T I T L E

THE RIGHT TO ASSOCIATE :

A Comparative Study of African Customary Law and International Law with particular emphasis on the Ameru of Kenya.

A DESSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE LL.B DEGREE COURSE, UNIVERISTY OF NAIROBI.

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DEDICATION

To my Parents Mr. & Mrs. Gerald Ikunyua whose efforts to give me the best in life have been ceaseless and to all those that love freedom, that they may live in a more democratic and peaceful world.

TABLE OF ABBREVIATIONS

1.	I.L.O.	-	International Labour Organisation
2.	O.A.U.	-	Organisation of African Unity
3.	UN.	-	United Nations
4.	K.A.N.U	-	Kenya African National Union.
5.	M.Ps	-	Ministers of Parliament

TABLE OF STATUTES

1. Industrial Relations Act 1913 of Britain

2. Trade Disputes Act Cap 234 Laws of Kenya

3. Trade Union Act Cap 233 Laws of Kenya

4. Societies Act.

CHAPTER ONE

A COMPARATIVE STUDY OF THE RIGHT TO ASSOCIATE UNDER AFRICAN CUSTOMARY LAW AND INTERNATIONAL LAW :

A subject of contemporary relevance to African states is the protection of human rights : these rights find expression in many international and regional documents. The image projected in Africa since the early seventies has been one of strife, mismanagement, cruel leadership and self-serving elites. This has also been evidenced in the breaches of Human Rights within member states of O.A.U, which has tended for sometime to treat such matters as falling under the domestic jurisdiction of the states directly concerned. The organisation thus failed to condemn in unequivocal terms the flagrant breaches of human rights in a number of countries, for example, in Uganda, Central African Republic, Equitorial Guinea, Ethiopia and Somalia to mention but a few. Despite the excess of Idi Amin, the O.A.U. held a meeting at Kampala in 1976 and for one year had the president as its Chairman :[1]

Further, political issues have become burdened with political and emotional issues giving rise to inconsistencies which have made progress towards a greater respect of human rights difficult and embarrasing. The O.A.U, like most International organisations realised how urgent and important it is to take a positive step inorder to fill the vacuum in the African continent on human rights. The O.A.U. has drafted the African Charter on human and peoples rights, otherwise known as the Banjul charter. The charter attempts to strike a balance between individual freedoms and the interests of the society as a whole and stipulates the establishment of a pan-african Commission to promote human rights which will consist of eleven members chosen from among African personalities of the highest reputation known for their high morality, Integrity, Impartiality and competence.

The charter incorporates the traditional political and civil rights, that is, in articles 2 - 12.[2]

It also enjoins the duties of individuals to the family, the society, the state and even the International community and other recognised communities. Also emphasised in the charter, are the duties to respect others without discrimination, to develop the family, serve the nation, pay taxes and promote African Unity and provides for economic social and cultural rights which the Third World sees as a component for redressing the colonial heritage typified by government for and by the manority against the majority. However, although individual duties are enumerated, there is no provision for enforcement against individuals. Thus there arises a question of the implementation of this charter, which is almost like the other International treaties on Human rights, for example, the United Nations charter. This charter is now in force.

WHAT IS DISCUSSED IN THE DESSERTATION :

The International human rights movement reflects to a large extent,the liberal, individualistic tradition of civil and political liberties as developed in countries such as Great Britain, the United States and France. The present attempt by O.A.U. to embody a list of peoples rights in a human rights convention is something very new. The dissertation finds out the reasons as to why the O.A.U. felt that there was need for Africa to have a charter on the peoples rights. Further, since the charter has been drafted and is now in force, there remains the question of implementati It seems that little has been written about the legal problems that might arise when the peoples' rights provisions of the charter are enforced. Thus note is taken on the problems of implementation, regard being had to the fact that most African Countries have directly or indirectly the influence of the European Convention on the constitutional provisions of their countries, yet there has been violations on human rights, this not withstanding. An example of such a country is Kenya.

The study shall be narrowed down to political rights and duties provided in the Charter : In particular, the right to free association, Article 10 of the Banjul Charter which states, "Every individual shall have the right to free association provided he abides by the law", and article 10(2) "Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join as Association".

These provisions of the charter are compared with the same rights and duties that were there in the Meru ethnic Community. The dessertation leaves out the social-economic rights and duties in the charter and also in the Meru ethnic Community. It's also not all the political rights and duties in the Meru Community that are discussed. A lot is left out about the right to vote, equality before the law etc. The focus is on the rights that are compared with those discussed in the African charter in Article 10. Note is taken on what is the International Contemporary view on the right to Associate.

RATIONALE OF THE STUDY:

A kind of comparative study is necessary when it comes to the implementation of this charter. This is because in dealing with a people, it is good to know the kind of values that they have, their habits etc. Hence it is good to study their social, political and economic rights. This kind of study could have been of help in the drafting of the charter. This would and shall even now, during the implementation help in determining whether legal norms of human rights exist in African Customary Law rules. Thus this comparative study helps in drawing any similarities between the legal concepts in the African customary law rules and the European Convention on human rights. If there are any contrasts; it helps in anticipating the kind of reception the charter is going to have and possible measures of remedying the situation can be devised.

Thus the study helps to check how much of the European convention will be acceptable in a charter of human rights for African.

Different kinds of society correlate with different kinds of law. Thus for example, traditional societies are different from modern societies. The former were held together by shared values and the collective conscience of the group constituted the basis of society, or like Sir, Henry Maine puts it,

> "True archaic communities are held together not by express rules but by sentiment, or, we should perhaps say, by instinct; and new comers to it by brotherhood....."[3]

Thus for traditional communities almost everything about it is organic. In modern societies in contrast, economic specialisation has led to role and class differentiation. The collective conscience found in the Indeginous community was weakened to the extent that role values have emerged. Thus with this kind of comparative study, we get the kind of notion the people had on "right" and "duty" and will from this know what kind of attitude the African people are to have of the African charter.

METHOD OF STUDY

Various methods of study have been used. The campus library was used to gather information on the Banjul charter, the Internatio view of the right to Associate, and on human rights in general. The Meru Museum Library was used when it came to getting information about the traditional Meru Community as far as political rights and duties concerning associations were concerned. Since this is a topic that cannot be fully exhauste using only library materials, a field research was conducted in Meru District by interviewing a few old men concerning the individuals rights and duties as seen at that particular perio In library research, both primary and secondary materials have been used.

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CHAPTER ONE

FOOT NOTES

1. K. Ginther & W. Benedk : New prespectives and conceptions of International Law : Spinger - Verlag Australian Science foundation, 1983 B.P. 122.

2. The African Charter of Human and Peoples' Rights.*(2-12)

3. Sir Henry Maine : Ancient Law, 7th Edition (London 1978) page 365.

CHAPTER TWO
THE RIGHT TO ASSOCIATE UNDER MERU CUSTOMARY LAW

INTRODUCTION

All legal relations however, numerous and complex, can be reduced to the relations of one man with another - of one individual with another - every such relation has two ends, each of them requiring and being actually given a name of its own. Any legal relation therefore is described from the stand point of two individuals. There has to be a right and a duty.[1] This will be brought out while explaining the various associations under Meru customary law. Like the western concept of a right, the idea of a right in Africa implied a corresponding duty.

In traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite which must be obeyed because it commands like a categorical imperative.[2] The European conception of human rights, that is to say, a set of principles whose essential purpose is to be invoked by the individual against the group with which he is in conflict, is not met in traditional Africa.[3] In Africa the individual, completely taken over by the archetype of the totem, the commmon ancestor or the protective genius, merges into the group.[4] An individuals rights were not guaranteed by the state such that he could, at his own instance, enforce them against the whole world.[5] The individual had to rely on his intimate group, the extended family or the clan, to manipulate the political and social forces to secure his rights. This group support was obligatory and could not be withheld from an individual unless he had been outlawed by the community.[6] The group afforded basic needs to its members. The right to associate in Meru customary law, therefore, originated from the organic nature of the society. People found a system which they also had to follow and perpetrate.

Keba Mbaye, while talking on African concept of law and African Humanism, stated that in traditional African Society the purpose of law is to maintain society in the state in which it has been transmitted by the elders, physically dead but still alive.[7] Living in the traditional societies,therefore, meant abandoning the right to be an individual, particular, competitive, selfish or aggressive in order to be with others in peace and harmony with the living dead, with the natural environment and the spirits that people it or give live to it.[8]

African traditional society's were both socialist and humanistic and had particular respect for aman and all the that attaches to him, including his rights. This form of humanism led to religions respect for others and the recognition of the rights and freedoms of everyone and of the entire group.[9] These rights and duties in traditional Africa must be seen in the context of the organic society with shared values rather than social contract based on individual values and rights. Traditional African Legal order recognised certain rights as fundamental and inalienable. Therefore, a law or an executive decision derogating from any of these rights would not stand. As the Basuto Would put it "man-made law must not contradict Mulao".[11]

The right to associate in in each society differed with its objective conditions and originated from the organic nature of the society unlike in the Western Countries where it arose out of social contract. The Meru Society was a communal society with a subsistence economy, a decentralised government and , therefore, a participatory mode of association. There were, therefore, warrior associations accult associations, association formed for the purpose of entertainment, by age agroup and for games.
Inorder to understand rights and freedoms of an individual one needs to study the socio-political system of the Meru society.

THE SOCIO-POLITICAL PARTIES OR TYPES OF ASSOCIATION UNDER MERY CUSTOMARY LAW

In traditional Meru, all men and women had to be members of certain fraternities or association within the community. These fraternities were established within the community. These fraternities were established institutions where one had to be a member after attaining a certain age, without fail, socially and politically, men had to be full members of the tribe, whose system of government was ran communally and where the status of king or nobleman was non-existent.[12] The qualification of membership to the various associations was maturity and initiation, property was never a criterion.[13]

The position of elders was determined by a sytem of age-grading and there were two categories of socio-political parties namely, KIRUKA and NTIBA. These parties according to Mr. George Murerwa got their names from KIRUKA and NTIBA who were brothers in Liji a place that the Meru's passed through before they entered Meru land.[13] It was during this period that they agreed that there would

be two political parties, namely, Kiruka and Ntiba, the names of both brothers. These two socio-political parties were to rule the land. Each socio-political party was to stay in power for a particular period and the other party was to take over.[14] According to the research I carried out, ruling power was handed down the age-sets and each age-set stayed in power for average of 13-15 years. Membership to these parties was determined by the date of birth, namely, if one generation, fall under the KIRUKA emblem whose symbol was a sheep, their sons would like wise be KIRUKA although they would be given another name.[15] The symbol of the Ntiba emblem was a goat.

The end of each generation's power in office was celebrated about a decade or so following the circumcision of the elder involved the cutting of the fore-skin and clidectorny for women. This ceremeny for handing over power to the other socio-political party was known as NTUIKO. Ntuiko was celebrated by the whole community (including women and children). Animals were slaughtered, foods-tuffs provided for each category of association - (KIRUKA and NTIBA). The two groups would have a camp facing each other in a clans common ground. Each would sing and dance to its praise and songs would be created to despise and mock the other side. After two weeks of continous feasting, dancing and singing, the younger generation would take over power. These two associations helped prevent any tendencies of despotic rule in the community.

NTHAKA OR WARRIOR ASSOCIATION

This association was the largest in the Meru Community. The members were the young men who had been initiated into manhood through circumcision. Circumcision was very important in the society and one could not be regarded a grown up unless he had been circumcised and therefore, initiated into adulthood. He would then be allowed to marry, to own property and could be given respect as an adult. Nthaka, was the name given to the circumcised young men.

The Nthaka association had a primary duty to defend the land from any invasion. They were the warriors and were taken care of by the community, so that they would be healthy enough to counter any attacks from the neighbours. They lived in a communal place constructed for them known as "Gaaru ya Nthaka". The universal tribal membership of the Nthaka, association was a sign of unification of the whole tribe. Every young man had a compulsory duty to belong to this association. In any case if one was circumcised it meant that he had to associate with those whom he

had been circumcised with. This, the young man did out of the social nature and habit.

All the members of the group had to strictly adhere to the ethics of the Nthaka associations. They were not to be intoxicated or to mix with drunkards, were not allowed to accost young girls especially those from ones own clan, or accost married women, were not allowed to visit their parents homestead alone, were not to enter their mothers' hut, were expected to be very discreet when relieving themselves, so that they were not seen by women or childr they were supposed to respect the old men and any order given by the elders, were not supposed to associate with the elders at beer drinking or snuff-taking past times and were expected to behave properly especially during clan ceremonies and feasts.[17]

KIAMA KIA RAMARE ASSOCIATION

This was an Intermediary Association between the defenders of the country (Nthaka) and the policy making elders. It served as a unifying force between the two age-groups. Membership was drawn from both married men and young warriors representations.

FUNCTIONS AND RULES OF THE ASSOCIATION

There were two types of members in this association. The elected and the observers who comprised of the electorate. Those elected to represent the warrrior group were known as RAMARE YA GAARU. They were elected from the clans married and unmarried lots Candidates had to be of good leadership qualities and impeachable character. Balloting was done by counting of sticks, spears or other weapons on a candidates heap but candidates had to get majority mandate from the observers lot. This observers lot was known as TUMBI. Once in this fraternity the members were to undergo a nationalist course and were guided to accept responsibility in the community. This guidance was given by old initiates and one's Godfather (Baba wa Kiama). This Godfather was singled out from among the well to do elders by the initiate himself. Once an elder was called upon to be a Godfather he would not let the initiate down. His job was to advice the young initiate and pay any material fines that the young man may be subjected to. A Godfather was paid a goat and skin for making traditional cloak. The goat would symbolise blood relationship and the initiates would be referred to as son of the Godfather from thence on.

At this stage the strict RAMARE regulations demanded total obedience, one had to be ready for mobilisation on the "National" duties at anytime and had to be of sober and fine physique.

Consumption of alcoholic drinks was punishable by age-mates who were in turn punished by the elders collectively, if they took no action against a drinking individual.

KIAMA GIA NKOMANGO ASSOCIATION -

FUNCTIONS AND RULES

This association is commonly known as the common Njiru. It was the law executing council. All males beyond the age of Ramare i.e. married men, were initiated into it. It consisted the court of the land and sentenced to death murderers, thieves, witches adulterers and the like. It was known as Kiama gia Nkomango because they used stones and rocks to execute criminals.[18] The judgements of this association were carried out collectively. For example, a cousin or a clansman had to stone him first. The criminal had to be blindfolded before he was executed by stoning to death.

The executioner would also produce a goat that was slaughtered and eaten to cleanse the Kiama gia Nkomango from any ill-omen. The criminal would then be stoned to death and covered with rocks.

Members of the group had to keep the rules of the association. They had to observe a lot of care in executing the criminals, inorder not to make a lot of mistakes. They also had to keep the secrets of the association and had to carry out their duties without being partial.

THE NJURI NCEKE ASSOCIATION -

ITS FUNCTIONS AND RULES

Unity in Meru land was created not only by a basically common culture, an age-set system (KIRUKA AND NTIBA), but also an institution of the traditional government body, the Njuri Ncheke The Community was supreme; it had to be safe guarded at all times. However, its relationships were affected by the manner in which particular decisions were carried out by the Meru elders, known as Njuri. These elders sat on a supreme council called Njuri Ncheke.

The Njuri Ncheke was charged with the duty of supervising the Meru legal system. This institution formulated reasonable rules and regulations to ensure all the Ameru lived in peace and harmony and were recognised by others. From time to time the system was revised and amended to suit the prevailing conditions.[19] It was also charged with the duty of safefuarding the rights and priviledges of the community. The protection of the individual's right.[2] This group also encouraged the people to have mutual obligations and total allegiance to one another and to be obedient t

their laws, thus making them more effective in serving the community.

Its secrets of the government by wisdom rather than force or statute were highly regarded by the community. This association or council was also the custodian of Meru customs; a disciplinary body and enjoyed priviledges of a highet court which adjudicated over cases that were beyond the jurisdiction of Kiama gia Nkomango, and listened to certain appeals concerning clan land disputes. After establishing someone's guilt, the Njiri-Ncheke would hand over the criminal to the "Kiama gia Nkomango for execution.

To be initiated in this fraternity one had to be a prominent member of "Kiama gia Nkomango" in his clan. These were mostly select elders who were more influentual than the normal members of "Kiama gia Nkomango". One had to be selected to represent the clan in the Njuri Ncheke council whose meeting was held at Nciru, in Tigania a central position in Meru Land. These members were recruited from various clans purely on the basis of their ability to interpret and execute the formulated laws affectively. It is such laws that often gave people a sense of direction and existence as they identified themselves with the community.

This was the most feared institution in Meru Society. The moment the Njiru Ncheke was interpreting the Meru Legal codes, the community could sense its existence. It stood for the good life in society. The members were bound to secrecy by a series of heavy oaths.

NJIRI IMBERE OR IMPINGIRE FUNCTIONS AND RULES

Literary this means the sieved and closely guarded Njuri. It consisted of eight honest people of high standard in the society. These were selected by the Njuri Ncheke, from within its group. The group dealt with inter-clan matters was custodian of Meru-land and settled land disputes. One of the most important person in this group was the Mugwe, who was the spiritual and political leader. He officiated in prayers and sacrifices and was a very senior person for he was believed to have some powers which enabled him to even forsee what was about to happen in the community. He was also the custodian of the land and was familiar enough with the clan boundaries to arbitrate in land issues. Since land was very important among the Meru, he had to be given an oath of impartiality. The position of Mugwe was hereditary but if one specific Mugwe was impartial he was deposed and another one from the same family installed.

Members of this Group had to keep the secrets of the association and had to keep a very high standard of morals.

DUTIES ARISING FROM THE RIGHT TO ASSOCIATION IN MERU SOCIETY

DUTY TO PRESERVE FAMILY TIES

The individual had a duty to preserve the harmonious development of the family to respect his parents at all times and to maintain them in case of need and especially in old age. The family was looked on as the basis of the community. Parents and adults in a family tried hard to see that other members of the family are well disciplined and that there was harmony and peace in a family. There was a strict but loving kind of up bringing so that the family did not in the end become a disgrace to the community. Families that were living in peace and harmony were looked upon with a lot of respect and were cited as good examples.

Children were taught at early stages of their life to respect their parents and to maintain them in old age. Duty of children to respect their parents and the old people in the community was inculcated in them in their early childhood. All children were taught to call people who were of their parents age, "Baba" for father and "Ntii" for mother. If an individual became disrespectful he was punished and there were times, depending on the gravity of his disrespect that he would have to slaughter a goat for the father and his age-mates as a sign of being sorry for the act done.

In times of old age the eldest son in a family had a duty to maintain his parents. He had to feed them, cloth them and see to their shelter. This was however mostly done by the wife of the first born son under the supervision of her husband.

DUTY TO SERVE THE COMMUNITY

An individual also had the duty to serve his community by placing his physical and intellectual abilities at its service. The individual had a duty to produce food for the community-the men. They had a duty to fend for their families, or the whole clan, since in Meru there were extended families. Infact men used to be named M"Marete which meant that ones father had gone to afar place to bring something valuable to the family.[21] Or Kirimi which meant somebody that is hard working in a farm.

The young boys after they had been initiated to adulthood through circumcision had to serve in the armies of the community as warriors

for some period before they eventually got married and had their status transformed into that of retired warrior, MUKURU. On the day of passing out, after healing of the wound" the boys were taken to gaaru, barracks consisting of a huge shelter constructe in every region as the focal point of the activities of the warriors and where they slept at night with their weapons, ready to respond to any war cry.[22] Thus in the community there were always a group of warriors ready to fight any invaders and they protected the community and their boundaries.

These warriors were fed by the community. Each home cooked some food and they took it to the warrior camps where it was shared equally among all the warriors. A man could not go home from the military camp without the company of some of his peers for the mother might even refuse to give him food to eat.[23] This actually shows that at this stage a person does.not belong too much to the family but to the community that he is under a duty to serve.

Individuals who had any intellectual abilities put them all at the disposal of the community. Thus there were those who were specialists at making containers, producing body covers and others who specialised in metal goods, the balck smiths. Body covers for example were made by men with special skills, the raw materials used were skins. According to research two types of specialists participated in making of body covers. Ther were those who softened and cut the skins, and there were those who knew how to sew the skins into different types of dresses. Among the Tigania, the first types of specialists were called Mutanti, while the second type were known as Mungari. These who wanted dressed made by such people obtained them through barter method.[24] On kind of container found in all Meru societi is the pot. Pots were made by specialized women generally know as Aumbi plural, Mumbi, singular. The gourd is another material used to make different types of containers.

In all cases, it is men who shape containers out of gourds. Men also manufactured different types of vessels from tress. For example, they made snuff containers, pestles and mortars. Also, they were the ones who manufactured things like seats of wood. Those who made weapons used to make them purposely for the warrior group and were maintained by the community through whatever goods they bartered for the blacksmiths goods.

Ritual work was also taken as another type of labour. Wherever any ritual sacrifice had to be done it was carried out exclusively by men, unless the ritual involved the direct participation of women. The highest authority the Njuri Ncheke is composed of men only, albeit old men. Likewise the Mwiriga, that council of clan elders who symbolically own the land actually distribute it to families and family members is composed entirely of men. And so, all rituals are the basic duties of these sages. As a matter of fact, they do not participate in the agro-pastoral activities and do not carry out any physical or technical work. They are sages and their functions are specific, but in so far as they are performing those duties, they are supplying what we could call "Intrinsic technical labour." [25]

DUTY TO PRESERVE SECURITY AND INDEPENDENCE OF THE COMMUNITY

There was a duty on the individuals to preserve the security of the community and to preserve and strengthen the independence of the community. The Meru had a number of neighbours who from time to time invaded their territories,made various attacks and hustled cattle and livestock generally. One such group was the maasai, who raided to steal livestock from the community. If one got to know that there was to be an invasion or that some strangers had been spotted in the land, there was a duty to inform the heads of the clan who would then report to the heads of the community,so that they would organise and arrange on what to do with the invaders or with the strangers.

If one was found to have given shelter to a stranger without informing the clan there was a penalty and the person would be punished for compromising the security of the community. All individuals were also under a duty to keep the secrets of the community.

For all the associations there were secrets which had to be kept within that group. If one divulged those secrets to strangers or enemies of the community, then he would be punished, and mostly this was considered a very big crime and the punishment was death.

Through the various associations the men managed to perform their duty of preserving and strengthening the independence of the Meru people and the territorial integrity of the community and to contribute to its defence in accordance with the law. The law was that the ruling power was to be handed down the age-sets. Each age-set stayed in power for an average of 13 - 15years. The customary law catered for two categories of socio-political parties namely KIRUKA and NTIBA.[12] Through these two parties, the independence of the community was not only preserved but strengthened. Since no party wanted to be blamed for weaknesses during its time in power, or the losing of any territorial boundaries. They also made sure that all strangers that came to the land were kept out of the political affairs of the community and were told nothing about the running of the community.

There was also the warrior group that was always prepared for the occurance of any eventuality. Through the warrior group the territorial integrity of the community was preserved and strengthened. Nobody could refuse to join the warrior group unless one had some kind of deformity, in which case he was exempted from going to war. Young warriors who fought well were rewarded and there were songs in praise of them. They become heros and due to this the others felt they needed to fight well so that they may be held with honour by the rest of the community.

DUTY TO PROMOTE & ACHIEVE MERU UNITY AND SOLIDARITY:

The Meru were a very unified group. They were so unified due to the fact that all members of the community had a common origin, a common religion and also as a result of the many festival which they had to all participate. They had proverbs that helped enhance the unity of the tribe. These proverbs used to teach on the importance of the solidarity of the group. There were also songs which ridiculed the loners or those who wanted to live on their own without taking part in the community functions. After harvests there used to be festivals in which members of the different clans participated. They would hold mock-fights, dances and the best dancers were praised by all. As a result of this, the whole community was unified and they got to know one another and refered to each other as brother and sister. Thus they were unified socially and politically.

Through the various ceremonies carried on in the land, alot of political ideas were inculated to the minds of the young who then learnt to keep the interests of the community. If political solidarity was threatened, they took oaths in which they swore to fight to the bitter-end, and anybody seen to be a collaborator of the enemies was punished. This is what happened during the Mau Mau era. All those that betrayed the Meru people by informing the authorities what they were planning or their moves were brutally treated. Common festivals and ceremonies in which all participated and the fact of common ancestory helped to unify the group.

DUTY TO PRESERVE AND STRENGTHEN MERU CULTURAL VALUES AND MORALS

The cultural values of Meru people were taught from early childhood up to the time that they aged and became grandparents. Boys were taught their place in society by their father in early childhood and their youth through the various associations which taught them all the various cultural values and morals. Girls were likewise taught by their mothers and the female members of the society.

As children grew up they were taught on how to relate to the other members of the society.

The older or mature people in the community had a duty to teach the young on all the cultural values and good moral behaviour. Through the various initiation ceremonies, all were taught on good behaviour. People who behaved in an immoral manner were punished and ridiculed by all. They become a disgrace to their own families. The various associations took a lot of time in inculcating morals to the young. All this led to a community that was morally clean at the time of independence before it was corrupted and polluted with the western ideas and morals.

CONCLUSION:

What emerges from the above discussion is that the right to association was created for and safeguarded by the law of the land. All those who qualified to join those fraternities could join them, provided they abided by therules of each association. It was the group and not the individual that really mattered. The right of the individual was realised in the group or in the association. There were therefore rights and duties for the various age-groups which the individual naturally enjoyed by being born in that age group.

People were born in a kind of system which they accepted and followed due to the realisation that they had shared common values which they all acknowledged. Thus idea of social contract was not known to them, since it was the group and not the individual that really mattered as far as rights and duties were concerned. As professor Collomb said, "living in Africa means abandoning the right to be an individual, particular, competitive, selfish, agressive.... In order to be with others in peace and harmony with the living dead and with the natural environment.[21]

From the discussion the African Society emerges as both socialis and humanistic having particular respect for men and all that attaches to him, including his rights. However the person had to keep a certain standard of morals that was expected for the well-being of the society. The Meru ethnic society was a communal society and due to this I think there was need for the collectivily or the group. This is because the entire welfare of the society could only be realised if all joined in the group and not if there was individualism. This is because taking that there was no technology at that time, food productic or defence would be a problem without the groups, which led to higher production and proper defence. There were therefore such saying as "unity is strength" which discouraged individualism.

Pre-colonial African, therefore possessed a fitting system of rights and freedoms, although there was neither the recognition nor the clear formulation of such rights and freedoms as they are recognised, formulated and analysed today.

Nevertheless, we discover a definite kinship which undeniably links them to the system of human rights. Those rights were recognised and protected. However, such recognition and protection must be understood in the context of the societies of long ago.

CHAPTER 2

FOOT NOTES

1. Wesley Newcumb Holfeld : Fundamental legal conceptions, New Haven, Yale university press, 1964 p.64
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CHAPTER THREE

THE RIGHT TO ASSOCIATE

INTRODUCTION:

There has come between the individual and the state new social groups very different from the classic traditional, territorial or spiritual groups, that is association of employers and workers. The law of the group, the idea of the mass have taken an unexpected importance and have contributed to the distortion of the structure and conditions of the traditionally recognised rights.[1] On the one hand, the life of the human being is conditioned more and more by the demand of collective life. Materially he is in a position of constant dependance on the state. But, by sort of defence reaction, the average man whose standard of living has improved becomes more and more demanding of respect for his dignity and his individual fundamental rights Man being a social animal, neither personal freedom nor freedom of thought and expression can give him full life unless he can share these freedoms with his fellows. This is the essence of the right to peaceful assembly and association proclaimed by the Universal Declaration, "Everyone has the right to freedom of peaceful assembly and association".[2] The Declaration envisages such freedom in political, economic, religious educational and cultural spheres. This right to association has been provided for in the International convenant and also in the Banjul Charter[4]

The right to associate in International level was first provided for in the Universal Declaration on Human Rights. This Chapte looks at the right as provided for in the International Covenant the connection between the universal system of United Nations Charter and the African Charter. Note shall be taken of the African social reality in regard to exercise of human rights and especially the right to associate.

Lord Denning while talking on freedom of association and the Right to work, had this to say, "That in these days we must not look solely to the freedom of the Individual. This depends on the maintenance of law and order. The essential guarantee of freedom is the maintenance of law".[5]

The question that arises in connection with the right to associate is whether it exists with all the derogations that arise, and especially in African where one - party state is almost the rule. Note is taken of the Kenyan case and chapter finds out whether the right to associate portends a multi-party state or a one party state.

THE RIGHT TO ASSOCIATE UNDER CONTEMPORARY INTERNATIONAL LAW

Claim is often made that the idea of respect for human rights is rooted in European tradition. Therefore, people with a non-western cultural background can be forgiven if they do not observe human rights. Ofcourse these are fallacies; for the love of freedom is Universal.[6]

The right to associate, according to Hood Phillips, includes, forming and belonging to political parties, trade union societies and other organisations. It is a liberty rather than a right in the strict sense, and (like the other liberties of the Individual) they are residual.[7] Ordinary, "rights", as a legal concept, will only arise from state imposition or from some private arrangements of the nature of a bargain, with parties assuming obligations or acquiring rights (eg a contract supported by consideration)[8]

The right to associate under International law is based on social contract. This means that due to social relations a contract arises and this is the basis of human rights. According to Sir Henry Maine, this implies, social political and economic Intercourse arising out of agreements among individuals or groups of individuals to do or not to do defined things.[8]

Article 22(1) of the International Covenant on Civil and politic Rights states, "Everyone shall have the right to form and join trade Unions for the protection of his Interests" Section 22(2) of the same states,

> " No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society, in the interest of national security or public safety, public or the protection of public health and morals or the protect of rights and freedoms of others".

The right to associate is also proclaimed by the Universal declaration, which states that, "Everyone has the right to freedom of peaceful assembly and association."[9] The United Nations Charter on the other hand amplified the principle of respect for basic human rights into International law imposing corresponding obligations to member states.[10] There is therefore an obligation under general International law for the member states of the U.N. to observe the principle of respect for basic human rights. This is broughtout clearly under article 55 which stipulates that with a view to the creation of conditions which are necessary for peaceful and friendly relations among states, the United Nations shall promot

> "Universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, language or religion".

Moreover, the International Covenant on Civil and political righ to which most African Countries are signatories, requires by its second Article that

> "(each) state party....undertakes to respect and to ensure to all Individuals within its territory and subject to its jurisdiction (the various human rights already sketched) without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status".

INTERNATIONAL LABOUR LAW

In the area of International labour law the right to association is of Crucial importance. Indeed according to Humprey, there would be no trade Union movement as it operates in democratic countries, without freedom of association.[11] The right to bargain collectively the right to strike and the very existence of Trade Unions themselves all depend on it.[12] Joyce Avery, also states that freedom of assembly is essential to the free exercise of trade Union rights, and unions should be able to meet freely on their own premises and there should be need for public authorities to have prior notice or to authorise meetings and their representatives should not attend them.[13]

Public meetings and demonstrations also constitutes an important trade union right, but the union should comply with the general formalities which uniformly apply to all these gatherings.[14]

The full exercise of trade union rights calls for a free flow of Information, opinion and Ideas at meetings and in Union publications. There should be a right to express opinions through the press or any other medium without prior censorship and trade union publications can also take stand on questions having political aspects as well as on Social questions.[15]

Article 23 of the Universal Declaration and article 22 of the political covenant specifically mention the right to form and join trade unions.[16] But as provided by article 22(2) of the political convenant there is no limit on the "lawful restrictions" which may be placed on the right of members of the Armed Forces and the Police (Categories to which article 11(2) of the European Convention adds members of the administration of the state) to exercise the right to freedom of association.[17]

The first substantive article on freedom of association and protection of the right to organise is article 2 of convention No. 87 of 1948, International Labour Organisation. The right is accorded to both workers and employers.[18] The point of this article is not to protect workers against attempts by employers to prevent them from organising but to ensure that there is freedom for all to exercise the right to organise in relation to public authorities.[19]

The right to organise extends to both forming and joining an organisation-workers and employers are free to form new organisations, and also to join existing ones, subject only to the rules of the organisation themselves : thus it would be in order for the rules of the trade union to stipulate that it is open only to certain categories of workers.[20] Under article 9 of the covention it is left to the laws and regulations of the countries themselves to determine the extent to which the convention shall apply to the armed forces and the police.

Workers and employers should not have to seek permission from the public authorities before setting up an Industrial organisation.[21] Formalities are usually prescribed by law for the establishment of an occupational organisation but article 2 of the convention implies that the authorities should not impose legal formalities which would be equivalent in practice, to previous authorisation nor consitute an obstacle amounting to a prohibition.[22]

The trade unions are further given the rights to draw up their constitution and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.[23] The rights in question are essential if an organisation once formed is to be able to functio in freedom.[24] The workers are also under a duty to respect the law of the land and secondly the law of the land should not be such as to impair the guarantees provided for in the convention.[25]

Another important safeguard is contained in Article 4 of the convention, namely that workers and employers organisations shall not be liable to be dissolved or suspended by administrative authority. The Article is Intended to provide guarantee against arbitrary suspension or dissolution by administrative fiat without the protection afforded by normal judicial procedure.[26]

The trade union Act, 1913 of Britain made it clear that political activity was perfectly lawful for trade unions but imposed on a degree of complicated control over the use of union funds for such activities. The Act applies to all unions, registered or not in so far as they use money in the support of candidates at parliamentary or Local elections, the maintenance of MPS and other public officers the holding of political meeting the distribution of political literature and other supporting activities.[27]

The right to belong or not to belong to a Trade union is rarely a simple matter of an Individual and an organisation. It usually involves the man's employment and therefore his employer, and may be regarded as a matter of public concern. According to the Industrial Relation Act of Britain, every worker shall, as between himself and his employer have 3 rights.[28]

These are:

a) The right to be a member of such registered Trade Union as he may choose.
b) The right to refuse to be a member of any trade union (registered or unregistered) at all, or of any particular Union. This right is subject to the "agency shop" and "approved closed shop" exceptions.
c) The right to take part in the activities of a registered union at an "appropriate time" and the right to stand for and hold office in the registered union.

From the above what emerges is that the right to participate in union activities is less clear. It is not only limited by being confined to the activities of registered unions, the activities must take place at an "appropriate time". Further defined in section 5(a) as either sometime outside working hours or sometime inside working hours in accordance with arrangement agreed with the employer or consent given by him.

Trade Union has been defined as an organisation temporary or permanent, consisting, "wholly or mainly" of workers "of one or more descriptions" whose principle objects include the regulation of relations between workers of that description and employers.[29] And According to Cronin and organisation must therefore have ordinary trade union activities -(Collective bargaining etc) among its main objects and must open its membership to workers with a "description" - though there is no apparent limit to the breadth of such description.[30]

That is how this right to associate should be exercised in accordance to International law. It should among other things include two basis that of strike leadership,[31] in so far as it relates to trade union. It also implies a plurality of politic parties.

The question to be looked into therefore is the exercise of this right in Africa , since Article 10 of the Banjul Charter provide for the right to associate. Question is does it portend a multi-party state or is it possible in a one-party state?

CONNECTION BETWEEN THE UNIVERSAL SYSTEM OF THE UNITED NATIONS AND THE BANJUL CHARTER:

The Universal Declaration of Human Rights has been regarded as the preliminary step towards more elaborate formulation of standards in relation to human rights in Instruments which would have had undoubted legal force as treaties for the parties to them. The nature of the subject matter is such that even for non-parties the content of the convenants represents authoratiti evidence of the content of the concept of human rights as it appears in the charter of United Nations.[32] The Declaration has no legal force as such but was to be supplemented by a legal binding International Bill of Rights as well as by appropriate measures of Implementation.[33] Not withstanding its hortatory character, however, the Declaration has made a remarkable impact on many countries which have assimilated the rights defined ther in into their constitutions bills of rights, not the least on those of Africa.

On December 10th, 1948, the General Assembly of the United Natio adopted the Universal Declaration on Human Rights.[34] The voting was 48 for and non against. The General Assembly has since initiated many measures intended to increase respect for human rights. Of those measures the following are relevant to any present purposes:

a) International Covenant on Civil and political rights.
b) International Covenant on Economic social and cultural right
c) Optional protocol to the International Covenant on Civil and political rights.

One of the purposes of the UN, as stated in Article 1 and 55 of the charter is to promote Universal respect for and observance o human rights and fundamental freedoms for all without distinctio as to sex, race, language or religion.

In Article 56 of the charter all members of theU.N. have pledged themselves to take joint and separate action in co-operation with the organisation for the achievement of that purpose. Pursuant to those provisions the general assemly of the UN has adopted and opened for signature, ratifications and accession the above instruments.

Article 52 of the UN Charter makes provisions for the existence of regional arrangements or agencies. The O.A.U. is therefore, a kind of regional arrangement advocated for by the Uni ted Nations Charter. Those arguing on the desirability of regional arrangement for the protection of human rights stated that it was desirable to begin at the "grassroots", to take into account the fact that there are different political, social and economic system which may make it more feasible to create operative systems on a regional basis rather than on a universal one, at least in the short run, and that some states were willing to go further than those others and should be permitted to do so through the vehicles of regional organisations.[35]

The Charter of O.A.U. was adopted by a conference of Heads of State and governments in Addisababa on 25th May, 1963.32 states signed the charter this total included all African states with the exception of;

a) States then not independent (Gambia, Malawi and Zambia);
b) The republic of South Africa.

On 21st July, 1964, 22 member states signed the protocol of the commission of mediation, conciliation and Arbitration established by article 19 of the charter of the organisation, by virtue of being a regional organisation, the O.A.U. is bound to keep its obligation by respecting the provisions of the U.N. Charter. Therefore, by formulating and drafting the African Charter on human and peoples' rights, the O.A.U was fulfilling its obligation as a regional organisation of the U.N.

The members of the O.A.U. have an obligation to recognise the peoples right to associate enshrined in article 10 of the Banjul Charter, "Every Individual shall have the right to free association provided that he abides by the law". This right is almost the same as that enshined in article 22(1) of the International

It had at this time become increasingly clear that ostensible entrenchment in a constitution, of provisions of fundamental human rights did not in itself guarantee that they would be enforced later. This is because it was found out that in most of the African constitutions there were provisions for human rights but these were always violated as realised for example, during Idi Amins reign in Uganda.

According to Ringera,the first regional seminar with special reference to Africa was held at Cairo,Eghpt, in September 1969 at the invitation of the Government of the United Arab Republic. The seminar appealed to African Governments to give their support and co-operation in establishing a regional commission on Human Rights for Africa.[42] Many other seminars followed.

During the meeting held in July, 1979 at the sixth session of the O.A.U. Conference of Heads of state and Government, it was agreed that a draft of an African Charter of Human and Peoples Rights should bw prepared. According to Bello, a group of African experts designated by the O.A.U. worked on it accordingly and produced a document that was to have received the approval of African heads of state in July 1980.[43] African experts had met at Dakar, Senegal to prepare the first draft of the proposed African Charter.

In order to promulgate a trully African Covention, a ministerial conference comprised mainly of African ministers of justice and other legal experts met in Banjul the Gambia, from June 8 - 15 1980, to continue and complete consideration of the draft charter, lengthy debate slowed their work, and at the conclusion of the conference only eleven articles had been approved.

The O.A.U. Council of ministers requested at a meeting the following week that the ministerial conference reconvene in Banjul "as soon as possible to complete the charter.[45]

The 2nd session of the O.A.U. Ministerial Conference of the draft charter convened on January 7 - 9, 1981, Forty of the fifty member states of the O.A.U. took part in the conference, and consideration of the draft charter was completed on schedule.[46] With its task accomplished the ministerial conference passed the charter to the next level of discussion, the 37th ordinary session of the council of ministers. On January 10, 1981, the secretary general of O.A.U presented before the plenatry of the council of ministers the report of the secretary general on the African charter.[47]

On June 17, 1981, the 18th Assembly of Heads of state and government convened to discuss the charter. The Assembly took note of the council of ministers recommendations and adopted the charter with no amendments. As of September 1982, twelve countries have signed the charter, while two others Mali and Guinea, have deposited with the General Secretariat Instruments of ratification with no resevations.

There has been, and still is considerable confusion reagrding the title of the charter. The charter originally was called "The Africa charter on Human and Peoples Rights", however, at the 37th session of the council of ministers, many states felt that the title would lead to confusion with the charter of O.A.U.[48] The heads of state took notice of the recommendation and subsequently changed the name of the charter, to "the Banjul charter on Human and Peoples Rights", as Banjul, the Gambia, was the site of the two ministerial conferences that resulted in the final draft of the charter that was presented to the ministers during the 1981 summit, in Nairobi, Kenya. Yet despite this change a recent reprint of the charter published by O.A.U. has retained the original title. The charter represents the culmination to two-year drafting.

The charter is now in force. It is now left to the various African states to implement it. The question to be answered is whether the right to associate is catered for in the African contextual situation, where one party is almost the rule.

Third World Countries consist mostly of countries which have recently attained their Independence, the greater part of them since 1955. In many cases their experience in political administration is relatively new. Government Institution - building is a long-term process in which most of the recently- Independent countries are still at early stages. Secondly, Third World Countries have been under one form of domination, political, economi social or cultural and they still encounter risks of new-colonialism after attaining political Independence. This influences their attitudes and their policies vis-avis their former colonizers. Thirdly, the countries of the 3rd world are plagued by the disease of under development.[49]

The African states feel that in the present stage of their development, they cannot honestly be expected to fulfil their obligations spelt out in the covenants. They are preoccupied with the task of nation building and may have to use stern measures to Integrate the diverse communities making up the state, some of whose leaders would not stop at nothing to disintegrate the state.[50]

The existence of powerful centrifugal forces calls for a strong regulative capacity, particularly in the area of integration for the achievement of a greater degree of Inter-ethinical accomodation and national integration is one of the most critical problems facing African states. And democratic Government cannot be practiced nor Individual rights protected in a society which is torn by Internal disorder.[51]

Moreover, gross economic and educational differences exist within society. President Nyerere in a speech at the University of Toronto said:

> "What freedom has a subsistence farmer? He scratches abare living from the soil .., his children work at his side witho schooling, medical care, or even good feeding, Certainly he has freedom to vote and to speak as he wishes, but these freedoms are much less real to him than his freedom to be exploited only when his poverty is reduced will his existing political freedom become properly meaningful and hi right to human dignity become a fact of dignity".[52]

Thus the masses have other problems which the states feel that they should be catered for first. These are social economic needs. In consideration of these factors many African states felt that constructive criticism or opposition within a single party framework is more helpful. Thus we have a number of one-party states in Africa, these include, Kenya, Tanzania, and Zambia.

All these arguments by scholars and leaders in support of one-party system can easily be disproved by a closer look at merits and demerits of one party system. I think one-party state encourages corruption. Since there is no opposition to scrutinis and critise government maladministration corruption is rampart. The reason for favouring one-party system seems to be in the fact of colonialism. The colonial administration, was characterised by brutality, suppression, and unlimited power. Opposition was rare, as the colonial government could not allow formation of parties, so as to contain nationalists. African leaders also support the one-party system because like in colonial time it gives unlimited power and allows suppression. Added to this are unlimited temptations to accumulate wealth when one is a leader. Any move that threatens a leaders position must be suppressed as he would not like to give way to others. I think because of this individual rights are not well catered for in one-party states.

As G.J.Laski said, ".....nothing appears to us so definite a proof of dictatorship as when the dictator destroys, as he is logically driven to destroy, all political parties save his own.[53]

It is therefore, personal ambition that drive the leaders to ban opposition parties.

Its sad that so many third world countries have denied their own peoples the very freedom which has been so difficult to achieve. Betrand stated that,

"their growing impatience with the apparent lack of progres after several years of independence led them to believe that they could accomplish more by subjugating their own people.

> And ... the absence of a politically mature electorate and a free press, accompanied by the progressive elimination of any potential source of criticism led invariably to the complete loss of freedom."[54]

This is true for Africa where by criticism has been curtailed by elimination of many political parties and control of the press.

The multi party systems are better because they do not encourage corruption, suppression or brutality. The opposition, parties can always criticise where something goes wrong. Nation building may prove impossible if the political centre lacks feedback on the utility of its approaches such feedback helps the system to function more effectively by ensuring that the leadership does operate and make its decisions in an informational vacuum.[55] Further, if people who happen to have differing views are willing and permitted to work constructively, within the legal framework of the system, they may well be providing support for that system, for this is essential for a political system to try to avoid the development of a false sense of support.[56]

I think an opposition can also be an effective way of channeling disatisfaction through legitimate filters and that way an organised opposition acts as a safety value because; by offering a legitimate avenue for criticism and protest, it discourages those who are dissatisfied from seeking redress outside the legal framework.

CASE STUDY

THE RIGHT TO ASSOCIATE IN KENYA

In the Kenyan case, the right to association is governed by the constitution and other legislation such as the Trade Unions Act[58] the Trade Dispute Act,[59] and the Societies Act.

Section 80(I) of the Kenyan constitution protects freedom of assembly and association. The section provides,

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and

association, that is to say his right to assemble freely and associate with other persons and in particular to form and belong to trade unions or other associations for protection of his interests".

Section 2(A) of the constitution provides for a dejure one party state. Thus,

> "There shall be in Kenya only one political party, the Kenya African National Union".

This makes formation of another political party illegal in Kenya.

Section 34(d) of the same provides that a person shall not be qualified as a member of the National Assembly unless, at the date of his nomination for election.

> "He is a member of the Kenya African National Union and is nominated by that party in the manner prescribed by or under an Act of Parliament".

Section 5(3) (a) further provides that,

> "Every candidate for president shall be a member of the Kenya African National Union and shall be nominated by that party in the manner prescribed by law under an Act of parliament".

The Constitution provides for derogations from the right to associate. This is found in section 80 (2). There will be

Limitation of this right to the extent that the law in question makes provisions:_

(a) that is reasonably required in the interest of defence, publi safety, public order, public morality or public health.

(b) that is reasonably required for the purposes of protecting the rights or freedoms of other persons;

(c) that imposes restriction upon public officers, members of disciplined force, or persons in the service of local government authority, or

(d) for the registration of trade unions and association of trade unions in a register established by or under any law... and conditions whereby registration maybe refused on the grounds that another trade union already registered ..... is sufficiently representative of the whole of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought, and except so far as that provision..... the thing done under the authority there of is shown not to be reasonably justifiab in a democratic society.

RIGHT TO ASSOCIATE FOR POLITICAL PURPOSES

The constitution of Kenya provides for the right to associate under section 80. However, section 2 A of the same makes provision for only one political party, the Kenya African National Union. This has the effect of making Kenya a dejure one party state. Freedom of association in one party state must be limited,to the extent that one cannot associate in or form another political party. Thus in Kenya the constitution allows fro freedom of association in economic, social and cultural sphenes not in political matters. Thus we have the Maendeleo ya Wanawake other professional associations and the trade unions but no other politica parties apart from Kanu.

One of the fundamental rights of every citizen in a democratic political system is the right to participate meaningully in the decision making process of the system which governs him. The prohibition on political association could reflect adversely on the formation and activities of other groups whcih though non-political, come under surveillance out of suspicion that they might develop along political lines. [60] The all-embracing nature of the party creates pressures to conform and people become apathetic or reluctant to speak their minds, for,

" who will appeal against the party to the party with any confid nce of redress." [61]

Furthermore, one party tends towards a collective rather than an individual philosopy and this could create an attitude of mind in which the interest of society are paramount and those of the individual take second place, security becomes the prime consider-ation to a political leadership which reacts nervously and suspiciously to real or imagined threats.[62] Thus for example, when comes to a trade union or an association taking part in political activities the party will feel threatened, if they seem like they are not following the party line. Such fears can lead to a lot of chaos for the party will and has always acted to protect itself.

The vulnerability of the set institutional structure lies in the power of the governing party which may seek to govern the people from top instead of being an expression of the will of the people. This has largely been the case in Kenya where what reall matters is indicated by the exeprience of the Kanu displinary committee which had been formed by one party. It became so corrupt and was a tool that the party leadership were using to finish their political rivals.

The party through its machinery and control over public opinion is able to control its members in the legislature and the executive, such vulnerability is characteristic of the one party state. This is because the legislature and executive, for example is filled by members of the party, since according to the constitution all aspitants for parliamentary seats are cleared by the party. It is a fact that the party cannot clear those people that will not uphold party policies. More over, the conceptual independence of the judiciary does not necessitate their independence in practice. Their independence, like the rule of law itself depends not on legal provisions (e.g. appointme removal and security of tenure) but on the commitment of the government and the party to those goals.[63]

The implication is that the extent to which a society adheres to the rule of law will depend on the extent to which the governing party is able to exert pressure on the executive, the legislature and the judiciary. But note should, be taken that the executive, the legislature and the judiciary are all there to implement the party decisions and , therefore, will not and do not detract from party policy inorder to give rights to the individual that the party does not want.

The right to political association is therefore, not a strong attribute of the Kenya Political system. Where the right is hedged in with exceptions reducing it to a sham. Apart from the legislative controls, the right to freedom of association is restricted through various non-legal measures such as presidential directives. Although the legal validity of such directives is questionable,[64] nobody can question or assess the validity of these directives in the given politival circumstances. The preservation of Public Security Act which Professor Ngugi wa Thiong describes as a total negation of all the democratic and human rights of Kenya enshrined in the constitution,[65] is another menacing sceptre in any attempt to enforce rights strictly.

It has been argued that,

> "No knowledgeable person has ever suggested that constitutional safeguards provide in themselves a complete and indifensible security. But they do make the way of transgressor the tyrant, more difficult. They are ... the outer bulwarks of defence."[66]

It matters little whether individual freedoms are protected in a written constitution, or in a written common law or some other way what matters is the actual content of the substantive and procedural law designed to protect these freedoms, and the willingness of the executive to ensure that their protection by the courts is effective.

RIGHT TO ASSOCIATE FOR TRADE UNION PURPOSES

In post colonial Kenya the demands of the "public interest" in economic development, political stability and social justice have often been used as the raison dietre for the legal regime of control and regulation of trade union power.[67] According to Grunfelds, the rules that limit the extent to which union power may be used to enhance the economic gains of wage labourers are justified on, first, the necessity to sacrifice consumption now for capital accumulation imperative for economic development, secondly, the need to avoid the disparity in incomes between workers and peasants which high wages is likely to generate, and lastly, the fact that high wages impede government efforts in creating employment.[68]

The Kenyan constitution guarantees the freedom of association and, more importantly, the freedom of workers to form and belong to unions.[69] But the right to organise thereby contained is made

subject to certain limitation made imperative by the necessity of good organisation, the demands of law and order, and the desire to protect the "public interest". [70] The state for this reason has reserved for itself legal powers which enable it not only to interfere but also to delimit the scope of the freedom to organise and define the legitimate jurisdiction of trade unions.

The law that defines the status of trade unions and demarcates the scope of their activities is contained in the trade union Act. [71] and Trade Unions Disputes Act. [72] The fact that the right to organise is conferned by positive law implies that the state has residue powers to specify its content and scope. By defining a "trade union" as an association whose principal objects under its constitutions are the regulations of the relations between employees and employers the Trade Union Act, [73] removed from the purview of the constitutional guarantee any organisation whose purpose do not conform to the demands of the statutory definitation. Any association that has any purposes over and above the protection and advancement of the vocational interests of its members fortfeits the right to organise. An Association with broad political objectives or which concerns itself with political issues cannot be registered as a trade union or if already registered can be struck off the register.

The trade Unions Act, in this respect, gives the Registrar powers to refuse or cancel registration of a trade union, if, firstly, any other objects of its constitution is "unlawful" secondly, the union is being used "unlawful" purposes and lastly the principle purposes of the union seeking registration are not in accord with those set out in the statutory definition of a trade union. [74]

In July, 1980 the president ordered the deregistration of the University Staff Union and the Kenya Union of Civil Servants on the grounds that they had engaged in political issues. [75] The interesting part of the episodes is the fact that civil servants union had done nothing manifestly political to warrant the ban. The case of the University staff Union was however, different. In a demonstration called by the Union ostensibly to protest the South African Apaetheid System the participants through placards denounced the role of multinational corporation in Kenya and certain action of government. [76] It can be argued therefore, that the union in taking a political stand removed itself from the purview of the constitutional guarantee of the right to organise. The dominant ideology conceives the political role of a trade union like that of any other pressure group.

The effect of compulsory registration on the constitution guarantee is to limit freedom of association in so far as it imposes constitutional and other restrictions both formal and substaintive on the nature of trade unions. The The groundson which the registrar can refuse or cancel registration are so extensive as to imply that in the final analysis the freedom to organise is to be exercised at the pleasure of the state. The attempt by the constitution to demarcate the province of the state and that of the individual in this regard has been diluted by the residue power left to the state to define and delimit the scope of the freedom to organise. At no time can its parameters be located with any amount of precision. In Angaha V. Registrar of Trade Unions;[77] it was established that the guarantee does not extend to the formation of a particular union so long as there has been no abuse of discretion in denying registration.

All Trade Unions are further required to settle their dispute within the framework of the Trade Disputes Act, section 19(1) of the Act gives the minister for Labour powers to declare any strike illegal if in his opinion all practical meanings of reaching a settlement through negotiation or arbitration have not been exhausted. It is a criminal offence to participate in a strike which the minister has declared illegal.[78] This considerably reduces the collective bargaining powers of Trade Unions, especially, when the government is the employer.[79]

Apart from legal controls to contrl the right to freedom of association, there are presidential directives which not only prohibit the use of some tools of industrial disputes but also destroy the very existence of trade unions themselves.[80] For example in 1980, the president made it clear that,

> "a servant of the people .....should not belong to a trade union".[81]

The right to organise might have been withdrawn in respect of civil servant. Although the validity of such directives is questionable[8] the workers conduct their affairs more or less in conformity of them.

This shows that Kenya has not fulfilled her obligation under Article 22(1) and 3 of the covenant on civil and political rights. Other non-legal machanisms used to harass and disband groups percieved by the ruling elite to be inimical of their interest. The most sophisticated of these non-legal measures is the phenomenon of suggested public opinion.

In Kenya the right of freedom of association has been converted into a concession granted at pleasure by the executive and which must be enjoyed strictly in accordance with the terms of concession With the power wielded by the executive both over the judiciary and parliament the guarantee is nothing more than a piece of paper with the power to bring into operation part 3 of the preservation of Security Act under section 83 of the

CONCLUSION

From the discussion what emerges is that the right to associate has greatly been derogated from in Africa, with the Kenyan case as an example. The right has been limited and interfered with through legal and extra-legal measure. One of the cardinal characteristics of liberal democracy is that it stands for a multi-party system. This is intended to foster and maximise the people participation in political affairs. Yet, has realised the right to political association is completly abrogated from in one-party states.

Under a multi-party system at least there is allowed the exercise of freedom to associate for political purposes. In such a situation there is always the right of formation of political parties apart from the ruling party which is of the essence of the right to associate. Such parties keep the electorate well-informed of the activity of the government, and form an important check on government excesses. This is because the ruling party would always be under threat of losing power and would take a lot of trouble to see that its policies are right and acceptable to the people.

The ruling party would first have to justify the importance of their policies to the opposition party and executive, legislature and judiciary would not be allowed to go out of the realm of the law. This is because for example, if the president or the executive made any decrees or directives whose effect is the limiting of fundamental human rights and freedoms, the other part would attack such directives, further if the judiciary passed judgements that are in derogation of the rights then the opposition party would attack them. The government in such a situation would be very careful and this would lead to very healt political, social and economic development of the various states and there would be political awareness among the people.

By having on-party system it means that there is a denial for the right to associate, since the people have no choice really but to join the only party that is there. This is the case in Kenya, Tanzania and Zambia to name but a few. There is a denial because the right to associate necessarily implies the right not to associate at the individual own choice.[83] But as realised in adejure one party state, one has no choice. Moreover, one is mor advantaged in such a situation if he is a member of the party as far as jobs and other benefits are concerned.

CONCLUSION (Cont'd)

The one-party system has therefore, failed in the protection, preservation and promotion of the right to freedom of association therefore, a multiplicity of parties should be allowed in the African Context if this right is to be preserved.

CHAPTER 3

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CHAPTER FOUR

COMPARSION BETWEEN THE RIGHT TO ASSOCIATE UNDER INTERNATIONAL LAW AND AFRICAN (MERU) CUSTOMARY LAW

Some scholars have stated that the human rights standards in the Universal Declaration of Human Rights and the two international Convenants were essentially western oriented pronouncements and that therefore, their applicability to Africa should not be automatically assumed.[1] I reject this notion that human rights concepts are peculiarly or even essentially bourgeois or western, and without relevance to Africans, such a notion confuses the articulation of the theoritical foundations of western concepts of human rights with the ultimate objective and any philosophy of human rights. Human rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual. This is an internal and universal phenomenon, and is as vital to Nigerians and Malays as to English Men and Americans.[2]

Traditional African concept of human rights is not very different from modern concepts. The notion of due process of law permeated indigenous law; deprivation of personal liberty of property was rare; security of the person was assured; and customary legal process was characterised not by unpredictable harsh encroachments upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision making[3].

The right to associate in international law is provided for in a number of international instruments.[4] Under Meru customary law the right to association is also catered for although the individual in the Meru traditional society does not really have a choice, for he has to join by virtue of attaining a certain age which requires him to associate with a certain age group.[5]

Under contemporary international law the right to associate, includes forming and belonging to political parties and other organisations.[6] Under the Meru customary laws, there were two political parties KIRUKA and NTIBA. These were opposition parties and were in leadership at different times. Thus the idea of a multiplicity of parties that is catered for in the western world would not be something very new to the Meru people for in the past they had these two parties which used to act as a check on each other so that the party in power doesn't misuse its power.

Article 22(2) of the international covenant of civil and political rights states that no restrictions may be placed on the exercise of this right other than those prescribed by law and necessary in a democratic state. Under the Meru traditional law when one was old enough to join a certain association, he could not be prevented or restricted from joining such an association. Thus even under Meru traditional law ones right to associate could not just be taken away without reason, unless one was an invalid in which case he would not be allowed to join the warrior association for he would not manage to go to battle.[7]

Under contemporary international law although there is the right to associate, there is also a corresponding duty arising out of this right. First and foremost the associates have to abide with the laws of the organisation and the laws of the state.[8] Likewise, those associating under the Meru traditional society had to keep the rules of the association and also the laws of the land. Failure to keep or abide with these laws in the traditional societies resulted in punishment just like in the modern times although in both cases the punishments differed.

The universal Declaration evisaged freedom of association in political, economic, religious educational and cultural spheres. The Meru people also used to associate for those purposes. As realised in chapter 3 people associated for political purposes, there is the Kiruka and Ntiba, and also for economic when it came to cultivating or harvesting of crops and also associated for religious, cultrual and educational purposes. It was in the group that the individual got educated and learnt about his culture and gods.

The Africans like the western world valued this freedom of association and it was catered for in almost all the traditonal communities. There are however, differences in the applicability and exercise of this right exercised in the traditional African societies compared to the practice under international law.

What will be realised is that although traditonal Africa does possess a coherent system of human rights, the philosophy unerlying that system differs from that which inspired the universal declaration of human rights. This therefore creates some differences in the rights as applied in traditional and modern society.

According to the European concept, human rights which include the right to associate, are a set of principles and rules made available to the individual with the essential aim of enabling him to defend himself against the group or entity which represents him.[9] This concept is not found in traditional Africa. There the individual is subjugated by the archetype of the totem of the common ancestor or protecting spirit and merges into the group. The individual had to rely on the extended family or the clan to manipulate the political and social forces to secure his right.[10] Traditional society therefor offered a balance between individual and collective rights that perhap tilted toward the latter; while under international law the rights and liberties of these individual may be more often asserted.

Further, human rights which include the traditional African societies, whether individual or collective were generally protected through custom rather than by written texts. However, procedures for settling disputes within a community were often well defined, even if they generally lacked such "modern improvement" as technical rules of evidence or a trained judiciary.[11] Traditional African law was also conciliatory and non-contentious and partook a desire for consensus and understanding within the community, unlike the modern law where parties just want to go to court of law.

The right to associate in international law arises out of social contract, people join out of essential will but under traditional law, the right to associate arises out of the organic nature of the society. The people joined the associations because that is what was expected of them, in actual sense they did not have a choice at all. It should however, be realised that all people wanted to join the associations so that they would be with others of their age.

The right to associate for trade union purposes provided in international law was not met in traditional African societies. This is because in traditional Africa there was really no working class group as is found in modern societies. This is because the traditiona societies were agricultural societies in which people worked for purposes of food production or caring for livestock. There was therefore, no working class group and therefore, no trade unions.

The community was of great importance in traditional Africa and individual rights had to be viewed within the context of the community It was within the group, that the individual found security, and in

some societies members of the family, clan, or group shared responsibility for acts of the individual, thus further reinforcing social control.[12]

CHAPTER FOUR

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CONCLUSION

In conclusion is a recap of the discussions in this study. In the Introductory Chapter it was stated that the subject of protection of human rights is of contemporary relevance to African states, where there has been several breaches of these rights even within member states of O.A.U. The efforts of O.A.U. and other International organisations in taking a step to remedy the situation by drafting the African charter on human and peoples rights, otherwise known as the Banjul charter were considered.

The main concern of Chapter 2 was to study the right to associate under Meru customary law. In ethnic Meru, all men and women had to be members of certain fraternities within the community. The various socio-political associations were studied with a view to finding out the nature of this right to associate. In Meru customary law this right originated from the organic nature of the society and the need for all to participate in its process. In Meru traditional society there were rights and duties of Individuals, within the associations, an Individual could not at his own instance enforce them against the whole group, but could rely on the Intimate group to manipulate the political and social forces to secure individual rights.

Ethnic Meru catered for a multi-party system. There were two social political parties, namely KIRUKA and NTIBA. although there were not the same as modern political parties they ensured the possibility of choice of policy for the community. Chapter three looked at the contemporary International law concerning the right to associate. This right is provided for in a number of International Instruments and includes the right to form and join political parties and trade Unions. The United Nations Charter amplified the principle of respect for basic human rights into International law imposing corresponding obligations to member states. The charter has led to evolution of the Universal protection of Human Rights evidenced in the charter, the Universal Declaration of Human Rights and the Covenants of 1966 of the UN and Banjul-Charter. The O.A.U is a regional arrangement provided for by the U.N. charter under article 52 of its charter. By formulating and drafting the African Charter, the O.A.U. was fulfilling its obligations as a member and regional organisation of the U.N. Being members of the U.N. it means that the O.A.U. has to respect, recognise, promote and enforce the rights

enshrined in the Banjul Charter, including the right to associate which is provided for both in International Covenant of civil and political rights and also in the U.N. Charter.

I looked at International labour law and found out that the right to organise extends to both forming and joining an organisation, subject only to the rules of the organisation. This right to associate was looked at in the African Context and the arguments for and against a multi-party system. I realised that those who hated the multi-party system feared criticism and wanted to remain in power. They therefore make sure that the party to which they belong, is the only one provided for in the constitution.

Kenya was used as a case study of the implementation of the right to associate. The right to associate is provided for in the constitution. However, the constitution imposes limitation to the right by providing that there shall only be one party, KANU. This limitation of the freedom of association means that one cannot join or form more than one political party. The freedom to join and form trade Unions provided for by the constitution and statutes is hampered by the formalities involved in forming these trade Unions.

It is difficult to participate wholly in the trade union due to the statutory control the government has over them. The public security Act makes exercise of the right to associate almost a mockery of the whole system. This is because it allows government to disband associations to preserve public security a number of times the Kenyan Government has derogated from fundamental rights by employing extra-legal measures such as presidential directive, which not only prohibit the use of some tools of industrial disputes such as strikes but also destroy the very existence of unions themselves by banning.

I observed that at least a multi-party system should have the government account for some of their actions and the ultra-vires methods used to limit the exercise of some rights and freedoms. This would lead to a very healthy political, social and economic development.

The comparative chapter looks at the right to associate both under International and Meru customary law. There were similarities and differences between the two systems of law regarding the exercise

of this right. The differences were mainly due to the different social political structures, on the one hand there is the liberal, Individualistic highly Industrial social political structure and on the other a comparatively conservative, collective mainly agricultural social political structure. What emerges is that the right to associate has been catered for in both systems. It should be noted that its application to the ethnic Meru is evoked through group action and therefore varies from its application in the International sphere which is based on the Individual and the primacy of his rights.

REFLECTIONS ON THE APPLICABILITY OF THE RIGHT TO ASSOCIATE IN PRESENT DAY AFRICA

Human rights vary depending on the means of production in a given society: In traditional societies, collective agricultural or other efforts were necessary to survive, today Individualism and self-Interest appear more important, and the work of one Individual may result in economic or social gratification without the assistance of the community. The need for collectivity that was there in traditional society is therefore no longer existent.

Industrialisation has led to the Introduction of Mechanised farming. Farming has therefore become much easier and the work which was formerly done by a group of people can now be done by one Individual. Sir Henry Maine, has stated in his book that "the movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place."[1] This is true for Africa. With the advent of colonialism the traditional African way of life was abandoned.

There is also the Introduction of Education and with it different ideas have emerged which no longer conform with traditonal ideas. People have learnt new skills, which coupled with education have led to the idea of salaried employment, forcing one to leave the family. This has weakened family dependency.

Rural-Urban Influx has resulted from the search for jobs in the towns and cities. This has led to the disruption of the traditional way of life, its laws and values. The right to associate under that level can therefore no longer be exercised due to all those changes.

Traditions that were associated with the right to political or social association developed in relatively closed societies which cannot be replicated at the level of modern state. Moreover, the unanimity which was often required in traditional societies is almost impossible to achieve given the heterogenous populations which make up most African states.[2] Today people of different tribes are mixed up very much in the different districts because of the advent of Industrialisation which has improved mobility and also due to fact of employment. This means that traditional norms can no longer be practiced and upheld by all, because different ethinic groups have different traditional values. The hierarchical structure which characterised most pre-colonial societies has largely disappeared.

Traditional Africa has therefore changed and is now modern and the ideas of human rights as applied in the west can now be applied in Africa. There in now a working class group which has emerged in the various towns and would actually like to safeguard their interes Thus the idea of the right to associate for trade union purposes will be acceptable to the working class people of Africa who might at present be expoited where they are working in factories, Industries or in the governemnt offices.

With the Introduction of Education, we now have in Africa a number of professionals such as Doctors, Engineers, Lawyers, Architects and Designers. All these need to associate to safeguard thei interest.

African leaders are turning towards dictatorship. There is also military rule, socialism and one-party systems which in one way or another violate the individuals rights and limits the exercise of his right to associate. The situation in Afirca is therefore, pathetic as far as human rights are concerned. This can be compared to the time when Europe was drafting the universal Declaration to safeguard human rights.

In the name of security, freedom of Press, expression and association are often denied and a dictatorship perpetrated to maintain governmental stability.[3] So many blunders have been commited by African Leaders in the name of Economic and Social developement. The aim of developement is therefore, itself frustrated, for development includes human rights and there can be no development without respect for human rights.

This situation is very frustrating for the African peoples who from time immemorial have had integrated in their values a system of respect for human rights and freedom. The Education received by the Africans has created greater political awareness and the right to associate for political purposes becomes a necessity. Such rights were catered for and realised in traditional societies and will therefore be easily accomodated.

I think it is high time that African Leaders stopped to sacrifice individual freedom in the pretences of safeguarding national independence. There is man, with his needs his fundamental rights and his freedoms, whether it is a question of civil and political or social, economic and cultural rights.

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