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Master of Laws (Human Rights and Democratisation in Africa)
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Negotiated management: advancing the right to demonstrate in Kenya and Nigeria

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**NEGOTIATED MANAGEMENT: ADVANCING THE RIGHT
TO DEMONSTRATE IN KENYA & NIGERIA**

**Submitted in partial fulfilment of the requirements for the Master of
Laws (Human Rights and Democratisation in Africa) Faculty of Law,
University of Pretoria.**

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30 October 2014

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Dedication

This research paper is dedicated to my pops P.K. Muhoro, who influences my life in more ways than he knows and does so with great wit and tact. And to my mother Dorcas Kamunyu, whose wisdom, discipline and dependability are unmatched.

Acknowledgment

I would like to thank the Centre for Human Rights for the opportunity to be part of this life-changing programme. Special thanks to Magnus Killander whose door is always open.

With utmost gratitude I acknowledge my supervisor Professor Ayodele Atsenuwa whose sharp intellect, candour and meticulous ways indispensably enriched this dissertation.

List of abbreviations

CRC	Convention on the Rights of the Child
FCT	Federal Capital Territory of Abuja
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IG	Inspector General of Police
MPs	Members of Parliament
NPF	Nigerian Police Force
NYPD	New York Police Department
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe
OWS	Occupy Wall Street
POA	Public Order Act
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America

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CHAPTER ONE – INTRODUCTION

1.1 Background

This is a tale of two countries; Kenya in East Africa and Nigeria the African giant in West Africa. But the story begins far from Africa; it begins in New York City in 2011. In September 2011, Americans downed their tools and took to the famed Wall Street financial district to protest in what came to be known as Occupy Wall Street (OWS). The reason for their protest was:¹

Social and economic inequality, greed, corruption and the perceived undue influence of corporations on government—particularly from the financial services sector. The OWS slogan, *We are the 99%*, refers to income inequality and wealth distribution in the U.S. between the wealthiest 1% and the rest of the population.

This was the first of what is known as the ‘Occupy movement... its primary goal being to make the economic and political relations in all societies less vertically hierarchical and more flatly distributed.’²

Back in Africa, in January 2012, Nigerian President Goodluck Jonathan did away with subsidies for petroleum products. ‘This action translated into more than one hundred per cent increase in fares, electricity, food, rents and virtually every all goods and services in Nigeria.’³ Inspired by the Occupy Movement, protests erupted across the country with the arm of the state similarly swinging in action quelling the protest and arresting protesters. More than a year later, enter Kenya. Between May and June 2013 Kenyans followed suit decrying their members of parliament’s (MPs) efforts to circumvent the law and award themselves hefty pay increases despite already being some of the best paid MPs in the world and in spite of the heavy wage burden that Kenyans shoulder through disproportionately high taxes. Like in Nigeria, some of the peaceful protests were dispersed by use of water cannons and beatings by the police.

The foregoing set of events motivated this study as they present both puzzling and disquieting concerns. Disquieting because they illustrate a clear knee-jerk reaction that the state and police have to protest; a disproportionate response which seems to be institutionalised and

¹ http://en.wikipedia.org/wiki/Occupy_Wall_Street (accessed 30 May 2014).

² http://en.wikipedia.org/wiki/Occupy_movement (accessed 30 May 2014).

³ O Emmanuel & B Ezeamalu ‘#Occupy Nigeria: One year later, the gains, the losses’ <http://www.premiumtimesng.com/news/114890-occupynigeria-one-year-later-the-gains-the-losses.html> (accessed 30 May 2014).

normalised. The concerns are puzzling in light of the budding democratic spaces in the case study countries which are evidenced by the growing freedoms of expression and media. Yet in stark contrast the management of protests is archaic and reeking of authoritarianism.

The preoccupation of this study is therefore the exchange of grievances between a state and its citizens through demonstrations. More precisely, it is about the modality of such grievances when they arise between government and demonstrators.

1.2 Statement of the problem

Protests have been utilised by citizens to express their grievances or aspirations since time immemorial. However, as the Special Rapporteur on the rights to freedom of peaceful assembly and of association notes, 'in far too many instances, the ability to hold peaceful assemblies has been denied or restricted by authorities in violation of international human rights norms and standards.'⁴ This is no different for the countries in question. Demonstrations are mostly tolerated by the state and even this, only when protests are not deemed inconvenient and do not rouse too much rubble. The main concern is that historical and current trends in both countries show that the state exercises a presumption in favour of arbitrarily restricting protest activities. These restrictions go over and beyond lawful limitation.

'Even in advanced democracies, demonstrations have not been policed without human rights abuses.'⁵ Only recently, Ferguson Missouri in the United States of America (US) played out on a world stage the state's propensity to circumscribe demonstrations even when the same are peaceful. Amnesty International admonished the US for human rights abuses in this instance and 'criticised the use of force and military equipment by the police in their attempt to control the disorder in the Missouri town following the shooting of unarmed black teenager Michael Brown'.⁶

The state machinery at work in indiscriminately quashing demonstrations is the police and for this reason they will form a significant part of the present discussion. One of the key difficulties is that the police's duty to maintain law and order has over time been misconstrued as being at odds with a citizen's right to express by way of protest. In the light of this, police have often 'chosen

⁴ UN Human Rights Council 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/23/39 (2013) 13.

⁵ IT Sampson 'The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria' (2010) 2 *African human rights law journal* 433.

⁶ E Palmer 'Ferguson Protests: Amnesty International Condemns US 'Human Rights Abuse' In Wake of Mike Brown Shooting' <http://www.ibtimes.co.uk/ferguson-protests-amnesty-international-condemns-us-human-rights-abuse-wake-mike-brown-1461735> (accessed 30 August 2014).

to risk criticism rather than praise; as the consequences attached to the policing of demonstrations almost always present human rights concerns.’⁷ Even worse, ‘their contemporary exhibition of pseudo-tolerance to civil protests is laden with political undercurrents, manifesting in their religious’⁸ and often subjective enforcement of restrictions to demonstrations. In this regard, ‘maintenance of public order’ trumps all other considerations as it is the most common justification proffered for suppression of protests.

In reiteration, a presumption against demonstrations is prevalent in the case study countries and indeed world over. This presumption persists owing to the current out-dated arrangements for the management of demonstrations in Kenya and Nigeria. The policing of protest in the case study countries embodies the proverbial fly in the ointment. Accordingly, the negotiated management model has been singled out for consideration as a potential transformative response to the distressing status quo.

1.3 Research questions

Towards addressing the research problem, this study seeks to answer the following research questions:

1. Is there a right to demonstrate?
2. What prospects does the negotiated management approach offer for the effective realisation of the right to demonstrate?
3. To what extent can the legal framework of Kenya and Nigeria accommodate a negotiated management approach to handling demonstrations?

1.4 Significance of the study

The aim of the study is to ensure that there is more meaningful implementation of citizen’s rights to express dissent by way of demonstrations. The objective is for the case study countries to have a model for implementation of a negotiated management approach. Such an approach is beneficial both for public administration of law and order as well as citizen participation and exercise of civil liberties.

⁷ n 5 above, 433.

⁸ n 5 above, 434.

1.5 Literature review

There is research on freedom of assembly, demonstrations and the right to protest. Negotiated management has received some attention but not nearly as much by way of scholarly works and rarely in the dimension of it being the primary vehicle to enhance the right to demonstration. This section reviews some of the existing works for their contributions and identifies the gaps in them which create the opportunity for the present work.

Mead, in one of the most recent authoritative works on peaceful protest:⁹

...a clear divide [exists] between those who see the police as having adopted a far more aggressive stance, akin to para-militarism when confronted with and dealing with large scale disorder and those who will still see public order policing as, largely, by consent and 'negotiated management' wherever possible – with violence and force a long, long way down the list of possible solutions.

Mead proposes a revolutionary way of looking at protests that is in line with the thinking that human rights should not be categorised into generations and thereby accruing varying obligations based on these hierarchies. Instead, he avers that the right to protest must be seen by states as a positive obligation requiring the government to facilitate protest and not merely view it as a negative right which they should refrain from limiting. This positive obligation is at the heart of negotiated management which calls for cooperation among all actors involved in a protest.

Konvitz prudently observes that freedom of assembly is usually asserted for the 'unmolested dissemination of unpopular economic, political, and social views'.¹⁰ In doing so, he draws attention to the nature of the right to freedom of assembly noting that it is one that inherently invites challenge and limitation. It is for this reason that a negotiated management approach then becomes particularly convenient as it then ensures that the state performs its positive obligation in facilitating demonstrations.

Sampson discusses the right to demonstrate in Nigeria by evaluating public order policing. His work serves to illuminate the protest context in Nigeria. For instance in discussing the history of protests, he avers that Nigeria's former military regimes may explain the culture of militancy displayed in protest policing to date. He also identifies prevalent restrictions on the right to demonstrate in Nigeria such as his overall deduction that in 'analysis of the police's response to

⁹ D Mead *The new law of peaceful protest: Rights and regulation in the Human Rights Act era* (2010) 19.

¹⁰ MR Konvitz *Fundamental liberties of a free people: religion, speech, press, assembly* (2003) 275.

demonstrations and civil protests in Nigeria, a consistent pattern becomes evident. This is that the police response has always been ‘anti-people.’¹¹

A global study¹² on repression and criminalisation of protest around the world features Kenya as one of its case study countries. The study highlights restriction tendencies in Kenya and identifies that the key challenge is the imposition of disproportionate restrictions and excessive use of force by police in Kenya.

The Organisation for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights has produced what are arguably the most authoritative guidelines on freedom of peaceful assembly.¹³ This inference is reached from observing the reliance that is placed on the guidelines in other key works such as UN reports and reputable international organisations. The guidelines espouse several guiding principles of the negotiated management approach such as the presumption in favour of holding assemblies as well as the state’s positive obligation to facilitate protest. The OSCE expressly captures best practice on actions and laws that would amount to disproportionate restrictions while also highlighting the idea of legitimate restrictions. These guidelines are employed to make firm deductions as to the proportionality of restrictions to the right to protest in the case study countries. The guidelines also corroborate the approaches taken under the negotiated management approach with regards to procedural issues.

The Geneva Academy of International Humanitarian Law and Human Rights recently released a briefing paper on the facilitation of peaceful protest.¹⁴ The briefing documents the latest trends in peaceful protests and helps to flesh out best practices in three key areas: the duty to facilitate peaceful protest, required action by law enforcement officials and preventing the excessive use of force in policing protest.

The United Nations (UN) *via* its Special Rapporteur on extrajudicial, summary or arbitrary executions, in a report¹⁵ on the use of force during demonstrations posits that negotiated management is one of the entry points and strategies in re-envisioning the role of police in demonstrations. ‘Under this approach, the task of the police is to protect rights and to facilitate,

¹¹ n 5 above, 445.

¹² International Network of Civil Liberties Organisations *Take back the streets: Repression and criminalization of protest around the world* (2013).

¹³ OSCE Office for Democratic Institutions and Human Rights *Guidelines on freedom of peaceful assembly* (2010).

¹⁴ Geneva Academy of International Humanitarian Law and Human Rights *Academy briefing no.5: Facilitating peaceful protests* (2014).

¹⁵ UN Human Rights Council ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ A/HRC/17/28 (2011).

rather than frustrate, demonstrations.’¹⁶ The strategies proposed in the report will be scrutinised for potential suitability in the case study countries.

1.6 Research methodology

This study will utilise desk review and in terms of scope, it will case study Kenya and Nigeria. These case studies are selected for the reason that Kenya and Nigeria are considered countries of influence in their sub-regions, East Africa and West Africa respectively. Additionally, possible advancements in Kenya and Nigeria may portend a positive stimulus for countries in their sub-regions to emulate. The site of the research will be in Nigeria and as much as this fact offers the opportunity, it will employ key informants interviews for clarification and to enrich the study.

1.7 Limitations of study

A preliminary literature review revealed that there is a scarcity of scholarly works specifically on negotiated management as it relates to protest. While this lacuna offers prospects for the present work, it also presents a limitation. As *Mead* equally observed:¹⁷

It is hard to count the number of books in the Anglo-Commonwealth world dedicated to the topic of free speech. Those on the topic of protest and assembly would probably not utilise the fingers of both hands.’

The writer will endeavour to mitigate this informational gap by consulting the broadest variety of resources such as reports, papers and such other useful sources.

1.8 Overview of chapters

Chapter one presents the background to the study, the statement of the problem, research questions, the methodology to be adopted and undertakes a review of key and current literature relevant to the study.

Chapter two presents the conceptual framework for the work. It begins by setting out the normative framework of the right to freedom of peaceful assembly then interrogating the existence

¹⁶ n 15 above, 17.

¹⁷ n 9 above, 6.

of a distinct right to demonstrate. It concludes by resolving whether there is a right to demonstrate internationally as well as in the case study countries.

Chapter three tackles the theoretical framework of the negotiated management approach and undertakes an analysis of how it works in practice. Specifically, this chapter assesses the prospects the approach offers through extrapolation of its key features and principles.

Chapter four analyses the state of public protests in the countries under review. This includes a brief history of protest, relevant legal framework together with the current status on management of demonstrations. It also assesses the prospects of implementation in both countries of study as well as entry avenues for the adoption of the model.

Chapter five consists of the key findings, recommendations and conclusion. Deductions will be drawn from canvassed arguments and recommendations proposed towards instituting a negotiated management approach of demonstrations in Kenya and Nigeria.

1.9 Definition of terms

In this dissertation, the terms demonstration and protest will be used interchangeably. The Oxford dictionary defines a demonstration as ‘a public meeting or march protesting against something or expressing views on a political issue’.¹⁸ Similarly a demonstration is elsewhere defined as ‘an occasion when a large group of people protest about something. Synonyms or related words for this sense of demonstration [are] protest.’¹⁹

Similarly, the terms: right to freedom of peaceful assembly, freedom of assembly, peaceful assembly will be used interchangeably:²⁰

An “assembly” is an intentional and temporary gathering in a private or public space for a specific purpose. It includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in.

¹⁸ Oxford dictionaries <http://www.oxforddictionaries.com/definition/english/demonstration> (accessed 30 May 2014).

¹⁹ MacMillan Dictionary <http://www.macmillandictionary.com/thesaurus/british/demonstration> (accessed 30 May 2014).

²⁰ UN Human Rights Council ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ A/HRC/20/27 (2012) 7.

CHAPTER TWO – FIRST THINGS FIRST: IS THERE A RIGHT TO DEMONSTRATE?

2.1 Introduction

Is there a specific right to demonstrate? Although the negotiated management approach to demonstrations proceeds on the premise that the right to demonstrate is justiciable, thereby creating an entitlement on the part of demonstrators and a duty on the part of the state; this work nevertheless considers the question a pertinent one. This section attempts to answer the question .

2.2 Establishing the right to demonstrate *via* history, legal norms and custom

2.2.1 The fundamental right to freedom of peaceful assembly

Demonstrations derive from the right to freedom of peaceful assembly. This right is considered a fundamental human right and is enshrined in the key international human rights documents. The Universal Declaration of Human Rights (Universal Declaration) provides that, '[e]veryone has the right to freedom of peaceful assembly and association.'²¹ The right is also affirmed in the International Covenant on Civil and Political Rights (ICCPR) which states: '[T]he right of peaceful assembly shall be recognised'²² and '[n]o restrictions may be placed on the exercise of this right'²³ except in so far as is legally permissible.

The right of peaceful assembly is also found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) where it is articulated with respect to trade union rights as a 'right to strike'.²⁴ The right accrues to children as the Convention on the Rights of the Child (CRC) affirms that, 'States Parties recognise the rights of the child... to freedom of peaceful assembly.'²⁵ The African human rights system similarly recognises the right *via* the African Charter on Human

²¹ Universal Declaration of Human Rights, art 20.

²² International Covenant on Civil and Political Rights, art 21.

²³as above, art 21.

²⁴ International Covenant on Economic, Social and Cultural Rights, art 8.

²⁵ Convention on the Rights of the Child, art 15.

and Peoples' Rights (African Charter) which provides that '[e]very individual shall have the right to assemble freely with others.'²⁶

2.2.2 A distinct right to demonstrate emerges

'The lineage of a distinct right to demonstrate, to protest or to assemble is more mixed and difficult to trace'²⁷ [here compared to freedom of expression]. As far as British history goes, '[t]here is no time at which one can easily plot the entry of a right to assembly and protest into legal and judicial discourse in England.'²⁸ The earliest mention of a distinct right to protest is observed in the 'judgment of Lord Denning MR in *Hubbard v Pitt*'²⁹ where he stressed that 'the right to demonstrate and the right to protest on matters of public concern... are rights which it is in the public interest that individuals should possess.'³⁰ Lord Denning found historical support for judicial recognition of the right to demonstrate:³¹

[I]n 1819... the Court of Common Council of London affirmed 'the undoubted right of English men to assemble together for the purpose of deliberating upon public grievances.' Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably... it is not prohibited.

In the *Hubbard* case, other justices affirmed the foregoing position, Stamp LJ spoke of the 'liberty to speak, the liberty to assemble and the liberty to protest or communicate information'.³² Lord Denning also noted that the 'right of protest is one aspect of the right to free speech'.³³ A subsequent case authoritatively asserts the existence of the right: 'English law upholds to the full the right of people to demonstrate and to make their views known so long as all is done peaceably'.³⁴ Following these leading cases, courts can be seen to be more explicit in asserting a right to demonstrate. For instance in the *Hirst* case, part of the holding reads thus: 'courts have long recognised the right... to protest on matters of public concern.'³⁵

2.2.3 International recognition and affirmation of the right to protest

Emergent international norms and practice evidence recognition of a right to protest. The UN Human Rights Council (the Council) has adopted various decisions, resolutions and reports that

²⁶ African Charter on Human and Peoples' Rights, art 11.

²⁷ D Mead *The new law of peaceful protest: Rights and regulation in the Human Rights Act era* (2010) 4.

²⁸ as above, 4.

²⁹ *Hubbard v Pitt* [1976] QB 142 (CA) cited in n 27 above, 4.

³⁰ as above, 5.

³¹ as above.

³² as above.

³³ as above.

³⁴ *R v Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board* [1982] QB 458, 470.

³⁵ *Hirst and Angu v Chief Constable of West Yorkshire* [1987] 85 Cr App R, 143.

support the universality of a right to peaceful protest. One resolution³⁶ establishes the mandate of a Special Rapporteur on the rights to freedom of peaceful assembly and of association while another³⁷ renews this mandate. The Special Rapporteur on the rights to freedom of peaceful assembly has been instrumental in the articulation of a right to demonstrate. In his first report to the Council, the Special Rapporteur defines that, '[a]n "assembly" is an intentional and temporary gathering in a private or public space for a specific purpose. It... includes demonstrations, inside meetings, strikes, processions, rallies...'³⁸ In a subsequent report, the Special Rapporteur reiterates that '[t]he ability to hold peaceful assemblies is a fundamental and integral component of the multifaceted right to freedom of peaceful assembly'.³⁹ In doing so, he highlights the multidimensional nature of the right to freedom of peaceful assembly in that it encompasses distinct rights such as protest.

Further, in pursuance of a decision⁴⁰ by the Human Rights Council, the Office of the UN High Commissioner for Human Rights (OHCHR) held a panel discussion on the promotion and protection of human rights in the context of peaceful protests. In this panel, the Special Rapporteur on the rights to freedom of peaceful assembly and of association asserted that:⁴¹

[T]he right for everyone to express their grievances and/or aspirations for change, including civil, political, economic, social and cultural, through peaceful protests and other non-violent ways, had been central [to human rights defenders]. That right was indeed at the heart of any democratic society.

Similarly, universal recognition of a right to protest can be illustrated by its recognition by states through inclusion in their domestic legislation. A report of the UN High Commissioner for Human Rights on peaceful protests noted that:⁴²

³⁶ UN Human Rights Council Resolution 15/21 'The rights to freedom of peaceful assembly and association' A/HRC/RES/15/21 (2010).

³⁷ UN Human Rights Council Resolution 24/5 'The rights to freedom of peaceful assembly and association' A/HRC/RES/24/5 (2013).

³⁸ UN Human Rights Council 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/20/27 (2012) 7.

³⁹ UN Human Rights Council 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/23/39 (2013) 13.

⁴⁰ UN Human Rights Council Decision 17/120 'Panel on the promotion and protection of human rights in the context of peaceful protests' A/HRC/DEC/17/120 (2011).

⁴¹ UN Human Rights Council 'Summary of the Human Rights Council panel discussion on the promotion and protection of human rights in the context of peaceful protests prepared by the Office of the United Nations High Commissioner for Human Rights' A/HRC/19/40 (2011) 5.

⁴² UN Human Rights Council 'Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests. Report of the United Nations High Commissioner for Human Rights' A/HRC/22/28 (2013) 8.

All States (emphasis mine) which provided input for this report indicated that the right to peaceful assembly, which in some cases also makes reference to peaceful protest or demonstration, is protected by the Constitution, specific legislation or both.

The foregoing illustrations do not constitute an exhaustive enumeration but certainly serve to illuminate the international acceptance of a right to peaceful protest.

2.2.4 The *raison d'être* for the right to demonstrate

Having interrogated and established a distinct right to demonstrate, a brief teleological analysis is fitting and may well serve to corroborate the thesis that there is a right to demonstrate. This calls for an examination of the *raison d'être* for the right to demonstrate.

Scholarly review has revealed that democratic expression is by far the most compelling and relevant justification for the right to demonstrate. 'Allowing citizens to engage in public protest is seen as being one of the main distinctions between a totalitarian society and a democracy.'⁴³ The UN High Commissioner for Human Rights affirmed this viewpoint in her report on peaceful protests:⁴⁴

Peaceful protests are a fundamental aspect of a vibrant democracy. States should recognise the positive role of peaceful protests as a means to strengthen human rights and democracy.

This view was reiterated by the Special Rapporteur on the rights to freedom of peaceful assembly and of association thus: '[the right is] at the heart of any democratic society, for that is how ordinary citizens could peacefully influence and alert their Governments on their issues.'⁴⁵

It has been noted that 'peaceful protests were an important part of a wider process of reform and transition... against an autocratic system of Government [towards] equality and for justice.'⁴⁶ Validating this perspective is President Mohammed Nasheed (then the president of Maldives) whose views were reported as follows:⁴⁷

He stressed that the recent events [Arab spring] across North Africa and the Middle East represented a defining geopolitical moment, a time of awakening when Muslims across the world were standing up as one to demand equality, human rights, democracy and the rule of law.

The foregoing illustrates that the *raison d'être* for the right to protest is generally universally accepted and applicable.

⁴³ H Fenwick & G Phillipson *Text cases & materials on public law and human rights* (2003) 947.

⁴⁴ n 42 above, 17.

⁴⁵ n 41 above, 5.

⁴⁶ n 41 above, 4.

⁴⁷ n 41 above, 4.

This is equally the case for the right to freedom of assembly, which provides the normative framework and basis for the right to protest. It has been said that '[t]he right to assemble peacefully rests at the core of functioning democratic systems, and is closely related to other cornerstones of democracy and pluralism'.⁴⁸ This situation is succinctly captured below:⁴⁹

[T]he freedom of peaceful assembly is associated with the right to challenge the dominant views within society, to present alternative ideas and opinions, to promote the interests and views of minority groups and marginalized sections of society, and to provide an opportunity for individuals to express their views and opinions in public, regardless of their power, wealth or status.

Finally, protest plays a unique two-pronged role in 'demonstrating to the government that it has strayed too far from the path of acceptability... and partly deterring it from doing so.'⁵⁰

2.3 The right to demonstrate in Kenya and Nigeria

Having established the distinct right to demonstrate, it is necessary to situate the same in the case study countries. Citizens of both Kenya and Nigeria enjoy various civil liberties and therefore demonstrations when held are well within their rights as will be exemplified. Their national constitutions guarantee the freedom of assembly which houses the right to demonstrate. Nigeria's Constitution in section 40 provides that, '[e]very person shall be entitled to assemble freely and associate with other persons or political party.'⁵¹ Nigerian case law upholds the significance of this right:⁵²

As observed by the Court of Appeal in *I.G.P v A.N.P.P.*,⁵³ the rights to freedom of assembly and expression are the bone of any democratic form of government. They are part of the foundation on which democratic governance rests.⁵⁴

More precisely, the right to demonstrate as an aspect of the right to freedom of assembly has received judicial approval by the Nigerian courts as they have held that:⁵⁵

⁴⁸ OSCE Office for Democratic Institutions and Human Rights *Handbook on monitoring freedom of peaceful assembly* (2011) 5.

⁴⁹ as above, 7.

⁵⁰ n 43 above, 947.

⁵¹ Constitution of the Federal Republic of Nigeria, 1999, sec 40.

⁵² ON Ogbu *Human rights law and practice in Nigeria* (2013) 364.

⁵³ (2007) 18 NWLR (pt 1066) 457.

⁵⁴ as above, 498 -500.

⁵⁵ *Inspector-General of Police v All Nigeria Peoples Party & Others* (2007) 18 NWLR 469-500 paras B-C cited in IT Sampson 'The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria' (2010) 2 *African human rights law journal* 447.

[C]ertainly, in a democracy, it is the right of citizens to conduct peaceful processions, rallies or demonstrations without seeking or obtaining permission from anybody. It is a right guaranteed by the 1999 Constitution and any law that attempts to curtail that right is null and void and of no consequence.

Kenya's Constitution goes a step further by expressly stating that, '[e]very person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.'⁵⁶ Arguably, this provision in the Kenyan Constitution is the outcome of the experience of the inadequacies of constitutional provisions that merely affirm a right to freedom of assembly from which a right to demonstrate may be deduced. The experience has been that often times, totalitarian governments reject such liberal readings of the right to assemble as English courts have extrapolated in *Hubber* and other cases referred to above. Such experience was commonplace during the apartheid years in South Africa and offered significant lessons that account for the express affirmation of a right to demonstrate in the country's post-apartheid Constitution. The Kenyan Constitution borrowed directly and verbatim from the South African Constitution.⁵⁷

The right to demonstrate is therefore unequivocal in both case study countries although via different routes. In one, it has been deduced from a constitutional right to freedom from assembly while in the other it is expressly affirmed as a constitutional right.

2.4 Conclusion

The chapter elucidates a distinct right to demonstrate which is recognised both internationally and in the respective case study countries. The fact of the recognition of the right in theory, however, does not mean that in its trajectory, there has not been opposition. *Mead* captures the situation succinctly:⁵⁸

There is a clear homogeneity about the value and necessity of freedom to speak, even to speak offensively or baselessly; the same cannot be said about the right to protest and demonstrate despite the allied, symbiotic nature of the two rights. Too often... it is argued that the right to protest should quite properly be countervailed by the convenience of others, business disruption and the 'unreasonable' nature of protest. It is, quite simply, inconceivable that sensible people would argue that free speech should be curtailed because others might be 'inconvenienced' or 'because I disagree with you'.

⁵⁶ Constitution of Kenya, 2010, art 37.

⁵⁷ Constitution of the Republic of South Africa, 1996, art 17.

⁵⁸ n 27 above, 7.

The foregoing quote lends validity to the relevance and significance of the research problem that is the focus of this work which is that all too often, the right to demonstrate is freely dispensed with or even worse counter balanced at the altar of 'convenience'.

The objective is to explore an approach that can ensure that the right to demonstrate can be more meaningfully realised.

CHAPTER THREE – NEGOTIATED MANAGEMENT: PRINCIPLES & PROSPECTS

3.1 Introduction

This chapter introduces the negotiated management approach by comprehensively elucidating its essence, principles and strategies. The chapter also addresses the impact of this approach on the handling of protests, traversing the various duties that accrue to the state on account of this model. In doing so, the discussion highlights the prospects of a negotiated management approach in enhancing the realisation of the right to demonstrate. The chapter will conclude by highlighting challenges that may constrain the ready adoption of the model; which will offer lessons for the case study countries.

3.2 The negotiated management model

'[T]he negotiated management approach has, over the last few decades, prevailed in much of the United States and Europe'.⁵⁹ It refers to a specific approach to policing and handling of public protests. 'By the end of the 1980s... police agencies had, for the most part, adopted a 'negotiated management' bundle of crowd control strategies.'⁶⁰ 'Following debilitating clashes between demonstrators and police in the 1960s',⁶¹ most western democracies began to explore the negotiated management approach. '[T]hose who had to do public-order policing came to the conclusion that it would be more productive, where possible, to work with crowds, rather than against them.'⁶² The Special Rapporteur on extrajudicial, summary or arbitrary executions has lauded negotiated management and succinctly highlighted its key feature:⁶³

Under this approach, the task of the police is to protect rights and to facilitate, rather than frustrate, demonstrations. Some community disruption by protesters is tolerated, and force is used only where violence occurs, and then only in moderation.

⁵⁹ UN Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/17/28 (2011) 18.

⁶⁰ JD McCarthy 'The Policing of Transnational Protest by Donatella Della Porta; Abby Peterson; Herbert Reiter' (2007) 50 *Acta Sociologica* 441.

⁶¹ n 59 above, 17.

⁶² n 59 above, 17.

⁶³ n 59 above, 17.

The negotiated management 'focuses on minimising violence and balancing the rights of companies, governments and the general public with those of workers and special interest groups'⁶⁴ and therefore enables the possibility of a win-win situation for all parties involved.

In stark contrast, in Africa, and as well in the case study countries, protests are predominantly handled using the escalated force model of protest policing that preceded negotiated management. 'Key features of escalated force... include: 'Massive use of force to deter even minor violations; Intimidating use of relations with organisers; [and] Generalized and indiscriminate information gathering'.⁶⁵ At its worst, 'the militancy of protestors [is] met by increased militancy by the police. Any show of force or violence by the protestors [is] met with overwhelming force in return.'⁶⁶

Demonstrations in Africa and the case study countries bear the clear marks of an escalated force model. This is in spite of the fact that the right to freedom of peaceful assembly is recognised in the ICCPR, African Charter and virtually all national laws including those of the case study countries. The African Commission on Human and Peoples' Rights (African Commission) has observed that 'exercising this right, even peacefully, is often met with repression and brutality from the state and its apparatus.'⁶⁷

This was also the case for western democracies in decades past. 'In response to the growing violence at demonstrations... [the] new doctrine of "negotiated management" emerged based on greater cooperation between police and demonstrators and an effort to avoid violence.'⁶⁸ Given the gains realised in countries which have adopted it, it is time for Africa and the case study countries to move towards negotiated management of demonstrations. The African Commission shares this conviction having recently stated that:⁶⁹

As Africa witnesses an increase in the number of protests, the challenges of implementation of known and accepted standards has injected a new urgency into the public order policing debate. The African Commission on Human and Peoples' Rights is currently developing its focus on the critical

⁶⁴ D Baker 'From batons to negotiated management: The transformation of policing industrial disputes in Australia' 391 available at <http://policing.oxfordjournals.org> (accessed 10 October 2014).

⁶⁵ D Della Porta & H Reiter *The policing of transnational protest* (2006) 183 cited in JD McCarthy 'The Policing of Transnational Protest by Donatella Della Porta; Abby Peterson; Herbert Reiter' (2007) 50 *Acta Sociologica* 441.

⁶⁶ AS Vitale 'From negotiated management to command and control: How the New York Police Department polices protests' (2006) 15 *Policing and Society: An International Journal Research of Research and Policy* 286.

⁶⁷ African Commission on Human and Peoples' Rights, Danish Institute for Human Rights & African Policing Civilian Oversight Forum 'Police and human rights in Africa' (2014) 4 *Newsletter on Police and Human Rights in Africa* 3.

⁶⁸ n 66 above.

⁶⁹ n 67 above.

area of Police and Human Rights. In this context, the Commission may be well served to consider the development of its own African guidelines on facilitating peaceful protest.

The African Commission's assessment of a public order management approach is in line with and in fact describes negotiated management. This is discernible from their view that '[p]olicing protest action and specifically peaceful protest must put dialogue, communication and negotiation at the core. These are fundamental values in any democratic and community centred policing paradigm.'⁷⁰

3.3 The effect of negotiated management on the right to demonstrate

The negotiated management approach bestows obligations and duties on the part of the state and its apparatus in the handling of demonstrations. Scholars, practitioners, rights holders and duty bearers are always concerned with the nature of obligation that a right imposes as this has a direct correlation to its realisation. With regards to the right to demonstrate, it has been said that:⁷¹

Complying with the right to protest in the context of freedom of assembly entails both the negative obligation of refraining from interfering with peaceful protests and the positive obligation of protecting rights holders, including human rights defenders, in the exercise of their right to protest.

3.3.1 Negative obligation

In so far as the right to demonstrate derives from the right to freedom of peaceful assembly which is a civil and political right, it is therefore also categorised as a civil and political right. Civil and political rights usually conjure a negative duty on the part of the state i.e. the general duty to refrain.

This obligation requires the state and its apparatus to refrain from interfering with the exercise of the right to protest. Towards this, the Special Rapporteur on the rights to freedom of peaceful assembly and of association 'considers as a best practice the presumption in favour of holding peaceful assemblies, as stressed by the OSCE/ODIHR Panel of Experts on Freedom of Peaceful Assembly.'⁷² From a negotiated management view, this presumption has two key implications. The first is that '[a]nything not expressly forbidden by law should be presumed to be permissible, and those wishing to assemble should not be required to obtain permission to do so.'⁷³

⁷⁰ n 67 above.

⁷¹ UN General Assembly 'Report of the Special Representative of the Secretary-General on human rights defenders' A/62/225 (2007) 2.

⁷² UN Human Rights Council 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' A/HRC/20/27 (2012) 8.

⁷³ OSCE Office for Democratic Institutions and Human Rights *Guidelines on freedom of peaceful assembly* (2010) 15.

The second is that the said presumption in favour of protest 'should be clearly and explicitly established in law.'⁷⁴

The Special Rapporteur reiterates that 'States... have a negative obligation not to unduly interfere with the right to peaceful assembly.'⁷⁵ He proposes the following test towards limiting prohibition of protests:⁷⁶

Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities.

The ultimate test proposed by the Special Rapporteur is that 'any restrictions imposed must be necessary and proportionate to the aim pursued.'⁷⁷

3.3.2 Positive obligation

Traditionally, civil and political rights were thought to engender negative obligations while socio-economic rights beget positive obligations. The negotiated management approach predominantly invokes a positive obligation on the part of states despite the classification of the right to protest as a civil and political right. This positive obligation should not be seen as an anomaly or an innovation. The traditional approach which rigidly classified human rights into distinct classes of civil and political rights engendering only negative obligations; and socio-economic and cultural rights engendering only positive obligations has long been jettisoned. The 1993 Vienna Declaration on Human Rights adopted in 1993 affirms that '[a]ll human rights [civil and political, socio-economic and cultural] are universal, indivisible and interdependent and interrelated.'⁷⁸

The key manifestation of the state's positive obligation in the protection of rights and to facilitate demonstrations is seen in 'the role of law-enforcement officials [which] goes beyond recognizing the existence of fundamental rights and includes positively safeguarding those rights'.⁷⁹ Best practice in this regard suggests that:⁸⁰

This should be expressly stated in any relevant domestic legislation pertaining to freedom of assembly and police and military powers. This positive obligation requires the state to protect the

⁷⁴ n 73 above.

⁷⁵ n 72 above, 11.

⁷⁶ n 72 above, 11.

⁷⁷ n 72 above, 11.

⁷⁸ UN World Conference on Human Rights 'Vienna Declaration and Programme of Action' A/CONF.157/24 (1993) para 5.

⁷⁹ n 73 above, 75.

⁸⁰ n 73 above, 36.

participants of a peaceful assembly from any persons or groups (including *agents provocateurs* and counter-demonstrators) that attempt to disrupt or inhibit them in any way.

As can be observed, this obligation necessarily informs an approach that is different from the approach taken in an escalated force model evident in the case study countries where police treat the protesters not as the persons deserving of protection, rather as the offenders. From an escalated force model stand-point, 'crowds are best understood as irrational, monolithic units that are dangerous and prone to violence [whereas the] new approach regard[s] stereotypes associated with the classical understanding of crowd behaviour as wrong and potentially dangerous'⁸¹ It offers the insight critical to understanding that force (from the police) begets force (from the protesters).

Aiming to correct this preconceived bias, the negotiated management approach emphasises that governments must comprehend protest as rational behaviour; democratic expression of dissent or displeasure by members of the citizenry. Most modern governments are coming to this realisation and are seeking to improve their protest policing infrastructure. For instance, the UK, through a parliamentary process conducted an inquiry into protest policing and subsequently recommended various legal and operational changes in order to enhance the right to protest. Their overall conclusion was that: 'Peaceful protest should be facilitated and protected: to fail to do so would jeopardise a number of rights'.⁸²

Equally of note is that, the success of the negotiated management approach largely depends on the implementers who are principally law enforcement officials. A departure from the old ways of policing protest inescapably calls for the government to take positive measures to ensure that the police are well trained and equipped to handle protest. Researchers in this area recommend:⁸³

Governments must ensure that law-enforcement officials receive adequate training in the policing of public assemblies. Training should equip law-enforcement agencies to act in a manner that avoids escalation of violence and minimizes conflict, and should include "soft skills", such as negotiation and mediation. Training should also include relevant human rights issues and should cover the control and planning of policing operations, emphasizing the imperative of minimizing recourse to force to the greatest extent possible.

This view has also been underscored by the UN High Commissioner for Human Rights who has avowed that 'management of demonstrations, in practice, also requires knowledge of crowd behavior, adequate equipment – including a range of less-than-lethal weapons – and appropriate

⁸¹ n 59 above, 17.

⁸² House of Lords & House of Commons Joint Committee on Human Rights 'Demonstrating respect for rights? A human rights approach to policing protest' (2009) 1 *Seventh Report of Session 2008-09* 56.

⁸³ n 73 above, 75 - 76.

training of law enforcement officials, including in human rights.⁸⁴ This serves to reiterate the fact that this duty on the part of government is now an accepted view.

3.4 Guiding principles

Having introduced the model, a brief enumeration of its key principles will deepen understanding of negotiated management for the purpose of assessing its prospects in the management of protest. The following assessment presents the underlying philosophy of negotiated management and lends the scholarly slant that is being relied on in the present work:⁸⁵

This approach [negotiated management] looks at the policing of protests as being guided by a consistent strategic philosophy. Rather than trying to isolate individual factors to explain the policing of demonstrations, it relies on a framework of beliefs and practices...

There are some deducible principles (referred to as beliefs and practices above) that capture the key philosophy of the negotiated management approach and they are accordingly discussed hereunder.

3.4.1 The safety triangle

Negotiated management encompasses the safety triangle principle which emphasises dialogue and communication among the three key parties to a protest i.e. the protesters, police and relevant authorities with the ultimate objective being to facilitate the right to peaceful protest. The safety triangle has been brought to prominence by the Special Rapporteur on extrajudicial, summary or arbitrary executions in his report on demonstrations:⁸⁶

A number of countries that follow this approach [negotiated management] have formalised the role of the “safety triangle” during demonstrations, that is, the organisers, local or State authorities, and the police, who are required to communicate with each other in order to avert safety risks and diffuse conflict.

In fact, the Special Rapporteur has lauded this as one of the key norms in the policing of protest by stating that “[t]he proper management of demonstrations depends on... the so-called “safety triangle”.⁸⁷ This approach has also been recognised by the UN High Commissioner for Human Rights

⁸⁴ UN Human Rights Council ‘Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests. Report of the United Nations High Commissioner for Human Rights’ A/HRC/22/28 (2013) 8.

⁸⁵ n 66 above, 287.

⁸⁶ n 59 above, 18.

⁸⁷ n 59 above, 19.

who listed it as one of the effective measures and best practices to ensure the promotion and protection of human rights in peaceful protest.⁸⁸

Leading scholars and researchers in protest management have recently recommended that 'National regulations should adopt the 'safety triangle' approach to promote the negotiated management of protests.'⁸⁹ This formalisation is in recognition of the indispensable role that the safety triangle plays to the negotiated and effective management of demonstrations.

However, there may be instances where a 4th group of stakeholders may need to be represented in the safety triangle, which may implicate a change of terminology to "safety square". A case in point is that there is a remainder of the public that is not dissenting but may be impacted by the protest's outcomes. Perhaps it is fair to say that such an interest will be represented by the state, but as depicted by cases of counter demonstration involving anti-abortion or pro-death penalty and anti-death penalty protesters; harmonisation of all interests within one safety triangle can be difficult. Irrespective of this, the police have 'a duty to protect and facilitate each event where counter-demonstrations are organised or occur, and the state should make available adequate policing resources to facilitate such related simultaneous assemblies'.⁹⁰

3.4.2 Dialogue and communication

Dialogue and communication are some principal pillars of the negotiated management approach and are collectively discussed here owing to their interdependent nature. Among the government's positive obligations is 'the need to facilitate peaceful protest through dialogue and communication.'⁹¹ The Special Rapporteur on the rights to freedom of peaceful assembly and of association 'stresses the utmost importance of genuine dialogue, including through negotiation, between law enforcement authorities and organisers in order to ensure the smooth conduct of the public assembly'.⁹²

Dialogue is relevant both before and during the protest. In order for the police to play their facilitative role, there should be 'good dialogue, communication and co-operation between police and protestors; police and third parties; and protestors and those against whom they are

⁸⁸ n 84 above, 8.

⁸⁹ Geneva Academy of International Humanitarian Law and Human Rights *Academy briefing no.5: Facilitating peaceful protests* (2014) 30.

⁹⁰ n 73 above, 18.

⁹¹ H Gorringer, C Stott & M Rosie 'Dialogue police, decision making, and the management of public order during protest crowd events' (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 111.

⁹² n 72 above, 11.

protesting.⁹³ In fact, 'effective dialogue in both directions was more likely to lead to a peaceful and trouble free protest.'⁹⁴

Effective communication between the police and protesters is important in exchanging information that will enable facilitation of the protest and protection of the protesters. In line with a negotiated management approach, protesters should not be treated as an unreasonable monolithic entity. This calls for what is known as a 'no surprises' approach to policing. A feature of this approach is that '[l]aw-enforcement officers should allow time for people in a crowd to respond as individuals to the situation they face, including any warnings or directions given to them.'⁹⁵ For instance, the police in the UK have adopted this 'no surprises' approach as the extract from the manual on public order policing indicates:⁹⁶

A 'no surprises' communication philosophy should be adopted: ongoing communication should be maintained with all relevant stakeholders throughout the operational planning strategies and during the event itself. Protesters and the public should be made aware of likely police action in order to make informed choices and decisions.

3.4.3 Negotiation and mediation

Under the traditional escalated force model, if tensions are high during a protest, the police response has customarily been to call-off the protest. However under negotiated management, '[i]f a stand-off or dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution.'⁹⁷ Doing so prevents the eruption of violence and thereby serving both protesters' and police interests. In Warsaw for instance, they deploy 'civil servants with previous experience in dealing with assemblies who may be present at an assembly and who can facilitate communication between the organisers and law-enforcement officials.'⁹⁸

Negotiation and mediation are not only useful during the protest but also before the protest at the planning stages. For instance, for mutual agreement as to when, where and how the assembly is conducted. This opportunity should not be used by the government to impose undue restrictions as to the time, place and manner of protest. Rather negotiation and mediation become particularly important when there is disagreement on these factors relating to the protest and 'may help reach a

⁹³ n 82 above, 48.

⁹⁴ as above, 48.

⁹⁵ n 73 above, 77.

⁹⁶ National Policing Improvement Agency, Association of Chief Police Officers & Association of Chief Police Officers in Scotland *Manual of guidance on keeping the peace* (2010) 92.

⁹⁷ n 73 above, 78.

⁹⁸ n 73 above, 78.

mutually agreeable accommodation in advance of the date provided in the notification for the assembly.⁹⁹

3.4.4 Tolerance

Under the negotiated management approach, keeping the peace is extended the highest premium. The peoples' right to express dissent is considered more paramount than the fastidious upholding of the law for minor infractions. One of the key features of negotiated management has been described as embracing 'coercive intervention as a last resort; tolerance of minor breaches; [p]artnership aimed at ensuring the right to demonstrate; [and] [i]nformation gathering focused on punishing offenses'.¹⁰⁰ The Special Rapporteur on extrajudicial, summary or arbitrary executions concurs with this principle:¹⁰¹

The negotiated management approach entails accepting some of the spill-over effect of the protest in return for assurances as to the peaceful nature of the event. The emphasis of this approach is therefore on ensuring peace, rather than enforcing law. In this paradigm of "under-enforcement" of the law, force should be used by the police in self-defence, rather than to assert the authority of the law in the abstract.

The foregoing is not an outlandish submission and is comparable to the justification for civil disobedience which is chiefly democracy. This notion has been identified as having received backing from the US Supreme Court for instance in *Cox v Louisiana*: "There is... a strong case for the protection of protests, demonstrations of civil disobedience under the first amendment."¹⁰² The First Amendment constitutionally guarantees 'the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'¹⁰³ In further justification for tolerance, one may also venture that the offences committed during protest are based on a pure democratic motive and not the intention to break the law.

This work does not suggest that the justification for protest or civil disobedience calls for blanket exoneration on all offences committed in the course of a protest. On this issue the US Supreme Court has recommended that the state should exercise a balanced approach depending on the violation; a holding which yet again lends credence to the tolerance principle:¹⁰⁴

⁹⁹ n 73 above, 70.

¹⁰⁰ n 60 above, 441.

¹⁰¹ n 59 above, 18.

¹⁰² *Cox v Louisiana* 379 US 559 (1965) 575 as cited in HA Freeman 'The right of protest and civil disobedience' (1966) 41 *Indiana Law Journal* 246.

¹⁰³ The Constitution of the United States, amend. I.

¹⁰⁴ n 102 above, 245.

The Court has also several times stated that there is a distinction between violation of law where a third person is injured and one where merely the State is incommoded, and has required the State to adjust itself to the citizens' conscience and first amendment interests.

The principle of tolerance also calls for a presumption of peacefulness of the demonstration. Where there are sporadic incidents, the police are required to simply identify and if possible single out the violent elements without necessarily calling off the whole protest. This has received support from scholars in the area who have insisted that tolerance is one of the prevailing traits of the negotiated management approach as it is practiced in the US and Europe:¹⁰⁵

The new approach called for the protection of free speech rights, toleration of community disruption, on-going communication between police and demonstrators, avoidance of arrests, and limiting the use of force to situations where violence is occurring...

Ultimately, the principle of tolerance finds justification in furtherance of democratic expression as established below:¹⁰⁶

[S]ociety might take the position that the individual has a *right* of dissent (and civil disobedience) because of the advantages accruing to society from free and open discussion. Here "tolerance" becomes "justified"-i.e. "juridified" on principle.

3.5 Challenges that may constrain the ready adoption of the negotiated management model

An objective discussion of the negotiated management model requires an assessment of some of the potential challenges that could arise with adoption of the approach. These pitfalls do not necessarily derive from weaknesses of the model itself rather from shortcomings that have been observed in jurisdictions that practice a negotiated management approach. These pitfalls offer lessons to the case study countries and others that are yet to adopt the negotiated management approach.

3.5.1 Resistance in uptake of the model

The negotiated management approach has been contrasted with the escalated force model. As has been noted, the latter model is characterised by heavy-handed policing of protests and overzealous enforcement of public order law. Yet the former model that is being proposed must rely on the same police force to 'unlearn' repressive policing tactics and relearn new ways to respond to protest. This is in fact an indispensable aspect to negotiated management '[s]ince police will always

¹⁰⁵ n 66 above.

¹⁰⁶ n 102 above, 247.

have to make on-the-spot determinations about how to deal with a given situation, it is especially important that respect for dissent be part of police culture.¹⁰⁷

The re-socialisation that is needed on the part of the state and the police has not always happened. This is owing mostly to resilient institutional inclination towards use of force but also a lack of political will from the state to adopt this more citizen empowering, democratic, human rights approach to policing. This is hardly surprising as scholars on the status of the state and democracy have observed that, 'half of the "democratizing" countries in the world today are illiberal democracies.'¹⁰⁸ Even in mature democracies such as the US, negotiated management has faced underhanded resistance from authorities in some states. The following assessment by the Special Rapporteur on extrajudicial, summary or arbitrary executions similarly reflects this position:¹⁰⁹

While the negotiated management approach has, over the last few decades, prevailed in much of the United States and Europe, it is important to note that it is not universally accepted in this area. In fact, there are indicators that less tolerant approaches, sometimes described as paramilitary policing, may be coming back into vogue, particularly in respect of, but not confined to, transnational anti-globalization protests. Governments may also feel that the floodgates have been opened by the events in Tunisia and other countries, and take a hard line on protest.

The present writer has explored numerous writings in trying to identify any valid reason that could possibly justify resistance to the proposed model. This search has been futile save for one 'potential argument against use of the negotiated management style of policing [in] that violent demonstrators may exploit the police desire to avoid escalation to get away with illegal acts.'¹¹⁰ This supposition is however unsupported in other writings or case studies that the present writer has come across. Accordingly, the inference in this regard is that in theory, negotiated management and its principles have not been faulted and this work will explore avenues to overcome potential resistance from the case study countries in the adoption of a negotiated management approach.

3.5.2 Presumption of bona fide implementation

The success of the negotiated management approach is premised on its bona fide implementation by the police and relevant authorities. This is to say that negotiation should be towards expanding and not restricting the right to demonstrate; this in line with the presumption in favour of holding protests.

¹⁰⁷ AA D'Addario 'Policing protest: Protecting dissent and preventing violence through first and fourth amendment law' (2006-2007) 31 *New York University Review of Law & Social Change* 127.

¹⁰⁸ F Zakaria 'The rise of illiberal democracy' (1997) 76 *Foreign Affairs* 24.

¹⁰⁹ n 59 above, 18.

¹¹⁰ n 107 above, 126.

The negotiated management model presents an entry point for authorities to be more involved in the planning of protest but this is an aspect that can easily be abused to stifle the autonomy of the protest and protesters. Warning against this, the Special Rapporteur on the rights to freedom of peaceful assembly and of association notes that arbitrary restrictions may manifest in various ways. The first relates to a notification process that is pegged upon a formal or informal request by the authorities to negotiate or propose the timings and venue of the protest.¹¹¹ In saying this, the Special Rapporteur is cognisant of the arbitrary way in which the notification requirement is applied in most countries i.e. misunderstood for permission. He further avers that any such insistence or requirement by authorities to negotiate the time and place of the protest is ‘tantamount to restricting the planned assembly and would need to pass the strict test of necessity and proportionality, as defined in article 21 of the Covenant [ICCPR]... applicable to restrictions.’¹¹²

Another caution relates to the necessity of genuine dialogue. Meaningful dialogue, involves some level of trust among the parties and their respective intentions; but the makings of police-citizen relationship in most if not all countries have traditionally been characterised with distrust, worsened by past police handling of demonstrations. ‘Police officers employing this style [escalated force] often enter such situations [protests] expecting trouble and viewing their role as one of protecting the general population from the troublemakers.’¹¹³ In contrast, the negotiated management approach has proved that such a dynamic is counterproductive as it does not necessarily result in peaceful protests and what is really needed is dialogue. Scholars have however expressed disquiet noting that:¹¹⁴

[D]espite the fact that dialogue policing is motivated to enhance human rights and democratic forms of protest policing, [that writer] reserves judgement on the approach. He notes the tension between instrumental police objectives and the rhetoric of dialogue.

The quoted work further echoes previously expressed scepticism with the writer maintaining that he ‘is unsure whether dialogue policing will result in’¹¹⁵ ‘genuinely more democratic forms of protest policing, or merely lead to nothing but more subtle forms of coercion.’¹¹⁶ This yet again alludes to the potential of the negotiated management approach to be utilised under the guise of

¹¹¹ UN Human Rights Council ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ A/HRC/23/39 (2013) 16.

¹¹² n 111 above.

¹¹³ n 107 above, 124.

¹¹⁴ M Wahlström, ‘Forestalling violence: Police knowledge of interaction with political activists’ (2007) 12 (4) *Mobilization* (2007) 389–402 cited in H Gorringer, C Stott & M Rosie ‘Dialogue police, decision making, and the management of public order during protest crowd events’ (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 113.

¹¹⁵ as above, 400.

¹¹⁶ PAJ Waddington *Liberty and order: Public order policing in a capital city* (1994) cited in Wahlström n 114 above, 400.

dialogue to restrict the right to protest. In fact, researchers corroborate this notion having found that ‘many commanders distrusted the tactic [dialogue] and resented having to engage with protesters whom have no desire to reciprocate, especially as the results of dialogue are not always immediately apparent.’¹¹⁷ Research done in Denmark has observed ‘some considerable resistance to the imposition of dialogue tactics in the Danish police.’¹¹⁸ Similarly in Australia there are findings that ‘modern police authorities, who maintain the latent capacity to use coercion including riot technology, remain resolute and determined to control major industrial strife, but preferably by negotiation and persuasion.’¹¹⁹

There is therefore justifiable apprehension that the negotiated management approach if not implemented genuinely can be used to create unnecessary bottlenecks and excessive police control in the planning and running of protest. This can however be countered by ensuring that the negotiated management model is incorporated in a manner that heightens chances of enforcement.

3.5.3 Select case study: ‘Command and control’ in New York

New York State has been selected as a case study for the reason that it is an illustration of an instance where negotiated management was initially adopted but policing strategies now show deviation in practice. New York State has also been deemed to be a representative sample of the US as ‘it encapsulates a period when the “escalated force” doctrine of protest policing was dominant in the United States generally, and in New York City and New York State in particular.’¹²⁰ Further, New York ‘represented a microcosm of police-protester and police-public interactions at the height of the period of escalated force... [and] the commonness of the repression of dissent...’.¹²¹ This case study further matches the immediately prior discussion of the threat of a non-genuine implementation of the negotiated management model.

This case study will focus on the New York Police Department (NYPD) which is concerned with policing protest in the state of New York. As stated, New York initially implemented the escalated force model, but this approach was ‘discredited in the 1970s and replaced by one of “negotiated management”’.¹²² A leading scholar and researcher reviewed the handling of protests in

¹¹⁷ n 114 above, 397.

¹¹⁸ J Havelund, J Ilum, M Jensen, B Nielsen, K Rasmussen & C Stott ‘Event policing—Dialogue in the policing of mass events in Denmark’ (2011) 4 *European Police Science and Research Bulletin* cited in H Gorringer, C Stott & M Rosie ‘Dialogue police, decision making, and the management of public order during protest crowd events’ (2012) 9 *Journal of Investigative Psychology and Offender Profiling* 113.

¹¹⁹ n 64 above, 390.

¹²⁰ J Earl, SA Soule & JD McCarthy ‘Protest under fire? Explaining the policing of protest’ (2003) 68 *American Sociological Review* 587.

¹²¹ as above.

¹²² n 66 above, 290.

New York over the course of six years from 1999 and concluded that the NYPD had departed from the negotiated management model by failing to follow each of its doctrines as demonstrated by their policing:¹²³

The NYPD refused to make any counter offers of a march location, developed a control model based on preventing almost any disruption of community activities, cut off negotiations with organisers and failed to establish adequate communication with organisers during the demonstration, used arrests indiscriminately, and finally used batons, pepper spray, and horse charges merely to clear streets, when there was no threat of injury or property destruction.

The researcher goes on to observe that this 'new style of protest policing can be called "command and control" because of its attempt to micro-manage demonstrations in an effort to prevent disorder and the disruption of everyday life.'¹²⁴ This model of policing is characterised by five practices being: 'aversion to disruption, controlled access, divide and conquer, shock and awe, and zero tolerance.'¹²⁵ The essence of these practices 'is their orientation towards heightening the ability of the police to micro-manage all important aspects of the demonstration from the granting of permits to the dispersal of demonstrators.'¹²⁶

The uproar against these new policing tactics has found its way to the court with decisions frequently in favour of the protesters thereby effectively disallowing some of the methods applied by the police:¹²⁷

In July 2004, a district court judge ruled that three of those four tactics [complained of] are unconstitutional... Granting injunctive relief to enjoin police from (1) closing streets at demonstration sites without providing information about alternate means of access, (2) using "pens" to restrict access to demonstrations, and (3) searching demonstrators' bags without individualized suspicion.

This case study presents key lessons for the case study countries of Kenya and Nigeria. Police 'must attempt to balance the desire... to avoid disruption with the rights of demonstrators to express their views.'¹²⁸ It is for this reason that the negotiated management approach is apposite as it relies on a framework of principles and practices such as dialogue and mediations that can accommodate

¹²³ n 66 above, 290.

¹²⁴ n 66 above, 283.

¹²⁵ n 66 above, 292.

¹²⁶ n 66 above, 292.

¹²⁷ *Stauber v New York* No. 03 Civ. 9162 (S.D.N.Y. Nov. 19, 2003) http://www.nyclu.org/mc_complaint_stb_111903.html for the judgment see *Stauber* 2004 WL 1593870 at 33 cited in n 107 above, 99 - 100.

¹²⁸ n 66 above, 302.

this quest for balance because the ‘nature of that balancing point and how it is achieved is a constantly shifting equation.’¹²⁹

One leading scholar having studied the new policing methods in New York recommends that, ‘[r]ather than adopting paramilitary or command and control models, police should re-examine the usefulness of the negotiated management approach to protest policing.’¹³⁰

3.6 Conclusion

This chapter unpacks negotiated management as a model for the handling of protests. This approach is contrasted with the escalated force model which is the prevailing protest management approach in Africa and the case study countries. A discussion on the obligations evoked by the right to demonstrate reveals that the negotiated management approach is predominantly concerned with a state’s positive obligations without which realisation of the right becomes burdensome.

Negotiated management is a strategy that embraces a framework of certain principles the foremost of which have been elucidated. This discussion also serves to illustrate the prospects of adopting a negotiated management approach in the handling of protests. In concluding this chapter, an assessment of the potential pitfalls of the model have been presented. The prevailing impression is that the model itself has hardly been criticised but instead the drawbacks derive when police and authorities attempt to circumvent the principles that guide the proposed approach.

Having comprehensively analysed the negotiated management model, the next chapter aims to assess its viability for adoption in Kenya and Nigeria. In doing so, the obligations, principles and pitfalls underscored in this chapter will provide a framework for analysis.

¹²⁹ n 66 above, 302.

¹³⁰ n 66 above, 302.

CHAPTER FOUR – TOWARDS THE NEGOTIATED MANAGEMENT MODEL IN KENYA & NIGERIA: CHALLENGES & PROSPECTS

4.1 Introduction

This chapter features an analysis of the case study countries under review. The discussion will be particularly concerned with public order management in both countries, the legal framework governing such management and how the present arrangements are interacting with the right to protest. The work will also undertake an assessment of implementation of the negotiated management approach in both countries, by illustrating how a negotiated management model can address practical concerns affecting demonstrations in the case study countries. Finally, the study will identify an entry point for the incorporation of this model in Kenya and Nigeria.

4.2 The legal framework governing the management of demonstrations in the case study countries

4.2.1 The law on public order management and policing

The management of public order and demonstrations are inextricably interlinked. This assertion emanates from an analysis of the legal attitude to demonstrations and a practical perspective on the nature of protest:¹³¹

Protests which have as their motive force more limited objectives, such as the end of an unpopular government policy or the improvement of conditions in the workplace, may actually achieve those objectives without seriously impinging upon public order. More often than not, however, some form of disturbance is a corollary of the protest.

As has been discussed, negotiated management is in itself a public order and policing management model. It is therefore imperative to interrogate the public order management arrangements in place in the case study countries in the context of demonstrations.

Kenya

In Kenya, public order management falls under the legislative scope of two acts: the Public Order Act (POA)¹³² and the National Police Service Act.¹³³ The POA concerns itself with the regulation of public gatherings and processions which comprise demonstrations. A public gathering is defined as, ‘a public meeting, a public procession, and any other meeting, gathering or concourse of ten or

¹³¹ D Pollard, N Parpworth & D Hughes *Constitutional and administrative law: Text with materials* (2007) 631.

¹³² Public Order Act Chapter 56 of the Laws of Kenya.

¹³³ National Police Service Act No. 11A of 2011.

more persons in any public place'.¹³⁴ A public procession is defined as 'any procession in, to or from a public place'.¹³⁵ Part III of the POA is dedicated to public gatherings and its exclusive jurisdiction in the management of demonstrations is illustrated by the provision that: 'No person shall hold a public meeting or a public procession except in accordance with the provisions of this section.'¹³⁶ The primary requirement for persons intending to hold demonstrations is notice which is 'at least three days but no more than fourteen days before the proposed date of the public meeting or procession.'¹³⁷ The notice should entail the organiser's contact details, the date and time of the procession as well as the proposed route.¹³⁸

The regulating authority in Kenya in matters of demonstrations is the Kenya Police. The National Police Service Act in its part VII vests various functions, powers, obligations and rights on police officers. It specifically obligates police to maintain order on roads and other places during demonstrations. Section 54(1) provides that '[t]he Kenya Police Service shall – (b) prevent unnecessary obstruction during assemblies, meetings and processions on public roads and streets...'.¹³⁹ From the phrasing of this section, it is clear that demonstrations are merely tolerated when convenient rather than facilitated. One can therefore begin to see why Kenya was earlier categorised as observing an escalated force model of protest policing.

Nigeria

In Nigeria, public order management in the context of demonstrations is primarily legislated under the Public Order Act (POA).¹⁴⁰ The POA defines an assembly to mean 'a meeting of five or more persons'¹⁴¹ and a public procession is defined as 'a procession in a place of public resort.'¹⁴² To the point, the POA in its very first section enacts the 'power to regulate assemblies, meetings and processions.'¹⁴³ More specifically, in sub-section 1 thereof, it provides that:

For the purposes of the proper and peaceful conduct of public assemblies, meetings and processions and subject to section 11 of this Act, the Governor of each State is hereby empowered to direct the conduct of all assemblies, meetings and processions on the public roads or places of public resort in the State and prescribe the route by which and the times at which any procession may pass.

¹³⁴ n 132 above, sec 2.

¹³⁵ n 132 above, sec 2.

¹³⁶ n 132 above, sec 5(1).

¹³⁷ n 132 above, sec 5(2).

¹³⁸ n 132 above, sec 5(3).

¹³⁹ n 133 above, sec 54(1)(b).

¹⁴⁰ Public Order Act Chapter 382 Laws of the Federal Republic of Nigeria, 1990.

¹⁴¹ n 140 above, sec 12(1).

¹⁴² n 140 above, sec 12(1).

¹⁴³ n 140 above, sec 1(3).

The regulation of demonstrations is vested in state governors' offices. However in practice, the regulation of public processions is managed by the police; a practice that is sanctioned by the POA itself. In section 1(3) of the POA, the Governor may authorise the issuance of licences by police of specified rank setting out the conditions of who can hold demonstrations and the venue for the same.¹⁴⁴ Further, subsection (4) enables the governor to delegate the powers to regulate demonstrations to the Commissioner of Police of the State or such other specified rank officer.¹⁴⁵ This duty on the part of police is further corroborated by the Police Act¹⁴⁶ which provides that:¹⁴⁷

[T]he Commissioner of a State shall comply with the directions of the Governor of the State with respect to the maintaining and securing of public safety and public order within the State, or cause them to be complied with.

The Police Act also provides for the appointment of emergency special constables in response to special circumstances where the Commissioner of Police is satisfied that 'an unlawful assembly or riot or breach of the peace has taken place or may reasonably be expected to take place in that area'.¹⁴⁸ This provision is a good example of the ill-founded preoccupation with public order that characterises protest policing.

Having laid out the legal framework that governs management of demonstrations in Nigeria, it behoves this study to highlight the legal status of the POA in Nigeria. The POA was the subject of a constitutional challenge first at the High Court:¹⁴⁹

The case was instituted by the All Nigeria Peoples Party and others against the Inspector General of Police [IG] after the party's rally, protesting against the rigging of the 2003 elections, was disrupted by the police because it did not obtain a police permit before embarking on the rally.

The applicants were successful with the Federal High Court in Abuja nullifying the POA and agreeing that it was a colonial relic. Dissatisfied, the IG lodged an appeal¹⁵⁰ at the Court of Appeal which returned a unanimous verdict upholding the High Court's judgment. Commenting on the judgment, a commentator noted:¹⁵¹

¹⁴⁴n 140 above, sec 1(3).

¹⁴⁵ n 140 above, sec 1(4).

¹⁴⁶ Police Act Chapter 359 Laws of the Federal Republic of Nigeria, 1990.

¹⁴⁷ n 146 above, sec 10(2).

¹⁴⁸ n 146 above, sec 52.

¹⁴⁹ 'Police permit not required for rallies - Falana' <http://kanmiakano.blogspot.com/2014/01/police-permit-not-required-for-rallies.html> (accessed 15 September 2014).

¹⁵⁰ I.G.P. v. A.N.P.P. (2007) 18 NWLR (Pt. 1066).

¹⁵¹ 'Appeal Court voids Public Order Act' <http://nigeriavillagesquare.com/forum/main-square/15116-appeal-court-voids-public-order-act.html> (accessed 15 September 2014).

[A] milestone was yesterday recorded in Nigeria's bid to enthrone constitutional democracy and guarantee the citizens' right to congregate as the Court of Appeal, Abuja Division, yesterday struck down the Public Order Act. The court declared the said Act, which mandates citizens to apply and obtain police permit or approval before holding rallies or peaceful assemblies, "null, void and of no effect".

The tenets of the Rule of Law prescribe that in the light of the decision of the court, parliament should move to review and/or repeal the POA. Since the decision was made over seven years ago, the legislature has not initiated any review process even though the police have not appealed the decision, which could imply their acceptance of it. This action has resulted in a travesty of justice as the Nigerian police continue to rely on the impugned POA to the detriment of citizens even when it has not taken steps to appeal the ruling of the court.

4.2.2 Legal limitations on the right to demonstrate

The right to demonstrate is not absolute in nature. Limitations on rights, including human rights are not necessarily ill-founded and may be necessary in a democratic society. What is important, however, is that they are imposed and implemented in strict compliance with the law and in a manner that does not defeat the very essence of the right or the spirit of the law. This section seeks to examine the parameters for the lawful limitation of the right to demonstrate in the case study countries.

In Nigeria, the right to demonstrate is encompassed within the freedom of assembly and like all other constitutional rights is not absolute. To begin with, '[w]ilst the Nigerian [C]onstitution does not... expressly state that such assembly or association must be peaceful or lawful, it is necessarily implied'.¹⁵² The right to demonstrate in Nigeria is subject to legal limitations by way of section 45 of the Constitution¹⁵³ which makes provisions on restriction and derogation from fundamental rights. It provides that the right to peaceful assembly can be restricted by a law that is:¹⁵⁴

[R]easonably justifiable in a democratic society – (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons.

¹⁵² KM Mowoe *Constitutional law in Nigeria* (2008) 479.

¹⁵³ Constitution of the Federal Republic of Nigeria, 1999.

¹⁵⁴ as above, sec 45.

It is from this provision that the drafters and defenders of the nullified POA found validation for its provisions which limit the freedom of peaceful assembly guaranteed by the Constitution. For instance, the POA provides that:¹⁵⁵

Any police officer of the rank of inspector or above may stop any assembly, meeting or procession for which no licence has been issued or which violates any conditions of the licence issued... and may order any such assembly, meeting or procession which has been prohibited or which has been prohibited or which violates any such conditions as aforesaid to disperse immediately.

The foregoing provision amounts to a disproportionate restriction of the right to demonstrate and this will be elaborated on later in this chapter.

In Kenya, the Constitution provides that '[e]very person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.'¹⁵⁶ The qualifier, to the right is immediately apparent: 'as long as the assemblies are peaceful and unarmed. Actions or laws aimed at quelling armed or violent assemblies will therefore not constitute an infringement of this right.'¹⁵⁷ On this qualifier, the UN offers some useful interpretive guidance noting that an 'assembly should be deemed peaceful if its organisers and participants have peaceful intentions and do not use, advocate or incite violence; such features [violence] should be presumed.'¹⁵⁸ In addition, the right to demonstrate in Kenya is also subject to the general limitation clause in the Constitution which provides that:¹⁵⁹

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

The foregoing constitutional limitations in Kenya and Nigeria adhere to international standards and are acceptable on paper. However, in practice the limitations are arbitrarily and excessively invoked. This is contrary to aspirations underpinning the affirmation and guarantees of the right to protest and international human rights jurisprudence which posit that, '[f]reedom to hold and

¹⁵⁵ n 140 above, sec 2.

¹⁵⁶ Constitution of Kenya, 2010, art 37.

¹⁵⁷ O Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 113 cited in M Kiwinda Mbondenyei & J Osogo Ambani *The new constitutional law of Kenya: Principles, government & human rights* (2012) 182.

¹⁵⁸ UN Human Rights Council 'Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests. Report of the United Nations High Commissioner for Human Rights' A/HRC/22/28 (2013) 6.

¹⁵⁹ n 156 above, art 24.

participate in peaceful protests is to be considered the rule, and limitations thereto considered the exception.’¹⁶⁰

4.3 The state of the right to protest in the case study countries

This section undertakes a practical discussion of the experience of demonstrations in Kenya and Nigeria. The previous discussion elucidates the legal arrangements in place for the management of demonstrations in the case study countries. The same have been shown to be heavy-handed and overly liberal in legal construction on restrictions of demonstrations. The state, both in Kenya and Nigeria has no doubt latched onto these spaces in their legal frameworks leading to the presumption of limiting demonstrations.

The wide legal berth afforded to the state to restrict protest is not unwitting; rather it is by design as deducible from the colonial histories of both countries. Both countries had similar colonial experience as they share the heritage of having been colonised by Great Britain. In colonial times, rights were not celebrated and the coloniser was not about creating laws that empowered subjects to express dissent. On the contrary, the coloniser was more committed to the suppressing of dissent and the colonial history in both countries is one of repressive laws and repressive policing. This negative culture that has persisted and continues to pervade the post-colonial experiences of both countries. Of Kenya, one scholar notes that:¹⁶¹

Actually, during the colonial era the right to assembly and to associate in any form was strictly controlled. The colonialists were afraid that the African people could effectively organise against colonial domination if they were allowed to assemble and associate.

The culture of restricting the right to assembly is a colonial vestige that the government adheres to. Successive governments have retained these repressive methods as highlighted by a study undertaken in 2000 on the state of democracy in Kenya during the *Moi*¹⁶² era. The study report notes that ‘[o]ver the years, the country has witnessed repeated examples of meetings and demonstration critical of the government being dispersed by the police, often with violence.’¹⁶³ This

¹⁶⁰ n 158 above.

¹⁶¹ K Kibwana *Fundamental rights and freedoms in Kenya* (1990) cited in CM Peter ‘Fundamental rights and freedoms in Kenya a review essay’ (1991) 3 *African Journal of International and Comparative Law* 79.

¹⁶² Daniel Toroitich Arap Moi is the second president of Kenya who served an unbroken 24 year term in office from 1978 to 2002.

¹⁶³ N Ng’ethe, JO Owiti, SW Nasongo, D Beetham & SL Bracking ‘Democracy report for Jamhuriya Kenya’ (2000) 17 available at <http://www.idea.int/publications/sod/upload/Kenya.pdf> (accessed 22 September 2014).

dismal state of affairs persists as illustrated by a recent 2014 report on the state of demonstrations in Kenya, excerpted below:¹⁶⁴

Since 2011, there have been a number of demonstrations involving clashes between demonstrators and police and military personnel. The police have been accused of using excessive power to intimidate Kenyans who protest. This has been affirmed by videos of police abusing protestors, particularly vulnerable groups, such as internally displaced persons (IDPs).

Nigeria is no different. The government is evidently keen on suppressing dissent by way of demonstrations and this tendency is also traceable to its colonial heritage. As one writer observes:¹⁶⁵

Creation of police forces that are para-military in organisation and which operate as apparatus of violence used by the rulers to suppress opposition to social injustices and anti-democratic rule is one of the legacies bequeathed to Nigeria by British colonial rulers.

One accurate supposition that explains adherence to this arbitrary colonial trend is that '[t]he repressive characters of both the state and police in Nigeria derive from the legitimisation problems which plagued successive governments in the country.'¹⁶⁶ As far back as the 1980s, scholarly works on policing in Nigeria point to the management of demonstrations as being a trouble spot. A 1988 study found that the police's poor handling of protests comprised of two out of a total of six main reasons for public outrage against police:¹⁶⁷

[S]ome of the factors responsible for the negative perception of the Nigerian police by members of society. They include: (1) distortion or exaggeration by the police of evidence in court; (2) the use of unnecessary force; (3) fatuousness in dealing with public demonstrations; (4) ineptitude in handling the public on occasions of public processions; (5) incivility to members of the public, and (6) unnecessary delay in attending to complaints.

Unfortunately, not much has changed. A 2014 report on the state of freedom of peaceful assembly in Nigeria summarises the key barriers to assembly as being; '[f]ailure to provide protection for and excessive use of force on protests that oppose government policies and excessive government

¹⁶⁴ The International Center for Not-for-Profit Law 'NGO Law Monitor: Kenya' available at <http://www.icnl.org/research/monitor/kenya.html> (accessed 22 September 2014).

¹⁶⁵ EEO Alemika 'Colonialism, state and policing in Nigeria' (1993) 20 *Crime, Law and Social Change* 187.

¹⁶⁶ as above.

¹⁶⁷ EEO Alemika 'Policing and perceptions of police in Nigeria' (1988) 11 *The International Review of Police Development* 168.

control over the route and time of protests.¹⁶⁸ The same report goes on to perceptively capture the reason behind the use of excessive force and arbitrary regulation of demonstrations:¹⁶⁹

In practice the State sometimes uses force to break up assemblies even where these are peaceful. The basis for allowing some assemblies to go ahead while preventing others appears arbitrary, but can usually be traced to the political interests of the government in power, since the Nigeria Police Force – although ostensibly a service for the entire Federation – is answerable to the President, and thus more likely to do his bidding, either express or anticipated.

From the foregoing, it is apparent that the dismal state of the right to demonstrate is as a result of the gaps and limitations created by the law as well as institutionalisation of an authoritarian culture throughout most facets of government. This status quo on demonstrations compels an alternative approach to the management of demonstrations. The next section accordingly proposes how to resolve the challenges to demonstrations in the case study countries via the negotiated management approach.

4.4 What negotiated management portends for present concerns

The aim in this section is two-fold. The first is to interrogate the present concerns about demonstrations in the case study countries and the second is to explore the prospects of an alternative reality by means of the negotiated management model. The concerns that will be elucidated include those that arise from the failings of the legal framework while others emanate from practice that is at variance with law.

4.4.1 Disproportionate restrictions in practice

The writer considers disproportionate restrictions to be those that atrophy or completely defeat the actualisation of the right to demonstrate. The Human Rights Committee (HRC)¹⁷⁰ has identified gaps that affect the implementation of freedom of assembly to include '(a) bans on demonstrations; (b) unjustified restrictions on demonstrations; [and] (c) unnecessary requirements to obtain authorizations that affect the enjoyment of freedom of assembly.'¹⁷¹

Total bans

¹⁶⁸ The International Center for Not-for-Profit Law 'NGO Law Monitor: Nigeria' available at <http://www.icnl.org/research/monitor/nigeria.html> (accessed 22 September 2014).

¹⁶⁹ as above.

¹⁷⁰ HRC is the treaty body that oversees the implementation of the International Covenant on Civil and Political Rights.

¹⁷¹ UN General Assembly 'Report of the Special Representative of the Secretary-General on human rights defenders' A/62/225 (2007) 7.

In both countries, the laws do not envisage a total ban on demonstrations; this has however come to be the police practice. In Kenya, the Constitution of 2010 provides an express constitutional right to demonstrate, yet the culture of blanket bans has persisted in spite of the new constitutional dispensation. After the general elections in 2014 and the presidential election petition that followed, there was a countrywide blanket ban on demonstrations. The day before the petition was released, the IG ‘warned that the police would not permit political gatherings, reminding the population of a countrywide directive issued earlier that month that banned all forms of demonstrations, celebrations, political rallies and gatherings.’¹⁷² A group of human rights organisations that evaluated and reported on protest incidents around this time concluded that:¹⁷³

[T]he directive clearly contravened Article 37 of the Constitution, which guarantees everyone “the right, peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities.” Nevertheless, media reports quoted the Inspector General as stating that the ban “should not be construed as denial of right to association, but a precaution to ensure criminal elements do not hijack such demonstrations to engage in lawlessness.”

In defending the ban, the police stated that it was ‘necessary to maintain security’. The Kenya Human Rights Commission maintained that ‘the exceedingly broad ban was not founded on a legitimate security threat.’¹⁷⁴ Even in 2014, the IG has continued to rationalise the total bans on demonstrations: ‘I have cancelled all political parties’ rallies until further notice due to security reasons. Cancellation of all political rallies also applies to processions & demonstrations, as criminals may take advantage of these gatherings.’¹⁷⁵ One can however question the sincerity of the security concerns as the IG reversed his decision soon after members of the opposition sought a lift on the ban to hold a welcome rally for the former Prime Minister that was returning from a hiatus abroad.¹⁷⁶ The foregoing events point to an arbitrariness in the imposition of bans which are incidentally also unsupported in law.

In Nigeria, the situation is similar. In April 2014, ‘276 female students were kidnapped from a Government Secondary School in the town of Chibok in Borno State, Nigeria.’¹⁷⁷ ‘Responsibility for the kidnappings was claimed by Boko Haram, an Islamic Jihadist and terrorist

¹⁷² International Network of Civil Liberties Organisations *Take back the streets: Repression and criminalization of protest around the world* (2013) 39.

¹⁷³ as above.

¹⁷⁴ n 172 above.

¹⁷⁵ ‘Kimaiyo bans political rallies, reverses ban to allow CORD rally’

http://sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2014/05/28/newsbrief-05 (accessed 22 September 2014).

¹⁷⁶ as above.

¹⁷⁷ ‘Chibok schoolgirls kidnapping’ *Wikipedia* http://en.wikipedia.org/wiki/Chibok_schoolgirls_kidnapping#Reaction (accessed 22 September 2014).

organisation based in northeast Nigeria.¹⁷⁸ Following the abductions, there was massive street protest demanding that the government take action to ensure the safe return of the girls. In response to the protests, the Commissioner of Police for the Federal Capital Territory (FCT) of Abuja ‘CP Joseph Mbu issued a statement in which he declared that all protests connected with the abducted Chibok schoolgirls were banned with immediate effect.’¹⁷⁹ Following public uproar the IG withdrew the ban but nonetheless:¹⁸⁰

[T]he #BringBackOurGirls protesters challenged CP Mbu’s statement in court, and on the June 4, the High Court of the FCT ruled that the NPF had no power to ban rallies and protests.

The foregoing narratives reveal some of the worst case scenarios in terms of the restrictions being manifestly unlawful.

Under a negotiated management model, a total ban is unacceptable. The model imposes a negative obligation on the part of the state to refrain from interfering with the right to demonstrate. Further, a total ban goes against several of the model’s tenets such as the presumption in favour of holding protests. In addition, the negotiated management model embraces conciliatory principles such as dialogue, negotiation, mediation and tolerance all of which would certainly prevent the imposition of a blanket ban.

The Special Rapporteur on the rights to freedom of peaceful assembly and of association has averred that ‘blanket bans are intrinsically disproportionate and discriminatory measures as they impact on all citizens willing to exercise their right to freedom of peacefully assembly.’¹⁸¹ This is similarly the view of the negotiated management model which calls for a case by case assessment of each demonstration thereby precluding a blanket ban approach.

Unjustified restrictions & unnecessary authorisations

The HRC has also flagged unjustified requirements to obtain authorisation as some of the factors that impede the implementation and enjoyment of the freedom of assembly. Our discussion of the legal limitations on the right to demonstrate reveals that there is a notice obligation in Kenya and a licence requirement in Nigeria. An assembly outside of these authorisation regimes is termed an ‘unlawful assembly’ by the POA in both countries. To make matters worse, in both countries, the POAs further enact that taking part in such an assembly amounts to an offence.

¹⁷⁸ as above.

¹⁷⁹ n 168 above.

¹⁸⁰ n 168 above.

¹⁸¹ UN Human Rights Council ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ A/HRC/23/39 (2013) 17.

This non-derogable authorisation requirement is problematic for two key reasons. To begin with, its effect is to make spontaneous protests impossible or immediately unlawful should they occur. This is manifestly unjust and ‘impede[s] enjoyment of an essential character of the freedom of assembly whereby people may come together spontaneously and immediately following a triggering event.’¹⁸² The nature of spontaneous assemblies is such that ‘there may be events of urgent or special significance to which an immediate response by way of a spontaneous assembly would be entirely justified.’¹⁸³ In these circumstances, delay occasioned by waiting for authorisation would render the response obsolete.¹⁸⁴

The second challenge with the authorisation requirement in the case study countries derives from the automatic inference of an ‘unlawful assembly’ where authorisation is not obtained and even worse the creation of an affiliated offence. Such an approach is highly discouraged in practice and in law in other jurisdictions. The European Court of Human Rights has held that:¹⁸⁵

A decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly.

The negotiated management takes on a different and more progressive approach in respect of authorisations. Under this model, the only non-derogable qualification for a demonstration is that it must be peaceable.

The negotiated management model imposes a positive obligation on the part of the state to facilitate protest. Therefore notice/licence requirements such as those in the case study countries should only be in place to enable facilitation. But the most important point is that fundamentally, ‘[a]ny such legal provision should require the organiser of an assembly to submit a notice of intent rather than a request for permission.’ The negotiated management approach in this regard is succinctly captured in international guidelines as below:¹⁸⁶

It is not necessary under international human rights law for domestic legislation to require advance notification about an assembly. Indeed, in an open society, many types of assembly do not warrant any form of official regulation. Prior notification should, therefore, only be required where its

¹⁸² M O’Flaherty ‘Effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests: a background paper’¹⁰ available at <http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/Seminar2December2013.aspx> (accessed on 22 September 2014).

¹⁸³ OSCE Office for Democratic Institutions and Human Rights *Guidelines on freedom of peaceful assembly* (2010) 69.

¹⁸⁴ as above.

¹⁸⁵ *Bukta and others v Hungary* European Court of Human Rights, 17 July 2007 para 36 cited in Geneva Academy of International Humanitarian Law and Human Rights *Academy briefing no.5: Facilitating peaceful protests* (2014) 13.

¹⁸⁶ n 183 above, 17.

purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly.

Viewed as such, a notice requirement ‘may not necessarily violate the right to peaceful assembly’.¹⁸⁷ Even where such a notice requirement is in place, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has asserted that:¹⁸⁸

Should the organisers fail to notify the authorities, the assembly should not be dissolved automatically (e.g. as in Austria) and the organisers should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment.

The same approach applies to government response to spontaneous assemblies. A negotiated management approach entails that: ‘[e]ven where no such exemption for spontaneous assemblies exists in the law, the authorities should still protect and facilitate any spontaneous assembly so long as it is peaceful in nature.’¹⁸⁹

The present regulatory regime in the case study countries entails several disproportionate restrictions which impinge upon the right to demonstrate. Negotiated management proposes a more viable and suitable alternative that will enhance the realisation of the right to demonstrate. Moreover, as relates to total bans and unjustified authorisations; the negotiated management approach is more in line with recognised international standards on protest management.

4.4.2 Examining the public order justification

In the case study countries, we have seen that legal limitations on the right to demonstrate are allowed to the extent that they are reasonable and justifiable in a democratic society. In Nigeria, limitation in the interest of public order is constitutionally recorded¹⁹⁰ as one of the reasons that satisfy this parameter. The Nigerian limitation clause is in fact identical to and possibly influenced by that in article 21 of the ICCPR. In Kenya, public order is not constitutionally provided but in the Kenyan POA; where there is a ‘clear, present or imminent danger of a breach of the peace or public order’,¹⁹¹ a demonstration may be barred. The foregoing public order justifications are acceptable if the limitation to the right to demonstrate falls within the legal parameter and is exercised in good faith. The writer concurs with the view that ‘even where the underlying causes of a particular

¹⁸⁷ Geneva Academy of International Humanitarian Law and Human Rights *Academy briefing no.5: Facilitating peaceful protests* (2014) 10.

¹⁸⁸ UN Human Rights Council ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ A/HRC/20/27 (2012) 9.

¹⁸⁹ n 183 above.

¹⁹⁰ n 140 above, sec 45.

¹⁹¹ n 132 above, sec 5(8)(b).

protest action are clearly meritorious, the State has a residual obligation to maintain public order.¹⁹² Public order as understood in this legitimate sense is therefore not the bone of contention in the present instance.

Germane to the present discussion are the instances where disproportionate restrictions on demonstrations are imposed under the guise of public order. Being countries that observe an escalated force model of policing, both case study countries have a typical obsession with the maintenance of public order. In Nigeria, it has been observed that:¹⁹³

Policing in both colonial and post-colonial Nigeria also exhibited pre-occupation with law and order maintenance, state security and defence of a few powerful and wealthy individuals who control the country's political and economic system through force and violence.

This preoccupation with public order can be seen to explain the wide, excessive and indiscriminate powers given to the police by the POA in both case study countries in the regulation of demonstrations. The Special Rapporteur on extrajudicial, summary or arbitrary executions in his oft quoted report on demonstrations is concerned about countries like Kenya and Nigeria when he observes that 'in a troubling number of instances, the police are given explicit, unfettered discretion to prohibit demonstrations.'¹⁹⁴ This sentiment receives corroboration from a report in Kenya:¹⁹⁵

"The license should be used to inform the government about public meetings so that the authorities can provide security," noted opposition MP Martha Karua, "to facilitate, not to obstruct legitimate activity." In practice, however, the law gives local authorities sweeping powers to interpret whether a meeting might "prejudice the maintenance of public order." This discretionary power is misused.

In Nigeria too, police obsession with security, law and order have been discovered, with scholars questioning their zealous implementation of the Nigerian POA. One scholar notes that the Nigerian police 'contemporary exhibition of pseudo-tolerance to civil protests is laden with political undercurrents, manifesting in their religious enforcement of the Public Order Act.'¹⁹⁶

In Kenya, it is surprising that in spite of a relatively new Constitution, there is 'an alarming tendency on the part of the state security apparatus to seek to roll back the constitutional gains

¹⁹² UN Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/17/28 (2011) 5-6.

¹⁹³ n 167 above, 161.

¹⁹⁴ UN Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/17/28 (2011) 15.

¹⁹⁵ Human Rights Watch *Multipartyism betrayed in Kenya: Continuing rural violence and restrictions on freedom of speech and assembly* (1994) 22.

¹⁹⁶ IT Sampson 'The right to demonstrate in a democracy: An evaluation of public order policing in Nigeria' (2010) 2 *African human rights law journal* 434.

realized... under the guise of preserving “peace and security”.¹⁹⁷ While the democratic space has certainly improved, security apparatus nevertheless retain a propensity for arbitrary invocation of the “public order” justification in seeking to restrain protest activities. They have accordingly been cautioned:¹⁹⁸

Security forces must operate within the structures of accountability, rule of law, respect for human rights and other core values established by the Constitution, and avoid the temptation to revert to old habits of acting as an arm of the regime in power and a tool for political repression and persecution.

The preoccupation and misappropriation of the ‘public order’ justification in the case study countries is one of the manifestations of the escalated force model. ‘The escalated force approach reflects a preference for the protection of public order’.¹⁹⁹ In contrast, ‘the negotiated management approach, which focuses on the preservation of peace, hinges the question as to whether protest should be curtailed on whether the rights of others are threatened.’²⁰⁰

Researchers on the right to protest have observed that just like in Kenya and Nigeria, currently there is a ‘tendency in many countries to treat public demonstrations as a threat to public order or national security and to criminalize or forcefully repress protests even when they are peaceful.’²⁰¹ A negotiated management approach is more reasonable as the ‘duty to facilitate peaceful protests implies that protests are not per se a threat to public order.’²⁰² This model recognises that, ‘[w]hen protests occur, the authorities should therefore engage in an open, inclusive, and meaningful dialogue with those who protest.’²⁰³

4.4.3 Excessive use of force

Policing of demonstrations in the case study countries is characterised by excessive use of force particularly through police violence & brutality as well as firing of live ammunition and teargas on more often than not peaceful protesters. In Nigeria, policing of protest has been heavily criticised in this regard:²⁰⁴

Police in Nigeria still use heavy-handed methods including excessive use of teargas and live bullets to disperse protests and demonstrations. Civil crowd-control methods are completely absent in the

¹⁹⁷ n 172 above, 42.

¹⁹⁸ n 172 above, 42.

¹⁹⁹ n 194 above, 15.

²⁰⁰ n 194 above, 15.

²⁰¹ n 187 above, 7.

²⁰² n 187 above, 7.

²⁰³ n 187 above, 7.

²⁰⁴ ‘The police force and the enforcement of human rights’ *The Lawyers Chronicle* <http://thelawyerschronicle.com/the-police-force-and-the-enforcement-of-human-rights/> (accessed 30 September 2014)

handbook of the Nigerian police. Despite over a decade of civil rule, policing in Nigeria still wears the brutal and bloody face it wore under military despotism.

Unlike the other constraints to demonstrations, the excessive use of force is particularly egregious because in addition to impinging on the right to protest; it also violates the rights to life, freedom and security of the person and the right to dignity. The following quote poignantly puts this into perspective:²⁰⁵

On 12 October 2009, armed security forces opened fire on a crowd of people peacefully protesting against the proposed demolition of their homes in Bundu community, Port Harcourt, Nigeria. At least twelve people were shot and seriously injured. In addition, eyewitnesses told Amnesty International they saw six dead bodies piled in the back of a Hilux police pick-up truck.

Unfortunately, the foregoing is not a singular story in Nigeria. For instance, in another incident, it was reported that 'Nigerian police fired live ammunition and tear gas to disperse a crowd protesting against fuel subsidy cuts in the northern city of Kano on Monday, wounding 18 at least people'.²⁰⁶ These incidents of excessive use of force are not without casualties, and one researcher notes that '[p]olice use of excessive force, including live ammunition, to disperse demonstrators resulted in numerous killings during the year [2010]'.²⁰⁷ What is worse is that in spite of clear evidence on excessive use of force, the government does little by way of accountability:²⁰⁸

Over the years Amnesty International has documented many cases of human rights violations by the security forces in Nigeria. Few officers are held accountable. In most cases there is no investigation into deaths in custody, extrajudicial executions and enforced disappearances.

The narrative is not much different in Kenya where it has been empirically established that '[t]he incidence of police violence in breaking up peaceful demonstrations, and in treating suspects in the course of arrest and while in custody, is a recurrent and disturbing phenomenon'.²⁰⁹

In Kenya, elections seem to always provide the trigger for the police to go into overdrive. This is in line with an observation that 'the use of excessive force by law enforcement officers [is]

²⁰⁵ Amnesty International *Nigeria Port Harcourt demolitions: Excessive use of force against demonstrators* (2010) 5.

²⁰⁶ 'Nigerian police fire to disperse Kano protest, wound 18' *African Outlook* <http://www.africanoutlookonline.com/index.php/component/content/article?id=3624:nigeria-police-fire-to-disperse-kano-protest-wound-18> (accessed 30 September 2014).

²⁰⁷ 'Nigerian legal system' *9ja Legal* <http://9jalegal.com.ng/Information/NigerianLegalSystem> (accessed 30 September 2014).

²⁰⁸ n 205 above, 14.

²⁰⁹ n 163 above, 8.

prompted by the belief that it is expected of them, in curbing political demonstrations.²¹⁰ For instance, after the 2007 general elections, Human Rights Watch reported that:²¹¹

Since the disputed December 27, 2007 presidential elections, Kenyan police in several cities have used live ammunition to disperse protesters and disperse looters, killing and wounding dozens. Some observers and even police have described the police response as an unofficial "shoot to kill" policy. For example, Human Rights Watch received credible reports that in Kisumu dozens of people were shot dead by police while demonstrating against the election result announced on December 31.

The foregoing is particularly pertinent for the reason that the post-election violence of 2007/2008 was subsequently found to be in the scale of crimes against humanity and consequently a present situation of the International Criminal Court (ICC). The post-election violence resulted in the death of almost 1,300 people; of this figure, it was found²¹² that the police were responsible for the deaths of at least 400 in unclear circumstances.

Similarly after the 2013 general elections and the announcement of the results of a presidential election that followed, 'demonstrations erupted in Kisumu, a city in western Kenya and a stronghold of support for Odinga.' A report that documented this incident found that:²¹³

Five people were shot dead and more than twenty injured when police used live ammunition to disperse protesters. These atrocities were committed in total disregard for the letter and spirit of the Constitution of Kenya, which is anchored on the principles of respect for human rights.

The same report further noted that, 'as many of the protesters were unarmed, the police actions violated the Public Order Act, which requires that the police should use no more force than is reasonably necessary.'²¹⁴

All the foregoing incidents point to a worrying and grounded practice in protest policing in the case study countries where protesters are treated as 'potentially violent'. However, the irony is that this approach is not useful at all nor does it succeed in keeping the peace as research has observed that, 'if a crowd is treated like an irrational group of criminals who only understand the language of force, that is how they will behave.'²¹⁵

²¹⁰ n 194 above, 7.

²¹¹ 'Kenya: End police use of excessive force' *Human Rights Watch* <http://www.hrw.org/news/2008/01/12/kenya-end-police-use-excessive-force> (accessed 22 September 2014).

²¹² Report of the Commission to Investigate Post-Election Violence, 2008.

²¹³ n 172 above, 38.

²¹⁴ n 172 above, 39.

²¹⁵ n 194 above, 17.

Owing to its principles particularly of tolerance, the negotiated management model is necessarily different:²¹⁶

This milder approach represents a shift towards a more active use of communication, negotiation, cooperation, information gathering and emphasis on preventive police policies. The new approach regard[s] stereotypes associated with the classical understanding of crowd behaviour as wrong and potentially dangerous, because the police could misunderstand the situation and use excessive force, which could escalate the conflict.

Premised on the foregoing, the negotiated management model invokes various facilitative obligations that are useful in mitigating the escalated use of force. For starters, the state ‘has a positive duty to take reasonable and appropriate measures to enable peaceful assemblies to take place without participants fearing physical violence.’²¹⁷ This includes ‘a positive obligation to protect the right to life... [and] the right to freedom from inhuman or degrading treatment.’²¹⁸

Further, implementation of the safety triangle feature of negotiated management means that dialogue has likely been established between protesters and police before the protest thereby heightening the chances of successful mediation on ground to resolve tension that could lead to violence. Indeed, *via* the negotiated management approach ‘violence can often be averted by the skilful intervention of law-enforcement officials’.²¹⁹

4.5 Exploring legal entries for the negotiated management model

In the previous section, the suitability and necessity of the negotiated management approach in the case study countries has been ascertained. It then becomes imperative to consider what legal avenues exist for the adoption of the model.

In Kenya and Nigeria, just like in other jurisdictions, we see that public order management in the context of demonstrations is vested in police authorities. The negotiated management is therefore suitable for application as it is, in fact a policing model. Nonetheless, given the present policing culture and context in the case study countries, it is unlikely that the principles of negotiated management will be embraced by the respective policing outfits without legal intervention. In a different context and probably more mature democracies, mere guidelines encapsulating the negotiated management model of policing would suffice. Indeed, authoritative

²¹⁶ n 194 above, 17.

²¹⁷ n 183 above, 75.

²¹⁸ n 183 above, 75.

²¹⁹ n 183 above, 73.

best practices have recommended that: “These rules need not be elaborated in legislation but should be expressed in domestic law-enforcement guidelines, and legislation should require that such guidelines be developed.”²²⁰ However, the police apparatus in the case study countries is obviously lacking in the political will or know-how in human rights policing. Further, this study earlier highlighted resistance by police in uptake of the model and this is more likely to happen in the event of non-binding guidelines. These realities necessitate adopting a more aggressive legal approach. Moreover, for practical reasons, guidelines would not suffice because in both countries there is already ‘bad’ law in place by way of the POA that needs reform. Since guidelines cannot repeal or amend extant laws, the express repeal or amendment by way of enactment of new legislation is needed.

Legislation is additionally suitable since its primary essence is to address a societal need by introducing or changing the law.²²¹ A distinct legislation on the management of demonstrations is also in line with global trends as captured by the Special Rapporteur on extrajudicial, summary or arbitrary executions in his report on demonstrations:²²²

Around one third of the 76 countries considered have specialised legislation in place on demonstrations. In other countries, demonstrations are regulated together with other public order issues or in the countries’ penal codes. Some countries recognise a positive duty to facilitate demonstrations.

Such legislation should be guided by the negotiated management model while mindful of the local context in the respective case study countries. The proposed legislation should have as its primary goal the facilitation of protests. The spirit of the law that should illuminate all provisions is that; at the heart of all its principles, negotiated management seeks to facilitate and not to circumscribe protest and a presumption in favour of holding protests should be assumed and expressly articulated. The phrasing and duties of the police in relation to policing protest should also reflect this position capturing not only negative but positive obligations.

In light of the massive restrictions to demonstrations in the case study countries and the poor policing culture; the proposed legislation will need to unequivocally enact that ‘the dispersal of assemblies should be a measure of last resort.’²²³ In addition, the proposed law should express

²²⁰n 183 above, 81.

²²¹ World at work ‘Public policy tool kit: The difference between legislation and regulation’ available at <http://www.worldatwork.org/waw/adimLink?id=33051> (accessed 22 September 2014).

²²² n 194 above, 14.

²²³ n 183 above, 81.

the, 'circumstances that warrant dispersal and who is entitled to issue dispersal orders (for example, only police officers of a specified rank and above).'²²⁴

Finally, in addition to the content, appropriate titling of such legislation is a critical issue for consideration. As has been argued, the success of the negotiated management approach rests on the trust levels or dynamics among the safety triangle parties i.e. state, police and protesters. The name of the legislation therefore needs to signify a clear turnaround in approach by affirming the right to protest and the intention to uphold it. Featuring familiar terminology of public order in the new legislative piece would likely do no more than conjure up the old perspectives which have been impugned. Titling the legislation also provides an opportunity to settle the debate as to whether there is a presumption in favour of or against the right to protest. It is against this backdrop that the writer proposes the title: 'Freedom of assembly and right to public protest (Protection and Enforcement) Act'.

4.6 Conclusion

This chapter has laid out the practical concerns that are plaguing the management of demonstrations in the case study countries. In both Kenya and Nigeria, these concerns range from a legal framework that has atrophied the right to demonstrate; to challenges that have emerged from authoritarian policing practice handed over from colonial times and persisting to date. The discussion has illustrated how the negotiated management model can address all the present restrictions in the handling of protests; thereby emerging as a suitable and much needed protest policing alternative.

²²⁴ n 183 above, 81.

CHAPTER FIVE – CONCLUSIONS & RECOMMENDATIONS

5.1 Summary of key findings

This section summarises the study's key findings as framed by the research questions enunciated at the beginning of this work.

The first research question sought to establish the right to demonstrate. This question has been answered in the affirmative and an international and justiciable right to demonstrate has been proven to have become articulated and recognised in international law and municipally in the two countries case studied. Global acceptance and affirmation of the right is evidenced by its articulation in various international mediums. This is against the backdrop of the fact that in international law, the adoption of normative standards by international bodies often leads to the ascription of universal acceptance of the standard. Justiciability is established because the right derives from the constitutions of the respective case study countries whose bill of rights is enforceable in a court of law.

The key research thrust in this work problematised the right to demonstrate making a case that despite its *de jure* status, it has suffered from a consistent presumption of limitation in the case study countries. Consequently, the second research question sought to interrogate the prospects that the negotiated management approach offers for the effective realisation of the right to demonstrate. This study has enumerated the features of the negotiated management model contrasting it with the present arrangements in the case study countries. The key finding is that the negotiated management approach presents a facilitative win-win approach in the handling of protests and its methods are largely praised. Moreover, one of the model's core premises is a presumption in favour of holding peaceful demonstrations and thereby portending great promise for the effective realisation of the right to demonstrate in Kenya and Nigeria.

The third research question sought to evaluate the extent to which the legal framework in Kenya and Nigeria can accommodate a negotiated management approach to handling demonstrations. The work takes on a multi-pronged approach in answering this question. First, the arrangements for the management of demonstrations are outlined noting to highlight the legal inadequacies and practical impediments that have led to the compromised actualisation of the right to demonstrate in the case study countries. The work then illustrates how the negotiated management approach responds to the present policing constraints thereby accentuating it as a

vital and viable model for implementation. Finally, the work identifies a suitable legal avenue for the implementation of the proposed model. This final assessment reveals that the case study countries are both well-placed to adopt a negotiated management approach.

5.2 Recommendations

In line with the study findings, the governments in Kenya and Nigeria need to take various definitive steps in order to enhance the right to demonstrate and facilitate the adoption of the negotiated management model.

Legal reform

This study has highlighted various challenges with the present legislative arrangements in the regulation of demonstrations. Consequently, legal reform is the most pivotal recommendation in this work. A negotiated management approach is completely incompatible with the respective POA that guides policing of protests in the case study countries. A new legislative regime is therefore necessary and crucial towards transforming protest policing practice in the case study countries. In Nigeria, this entails the repeal of the POA in totality as it has been found to be unconstitutional by a court of law as well as repeal of offending sections in the Police Act. In Kenya, this entails the repeal of Part III of the POA and any other sections that regulate public gatherings. In both case study countries, the enactment of a 'Freedom of assembly and right to public protest (Protection and Enforcement) Act' is proposed. The proposed law should observe the following minimum parameters:

- Presumption in favour of holding peaceful protest.
- Provisions espousing positive obligations of the police and state to facilitate protest.
- Provisions espousing negative obligations of the police and state not to unjustly fetter the right to protest.
- Notification is encouraged in order to enable the government's facilitative role but should not be mandatory. In any event, 'a permit requirement system [is not deemed restrictive] provided there is the assumption such a permit will be issued.'²²⁵
- The decriminalisation of unlawful assemblies and related offences.

²²⁵ n 194 above, 14.

- Provisions that espouse that the dispersal of a protest is a measure of last resort and clear directions on the conditions and authorisation for such dispersal.
- Permissibility of spontaneous assemblies, simultaneous assemblies as well as counter demonstrations.

Beyond legal reform

In addition to legal reform, there are additional measures that will serve to facilitate the adoption and flourishing of a negotiated management approach in Kenya and Nigeria.

- Parliamentary inquiry. The commissioning of a parliamentary inquiry or study into the policing of demonstrations in the respective case study countries is recommended. This is to follow a good practice like that of the UK parliamentary inquiry earlier discussed. The process of the inquiry will foster in depth examination of the relevant issues, enable the legislature to receive expert input and foster stakeholder participation and ownership, all of which will ensure that the legislation proposed and adopted is responsive to each country's needs.
- Police pre and in-service training is essential to ensure attitudinal and transformative policing practice and new culture. Pre-service training should encompass review of the police curriculum and methodologies while in-service training should be immediate and continuous to enable implementation of the new protest policing regime.
- Public awareness. There is a place for popular education to support the proposed reforms to protest management in the case study countries. Specific targets include civil society and the legal community who can then cascade awareness to their respective communities towards creating new dynamics suited to the negotiated management approach.

5.3 Conclusion

This study identifies a practical solution to a long standing challenge in Kenya and Nigeria. Citizens in the respective countries do not fully enjoy their right to demonstrate in spite of constitutional guarantee for the same. The denial of this right has been traced primarily to the draconian policing and management of protests in place in the case study countries. Policing which is characterised by laborious restrictions as well as excessive use of force. Moreover, such reproachable police practice

is virtually sanctioned, as analysis of the law regulating demonstrations reveals authoritarian undertones and a disproportionate preoccupation with public order.

While the state of protest in the case study countries is dire, it is not unique. Accordingly, this study illustrates how faced with the same predicament, western democracies institutionalised a negotiated management approach to policing protest. This model is premised on a presumption in favour of holding demonstrations and the ensuing positive obligation on the state to facilitate and protect the right to protest.

An in-depth analysis into the state of protest in the case study countries clearly illustrates the necessity and suitability of the negotiated management model. Accordingly, the recommendations that have been proposed provide an avenue to change the status quo in protest policing and management.

The enactment and genuine implementation of the negotiated management model will undoubtedly enhance the right to demonstrate in Kenya and Nigeria.

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