizens."

Conclusion

Kenya's transformative constitution has cemented the right to assembly, demonstration, picketing and presentation of petitions to authorities; courts have been quick to insist that the right must be protected. However, Kenya's government and the police in particular have continued to interfere with the exercise of this right in an intensely worrying way. It seems that the police still embrace a colonial attitude which was based on a knee jerk and irrational urge to use the coercive instruments of state power to inhibit on people's exercise of rights, especially those of assembly. It is disturbing that nine years after the promulgation of the 2010 constitution the police have done little to come up with constitutionally required approach to ensure it facilitates the enjoyment of the right to the extent possible.

Worse, this incorrigibility by the police is a direct affront of the constitution's provision that establishes the values that governs state security under Article 243 of the Constitution including,

(c) comply with constitutional standards of human rights and fundamental freedoms;
(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity

Court's pushback against police excesses on its – too predictable - response to those exercising the right to assembly has been instrumental in ensuring that the police are not left untamed in their eagerness to frustrate a right that anchors or gives great potency to other foundational rights in the constitution. PIL may not have done enough, but it has ensured that the police are constantly reminded that the right to assembly is non-negotiable in the constitutional democracy that the 2010 Constitution sought to establish in Kenya.

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