FREEDOM OF EXPRESSION AND THE CONTOURS OF POLITICAL SPEECH IN ETHIOPIA: LESSONS FROM A COMPARATIVE STUDY

Mesenbet Assefa Tadeg

A Thesis submitted in Fulfillment of the Requirements for the Degree of Doctor of Philosophy

Supervisor: Dr. Ekaterina Yahyaoui Krivenko

Irish Centre for Human Rights,
College of Business, Public Policy and Law, National University of Ireland Galway
(August 2017)

TABLE OF CONTENTS

ABSTRACT

The doctoral thesis studies the scope and application of the right to freedom of expression and the contours of political speech in Ethiopia. In particular, the research focuses on two fundamental areas of speech regulation-the regulation of incitement to terrorism and incitement to genocide. Drawing from both the general theory of freedom of expression and international and comparative law, it looks into how political speech is regulated in the context of incitement law in general, and the emerging comparative developing law in the area of incitement to terrorism and incitement to genocide. The overall research is premised on the utility and significance of comparative study in resolving legal problems and social orderings associated with a particular society by drawing lessons from other societies and the framework of international law. Broadly speaking it employs both free speech doctrine and criminal culpability theory in addressing the challenges of determining the boundaries of political speech vis-à-vis inciting speech.

Theoretically, building from the works of Alexander Meiklejohn and contemporary free speech scholars, it argues that a principled application of freedom of expression requires adherence to a democracy-based justification of free speech. This theory underscores the privileged position of core political speech made in the furtherance of public discourse as the basis for any judicial scrutiny of speech regulation. It argues that this collectivist view which conceives free speech as a public good and its broader societal significance has structural resonance with the normative constitutional framework of non-liberal, emerging and transitional democracies such as Ethiopia. Normatively, the objective is to draw common principles on the regulation of speech from international and comparative law in an effort to develop an optimal model of normative constitutional theory and principles of law that could serve as a normative guidance for the regulation of political speech in the context of Ethiopia.

Accordingly, it provides a theoretical and normative framework for the application of the right to freedom of expression and the regulation of political speech under the constitutional framework of Ethiopia. Its broader objective is, however, taking the case study of Ethiopia and similarly situated emerging and transitional democracies to demonstrate the utility and significance of comparative study in free speech in fostering robust public discourse while at the same time accommodating the national security and public order demands of these States. By doing so, it uses free speech doctrine and criminal culpability theory in analyzing the justified limits of political speech in international and comparative law that could have broader significance in resolving similar problems in the constitutional and legal framework of emerging and transitional democracies while at the same time accommodating the national idiosyncrasies associated with these polities.

DECLARATION

This thesis or any part thereof has not been or is not currently being submitted for any degree at any other university. The work reported herein is as a result of my own investigations, except where acknowledged and referenced.

Mesenbet Assefa Tadeg

DEDICATION

To my father Balambaras Assefa Tadeg and my mother W/ro Tsehayseged Gessesse Tewodros

With Love

ACKNOWLEDGEMENTS

This work would not have been possible without the support of several individuals. I would like to thank my parents, my father Balambaras Assefa Tadeg and my mother W/ro Tsehayseged Gessesse for all the love and support they showed in pursuing my studies. Thanks are owed to my brothers and sisters for their encouragement and support in the course of my studies.

I would like to extend my profound gratitude to my supervisor Dr. Ekaterina Yahyaoui Krivenko for the rigor and excellence she demonstrated in shaping the structure and points of argument in this thesis and making this work possible. Any oversights can only be attributed to me. I would also like to thank Professor Michael O'Flaherty who initially shaped the thoughts and the structure of the thesis before his departure to become the Director of the EU Agency for Fundamental Rights in 2014. My thanks are also owed to the staff and colleagues at the Irish Centre for Human Rights as well as PhD students based at the National University of Ireland Galway for making my study productive and for being generous in sharing their ideas that enriched some of the points of argument in this research.

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ATP	Anti-Terrorism Proclamation of Ethiopia
AC	Appeals Chamber
CEFDCT	Council of Europe Framework Decision on Combating Terrorism
CECPT	Council of Europe Convention for the Prevention of Terrorism
CUD	Coalition for Unity and Democracy
DCCPSM	Draft Code of Crimes against the Peace and Security of Mankind
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court on Human Rights
EPRDF	Ethiopian People's Revolutionary Democratic Front
EPRP	Ethiopian Peoples' Revolutionary Party
GC	Grand Chamber
Ginbot 7	Ginbot 7 Movement for Justice, Freedom and Democracy
HRC	Human Rights Council
ICC	International Criminal Court
ICTR	International Criminal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal at Nuremberg

OHCHR	The Office of the United Nations High Commissioner for Human Rights
OLF	Oromo Liberation Front
RPF	Rwandan Patriotic Front
RTLM	*Radio Télévision Libre des Mille Collines*
SCCTC	Security Council Counter-Terrorism Committee
TC	Trial Chamber
TPLF	Tigrayan People's Liberation Front
UDHR	Universal Declaration of Human Rights
UNSC	United Nations Security Council
UNSRFE	Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression
UDJ	Unity for Democracy and Justice
UNESCO	United Nations Education, Scientific and Cultural Organization

OUTLINE OF DOCTORAL RESEARCH PROJECT

I. Introduction

Freedom of expression is one of the most 'essential foundations' for any democratic society.[1] In particular, in the context of political speech which forms its normative core, freedom of expression has often been described as the 'lifeblood of democracy'[2] and one of the most significant fundamental freedoms for any democratic society.[3] Free expression provides the most important means by which individuals can fully participate in the political life of a society.[4] The vitality of free expression ensures the free flow of information and the ability of individuals to express their views, serving as a catalyst for influencing significant political outcomes in the democratic process. In emerging and transitional democracies such as Ethiopia, ensuring free expression is particularly important as it pacifies tension in society and reduces the risks of violence.

It is often argued that freedom of expression has a multiplier effect for the realization of other human rights.[5] As Michael O'Flaherty notes, 'freedom of expression is essential to the good

---

[1] United Nations Human Rights Council (HRC) Res. Safety of Journalists A/HRC/21/L.6 (21 September 2012) Preamble para 3.

[2] Lord Steyn in *Sims v Secretary of State for the Home Department* (2000) 2 AC (8 JULY 1999) para 115, 126.

[3] *Tae Hoon Park v Republic of Korea,* Communication No. 628/1995, CCPR/C/64/D/628/1995 (20 October 1986) para 10.3.

[4] Human Rights Committee, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25) (12 July 199), CCPR/C/ 21/Rev.1/Add.7; 4 IHRR 1 (1997).

[5] BS Gigler, *Development as Freedom in Digital Age: Experience of the Rural Poor in Bolivia* (World Bank, 2015) 404.

working of the entire human rights system'.[6] Because of its multiplier effect, freedom of expression is often referred as a meta-right and a transcendental value[7] that serves as the foundation for the enjoyment of other fundamental freedoms.[8]

Freedom of expression has also significant socio-economic dimensions serving an important component of the economic development of States. In a recent thought provoking contribution to the justification of freedom of expression, Richard Baron Parker argues that one of the principal reasons that defined the rise and fall of nations over the past two centuries has been the degree of protection afforded to freedom of expression in their societies.[9] In articulating his premise, Parker argues that the three essential 'social technologies' for the flourishing of any organized political society democracy, scientific inquiry and the free market can be better advanced when the right to freedom of expression is better protected.[10] Nobel Laureate Amartya Sen similarly contends that no country that protects freedom of expression and free media in a democracy has experienced famine.[11] The equitable enjoyment of socio-economic rights and responses to serious economic challenges such as famine is made possible when the ability of individuals to express and the exchange of information are protected. Sen astutely observes that in States like India which had a poor economic base in their post-independence

---

[6] M O'Flaherty, Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34 (2012) 12 *Human Rights Law Review* 627.

[7] J Cohen, Freedom of Expression (1993) 22 *Philosophy and Public Affairs* 221.

[8] Michael O'Flaherty, 'Article 19 UDHR : *Contemporary Challenges and Opportunities for Freedom of Expression* (2009) available at: http://www.hks.harvard.edu/cchrp/events/2009/month03/article19.pdf (accessed 30 November 2013).

[9] RB Parker, Free Speech and the Social Technologies of Democracy, Scientific Inquiry and the Free Market, in Deirdre Golash (ed) *Freedom of Expression in a Diverse World* (Springer, 2010) 3-11.

[10] Ibid; for a general discussion on the importance of political freedoms in development see, W Easterly, *Tyranny of Experts: Economists, Dictators and the Forgotten Rights of the Poor* (Basic Books, 2014).

[11] A Sen, *Poverty and Famines: An essay on Entitlement and Deprivation* (Oxford University Press, 1994); See also A Sen, *Development as Freedom* (Oxford University Press, 1999).

period, a political triggering mechanism with a vibrant civil society, free media and functional opposition political parties enabled them to avoid any famine in their entire history by facilitating better-coordinated responses and managing risks.[12] Often freedom of expression is also a powerful means of addressing deep-rooted structural problems in society. Corruption and embezzlement which have significant human rights implications in emerging and transitional democracies cannot be effectively addressed if the opportunity for free expression is inhibited.[13]

Although the protection of freedom of expression has multiple rationales, its distinctive place to robust democratic public discourse requires that States protect political speech which forms an essential component of its normative core.[14] Eric Heinze in his recent book, 'Hate Speech and Democratic Citizenship' notes that because of its function to democratic public discourse, free speech should not just be considered 'as individual right but also, an essential attribute of democratic citizenship'.[15] This 'distinctly democratic interest' in free speech requires the importance of protecting political speech which forms an integral part of its normative core.[16] In transitional democracies such as Ethiopia which have complex and multi-faceted political actors engaged in the political process, the significance of providing adequate legal protection to political speech cannot be overemphasized.[17] The democratic function of free speech in

---

[12] A Sen, Food and Freedom (1989) *17 World Development* 769.

[13] B James (ed), *Media and Good Governance* (UNESCO, 2005).

[14] A Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brothers Publsihers, 1948, Reprinted by the Lawbook Exchange, Ltd 2002).

[15] E Heinze, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016) 4.

[16] Ibid, 5.

[17] I use the term emerging and/or transitional democracies to describe States such as Ethiopia which have a mixture of 'a substantial degree of democracy with a substantial degree of illiberalism' in line with Fareed Zakaria's and Li-ann Thio's taxonomy of transitional democracies. See F Zakaria, The Rise of Illiberal Democracy (1997) *76 Foreign Affairs* 22; LA Thio, Constitutionalism in Illiberal Polities, in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University

emerging and transitional democracies such as Ethiopia helps to ensure faith in the political process and contain violence and conflict that has characterized these countries and the larger region of East Africa far too long.[18]

Nevertheless, despite the crucial significance of free expression to the continued vitality of the democratic process, many States continue to disregard their international obligations to protect this basic freedom. In particular, in recent times one observes a declining trend in the protection of freedom of expression worldwide.[19] The use of national security and anti-terrorism laws; censorship and surveillance; and a resort to other speech-limiting offences continue to have a chilling effect on the exercise of the right to freedom of expression in many

---

Press, 2012) 133; Li-ann Thio notes that illiberal polities are varied and competing, which include many forms- illiberal, pre-liberal, non-liberal, or semi-liberal societies, see at 134. Various forms of mixed polities that combine liberal and illiberal characters have also been discussed and include, hybrid regime, semi democracy, virtual democracy, electoral democracy, pseudo democracy, illiberal democracy, semi-authoritarianism, soft authoritarianism, electoral authoritarianism, and Freedom House's Partly Free states, for further discussion see S Levitsky and Lucan Way, 'The Rise of Competitive Authoritarianism' (2002) *13 Journal of Democracy* 51; See also B Bugarič, A Crisis of Constitutional Democracy in Post-Communist Europe, 'Lands In-between Democracy and Authoritarianism (2015) *13 International Journal of Constitutional Law* 219.

[18] The most recent account of such taxonomy of illiberal polities is Mark Tushent's idea of authoritarian constitutionalism, See M Tushnet, Authoritarian Constitutionalism (2015) *100 Cornell Law Review* 391. Tushnet argues that, 'authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism-not strategic calculations-to those controlling these nations' see at 397; See also S O Nur, *The Rise of Illiberal Democracy in Africa: An Exploration of Semi Authoritarianism in Post 1991 Ethiopia* (MA Thesis, Faculty of Social Sciences University of Osnabrueck Osnabrueck, Germany 2013).

[19] See D Pokempner, *A Shrinking Realm: Freedom of Expression Since 9/11* (Human Rights Watch World Report, 2007); See also The Office of the United Nations Office of High Commissioner for Human Rights (OHCHR), *Human Rights, Terrorism and Counter-Terrorism* : Fact Sheet No. 32 (Geneva, 20008).

countries.[20] Legal reforms in relation to the regulation of freedom of expression over the past decade have been regressive and reflect a global trend which has been described as 'legal deterioration by limitation'.[21] While this is a general trend in many countries, Ethiopia continues to be one of those few countries where serious questions continue to be raised with regard to the protection of the right to freedom of expression.[22]

In analyzing the normative and wider socio-political challenges in the protection of freedom of expression in Ethiopia, international and comparative law can offer important lessons to transitional democracies such as Ethiopia in drawing the boundaries of legitimate political speech and inciting speech.[23] The utility of comparative law is significant in developing an optimal model of normative constitutional law that takes into account the socio-political realities of the State. Moreover, comparative constitutional law scholars argue that the legitimacy of any democratic constitution worthy of its name is not only measured by the legitimacy of its constitutional framework but also in 'how the national constitution is integrated into and relates to the wider legal and political world'.[24] In this regard, international and comparative law can provide an important methodological tool in assessing how best to

---

[20] F La Rue, *Ten Key Challenges to Freedom of Expression in the Next Decade*, Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and expression (UNSRFE), A/HRC/14/23/Add.2, vol 12534 (2010).

[21] C Radsch (ed) *World Trends in Freedom of Expression and Media Development* (UNESCO, 2014) 28.

[22] Committee to Protect Journalists, reported in 2015 that Ethiopia is currently the 4th most censored country in the word, see CPJ *10 Most Censored Countries* https://cpj.org/2015/04/10-most-censored-countries.php (accessed 10 July 2016).

[23] I Use the term international and comparative interchangeably with comparative law to refer to both the framework of international law (including international human rights law and international criminal law) and constitutional and legal developments related with free speech in comparative domestic systems.

[24] M Kumm, The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law (2013) *20 Indiana Journal of Global Legal Studies* (2013) 605.

resolve regulatory problems associated with the contours of political speech and incitement law in Ethiopia.

As will be shown in the subsequent sections, although comparative law scholarship has faced numerous oppositions in its methodological approach, it remains a thriving field of legal scholarship and methodological tool in resolving legal problems associated with different societies.[25] It is with this understanding that the thesis would approach the contemporary challenges in the regulation of political speech in Ethiopia, in particular in the context of incitement to terrorism and incitement to genocide.

II. Background and Justification

Freedom of expression is one of the founding principles of international human rights law.[26] The Universal Declaration of Human Rights (UDHR),[27] International Covenant on Civil and Political Rights (ICCPR) [28]and many other international human rights conventions such as the

[25] See R Hirschel, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014).

[26] See United Nations General Assembly (UNGA) Calling on an International Conference on Freedom of Information A/RES/59(I) (14 December 1946), in which the Resoltion asserted that '[f]reedom of information is a fundamental human right and is the touchstone of all the freedoms to which the UN is consecrated' Preamble; Although the resolution made reference to freedom of information, the resolution clearly states that it recognized the right to freedom of expression, noting that right of information included the right to 'gather, transmit and publish'; see preamble; See also O'Flaherty, Freedom of Expression (n 6) 629.

[27] Universal Declaration of Human Rights (Adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Art 19.

[28] International Covenant on Civil and Political Rights (adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171 (ICCPR) Art 19.

Convention on the Elimination of All forms of Racial Discrimination (CERD)[29] and Convention on the Rights of the Child (CRC)[30] explicitly guarantee the right to freedom of expression as a fundamental freedom. Regional human rights conventions including the African Charter on Human and Peoples' Rights (ACHPR),[31] the American Convention on Human Rights (ACHR)[32] and the European Convention on Human Rights and Fundamental Freedoms (ECHR),[33] also explicitly provide for the protection of freedom of expression. In 1993 the UN established the mandate of Special Rapporteur on the Right to Freedom of Opinion and Expression (SRFE) to enhance the global protection of freedom of expression.[34] Similar developments can also be seen in regional human rights mechanisms.[35] Parallel to these international and regional instruments, national States have enshrined freedom of expression as a fundamental freedom in their constitutions.

---

[29] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, Entered into Force 4 January 1969) 660 UNTS 195 (ICERD) Art 5.

[30] The Convention on the Rights of the Child (adopted 2 November 1989, Entered into Force 23 March 1976) 1577 UNTS 3 (CRC) Art 13.

[31] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (ACHPR) Art 9.

[32] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) O.AS. T.S 36 1144, UNTS 123 (ACHR) Art13.

[33] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) Europ.T.S. No. 5, 213 U.N.T.S. 221 (ECHR) Art 10.

[34] OHCHR, Right to Freedom of Opinion and Expression, UN Doc E/CN.4/RES/1993/45 (5 March 1993).

[35] African Commission on Human and Peoples' Rights, Resolution 71 Establishing the Special Rapporteur on Freedom of Expression and Access to Information, 36th Ordinary Session held in Dakar, Senegal from 23rd November to 7th December 2004; The Inter-American Commission on Human Rights Office of the Special Rapporteur for Freedom of Expression during its 97th period of sessions held in October 1997 by the unanimous decision of its members; and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media established, by the Decision of the Permanent Council, 137th Plenary Meeting, PC.DEC/193 (5 November 1997).

Ethiopia is one of the pioneer States in taking the initiative for ensuring the protection of human rights including freedom of expression by adopting the UDHR in 1948.[36] Since then, Ethiopia has ratified a significant number of international human rights treaties including the Convention on the Prevention and Punishment of Genocide,[37] ICCPR,[38] the International Covenant on Economic, Social and Cultural Rights,[39] the Convention against Torture,[40] the International Convention on the Elimination of all Forms of Discrimination against Women,[41] and the CRC.[42] It is also a State party to many of the regional human rights treaties of the African Union including the ACHPR.[43]

The coming to power of the current ruling political party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) in 1991 heralded a new chapter in the history of Ethiopia. In 1995, the Constitution was adopted which stipulates extensive provisions on human rights including

---

[36] Ethiopia is one of the 48 countries that voted in favour of the adoption of the UDHR on 10 December 1948, See UN Voting record, [<http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~%21909326~%210&ri=1&aspect=power&menu=search&source=~%21horizon>] (accessed 10 June 2017).

[37] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (hereinafter Genocide Convention).

[38] International Covenant on Civil and Political Rights (adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171 (ICCPR) ratified on 11 June 1993 .

[39] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into Force 3 January 1976) 993UNTS 3 (ICESCR), ratified on 11 June 1993).

[40] The Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment, (adopted on 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), ratified on 14 March 1994.

[41] Convention on the Elimination of All forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) ratified 10 September 1981.

[42] Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 3 UNTS 1577 (CRC) ratified on 14 May 199.

[43] ACHPR, ratified on 15 June 1998.

freedom of expression.[44] From 1995 to 2005, freedom of expression was largely tolerated with a growing political critique as well as different forms of journalistic expression on political and social issues making their presence in the political scene. Given the backdrop of the country's dark political history preceding the new constitutional order, the commencement of this new and a more open constitutional order was an important milestone in the country's democratic trajectory.

The turning point in the government's stance on freedom of expression began in the aftermath of the 2005 disputed national election. Undoubtedly, this period was the first time that a relatively free and fair election was conducted in the history of Ethiopia.[45] Following the election, the main opposition political party, Coalition for Unity and Democracy and (CUD) won considerable seats in the national parliament as well as all the seats for Addis Ababa City Administration. Nevertheless, the winds of change began to be reversed in the aftermath of the election. Subsequent to the election, protests erupted by contesting the electoral result. Serious allegations were made against the government on vote rigging and hijacking the electoral process. The government crushed the protests which resulted in the death of more than 193 protesters from the period June-November 2005.[46] The government also arrested tens of thousands of individuals as well as the leaders of opposition political parties on allegations of trying to topple the government by unconstitutional means. Most of the individuals were later pardoned and released from prison as part of a political deal made by the government. However, the period marked the beginning of a shrinking political space that drastically restricted freedom of expression through broad and vague legislations which threatens to shake and reverse the initial gains made in the country's democratic trajectory.

---

[44] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazeta* No. 1 (21 August 1995) (herein after Constitution of Ethiopia) Art 29.

[45] I Gagliardone, New Media and the Developmental State in Ethiopia (2014) *113 African Affairs* 279.

[46] BBC News, Ethiopian Protesters 'Massacred', [<http://news.bbc.co.uk/1/hi/6064638.stm>] (accessed 10 March 2014).

Various human rights bodies have accused the State of manipulating domestic laws as an excuse to silence political dissent.[47] According to Freedom House, the Mass Media Proclamation,[48] among others, introduced crippling fines, licensing restrictions for establishing a media outlet, prohibiting the right to establish mass media outlets to foreign nationals, and powers allowing the government to control periodical publications.[49] Similarly, the 2009 Anti-Terrorism Proclamation (ATP) includes a broad and vague definition of terrorism, which gives the government broad discretion to suppress nonviolent political dissent. Under Article 6 of the proclamation, any publication of a statement that is likely to be understood as a direct or indirect encouragement of terrorism is punishable by up to 20 years in prison.[50] Currently, many individuals have been imprisoned in relation to the terror charges brought by the government which questions the legitimacy of the laws against the constitutional principle of freedom of expression and Ethiopia's obligation under international law.[51] A similar trend can be seen in the application of its hate speech laws in particular with regard to incitement to hatred and incitement to genocide.[52]

---

[47] See Resolution 218 on the Human Rights Situation in the Democratic Republic of Ethiopia, the African Commission on Human and Peoples' Rights (the African Commission), meeting at its 51st ordinary Session held in Banjul, The Gambia from 18 April to 2 May 2012. See also Freedom on the Net: Freedom House Report on Ethiopia (2015).

[48] A Proclamation to Provide for Freedom of the Mass Media and Access to Information, Proclamation No. 590/2008, *Federal Negarit Gazeta* No. 64 (4 December 2008) (herein after Mass Media Proclamation).

[49] Freedom House, [<http://www.freedomhouse.org/report/freedom-net/2012/ethiopia>] (accessed on 1 December 2013).

[50] A Proclamation on Anti-Terrorism Proclamation No. 652/2009, *Federal Negarit Gazeta* No. 57 (28 August 2009) (ATP).

[51] Pen International, http://www.pen-international.org/pen-world/centres-news/ (accessed 1 December 2013).

[52] YL Mengistu, Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws in M Herz and P Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 370-372.

For the UN, international rights groups and the international community at large, Ethiopia provides a test case where conflicting international interests overlap. On one hand, Ethiopia has been seen not only as a very reliable ally for the war on terror but also a remarkable success story in the fight against poverty and ensuring sustainable development. The International Monetary Fund and the World Bank have hailed the continuous economic growth of the country.[53] The aggressive diplomatic efforts of the late Prime Minister Meles Zenawi in portraying the country as one of the success stories of economic development in Africa earned praise and support from the international community. Ethiopia is currently one of the most prominent recipients of foreign aid. In the last decade, Ethiopia on average has received $ 3.6 Billion annually, making it one of the largest recipients of foreign aid in the world.[54]

On the other hand, the State is highly criticized for its authoritarian tendencies and repressive measures on dissident political groups. Rights groups accuse the government of being repressive with little tolerance for critical political views. Reports by rights groups show that journalists, members of opposition political parties, academics and activists have been thrown in jail because of their political views and criticizing the government.[55] Reports also show that the press and the media, political parties and civil society organizations have been harshly repressed and many of them were forced to close down.[56]

Nevertheless, beyond the brief reports by rights groups, there has been little academic interest and scholarship in attempting to articulate the normative boundaries of political speech in

---

[53] World Bank [<http://www.worldbank.org/en/country/ethiopia/overview>] (accessed 15 March 2014).

[54] OECD DAC Statistics Ethiopia 2011 [<http://www.oecd.org/dac/stats/ETH.gif>] (accessed on 12 January 2014).

[55] Human Rights Watch, *Journalism is not a Crime: Violations of Media Freedom in Ethiopia* (2015).

[56] *Ibid*.

Ethiopia.[57] Accordingly, the purpose of the thesis is to study the contemporary challenges to freedom of expression in Ethiopia in two fundamental areas of speech regulation- incitement to terrorism, and incitement to genocide within the broader context of hate speech. Drawing both from the framework of international and comparative law, the study will look into how a proper balance can be maintained between the demands of national security and public order of the State on one hand and the importance of ensuring freedom of expression on the other. Although the thesis will highlight some of the socio-political factors that inform the position of the State with regard to freedom of expression, the study will be largely normative.[58] In particular, the thesis will closely look into the limits of political speech vis-à-vis incitement law under international and comparative law which will help to illuminate and develop an optimal model of normative constitutional theory as well as legal rules that can be applied to the regulation of political speech in Ethiopia.

III. Statement of the Problem

International human rights norms have been helpful in setting important normative benchmarks and guiding principles regarding the application and implementation of human rights norms at the domestic level.[59] The international human rights framework, in particular, the treaty-based system and the charter-based special mechanisms have elaborated a good deal of standard setting that serves as a normative reservoir for the application of human rights norms including freedom of expression at the domestic level.[60] Moreover, most States including Ethiopia provide for the protection of freedom of expression and other human rights in their

---

[57] G Timothewos, Freedom of Expression in Ethiopia: the Jurisprudential Dearth (2010) *4 Mizan Law Review* 201.

[58] In this regard see discussion in Chapter Three.

[59] See P Alston and R Goodman, *International Human Rights* (Oxford University Press, 2012).

[60] For comprehensive study of the UN treaty system, See S Egan, *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional, 2011)

constitutions, thereby forming integral part of their domestic legal order.[61] The constitutional framework of certain States including Ethiopia also allows the application of international human rights norms as an interpretive tool in the application of these norms.[62]

However, it is evident that the domestic system of human rights protection uses different standards to apply and implement human rights norms including freedom of expression. In this regard, the major conundrum of the global protection of human rights has been the 'implementation gap' that exists between international human rights law and domestic law.[63] States have subscribed to international human rights instruments that oblige them to adhere to the principles and obligations enshrined therein. Yet, the full realization of these international human rights norms at the domestic level is significantly lacking. Moreover, it should also be emphasized that the globalization of international law can also trigger 'anti-constitutional ideas' at the domestic level by requiring States to adopt domestic laws which have a draconic effect on human rights.[64] For example, the anti-terrorism campaign launched under the rubric of the 'war on terror' and the various UN-sponsored conventions and resolutions on counter-terrorism had serious repercussions in the protection of human rights in many States.[65] In the context of freedom of expression, the proliferation of laws which prohibit incitement to and

---

[61] See Constitution of Ethiopia Art 29.

[62] See Constitution of Ethiopia Art 13(2) noting that 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia'; See also Art 39(1) of the Constitution of South Africa noting that courts in interpreting the Bill of Rights 'must consider international law; and 'may consider foreign law'.

[63] WM Cole, Mind the Gap: State Capacity and the Implementation of Human Rights Treaties (2015) *69 International Organization* 405; CJ Hamelink, Human Rights: the Implementation Gap (1998) *5 Journal of International Communication* (1&2) 54.

[64] KL Scheppele, The Migration of Anti- Constitutional Ideas: the Post 9/11 Globalization of Public Law and the International State of Emergency, in S Choudhry (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 347.

[65] RA Wilson (ed) *Human Rights in the War on Terror* (Cambridge University Press, 2005).

glorification of terrorism have significantly increased subsequent to the adoption of Security Council Res. 1624 in 2005.[66] In the case of Ethiopia, this migration of anti-constitutional norms has had a significant effect on the state of free speech in the country. Since the adoption of the anti-terrorism law in 2009, there has been a significant rise in the prosecution of political activists and journalists for inciting terrorism.[67] This chilling effect of the anti-terrorism laws on freedom of expression has been particularly draconic with regard to political speech.

Although this regression in the protection of freedom of expression and other human rights is more pronounced in the area of counter-terrorism laws, similar trends can be seen in other areas of speech regulation including hate speech and incitement to genocide.[68] This demands the examination of the domestic laws of Ethiopia in light of international and comparative law as well as the experience of different States that are grappling with the demands of increased regulation in speech parallel with the protection of robust political speech. In particular, the thesis draws on best practices in how incitement law in general, and incitement to terrorism and incitement to genocide in particular, have developed under international and comparative law.

IV. Hypothesis and General Methodological Approach

The fundamental premise of the thesis is based on the significance and utility of international and comparative law in resolving contemporary problems associated with the regulation of political speech in Ethiopia. Because of this, it is important to explain the hypothesis in which

---

[66] See, K Gelber, *Free Speech After 9/11* (Oxford University Press, 2016); UN Security Council (UNSC) Resolution 1624, S/Res/1624 (14 September 2005).

[67] See Human Rights Watch, *Journalism is Not a Crime* (n 55).

[68] CE Baker, Genocide, Press Freedom and the Case of Hassan Ngeze (2004) *University of Pennsylvania Law School, Public Law Working Paper No. 46*. Available at SSRN: [<https://ssrn.com/abstract=480762 or http://dx.doi.org/10.2139/ssrn.480762 >] (accessed 3 March 2015); See also OHCHR, The Prohibition of Incitement to Hatred in Africa: Comparative Review and Proposal for a Threshold, Expert Meeting (Nairobi, Kenya, 6-7 April 2011).

the research is based which helps to disentangle some of the methodological questions and caveats involved in comparative study.[69] It should be pointed out from the outset that despite the various methodological questions that continue to be raised in comparative study, it continues to be a thriving field of legal scholarship in many countries.[70] This includes an increasing academic interest to understand the normative and institutional challenges of different polities to entrench constitutional democracy in their political order as well as a desire to study the protection of human rights norms including freedom of expression in other societies.[71]

The constitutional experiment of comparing different polities and the norms and social orderings associated with these polities has ancient roots. Philosophers including Aristotle and political scientists such as James Madison looked into different systems of government in order to determine how best to organize polities.[72] Heinze notes that in the early 19th Century, Kantian idealism and Napoleonic codifications were used to draw some universal principles of law from other societies in an effort to eradicate backward customary norms with more progressive legal regimes.[73] Montesque's empiricism in *The Spirit of the Laws,*[74]which is

---

[69] One notes that while comparative constitutional law is a more recent field, comparative law in the area of private law has commenced much earlier, beginning from the First World Congress on Comparative Law in 1900, See in this regard C Donahue, Comparative Law Before the Code Napoleon, in M Reimann and R Zimmermann (Ed), *Oxford Handbook on Comparative Law* (Oxford University Press, 2012).

[70] M Tushnet, The Possibilities of Comparative Constitutional Law (1999) *108 Yale Law Journal* 1225; See also M Tushnet, The Inevitable Globalization of Constitutional Law (2009) *49 Virginia Journal of International Law* 985; For more recent discussions on the role of comparative law in general see M Tushnet, The Boundaries of Comparative Law (2017) *13 European Constitutional Law Review* 13.

[71] EJ Eberle, The Method and Role of Comparative Law (2009) *8 Washington University Global Studies Law Review* 451.

[72] Rosenfeld and A Sajó (n 17) 3.

[73] Heinze (n 15) 197.

considered as a 'defining moment in the history of comparative public law', has also been used to draw normative conclusions by making historical comparisons and thereby laying down the foundation for the development of modern comparative constitutional law.[75] More recently, since the Second World War comparative constitutional law began to develop ideas of using comparative methods to study the operation of government, their institutional design, the substantive content and scope of fundamental human rights, and systems of judicial review.[76] The fundamental assumption of such intellectual endeavor was rooted in the belief that legal problems and social orderings associated with the relations between citizens and governments are confronted by all societies which help to enlighten other States to learn from similar experiences.[77]

Nevertheless, the application of human rights norms including freedom of expression has often triggered the debate between universalism and cultural relativism.[78] In the context of

---

[74] C-L de Secondat, B de Montesquieu, De l'esprit des lois (*The Spirit of the Laws*) (1748) (Cambridge University Press, 1989), Cited in Hirschel, Comparative Matters (n 25)127.

[75] Hirschel, Comparative Matters (n 25) 127; Se also A Robilant, A Symposium on Ran Hirschel's Comparative Matters : the Renaissance of Comparative Constitutional Law Big Questions Comparative Law (1992) *96 Boston University Law Review* 1325.

[76] Mark Tushnet, *Comparative Constitutional Law*, in Reimann and Zimmermann (n 69) 1227-28.

[77] *Ibid* .

[78] With regard to the major proponents of universalism, See J Donnelly, Cultural Relativism and Universal Human Rights (1984) 6 *Human Rights Quarterly* 400; A Sen, Human Rights and Asian Values (1997) Sixteenth Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy (25 May 1997) where he staunchly objects to the claim of cultural relativism of human rights and argues that there is 'no grand dichotomy' between Western and Non Western cultures with respect to human rights; Cf DL Donoho, Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards (1991) *27 Stanford Journal of International Law* 345; See also B Ibhawoh, Between Culture and Constitutions: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) *22 Human Rights Quarterly* 838.

comparative law similar arguments have been raised between those who advocated for a universal theory of rights and others who argue on the importance of looking into national idiosyncrasies and the unique features of a given legal system.[79] From the perspective of cultural relativists, comparative law has been criticized as 'naive universalism' that ignores significant historical factors and cultural contingencies of different societies.[80] They argue that 'no theory develops in a vacuum but is conceived and brought to fruition in a definite cultural and social environment. To ignore this is to distort the theory itself'.[81] Similarly, in the particular context of freedom of expression, Lawrence Beer notes that the approach taken in traditional comparative studies has been their 'cultural insularism'.[82] They tend to focus on elaborate laws and legal institutions without looking at the historical, political and socio-legal factors affecting freedom of expression which often have a significant impact in how the right is understood in a particular society.[83] Other Scholars similarly argue that in order to understand the application

---

[79] Early proponents for a universal theory of rights include G Jellinek, *The Theory of the Unifications of States* (1882; G Jellinek *General Theory of the State* (1990); and most notably G Jellinek *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (1895); More recent proponent of the universalist approach include See, e.g., A Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974); Cf On the literature for cultural relativist approaches that argue against the universalist thesis see, P Legrand, *Fragments on Law-as-Culture* (Kluwer, 1999) 27; P Legrand, European Legal Systems Are Not Converging (1996) *45 International and Comparative Law Quarterly* 52-81; See discussion in Hirschel, Comparative Matters (n 25) 156 et seq.

[80] Heinze (n 15) 196.

[81] MN Shaw, *International Law* (Cambridge University Press, 2008).

[82] L Beer, *Freedom of Expression in Japan: A Study of Law, Politics and Society* (Kodansha Int'l, Ltd. 1984) 21-23.

[83] *Ibid*.

and regulation of freedom of expression in a particular society, it is important to study the underlying 'invisible powers' that shape the development of the law.[84]

This argument which comes under the rubric of 'historical and cultural determinism' poses a continuing methodological challenge to comparative study.[85] These skeptics of comparative law have criticized comparative usage since early libertarian and enlightenment thought that sought to apply universal liberal principles of justice, equality and freedom.[86] Historicist thinkers such as Savigny criticized universalist approaches noting that customary norms are the result of a complex historical process and changing needs of different societies. Because of this, they argue that applying universal legal rules will be a misfit to the particularities of a certain society.[87] Montesquieu himself also cautioned against the use of comparative law and emphasized that national idiosyncrasies should be carefully looked into since the laws of one State may not suit the laws of another.[88]

Moreover, scholars from the global south such as Upendra Baxi argue that much of the scholarship in comparative constitutional law has been predominated by Western liberal discourse. [89] They argue that reference to non-Western constitutional law and jurisprudential

---

[84] B Grossfeld and EJ Eberle, Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers (2003) *38 Texas International Law Journal* 29; See also EJ Eberle, The Methodology of Comparative Law (2011) *16 Roger Williams University Law Review* 52.

[85] Hirschel, Comparative Matters (n 25).

[86] *Ibid*.

[87] Heinze (n 15) 197.

[88] For a good discussion on Montesquieu's skepticism to legal transplantation and use of comparative law, See O Kahn-Freund, On Uses and Misuses of Comparative Law (1974) *37 The Modern Law Review* 1.

[89] U Baxi, The Colonial Heritage, in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transition* (Cambridge University Press, 2003), Cited in Hirschel, Comparative Matters (n 25) 205. Hirschel also notes that this criticism also comes from third world scholars and critics of international law who argue that the rules of international law are shaped by the historical inequalities shaped by colonialism and imperialism, See in this regard A Anghie, *Imperialism, Sovereignty, and the Making of*

developments is marginal if not nonexistent. Similarly, Christine Schwöbel argues that there is a significant omission of non-Western societies and their constitutional law experiences in international law theory and global constitutionalism.[90] This is evident even when there are novel and important constitutional experiences in non-Western societies. For example, although the principle that administrative courts should provide a reason for their decisions was first developed by the Supreme Courts of India and Botswana, constitutional law scholars usually cite the *Baker* case[91] decided by the Supreme Court of Canada.[92]

Despite these limitations, however, comparative law study continues to serve as a significant methodological tool in resolving regulatory challenges associated with the protection of fundamental freedoms including freedom of expression in many societies.[93] Acknowledging its caveats and limits would help to carefully craft and apply the methodological tools for the study of comparative law but does not rule out its methodological significance altogether. Therefore, a more realistic approach lies somewhere between the two extreme positions.[94] Early libertarians such as Hegel and Kant, and contemporary comparative constitutional law scholars including Ran Hirschel, Mark Tushnet and Eric Heinze argue that liberalism as a political thought

---

International Law (Cambridge University Press, 2004); A Orford (ed*) International Law and its Others* (Cambridge University Press, 2006); B Fassbender and A Peters (eds),*The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), Cited in Hirschel, Comparative Matters(n 25) 208.

[90] C Schwöbel, Organic Global Constitutionalism (2010) *23 Leiden Journal of International Law* 529.

[91] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[92] U Baxi, The Future of Human Rights (Oxford University Press, 2012); See also C Saunders, Towards a Global Constitutional Gene Pool (2009) *4 National Taiwan University Law* Review 3; J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); MK Addo, Practice of United Nations human rights treaty bodies in the reconciliation of cultural diversity with universal respect for human rights (2010) *32 Human Rights Quarterly* 601.

[93] See Tushnet, The possibilities of Comparative Constitutional Law (n 70).

[94] See Hirschel, Comparative Matters (n 25).

and universalist legal rules can be applied 'within some historically and culturally grounded context'.[95] In particular, in the context of rights discourse including freedom of expression, judicial reference to decisions of international courts and foreign judgments is more common and a more suited area of comparative constitutional law than in other areas such as the study of separation of powers, mechanisms of judicial review and other areas of constitutional law which are considered organic and where national idiosyncrasies are more apparent.[96]

In terms of its functional aspect, comparative law has been used to resolve legal and institutional challenges that have grappled different societies, by drawing from the experience of other societies. From early engagements in comparative law to modern scholars including Bernhard Grosfeld, Alan Watson, and many other scholars have used comparative law as a method of seeking 'just solution to a given constitutional challenge their polity has been struggling with' and the belief that 'constitutional practice in a given polity may be improved by immolating constitutional mechanisms employed elsewhere'.[97] As Rosalyn Dixon notes, this reliance on comparative law is particularly apparent in the areas of rights discourse including freedom of expression where courts increasingly rely on comparative jurisprudence to resolve legal problems associated with the protection of fundamental rights and seeking the 'best' or 'most suitable rule across cultures'.[98] The fact that States are dealing with similar security and public order challenges in an increasingly interconnected world demands the need to look into constitutional and legal developments in other countries. Ultimately, the study will be significant in the quest for formulating a theory of public good that helps in establishing a right

---

[95] Heinze (n 15) 197.

[96] Hirschel, Comparative Matters (n 25) 21.

[97] R Hirschel, The Question of Case Selection in Comparative Constitutional Law (2005) *53 American Journal of Comparative Law* 127; See also B Grossfeld, Core Questions of Comparative Law (Carolina Academic Press, 2005).

[98] Hirschel, Comparative Matters (n 25) 235.

political order, or more properly an optimal way of regulation.[99] Although there is a fine line between the competing values of order and liberty, comparative constitutional law in free speech helps to provide methods of resolving the dilemma between security and order on one hand and liberty on the other, thereby maintaining an ordered-liberty within a political community across cultures.[100] It helps to contribute to the deliberative process of exploring specific normative and socio-political challenges that are faced by societies across cultures.[101]

In the specific context of emerging and transitional democracies, Ginsburg and Huntington also reiterate the importance of turning into the study of democratization and constitutionalism in these polities. They argue that the conventional study of democracy as the conducting of periodic elections is inadequate to explain the legal and political dynamics of emerging democracies.[102] Huntington similarly contends that many electoral democracies in the world do not protect civil and political liberties including freedom of expression and argues that the focus should be in looking closely at the constitutional experience of these States in relation to specific rights.[103] Because of these factors, there has been a growing need to analyze constitutionalism and the application of human rights and fundamental freedoms in transitional and non-liberal democracies.[104] Mark Tushnet, one of the most influential comparative constitutional law scholars, argues that much of the scholarship in political science and

---

[99] U Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Routledge, 2013) 90.

[100] DP Kommers, The Value of Comparative Constitutional Law (1976) *9 John Marshall Journal of Practice and Procedure* 692.

[101] S Fredman, Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law (2015) *64 International and Comparative Law Quarterly* 631.

[102] T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) 295.

[103] See S Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schister, 1996).

[104] See Ginsburg, *Judicial Review in New Democracies* (n 102).

comparative constitutional law has been analytically descriptive rather than normative.[105] Similarly, Michel Rosenfeld and Andras Sajo argue that constitutional law scholarship has focused on structural issues of political governance rather than on specific human rights such as freedom of expression.[106]

In the particular context of freedom of expression, comparative law provides an important methodological tool to study the regulation of speech in the context of incitement law which can provide important insights in balancing the demands of maintaining national security with the protection of political speech. As David A.J. Richards puts it, freedom of expression is a 'natural subject of (…) comparative law study'.[107] The comparative study of freedom of expression provides the opportunity to study the possibilities of normative convergence and areas of consensus emerging in the regulation of free speech and incitement law. Even where there are differences in approach the comparative study of free speech helps to illuminate as a source of reflection why there are differences in approach and develop an optimal regulatory framework on free speech suited to the specific context of a particular State.

In recent times, scholars including Adriane Stone, Ashutosh Bhagwat, Michele Rosenfeld, Timothy Zick and Uladzislau Belavusau have not only demonstrated the importance of comparative study of freedom of expression, but also more importantly, articulated the continued significance of comparative constitutional law in resolving free speech problems associated with transitional democracies and the overall significance of looking into

---

[105] Tushnet, Authoritarian Constitutionalism (n 18) 421; See also T Ginsburg and A Simpser (eds) *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014) 141); M Albertus and V Menaldo, Dictators as Founding Fathers? The Role of Constitutions under Autocracy (2012) *24 Economics and Politics* 279; See also Thio, Constitutionalism in Illiberal Polities (n 17) 133.

[106] Rosenfeld and A Sajó (n 17) 8.

[107] D AJ Richards, *Free Speech and the Politics of Identity* (Oxford Univesity Press, 1999) 1; See also RJ Krotoszynski, *The First Amendment in Cross-Cultural Perspective: A Comparative legal Analysis of the Freedom of Speech* (New York University Press, 2006) XIV.

constitutionalism in emerging and transitional democracies.[108] Accordingly, the use of comparative methodology is not only required by the pragmatic necessity of resolving the regulation of free speech problems in Ethiopia but also backed by contemporary trends in academic scholarship that increasingly relies on comparative inquiry in the study of freedom of expression and its legal limits in public discourse in transitional democracies.

In looking at the comparative constitutional law experience of other States on freedom of expression, the idea is to develop an optimal model of normative constitutional theory and principles of law in the regulation of free speech.[109] This approach is based on the belief that even if each State's constitutional discourse including in the area of freedom of expression is a reflection of its national identity with its particularities, there are many areas of common interest that help to illuminate important lessons in the regulation of free speech in other States. One should also be cognizant of the limits of International law in articulating the cultural and historical contingencies as well as broader issues of national identity which significantly influence the normative conception of rights in States.[110] International law cannot adequately explain the deeper normative, institutional, socio-political and historical factors which are intricately related with law and society.[111] Comparative law provides an important methodological tool complementing the normative framework of international law by

---

[108] A Stone, The Comparative Constitutional Law of Freedom of Expression (July 1, 2010) 476 University of Melbourne Legal Studies Research Paper, [<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633231>] (Accessed 5 December 2015); A Bhagwat, Free Speech without Democracy (2015) *49 University of California Davis Law Review* 59; T Zick, *The Cosmopolitan First Amendment, Protecting Trans-border and Expressive and Religious Liberties* (Cambridge University Press, 2014); Belavusau (n 90).

[109] Belavusau (n 90) 4.

[110] A Dodek, A Tale of Two Maps : The Limits of Universalism in Comparative Judicial Review (2009) *47 Osgoode Hall Law Journal* 287.

[111] E Barendt, Freedom of Expression, in Rosenfeld and Sajo (n 17) 892-893.

combining both how legal rules and high politics operate in specific societies.[112] In this context, comparative study of freedom of expression in Ethiopia offers a useful methodological approach to study legal developments and the jurisprudence of Courts in different States with regard to freedom of expression which can enlighten legal reforms as well as a principled application of free speech norms suited to its particular context.

V. The Significance of Comparative Study in Free Speech in the Context of Ethiopia

Beyond the general methodological significance that is associated with comparative inquiry, the importance of comparative study of freedom of expression in Ethiopia is required by the following pragmatic factors.

- First, there is very little free speech literature and case law on freedom of expression in Ethiopia. Although few attempts by constitutional law scholars including those by Gedion Timothewos and Yared Legsse Mengistu have been made, the broader literature has largely focused on issues related with federalism and State structure in Ethiopia.[113] Moreover the jurisprudence of Ethiopian courts with regard to freedom of expression is very limited; and when one finds some fledgling case law, there is little attempt to expound the doctrinal basis of the decisions.[114] The lack of literature coupled with the dearth of domestic jurisprudence demands a comparative law engagement that aims to resolve problems associated with the boundaries of political speech and incitement law in Ethiopia

---

[112] VC Jackson and M Tushnet*, Comparative Constitutional Law* (Foundation Press, 2014) 1229.

[113] Some o f the Most Prominent Studies include MC Reta, *The Quest for Press Freedom in Ethiopia: One Hundred Years of History of the Media in Ethiopia* (University Press America, 2013); G Timothewos, An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia, a Comparative Study (unpublished LL.M Thesis, Central European University, 2009); Timothewos, Freedom of Expression in Ethiopia (n 57) 201 and Mengistu (n 52) 352.

[114] Timothewos, Freedom of Expression in Ethiopia (n 57).

- Second, the constitutional framework of Ethiopia provides that the fundamental rights and freedoms provided in the constitution including freedom of expression should be interpreted in accordance with international human rights adopted by Ethiopia.[115] The recourse to comparative law sources is not only confined to international human rights norms but also legal developments in comparative jurisdictions. Unlike other jurisdictions where there is skepticism and even rejection to the use of comparative law, Ethiopian courts have a much more receptive attitude towards international and comparative law.[116] Accordingly, the constitutional framework and the emerging jurisprudence clearly supports the use of comparative law in resolving problems associated with the protection of human rights and fundamental freedoms including freedom of expression.
- Thirdly, the increasing migration of constitutional norms that came to the scene because of collective security challenges faced by States such as terrorism has added the impetus for legal transplantations across different States. One observes that many States including Ethiopia have directly borrowed anti-terrorism legislations from other countries without serious scrutiny of its implications to their particular context.[117] Because of this, the idiosyncratic nature of national constitutions has been increasingly challenged by both collective security and public order challenges of States such as terrorism, and the

---

[115] See Constitution of Ethiopia Art 13(2) which reads: 'The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia'.

[116] See for Example ወ/ሪት ፀዳለ ደምሴ እና አቶ ክፍሌ ደምሴ (የፌዴራል ጠቅላይ ፍርድ ቤት የሰበር መ/ቁ/23632 ጥቅምት 26 ቀን 2000 ዓ/ም (W/rit Tsedale Lema Demese and Kifle Demese, Federal Supreme Court Cassation Division of Ethiopia, Case No. 23632 (Judgment of 6 November 2007), a seminal case in which the Supreme Court applied and interpreted the constitutional principle of the best interest of the Child provided in Art 36 (2) by relying on the CRC and eventually repealed a regional family law which contradicted with the principle of primary consideration for the best interest of the child in disputes involving children.

[117] See Scheppele (n 64).

> increasing universalism of human rights norms through global constitutionalism. This demystifies the cultural and historical determinism that is usually associated with detractors of the use of comparative law. It should also be noted that even when States purport to challenge the use of comparative law or choose to adopt the experience of a particular country, they are driven by political factors rather than the weight and strength of the legal reason or the functional relevance and significance of the question at hand. As Ran Hirschel observes, the choices made by States in relation to comparative law usage is driven by 'socio-political, not juridical' factors.[118]

Consistent with the above methodological approach, the thesis will look into international and comparative developments in the area of the regulation of political speech and incitement law. The idea is to focus on the thematic areas of the study rather than a specific regional human rights system or a particular legal system of a specific State. Accordingly, it would make reference to the regulation of incitement law and the regulation of political speech in international and comparative laws which have functional relevance to the study. This is consistent with the current pragmatic approach of comparative law study that conceives comparativism as a deliberative process of legal reasoning aimed at solving practical normative problems associated with the regulation of free speech and other human rights in different societies.[119]

In general, whatever the political posture and characterization of a particular State might be, there is a significant utility of comparative law which can offer important insights to any State in articulating its normative constitutional theory and principles of law as well as consolidating its democratic trajectory. As Ran Hirschel astutely observes:

---

[118] Hirschel, Comparative Matters (n 25) 43.

[119] See Fredman (n 101) ; See also, B Grossfeld, Core Questions of Comparative Law (n 97), arguing that the primary purpose of comparative inquiry should be to draw best practices in addressing a particular legal problem.

> With the exception of uber-totalitarian North Korea and a small handful of other outlier polities, there is copious similarity alongside sufficient degrees of difference in the world of new constitutionalism to allow for some productive comparison, at least in theory.[120]

In this regard, comparative developments in the areas of free speech and incitement law can provide an important method of comparative inquiry in determining the contours of political speech and incitement law. Accordingly, it is based on this fundamental premise of acknowledging the utility and significance of comparative inquiry, while at the same time understanding the limits of universalism and the demands of contextualism, that the thesis would approach the regulation of incitement to terrorism and incitement to genocide in the context of Ethiopia.

[120] Hirschel, Comparative Matters (n 25) 205.

CHAPTER ONE

THE JUSTIFICATIONS OF FREEDOM OF EXPRESSION

The legal philosopher H.L.A Hart contended that all moral and legal thought is based on 'the tacit assumption that the proper end of human activity is survival'.[121] In response to Hart's proposition, another legal theorist Lon Fuller asserted that effective communication between persons and freedom of expression is central and indisputable element for human survival.[122] Freedom of expression has also been characterized as the 'first principle of natural law',[123] 'a human yearning-insistent, persistent and universal.'[124] From these assertions, it is plausible to argue that free expression is what essentially characterizes the human person as distinctive to its nature and the foundation for its constant intellectual, artistic and scientific development.

However diverse the characterizations about freedom of expression and the various values it seeks to promote, there is an overwhelming consensus that freedom of expression is not only a fundamental individual human right but also an integral part of democratic citizenship.[125] For any democratic society, the case for open democratic discourse begins with the protection of freedom of expression.[126] A society that aims at integrating openness as its overarching value will not merely uphold the individual right to free expression, but also opens up the deliberative process of government to public scrutiny.[127] In an open and democratic society, public scrutiny of the conduct of government including the legislative, administrative and judicial proceedings

---

[121] HLA Hart, *The concept of Law* (Oxford University Press, 1961) 187.

[122] LL Fuller, *The Morality of Law*, (Yale University Press, 1969) 185-6.

[123] J Beatson and Y Cripps, *Freedom of Expression and Freedom of Information : Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 18.

[124] R Smolla, *Free Speech in an Open Society* (Alfred A Knopf, 1992) 3.

[125] Heinze (n 15) 4.

[126] M Redish, *Freedom of Expression: A Critical Analysis* (Michie Co. 1984) 276.

[127] Smolla, Free Speech in an Open Society (n 124) 4.

and deliberations form integral part of the body politic.[128] While there are rational justifications on the importance of regulating freedom of expression to protect compelling interests of States such as national security and public order, it cannot detract the overriding foundational value of freedom of expression in a democratic society and its distinctive function to democratic public discourse. In the following sections, the thesis analyzes the historical development and foundation of the right to freedom of expression and the various theoretical justifications that underlie this basic component of democratic citizenship.

1.1. The Historical Evolution and Foundations of Freedom of Expression

Many scholars have articulated different attributes of human rights. However, most scholars would agree that human rights are evolving norms that continuously appear with the constant struggle of people for freedom.[129] Orlando Patterson contends that freedom is not something that is discovered like a new element.[130] Freedom is an invented value which is the result of individual and societal construct that unfolds as a result of the continuous struggle of people against coercion and restraints imposed by others.[131] It should be made clear from the outset that despite the remarkable achievements made to ensure the free expression of individuals, censorship remains an enduring challenge of any organized political society.[132] Individuals in power have the propensity to control expressions that are deemed to undermine their legitimacy or political authority. While free expression forms an intrinsic value of the human person, it is reasonable to infer that any political authority that feels threatened by the views of others is more likely to suppress this basic freedom. The ultimate objective of any democratic

---

[128] F Haiman, *Speech and Law in a Free Society* (University of Chicago Press,1981) 297-339, 369-409.

[129] C Heyns, A 'Struggle Approach' to Human Rights in A Soeteman (ed), *Pluralism and Law* (Springer, 2001).

[130] O Paterson, *Freedom* (New York Basic Books, 1991).

[131] *Ibid*.

[132] RE McCoy, *Freedom of the Press: An Annotated Bibliography* (Southern Illinois University Press, 1993) 165.

society should be to maintain an ordered liberty, by striking a balance between competing interests of the individual and the State.

Freedom of expression has ancient roots.[133] Scholars contend that freedom of expression was an essential aspect of Athenian democracy.[134] Under Herodotus' time, the equal right to freedom of expression was one of the most fundamental elements of the equality of all citizens (*isonomia).* Plato's reference to Athens as *philologus* (a city in love with speech) is believed to demonstrate Athenian tolerance to freedom of expression.[135] Freedom of expression was also integral to the political thought and philosophy of Aristotle in which he referred the human person as a political animal (*zoon-politicon*).[136] The idea of free expression also finds support in many religions. For example, the Islamic scholar Hugh Goddard argues that freedom of expression, in particular, academic freedom originated from ancient Islamic schools (*madras*).[137]

Nevertheless, as much as the innate desire to express is as old as humanity itself, the proclivity and impulse to censor was also part of the history of organized political society.[138] History shows that the exercise of control over words, symbols and ideas was common to all societies.[139] Evidence of these kinds of controls can be traced to pre-literate societies such as in early Sumerian and Egyptian civilizations where censorship of symbols was practiced.[140] In the Old Testament, instances of censorship can be observed including the burning of the scrolls

---

[133] TD Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (Martinus Nijhoff, 1998) 34-7.

[134] E Berti, Ancient Greek Dialectic as Expression of Freedom of Thought and Speech (1978) *39 Journal of the History of Ideas* 347.

[135] *Ibid*.

[136] O'Flaherty, Freedom of Expression (n 6) 628.

[137] H Goddard, *A History of Christian-Muslim Relations* (Edinburgh University Press, 2000) 100.

[138] SC Jansen, *Censorship: The Knot That Binds Power and Knowledge* (Oxford University Pres, 1991) 4.

[139] *Ibid*, 41.

[140] VG Childe, *Man Makes Himself* (New American Library, 1951).

containing the prophecies of Jeremiah which foretold the destruction of the house of Judah and Jerusalem.[141] Similarly, in ancient China, in 250 B.C the then emperor of China ordered the burning of the writings of the great Chinese philosopher Confucius, as they were believed to be contradictory to the philosophy and political thought of the monarchy.[142] Censorship was also widely practiced since the time of ancient Rome. The Roman emperor Augustus is considered as the first ruler in the Western world to establish a codified law prohibiting libelous and scandalous writings (*libelli famosi*).[143] The then existing law also allowed for book burning as a legitimate means of suppressing proscribed writings. Plato's *Republic,* in which he called for banning of the arts and elimination of any discussion in order to establish the ideal State, is also the most vivid account of direct advocacy of censorship.[144]

With the advent of Christianity and the rise of the theocratic governments of Western Europe, the consolidated power of the Catholic Church and the State formed a formidable power to censor expressions that were considered to undermine their legitimacy and political power. Any form of expression that questioned the teachings and doctrines of the church was considered as heretic against the church and the State. Heresy was, thus, the first 'great libel, a libel against God, the church and state.'[145] The Church also launched the inquisition, a drastic and deeply aggressive campaign aimed at maintaining the system and power of the church.[146] The inquisition began when Pope Paul III convened the Council of Trent which formally established the Roman Inquisition and the Index of banned books (*Index Librorum Prohbitorum*).[147] It is

---

[141] Jeremiah 36:23.

[142] R Tragger and DL Dickerson, *Freedom of Expression in the 21st Century* (Pine Forge Press, 1999) 37.

[143] Jansen (n 138) 41.

[144] *Ibid*, 36.

[145] Tragger and Dickerson (n 142) 38.

[146] Ibid, 39; for a more detailed discussion see F Bethencourt, translate by Jean Birrell, *The Inquisition : A Global History, 1478-1834* (Cambridge University Press, 2009).

[147] Tragger and Dickerson (n 142) 39.

estimated that during the late 1500s, the Spanish Inquisition alone killed more than 2,000 heretics and non-believers.[148]

With the advent of secularism as a political thought in Western Europe in the 17th Century, a new worldview and philosophy which basis its foundation on science and empirical observation began to emerge. Copernicus and Galileo challenged the orthodox view of the church which considered the earth as static, by proposing that the Sun, not the Earth is at the center of the universe.[149] For the next several hundred years, science began to take over the place of religion in the public space basing its foundation on objective scientific inquiry and free expression.[150]

1.2. Philosophical Foundations

The Enlightenment period also called the age of reason, provided the foundations for the modern understanding of freedom of expression.[151] While traces of the right to freedom of expression can be found in ancient times as discussed above, one finds a 'primary and direct connection' in the protection of freedom of expression during the period of the Enlightenment.[152] The Enlightenment philosophers including John Milton, Benedict de Spinoza and John Locke and their philosophical ideas formed the foundation for the modern understanding of freedom of expression.[153] Subsequently, political thinkers such as John Stuart Mill expanded the ideas and political thought of the Enlightenment thinkers more expansively. Although their theoretical justifications for the protection of the right to freedom of expression

---

[148] *Ibid*, 39; See also EM Oboler*, The Fear of the Word: Censorship and Sex* (Scarecrow Press, 1974).

[149] *Ibid*, 40, 41.

[150] *Ibid*.

[151] This period covers from the early 1600 to the late 1700.

[152] O'Flaherty, Freedom of Expression (n 6) 627.

[153] Tragger and Dickerson (n 142) 47.

have been articulated more extensively, a brief discussion of their underpinning philosophical ideas will be useful.[154]

One of the most prominent philosophers of the time, John Milton (1608-1674), and his philosophical works are largely considered instrumental in laying down the foundation of the philosophical rationale for the protection of freedom of expression. In his essay, *Areopagetica,* Milton strongly argued against the then existing licensing laws of England.[155] He noted that books should be considered as souls that live on after the writer has died and compared the licensing scheme similar to the book burning during the inquisition, where he argued 'to kill a book kills reason and immortality'.[156]

Benedict Spinoza (1632-1677) is widely considered as the first philosopher to have laid down the foundations for the later Enlightenment thought through his philosophical works beginning with his first philosophical contribution- the *Tract on Philosophy and Theology*.[157] In one of his classic works *Ethics* Definition Seven, Spinoza summarizes the meaning of freedom, 'that a thing is called free, which exists solely by the necessity of its own nature, and of which the action is determined by itself alone. On the other hand, that thing is (unfree), which is determined by the something external to itself'. [158] Spinoza's understanding of personal and political freedom shows his underlying argument that the State has no right to restrict freedom of expression. In this regard, two major arguments of Spinoza's position have implications for our understanding of freedom of expression. First, he argues that the State does not have a right to control

---

[154] *Ibid*; See also A Guider, *Freedom of Expression and the Enlightenment* (Unpublished LLM thesis, 2015); JB Bury, *A History of Freedom of Thought* (Cambridge University Press, 2004).

[155] J Milton, *Areopagetica* (1644), cited in Tragger and Dickerson (n 142) 45.

[156] *Ibid*.

[157] B Spinoza Tractatus Theologico-Politicus (1670) in AG Wernham Translation (Oxford University Press, 1958) cited in E Pitts, Spinoza on Freedom of Expression (1986) *47 Journal of the History of Ideas* 21.

[158] B Spinoza, *Ethics* (1677), Cited in Tragger and Dickerson (n 142) 31-32.

individual freedom which natural law makes impossible to control.[159] Second, he contends that censoring expressions of individuals is not politically prudent to do so.[160] Thus, he contends that the right to form individual judgments which forms an integral part of the right to freedom of expression is an inalienable right.[161] Although Spinoza's work emanates from other social contract theorists such as Hobbes and Locke, scholars argue that his theory was more inclined to individual freedom.[162] Spinoza also argues for a very narrow limitation on freedom of expression and noted that limitation should only be made when expressions threaten the very basis of the State.[163]

While both Spinoza and Milton had important contributions to the modern understanding of freedom of expression, they also had their differences. The major difference between Spinoza and Milton was the purpose behind their arguments for the protection of freedom of expression.[164] Milton argued that the purpose of freedom of expression, whether acquired through rational thought and debate or through belief in God, was to find the truth.[165] On the other hand, Spinoza argued that the purpose of freedom of expression is not the arrival at truth but rather fostering human intelligence and reason.[166] According to Spinoza, rather than arriving at the truth, what is more important is rational thought and debate and the process of truth discovery as what is true now can change over time.[167]

---

[159] Pitts (n 157) 26.

[160] *Ibid.*

[161] Tractatus Theologico-Politicus, Ch. XX, 227, Cited in Ibid, 26 .

[162] See RA Duff, *Spinoza's Political and Ethical Philosophy* (James MacLehose and Sons, 1903) 11.

[163] Spinoza, *Tractatus Theologico-Politicus*, Ch. XX, 231, Cited in Ibid, 27.

[164] Tragger and Dickerson (n 142) 47.

[165] *Ibid*.

[166] *Ibid.*

[167] *Ibid*.

John Locke (1632-1704) and his contribution to our understanding of the concept of limited government has also implications for the foundational concepts of freedom of expression.[168] He argued that individuals have natural rights that the very sovereign does not have even the right to derogate. He also acknowledged that the liberty of individuals is subject to limitations emanating from the need to protect the rights of others and promote the common good. [169] In particular, in *a Letter Concerning Toleration,* Locke strongly argued for the principles of secularism and stated that persuasion, not coercion should be the solution to individuals who do not accept the dogmas and doctrines of the Church.[170] Nevertheless, Locke did not directly expand his theme of toleration to the theory of the protection of freedom of expression.[171] Yet his understanding about the notion of limited government and the inalienable rights of individuals is informative to the discussions on freedom of expression.

Subsequent to the above enlightenment thinkers, John Stuart Mill (1806-1873), not only helped shape the benchmarks for our current understanding of the right to seek, receive and impart information but also the justified limits that can be put on freedom of expression when there is a direct threat to life in society.[172] In arguing the importance of freedom of expression, Mill contended that all ideas even those which are entirely false should not be suppressed in order to enhance the search for truth.[173] Mill argued strongly against censorship by noting that genuine human progress involves resolving differences by dialogue and accepting an increasing

---

[168] Tragger and Dickerson (n 142) 49.

[169] See J Locke, John Locke, Two Treatises of Government, http://www.efm.bris.ac.uk/het/locke/government.pdf (accessed 11 February 205) 205; See also SJ Heyman, "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression" (1999) *78 Boston University Law Review* 1282.

[170] J Locke, A Letter Concerning Toleration (1685).

[171] Tragger and Dickerson (n 142) 50.

[172] O'Flaherty, Freedom of Expression (n 6) 628.

[173] Tragger and Dickerson (n 142) 57.

number of truths through an open discussion.[174] He asserted that ideas and opinions can be true, false or partly true and partly false. As such absolute truth is difficult to establish. He stated that if discussions and debates are not allowed to flourish ideas will be '*dead dogmas*'.[175] His argument signifies the vitality of continued discussions and deliberation as integral part of an open and democratic society.

Scholars point out two major factors for the unprecedented revolution in thought and social organization during and after the period of the Enlightenment. The first factor was the understanding about the limits of government power. The second factor is related to the belief that the ultimate sovereignty of power rests with the people and that they are the only ones that decide on their destiny.[176] In a broader sense, however, five distinct factors shaped people's thought about government which had a revolutionary effect on the socio-political and economic transformation of the period. These include the transformation from family and feudal-based economy to market-based economy, the protestant reformation, the emergence of scientific inquiry, secularism and the invention of the printing press.[177]

As the above discussions illustrate, the common underlying principles of the Enlightenment philosophers was based on a theory of liberty and libertarianism which emphasizes on secularism, rationalism, humanity, freedom from arbitrary power, freedom of trade and freedom of expression.[178] These principles laid down the foundation for the modern and contemporary understanding of freedom of expression. Some of the major justifications for freedom of expression such as the search for truth and the marketplace of ideas were laid down in the philosophical works of the Enlightenment.

---

[174] MD Bunker, *Critiquing Free Speech First Amendment Theory and the Challenge of Interdisciplinarity* (Lawrence Erlbaum Associates Publishers, 2001).

[175] JS Mill, On Liberty (Crofts Classics, 1947) (1859) 36.

[176] GE Carmi, Dignity-The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification (2007) *9 University of Pennsylvania Journal of Constitutional Law* 957.

[177] Tragger and Dickerson (n 142) 41

[178] *Ibid*, 51.

1.3. The Justifications of Freedom of Expression

Joseph Raz notes that '[f]reedom of expression is a liberal puzzle'.[179] Although most scholars agree on the significance of freedom of expression, they have not convincingly argued why it deserves a special place in a democratic society.[180] These factors have led Larry Alexander to conclude that scholars have failed to come up with a coherent and defensible theoretical justification on freedom of expression.[181] Similarly, Stanley Fish has argued that there is no such thing as free speech as it is constructed by the dominant public and embedded in the values and cultural contingencies of different societies.[182] Nevertheless, the liberal critic of free speech, while showing its flaws does not offer any alternative theoretical approach to the justifications on free speech. As Fredrick Schauer rightly notes the lack of articulating a theoretical framework for free speech 'is not only philosophically troubling but also deficient as a legal analysis.'[183] It is, therefore, important to articulate the various theoretical justification of freedom of expression and draw a defensible free speech justification that serves as a general theoretical framework for the application of freedom of expression.

Most scholars have approached the theoretical justifications for freedom of expression from a single approach by undermining the possibility of coming up with a broader framework for

---

[179] J Raz, Freedom of Expression and Personal Identification (1991) *11 Oxford Journal of Legal Studies* 302.

[180] *Ibid*.

[181] L Alexander, *Is There a Right of Freedom of Expression?* (Cambridge University Press 2005) 147; See also Stanley Fish, *There's No Such Thing As Free Speech: and It's a Good Thing Too* (Oxford University Press, 1994) where he argues that 'abstract concepts like free speech do not have a 'natural' content but are filled with whatever content and direction one can manage to put into them. 'Free speech' is just the name we give to verbal behavior that serves substantive agendas we wish to advance.... Free speech, in short, is not an independent value but a political prize' Se at 102.

[182] *Ibid*.

[183] F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) IX.

validating the values served by freedom of expression.[184] Earlier exponents of free speech John Milton and John Stuart Mill emphasized the importance of the search for truth as the foundational value of freedom of expression. While Alexander Meiklejohn emphasized on political expression and democracy as the most significant basis for protecting freedom of expression.[185] Meiklejohn argued that freedom of expression basis its foundation on the principles of self-government in which the significance of public deliberation forms its core value.[186] Thomas Emerson expanded the theoretical justifications of freedom of expression to include a multitude of rationales including individual self-fulfillment; advancing knowledge and search for truth; enhancing participatory decision-making and achieving adaptable and more stable community.[187] Other liberal scholars on freedom of expression including Zechariah Chafee, Martin Redish, Thomas Scanlon and David A.J. Richards have expanded the enlightenment thought and articulated their accounts of the underlying values served by freedom of expression.[188]

---

[184] MH Redish, Freedom of Expression (Michie Co., 1984); See also MH Redish, The Value of Free Speech (1982) *130 University of Pennsylvania Law Review* 591 where he argues that the core value advanced by freedom of expression is "self realization".

[185] Meiklejohn, Self-Government (n 14).

[186] *Ibid*, 100.

[187] T Emerson, *The System of Freedom of Expression* (Random HouseIncorporated, 1970)15.

[188] See Z Chafee, *Free Speech in the United States* (Harvard University Press 1941); emphasizing on the importance of political truth as the core value of freedom of expression; T Scanlon, A Theory of Freedom of Expression (1972) *1 Philosophy & Public Affairs* 204; See also TM Scanlon, Freedom of Expression and Categories of Expression (1978) *40 University of Pittsburgh Law Review* ; TM Scanlon, Why Not Base Free Speech on Autonomy Or Democracy? (2011) *97 Virginia Law Review* 541; D AJ Richards, *Toleration and the Constitution* (Oxford University Press, 1989); D AJ Richards, *Free Speech and the Politics of Identity* (n 107), suggesting individuals freedom and equality-based approach theory to freedom of speech.

One of the few attempts made by scholars to come up with a broader framework for the theoretical justifications of freedom of expression is Kent Greenawalt.[189] Greenawalt's approach provides a more detailed broader framework that looks into the importance of looking at all the relevant grounds for the justification of freedom of expression. This approach is significant because of its underlying assumption that each justification has its own role in validating the importance of freedom of expression. Smolla concurs with this view by asserting that there 'is no logical reason why the preferred position of freedom of speech might not be buttressed by multiple rationales'.[190]

However, although free speech has multiple rationales, it is important to recognize that a democracy-based justification of freedom of expression which emphasizes on the significance of protecting political speech and democratic public discourse has a distinctive place in free speech doctrine. Accordingly, while the thesis supports the approach that freedom of expression can be supported by multiple rationales, a democracy-based theory of freedom of expression is a distinct theory which offers a coherent theory of free speech that has the practical utility of solving many of the problems associated with the regulation of free speech.

In assessing the various theoretical rationales for protecting free speech, one of the most common taxonomies made to analyze the justifications for freedom of expression is to look at non-consequentialist (intrinsic or deontological) and consequentialist (utilitarian or teleological) justifications.[191] Although some level of overlap exists in the distinction between the consequenstialist and non-consequesntialsit justifications, the classification is a significant starting point in the discussion of the justifications of freedom of expression in structured manner.[192]

---

[189] K Greenawalt, Free Speech Justifications (1989) *89 Columbia Law Review* 119; K Greenawalt, *Speech, Crime and the Uses of Language* (Oxford University Press, 1989) 9-40.

[190] Smolla, Free Speech in an Open Society (n 124) 5.

[191] Greenawalt, Free Speech Justifications (n 189) 127-30.

[192] *Ibid*.

1.3.1. Non-Consequentialist Justifications

The non-consequentialist justification views freedom of expression as inherent and intrinsic natural law which should be protected whether or not the consequences for its protection have societal significance. The central tenets of the non-consequentialist view emphasize on dignity and equality, and individual autonomy.[193]

A. Autonomy

Individual autonomy which is premised on human rationality has been considered as the basic foundation of protecting freedom of expression by some of the most prominent free speech scholars including David A.J. Richards, C. Edwin Baker and Ronald Dworkin.[194] In outlining the significance of autonomy, David A.J. Richards argues that the ability of individuals to express freely encourages independent decision-making and judgment by affording individuals the opportunity to listen to a wide variety of views.[195] Edwin Baker takes the argument further and notes that the legitimacy of any State should be measured by the level of respect that it gives to the autonomy of the individual and as such autonomy forms the core of the justification of freedom of expression.[196] Dworkin similarly contends that restricting expressions because people have a different style of life or have a different understanding of a certain issue violates their autonomy and 'moral independence'.[197] He argues that a government cannot discriminate

---

[193] *Ibid*, 147.

[194] Richards, *Toleration and the Constitution* (n 188) 85, 167-69, 183; CE Baker, Scope of the First Amendment Freedom of Speeech (1977) *25 UCLA Law Review* 991-992,998; CE Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989) 37–46; Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1986); Cf Michael Freeman, *Human Rights an Interdisciplinary Approach* (2011) 85.

[195] Richards, Toleration and the Constitution (n 188) 167.

[196] CE Baker, Autonomy and Free Speech (2010) *27 Constitutional Commentary* 251.

[197] R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999) 353.

among citizens by permitting some views and denying other views. Such conduct is discriminatory not only to the speaker but also to the society as a whole.[198]

Although the notion of autonomy is intricately linked with dignity, the emphasis of the justification from autonomy is the recipient of the information rather than the speaker and hence requires separate treatment.[199] In this regard Larry Alexander provides a good illustration. If a posthumous work is banned for publication by a government, the government's prohibition cannot be said to violate the author's right as he is dead. Nevertheless, he notes that since underlying the principle of autonomy is the right of the audience, the government's act can be considered as a violation of the right to freedom of expression.[200]

However, questions are raised on the autonomy justification as it emphasizes on the rationality of human conduct as the basis of its assumption. It is argued that the manipulation of information can lead individuals to react irrationally.[201] These irrational behaviors may ultimately lead to social harms. Joshua Cohen notes that the fundamental assumption that considers autonomy as a cherished and elevated value in itself is questionable. He argues that this approach can 'turn freedom of expression into a sectarian political position'.[202] Cohen focuses on a stringent protection of free speech in what he describes as the expressive, deliberative and informational categories of expression. By focusing on autonomy, he argues that we ignore the different other values served by freedom of expression.[203] Similarly, other scholars also argue that the emphasis on autonomy and rationality undermines the importance attached to other justifications of freedom of expression such as truth discovery and

---

[198] R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 277-78; Dworkin, *Freedom's Law* (n 197) 200.

[199] Greenawalt, Free Speeech Justificaitons (n 189) 150.

[200] Alexander, Is There a Right of Freedom of Expression (n 181) 8.

[201] *Ibid*, 151.

[202] Cohen, Freedom of Expression (n 7) 221-222.

[203] *Ibid*, 223, 229.

democracy.[204] The most vivid opposition to the autonomy argument for free speech, in particular, comes from Owen Fiss. In his support for a democracy-based theory of speech and why autonomy should not form the foundational notion for free speech he notes:

> Speech is protected when [it enriches public debate],… not because it is an exercise of autonomy. In fact autonomy adds nothing, and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective determination.[205]

The above criticisms, however, do not undermine the fundamental approach taken by Greenawalt. Greenawalt's approach emphasizes on a plurality of values served by freedom of expression. The approach he takes is based on the general understanding that each justification has its merit and deserves a place in the justifications of freedom of expression.[206] Moreover, the autonomy and rationality justification integrates other important values of freedom of expression such as dignity and tolerance. If the protection of freedom of expression is not based on these fundamental values, individuals are considered as passive recipients of information that do not have the rational faculty to discern what is good and bad. This, in turn, can be used as an excuse to have more encroachments on the exercise of the right to freedom of expression. The autonomy justification puts a high bar on the power of State to justify any kind of limitation on freedom of expression by requiring restrictions to be grounded on careful consideration of the reasons justifying the limitations.

---

[204] Carmi (n 176); Carmi draws his arguments from the general criticism of the arguments form autonomy from liberal thinkers who are critical of the arguments from autonomy in a rights discourse; see J Rawls, *Political Liberalism* (Columbia University Press, 1993); C Larmore, *The Autonomy of Morality* (Cambridge University Press, 2008); WA Galston, Two Concepts of Liberalism(1995) *105 Ethics* 516. CF Rostboll, Freedom of Expression, Deliberation, Autonomy and Respect 2011) *10 European Journal of Political Theory* 5.

[205] O Fiss, Free Speech and Social Structure (1986) *71 Iowa law Review* 1411.

[206] Greenawalt , Free Speech Justifications (n 189) 119.

B. Dignity and Equality

Recent scholarship has focused on the concept of dignity as a major theoretical justification for the protection of human rights.[207] Moreover, many States are becoming increasingly reliant on the concept of human dignity as an overarching normative constitutional value.[208] In a similar vein, in the context of free speech two interrelated rationales, dignity and equality form part of the non-consequentialist justifications which have particular relevance to freedom of expression. [209] The values of dignity and equality focus on the speaker's right to free expression and protection from being discriminated. Weinrib argues that while the justifications of self-government and democracy emphasize on the collective well-being of society, the justifications for dignity and equality emphasize on the intrinsic values of the human person.[210] Free

---

[207] See D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Springer, 2002); J Waldron, Is Dignity the Foundation of Human Rights Waldron, (2013) *NYU School of Law, Public Law Research Paper No. 12-73*, available at SSRN: [<https://ssrn.com/abstract=2196074 or http://dx.doi.org/10.2139/ssrn.2196074 >] (available 7 August 2015); C.j McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* (2008) *19 European Journal of International Law* 655 ; J Paust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content (1984) *27 Howard Law Journal* 145.

[208] Among this countries include Israel, Germany and South Africa; see Carmi (n 176) 967; For example, in the case of *Khumalo v Holomisa*, involving a defamation claim based on an alleged violation of human dignity, the South African Constitutional Court balanced both freedom of expression and human dignity and stated that free speech must be 'construed in the context of other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality'; (*Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC) at 25 (S. Afr.).

[209] Greenawalt, Free Speech Justifications (n 189) 152-153.; See also M Civic, The Right to Freedom of Expression as the Principla Component of the Preservation of Personal Dignity: An Arguemnt for Internaitonal Protection Within All Nations and Across All Borders (1997) *4 University of Pennsylvania Journal of Law and Social Change* 117.

[210] J Weinrib, What Is the Purpose of Freedom of Expression (2009) *67 University of Toronto Faculty of Law Review* 177.

expression is something that individuals hold dearly, perhaps more than most actions individual perform; it is a human instinct and expression of self-identity.[211] A selective restriction on the content of what is expressed can have implications for undermining equality and dignity of individuals.[212]

Nevertheless, arguments have been raised on the proper meaning of dignity and its significance in the context of freedom of expression.[213] Fredrick Schauer questions the merits of using human dignity as the foundation for the protection of freedom of expression. He contends that some accounts of human dignity can serve as rationales for restricting speech than defending the cause of free speech.[214] Similarly, Eric Barendt argues that the emphasis placed on other values such as dignity and privacy under the ECHR has led the ECtHR to adopt an incoherent and unprincipled approach to the protection of freedom of speech in the context of Europe.[215] In reaching this conclusion, one of the major points of his argument is that when it comes to

---

[211] Greenawalt, Free Speech Jutifications (n 189) 153.

[212] *Ibid*.

[213] See also Carmi (n 176), noting that a theoretical Justification of freedom of expression based on dignity rather than supporting the ideals for the justifications of freedom of expression would be counterproductive to its theoretical justifications.

[214] F Schauer, The Exceptional First Amendment (February 2005), *KSG Working Paper No. RWP05-021*, available at SSRN: https://ssrn.com/abstract=668543 or http://dx.doi.org/10.2139/ssrn.668543 where he argues that 'in the United States the freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests' including dignity and equlity, see at 18-19; It should also be pointed out that much of the criticism of dignity as theoretical justification of freedom of expression has been influenced by the political history and legal tradition of the US which emphasizes on a free expression rather than human dignity; See also E Bleich, Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe (2014) *40 Journal of Ethics and Migration Studies* 283.

[215] E Barendt, Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court (2009) *1 Journal of Media Law* 49.

the protection of political speech, which forms the most important aspect of the right to freedom of expression, the fact that the Court gives similar protection to other rights such as the right to privacy and reputation of individuals and groups has undermined the development of a coherent approach to its jurisprudence on free speech.[216] Barendt notes that though the Court has a relatively coherent approach in issues involving limitations of the right to freedom of expression in the context of national security, the balancing approach the Court takes in the context of other competing rights has been problematic.[217]

In brief, there should be a cautious approach when considering dignity as a justification of freedom of expression. While dignity forms the founding principle of the corpus of international human rights law, its place in free speech justifications should be weighted carefully. Given the unparalleled place of freedom of expression in a democratic society, any limitations imposed on freedom of expression based on competing grounds of other rights should be subject to a close scrutiny.[218]

C. Social Contract and Limited Government

The theory of social contract, which is linked to the tradition of liberal democracy basis the legitimacy of the State on the consent of the governed. John Locke argued that the legitimacy of the authority of government derives from the consent of the governed and the purpose of government should be to protect the rights and interests of individuals.[219] While Greenawalt

---

[216] *Ibid*.

[217] *Ibid*.

[218] See also Waldron, Is Dignity the Foundation (n 207), where he argues that its utility has to be seen I terms of the particular right at issue. For example while dignity may have more significant relevance in the context of the prohibition of Torture and other forms of inhuman treatment, it has less relevance in the context of free speech doctrine, see at 3.

[219] John Locke, John Locke, Two Treatises of Government, http://www.efm.bris.ac.uk/het/locke/government.pdf (accessed 11 February 205) 205.

highlights the difficulty of accepting the fact that society actually entered into a social contract, he nevertheless accepts it as a plausible hypothetical argument that can elucidate to show how individuals would consent in a transition from a state of nature to a political society.[220]

Although the implication of the ideals of social contract and the consent of the governed has a much wider significance than freedom of expression, they have considerable relevance for the justification of freedom of expression. This it does in two ways. First, the idea of limited government sets restrictions on the power of government by requiring any limitations on freedom of expression to be grounded on appropriate compelling government objectives.[221] Second, it requires that there should be a direct connection between the prohibited expression and the purported social harm that would occur.[222] Hence, by putting critical assumptions on the limits of government power, it provides a conceptual framework on any limits on freedom of expression to be closely scrutinized based on a closer consideration of the proximity of the purported harm that would be caused.[223]

1.3.2. Consequentialist Justifications

The consequentialist view argues for a theoretical justification of freedom of expression by articulating a set of desirable outcomes such as the search for truth and democratic self-government.[224] It focuses on the end result of why we need to protect freedom of expression and tries to elucidate its underlying reasons. Although the consequentialist reasons can be diverse, the most common justifications rely on the search for truth and the marketplace of

---

[220] Greenawalt, Free Speech Justifications (n 189) 148.

[221] *Ibid,* 150.

[222] *Ibid.*

[223] *Ibid*.

[224] *Ibid* ,127, 130-47.

ideas, the promotion of tolerance, the deterrence of abuses of government authority, and the argument from democracy.[225]

A. The Search for Truth and the Marketplace of Ideas

One of the most common reasons, and often described as a '*siren song*' for the theoretical justification of freedom of expression is the notion of the marketplace of ideas and the search for truth. [226] The metaphor of the marketplace of ideas argues that similar to the market for goods where competition between different business entities enhances the growth of national economies, freedom of expression also affords individuals the opportunity to contribute different ideas in the economic, social and political life of a community.[227] The underlying assumption underscores the importance of providing the opportunity for entertaining a wide variety of competing views which can ultimately support in the search for truth or more generally some public good. The search for truth and the marketplace of ideas are the strongest justifications for some of the most prominent philosophers of the enlightenment including John Milton and John Stuart Mill.

Although Milton's arguments were based on religious grounds, in his book, *Areopagetica*, he strongly argued for freedom of expression on the basis of the search for truth. He contended, *'*let truth and falsehood grapple; whoever knew truth put to the worse in a free and open encounter'.[228] John Stuart Mill similarly argued that the suppression of expression may inhibit the possibility for unveiling ideas that could be true or partly true.[229] In the early 20th century,

---

[225] *Ibid*.

[226] J Schonscheck, The Marketplace of Ideas: A Siren Song for Freedom of Expression Theorists in Golash (n 9) 29-30

[227] Greenawalt, Free Speech Justificatios (n 189) 130.

[228] J Milton*, Areopagitica and Of Education* (George H.Sabine ed., Harlan Davidson, 1987) (1644), cited in MD Bunker, *Critiquing Free Speech: First Amendment theory and the Challenge of Interdisciplinary* (Lawrence Erlbaum Associates, 2001) 2.

[229] See Mill (n 59).

Milton's and Mill's ideas were echoed in an eloquent opinion by Justice Oliver Wendell Holmes when he wrote*:*

> persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and you want a certain result with all your heart, you naturally express your wishes in law and swipe away all opposition…But when men have come to realize that time has upset many fighting faiths, they may come to believe even more than the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market…[230]

While the search for truth and the marketplace of ideas serve as one of the most convincing grounds for the protection of freedom of expression, questions have been raised about their theoretical validity. Scholars question whether there is objective truth and even if there is one, the conditions in which it is discovered cannot readily lead to the discovery of truth.[231] Greenawalt also concedes that truth discovery is much more difficult to ascertain in domains involving value judgments than the physical sciences.[232]

The comparison between the marketplace for ideas and the marketplace for goods has also evoked the intellectual appeal of mainstream economists. It has generated debates on whether regulation is more appropriate in the context of the market for goods or ideas. The opinion of scholars in this regard is diverse.[233] While some have argued for the appropriateness of the

---

[230] *Abrams v United States,* 250 U.S. 616, 630 (1919) *(dissenting opinion).*

[231] Greenawalt, Free Speech Justifications (n 189) 131-141.

[232] Ibid, 137; See also J Schonscheck (n 226) 29-30; Schonscheck provides the history of the Hindenburg disaster which killed 35 passengers of the Hindenburg airship in 1937 as a good example of how the marketplace of ideas does not always lead to truth discovery. He argues that media distortion in the aftermath of the crash resulted in a false consciousness and the understanding that hydrogen was the cause of the accident. Although repeated scientific research has shown that hydrogen is the most readily available resource that can be utilized for aviation and many other industries, the misconception and its association with the Hindenburg disaster resulted in the complete disregard for its scientific utility.

[233] The leading essays in this regard include R Coase, The Market for Goods and the Market for Ideas (1974) *64 The American Economic Review* 384; RH Coase, Advertising and Free Speech (1977) *6 The*

regulation of the marketplace of goods, others dismiss the same kind of regulation in the context of the marketplace of ideas. Ronald Coase argues that in the market for goods, government regulation is desirable, whereas in the market for ideas government regulation is undesirable and should be strictly limited.[234]Coase contends that in the market for goods, the government is commonly regarded as competent to regulate and '*properly motivated*'.[235] For example, consumers may lack the ability to decide on appropriate choices and producers can exercise monopolistic power.[236] For these reasons, government intervention in the marketplace for goods is appropriate in order to promote the public interest. To the contrary, in the marketplace for ideas, government regulation would be inefficient. Moreover, he warns that the government's *motives* are generally bad and the results of such regulation would be undesirable.[237] Similar reasons have prompted Aaron Director to argue that freedom of expression is 'the only area where laissez-faire is still respectable'.[238]

---

*Journal of Legal Studies*1; A Director, The Parity of the Economic Market-Place (1964) *7 Journal of Economics and Law* 3-6; Cf F McChesney, Commercial Speech in the Professions: The Supreme Court's Question and Questionable Answer (1985), *134 University of Pennsylvania Law Review* 45. (1985); R Posner, Free Speech in an Economic Perspective (1986) *20 Suffolk University Law Review* 1 .

[234] R Coase, The Market for Goods (n 233) 384; See also Director (n 233), where he argues that freedom of expression is " *the only area where laissez-faire is still respectabl*e", see at 5.

[235] *Ibid*, (Emphasis added).

[236] *Ibid*, 384.

[237] *Ibid*, 384 (emphasis added)

[238] Director (n 233), It can also be observed that there is a lack of consensus on whether economic systems determine the level of freedom within states or vice versa. An empirical study conducted on a number of states has shown that the results are inconsistent and there is no conclusive evidence to show that capitalism as an economic model is a necessary precondition for political freedom; in this regard see F Pryor, Capitalism and Freedom? (2010) *34 Economic Systems* 91; where he concludes that 'although political freedom and capitalism are correlated on a cross-section basis, capitalism is neither a necessary nor sufficient condition for political freedom. And, I might add, I could find no confirmation for the reverse proposition either, that political freedom is a necessary or sufficient condition for capitalism.'

Overall, the search for truth and the marketplace of ideas provide a strong theoretical justification of freedom of expression. Both are expansive concepts that include philosophical, religious, political, scientific or social truths. Because of this, it is acceptable and even desirable to argue that people could have different views on what is considered objective truth. While objective truth is difficult to ascertain, open discussion and contestation of ideas are powerful means of unveiling truth. It should be emphasized that the major rationale behind the search for truth and the marketplace of ideas is not the attainment of objective truth but rather the process of reaching the truth. It is also difficult to see how the suppression of ideas in any meaningful sense will lead to a better result in the search for truth.

B. Tolerance

Greenawalt categorizes interest accommodation and social stability as separate justifications for freedom of expression from the promotion of tolerance.[239] Though there are some points of difference in these rationales, one can observe greater overlap of these concepts. For this reason, it is plausible to consider them together in a boarder category of the principle of tolerance. The underlying argument for tolerance as a basic value for the protection of freedom of expression is based on the fact that the accommodation of diverse and competing desires and interests in society will be beneficial to peaceful coexistence and social stability.[240] Some scholars have also proposed a theoretical justification for freedom of expression that is exclusively based on the promotion of tolerance.[241] On the other hand, most scholars such as David A.J. Richards have argued that a sound theoretical justification for freedom of expression cannot be exclusively grounded on the argument for toleration, but can be complementary to

---

[239] Greenawalt, Free Speech Justifications (n 189) 141, 146.

[240] *Ibid*, 146, 147.

[241] L Bollinger, *TheTolerant Society* (Oxford University Press, 1986).

the general justification of freedom of expression.[242] Similarly, Greenawalt contends that the fact that tolerance forms the justification of freedom of expression does not imply that it is the primary justification; nor that it should play a critical role in the decision to limit expressions.[243] Yet, it serves as an additional philosophical justification for the protection of freedom of expression.

Tolerance has often been described as the 'chief virtue' of a democratic society.[244] As the basis and the foundation of a democratic society, the promotion of tolerance should be considered as supportive of the idea that expressions that are offensive to others can be allowed because of the commitment and the belief that tolerating to views which we do not agree is an integral part of the virtue of an open and democratic society. If the idea of free expression is grounded in the commitment that not only comfortable or politically correct opinions but also ideas that 'offend, shock and disturb' should be tolerated, then openness and tolerance should be an overarching supportive value to the theoretical justification of freedom of expression.[245]

C. Deterrence of Abuse of Authority

Freedom of expression also plays an important role in fostering government accountability by serving as a check on abuse of authority. According to Greenawalt, while this justification is closely linked with the truth discovery and interest accommodation, it is separately treated because of its 'historic and central importance' to freedom of expression.[246] Originally

---

[242] See D Richards, Free Speech as Toleration in W Waluchow (ed), *Free expression: Essays in Law and Philosophy* (Clarendon Press 1994) 31-57; The basis of his argument emphasizes on tolerance as the core the justification of freedom of expression and is critical of other non consequential and consequential justifications such as justifications based on democracy; See also Richards, *free speech and the politics of identity* (n 107), and Richards, *Toleration and the Constitution* (n 188).

[243] Greenawalt, Free Speech Justifications (n 189) 147.

[244] Fukuyama, *The End of History and the Last Man* (Penguin, 1992) 305.

[245] *Handyside v the United Kingdom*, *Application no. 5493/72* (ECtHR 7 December 1976) Para 49.

[246] Greenawalt, Free Speech Justifications (n 189) 142.

developed by Vincent Blasi, this justification argues that the scrutiny of government by journalists, the media and the larger public can be a powerful tool for exposing the flaws of government which can compel it to take corrective action and thereby deter future abuses.[247]

This 'checking value' of freedom of expression contends that critical press and public scrutiny on matters of public concern not only helps to unveil truth but also even when claims are inaccurate, it influences the understanding about the nature of exercise of government power by emphasizing on exercise of authority as a responsibility than opportunity for personal gain.[248] Greenawalt also argues that this justification does not only work in liberal democracies but, more importantly in the context of transitional and emerging democracies such as Ethiopia. The opportunity for freedom of expression and the ability to present critical views can be used as powerful tools to fight corrupt practices which remain a huge challenge in many of these countries.[249]

Generally, all the above justifications provide some of the most common justifications of freedom of expression. Each justification has its own merits and as such should be recognized and articulated as part of the broader theoretical justifications for freedom of expression. However, there is an overwhelming consensus on the critical importance of a democracy-based theory of freedom of expression as being the most important justification of freedom of expression.[250] This is particularly true in the context of transitional democracies such as

---

[247] Vincent Blasi, The Checking Value in First Amendment Theory (1977) *2 American Bar Foundation Journal* 521.

[248] Greenawalt, Free Speech Justifications (n 189) 142-143.

[249] *Ibid*.

[250] See in this regard, Meiklejohn, Self-Government (n 14); For more recent literature on arguments from democracy, See R Post, Participatory Democracy and Free Speech (2011) 97 *Virginia Law Review* 477; J Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine (2011) *97 Virginia Law Review 491*; Cf C Baker, Is Democracy a Sound Basis for a Free Speech Principle (2011) *97 Virginia Law Review* 515, where he argues that the autonomy rationale is more inclusive than the democracy-based justification of freedom of expression.

Ethiopia where freedom of expression can provide an important democratic platform for resolving socio-political problems that the country continues to grapple with. Because of these factors, a more detailed discussion on the democracy-based justification of free speech which distinctively places the centrality of political speech to democratic process as the principal justifications of freedom of expression is in order. [251]

1.4. A Democracy-Based Justification of Freedom of Expression

Democracy, which can be defined as rule by people, has two integral concepts which have important implications for our understanding of the justifications to freedom of expression from democracy.[252] These include popular sovereignty and the right of citizens to participate in the political process.[253] James Weinstein argues that these two essential elements of democracy cannot function if there is no right to freedom of expression.[254] He argues that the opportunity for free and equal participation in the political process which forms an integral part of freedom of expression is vital to the legitimacy of the entire legal system.[255] The political dimension of the right to freedom of expression is readily apparent because of its central importance to the participation of individuals in the political life.[256] In taking this position the thesis argues that this approach is both conceptually sound and normatively coherent.

---

[251] Redish, The Value of Free Speech (1982) *130 University of Pennsylvania Law Review* 591.

[252] The term democracy was used for the first time by the Greek Historian Herodotus in the 5th BC and combines the Greek words *demos* (the people) and *Kratein* (to rule), See B Holden, *Understanding Liberal Democracy* (Harvester Wheatsheaf, 1993) 7.

[253] Weinstein, Participatory Democracy (n 250) 25.

[254] *Ibid*.

[255] *Ibid.*

[256] V Zeno-Zencovich, *Freedom of Expression: A Critical and Comparative Analysis* (Routledge, 2008) 1.

1.4.1. Conceptual Soundness

The democracy-based justification of freedom of expression has been considered 'the most influential in the development of free speech law'.[257] Described as the lifeblood of democracy, freedom of expression contributes to the well-functioning of democratic public discourse by affording people to participate in the political process through which important political outcomes are shaped.[258] The leading scholar and staunch advocate of freedom of expression as an integral part of democratic self-government is Alexander Meiklejohn. His groundbreaking work 'Free Speech and its Relation to Self-Government', emphasized on the central value of freedom of expression for open public discussion in the deliberative process of self-government.[259] Given his significant and original contribution to our understanding of the arguments for the justification of freedom of expression from democracy, a more detailed discussion will be useful to look into his underlying arguments and their validity. [260]

---

[257] E Barendt, *Freedom of Speech* (Oxford University Press, 1985) 23.

[258] See *Lord Steyn in R v Sec of State* (n 2).

[259] See Meiklejohn, Self-Government (n 14); see also A Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965) 75.

[260] See Carmi (n 176) 971; in this regard we can infer the definition provided by James Weinstein with regard to the meaning of freedom of expressions in the context of democratic public discourse: 'Public discourse consists of speech on matters of public concern, or, largely without respect to its subject matter, of expression in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the internet, or in public forums such as the speaker's corner of the park', See Weinstein, Participatory Democracy (n 250) 493; a similar definition provided by Robert Post, who notes that '[p]ublic discourse includes all communicative processes deemed necessary for the formation of public opinion', See Post, Participatory Democracy and Free Speech (n 250) 486.

A. Meiklejohn's Theory

Meiklejohn's starting point is his conception of constitutions as a reflection of the self-governed in that they are a reflection of our own self-control.[261] As such his underlying presumption is that the legitimacy of governments is established through a democratic process by the explicit consent of the governed. He extends this argument to say that the foundation of the principle of freedom of expression is *'*the necessities of the program of self-government. It is not a law of nature or of reason in the abstract. It is a deduction from the basic … agreement that public issues shall be decided by universal suffrage'. [262]

In underscoring the importance of public discussion, Meiklejohn emphasizes on the significance of making a distinction between private rights of expression and freedom of public discussion. He notes that since private expressions do not support for the public exposition of ideas that can contribute to the discussion of the general welfare of the State, they are not protected under the right to freedom of expression.[263] Accordingly, he argues that expressions which have little significance to public discourse and 'citizens' participation in government' such as 'persuasion to murder'[264] and 'falsely shouting fire in a theatre and causing a panic' and a host of other forms of private speech can be proscribed consistent with the philosophical and doctrinal foundations of free speech. [265] Echoing Meiklejohn vision, Weinstein points out that there are many areas of speech that are regulated and limited and include those regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract, negligence, fraud and libel.[266] He

---

[261] See Meiklejohn, Self-Government (n 14).

[262] *Ibid*, 26-27.

[263] *Ibid*, 94.

[264] *Ibid*, 41-42.

[265] *Ibid*.

[266] See Weinstein, Participatory Democracy (n 250) 492.

argues that these types of regulations and limitations on speech do not raise any free speech concerns.[267]

On the other hand, Meiklejohn contends that expressions made for the general welfare of society should be considered as having a higher threshold for their protection. What underscores the significance of freedom of expression is, thus, its strong nexus with democracy and the significance of public discussion. Meiklejohn argues that there is unlimited guarantee of freedom of public discussion which is made in the context of the general welfare of society and as such it is beyond the reach of any legislative limitation. He wittily described the importance of political speech in his most quoted aphorisms, 'what is essential is not that everyone shall speak, but that everything worth saying shall be said'.[268] Meiklejohn's emphasis is thus in the public function of free speech to public discourse. He argues that freedom of speech 'does not protect the "freedom to speak".'[269] It protects the freedom of those activities of thought and communication by which we 'govern'. It is concerned, not with a private right, but with a public power, a governmental responsibility.'[270]

The lack of the distinction between private expressions and expressions made for public interest, Meiklejohn argues, has led the US Supreme Court to adopt an erroneous interpretation of the First Amendment as laid down by the clear and present danger doctrine.[271] He also draws his argument from another most respected scholar, Zechariah

---

[267] *Ibid*.

[268] See Meiklejohn, Self-Government (n14) 25; Cf Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse (1993) *64 University of Colorado Law Review* 1109; Although Post is critical of Meiklehon's approach, he states that he continues to inspire contemporary scholarship on freedom of expression, see at 1111.

[269] A Meiklejohn, The First Amendment is an Absolute (1961) *1 Supreme Court Review*255.

[270] *Ibid*, 255.

[271] See Meiklejohn, Self-Government (n 14) 28-57; See also *Abrams v United States,* (n 230) (dissenting opinion).

Chafee who makes a similar distinction between private and public discussion.[272] Thus, Meiklejohn contends that public discussion has unparalleled constitutional status and stands alone as the cornerstone of the structure of self-government.[273] Because of this, freedom of expression in the context of public discussion cannot be derogated not only when there is a clear and present danger but also when there is an emergency.[274] He warns that the breakdown of self-government would materialize when the opportunities for free expression are shuttered.[275]

He thus adopts an absolutist position on the importance of freedom of expression in public discourse.[276] According to Meiklejohn, what underscores the dangerousness of the suppression of political speech is the fact that it can lead to subversive activities that can undermine the proper functioning of a democratic discourse. By limiting freedom of expression to avoid lesser evils, Meiklejohn warns that greater evils will be created.[277] Other scholars similarly argue that good political decisions and the betterment of government can be better advanced through the participation of informed citizens.[278] The sense of inclusion of all citizens on an equal basis through a participatory democracy process can pacify the frustration of citizens and avoid undesirable political consequences.

Although Meiklejohn adopts an absolutist approach to the protection of political expression in public discussion, a more reasonable approach should be to adopt the view that given its central importance, political expressions should be afforded more protection than other forms

---

[272] See Z Chafee, *Free Speech in the United States* (Harvard University Press, 1946) 33.

[273] See Meiklejohn, Self-Government (n 14) 63.

[274] *Ibid*, 64;

[275] *Ibid*, 68

[276] *Ibid*, 94; see also A Meiklejohn, The First Amendment is an Absolute (n 269).

[277] Meiklejohn, Self-Government (n 14) 68.

[278] Greenawalt, Free Speech Justifications (n 189) 146.

of expressions.[279] It is evident that if there is a compelling governmental interest, a narrow set of limitations can be placed to meet the national security and public order demands of the State. In his seminal work, 'Democracy and the Problem of Free Speech', Cass Sunstein similarly proposes a 'new deal' for the constitutional protection of freedom of expression. His central argument lies in the fact that rather than adopting a rigid approach that bans government regulation on speech, the focus should be whether the particular regulation was intended at expanding and consolidating public discourse and the deliberative process of democratic self-government.[280]

More recent literature has criticized Meiklejohn's narrower theoretical approach to free speech.[281] Nevertheless, he continues to inspire contemporary scholarship on freedom of expression.[282] The major criticism forwarded against Meiklejohn is that he understands political expression narrowly, merely as something that is made in the context of collective self-governance rather than the individual's right to self-governance.[283] Robert Post argues that Meiklejohn's emphasis is on 'Democracy's effort to ensure 'the voting of wise decisions'.[284] According to Post, this collectivist theory supports the power of government to regulate speakers whose expressions detracts the purpose of arriving at an informative and rich public dialogue, especially in order to achieve particular views of national identity, equality and

---

[279] *Ibid*; see also C Edwin Baker, Autonomy and hate Speech, in I Hare and J Weinstein (eds) *Extreme Speech and Democracy*, (Oxford University Press, 2009) 139.

[280] CR Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993) 17 ff.

[281] See Post, Meiklejohn's Mistake (n 268).

[282] *Ibid*, in which Post notes that despite Meiklejohn's narrower approach '(b)ecause of its candid and unflinching exploration of the theory's assumptions and implications, Meiklejohn's work offers an especially clear revelation of the theory's essential constitutional structure', see at 1111; Meiklejohn's theory of free speech has been endorsed by prominent legal scholars including professor Harry Kalven, Owen Fiss, and Cass Sunstein and Robert Burk, See Krotoszynski (n 107) 16-17.

[283] *Ibid*, 1109.

[284] *Ibid*, 1111-1112.

fairness.[285] Briefly stated, his major criticism lies in the fact that Meiklejohn's collectivist view 'subordinates individual right of expression to a collective process of public deliberation'.[286] Post focuses more on the deliberative aspect of the importance of free speech in providing the platform for public discourse rather than as a means of promoting the collective will.[287]

Although the above differences are apparent, the view taken here is more inclusive in the sense that political speech made in the context of public discourse or the political process of government forms the core value of the right to freedom of expression. The thesis does not propose an exclusive democracy-based theory of speech. Rather, it emphasizes that while freedom of expression can be buttressed by multiple justifications, a democracy-based theory of speech forms its normative core and any law or act of government that is aimed at restricting political speech should have more heightened scrutiny than any other form of expression. In underscoring the central importance of political expression, Greenawalt also argues that while it is not radically different from other consequentialist justifications, freedom of expression takes 'extra weight when political matters are involved'.[288] Similarly, Fredrick Schauer argues that although the democracy-based justification of free speech may sound narrow, it does provide a principled application of free speech norms and underscores the distinctive importance of protecting political speech.[289]

---

[285] *Ibid*, 1120.

[286] *Ibid* ; In arguing that private rights of speech also form the core of the First Amendment, Post draws from the case of *Buckley v Valeo*, 424 U.S. 1, 48-49 (1976) which held that 'the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly to the First Amendment', and *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974), holding that there is editorial autonomy of the press and that political candidates do not have a right of rely when criticized by the press, see at 1109.

[287] *Ibid*, 1109.

[288] Greenawalt, Free Speech Justifications (n 189) 146.

[289] Schauer, Free Speech: a Philosophical Inquiry (n 183) 42.

B. Contemporary Scholarship

In contemporary free speech debate, there is a remarkable unanimity of legal scholarship which underscores that the core value served by freedom of expression as being the promotion of democratic public discourse.[290] In the words of Robert Post, described as one of the most influential free speech scholars in recent memory,[291] 'there is little dispute that one of the most important themes of the right to freedom of expression is its function as the guardian of democracy'.[292] This is buttressed by Cass Sunstein's assertion that the 'touchstone of constitutional analysis should be what 'best promotes the right to democratic deliberation'.[293] Similarly, James Weinstein argues that the argument from democracy is central and 'no other theory provides nearly as good an explanation of the actual pattern of the [Supreme Court of the United States'] free speech decisions'.[294]

Similarly, Rodney A. Smolla contends that despite the fact that the Supreme Court of the United States has at times justified the protection of freedom of expression based on other rationales such as the search for truth and marketplace of ideas, and autonomy, the Court has explicitly stated that 'whatever differences may exist about the interpretations of the First Amendment, there is practically universal agreement that the major purpose of that Amendment was the free discussion of government affairs'.[295]

---

[290] See Post, Participatory Democracy (n 250); Weinstein, Participatory Democracy (n 250); and Sunstein, Democracy and the Problem of Free Speech (n 280).

[291] S Heyman, Hate speech and Public Discourse (n 169) 170.

[292] Post, Meiklejohn's Mistake (n 268) 114-1555, citing *Brown v Hartlage*, 456 U.S. 45, 60 (1982); *Schneider v New Jersey*, 308 U.S. 147, 161 (1939); *Stromberg v California*, 283 U.S. 359 (1931).

[293] CR Sunstein, Preferences and Politics (1991) *20 Philosophy and Public Affairs* 3, 28.

[294] Weinstein, Participatory Democracy (n 250) 491.

[295] *Mills v Alabama,* 384 U.S. 214, 218 (1966).

In this regard, Smolla points out five principal reasons why political speech forms the core of the value served by the right to freedom of expression. First, he argues that free expression forms an important aspect of the participation of individuals in public debate in the body politic. Smolla views this as forming part of the self-fulfillment of the individual 'to join the political fray' and be an active player in the democratic process.[296] Secondly, he notes that political speech furthers the pursuit of political truth. Thirdly, he argues that political speech ensures the furtherance of majority rule. Although democratic self-governance has many other important aspects including the protection of minority interests, he notes that what necessarily flows from the notion of democracy is 'ensuring that collective policy-making represents to the greatest degree possible the collective will'.[297] Fourthly, Smolla contends that political speech helps to prevent government abuse. Smolla argues that the ability of individuals to engage in the political process in the context of participatory democracy puts restraint on tyranny, corruption and ineptitude of government.[298] Finally, Smolla concurs with Meiklejohn's argument that political speech helps to maintain the stability of the body politic.

Smolla's argument for a democracy-based theory of speech seems redundant. It reiterates the various justifications already covered by other theories such as the truth discovery justification and the checking value of free expression as it related to the democracy argument of free speech. Yet, one can argue that this integrative function of the argument from democracy should be seen as one aspect of its theoretical coherence. The fact that the democracy-based theory of speech integrates some of the most important justifications including truth discovery and the checking function of free speech should be considered another factor that enhances its validity as a coherent theory of speech.

More recently, Robert Post and James Weinstein have articulated the argument from democracy as the principal basis of the justification of freedom of expression.[299] Professor Post

---

[296] Smolla, Free Speech in an Open Society (n 124) 12.

[297] *Ibid*.

[298] *Ibid*, 12-13.

[299] Post, Participatory Democracy (n 250); Weinstein, Participatory Democracy (n 250).

observes that many areas of speech in private relationships such as patient-physician, lawyer-client, teacher-student and employer-employee relationships are regulated and these kinds of limitations have been found to be legitimate. On the other hand, any limitation on political speech aimed at furthering public discourse or the deliberative process of government has been given more heightened scrutiny and as such, there is a presumption of unconstitutionality of any law or conduct of government that aims at restricting political expression.[300]

Professor Post argues that this understanding which distinctively emphasizes the importance of political speech is related to the political equality of citizens in a democracy.[301] The political equality of individuals which underwrites the right to freedom of expression inhibits the distinction between good and bad ideas.[302] Accordingly, in the words of Professor Post, 'the most normatively desirable account of [the right to freedom of expression] is to conceive its fundamental purpose as protecting the processes of opinion formation that are necessary for democratic self-governance'.[303] Professor Post astutely observes that while there are cases where the US Supreme Court has highlighted other values served by the right to freedom of expression, in the overwhelming majority of cases, the Supreme Court has consistently relied on a democracy-based theory of speech to justify the protection of the right to freedom of expression.[304]

Similarly, Weinstein argues that a descriptively powerful and normatively accurate representation of the freedom of speech in the US Supreme Court is one that distinctively places the importance of public discourse and a platform that affords individual participation in the political process.[305] Because of this, the central element and normative core of free

---

[300] Post, Participatory Democracy (n 250) 481-485.

[301] *Ibid*, 484.

[302] *Ibid*.

[303] *Ibid*, 487.

[304] *Ibid*, 482.

[305] Weinstein, Participatory Democracy (n 250) 491.

expression lies in protecting political speech which is indispensable to the vitality of the democratic process. This entails that free speech 'cannot be conceived as covering the entire expanse of human expression', but rather to speech that has functional relevance to public discourse.[306] Weinstein argues that this democracy-based theory of free speech provides a 'solid justification' for a free speech theory that distinctively recognizes individual participation in the political process 'while simultaneously allowing appropriate suppression of harmful speech not connected with the political process'.[307]

Looking at the arguments forwarded by Meiklejohn and other contemporary free speech scholars, one draws clear consensus that ensuring democratic public discourse and robust political debate forms the core justification for the protection of freedom of expression. Although it can be contended that freedom of expression has multiple justifications, its central importance lies in serving as lifeblood of democracy in a political society.[308] There is a remarkable unanimity of legal opinion that distinctively emphasizes on the democracy-based justification of free speech and the unparalleled significance of political speech to robust public debate.[309] This is not only significant on a theoretical level but also at a normative level. If one looks at the framework of international human rights law and the jurisprudence on freedom of expression drawn from international and comparative law, there is a clear pattern that this theory is supported by firm legal doctrine. In the subsequent section, the thesis will highlight why the democracy-based theory of speech is not only conceptually sounds but also normatively coherent.

---

[306] *Ibid*, 493.

[307] *Ibid*, 513.

[308] See *Lord Steyn in R v Sec of State, exparte, Simms* (n 2).

[309] See Krotoszynski (n 107); Post, Participatory Democracy (n 250); Weinstein, Participatory Democracy (n 250); Sunstein, Democracy and the Problem of Free Speech (n 280).

1.4.2. Normative Coherence

A democracy based-theory of free speech which emphasizes on the distinctive places political speech and its significance to the vitality of robust public debate provides order, coherence and principled application to the conundrums involved in adjudicating free speech cases. As Weinstein notes '[i]f one is interested… in bringing coherence to what otherwise appears on the surface to be largely a jumbled, random assortment of cases, the importance of a theory with good doctrinal fit is manifest'.[310] This theoretical inquiry to draw principled approaches to the regulation of speech is not only faithful to the original statement and purpose of comparative constitutional law inquiry but also provides order and normative coherence in resolving free speech issues that arise in concrete cases. As Schauer rightly notes to fail to acknowledge this 'is not only philosophically troubling but also deficient as legal analysis.'[311]

In the United States, the Supreme Court's jurisprudence has established a legal doctrine that distinctively locates core political speech as central to claims based on the First Amendment freedom of speech.[312] Accordingly, there is a presumption of unconstitutionality for any law or conduct that is aimed at restricting political speech.[313] In this regard, Weinstein dismisses the content neutrality argument in the American free speech doctrine.[314] He concedes that there are certain kinds of speech that do not form part of the democratic core of freedom of expression but which may require some level of regulation and include fighting words (i.e. face to face insults); [315] obscenity;[316] child pornography;[317] true threats;[318] incitement to law violation that is likely to cause such conduct;[319] and defamation.[320]

---

[310] Weinstein, Participatory Democracy (n 250) 634.

[311] Schauer, Free Speech a Philosophical Inquiry (n 183) IX.

[312] *New York Times v Sullivan,* 376 U.S. 254, 84 S.Ct. 710.

[313] Sunstein, Democracy and the Problem of Free Speech (n 280) 122

[314] Weinstein, Participatory Democracy (n 250) 492.

[315] *Chaplinsky v New Hampshire*, 315 U.S. 568, 573 (1942).

[316] *Miller v California*, 413 US 15, 36 (1973).

The more accurate representation of American free speech doctrine is, thus, a democracy-based theory that emphasizes on the distinctive significance of political speech to public discourse and a presumption of unconstitutionality for any limits on this form of speech.[321] In other contexts dedicated to other purposes than public discourse, the government has far greater leeway to regulate the content of speech. And as such one notes that regulations aimed at limiting these forms of expressions can be justified and do not raise constitutional concerns.[322] This distinction is starkly apparent if one looks at the way defamation lawsuits have been dispensed by the US Supreme Court.[323] If a defamatory statement is concerned with a public official, then it is fully protected under the right to freedom of expression. To the contrary, if the speech is made in the context of private concern, then ordinary limitations that apply to defamation law are consistent with the underlying principle of the right to freedom of expression.[324]

If one looks at a series of decisions of the US Supreme Court including in *Connick*,[325] *Bartnicki*,[326] *Hustler*,[327] *Sullivan*[328] *and Snyder*[329], the major basis of the Supreme Court's decision has been whether the concerned speech promotes public discourse. Of particular significance is the case

---

317 *New York v Ferber*, 458 US 747, 774 (1982).

318 *Watts v United States,* 394 US 705, 707 (1969).

319 See *Brandenburg v Ohio,* 395 U.S. 444, at 444, 447.

320 Weinstein, Participatory Democracy (n 250) 42; See also J Weinstein, An Overview of American Free Speech Doctrine, in Hare and Weinstein (n 279) 23.

321 Weinstein, Participatory Democracy (n 250) 512.

322 *Ibid*.

323 See in this regard *New York Times v Sullivan* (n 312).

324 *Ibid*.

325 *Connick v Myers,* 461 US 138 (1983).

326 *Hustler Magazine Inc. v Falwell* 485 US 46 (1988).

327 *Bartnicki v Vopper* 532 U.S. 514 (2001).

328 *New York Times v Sullivan* (n 312).

329 *Snyder v Phelps* 131 S. Ct. 1207 26 (2011) (2 March 2011).

of *New York Times v Sullivan*. In the *New York Times v Sullivan*, the US Supreme Court underscored the distinctive place of political speech in American free speech doctrine consistent with the Meiklejohnian vision of the First Amendment.[330] In underscoring the unparalleled significance of political speech, the Supreme Court noted that 'fearless, vigorous, and effective administration of policies of government' can only be ensured if there is uninhibited right of citizens to criticize public officials.[331] As Anthony Lewis observes, *New York Times v Sullivan,* fundamentally established that 'the central meaning of the First Amendment was the right to criticize government and those who hold office in it'.[332] In adopting the Meiklejohnian theory of speech, *New York Times v Sullivan* held that defamation cases by public officials would have to show that there was actual malice by the speaker- interpreted as a reckless disregard for the truth.[333] This meant that a speaker engaged in public discourse will not be held for defamation unless he knows or was reckless as to the falsity of the information.

In articulating the central importance of political speech to democratic public discourse, Smolla draws from the Skokie case as a good illustration. He asks the question why offensive speech in the context of obscenity/pornography is prohibited but other offensive speeches related with democratic self-governance is tolerated in the American legal tradition.[334] In *Skokie*, the Supreme Court upheld that Neo-Nazis with have a right to march and protest Swastika symbols in Illinois, a region that has many Holocaust survivors in the US.[335] In arguing why offensive speech such as in this kind of political expression is allowed but restricted in the context of

---

[330] See *New York Times v Sullivan* (n 312).

[331] *Ibid, 304, citing Barr v Matteo*, 360 U.S. 564 S.Ct. 133 at 571, 79.

[332] A Lewis, Keynote Address in D Kretzmer and FK Hazan (eds) *Freedom of Speech and Incitement Against Democracy* (Martinus Nijhoff Publishers, 2000) 8.

[333] *New York Times v Sullivan* (n 312) at 262, 280, 284.

[334] Smolla, Free Speech in an Open Society (n 124) 151-160.

[335] *Collin v Smith,* 578 F.2d 1197 (7th Cir. 1978); *Village of Skokie v National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978).

pornography, he argues that the values attached to political expression are higher to be susceptible to any kind of limitation by the State.[336]

The democracy-based theory of speech is not only distinctly American doctrine but it has also a transnational ideological character.[337] If one looks at the line of cases both in international and regional human rights systems, as well as the jurisprudence of national courts including Australia, Canada, India Japan, South Africa, United Kingdom, Zimbabwe and many other States, the structure of legal reasoning supports a democracy-based theory of speech which has a clear transnational resonance. Accordingly, the position that political speech has unparalleled protection is not only limited to the American legal tradition but also supported by comparative constitutional law developments drawn from both the jurisprudence of international and national jurisdictions.[338]

In the context of Australian constitutional experience, it is interesting to note that the right to freedom of expression has been inferred from the notion of democracy itself. This was illustrated in *Australian Capital Television Pty. Ltd. v Commonwealth*, a landmark decision of the High Court of Australia in the context of free speech.[339] Although Australia does not have any formal constitutional or legislative recognition of the right to freedom of expression, the Court stated that there is no way to be a democracy without the recognition of freedom of expression; and as such the right to freedom of expression is an integral part of its legal system.[340]

Similarly, the Supreme Court of Canada has also repeatedly envisioned a Meiklejohnian vision of free speech which embraces the democracy-based theory of free speech. It is also interesting to note that although the Court, unlike the US Supreme, had adopted a balancing approach that

---

[336] Smolla, Free Speech in an Open Society (n 124) 151-160.

[337] Krotoszynski (n 107).

[338] See in this regard, Krotoszynski (n 107).

[339] *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106.

[340] *Ibid*.

takes cognizance of dignity concerns, it has repeatedly reiterated the intricate relationship between freedom of expression and democracy. Many cases involving freedom of expression including *R v Keegstra*,[341] *the Dolphin Delivery Case,*[342] *Zundel v R,*[343] clearly show that the Supreme Court's jurisprudence is firmly grounded in a Meiklejohnian vision of freedom of expression which underscored the significance of political speech and public discourse in a democracy. According to the Supreme Court of Canada '[r]estrictions which touch the critical core of social and political debate require a particular close attention because of the dangers inherent in state censorship of such debate'.[344]

In Japan, the Supreme Court of Japan has consistently endorsed the Meiklejohnian vision of a democracy-based theory of free speech and underscored the connection between freedom of expression and democratic self-governance in many of its decisions.[345] In the *Tokyo Ordinance Decision*, which concerned the violation of prior notification for holding peaceful protests, although the Court took the view that local authorities have the right to place limitations on freedom of expression, it nevertheless reiterated the importance of the Meiklejohnian vision of the argument from democracy in the following terms:

> …the freedom of speech, press and all other forms of expression provided for in Article 21 of the Constitution of Japan belongs to eternal and inviolable rights, the basic human rights and that the absolute guarantee of the above is one of the fundamental rules and

---

[341] *R v Keegstra* (1990) 3 S.C.R. 310.

[342] *Retail etal. Union v Dolphin Delivery Ltd.* (1986) 33 DLR (4th) 174, recognizing that before the adoption of the Canadian Charter of Rights and Freedoms 'freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy' and stated that representative democracy 'depends up on [the] maintenance and protection [of freedom of expression]', See at para 12 and 15.

[343] *R v Zundel* (1992), 2 S.C.R. 731.

[344] Justice McLachlin in Keegstra Dissenting, in *R v Keegstra* (n 341).

[345] Krotoszynski (n 107) 146.

> characteristics of democratic form[s] of government which distinguishes democracy from totalitarianism.[346]

In a line of cases related to peaceful assembly including the *New Narita Airport Decision,*[347] *Kanemoto Pamphlet Case*,[348] and defamation cases such as the *Judgment upon Case of Defamation Decision*,[349] the Japanese Supreme Court has stated that the survival of democracy depends upon freedom of expression.[350] In particular, the Supreme Court has consistently reiterated the distinctive place of political speech and uninhibited right to free expression of individuals in matters of public concern. In brief, the Japanese Supreme Court's approach explicitly embraces a Meiklejohnian vision of a democracy-based theory of speech that underscores political speech as the normative core of the right to freedom of expression.[351]

In the United Kingdom, the jurisprudence of the House of Lords shows that higher importance is attached to expressions involving political speech. In *R (ProLife Alliance) v BBC,* which

---

[346] *Judgment upon case of the Metropolitan Ordinance* (Violation of Metropolitan Ordinance No. 44 of 1950 concerning Public Meetings, Mass Parade and Mass Demonstration) (Decision 20 July 1960) para 2.

[347] *Judgment Upon Case of Constitutionality of the Provision of the New Narita Airport Law*, Series of Prominent Judgments of the Supreme Court of Japan Upon Constitutionality No. 26 (Supreme Court of Japan 1993) (decided 1 July 1992) at para 2-3.

[348] *Japan v kanemoto*, *396 Hanrei Jihoi* 19 (Supreme Court Decision 21 December 1964) Reprinted in Hiroshi Itoh and L Beer, *The Constitutional Law Case of Japan: Selected Supreme Court Decisions* (1961-1970) at 242.

[349] *Katsuyoshi Kawachi* (Judgment upon a case of defamation), Case Number (A) No. 2472 of 1966 (Supreme Court, 25 June 1969), published in Article 19, [<https://www.article19.org/resources.php/resource/2678/en/katsuyoshi-kawachi-(judgment-upon-a-case-of-defamation)>] (accessed 5 September 2016) In holding that a publisher cannot be liable for defamation where there is a reasonable ground to believe that his statements were true, the Court held that '[E]ven if there is no proof of the existence of the facts ... no crime of defamation was committed because of the absence of mens rea, when the publisher believed mistakenly in the existence of the facts and there was good reason for his mistaken belief on the basis of reliable information and grounds.

[350] *Ibid*.

[351] Krotoszynski (n 107)154.

concerned about a BBC's refusal to broadcast anti-abortion TV program which among others showed aborted foetuses, Lord Nicholls stated that 'freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts'.[352] Similarly, in *R V Secretary of State for the Home Department,* the House of Lords held that 'freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate'.[353]

This recognition of the particular nexus between free speech and democracy as well as the distinctive importance political speech is also consistent with jurisprudential developments from the global south. In the recent decision of the Constitutional Court of Zimbabwe, this was clearly spelled out when the court abolished criminal defamation as a form of criminal sanction for speech-related offences. In arguing the incompatibility of criminal defamation with the right to freedom of expression, the Court underscored the indisputable importance of freedom of political speech as lifeblood for democratic self-governance.[354] Similarly, jurisprudential developments in India, South Africa and many other jurisdictions from the global south also place a distinctive place in the democracy argument for the protection of freedom of expression.[355] Particular to note is the decision of the Supreme Court of India in its recent decision which invalidated Section 66-A of the Information Technology Act which makes it a crime to write online offensive speech. In articulating the particular place of political speech to democratic public discourse, the court noted that 'It cannot be overemphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount

---

[352] *R (ProLife Alliance) v BBC* [2003] UKHL 23 [2004] 1 AC 185 at 224.

[353] *R (ProLife Alliance) v BBC* para 6.

[354] *Nevanji Madanhire and Nqaba Matshazi v Attorney General* (Constitutional Court of Zimbabwe, 12 June 2014) Holding that '[c]rucially, freedom of expression is constitutionally enshrined and encouraged, as the lifeblood of democracy. The freedom to wield fists and firearms enjoys no similar status in our supreme law' at 10.

significance under our constitutional scheme'.[356] In articulating the particular significance of political speech, it held that 'freedom of speech and of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions'.[357]

In fact, it is also plausible to argue that a democracy-based theory of free speech is more compelling and compatible with the political context of emerging and transitional democracies. In this regard, some of the emerging case laws show that because of the nascent nature of the democracy, more protection not less should be afforded to freedom of expression. For example in *S v Mamabolo*, the Constitutional Court of South Africa observed that although there are differences in approach with the United States with regard to the protection of freedom of expression, there is more need to protect freedom of expression because of its apartheid repressive history and a desire to move from that to a new democratic political order. The Court noted:

> Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression-the free and open exchange of ideas –is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way.[358]

As Iain Currie and Johan de Wal in their leading volume on constitutional rights in South Africa, 'The Bill of Rights Handbook', astutely observe 'there can be no doubt that the force and attractiveness of' the democracy-based theory of free speech. Freedom of speech helps to build and consolidate the democratic trajectory of post-authoritarian, emerging and transitional democracies, by overturning a preexisting authoritarian polity and establishing a constitutional

---

[356] *Shreya Singhal v Union of India* (AIR 2015 SC 1523) (24 March 2015) para 8.

[357] Ibid, para 9, quoting concurring Opinion of Beg J in *Bennett Coleman & Co. & Ors. v Union of India & Ors*., (1973) 2 S.C.R. 757 para 829; See also *South African National Defence Force Union v Minister of Defence* 1994 (4) SA 469 (CC), holding that '[f]reedom of expression lies at the heart of a democracy…' para 7.

[358] Kriegler J in *S v Mamabolo* 2001 (3) SA 409 (CC) (11 April 2001) para 37.

democratic political order in its place.[359] Currie and de Wal also clearly note that the jurisprudence of South African Courts on free speech clearly places a distinctive place to political speech and lesser protection to other forms of expressions.[360]

As it would be argued in more detail in the later parts of the thesis, the normative appeal of the democracy-based theory of speech to emerging and transitional democracies such as Ethiopia is readily apparent. In fact, when one looks at the structure of the constitution as well the minutes of the Constitutional Assembly, the free speech-democracy nexus was given particular attention.[361] Although the jurisprudence of Ethiopian courts has not adequately expounded on this notional nexus, one finds some interesting rulings which emphasize on the distinctive significance of free speech to democracy. For example, in one of the early significant cases on freedom of expression of the new Constitutional order, the Federal High Court of Ethiopia ruled that:

> Freedom of expression is one of the core attributes of democratic governance…That a general will of society can be ensured and the progress and change in society comes when critical and different views are shared…[362]

It is also interesting to point out that similar to the decision of the Constitutional Court of South Africa in *S v Mamabolo*, the Court recognized that the particular emphasis placed on the protection of freedom of expression in the new constitutional arrangement in Ethiopia was required by the desire to move from its authoritarian past to a new democratic political

---

[359] I Currie and J de Wal, *The Bill of Rights Handbook* (2005) 361.

[360] *Ibid*, 362.

[361] Timothewos, An Apologetics for Constitutionalism (n 113) 14-15.

[362] ማእከላዊ አቃቢ ህግ መ/ት v አቶ ነቢዩ እያሱ መንክር እና አቶ አደም ከማል ፋሪስ, የፌደራል ከፍተኛ ፍ/ቤት የ/ወ/ መ/ ቁ/ 7/85 (ታህሳስ 7, 1986 ዓ ም) ገጽ 3 (*Central prosecution Office v Mr. Nebiyu Eyasu and Mr. Adem Kemal Faris*, Cr. File No. 7/85 (16 December 1993) at 3. The original judgment of this case is in Amharic and there are no official or unofficial translations of the case. The translation is the author's personal translation; every effort has been made to be faithful to the original text and meaning of the judgment in Amharic. This disclaimer also works for all the translations of other cases in this thesis.

order.[363] In this regard, it noted that 'the protection of uninhibited guarantee of freedom of expression is the only viable choice for democratic governance'.[364] Echoing the collectivist Meiklejohnian notion of freedom of expression to participatory democracy, it held that 'under a system of democratic governance, expressing one's views on national issues is not only an individual right of expression but also an essential aspect of participatory governance'.[365] Because of these rationales, it held that freedom of expression 'should not just be construed as a right to express readily acceptable ideas but also expressing critical views, resentments and differences'.[366]

As the above discussions demonstrate, it can be inferred that while the right to freedom of expression can be buttressed by multiple justifications, political speech and the promotion of public discourse stands out as the core and most significant value of the right to freedom of expression. As clearly demonstrated by the jurisprudence drawn from international and comparative law, the democracy-based justification of freedom of expression has unparalleled significance in free speech justifications. The implication of this conclusion is clear; while courts should take cognizant of other values in the constitutional dispensation of cases involving freedom of expression, they should give the utmost and heightened scrutiny when it comes to restrictions on political speech.

What flows from a democracy-based theory of free speech, is the distinctive place of political speech in the normative content of freedom of expression. As expression is an innate human behavior, it manifests itself in various ways. Making a political speech, watching pornography, advertising your product, drawing a picture and a host of other activities can legitimately fall under freedom of expression. The question that should be asked is whether all these categories of expressions should be equally protected with identical parameters of judicial scrutiny. A

---

[363] *Ibid*, 4; See also *S v Mamabolo* (n 358).

[364] *Ibid*.

[365] *Ibid*.

[366] *Ibid*.

sound and principled approach calls for a more differentiated and nuanced appreciation of the values served by these different forms of speech and their political function. Thus, although it is true that the subject of free expression encompasses wide variety of expressions, it is crucially relevant to political speech which forms its normative core.

1.5. Political Speech as High-Value Speech: It's Meaning and Scope

The democracy-based theory of free speech clearly implies that more than any other form of expression, political speech should have the most rigorous protection in the context of freedom of expression. There is a general consensus that the protection of core political speech is the most fundamental and central value of the right to freedom of expression.[367] What is usually more controversial, however, is how to define, identify and adequately protect political speech that furthers public discourse in democratic society.

Generally, political speech includes expressions intended to gain support for an issue or position in a protest movement, including economic protests, actions or works in support of a candidate in a formal political campaign, and speech embedded in or represented in artistic and cultural productions which has a political content.[368] Clearly, speech directed against government policy, laws and practices and any other form of commentary on the government or its institutions and the State in general, falls under political speech. But as Lisa Brooten observes, expressions which at face value may seem to cover social and economic issues can have political import, thereby making it difficult determine the content of political speech.[369]

---

[367] See discussion in Chapter one above; For recent works on critics of such a reductivist approach see T Jarymowicz, Robert Post's Theory of Freedom of Speech: A Critique of the Reductive Conception of Political Liberty (2014) *40 Philosophy & Social Criticism* 107.

[368] L Brooten, Political Speech and the Law (2015) *The International Encyclopaedia of Digital Communication and Society* 1.

[369] *Ibid*.

Thus a more detailed discussion would help to explain the scope and content of political speech.

Scholars have identified two principal grounds to define, identify and protect political speech from other categories of expressions. The first ground of distinction focuses on the objective assessment of the type of expression used based on the content of the expression and evaluate whether that particular expression will further public discussion in the political process.[370] The basis of this assessment is whether a reasonable person in the circumstances will consider the particular expression as furthering some kind of idea of political or social importance to the larger public.[371] The second ground focuses on the intent of the speaker in order to decide whether the concerned speech can be categorized under political speech. According to the intent-based approach, the principal focus should be not the actual expression but the reasons and the motives behind the use of that particular expression.[372]

Prominent scholars on free speech including Cass Sunstein and Larry Alexander argue that in order to identify political speech one must first look at the intent of the speaker.[373] Sunstein defines political speech as 'speech that is both intended and received as a contribution to public deliberation about some issue'.[374] Underscoring the importance of intent in defining political speech, Sunstein argues that for a political speech to deserve special protection, two important elements have to be considered. First the speaker's intent is central to understanding whether a certain form of expression is considered as political. Secondly, not only the speaker should intend to pass on a political message but also the listener or audience

---

[370] A Niedrich, Emphasizing Substance: Making the Case for a Shift in Political Speech Jurisprudence (2010) *44 University of Michigan Journal of Law Reform*1019.

[371] *Ibid*.

[372] *Ibid*.

[373] See CR Sunstein, Free Speech Now (1992) *59 University of Chicago Law Review*.; L Alexander, Free Speech and Speaker's Intent (1995) *12 Contituional Commentary* 1019.

[374] Sunstein, Democracy and the problem of Free Speech (n 280) 130.

should receive that particular expression as a political message.[375] On the other hand, Larry Alexander argues that while intent forms an important element in identifying political speech, the focus should not be on the speaker but on the intent, motives and reasons of the government in regulating speech.[376]

Niedrich argues that both Sunstein's and Alexander's intent based approaches make the definition of political speech problematic.[377] She argues that both approaches are subjective and depend on an individual assessment of intent which is fluid and difficult to establish. She notes that the most important element of the definition should be an objective assessment of whether the particular speech at hand can further a contribution to political discourse.[378] Niedrich argues that this view is supported by a series of decisions of the US Supreme Court.[379] Martin Redish takes a similar position by arguing that 'under well accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection'.[380] However, a sound approach to define, identify, and adequately protect political speech requires a middle ground which takes into consideration both an assessment of the intent of the speaker and the objective content of the message conveyed. The ideas underlying any communicative idea depend up on the content of the speech itself, the context in which the speech was made and the audience to which the particular speech is presented.[381]

---

[375] *Ibid*.

[376] See Alexander, Speaker's Intent (n 373).

[377] Niedrich (n 370) 1030.

[378] *Ibid*, 1035.

[379] *Ibid*, Citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), at 468-69 (quoting *NAACP v Button*, 371 U,S, 415, 433 (1963)), *Boy Scouts of America v Dale*, 530 U.S. 640, 685-86 (2000) (Stevens,J., dissenting)

[380] M Redish, *Money Talks: Speech, Economic Power and the Values of Democracy* (New York University Press, 2001) 91.

[381] See for example the Rabat Plan of Action on the Prohibition of Advocacy of National , Racial or Religious Hatred that Constitutes Incitement to Discrimination , Hostility or Violence, Conclusions and Recommendations Emanating from the Four Regional Expert Workshops (2012).

Ericke v Lynch, an earlier district court case in the US which concerned the right of gay couple to attend a gay prom is instructive in identifying political speech.[382] In this case a gay couple was prohibited from attending their public High School Prom. The couple challenged the legality of their prohibition by bringing a suit against the School alleging the abridgement of their right to free speech. They argued that although attending the event and enjoying the dance was part of their desire to attend the prom, their primary interest and motivation was communicating a political message about homosexuals and their interest to live openly.[383] In holding that the applicant's right to free speech is violated, the court's reasoning reflected the importance of the political message rather than the fact of attending the prom dance, as significant warranting protection.[384]

The case of *New York Times v Sullivan,* in which the US Supreme Court established the distinctive place of political speech in American free speech doctrine, is also illustrative of the importance of intent in identifying political speech.[385] In *New York Times v Sullivan*, the US Supreme Court established that speakers engaged in public discourse cannot be held liable for offensive speech made against public officials unless it is shown that 'actual malice' (defined as knowledge of reckless or indifference to the falsity of the statements at issue), is proved by the applicant.[386] If one closely looks at the arguments in which the Sullivan case is based, intent forms a significant part of the reasoning of the Court.

The more recent case of *Snyder v Phelps* is also another illustrative case on the importance of intent and whether a particular expression falls under protected political speech. [387] The case concerned a highly offensive speech made by members of a church against a deceased

---

[382] *Aaron Fricke v Richard B. Lynch*, 491 F. Supp. 381 U.S. Dist. LEXIS 11770.
(May 28, 1980).

[383] *Ibid*.

[384] *Ibid*.

[385] See *New York Times v Sullivan* (n 312).

[386] Ibid .

[387] *Snyder v Phelps* (n 329).

American soldier who died in a line of duty in Iraq. A group of individuals protested near the funeral of the soldier chanting that he was killed by God because the government of the US tolerated homosexuals.[388] The placards read:

> God hates the USA/Thank God for 9/11, America is Doomed, Don't Pray for the USA, Thank God for the IEDs, Fag Troops, Semper Fi fags, God Hates Fags, Maryland Taliban, Fags Doom Nations, Not Blessed Just Cursed, Thank God for Dead Soldiers, Pope in Hell, Priests Rape Boys, You're going to Hell, God Hates You.[389]

In dismissing the suit for intentional infliction of emotional distress by the relatives of the deceased, Chief Justice Roberts noted that 'speech on matters of public concern.., is at the heart of the First Amendment's protection'; and as such 'the First Amendment prohibits holding [the church] liable for its speech in this case turns largely on whether that speech is of public or private concern'.[390] Because of this, he noted '[n]ot all speech is of equal First Amendment importance' and as such 'where matters of purely private significance are at issue, First Amendment protections are often less rigorous'.[391] Accordingly, the expression in the case concerned plainly relates to broad issues of interest to society at large such as homosexuality in the military and the moral conduct of the United States rather than matters of purely private concern and is protected under the First Amendment.[392] In reaching at this conclusion, and in distinguishing between defamatory statement made in the context of private concern, which has a lesser protection and that of defamatory statements in public discourse, the Court's reasoning clearly was based on the intent of the speakers and scrutinizing whether the speech had a political content.

---

[388] *Ibid*, para 1213.

[389] *Ibid.*

[390] *Ibid*, at 1208, 1211, 1215, citing *Dun & Bradstreet, Inc. v Greenmoss Builders*, Inc., 472 U. S. 749, 758–759 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v Bellotti*, 435 U. S. 765, 776 (1978).

[391] *Ibid*, at 1215.

[392] *Ibid*, at 1209, 1211.

Conclusion

The various theoretical justifications for the protection of the right to freedom of expression discussed do not provide a complete principled application of these rationales to practical questions that may be raised in cases involving freedom of expression. However, the above justifications highlight why it is important to protect freedom of expression in any democratic society by providing a set of considerations that serve as contours in checking the power of government in relation to the limitations of freedom of expression.[393]

It can be argued that while the regulation of free speech is diverse in both in western liberal societies and non-liberal societies, the democracy-based justification of free speech has a transnational character.[394] If one closely looks at the structure of legal reasoning drawn from comparative law, it can be clearly observed that a democracy-based theory of speech has a universal ethos. This distinctive nexus between free speech and democracy is both conceptually sound and normatively coherent.

Beyond its theoretical significance, a democracy-based theory of speech also offers a clear normative guidance and the development of a coherent jurisprudence. Without this important doctrinal import, Courts would risk having unprincipled approach in dealing with freedom of expression issues which can potentially affect the possibility for a rigorous protection of core political speech which is essential to democratic public discourse.[395] It avoids a normative chaos that could potentially occur in the adjudication of cases involving freedom of expression by identifying its normative core. If this fundamental premise is abandoned, there will be a danger that it will lead to a slippery slope where the central grounds of judicial scrutiny cannot be maintained in cases involving freedom of expression.

---

[393] Greenawalt, Free Speech Justifications (n 189) 154.

[394] See Krotoszynski (n 107).

[395] Weinstein, Participatory Democracy (n 250) 43.

CHAPTER TWO

THE PROTECTION OF POLITICAL SPEECH IN INTERNATIONAL HUMAN RIGHTS LAW

It is widely believed that the global effective protection of the right to freedom of expression requires multi-faceted measures.[396] These may include a range of different strategies such as continuous monitoring and reporting, advocacy, education about the role of freedom of expression in society, putting in place self-regulatory frameworks for journalists, law reform, judicial oversight, and accountability for human rights violations.[397] Akin to these wide-ranging responses is also putting in place adequate international legal framework that can support the application and implementation of the right to freedom of expression at the domestic level.[398]

The UDHR is the first comprehensive international human rights instrument that explicitly guaranteed the right to freedom of expression as a fundamental human right.[399] Subsequently, many international human rights treaties including the ICCPR, CERD and the CRC explicitly provide for the right to freedom of expression as a fundamental human right.[400] In a similar vein, regional human rights conventions including the ACHPR, ECHR and ACHR also guarantee the right to freedom of expression as a fundamental human right.[401]

Beyond the hard law that serves as the principal normative basis for the right to freedom of expression, supplementary soft law instruments have also helped to elaborate on the contents and requirements for its effective protection. These include the General Comment on the Right

---

396 O'Flaherty, Freedom of Expression (n 6) 632.

397 *Ibid*, 632, 633.

398 *Ibid*,

399 UDHR Art 19.

400 See ICCPR Art 19; CERD Art 5; CRC Art 13.

401 See ACHPR Art 9; ECHR Art 10; ACHR Art 13.

to Freedom of Opinion and Expression,[402] the Johannesburg Principles on National Security on Freedom of Expression and Access to Information,[403] The Global Principles on National Security and the right to information,[404] the Inter-American Declaration of Principles on Freedom of Expression,[405] the African Commission Declaration of Principles on Freedom of Expression in Africa,[406] the Outcome Document of the World Summit on Information Society,[407] the Model Law on Access to Information in Africa,[408] and the recently adopted Council of Europe Human Rights Guidelines on Freedom of Expression Online and Offline.[409] Since 1993, the UN has also established the mandate of SRFE as a specialized body which has the mandate to receive information on violations, provide technical assistance to States and respond to violations of freedom of expression.[410] Similarly, the African Commission on Human and Peoples' Rights, the

---

[402] General Comment No. 34, Article 19: Freedom of Opinion and Expression, Human Rights Committee (2011) CCPR/C/GC/34 (hereinafter General Comment No. 34).

[403] Adopted by a Group of Experts in International Law, National Security, and Human rights Convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg (1996).

[404] Also called *The Tshwane Principles* (2013), These Principles were drafted by 22 organizations and academic Centers (listed in the Annex) in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, Facilitated by the Open Society Justice Initiative, and in consultation with the Four Special Rapporteurs on Freedom of Expression and/or Media Freedom and the Special Rapporteur on Counter-Terrorism and Human rights.

[405] Approved by the Inter-American Commission on Human Rights during its 108 regular session (19 October 2000).

[406] Adopted by the African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia (from 17th to 23rd October 2002).

[407] (2003).

[408] Adopted by the African Commission on Human and Peoples' Rights (2012).

[409] (2014)

[410] See UNCHR Res 45 (1993) UN Doc E/CN.4/RES/1993/45; [<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>] (accessed 23 may 2014)

Council of Europe and the Organization of American States have established their respective offices to follow up the implementation of the right to freedom of expression.

This body of International human rights law has been instrumental in shaping the application of human rights norms including freedom of expression and generating legal reforms at the domestic level. This has resulted in the constitutional guarantee of the right to freedom of expression in increasing number of States,[411] adoption of regional declarations[412] and enabling legislations such as freedom of information and journalistic protection laws,[413] and the decriminalization of defamation laws.[414]

One of the most significant aspects of the protection of the right to freedom of expression relates to the protection of political speech. As vital as political speech is to the lifeblood of a democratic society, there should also be adequate safeguards for encroachments that tend to limit this most fundamental aspect of the right to freedom of expression. In the context of political speech, while there is a greater consensus that core political speech should have a robust protection than any other form of expression,[415] there has not been a consistent and coherent approach in dealing with limitations with this fundamental aspect of the right to

---

[411] Empirical studies show that more than 97% of the constitutions in the world that were in force since 2006 have formally recognized freedom of expression as a basic human right; see in this regard DS Law and M Versteeg, Evolution and Ideology of Global Constitutionalism (2011) *99 California Law Review* 1200.

[412] See (n 405, 406).

[413] While legal developments on access to information differ among regions, the global trend on the proliferation of access to information laws has been remarkable with more than 90 states having access to information legislation, see in this regard Radsch (n 21)30.

[414] *Ibid.*

[415] Meiklejohn, Self-Government (n 14) 107; R Bork Neutral Principles and Some First Amendment Problems' (1971) *47 Indiana Law Journal* 1, 23; Sunstein, Preferences and Politics (n 293) 3, 28; Barendt, *Freedom of Speech* (n 257) 23.

freedom of expression.[416] However, important standards have been developed by international and regional human rights supervisory bodies in an effort to articulate the standards to be employed in limiting the freedom of political speech. These standards and the emerging jurisprudence can set important benchmarks and locating areas of consensus that provide a strong normative basis to guide domestic institutions such as legislatures, courts and national human rights institutions in dealing with restrictions on political speech. This Chapter provides a comprehensive review of the protection of political speech in international and regional human rights systems. The objective is to highlight the developing jurisprudence on political speech that will clearly implicate and inform the discussions on lessons to be drawn from international and comparative law in resolving contemporary challenges to freedom of expression in the context of Ethiopia.

2.1. Scope of Protected Expressions

Article 19 (2) of the ICCPR guarantees the right to express 'ideas of all kinds'.[417] It has been inferred that any type of communicative idea is protected under the right to freedom of expression.[418] Within this broader framework international human rights law covers three broad categories of expressions. These are political, artistic and commercial expressions.[419] However, this classification should not be taken rigidly as expressions of general nature and the publication of scientific or academic nature which may not fall under the preceding

---

[416] See J Davis and J Rosenberg, The Incoherent Structure of Free Speech Law (2011) *19 William and Mary Bill of Rights Journal* 131; For a similar conclusion on the incoherent approach of the ECtHR on freedom of expression see, Barendt, Balancing Freedom of Expression (n 215); With regard to the inconsistency on the Human Rights Committees approach see O'Flaherty, New Challenges (n 8) 12.

[417] ICCPR Art 19 (2).

[418] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2005) 443 -444.

[419] O'Flaherty, Freedom of Expression (n 6) 636-637; See also *Muller v Switzerland*, Application No. 10737/84 (ECtHR, 24 May 1988) para 27.

classifications are also protected.[420] The jurisprudence of the Human Rights Committee reaffirms the recognition for a wide range of expressions including political expression[421] and commentary on public affairs,[422] canvassing,[423] discussion of human rights,[424] journalism,[425] cultural and artistic expression,[426] teaching,[427] religious discourse,[428] and commercial speech.[429]

Article 19 (2) also guarantees the right to use different means of expressing ideas including speaking, sign language, writing and non-verbal expressions such as images and works of art.[430] International human rights law also recognizes the use of different medium of communication including books, newspapers, pamphlets, posters, banners, dress and legal submissions as well as expressions made through audiovisual, electronic and internet platforms.[431] Similarly, the ECtHR has also held that not only the substance of the communication but also the form of

---

[420] see *Hertel v Switzerland, Application No. 25181/94,* (ECtHR, 25 August 1998) para 47, where a newspaper article about the dangers of microwave ovens was considered as expression not only of a commercial nature but also of general interest to the public.

[421] See *Essono Mika Miha v Equatorial Guinea,* Communication No. 414/1990 (8 July 1994) para 6.8.

[422] *Coleman v Australia*, Communication No. 1157/2003 (17 July 2006) para 7.3.

[423] Concluding Observations on Japan, CCPR/C/JPN/CO/5 (30 October 2008) para 26.

[424] *Velichkin v Belarus*, Communication No. 1022/2001 (20 October 2005).

[425] *Mavlonov and Sa'di v Uzbekistan*, Communication No. 1334/2004 (19 March 2009).

[426] *Shin v Republic of Korea*, Communication No. 926/2000 (16 March 2004).

[427] *Ross v Canada*, Communication No. 736/97 (18 October 2000).

[428] *Ibid*.

[429] *Ballantyne, Davidson, McIntyre v Canada*, Communication Nos. 359/1989 and 385/1989) (5 May 1993) para11.3; See also *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, Application No. 10572/83(ECtHR, 20 November 1989).

[430] *Shin v Republic of Korea* ; *Otto-Preminger Institute v Austria*, Application No. 13470/87 (ECtHR, 20 September 1994).

[431] General Comment No. 34, para 12.

expression is protected under Article 10.[432] These forms of expressions, the Court argued, may include right to express one's ideas through a mode of dress[433] or through conduct.[434]

In some occasions, however, the Human Rights Committee has been reluctant to recognize certain forms of expressions. In the case of *S.G. v France* the Human Rights Committee declined to recognize defacement of a road as a form of protected expression under Article 19.[435] In the case of *Baban v Australia*, the question whether hunger strike can be considered as a protected expression was positively received by the Committee although the case was dismissed on admissibility grounds.[436] In the case of *L.T. v Finland*, the Committee declined to recognize refusal to perform military service as a protected expression initially;[437] but in *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea,* it accepted that such act constitutes the manifestation of one's religion or belief.[438] In the related case of *Hudoyberganova v Uzbekistan* which concerned about the prohibition of wearing a *Hijab* in a State-run educational facility, the Committee declined to consider violations of Article 19 but found violation of Article 21 of the right to freedom of religion.[439] Arguably, this approach of the Human Rights Committee seems to correspond with the position of the ECtHR which takes the view that any legal issues that are invoked based on the right to manifestation of religion are dealt within the legal parameters

---

[432] *Jersild v Denmark*, Application no.15890/89 (ECtHR Grand Chamber (GC) 23 September 1994) para 31.

[433] *Stevens v the United Kingdom*, Application No. 11674/85, (Commission Decision of 3 March 1986) para 245.

[434] *Kara v the United Kingdom*, Application No. 36528/97 (22 October 1998) and *Smith and Grady v The United Kingdom* Application Nos. 33985/96 and 33986/96 (23 February 1999); *Donaldson v The United Kingdom, Application No*. 56975/09, (25 January 2011.

[435] Communication No. 347/1988, U.N. Doc. CCPR/C/43/D/347/1988 (1 November 1991) para 5.2

[436] Communication No. 1014/2001 (6 August 20003) para 6.7.

[437] (Communication No. 185/1984, U.N. Doc. CCPR/C/OP/2/1990 (9 July 1985) para 5.2.

[438] Communications Nos. 1321/2004 and 1322/2004, CCPR/C/88/D/1321-1322/2004 (3 November 2006) para 8.3.

[439] Communication No. 931/2000,U.N. Doc. CCPR/C/82/D/931/2000 (2004) (5 November 2004).

provided by the right to freedom of religion provided in Article 9 of the ECHR. In the recent case of *SAS v France,* which concerned about the ban on the wearing of *niqab*, a full-face veil the Court declined to consider the alleged violation of Article 10, choosing to consider the case instead in the context of the right to freedom of religion provided under Article 8 of the ECHR.[440]

This interpretative tendency of the ECtHR and the Human Rights Committee that seeks to adopt a two-stage scrutiny of the type of protected expressions is redundant.[441] The focus should be on whether the concerned expression, however detestable, can be defined as a form of expression. Thus, it may be proper to distinguish 'expressions' or expressive conduct from 'actions' which has to do with the active involvement of individuals to further these ideas, for example making concrete preparations to overthrow a government.[442] Accordingly, any type of communicable idea and opinion, however extreme should be categorized under the scope of protected expressions in Article 19.[443] The fact that any expression is protected under Article 19 (2) does not, however, mean that it is not subject to the permissible limitations provided under Article 19 (3). The understanding is that if a certain type of expression is a legally protected expression under Article 19 (2), then the entire legal requirement for complying with international human rights law as it relates to freedom of expression applies to that category of expression. The recent case law of the ECtHR is in line with this contention and should be seen as a welcome development. For example, in the recent decision of the ECtHR in the case of

---

[440] *SAS V France*, Application No. 43835/11 (ECtHR GC, 1 July 2014).

[441] Nowak (n 418) 443-44; For similar conclusions on the general approach to categories of protected expressions, See Alexander Alexander, *Is There a Right of Freedom of Expression* (n 181) 8; and J Rubenfeld, The First Amendment's Purpose (2001) *1 Stanford Law Review* 757.

[442] *Ibid*, 445.

[443] In this regard the experience of the Canadian Supreme Court is useful. The court's two-stage analysis depends usually whether the expression can be recognized as such under section 2 of the Canadian Charter of Rights and Freedoms, if so the Court proceeds directly to whether limitation on the right freedom of expression is necessary in a free and democratic society; See in this regard *R v Keegstra* (n 341); See also Krotoszynski (n 107) 62-63.

Gough v United Kingdom which concerned with the right to walk naked in public, while the court justified the restrictions based on public order grounds laid down in Article 10 (2), the Court clearly indicated that going naked is a protected category of expression under Article 10 (1) of the ECHR.[444]

2.2. Freedom of Opinion as a Priori to Political Speech

If thought is the ancestor of every action,[445] the fount of expression is also thinking.[446] Freedom of opinion serves as an important foundation of freedom of expression. Any commitment to freedom of expression should begin with unyielding respect for freedom of opinion and thought. The basic understanding that individuals should not be punished for their thought alone is one of the most fundamental foundations for a democratic society.[447] Any creative and innovative human endeavor including the creation and refinement of ideas of political, artistic and scientific nature begins with thinking. Although more direct restrictions on freedom of thought are almost impossible to implement, indirect forms of repression of thought are the hallmark of authoritarian States.[448]

Despite this, however, the significance of the right to freedom of opinion is often overlooked. Given its far-reaching significance in the context of ensuring the uninhibited right of individuals to political speech, it is important to recognize its implications to freedom of expression. Freedom of opinion is a priori right that requires the individual's intellectual sphere of

---

[444] *Gough v United Kingdom*, Application No. 49327/11 (ECtHR, 28 October 2014) para 149.

[445] RW Emerson, *Spiritual Laws, Essays: First Series* (1841).

[446] Tragger and Dickerson (n 142) 14.

[447] K Greenawalt, *Speech, Crime, and the Uses of Language* (n 189) 31.

[448] I Bantekas and L Oette, *International Human Rights Law and Practice* (Cambridge University press, 2016) 391.

freedom.[449] Because of this, it creates conducive conditions for the realization of free expression.[450] Measures aimed at restricting the freedom of opinion of individuals have been declared 'inconsistent with the nature of a democratic society'.[451]

This should be seen against the backdrop of a large part of human history where the control and refinement of ideas was a common way of controlling the public by individuals in political power in different societies. Even though the type of totalitarian government portrayed in George Orwell's *Nineteen Eighty Four* which depicts the control of every facet of life can hardly be said to exist in today's world, the underlying desire of autocratic governments to control thought and ideas has been demonstrated at different times in many societies.[*452*] In China during the 1960s, individuals who were considered as counter-revolutionaries were imprisoned and forced to recant their 'dangerous thoughts' publicly.[453] In some other illiberal polities such as North Korea and Thailand, instances of shaping the political thought and opinion of individuals also continue to be manifested in direct ways.[454] These forms of indoctrination of individuals and any discrimination or distinction made on individuals based on the political opinion that they hold is contrary to the right to freedom of opinion.[455]

---

[449] A de Zayas and ÁR Martín, Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the UN Human Rights Committee (2012) *59 Netherlands International Law Review* 434.

[450] M Macovei, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (Council of Europe, 2004).

[451] V Dijk and V Hoof, *Report of the Committee of Ministers, in Theory and Practice of the European Convention on Human Rights* (Kluwer, 1990) 413.

[452] George Orwell, *1984 Nineteen Eighty-Four* (Penguin Classics, 1986).

[453] Tragger and Dickerson (n 142) 15.

[454] See T, Haberkorn, *Martial Law and the Criminalization of Thought in Thailand* (2014) The Asia Pacific Journal: Japan focus [<https://www.radcliffe.harvard.edu/news/in-news/martial-law-and-criminalization-thought-in-thailand>] (accessed 14 September 2015).

[455] Nowak (n 418) 444.

In terms of its normative content, Article 19 (1) of the ICCPR which provides for the right to freedom of opinion relates to private matter belonging to the realm of the mind.[456] On the other hand, freedom of expression is a public matter and relational in nature which requires appropriate legal restrictions.[457] The absolute nature of the right to freedom of opinion is recognized because of the inevitability of the individual's influence by the external world which is impossible to regulate.[458] Article 19 (1) includes the right to change one's opinion wherever and for whatever reason.[459] Accordingly, all kinds of opinion on political, scientific, historic, or religious nature are protected.[460] Thus, it would be incumbent on States to protect individuals from any kind of harassment, intimidation, or stigmatization, arrest, detention, or imprisonment because of the opinion they hold.[461] Any act aimed at criminalizing a particular opinion has also been declared inconsistent with the requirements of Article 19 (1).[462]

The Human Rights Committee dealt with the right to freedom of opinion in the case of *Mika Miha v Equatorial Guinea* which concerned a high ranking government official who has been arrested and detained from 1988 to 1990 because of his political views and opposition to President Obiang Nguema.[463] The Committee found that the author was subject to unlawful arrest and cruel treatment and found violations of both Article 19 (1) and (2). Nevertheless, the Committee has not demonstrated whether the reprisals taken were aimed at changing his

---

[456] *Ibid*, 442.

[457] *Ibid*.

[458] *Ibid*; see also Human Rights Committee General Comment No. 22, para. 3.

[459] General Comment No. 34, para 9.

[460] *Ibid*.

[461] See *Mpaka-Nsusu v Zaire,* communication No. 157/1983, (26 March 1986) *Mika Miha v Equatorial Guinea* (n 421) para 6.8, where the Human Rights found a violation of both paragraph 1 and 2 of Art 19 in relation to a series of human rights violations the victim faced as a result of his membership in political party.

[462] See *Faurisson v France*, Communication No. 550/93 (8 November 1996)

[463] See *Mika Miha v Equatorial Guinea* (n 421).

political opinion, and failed to articulate the explicit violation of Article 19 (1).[464] *Kang v Republic of Korea* concerned a petitioner who had been detained for 13 years because of his communist political opinion and was subject to the 'ideology conversion system' in accordance with the 1980 Penal Administration Law.[465] In this case the Committee rightly found violation of Article 19 (1). However, the Committee's reasoning that the State party has not shown that the limitations were justified by the scope of Article 19 (3) is inconsistent with the absolute nature of the right to freedom of opinion.[466]

2.3. Permissible Limitations on Political Speech

Article 19 (3) of the ICCPR, which provides for the limitation clause of the right to freedom of expression, reads as follows:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.[467]

As can be seen from Article 19 (3), three broadly defined kinds of limitations are provided. These include those limitations that are imposed in order to protect national security, public order and public health or morals. The fact that these substantive limits to the right to freedom of expression are permissible does not mean that States are under discretion to put limits at their whim. They are subject to the strict requirements of principles of international human rights law including, that restrictions should be expressly stated by law and sufficiently be precise; they must be necessary in a democratic society, (i.e. the prescribed limits must be able to address a certain pressing social need); and that the limitations must conform to the strict

---

[464] Nowak (n 418) 442.

[465] Communication No. 878/1999 (15 July 2003).

[466] Nowak (n 418) 442.

[467] ICCPR Art 19(3).

test of proportionality. Every consideration should be made to impose less restrictive means that does not undermine the essence of the right.[468]

It should also be pointed out that compared to other human rights instruments Article 19 provides for a limited range of restrictions.[469] This is particularly apparent if one compares it with the ECHR. Article 10 of the ECHR provides a broad range of restrictions which are not found in Article 19 of the ICCPR. These include restrictions based on grounds of territorial integrity, public safety, prevention of crime and disorder, preventing the disclosure of information received in confidence and limitations imposed for maintaining the authority and impartiality of the judiciary; none of which are explicitly provided under Article 19.[470] Although these forms of restrictions may also be justified limits under Article 19, the limited number of restrictions under Article 19 means that there is the presumption that any of these forms of restrictions have to be narrowly construed.[471] The language of Article 19 (3) shows that there is a presumption that limitations falling outside the listed grounds will be subject to a very strict scrutiny. Because of this, it is imperative to highlight some of the international guiding principles in relation to the specific limitation grounds on freedom of expression.

2.3.1. The Protection of the Rights or Reputation of Others

The first ground of restriction on the right to freedom of expression as laid down in Article 19 (3) relates to restrictions aimed at ensuring respect for the rights and freedom of other individuals and groups, particularly those who are defined by their religious faith or ethnic origin. The term 'rights of others' may also extend to those limitations imposed to respect other human rights recognized in the covenant and other international human rights treaties.[472]

---

[468] General Comment No, 34 Paras 21-27.

[469] See Nowak (n 418) 440-441.

[470] ECHR, Art 10 cf ICCPR Art 19.

[471] *Ibid*, 461.

[472] Nowak (n 418) 462.

These usually include legitimate restrictions to respect privacy, freedom of religion and the protection of minorities.[473] This ground of limitation which is also provided in Article 10 (2) of the ECHR and Article 13 (2) of the IACHR presents one of the classic conflicts of rights between freedom of expression and the dignity and personality of individuals.[474] Particular forms of restrictions which are common in this context are defamation, derision, slander and other forms of civil suits such as civil claims of individuals whose honour or reputation has been violated.[475]

This ground of limitation has been one of the most problematic grounds because of the very difficulty in the balancing exercise that courts grapple with.[476] Various forms of civil and criminal sanctions, in particular, hate speech and defamation suits can have a chilling effect on freedom of expression and there should be a careful consideration of the principle of proportionality.[477] In this regard, it is important to highlight certain key indicators that can support State compliance with regard to the right to freedom of expression. The Human Rights Committee has reiterated that criminal sanctions in the context of defamation should be avoided and in any event, imprisonment is incompatible with the right to freedom of expression.[478] In particular, when defamation suits involve political speech made in the context of public interest in a democratic society, the presumption is that this 'high-value speech' should have the highest considerations.[479] The ECtHR has held that when a public official is involved, critical opinions can involve exaggeration and at times false information. Because of

---

[473] *Ibid*.

[474] *Ibid*; See also *Van Hannover v Germany, Application Nos. 40660/08 and 60641/08* (ECtHR 7 February 2012).

[475] *Ibid*.

[476] *Ibdi*.

[477] *Ibid.*

[478] General Comment No. 34 para 47.

[479] *Ibid*.

this, proof of truth should not be scrutinized closely.[480] Moreover, the ECtHR has emphasized that value judgments should be differentiated from factual statements, implying that while there is no requirement of proof for the former in the latter case there might be a requirement that the concerned individual who made the defamatory statement should have made efforts to reach the truth.[481]

While restriction on freedom of expression in order to protect the rights of others can extend to religious groups, prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the requirements of Article 19 (3) and can only be justified if they constitute incitement to racial hatred in the context of Article 20 (2).[482] The criticism of religious leaders or commentary on religious doctrine and tenets of faith is a legitimate exercise of the right to freedom of expression and as such limitations should not be used to undermine a legitimate exercise of the right to freedom of religion.[483] In the context of Holocaust denial and other forms of memory laws, the Human Rights Committee although

---

[480] See *Stoll v Switzerland*, Application No. 69698/01 (ECtHR GC 10 December 20007), noting that 'Admittedly, freedom of the press covers possible recourse to a degree of exaggeration, or even provocation'; citing *Prager and Oberschlick v Austria*, Application No. 15974/90 (ECtHR, 26 April 1995) para 38.

[481] See *Lingens v Austria*, Application No. 9815/82 (ECtHR, 8 July 1986l); *Jerusalem v Austria*, Application no.26958/95 (27 February 2001) para 42, holding that 'The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10'; and also It held that making statement that an association had a 'totalitarian' and 'fascist' character was 'fair comment on matters of public interest' and constitutes a value judgment rather than one based on fact'.

[482] General Comment No. 34, para 50-51; the General Comment made a significant statement in this regard as there has been inconsistency in terms of the applicability of the two provisions in the context of the right to freedom of expression.

[483] *Ibid*, para 48.

initially upholding that such kinds of limitations as legitimate,[484] has later noted that these kinds of memory laws are incompatible with Article 19 (3).[485]

Restrictions based on the need to protect the rights of others can also extend to justified grounds of protecting the privacy and personal data of individuals. This also includes restrictions on the public, including the media for compelling reasons of protecting the rights of others. Moreover, it seems that if there are compelling reasons for restricting freedom of expression to ensure the basic democratic order of a certain polity, appropriate restrictions can be placed on such forms of expressions. For example, in the recent case of *SAS v France* in the ECtHR, which dealt with the right to wear a *niqab*, a full face veil, shows also that the protection of the rights of others can be extended to the protection of the basic democratic values and way of life of a State. In *SAS v France*, the ECtHR held that the right of the protection of the rights of others can also be extended to the protection of 'living together' as an essential element of France's fundamental democratic tenets and hence the law banning the full face veil was held to be a legitimate ground of limitation on the right to freedom of religion and private and family life.[486]

In brief, given the difficulty of the balancing of different competing rights with freedom of expression, States should give the utmost care and scrutiny when applying restrictions aimed at protecting the rights and reputations of others. It is also important to consider that legal development such as the decriminalization of defamation laws, right of reply in case of untrue media stamens should be explored as commensurate ways of responding to such concerns. Lastly, there should be the unfettered and uninhibited guarantee to ensure that political speech

---

484 See *Faurisson v France* (n 462).

485 General Comment No. 34, para 49.

486 *SAS v France* (n 440) para 157.

and expressions made in the context of general interest in a democratic society are given the highest regard.[487]

2.3.2. National Security

Article 19 (3) of the ICCPR, Article 10 (2) of the ECHR and Article 13 (2) (b) of the ACHR provide limitations on the right to freedom of expression based on national security grounds. National security has been one of the most commonly used grounds of restrictions on freedom of expression, in particular in authoritarian States that seek to suppress genuine political dissent. Although the historical evidence shows that more open democratic dialogue and a robust protection of the right to freedom of expression can significantly pacify tensions in society and ensure the national security of States, many governments consider critical opinions as a threat to their national security.[488]

It is difficult to provide a definition of what national security involves. But it is reasonable to infer that it can include serious and genuine measure to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.[489] Simply put, it implies the right of the State to take restrictive measures in order to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.[490] Accordingly,

---

[487] See *Zeljko Bodrozic v Serbia and Montenegro*, Communication No. 1180/2003 (23 January 2006) para 7.2.

[488] S Coliver, Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1998) *1 Human Rights Quarterly* 12.

[489] The Johannesburg Principles (n 43) Principle 2 (a).

[490] United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985).

restrictions can be imposed on the procurement or dissemination of military secrets; expressions which make a direct call for violent overthrow of the government or incitement for war, in particular when made in the context of a volatile political unrest.[491] Accordingly, restrictions on freedom of expression should only be allowed in serious threats of political and military nature that threaten the entire State.[492] What flows from this conclusion is that restrictions intended to prohibit the criticism of, or insult to the nation, the State or its symbols, the government, its agencies, or public officials, or a foreign nation, State or its symbols is incompatible with Article 19 (3) and cannot be used for restricting the right to freedom of expression on national security grounds.[493]

Moreover, vaguely defined accusations such as subversive or dangerous activities cannot be justified under national security laws or any of the other grounds listed in Article 19 (3).[494] The Human Rights Committee has consistently rejected broad and vaguely defined grounds of restrictions on freedom of expression such as subversive activities on many occasions despite many States trying to justify restrictions on national security grounds.[495] In this regard, States should be guided by such instruments as the Johannesburg Principles on National Security, Freedom of Expression and Access to Information,[496] the Global Principles on National Security and the Right to Information (Tshwane Principles)[497]and similar other international instruments.[498]

---

[491] Nowak (n 418) 464.

[492] *Ibid.*

[493] The Johannesburg principles (n 403) principle 7 (a) (ii); In many countries, however, these kinds of restrictions are common, See for eg Arts 244, 245, 261, 264, 265, Revised Criminal Code of the Federal Democratic Republic of Ethiopia 2005.

[494] Nowak (n 418) 466.

[495] *Ibid*.

[496] See The Johannesburg Principles on Freedom of Expression (n 403).

[497] See Global Principles on Freedom of Expression (n 404).

[498] See discussion on Introductory Chapter.

One of the more recent contemporary challenges on the exercise of the right to freedom of expression in the context of national security has been the use of counter-terrorism laws such as the prohibition of the glorification, incitement and advocacy of terrorism.[499] The lack of clarity in the definition of terrorism at the international level and its conceptual fluidity has prompted many States to use anti-terror laws as typical ways of suppressing legitimate political dissent and freedom of expression.[500] The thesis will deal with the issue of anti-terrorism laws and freedom of expression in a separate Chapter, it suffices to point out that any measure aimed at limiting freedom of expression based on anti-terrorism grounds should comply with international human rights standards.[501] In particular 'incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'.[502] Attempts should also be made to draw on best practices of legislative frameworks that provide for more clarity in the definition of terrorism and suppression of expression in that context such as the Council of Europe Convention on the Prevention of Terrorism (CECPT) as well as the standards set out by the UN Special Rapporteur on Human Rights and Fundamental Freedoms while Countering Terrorism (UNSRCT).[503]

---

[499] See Report of Special Rapporteur, *Ten Key Challnges* (n 20)*;* See also H Keller and M Sigron, State Security v Freedom of Expression: Legitimate Fight against Terrorism or Suppression of Political Opposition? (2010) *10 Human Rights Law Review* 151; A Hudson, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights (2007) *25 Berkeley Journal of International Law* 203; I Cram, *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeeda* (Springer, 2009).

[500] *Ibid*.

[501] General Comment No. 34, para 46.

[502] International mechanisms for promoting freedom of expression", Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (21 December 2005).

[503] Council of Europe Convention for the Prevention of Terrorism, Council of Europe (16 May 2005) European Treaty Series, No. 196 (CECPT); See also Guidelines on human rights and the fight against

2.3.3. Public Order (*Ordre Public*)

Public order (*ordre public*) as a limitation ground is also one of the most difficult concepts to articulate its meaning and scope. The notion of public order is a vague legal concept which has its roots in the civil law tradition that includes public policy and other grounds in the context of limitation of rights.[504] The travaux préparatoires of Article 19 show that a British proposal to replace the word 'public order' with 'prevention of disorder or crime' narrowly failed to pass.[505]

The term public order can include measures intended to prevent crime or disorder, as well as those 'universally accepted fundamental principles, consistent with respect for human rights on which a democratic society is based'.[506] It also includes those grounds of restrictions to prevent the dissemination of confidential information and endangering the impartiality of the judiciary. Given the danger that the public order grounds can open a Pandora's Box in which many other grounds of limitations can be invoked, it is important that any justifying ground should be construed narrowly.[507] For example, it has been held that freedom of expression of prisoners should be protected unless there is a law explicitly stating the grounds of restrictions and when absolutely necessary to prevent crime or disorder in prison.[508] In a similar vein, vague accusations of 'subversive' and 'dangerous' activities cannot be justified grounds to restrict freedom of expression under Article 19 (3).[509]

---

terrorism adopted by the Committee of Ministers on at the 804th meeting of the Ministers' Deputies (11 July 2002).

[504] Nowak (n 418) 464.

[505] See UN Doc E/CN.4/440; E/CN.4/SR.167, S 19.

[506] Nowak (n 418) 465.

[507] *Ibid*, 466.

[508] *Ibid*.

[509] *Ibid*.

2.3.4. Public Health or Morals

Limitations based on public health grounds are common in almost all provisions of the ICCPR as well as in regional human rights instruments. Nevertheless, public health grounds are of minor relevance in serving as a ground of limitation in the context of the right to freedom of expression. There may still, however, be certain areas where justified restrictions may be imposed on public health grounds. These may include restrictions on misleading publications on health-threatening substances such as drugs, medicine, poisons, and radioactivity. Moreover, advertisings on tobacco, alcohol, medicine or drugs may be restricted on public health grounds.[510]

With regard to public morals, the most common kinds of limitations include restrictions on pornographic or blasphemous publications. Nevertheless, the concept of morals should be construed as emanating from many social, philosophical and religious traditions, rather than those deriving from the traditions of a single State.[511] In any event, limitations based on morals should be guided by the principle of the universality of human rights and the equality and non-discrimination of individuals and groups. Yet, compared to limitations on the right to political speech made in the context of public discourse, States should have a much wider margin of appreciation in effecting restrictions emanating from public moral grounds.[512]

2.4. The Privileged Position of Political Speech

As indicated in the previous sections, there is a wide range of protected expressions under the right to freedom of expression including political, artistic, and commercial expressions. While some have questioned the appropriateness of elevating a specific category of expressions, the

---

[510] *Ibid*.

[511] Human Rights Committee, General Comment 22, Art 18 para 8; Human Rights Committee General Comment No. 34, para. 32.

[512] *Gough v United Kingdom* (n 444) para 166.

highest importance is attached to political speech as the core normative content of freedom of expression.[513] This is buttressed by both the jurisprudence of the human rights committee, the various supervisory bodies of regional human rights systems and decisions of domestic courts. In articulating the distinctive place of political speech, the foregoing discussions in Chapter one have demonstrated that this is both 'descriptively powerful and normatively attractive'.[514]

At the international level, the Human Rights Committee has explicitly stated that higher importance is attached to political speech and expressions made in the context of public discourse or of general interest to the public. This was succinctly put in the case of *Bodrozic v Serbia,* in which the Committee found violation of freedom of expression for the conviction of a journalist for criminal insult. It noted:

> the Committee observes, … that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.[515]

In a similar vein, the Committee has emphasized that given the central importance of freedom of expression in the context of public discourse, laws aimed at restricting political expressions are incompatible with the requirements Article 19.[516] In a series of its decisions, the Human Rights Committee has also consistently held that political speech forms the most fundamental element of freedom of expression. In the case of *Aduayom et al v Togo*, the applicants who were charged with 'political' offences by violating the *les majeste* law were arbitrarily arrested and expelled from their jobs.[517] In finding violations of Article 19, the Committee observed that:

> The freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and

---

[513] See in this regard, Zeno-Zencovich (n 256) 13; where he argue that distinctions made based on what is expressed is undesirable since it can lead to excessive discretion and abuse.

[514] Weinstein, Participatory Democracy (n 250) 491.

[515] See *Bodrozic v Serbia and Montenegro* (n 487) para 7.2.

[516] *Rafael Marques de Morais v Angola***,** Communication No. 1128/2002 (29 March 2005) para 6.8.

[517] Communications Nos. 422-424/1990 (30 June 1994) para 7.4.

> that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3.[518]

In the context of elections, there has been growing concern by the Human Rights Committee on draconic measure taken to limit political speech. In this regard the Human Rights Committee has noted that prohibition of door-to-door canvassing, restrictions on the number and type of written materials that may be distributed during election campaigns, blocking access during election periods to sources, including local and international media of political commentary, and limiting access of opposition parties to media outlets are incompatible with the requirements of Article 19 (3).[519] It can, however, be legitimate to restrict political polling imminently preceding an election in order to ensure the integrity of the electoral process in accordance with Article 19 (3).[520]

The jurisprudence of the Human Rights Committee also shows that individuals exercising the highest political authority in the State including heads of governments are subject to legitimate criticism and political opposition including expressions considered to be insulting.[521] This emanates from the underlying understanding that criticism of public officials forms one of the central tenets of a democratic society where public officials are expected to be the subject of public criticism.[522] The Committee also expressly noted that laws such as *les majeste*, *desacato*, disrespect for authority, disrespects for flags and symbols, defamation of public institutions are incompatible with Article 19 (3).[523]

---

[518] *Aduayom v Togo*, See communications Nos. 422-424/1990 (30 June 1994) para. 7.4.

[519] General Comment No. 34 Para 37.

[520] Ibid; see also, *Kim v Republic of Korea*, Communication No. 968/2001 (14 March 1996).

[521] *Rafael Marques de Morais v Angola* (n 516).

[522] *Ibid*.

[523] General Comment No. 34, Para 38; See also See Concluding Observations on Costa Rica (CCPR/C/CRI/CO/5), para. 11; Concluding Observations on Tunisia (CCPR/C/TUN/CO/5), para. 91.

Similarly, the ECtHR has repeatedly underscored the unparalleled significance of freedom of expression in a democracy.[524] The Court has established a line of doctrine which clearly sets political expression to be the core protected expression under Article 10 of the ECHR.[525] According to the Court's case law, the ECtHR has identified three major types of expressions protected under Article 10 of the ECHR. These include political, artistic and commercial expressions. However, the Court has attached the highest importance to political speech as evidenced in such decisions as *Lingens v Austria* and a number of other cases.[526] In *Lingens v Austria*, the Court in emphasizing the importance of political speech stated that:

> The limits of acceptable criticism are . . . wider as regards a politician as such than as regards a private individual: unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others — that is to say, of all individuals — to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues..[527]

The ECtHR in one of its most quoted dictums also emphasized that Article 10 does not only guarantee comfortable, inoffensive or politically correct expressions, but also to ideas that

---

[524] A Sharland, Focus on Article 10 of the ECHR (2009) *14 Judicial Review* 63.

[525] *Lingens v Austria* (n 481) para 42, holding that 'freedom of political debate is at the very core of the concept of a democratic society'; *Castells v Spain* Application, Application No. 11798/85 (ECtHR, 23 April 1992) para, holding that freedom of expression 'constitutes one of the essential foundations of a democratic society', See, Concurring opinion of judge Carrillo Salcedo; for more recent decisions, see also *Kacki v Poland,* Application No.10947/11 (ECtHR GC, 4 July 2017) para 42, holding that '[a]ccording to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.

[526] *Ibid*.

[527] *Lingens v Austria* (n 481) para 42.

'offend, shock and disturb'.[528] The central importance of political speech is repeatedly highlighted in many of its decisions.[529] In the case of *Feldek v Slovakia* it held:

> The Court emphasizes that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned. [530]

The special value attached to political speech has also been reiterated by Inter American Court of Human Rights. The Court succinctly put this position in its advisory opinion noting that '[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion…[and] the development of political parties'.[531] The Court has also argued that when such important political debates are restricted, 'the development of democracy is interrupted' as it impedes the free discussion of ideas.[532] Similarly, in *Canese v Paragua*y the Inter American Commission has similarly held that:

> the right to freedom of expression is precisely the right of the individual and of the whole community to take part in active, concrete, and challenging debates on all aspects of the normal, harmonious functioning of the society which can often be critical

---

[528] *Handyside v the United Kingdom* (n 245) Para 49.

[529] *Lingens v Austria* (n 481) para 42.

[530] Application no. 29032/95 (ECtHR, 12 July 2001) Para 83..

[531] Compulsory membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85 (November 13, 1985) para 70; See also *Baruch Ivcher-Bronstein v Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 54 (6 February 2001).

[532] Report of the Office of the Special Rapporteur for the Freedom of Expression 1998, Inter- Am. Comm'n H.R., O.A.S. Doc. OEA/Ser.L/V/II.102. doc. 6, ch. IV, S A, at 35–36 (16 Apr. 1999) at 4; For a detailed discussion on freedom of expression in the Inter-American Human Rights System, See C Grossman, *Challenges to Freedom of Expression Within the Inter-American System: A Jurisprudential Analysis* (2012) *34 Human Rights Quarterly* 361.

> of and even offensive to those who exercise public positions or who are involved in formulating public policy.[533]

The distinctive place of political speech and its distinctive significance to democratic public discourse is also highlighted in the emerging case law on freedom of expression in the African human rights system. In the recent landmark decision of the African Court on Human Rights on freedom of expression, *Lohi Issa Konate v Burkina Faso*, which concerned with defamation of a public official, the Court in reversing the conviction of a journalist for defamation ruled that '[t]he Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate….'[534] The decision of the Court clearly endorses the central importance of political speech in public discourse. More importantly, it clearly noted that this doctrinal import requires Courts to have more rigorous scrutiny of limitations imposed on political speech, consistent with the democracy-based theory of freedom of expression.[535] This position has also been reflected in other important decisions of the ACOHPR. In the case of *Media Rights Agenda et al. v Nigeria*, the ACHPR held that 'People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'.[536]

The foregoing discussions clearly indicate that as a matter of principle of international human rights law, and the emerging comparative case law on freedom of expression, there is a clear

---

[533] *Canese v Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111 (31 Aug. 2004).

[534] *Lohi Issa Konatei v Burkina Faso*, App. No. 004/2014, (ACtHR, 5 December 2014) para 155.

[535] *Ibid*.

[536] See also *Media Rights Agenda et al. v Nigeria*, Communication No. 105//93, 128/94, 130/94, 152/96, African Commission, para 74 holding that 'People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'.

consensus that emphasizes on the distinctive place of political speech in the broader context of the protection of freedom of expression. The implication of this finding requires that any restrictions aimed at limiting political speech should have a heightened scrutiny than any other kind of expression. The quintessential role that freedom of expression plays in furthering public discourse in a democratic society should inform States to have the highest regard in protecting political speech.

Conclusion

The effective protection of political speech is instrumental in ensuring the uninhibited right of individuals to express their views and the continued vitality of the democratic process. International and comparative law clearly supports a democracy-based theory of speech which distinctively places high-value to political speech made in the context of public discourse. This understanding helps to clarify much of the legal challenges that courts face in dealing with cases involving freedom of expression.

This legal theory should also be supported by a robust analysis of the jurisprudence on freedom of expression that exists at the international, regional and national levels. Comparative law affords to build areas of consensus and a set of commonly agreed principles that can enhance the universal aspirations for free expression in which the international human rights regime itself was founded, while at the same time accommodating national idiosyncrasies. This inter-play between normative constitutional theory and international and comparative law serves as a tremendous theoretical and normative basis which helps to clarify much of the existing challenges on how to regulate free speech in democratic societies, including emerging and transitional democracies such as Ethiopia.

In the context of Ethiopia, the application of the right to freedom of expression by domestic courts should be cognizant of its international commitment to ensure political speech and thereby consolidate its democratic trajectory. The different international human rights norms discussed help to provide an important normative guidance in the application of the right to freedom of expression in general and political speech in particular. This should be supported by

a robust system of legal protection in the constitutional and legal framework on freedom of expression which helps to ensure the effective protection of political speech in Ethiopia.

CHAPTER THREE

THE STATE OF DEMOCRACY AND POLITICAL SPEECH IN ETHIOPIA

Although international and comparative law can provide significant normative guidance in the protection of freedom of expression and political speech, the domestic protection of fundamental freedoms including freedom of expression forms the most effective system of protection.[537] The protection of freedom of expression and political speech at the international level should be supported by a constitutional and regulatory framework that affords adequate protection at the domestic level. In this regard, the constitution of Ethiopia provides extensive provisions dealing with human rights and fundamental freedoms.[538] Nevertheless, the constitutional protection of freedom of expression and other fundamental freedoms has not been adequately applied by the courts.[539] Moreover, more recent legislations adopted by the State including the ATP continue to have a significant effect on the state of free speech and the democratic space in the country. Courts should be vigilant in ensuring these laws are compatible with Ethiopia's international human rights commitments as well as the constitutional guarantee of freedom of expression. Accordingly, this chapter looks into the state of democracy and the constitutional framework on freedom of expression in Ethiopia as

---

[537] See I Idris, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (2000) *20 Ethiopian Journal of Law* 113; See also መሰንበት አሰፋ : ኢትዮጵያ ያፀደቀቻቸው አለም አቀፍና አህጉራዊ የሰብአዊ መብት ስምምነቶች በፌዴራል ፍርድ ቤቶች ያላቸው ተፈፃሚነትና ያሉ ችግሮችና ተግዳሮቶች, በ ኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፓብሊክ መንግስት የፍትህና የህግ ስርዓት ምርምር ኢንስቲትዩት (ግንቦት *20, 2005*) (Mesenbet A. Tadeg, Application of International Human Rights Treaties in Ethiopia, a Research Commissioned by the Ethiopian Legal and Justice Research Institute (unpublished, 28 May 2013) available at https://www.academia.edu/10307647/Application_of_Internaitonal_Human_Rights_Treaties_in_Ethiopia_Amharic_

[538] See Constitution of Ethiopia Arts 10 to 44; These provisions on human rights and fundamental freedoms cover 1/3 of the volume of the Constitution.

[539] See Timothewos, Freedom of Expression in Ethiopia (n 57).

well as the legal challenges associated with the protection of freedom of expression and political speech.

The current state of free speech and democracy in Ethiopia cannot, however, be captured by purely normative considerations. A realistic account of the state of free speech and democracy in Ethiopia should look into the ideological and socio-political factors that significantly influence the current state of democracy and political speech in the country. In her account of the soft constitutionalism in transitional democracies and non-liberal States, Li-Ann Thio emphasizes on the importance of looking into 'nonbinding, deliberately created constitutionally significant norms' that form the soft laws of these States.[540]

In what Thio describes as a 'positivist version of realism' she argues that the marginal role that courts and legal rules play in transitional and non-liberal democracies requires looking into the soft law-the ideological and socio-political factors that have significant role in 'ordering constitutional relationships' and normative conceptions in these States.[541] She notes that soft constitutional law in transitional democracies because of its conceptual fluidity has inherent fuzziness and lacks the certainty and accuracy when compared to legal norms. But she argues that '[w]hat [soft constitutional law] forsakes in terms of conceptual clarity, it gains in terms of capturing constitutional realities accurately'.[542] Mark Tushnet similarly notes that a more nuanced understanding of constitutional norms can best be drawn by studying how high politics influences the conception of constitutional values in States.[543] Accordingly, the Chapter will also discuss some of the embedded ideological and socio-political factors that underlie the state of democracy and political speech in Ethiopia. The purpose is to provide a conceptual and

---

[540] Li-Ann Thio, Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies (2010) *8 International Journal of Constitutional Law* 766.

[541] Ibid; See also M Palmer, Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution (2006) *54 American Journal of Comparative Law* 87, 589.

[542] Thio, Soft Constitutional Law (n 540) 769.

[543] Tushnet, Comparative Constitutional Law (n 76) 1229.

normative framework for the discussion on the protection of political speech and the legal boundaries of incitement to terrorism and incitement to genocide in the context of Ethiopia.

3.1. Contemporary Challenges to Freedom of Expression in Emerging and Transitional Democracies

Bruce Ackerman's optimistic outlook in *the rise of world constitutionalism* outlined the growing acceptance of a constitutional democratic form of governance in many States which *inter alia* embodies the protection of fundamental human rights and a system of judicial review.[544] Ackerman also highlights the increasing recognition of constitutions as the fundamental law of States in many jurisdictions since the end of the Second World War.[545] This is evident, both in liberal and no liberal polities that embrace the idea of constitutions.[546] In many of these States, constitutions not only define the structure of power and functions of State institutions but also provide for the fundamental guarantee of human rights and freedoms including the right to freedom of expression. As a demonstration of their commitment to democratic principles, it is also common for many constitutional democracies to hold regular multi-party elections.

Just as Ackerman wrote about the rise of constitutional democracies in the world, Fareed Zakaria outlined a chilling aspect of it, in the name of the parallel 'rise of illiberal democracy'[547] According to Zakaria, the recurrent problem of many emerging democracies has been the lack of entrenching liberal democratic constitutional norms. He points out that sustainable democracy and development of States requires not only democracy as understood in the sense of conducting regular elections, or the formal recognition of fundamental rights but rather the

---

[544] B Ackerman, The Rise of World Constitutionalism (1997) *1 Virginia Law Review* 771.

[545] *Ibid*, 773.

[546] The idea of non-liberal or illiberal constitutionalism was originally espoused by Graham Walker See, G Walker, The Idea of Non-Liberal Constitutionalism (1997) *39 Ethnicity and Group Rights* 155.

[547] See Zakaria (n 17).

absence of constitutional liberalism-democracy in substance.[548] In these States, beyond conducting regular elections, the fundamental cornerstones of a constitutional democracy such as rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property are significantly lacking.[549]

The decline in constitutional liberal democratic practices and the rise of illiberal democracies is particularly demonstrated if one looks at the increasing decline in the protection of freedom of expression. The use of national security and anti-terrorism laws; censorship and surveillance; and a resort to the use of other speech-limiting offences continue to have a chilling effect on the exercise of the right to freedom of expression in many countries. In particular, in emerging and transitional democracies such as Ethiopia, serious questions continue to be raised on restrictions placed on freedom of political speech.[550]

Nevertheless, even in semi-authoritarian States where authoritarian inclinations are clearly apparent such as Ethiopia, there is a 'modest' and some level of normative commitment to ensure the protection of human rights and fundamental freedoms including freedom of expression.[551] Within this broader legal framework, it is plausible to argue that international and comparative law can provide important doctrinal lessons and guiding principles on the regulation of political speech in the context of Ethiopia.

3.2. The Ecology of Freedom of Expression in Ethiopia

Historically, Ethiopia has epitomized the struggle for the right of individuals and peoples to freedom, self-determination and independence. It has persistently defied European colonialism

---

[548] *Ibid*, see also President Barrack Obama, during his historic visit as First Seating Head of State of the United States to the African Union and Ethiopia on 28 July 2015 [<https://www.whitehouse.gov/the-press- office/2015/07/28/remarks-president-obama-people-africa>] 2015 (accessed 15 August 2015).

[549] Zakaria (n 17) 22.

[550] See Frank La Rue, Ten Key Challenges (n 20).

[551] See Tushnet, Authoritarian Constitutionalism (n 18) 391.

and symbolized the struggle of oppressed people for freedom. Ethiopia's remarkable history also attests a tolerant society that embodies two of the world's largest and oldest religions-Christianity and Islam. Although Ethiopia existed as a Christian Kingdom for much of its history, it was the first country to accept Islam peacefully when followers of Prophet Mohamed sought asylum, considered also to be the first *Hijira*, from the persecution in their home country in the 7th A.D.[552] This unique history that characterizes the Ethiopian State has also been helpful in establishing many aspects of its social and political organization. Some of these historical legacies are manifested in the use of its own working language (Amharic), calendar, alphabet and many other aspects of its political and social organization. In the words of Samuel Huntington '[h]istorically, Ethiopia has existed as a civilization of its own… [o]nly Russian, Japanese and Ethiopian Civilizations, all three governed by highly centralized imperial authorities, were able to resist the onslaught of the West and maintain meaningful independent existence'.[553] The presence of this historical and social capital has important implications to nurture and support social institutions and norms which can further the cause of human freedom including freedom of expression.

Since the new constitutional order was established in 1995 following the overthrow of the military dictatorship of Mengistu Haile Mariam, Ethiopia had initially made notable achievements in advancing the democratization process and easing restrictions on freedom of expression in the country. The Constitution was adopted in 1995 which includes extensive and robust protection on human rights including freedom of expression.[554] The formative years of

---

[552] J Abbink, Religion in Public Spaces: Emerging Muslim-Christian Polemics in Ethiopia (2011) *110 African Affairs* 253.257

[553] Huntington (n 103) 5; See also C Clapham, Ethiopian Development: The Politics of Emulation (2006) *44 Commonwealth & Comparative Politics*137.

[554] See Constitution of Ethiopia Art 29.

the ruling party, the EPRDF indeed showed significant improvements in the protection of freedom of expression. [555]

Nevertheless, in the aftermath of the contested 2005 national election, the hope for a democratic transition has been increasingly frustrated by a shrinking political space that threatens to shake the initial democratic gains made over the past 20 years. Since this watershed political event, there has been a general state of a shrinking political space in the country. Despite international criticisms, the ruling party, the EPRDF continues to use measures which have drastically narrowed the democratic space and suffocated the platform for independent media outlets.[556]

In the following sections, the thesis will highlight on the current state of democracy and freedom of expression in Ethiopia which helps to shed light on why it is particularly important to address the contemporary challenges to freedom of expression at this important political juncture in the country. In doing so, this Chapter briefly highlights a historical account of freedom of expression and media development in the country, the political transition from a military dictatorship to a multi-party democratic constitutional framework, and the contemporary challenges faced by the State to consolidate its democratic trajectory and the protection of freedom of expression.

---

[555] W Teshome-Bahiru, Media and Multi-Party Elections in Africa: The Case of Ethiopia (2009) *6 International Journal of Human Sciences* 91.

[556] The Washington Post, *Ethiopia's Stifled Press* , 9 February 2015 [<http://www.washingtonpost.com/opinions/crackdown-in-ethiopia/2015/02/08/ad1e6bce-abef-11e4-ad71-7b9eba0f87d6_story.html>] (accessed on 10 April 2015); See also The Guardian, *Ethiopia's Media Crack Down is Bad News for Africa*', (23 January 2015) <[http://www.theguardian.com/world/2015/jan/23/ethiopias-media-crackdown-is-bad-news-for-africa>] (accessed 12 April 2015).

3.2.1. Historical and Social Context

Ethiopia has a rich literary and artistic tradition that dates back to the foundation of the Ethiopian Empire. Largely, this has been shaped by the teachings and traditions of the Ethiopian Orthodox Church which was the State religion until the overthrow of the monarchy in 1974. The country has produced some of the most internationally recognized Poets and Laureates such as Maitre Artist Afework Tekle and Laureate Tsegaye Gebremedhen.[557]

This rich history and tradition the country embodies has created a fertile ground for artistic and literary creativity to flourish. Some of the first traces of African philosophy came from one of the enlightened thinkers of the time, Zera Yacob (1599-1692). The works of Zera Yacob, particularly his treatise, *Hatata* (1667)[558] has been compared with Descartes' works.[559] While organized form of media outlets did not come into existence until the beginning of the 20th century, various kinds of publications did exist. For example, the handwritten sheets of Blatta Gebre Egziabher written around 1900, is largely considered as the first newspaper, albeit an informal one.[560] Vibrant oral poetic traditions such as *Qene* and *Semna Werq* (Wax and Gold) also form some of the richest ways of expressions in Ethiopian Society.

Modern newspaper publication began in the beginning of the 20th Century. The first newspaper publication to appear in Ethiopia was *Aimero* (intellect) which started publication in 1902 during reign of Emperor Menelik II. Later *Le Semeur d'Ethiopie* (1905-1911), *Le Courier d'Ethiopie* (The Ethiopian Newspaper) (1913-1920) and *yetor Ware (War News)* (1916-1918)

---

[557] See Encyclopaedia Britannica, [<http://www.britannica.com/EBchecked/topic/607675/Gabre-Medhin-Tsegaye>] (accessed 2 December 2013).

[558] *Hatata* literally interpreted means 'explanatory note'.

[559] T Asfaw, *The Contribution of Native Ethiopian Philosophers: Zara Yacob and Wolde Hiwot* (MA Thesis Addis Ababa University , 2004).

[560] Artilce 19, *The Legal Framework on Freedom of Expression in Ethiopia* (1 Mar 2003) 14.

continued to be published.[561] With the establishment of the national printing press *Berhanena Selam* in 1925, many other publications followed suit including the hitherto State-owned daily *Addis Zemen* (1941) and the English language daily Ethiopian Herald (1945).

In 1933, a radio station started its transmission serving as the most important means of communication to this date. Similarly, the national television broadcasting started its transmission in 1960. While radio remains the major means of communication for the general public, there is increasing television coverage in urban and rural areas including access to international satellite programs. There are few private radio services, which almost entirely focus on entertainment and social issues than important political matters and are largely confined to the capital, Addis Ababa.[562]

3.2.2. Historical Context of State and Media

During the reign of Emperor Haile Selassie, the Emperor's progressive views contrary to the rank and file of the then *Shoan* nobility had initially paved the way for some liberal attitudes.[563] The adoption of the 1931 Constitution while still maintaining the absolute power of the king gave some concession including the establishment of the national parliament and the inclusion of human rights and fundamental freedoms.[564] These progressive libertarian tendencies

---

[561] Teshome-Bahiru, (n 555) 88.

[562] Human Rights Watch, *Journalism Is Not a Crime* (n 55) 11.

[563] While the feudal and monarchical system was inherently exploitative, it can be argued that more libertarian tendencies were seen during Emperor Haile Selassie's reign; See in this regard M Haile, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the Republic's Cucullus Non Facit Monachum (2005) *1 Cardozo Journal of International and Comaprative Law* 1; for a similar conclusion see B Zewde, Hayla-Sellase: From Progressive to Reactionary' (1995) *2 Northeast African Studies* 99.

[564] The Constitution of the Empire of Ethiopia, 1931 (16 July 1931) Arts 22 -28.

continued with the adoption of the Revised Constitution of 1955.[565] The Revised 1955 Constitution notably included for the first time the right to freedom of expression as a fundamental right of the subjects of the empire.[566] Haile Minase also observes that, while the authority of the King was unchallenged, his actual powers were limited by the scrupulous scrutiny of laws and policy debates of the Senate and the Chamber of Deputies.[567]

In relation to the general state of press and media freedom, one observes also that there was some flexibility that gave the space for private and semi-private media that operated to a certain degree. Periodic publications of the National Patriotic Association were issued with no visible oversight by the government.[568] Parliamentary deliberations were also regularly reported by the private and State owned press. For example, the Addis Ababa University School of Law in 1967 reported that it found no case where the government challenged the power of the press to publish parliamentary proceedings.[569] This is also consistent with Bahru Zewde's observation on Haile Selassie political stance in general, where he argues that Haile Selassie was by far a progressive monarch albeit he turned to becoming a reactionary towards the later stage of his political career.[570] Nevertheless, it can be argued that the general state of the country at that time did not create a political platform where dissenting views can be shared openly.

With the growing political opposition to the monarchy, notably the student movement of Addis Ababa University and their emblematic motto of 'land to the tiller', the regime was unable to

---

[565] Proclamation Promulgating the Revised Constitution of the Empire of Ethiopia 1955 (4 November 1955) (1955 Revised Constitution).

[566] 1955 Constitution of Ethiopia Art 41.

[567] See Haile (n 563) 16-19.

[568] Ibid, 23; For a general discussion on the history of censorship in Ethiopia, See እንዳለጌታ ከበደ: *ማዕቀብ* (2008 ዓ/ም) (E Kebede, '*Sanction*' (2014)

[569] J Paul and C Clapham, *Ethiopian Constitutional Development: a Sourcebook* (Oxford University Press, 1967) 775.

[570] See Zewde, Hayla-Sellase (n 563).

respond to the wide-ranging social and political problems of the country.[571] Finally, Emperor Haile Selassie abdicated his power to a group of military officers called the *Derg* in 1974. It is also important to note that while the ultimate demise of the monarchy was inevitable, media coverage of the *Wollo* famine of 1973 had a significant impact in mobilizing the political opposition of the Emperor.[572] It is largely believed that Jonathan Dimbleby's report 'The Unknown Famine' in the BBC in 1973 exposed the monarchy's inability to cope with deeper socio-economic problems and seriously undermined its political legitimacy.[573] The 1974 revolution was broad-based that included various sections of the Ethiopian Society including university students, the peasantry, workers unions and various religious groups.[574]

Nevertheless, the popular movement which sought to establish a democratic transition and achieve social and economic transformations of the country was hijacked by a ruthless military group called the *Derg* led by its chairman Mengistu Haile Mariam. Mengistu's 17-year rule (1974-1991) under a communist military dictatorship can best be described as one of the darkest periods in Ethiopian history. The *Derg* persecuted its political opponents and committed large-scale massacres, as well as 'genocide' against political groups, wiping out some of the most vibrant intellectuals of the era.[575] Many of the members of the political opposition notably the Ethiopian Peoples' Revolutionary Party (EPRP), which was supported by the intelligentsia of the era, were victims of the red terror campaign which the regime launched

---

[571] For a detailed discussion on the Ethiopian student movement, see B Zewde, *The Quest for Socialist Utopia: The Ethiopian Student Movement, C. 1960-1974* (Addis Ababa University Presss, 2014).

[572] Teshome-Bahiru (n 555) 90.

[573] *Ibid*.

[574] J Harbeson, Ethiopia's Extended Transition (2005) *16 Journal of Democracy* 144. 145

[575] It is interesting to note that the *Derg* Officials were charged for committing genocide under the Criminal Law of Ethiopia. Although the Convention on the Prevention and Punishment of Genocide requires intent to destroy a racial, religious, national or ethnic group, it was argued that the prosecution of the *Derg* officials for genocide was made under the national law where intent to destroy a political groups is also included as an element of the crime under the Criminal Code of Ethiopia, see discussion in Chapter Five Section 5.6.1.

to eliminate the members of the political opposition. Although estimates vary it is believed that Derg's 'red terror' campaign of exterminating members of the political opposition has claimed the lives of around 1.5 million individuals.[576]

Simply stated, the *Derg* regime had no space for any kind of political dissent let alone the possibility to protect freedom of expression and the development of an independent private press and media in the country. [577] Those who tried to oppose the regime distributed leaflets and political manifestos underground, usually distributing fliers at night. Journalists and authors were also the notable victims of the regime. It is largely believed that among others the renowned Ethiopian authors Bealu Girma was murdered by the Derg because of the publication of its widely read book 'Oromay' ('*the End*', also interpreted sometimes as meaning pointless). The mysterious death of another renowned journalist and author Abe Gubegna was also associated with the regimes campaign of annihilating dissident voices and silencing the freedom of expression of individuals.[578] The *Derg* regime was characterized by a complete control of the political space and unmatched censorship platform called *Sansur* whereby any publication has to pass through a rigorous scrutiny of its contents under a specific governmental department. In particular, after the establishment of its political wing, the Workers Party of Ethiopia in 1984, the government established a one-party State with a total

---

[576] The figure with regard to the victims of *Derg's* campaign of red terror varies from hundreds of thousands to one and half a million victims, Firew Tiba puts the figure of 'genocide' victims of the Derg to 1.5 million, See F Tiba, The Trial of Mengistu and other Derg Members for Genocide, Torture and Summary Execution in Ethiopia in C Murungu and J Biegon, *Prosecuting International Crimes in Africa*, (Pretoria University Law Press, 2011) 516.

[577] M Bezabih, Access to Information and Press Freedom in Ethiopia, in Zenebework Tadess (ed) Development and Public Access to Information in Ethiopia (Proceedings of the Symposium of the Forum for Social Studies, 2000) 129.

[578] Reta, (n 113) 184.

control of the press and media platform.[579] Finally, in 1991 *Derg's* 17 year military dictatorship was overthrown by the EPRDF, putting also an end to extended guerrilla warfare in the country.

3.2.3. Freedom of Expression and the Media Landscape in the Formative Years of the EPRDF

Since taking power in 1991, the formative years of the EPRDF showed that the new government was open to democratic reform.[580] The Transitional Period Charter of Ethiopia was adopted in 1991 through a process that included a broad participation of a sizable number of political parties.[581] However, some political commentators also point out that some of the major political groups have been left out during the negotiation of the peace conference preceding the adoption of the Transitional Charter.[582] Moreover, after the adoption of the Transitional Charter, one of the most prominent political groups which had a major part in the new political arrangement, the Oromo Liberation Front (OLF) left the country and began guerrilla warfare. This created a major political setback in the country's democratization process, particularly given the initial broad support that the OLF had over the years in the regional State of Oromiya.

On balance, however, the Transitional Period (1991-1995) had included a sizable number of political parties in the negotiation process and can be considered as the first important step in the new constitutional arrangement. The Transitional Period Charter had stipulated a

---

[579] *Ibid*.

[580] *Ibid*; This liberal trend is associated with the third wave of democratization that swept Africa with notable improvement in both multi-party elections and liberal constitutional reforms in post cold war period, See Nur (n 18) 29.

[581] The Transitional Period Charter of Ethiopia, adopted at the Peaceful and Democratic Transitional Conference of Ethiopia on 22 July 1991. See also K Abraham, *Ethiopia from Bullets to the Ballet Box: the Bumpy Road to Democracy and the Political Economy of Transition* (The Red Sea Press, 1994) 24.

[582] See in this regard (ገብሩ አስራት: ሉኣላዊነትና ዲሞክራሲ በኢትዮጵያ (2007 ዓ/ም)

(G Asrat, *Sovereignty and Democracy in Ethiopia* (2015).

commitment to democratic values and fundamental human rights. Notable among these is the right to freedom of expression included in the First Article of the Charter which reads:

> Based on the Universal Declaration of Human Rights of the United Nations, adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December 1948, individual human rights shall be respected fully, and without any limitation whatsoever. Particularly, every individual shall have:
> (a) the freedom of conscience, expression, association and peaceful assembly;
> (b) The right to engage in unrestricted political activity and to organize political parties, provided the exercise of such rights does not infringe upon the rights of others. [583]

As the wording of the first Article of the Transitional Charter clearly indicates, the foundation of the new political order was to be based on the respect for human rights and most importantly, respect for the freedom of expression of individuals. Moreover, the series of legislative measures taken to ensure press and media freedom as well as the broader right to freedom of expression are testament to the bold democratic initiatives of the new constitutional order. Accordingly, the Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting;[584] the Proclamation for the Determination of the Application of State-owned Mass Media;[585] and the first Press Law in the country, the Proclamation Provide for the Freedom of the Press were promulgated.[586] These laws had a number of progressive provisions including the ban on any form of censorship and the protection of journalistic sources.

Nevertheless, there were also some notable limitations. Particularly, the first press law that was adopted in 1992 provided for broad limitations on freedom of expression by stating that expressions should be free from any criminal offence against the safety of the State or of the

---

[583] Transitional Period Charter of Ethiopia, Proclamation No. 1, *Negarit Gazeta* No. 1 (22 July 1991) Art 1.

[584] Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting, Proclamation No. 3/199, Negarit Gazeta No. 4 (12 August 199) Art 1, still regulates the peaceful protests and public assemblies.

[585] Proclamation to Provide for the Determination of the Application of State owned Mass Media No. 6/1991, Negarit Gazeta Year No. 1 (3 October 1991)

[586] Press Proclamation No. 34/1992, Negarit Gazeta No. 8 (21 October 1992).

administration and should not contain any defamatory or false accusations against individuals, nationalities, people, or organizations as well as incitements of conflicts among peoples or agitation of war.[587] It has to be conceded that even in these formative years, the government was sometimes heavy-handed on the political opposition. In 1993, 41 Professors of Addis Ababa University were dismissed for openly expressing their views and opposing the government.[588]

In particular, the EPRDF had little tolerance of influential political figures that opposed the regime and who had nationalist agendas than ethnic-based political ambitions. The political persecution of Professor Asrat Weldeyes, a surgeon and an influential political figure who also worked as the private physician of Emperor Haile Selassie is a good example. After he founded the All Amhara Peoples Organization and began his political activities, he was constantly persecuted and ultimately charged with a crime of inciting violence and overthrowing the government by unconstitutional means. After languishing in prison for many years he died shortly after he was released from prison because of medical reasons.[589]

Nevertheless, given the backdrop of its dark political history during the *Derg* era, these formative years were the first attempts made to ensure freedom of expression and a degree of political dissent in the country. It should also be mentioned that during these initial periods of transition, the media industry and the larger political context had no prior history of a legally established right for political dissent. These factors have negatively impacted in observing the ethical demands of responsible media reporting as well as observing the regulatory regime governing the media. Overall, the formative periods of the ruling party, the EPRDF showed the

---

[587] TJ Ross, Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation, (2009) *1 Penn State Law Review* 1050.

[588] U.S. Department of State (1994) Ethiopia Human Rights Practices (1993) [<http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/Ethiopia.html>] (accessed 10 October 2015).

[589] New York Times, Asrat Woldeyes of Ethiopia: Doctor and Dissenter Dies (17 May 1999) [<http://www.nytimes.com/1999/05/17/world/asrat-woldeyes-of-ethiopia-doctor-and-dissenter-dies.html>] (accessed 16 February 2015).

first traces of independent media reporting and a degree of protection of freedom of expression which set the scene for a constitutional democratic system of government.

3.3. Overview of the Current State of Freedom of Expression and The Media Landscape

The current state of freedom of expression and the media landscape in Ethiopia is heavily influenced by the State. The State controls the information flow and media enterprises making it difficult for the presence of viable media platform that can ensure the possibility to accommodate and entertain different political views. The licensing and operation of all media outlets including print and electronic media is regulated by the government body, the Ethiopian Broadcasting Authority which is accountable to the Government Communication Affairs Office.[590] Television broadcast is controlled by the State-run Ethiopian Television. Although State media is constitutionally mandated to serve the larger public interest and provide diverse views and political perspectives, it has been used to disseminate the governing party's political program and the different activities of government.[591] The particular occasion where political parties have the opportunity to use State media is during elections. In recent times, there has been growing public interest in two prominent Diaspora based television broadcasts, the Ethiopian Satellite Television and the Oromiya Media Network, albeit a continuous effort by the government to block their transmission.[592]

Radio broadcast service still forms the most important means of communication for the rural community in Ethiopia which accounts for 80% of the population.[593] Although there has been a

---

[590] Human Rights Watch, Journalism is not a Crime (n 55) 11.

[591] *Ibid*.

[592] *Ibid*.

[593] see D Ward and S Ayalew, Audience Survey 2011' Electoral Reform International Services (ERIS), (2011); noting that more than 80% of respondents in Ethiopia stated that radio serves as a principal means of information, cited in Human Rights Watch, Journalism is not a Crime (n 55) 11.

recent surge in the number of privately owned radio services, most of them are confined to Addis Ababa that barely touch upon political issues, instead focusing on entertainment and sports commentary. The broadcast law also prohibits political parties, religious institutions and foreigners from owning broadcast stations.[594]

It has to be recalled that State ownership of media outlets does not necessarily deprive the opportunity for free expression and the possibility to entertain diverse political views. Many media outlets in liberal democratic societies including the BBC in the UK, the CBC in Canada as well as other State-owned media outlets in Scandinavian countries have been functional in this framework.[595] Nevertheless, in emerging democracies such as Ethiopia, the control of a media platform without the possibility of developing independent private media outlets has serious repercussions on freedom of expression and the vitality of the democratic process.

The print media has been the natural frontier of independent voices in Ethiopia.[596] Yet, the print media is usually limited in terms of its reach to the capital, Addis Ababa, leaving much of the rural and urbanite without access to the much-needed information. Recent figures show that there are 17 newspapers and 20 licensed magazines.[597] The State-run newspapers including the English Weekly Ethiopian Herald and the Amharic newspaper Addis Zemen also serve as important media outlets for the government. The print media suffers from low economic incentives and a rising cost of publishing. Ethiopia has a newspaper circulation of below 2 per 1000 figure, which is lower than the minimum standard required by the United Nations Education, Scientific and Cultural Organization (UNESCO).[598]

---

[594] A Proclamation on Broadcasting Services, Proclamation No. 533/2007, Negarit Gazeta 13th Year No 39 (23 July 2007) Arts 23 (3) and 4).

[595] See Reta (n 113).

[596] Human Rights Watch, Journalism is not a crime (n 55) 11.

[597] *Ibid*.

[598] N Tefera, Ethiopian Mass Media Profile (2006) 2.

The opportunity provided by the advent of information technology to ensure greater public participation in the affairs of government through the internet and other social media platforms has been undermined by countervailing measures such as internet filtering and blocking and extensive surveillance programs. Although internet penetration in Ethiopia is very low, a recent study on freedom of expression on the internet shows that Ethiopia is one of the few countries in Sub-Saharan Africa to implement extensive national wide internet filtering. [599] The government's monopoly of the telecom sector and ownership makes it difficult to strengthen the telecom infrastructure. It also imposes very high costs of usage charges. These factors and the high level of corruption in the telecom sector have been one of the major reasons for the poor growth of information and communication technologies in the country.[600] The government's hesitance to open the telecom sector to the private sector is partly informed by the backdrop of the 2005 elections, where social media platforms and SMS messages were used for political mobilization and to stage peaceful protests. After the contested 2005 national election, the government suspended SMS services for two years. There is also increasing censorship of online media outlets.[601]

The government also undertakes extensive surveillance on political dissidents and journalists. In February 12, 2014, Citizen Lab, a research institute based at the Munk School of Global Affairs at the University of Toronto in Canada, a report also confirmed by Washington Post recently, reported that the Government of Ethiopia has acquired advanced surveillance technologies including the FinFisher malware from the Italian based IT company Hacking Team to track

---

[599] Current internet penetration in Ethiopia is 1.5, which is very low compared to international standards, see Freedom House, *Freedom on the Net: a Global Assessment of Internet and Digital Media* (2013). According to Internet World Stats, 1.9 percent of Ethiopians are connected to the Internet; in comparison, 47 percent have Internet access in Kenya and 38 percent in Nigeria; See Internet World Stats, "Africa," November 6, 2014, [<http://www.internetworldstats.com/africa.htm#et>] (accessed 3 June 2015).

[600] Measuring the Information Society Report, ITU (2014) 123.

[601] I Gagliardone et al*, Mapping and Analyzing Hate Speech Online: Opportunities and Challenges for Ethiopia, Working Paper* (Oxford, 2014) 32.

political dissidents and journalists both inside and outside the country. [602] In the same year Mr. Kidane, an Ethiopian political dissident living in the US, filed a case in the District of Columbia against the Government of Ethiopia for being a victim of the surveillance program of the Ethiopian government and the infringement of his right to privacy.[603] It is also important to note that the Information Network Security Agency of Ethiopia has enabled the government to develop a very sophisticated and institutionalized system of surveillance and internet filtering capabilities. These technologies have blocked websites and blogs as well as jamming Diaspora based radio programs.[604] It can also be observed that the government's frequency and coverage of censorship increases in election periods, further suffocating the democratic space in the country.[605]

3.4. The Shrinking Political Space Post 2005

Since the contested 2005 national election, there has been a general growing trend of shrinking political space in the country.[606] The series of measures taken after the contested 2005 election, including the adoption of the ATP, the Charities & Societies Law and the Mass Media & Access

---

[602] Citizen Lab, *Hacking Team and the Targeting of Ethiopian Journalists,* [<https://citizenlab.org/2014/02/hacking-team-targeting-ethiopian-journalists/>] (accessed 9 April 2015).

[603] *John Doe a.k.a. Kidane v Federal Democratic Republic of Ethiopia*, 14-cv-372, U.S. District Court, District of Columbia (Washington), see at [<https://www.eff.org/cases/kidane-v-ethiopia>] (accessed 9 April 2015).

[604] Human Rights Watch, *They Know Everything We do: Telecom and Internet Surveillance in Ethiopia* (2014); the report shows that there are more than 40 websites currently blocked in Ethiopia, see at 101.

[605] Human Rights Watch, Journalism is not Crime (n 55) 46.

[606] See Resolution of the African Commission on Ethiopia, *meeting at its 51st ordinary Session held in Banjul, The Gambia from 18 April to 2 May 2012*; Human Rights Watch 'One Hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia' (2010) [<http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure>] (accessed 5 April 2015).

to Information Proclamation continue to suffocate open public debate n the political process. Reports from rights groups currently indicate that Ethiopia currently has the highest number of journalists in prison.[607] Since the muted 2010 election, more than 60 journalists have left the country because of alleged persecution from the government. More than 20 journalists are currently in jail for speech-related offences making Ethiopia Africa's second jailor of journalists next only to Eritrea.[608] Since 2010 alone, the government has charged at least 38 journalists with various crimes under the ATP and the Criminal Code.[609]

The government's crackdown on the media started in 2005. In June 2005, the government of Ethiopia arrested tens of thousands of individuals, scores of journalists and members of the political opposition. Among the 120 individuals who were charged and prosecuted for 'outrages against the constitution' and other crimes, included six publishing houses and more than 20 journalists.[610] Most of the individuals were later pardoned and released from prison as part of a political deal by the government, but the climate of constant fear and persecution persists to this day.

In 2009, the highly acclaimed Ethiopian newspaper *Addis Neger* was closed because of the relentless government pressure that the journalists faced from the government.[611] This inflicted a massive blow on the already weak independent media voices in the country. The absence of an equal level playing field in the democratic space led to a swiping victory for the ruling party

---

[607] Human Rights Watch, Journalism is not Crime (n 55) 1; See also The Economist, *The Noose Tightens: Bloggers and Journalists who Criticise the Government are Under the Cosh* [<http://www.economist.com/news/middle-east-and-africa/21611119-bloggers-and-journalists-who-criticise-government-are-under-cosh-noose>] (accessed 14 November 2015).

[609] Human Rights Watch, Journalism is not a crime (n 55) 20.

[610] Amnesty International, *Justice Under Fire: Trials of Opposition Leaders, Journalists and Human Rights Defenders in Ethiopia* (29 July 2011) [<https://www.amnesty.org/en/documents/AFR25/002/2011/en/>] [accessed on 7 April 2015].

[611] Frontline Defenders, *Ethiopia: Closure of independent newspaper Addis Neger and exile of its Chief Editors* (10 December 2009), [<http://www.frontlinedefenders.org/node/2286>] (accessed 6 April 2015).

in the 2010 national election winning 99.6 % of the seats in the 547 seat of the National Parliament, the House of Peoples Representatives, with only a single member of the opposition in parliament.[612] This continued in 2015, when the ruling party the EPRDF, won all the seats in the national parliament.[613]

Since 2005, the government's crackdown was particularly drastic on journalists and independent media outlets. The imprisonment of Temesgen Desalegn, Reeeyot ALemu, Eskinder Nega, Woubishet Taye, Elias Kifle and Yousuf Getachew has symbolized the plight of many journalists imprisoned in Ethiopia. While the legality and legitimacy of these prosecutions have to be closely looked into by studying the applicable laws and their compatibility with international law and the constitutional framework, it is important to note that the increasing prosecution of journalists and political activists under the ATP for incitement to terrorism and other speech offences continues to have a chilling effect on political speech. The most recent case of the *Zone 9 Bloggers* illustrates the difficult position of journalists and independent media outlets in exercising their constitutional right to freedom of expression. The *Zone 9 bloggers* were a group of young political activists that blog on important social and political matters. In April 2014, six members of the Zone 9 bloggers were arrested in Addis Ababa, alongside with three journalists. The six bloggers include Atnaf Berahane, Befekadu Hailu, Abel Wabela, Mahlet Fantahun, Natnael Feleke, and Zelalem Kibret. Soliana Shimeles, a seventh blogger, was charged in absentia. Three journalists who were also connected to the zone 9 bloggers, Tesfalem Waldyes, Edom Kassaye, and Asmamaw Hailegiorgis, an editor at weekly

---

[612] Human Rights Watch, *Ethiopia: Government Repression Undermines Poll,* (24 May 2010) [<http://www.hrw.org/news/2010/05/24/ethiopia-government-repression-undermines-poll>](accessed on 10 April 2015).

[613] See BBC, *Ethiopia election: EPRDF wins every seat in parliament* [<http://www.bbc.com/news/world-africa-33228207>] (accessed 27 September 2016).

magazine Addis Guday, were arrested in April. All 10 were charged among others, with incitement to terrorism under the anti-terrorism law in July 2014.[614]

3.5. Discursive Ideologies: Revolutionary Democracy and the Developmental State Doctrinaire

In order to understand the government's stance on freedom of expression, and the broader political posture of the State, it is also important to look into the ideological foundations of the ruling party, the EPRDF. Much of the legal and political framework shaping the political discourse and the government's stance on the freedom of expression is implicitly but crucially influenced by the overarching political programs and policies of the ruling Party.[615] One observes that the EPRDF continues to use different discursive ideologies to galvanize its democratic legitimacy that undermine open and democratic dialogue and respect for freedom of expression.

The genesis of the political doctrine of the EPRDF has been leftist in nature. For many years since the beginning of its armed struggle in the 1970s, the central political ethos of the EPRDF has been that the 'true' version of communism espoused by Lenin should be the guiding doctrine of the party. The policies and programs of the EPRDF, as well as its senior officials also accepted the view that only the true Albanian Model of communism should be considered as a model for its political program.[616] Its broader ideology of 'revolutionary democracy' has been inspired by Lenin's notion of Proletarian Democracy which rejects bourgeoisie parliamentary democracy and bureaucratic capitalism. It emphasizes instead on mass mobilization and organization of the working people to achieve 'true democracy', i.e equality and freedom. This notion continues to feed the ideological basis of the party and its program of nation-building in Ethiopia. Although Leninist political rhetoric has faded over the years, the fundamentals of

---

[614] Human Rights Watch, Journalism is not a crime (n 55).

[615] Reta (n 113) XIII.

[616] A Berhe, *A Political History of the Tigray People's Liberation Front 1975-1991): Revolt, Ideology and Mobilization* (PhD Thesis, University of Virje, 2008).

EPRDF's political ideology remains intact. [617] In the words of Sarah Vaughan, 'an ideology of revolutionary democracy has driven the project of State building in Ethiopia over the past 20 years'.[618]

One of the tools that the EPRDF has used to restrict the freedom of expression of individuals is the mass mobilization of individuals which serves as a mechanism of political control. The genesis of the political ideology of the EPRDF is rooted in the political programs and principles of the Tigray Peoples' Liberation Front (TPLF), the most dominant party within the EPRDF and the architect of its political program. Aregawi Berhe who was one of the founders of the TPLF notes that one of the key aspects of the organizational structure and the ideology of the regime has been driven by mass mobilization, beginning from the era of the guerrilla fight against the *Derg*.[619] During its armed struggle, the TPLF developed a populist mobilization rhetoric organizing the peasantry through local *Baytos* (peoples council). The *Baytos* served as a mechanism of control, disseminating the propaganda of the party and mobilization for armed struggle.[620] While this form of mobilization was an important aspect of building a disciplined army that was able to achieve a military triumph on one of the most armed regimes in Africa, its basic political assumptions are inimical to an open and democratic society including for the protection of freedom of expression.

The history of the TPLF shows that it was only during the presence of rival armed political parties that the people of Tigray at the time exercised the right to freedom of expression.[621] With the dominance of the TPLF over rival armed groups including the EPRP and the Ethiopian

---

[617] J Bach, Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia (2011) *5 Journal of Eastern African Studies* 642.

[618] S Vaughan, Revolutionary Democratic State-Building: Party, State and People in the EPRDF's Ethiopia' (2011) *5 Journal of Eastern African Studies* 619.

[619] See Berhe (n 616).

[620] *Ibid*.

[621] *Ibid*.

Democratic Unity party, the relative freedom of expression of individuals and their political freedom vanished completely.[622] Within the party itself, the TPLF had little tolerance towards dissenting political viewpoints. In one of the most excruciating reports on the issue, a dissident figure, Gebru Asrat recalls that the party had persecuted many of its members for challenging some of its ideological inclinations.[623]

Traditional institutions such as the local *shimageles* (local elders who reconcile conflicts) were also seriously undermined by the revolutionary institutional structures as they were believed to contradict with the democratic centralist ethos of the party.[624] In the most recent scheme of mobilization and political control tactics of the regime, a program of five-to-one and a mobilizing scheme called the 'development army' have been deployed to garner its political support.[625] These political structures continue to have a huge impact in suffocating open and democratic discourse and silencing political dissent in Ethiopia. The government has also established youth leagues, women's leagues and a host of other peasant and workers organizations to entrench its ideological doctrines and to gain political support. The political motives of the EPRDF in controlling mass associations in the country has made it vigilant in making sure that workers organizations, and professional associations such as the Ethiopian Teachers Association, and students associations are under the direct control of the ruling party. Of particular relevance in analyzing revolutionary democracy and the developmental State doctrine as a driving ideology of the ruling party EPRDF is its petulant stance on media freedom. Hagmann and Abinink note that among the structural characteristics that define revolutionary democratic Ethiopia is the absence or very marginal role of free media and civil society organizations including human rights organizations and trade unions.[626]

---

[622] *Ibid*.

[623] *Ibid*.

[624] *Ibid*, 279-80.

[625] S Vaughan, Revolutionary Democracy (n 618) 619.

[626] T Hagmann and J Abbink, Twenty Years of Revolutionary Democratic Ethiopia, 1991 to 2011 (2011) *5 Journal of Eastern African Studies* 584

Since 2005, EPRDF's revolutionary democracy doctrinaire has adopted new ideological dimensions, notably the developmental State doctrine. Following the success of South East Asian economies and the support garnered by prominent economists including Mustaqh Khan, Dani Rodrik, Howard Stein and Joseph Stiglitz the developmental State doctrine has dominated the political rhetoric of the party.[627] While the developmental State doctrine manifests itself as an economic model which relies on State driven economic development, it has also important political undertones. Political commentators point out that liberal democratic values such as respect for human rights and democratic practice are antithetical to the developmental State doctrine.[628]

In more recent times, the EPRDF has openly endorsed China's economic model. Over the past 10 years, Sino-Ethiopian relations have significantly increased. Sino-Ethiopian relations are motivated by ideological factors as much as economic ones. Cabestan points out that unlike many other African countries including Ghana, Senegal and Zambia, the government of Ethiopia has endorsed an authoritarian oriented economic model of the Chinese Communist Party. The EPRDF endorses the authoritarian developmentalism model inspired by Lee Kuan Yew of Singapore, which focuses on a State led economy and as such considers human rights and political pluralism necessary tradeoffs to achieve economic development.[629]

In brief, it can be observed that the ruling party has merged two inherently contradictory notions. While it professes itself to be committed to multi-party democracy and fundamental democratic values including respect for freedom of expression, its political ideology of revolutionary democracy and the developmental State is markedly intolerant to political

---

[627] *Ibid*, 623.

[628] *Ibid*.

[629] See L Yew, *From First World to Third World: the Singapore Story 1965-2000* (Singapore Press Holdings, 2000); See also, Foreign Policy, *Ethiopia's Economic Miracle Running Out of Steam, Why It's Time for East Africa's Big Success Story to Change the Way it Does Business* (15 April 2015), [<https://foreignpolicy.com/2015/04/16/ethiopias-economic-miracle-is-running-out-of-steam-east-africa/>] (accessed 15 June 2015); See also Li-ann Thio, Soft Constitutional law (n 540) 782.

pluralism and multi-party democracy. This political reality paints a dark picture of the current State of democracy in Ethiopia. If the government is committed to democratic values, sustainable development and its democratic aspirations, it needs to reconcile its broader ideological tenets to fit with the demands of an open and democratic society, as the constitution explicitly dictates.

3.6. The Development Argument and Freedom of Expression

A related persistent argument that informs the government's heavy-handedness in political freedoms including freedom of expression is that economic development is its top priority in its national agenda. Bertolt Brecht's most quoted aphorisms 'grub first then ethics' best describes the recurrent ideological rhetoric of the EPRDF on development and democracy.[630] Driven by the developmental State ideology, the EPRDF's political rhetoric focuses on achieving sustained economic growth. This position has a political undertone which implies that a functional democratic system can only be established after reaching a certain level of economic development.[631] Because of this, there is an embedded assumption that human rights and democratic values are necessary tradeoffs in order to attain sustained economic growth and ensure the country's ambition of joining middle-income countries in the next few decades. Proponents of the development State theory argue that significant economic development and poverty elimination can be achieved by repudiating the standard norms, practices and expectations of liberal democracies. In particular, Yew questioned and argued against the importance of a free and vibrant press for securing development or social harmony.[632]

---

[630] Gagliardone, New Media (n 45) 1.

[631] *Ibid*; For a general discussion on constitutionalism and economic realities of States See A Thiruvengadam and G Timothewos, Constitutionalism and Impoverishment, in Rosenfeld and A Sajó (n 17) 153.

[632] See Yew (n 629); for a general discussion of the Developmental State ideology, see A Leftwich, Bringing Politics Back in: Towards a Model of the Developmental State (1995) *31 Journal of Development Studies* 400.

Nevertheless, despite the lack of consensus on whether political freedoms including freedom of expression facilitate economic development or not, the weight of evidence clearly shows that economic development, as well as social progress, in many societies is associated with greater protection of political freedoms including freedom of expression.[633] William Easterly, in his recent book, the *Tyranny of Experts* has meticulously demonstrated the unparalleled significance of a good system of political governance to the economic development of many societies in the world. In one of the most groundbreaking works of economic theory, Nobel Laureate Amartya Sen similarly contends that no country that vigorously ensures freedom of expression has experienced famine.[634] He contends that the equitable allocation of socio-economic resources and responses to serious economic deprivations such as famine is not possible without the ability to express views and the exchange of information. What makes Sen's argument so powerful is that he has validated his theoretical premises in some of his outstanding academic works through empirical evidence. In his analysis of food and freedom, where he highlights the importance of freedom in addressing the challenges of famine, Sen gives an impressive historical and factual account of not only the economic factors but most importantly, the socio-political factors that led to the 1984 famine in Ethiopia. Sen astutely observes that although India had far less food availability than Ethiopia and many other Sub-Saharan African countries, it has effectively prevented famine because of the existence of a 'political triggering mechanism' including the existence of a free media and opposition political parties.[635]

---

[633] B Nega, No Short Cut to Stability: Democratic Accountability and Sustainable Development in Ethiopia (2010) *77 Social Research* 1401, arguing that market efficiency cannot function without the requisite 'social infrastructure' and socio-political environment in which economic agents operate.

[634] Sen, *Development as Freedom* (n 11) 16; see also World Bank, The Right to Tell: The Role of Mass Media in Economic Development (2002).

[635] A Sen, Food and Freedom (1989) *17 World Development* 769.

More recently, in a thought-provoking contribution to the justification of freedom of expression, Richard Baron Parker argues that one of the principal reasons that determined the progress of States over the past two centuries has been the degree of protection afforded to freedom of expression in their societies.[636] In articulating his premise, he argues that the three essential 'social technologies' for the flourishing of any organized political society- democracy, scientific inquiry and the free market, can be better advanced if the right to freedom of expression is better protected.[637]

It should also be noted that in recent decades, the advent of internet-based communication platforms has expanded the range of possibilities for commercial and business activities as well as the ability of individuals to participate in government. The digital age, thus, provides an ever more important impetus to infuse the values served by freedom of expression in the development context. In his analysis of freedom of expression in development in African States, Kwadwo Appiagyei-Atua rightly notes that traditional African Societies have embedded cultural virtues that embrace freedom of expression.[638] In particular, he notes that social mobilization and participation and the ability to influence policy outcomes have been possible in traditional African societies through the ability to express oneself which can contribute to the social progress and economic development of African States.[639] In brief, freedom of expression is a vector right that has a multiplier effect in expanding the range of human capabilities and garnering individual and social contribution in the development process and as such should be considered as an integral aspect of the development initiatives of States.

---

[636] See Parker (n 9).

[637] *Ibid*.

[638] See K Appiagyei-Atua, A Review of the Theories of Expression in the Context of the development Argument (2007) *23 University of Ghana Law Journal* 197.

[639] *Ibid*.

3.7. Constitutional Framework

At the outset, it is important to point out that the constitutional framework provides for a robust protection of freedom of expression, including a ban on censorship and underscores the importance of diversity of views. Article 29 of the constitution, which provides for the protection of freedom of expression reads:

> 1. Everyone has the right to hold opinions without interference.
> 2. Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
> 3. Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
> (a) Prohibition of any form of censorship
> b) Access to information of public interest.
> 4. In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.
> 5. Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.
> 6. These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.
> 7. Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.[640]

As can be seen from above, the Constitution extends a wide-range of protections with far-reaching significance for the protection of freedom of expression of individuals as well as freedom of the press and the media. It emphasizes the special position of media in ensuring the vitality of the democratic process and reiterates that special measure should be taken to ensure its operational independence and its ability to entertain diverse opinions. The constitution also

[640] The Constitution of Ethiopia, Art 29.

provides that State media should have the obligation to entertain diverse views in order to ensure that it is not used as a political propaganda for the ruling party. Although the constitution provides for limitations on the exercise of the right to freedom of expression, it also restricts the limitations to a set of narrowly defined grounds subject to the requirements of necessity and proportionality in a democratic society.[641]

Moreover, the Constitution provides important foundational principles and values of constitutional democracy including constitutional supremacy, secularism, accountability and transparency of government affairs.[642] The constitutional commitment to human rights and basic democratic values can be observed form the opening paragraphs of Article 10 which underscores the inviolability and inalienability of human rights and the need to respect basic democratic freedoms.[643] The Constitution also requires that in order to ensure the effective protection of human rights, State institutions both at the Federal and State level including the legislative, executive and judicial organs have the responsibility to protect and enforce fundamental human rights and freedoms.[644] Although the review power of the courts on constitutional invalidity is limited, the House of Federation, which is the upper House of the Parliament, can decide the constitutional invalidity of a legislation or act of government based on the recommendation of the Council of Constitutional Inquiry.[645] Moreover, ordinary courts

---

[641] *Ibid*.

[642] *Ibid*, Arts 9 (1), 11 and 12 respectively.

[643] *Ibid*, Art 10.

[644] *Ibid*, Art 13(1).

[645] See A Fiseha, Constitutional Adjudication in Ethiopia, Exploring the Experience of the House of Federation in Ethiopia (2007) *1 Mizan Law Review* 1; Y Fesseha, Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Ethiopian Constitutional Review (2006*) 14 African Journal of International and Comparative Law* 53; However, Yonathan Feseha also concedes that the fact that the ultimate power of constitutional review is granted to The House of Federation, rather than ordinary courts has significantly limited the review power of courts, and notes 'In as much as the Ethiopian approach can be commended for the novelty of the system, it is not a commendable system

still have the power to apply and interpret the constitutional provisions including freedom of expression in the course of deciding cases.[646]

However, the constitutional stipulation of basic freedoms without effective systems of enforcement of human and fundamental rights does not guarantee the rights of individual to freedom of expression. This is evident not only in the case of Ethiopia but in many other transitional democracies.[647] The functionality of basic constitutional values such as freedom of expression and the media is ensured if there is a democratic political structure including independent judiciary; independent watchdog institutions such as national human rights organs and civil society; media pluralism and multi-party democracy.[648]

In many jurisdictions including the US, the boundaries of political speech and freedom of expression have been developed with a vigorous judicial review process that established the limits of government power in the regulation of speech. Although the text of the US constitution at face value seems to ban any form of censorship, for over more than two centuries, it was believed that the First Amendment to freedom of speech only protected

---

of constitutional review as it does not have characteristics that make it a good part of a well-designed constitutional system', See Y Fesseha, Whose Power is It Anyway: The Courts and Constitutional Interpretation in Ethiopia (2008) *22 Journal of Ethiopian Law* 144; But Soboka argues that 'it is the practice rather than any inherent constitutional flaw that has been at the heart of the problem of jurisdictional dilemmas surrounding judicial referral of constitutional issues …' , See TS Bulto, Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory (2011) *9 African Journal of International and Comparative Law* 123.

[646] *Ibid*.

[647] Empirical studies show that more than 97% of the constitutions that were in force since 2006 have formally recognized the right to freedom of expression as a basic human right; see in this regard DS Law and M Versteeg (n 411) 12.

[648] Reta (n 113) XIV.

individuals from prior censorship and a very limited set of rights.[649] It was not until the beginning of the 20th century that the US Supreme Court began to develop a robust jurisprudence that established its doctrinal basis and ensured the extensive protection of freedom of expression.[650] Because of this, it is important to note that legal rules are nurtured and developed through a constitutional process that respects the integrity of the judicial process and allows it to develop norms that guard individuals against undue interference and censorship against the State as well as ensure the vitality of political speech in the democratic process.

3.8. Regulatory Challenges to Freedom of Expression

Despite the constitutional guarantee of freedom of expression, the adoption of different legislations that put vague and broad limitations has drastically affected the protection of political speech and the broader democratic space in the country. Among others, the anti-terrorism law, as well as different hate speech laws including laws on incitement to hatred and incitement to genocide, continue to have a chilling effect on political speech.[651] Although the issue of incitement to terrorism and incitement to genocide will be the particular subjects of discussion in the subsequent chapters, a brief outline of the overall regulatory challenges to freedom of expression in Ethiopia would help to inform and highlight a background discussion to the later chapters.

---

[649] Sunstein, Democracy and the Problem of Free Speech (n 280) xii-xiv.

[650] See Lewis (n 332) 4-5; See also *Abrams v United States* (n 230).

[651] See Amnesty International, 'Dismantling Dissent : Intensified Crackdown on Free Speech in Ethiopia' (2011); With regard to hate speech and genocide, see also Gagliardone, Mapping Hate Speech (n 601).

3.8.1. The Anti-Terrorism Law and the Shrinking Political Speech

The most draconic provision of the ATP which has serious repercussions on freedom of expression is Article 6 which prohibits encouragement of terrorism. There is a risk that Article 6 of the ATP can include a broad range of legitimate speech as it bans any speech that 'encourages' or 'induces' directly or indirectly terrorist acts.[652] Moreover, this provision sets a subjective standard which makes it difficult to establish the causal connection between the purported terrorist act and the particular speech at hand.[653] The law does not provide an objective assessment of the form of speech made and the *mens rea* of the speaker.[654] It should also be emphasized that what makes incitement to terrorism more problematic is by its nature it is an inchoate crime, in the sense that the commission of the crime is established without the need to show the actual resulting harm. Unless legal rules are applied narrowly and carefully, the possibility for abuse including the silencing of political dissent is clearly apparent.

The ATP also provides for extensive powers to government authorities to collect information from any media outlet.[655] The law also gives power for government authorities to conduct covert searches without the possibility to protect confidential information held by the media, religious officials, lawyers and other persons which have a professional responsibility to maintain confidentiality.[656] Furthermore, the ATP allows a broad range of evidence including confessions, intelligence reports and evidence gathered through interception or surveillance to be admissible in a court of law.[657] It is likely that confessions obtained through the use of torture and other ill-treatment which is clearly unconstitutional can be used as evidence in a court of law. The ATP also gives extensive powers of pre-trial detention drastically changing the

---

[652] ATP Art 6.

[653] Article 19, Comment on Anti-Terrorism Proclamation of Ethiopia (March 2010).

[654] *Ibid*.

[655] ATP, Art 12 & 14.

[656] ATP, Art 17 &18.

[657] ATP, Art 17 & 18

hitherto applicable law which required a lesser time for remand to finalize investigations by the prosecutor. These set of extensive powers to collect information and to conduct mass surveillance particularly affect the media as they have the potential to expose the identity of their sources.[658] If Ethiopia is to make its anti-terrorism law on par with international standards, the ATP should be construed in line with the basic requirements of constitutional democracy and the framework of international and comparative law.[659]

3.8.2. Defamation Laws and Political Speech

Defamation laws have been one of the typical ways to silence political dissent in many countries.[660] In the context of Ethiopia, one also observes that defamation laws continue to have a chilling effect on political speech.[661] Often these defamation laws have been difficult to articulate and delimit their legal application because of the broad legal definition which makes it problematic to ensure the protection of political speech. Moreover, some of the archaic laws that were related to the imperial order continue to apply in the 2005 Revised Criminal Code.[662] The Revised Criminal Code in Article 613 provides for a broad definition of defamation which unreasonably requires for establishing the truth of the defamatory statements.

The Mass Media and Access to Information Proclamation which was introduced in 2008 has also come up with draconic provisions which have the effect of drastically limiting legitimate political speech. One of the difficult aspects of the law relates to the broad prohibitions on

---

[658] See Article 19, Comment on Anti-Terrorism Proclamation (n 653).

[659] See Concluding Observations of the Human Rights Committee, Ethiopia, CCPR/C/ETH/CO/1. (19 August 2011) para 15.

[660] See Article 19, Civil Defamation : Undermining Free Expression (2009).

[661] See Ethiopia Media Sustainability Index (IREX Report on Ethiopia 2012); See also Ross (n 587).

[662] See for example Revised Criminal Code, Injuries and Insult to the State (Art 244), Insults to foreign States (Art 264), Insults to official Emblems of Foreign States (Art 265), Insults to Inter-State Institution (Art 266).

defamation and false accusations.[663] In particular, it allows prosecutions for defamatory or false accusations on constitutionally mandated legislative, executive or judicial authorities.[664] The law deprives the normal protections available by the Criminal Code to freedom of expression by making defamation cases to be subject to prosecution without the requirements of the victim's complaint as well as imposing huge sums of compensatory moral damages.[665] Moreover, while the criminal law limits to cases where defamatory statements were made with intent to injure an individual, the Media Proclamation extends this to 'false accusations' further limiting the protection afforded to political speech.[666]

It is interesting to note that the hitherto applicable law of the Civil Code enacted during the Emperor' time had more progressive provisions paralleling the *Sullivan* standard laid down by the US Supreme Court. Article 2046 of the Civil Code, which provides for speech made in the context of public interest shows that if an individual makes statements on matters of public interest, defamation cases cannot be established unless there is an *actual malice*, i.e. the statements were made with the knowledge that the defamatory statement was false.[667] The Civil Code in Article 2048 further also provides for parliamentary privileges for speech made in the context of the deliberations of the parliament by stating that 'utterances made in parliamentary debates or in the course of legal proceedings' cannot be the subject of civil suit unless an actual malice is established and where the statements were made merely with intent to injure.[668] Given the far-reaching nature of these provisions in protecting political speech, one

---

[663] Mass Media Proclamation Art 43 (7).

[664] *Ibid*.

[665] One notes that the Revised Criminal Code of the Federal Democratic Republic of Ethiopia provides that defamation cases should be subject to complaints made by victims of the defamatory statement (See in this regard Revised Criminal Code Art 613)

[666] Mass Media Proclamation Art 43 (7).

[667] See Civil Code of Ethiopia Art 2046; Cf, *New York Times v Sullivan* (n 312).

[668] *Ibid,* Art 2048.

can only describe the recent legislative moves of the government as regressive stipulations on the protection of political speech.

The above elements of the laws on defamation have a chilling effect on freedom of expression, in particular on political speech. It instills fear on independent voices including political activists and journalists and makes it difficult to criticize government officials and their policies as they have to always rely on the accuracy of the information they provide. It should also be noted that journalistic activity requires sometimes a level of exaggeration and even false statements and as such should not be unfairly curtailed. In this regard, it is also important to make a distinction between facts and opinions. It might be proper to demonstrate the existence of facts; however, value judgments and opinions cannot readily be susceptible to proof.[669] In many areas of political speech made in the context of public discourse, it is essential that opinions and views made against public officials as well as policies and programs of the government should be tolerated to the widest degree possible.

The Mass Media Proclamation also indirectly erodes the constitutional guarantee against prior censorship. It allows the Office of the public prosecutor to have the authority to impound and prevent any publication that may cause a clear and present danger to the national security of the State.[670] These broadly defined powers clearly violate the constitutional guarantee against prior restraint. The Media proclamation also provides onerous registration and licensing requirements as well as excessive fines for speech-related offences.

3.8.3. Hate Speech

Hate speech in Ethiopia continues to be one of the most sensitive forms of expression. In a multi-ethnic and multi-religious country such as Ethiopia, the issue of regulating hate speech

---

[669] See in this regard *Lingens v Austria* (n 481).

[670] Mass Media Proclamation Art 42.

has been justified to protect minority ethnic and religious groups in the society.[671] The use of hate speech has also been used as a way of degrading certain groups in the political history of Ethiopia. Defining the limits of hate speech in Ethiopia becomes even more difficult because of the controversies surrounding what the proper limits can be placed on these kinds of expressions.[672]

One of the challenges in relation to hate speech has been the lack of clear definition of what the proper limits are under Ethiopian Law. In particular in Ethiopia, the existence of minority groups that have been marginalized in the political sphere in the country has made it very difficult to balance the interest of minority groups with the adequate protection of political speech.[673] Moreover, the legal framework on hate speech is fragmented where by provisions in different pieces of legislations can be applied to the case of hate speech.[674] The 2005 Revised Criminal Code of Ethiopia provides certain provisions that can be applied to restrict hate speech. Article 486 (b), which prohibits inciting the public through false rumours, proscribes fomenting dissension, arousing hatred, or stirring up acts of violence or political, racial or religious disturbances. Moreover, Article 816, which prohibits blasphemous expressions, can also unduly restrict legitimate political speech made in the context of public discourse.

The government has at times prosecuted individuals for violating laws on incitement to hatred and incitement to genocide as demonstrated in the aftermath of the 2005 national election. The members of the CUD, the then major opposition political party including the party chairman Engineer Hailu Shawel and 130 other members were charged with incitement to genocide.[675] Although the charges were later dropped, hate speech and incitement to genocide

---

[671] See Gagliardone, Mapping Hate Speech (n 601).

[672] See Mengistu (n 52).

[673] *Ibid*, 352.

[674] *Ibid*, 363.

[675] *Federal Public Prosecutor v Hailu Shawel*, Criminal Charge Number 432/1998, cited in Timothewos, Freedom of Expression in Ethiopia (n 57).

has continued to be one of the major contentious issues which can have a chilling effect on political speech. While hate speech which constitutes incitement to violence should be restricted in accordance with law, it can often be the case that these laws can be used to silence political dissent.

Although the thesis will provide a detailed analysis of the application of laws on hate speech as they relate to incitement to genocide in the context of political speech, it suffices to say that in multi-ethnic and multi-religious society such as Ethiopia, hate speech continues to be one of the most challenging issues in defining the contours of political speech and incitement law. While some Ethiopian Scholars acknowledge the fact that hate speech may be important to 'shield' marginalized and historically disadvantaged ethnic groups from verbal abuse,[676] the current legal and political framework drastically affects the ability to make legitimate political expressions which could have significant constraints to the vitality of the democratic process.[677] Because of this, courts should be vigilant in understanding the particular significance of political speech to the vitality of the democratic process and construe hate speech laws narrowly.

3.9. Ethiopia's Asymmetry of Soft Semi Authoritarian Constitutionalism Vis-à-Vis Its Generic Constitutionalism

From the foregoing discussions, it can be observed that Ethiopia's approach to constitutionalism manifests two contradictory visions of the good society. Its soft constitutionalism manifested through the ideological basis of the ruling party, the EPRDF and its leftist authoritarian orientation clearly negates the protection of human rights and fundamental democratic values including freedom of expression. On the other hand, its formal or generic

---

[676] See Mengistu (n 52).

[677] Many scholars have contended that hate speech laws should be banned because of the fact that they perpetuate inequality of different groups that have been disadvantaged and as such it itself is antithetical to the democratic process, see in this regard CA MacKinnon, *Only Words* (Harvard University Press, 1993); Cf CE Baker, Of Course, More Than Words (1994) *61 University of Chicago Law Review* 181.

structure of the constitutional framework provides for a robust protection to human rights and democratic values including freedom of expression.

However, even when the State justifies its heavy-handedness to its human rights record, it has tried to articulate this as a transitory political stance. The government has made it clear that the consolidation of its democratic trajectory will come to fruition with the countries ambition of joining the middle-income countries in the coming decades.[678] Thus, implicit in this political position, there is a clear acknowledgement that even if there is some degree of its authoritarian stance, that it is merely a transitional political position. There is a clear recognition that the country will consolidate its democratic trajectory with its economic development. This provides an added impetus why an inquiry into comparative constitutional law in free speech matters, as a means of resolving its current dilemmas and the opportunity for consolidating its democratic trajectory through legal and political reforms suited to its socio-political context.

As discussed in the foregoing sections of the thesis, although Li-ann Thio's position captures a realistic appreciation of the soft constitutionalism that typically characterizes transitional and non-liberal democracies much of the literature has extensively studied this 'soft' aspect of constitutionalism in these polities.[679] In particular in the context of Ethiopia, one finds a number of studies in the realm of political science and history on how high politics and soft constitutionalism operates in the country. What is significantly lacking is a normative

---

[678] T Adugna, Economic Development and Democracy in Ethiopia: Performances and Challenges (8 December 2016) *Horn Affairs*, available at [<http://hornaffairs.com/2016/12/08/development-and-democracy-ethiopia-performances-challenges/>] (accessed 20 January 2017).

[679] See Reta (n 113); Nur (n 18); See also F Nahom, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press, 1997); A Abebe, From the 'TPLF Constitution' to the 'Constitution of the People of Ethiopia': Proposals for Constitutional Reform, in T Ojienda, *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives in Sub-Saharan Africa* (Pretoria University Law Press, 2013) 51; For a seminal work on the comprehensive political history of Ethiopia, see B Zewde, *A History of modern Ethiopia, 1855–1991* (Ohio University Press, 2002).

exploration of the 'hard law constitutionalism', as developed by the courts and the general constitutional framework with regard to human rights norms. In particular, in the area of freedom of expression, there is a 'dearth of literature' in expounding the position of the courts as well as the general regulatory framework as it relates to free speech and incitement law.[680] This further justifies the importance of comparative law engagement in free speech as a way of resolving some its current dilemmas in the regulation of free speech by drawing lessons from international and comparative law which could help in consolidating its future democratic trajectory.

3.10. The Democracy-Based Approach to Free Speech and its Appeals to Ethiopia's Constitutional Architecture

Professor Robert Post, one of the most influential free speech scholars when asked about the promise of a universal right to free speech responded by astutely noting that more than anything its democratic appeals would provide for the promise of universal protection of freedom of expression in the world.[681] The thesis uses this 'activist' approach which basis its foundation based on the belief that the democratic appeal of freedom of expression and its distinctive deliberative significance to democratic public discourse provides an added impetus for the protection of freedom of expression in emerging and transitional democracies such as Ethiopia.

This has also structural resonance to the theory of universal democracy which conceives democracy as an emerging universal norm. In expounding the notion of universal democracy, Sen argues that the question is no longer whether a particular State is 'fit for democracy' but rather how to make the State 'fit through democracy'.[682] Sen strongly argues that the idea that

---

[680] See Timothewos, Freedom of Expression in Ethiopia (n 57).

[681] Interview with R Post, in Hertz and Molnar (n 52) 23-24.

[682] A Sen, Democracy as a Universal Value (1999) *10 Journal of Democracy* 3.

democracy as a value is not just rooted in Western tradition but generally accepted in many Asian and African societies.[683] This is particularly true when one contextualizes this in the context of Ethiopia, where indigenous democratic systems of governance such as the *Gadda* system, in particular in the Oromo community in Ethiopia has been recognized as one of the most prominent indigenous democratic institutions recognized recently by the UNESCO.[684] Moreover, as Ali Khan astutely observes the universality of a certain norm or values should not be determined on its appeal to particular society but also 'on the basis of its appeal to the global society as a whole'.[685]

In conceptualizing the notion of democracy, Sen argues that democracy should not just be about majority rule and elections but fundamentally about 'the guaranteeing of free discussion and uncensored distribution of news and fair comment'.[686] It is true that elections provide an important platform for a peaceful transition of power and a range of policy choices to citizens through the political process, forming an integral part of a system of democratic self-government. However, elections are not the only virtues of a good system of political governance.[687] In this regard, the political theorist Isaiah Berlin in his distinguished essay on two concepts of liberty observes:

> Freedom in this sense is not, at any rate logically, connected with democracy or self-government. Self-government may on the whole, provide a better guarantee of the

---

[683] Sen argues that 'It was in the twentieth century, however, that the idea of democracy became established as the "normal" form of government to which any nation is entitled--whether in Europe, America, Asia, or Africa' See *Ibid*, at 3.

[684] See A Legesse, *Oromo democracy: An indigenous African Political System* (Red Sea Press, 2000); See also UNESCO, *Gada System: An Indigenous Socio-Political System of the Oromo* (2016) [<https://ich.unesco.org/en/RL/gada-system-an-indigenous-democratic-socio-political-system-of-the-oromo-01164>] (accessed 12 January 2017).

[685] A Khan, A Theory of Universal Democracy (1998) *16 Wisconsin International Law Journal* 75.

[686] Sen, Democracy as a Universal Value (n 682) 10; see also L Diamond, Universal Democracy? (2003*) Policy Review* 3; A Burgess, Universal Democracy, Diminished Expectations (2001) *8 Democratization* 51.

[687] *Ibid*, 40.

> preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connexion between individual liberty and democratic rule. The Answer to the question ''who governs me?'' is logically distinct from the question ''how far does the government interfere with me?'' It is this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists.[688]

Similarly, Zakaria argues that in illiberal polities where the tenets of liberal constitutionalism are lacking, elections can do more harm than good. Observing the historical experience of many East European and African countries, he argues that 'without a background in constitutional liberalism, the introduction of democracy in divided societies has actually fomented nationalism, ethnic conflict, and even war'.[689] While this conclusion does not in any way suggest that elections should be abandoned in these polities, it is important to emphasize the significance of consolidating fundamental freedoms and constitutional guarantees including freedom of expression in these transitional democracies.

Moreover, although some democratic values such as secularism or the free market cannot be said to have attained universal acceptance, freedom of expression is considered intricately linked with the notion of democracy. For this reason, freedom of expression should be considered as integral part of democracy and can be considered as a universal value in itself. The particular significance of free speech in ethnically and religiously diverse societies such as Ethiopia is paramount in that it offers a process of collective public deliberation which helps to find a common ground in shaping the constitutional identity of the State. In this regard, Habermas observes that free speech offers the opportunity for the creation of a new constitutional identity by participating in a collective process of public deliberation.[690] Similarly, in conceiving the normative content of free speech Post argues that what is essential is not that

---

[688] I Berlin, *Two Concepts of Liberty*, in *Four Essays of Liberty* (Oxford University Press, 1969) 130.

[689] Zakaria (n 17) 35; for a similar conclusion see D Horowitz, Democracy in Divided Societies, in L Diamond and MF Plattner (eds) *Nationalism, Ethnic Conflict and Democracy* (Johns Hopkins University Press, 1994) 35-55.

[690] See the Works of Jurgen Habermas, Internet Encyclopaedia of Philosophy http://www.iep.utm.edu/habermas/ (accessed 20 February 2017)

decision making reflects the will of the majority but rather, free speech affords a platform for public discourse in which individuals in a particular society are 'free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity'.[691]

It should also be noted that a conception of a non-liberal constitutionalism distinct from a liberal model, is defensible and even appropriate system of constitutional democracy in transitional democracies such as Ethiopia. The skepticism that non-liberal constitutions may give a pretext to the unfettered power of dictators should not rule out a conception of constitutionalism distinct from the liberal model. In fact, in new emerging or transitional democracies the rejection of the possibility to develop a non-liberal constitutional discourse can give impulses for discarding the very idea of constitutionalism and the generic virtues that come with it.[692] Moreover, it should be recalled that liberalism has its discontents-its covert forms of social exclusion; its reductive approach to knowledge; and those who criticize its notion of 'individual autonomy rights as a form of naive and homogenizing universalism, and …[the] ethnic and moral ''neutrality'' of the liberal State as a covert form of coercion'.[693]

---

[691] Post, Meiklejon's Mistake (n 268) 1116.

[692] This is particularly apparent when one looks at the constitutional discourse in Ethiopia where the government has consistently positioned itself as anti-liberal West. The notions of developmental state theory and its political counterpart, revolutionary democracy continue to serve as its ideological driving forces (see discussion on Chapter 3 in this regard)

[693] Walker (n 546)157; In the context of media freedom and expression, there have also been critics of the liberal model, for example Edward Herman and N Chomsky in what they describe as 'the propaganda model' argue that money and power significantly influence public discourse and conclude that 'a propaganda model suggests that the ''societal purpose'' of the media is to circulate and defend the economic, social and political agenda of privileged groups that dominate society and the state', See ES Herman and N Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon, 1988) .

Walker in his idea of *non-liberal constitutionalism* argues that the best system of normative constitutional architecture is one that combines non-liberal notions of constitutionalism with some Western liberal values.[694] It is appropriate to develop a normative constitutional architecture that embraces certain non-liberal communitarian norms while at the same time qualifying and even demoting some aspects of the values and normative architecture of the liberal west, including the notions of the neutral State and individual autonomy.[695] By accommodating these non-liberal values, it diffuses the tensions, anxieties and authoritarian impulses of non-liberal polities without undermining the basic tenets of liberal constitutionalism.[696]

In this broader context, what characterizes freedom of expression as distinctively linked with democratic public discourse is not its attribute as an individual right but rather its attribute as a public good.[697] As Owen Fiss observes 'what the phrase "the freedom of speech" …refers to is a social State of affairs, not the action of an individual or institution'.[698] Similarly, Fredrick Schauer in his seminal work 'Free Speech: a Philosophical Inquiry' astutely observes that a democracy-based theory of speech 'has found some appeal among those who reject the fundamental tenets of liberalism'.[699] He argues that the argument from democracy offers a more collectivist view of democracy which emphasizes on the interests of society rather than 'the atomistic and elitist character of liberalism which emphasizes on the interests of the

---

[694] *Ibid*, 171.

[695] Here it can be argued that communitarian norms such as the right of minority ethnic groups (as can be demonstrably seen in the case of Ethiopia), the right to development and the discourse on socio-economic rights in Africa and Asia as well as affirmative action are good illustrations for accommodating non-liberal norms; See for example Art 39 of the Constitution of Ethiopia.

[696] Walker (n 546) 178.

[697] *Ibid*.

[698] Fiss, Free Speech and Social Structure (1986) *71 Iowa Law Review* 1411.

[699] Schauer, A Philosophical Inquiry (n 183) 36.

individual'.[700] This collectivist understanding of freedom of expression and its social importance provides an interesting coherence with the broader idea of no liberal constitutionalism in States like Ethiopia.

Ethiopian constitutional law scholars including Gedion Timothewos also argue that the constitutional protection of freedom of expression in Ethiopia was particularly informed by the need to protect robust political speech.[701] He argues that the minutes of the Constitutional Assembly clearly demonstrate the particular concern of the drafters in protecting robust political speech.[702] This was informed by the country's political history, where the military dictatorship under the Derg military junta and its sophisticated machinery of censorship, commonly known as *Sansur*, was the defining aspect of the political life of the time. In the desire to move from this dark political history to a new democratic path, the drafters were keen in protecting not only the generic virtues of free expression but fundamentally freedom of political speech.[703] This can also be seen from the very structure of the constitution itself, which categorizes freedom of expression in the first Article of the chapter dealing with democratic rights, separate from the chapter dealing with human rights.[704]

Clearly, the structure of the constitution itself acknowledges the intricate relationship between freedom of expression and democracy.[705] Most Ethiopian constitutional law scholars have also argued that the structure of the constitution indicates that democratic rights including freedom

---

[700] *Ibid*, 36, 47.

[701] Timothewos, An Apologetics for Constitutionalism (n 113) 14-15.

[702] *Ibid*.

[703] See (n 404) ff.

[704] See Constitution of Ethiopia Part Two', which is captioned as 'Democratic Rights' in which the first Article, Art 29 provides for the right to freedom of expression.

[705] *Ibid*.

of expression imply distinct norms which are intricately linked with democratic citizenship.[706] On the other hand, they argue that other human rights norms enshrined in the constitution emanate from the nature of human beings and as such, they have separate nature. Although this dichotomy is sometimes framed in challenging the idea that democratic rights cannot be considered as human rights, a more realistic claim would be to recognize the distinctive role of freedom of expression to democratic public discourse. This doctrinal import is not only supported by the structure of the constitution itself but also international and comparative law which places distinctive significance to the protection of freedom of expression because of its crucial function to democratic public discourse.

Conclusion

20 years after the adoption of the FDRE Constitution, the state of democracy and media freedom in Ethiopia is currently at crossroads. Since the disputed 2005 national election there has been a persistent shrinking democratic space and free expression in the country. The government has adopted vague and broad restrictions through laws and regulations including the ATP which have suffocated political pluralism and multi-party democracy, and the freedom of expression of individuals. If the Constitution promises to establish a political community 'founded on rule of law, capable of ensuring a lasting peace, [and] guaranteeing a democratic order',[707] the adequate guarantee of freedom of expression and political freedoms, and consolidating multi-party democracy should also form an integral part of the body politic.

The country's continuous economic growth should be backed by political reforms that ensure the vitality of multi-party democracy and the freedom of expression of individuals. Decades of

---

[706] T Regassa, Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia (2009) *3 Mizan Law Review* 303, while acknowledging the constitutional distinction between human rights and democratic rights, questions whether the distinction has a mere descriptive significance, prescriptive value; see at 303.

[707] Opening paragraph of the Constitution of Ethiopia.

hard-fought achievements that the country has been able to sustain will be in constant jeopardy unless all inclusive significant legal and political reforms are made and ensure the protection of political speech which is vital to consolidate its democratic trajectory.

In particular, in the context of defining the boundaries of permissible political speech and incitement law, international and comparative law provides a significant normative basis to resolve similar legal problems in the socio-political context of Ethiopia. This has become all the more important because of the increasing migration of constitutional ideas as well as the normative convergence that came to the scene as a response to similar security and public order challenges of States.

CHAPTER FOUR

INCITEMENT TO TERRORISM AND THE BOUNDARIES OF POLITICAL SPEECH IN ETHIOPIA

The foregoing chapters have largely focused on the broader international and national framework as well as the state of freedom of expression in Ethiopia. Although the thesis focuses on the regulation of political speech in Ethiopia, a study of this scale has to set out both the theoretical basis of why we protect freedom of expression and the international human rights framework that supports the normative boundaries of free expression at the domestic level. Because of this, the discussions focused on the theoretical justification, the international human rights framework, and the state of democracy and freedom of expression in Ethiopia.

These discussions set out an important background conceptual and normative framework for a more detailed discussion in two fundamental areas of speech regulation-incitement to terrorism and incitement to genocide. The purpose is to highlight the normative boundaries of incitement to terrorism in Ethiopia by relying on international and comparative law. In articulating the normative boundaries of incitement to terrorism on one hand and protected political speech on the other, it will use both free speech doctrine and, international and comparative law and draws important normative conclusions. This chapter first analyzes the migration of anti-constitutional norms on in international and comparative law in the context of incitement to terrorism. It then analyzes the legal elements that help to delimit the boundaries of incitement to terrorism in Ethiopia by looking into international and comparative law. Finally, it analyzes the emerging case law and prosecutorial trend with regard to incitement to terrorism in Ethiopia and its chilling effect on political speech.

4.1. The Migration of Anti-Constitutional Norms and the Shrinking Realm of Free Expression in the Era of Counter-Terrorism

Kim Lane Scheppele observes that the first wave of globalization of international human rights law is being increasingly challenged by a new second wave of public law globalization.[708] Scheppele argues that the first wave of the globalization of public law under the auspices of the UN helped in entrenching human rights norms including freedom of expression and the 'constitutionalization of state power' in many societies.[709] Nevertheless, she contends that this first wave of the globalization of public law is countered by a second wave of anti-constitutional norms that have the tendency to undermine the protection of human rights and basic constitutional guarantees, including freedom of expression.[710] She argues that this anti-constitutional effect in the migration of public law norms has been particularly influenced by norms and institutional practices emanating from international and comparative law.[711]

In the aftermath of the 9/11 attacks and the subsequent adoption of UNSC resolution 1373 in 2001, nearly every member of the UN has become increasingly vigilant in countering terrorism by adopting different laws.[712] There has also been a proliferation of international and regional mechanisms for countering terrorism unprecedented in the history of the UN.[713] This had a serious impact on international constitutionalism, largely because essentially the UNSC started legislating on important constitutional issues which were hitherto left to nation States.[714] The immediate effect of these security measures on international constitutionalism was more significant because of the coercive nature of the measures of the UNSC, which is markedly

---

[708] Scheppele (n 64) 350.

[709] *Ibid*, 351.

[710] *Ibid*, 350.

[711] *Ibid*, 351.

[712] See Pokempner, A Shrinking Realm (n 19).

[713] According to the UN, currently there are more than 16 International and 22 regional conventions on countering terrorism; see at [<http://www.un.org/en/sc/ctc/laws.html>] (accessed 20 May 2016).

[714] PC Szasz, The Security Council Starts Legislating (2002) *96 American Journal of International Law* 901.

different from international human rights law that functions under the rubric of 'constructive dialogue'.[715]

In particular, in the context of freedom of expression, since the adoption of the UNSC resolution 1624 in 2005 which requires States to proscribe the glorification, encouragement and incitement of terrorism, there has been a significant proliferation of domestic laws aimed at proscribing the glorification, encouragement and incitement of terrorism.[716] In the context of the EU for example, before the adoption of CECPT in 2005, the report of the Committee of Experts on Terrorism shows that out of the 47 member States of the Council of Europe only six States- Bulgaria, Denmark, France, Hungary, Spain and the United Kingdom had domestic laws criminalizing the glorification and incitement of terrorism. After the adoption of the CECPT this figure has risen significantly.[717] The recent survey of the UN Security Council Counter-Terrorism Committee (SCCTC) shows that there are more than 76 States which have criminalized the incitement of terrorism, signifying a significant increase in the proliferation of laws criminalizing the incitement of terrorism.[718]

However, UNSC resolution 1624 does not explicitly require States to criminalize incitement of terrorism, merely referring the need to 'prohibit by law incitement to commit a terrorist act or acts'.[719] Moreover, the resolution was not adopted under Chapter 7 of the UN Charter and

---

[715] Scheppele (n 64) 350.

[716] Global Survey of the Implementation of Security Council Resolution 1624 (2005) by Member States, Security Council Counter Terrorism Committee, Shows that as of 1 November 2015, at least 76 States worldwide had expressly criminalized incitement to commit a terrorist act in their national legislation, , See [<http://www.un.org/en/sc/ctc/resources/>] (accessed 20 Sep 2016) (hereinafter Global Survey).

[717] CE, Committee of Experts on Terrorism (CODEXTER), ''*Apologie Du Terrorisme*'' and ''Incitement to Terrorism'', Secretariat Memorandum, Prepared by the Directorate General of Legal Affairs, 3rd Meeting Strasbourg (6-8 July 2004).

[718] See Global Survey (n 730).

[719] Threats to International Peace and Security (Security Council Summit 2005), SC Res 1624, UN SCOR, 5261 ' mtg, UN Doc S/Res 1624 (2005) para 3.

lacked any clear legal obligation on member States to criminalize incitement to terrorism. Nevertheless, the resolution eventually had a coercive effect on States to criminalize the encouragement and incitement of terrorism. In particular, the SCCTC which requires States to report on the measures they have taken to implement the resolution, has in effect created a legal obligation on member States to proscribe incitement of terrorism in their domestic laws and follow up on the measures they take to counter-terrorism.[720]

The new emphasis on the prohibition of encouragement and incitement to terrorism is motivated by the belief that terrorism as a new form of political violence was exacerbated by extremist ideological beliefs manifested through radical political and religious expressions.[721] As a result, there was a shift towards the prohibition of the glorification and incitement of terrorism as a preventative mechanism integral to the counter-terrorism campaign both at the international and domestic levels.[722] Resolution 1624, which forms the principal international basis for the proscription of incitement to terrorism, was sponsored by the then Blair government of the UK, as a response to the London Bombings.[723] Scholars point out that the move was the result of political expediency which saw the then Blair government compelled to respond in some way in order to gain public confidence in the aftermath of the London bombings. They argue that the whole process involved little debate and consultation with stakeholders.[724] This resulted in broad and vague legal regimes proscribing the encouragement,

---

[720] Scheppele (n 64); Scheppele notes for example that pursuant to the recommendation of the UNCTC, not only did States proscribe new forms of conduct such as the glorification and incitement to terrorism but also changed their laws to impose more severe penalties of imprisonment for terrorism related crimes, see at 366.

[721] Report of the Secretary-General, 'The protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/63/337 (28 August 2008) para. 59-60, See also A Spataro, Why Do People Become Terrorists? A Prosecutor's Experiences (2008) *6 Journal of International Criminal Justice* 509.

[722] *Ibid*.

[723] Cram (n 499) 2-3.

[724] *Ibid*, 1-3.

glorification and incitement of terrorism which can significantly constrain the ability of individuals to express and participate in the democratic political process.[725]

In particular, the down side of this campaign has been the advent of creeping anti-constitutional norms that continue to have draconic effect on the freedom of expression of individuals. In this regard, Antonio Cassese cautions that the new international counter-terrorism legal regime could create a disruptive international legal order unless it is carefully crafted.[726] Such was the consequence of the adoption of resolution 1624, triggering the proliferation of anti-terrorism laws criminalizing the glorification and incitement of terrorism without a careful consideration of their legal consequences. As Katherine Gelber, observes the proliferation of laws criminalizing incitement to terrorism and various speech-limiting laws have created 'a new normal' in which limits on free speech which were considered 'anachronistic, inappropriate or even completely unacceptable' before 9/11 have now become readily acceptable.[727] As a result, the difference in the place of free speech in established democracies and more authoritarian oriented States has in fact become blared. One observes greater 'convergence between policies of democratic States and countries with poor human rights record' albeit the difference in the degree to which they protect free speech.[728]

This shrinking space in freedom of expression is not only confined to the effects of international law on domestic systems but also to the migration of anti-constitutional ideas across domestic systems.[729] In the case of counter-terrorism laws, the adoption of the UK Terrorism Act 2000 had a significant influence on the legal transplantation of anti-terrorism laws in many States

---

[725] B Saul, Speaking of Terror: Criminalizing Incitement to Violence (2005) *28 University of New South Wales Journal* 870.

[726] A Cassese, Terrorism is also Disrupting Some Crucial Legal Categories of International Law (2001) *12 European Journal of International Law* 993.

[727] Gelber (n 66) 2.

[728] *Ibid*, 3.

[729] Scheppele (n 64) 347.

including Canada, Australia, New Zealand, Hong Kong, Indonesia, South Africa and Ethiopia.[730] Kent Roach notes that this was due to the fact that the UK Terrorism Act represented a state of the art in anti-terrorism law prior to the 9/11 attacks.[731] Many States, in a rush to adopt similar laws began to transplant these laws to their domestic legal order, a phenomenon which scholars describe as bricolage-a preference to work at what is at hand instead of crafting new laws.[732]

The adoption of the UK Terrorism Act 2006 which amended the Terrorism Act 2000, for the first time included a comprehensive ban on incitement to and glorification of terrorism.[733] The law bans direct or indirect forms of incitement and glorification of terrorism defined as statements 'likely to be understood' to incite individuals to 'commit terrorist offences intentionally or with recklessness'.[734] The inclusion of the crime of incitement to terrorism under the Terrorism Act 2006 had a similar effect in the migration of anti-constitutional ideas in other States.[735]

---

[730] K Roach, The Post 9/11 Migration of Britain's Terrorism Act 2000, in Choudhry (n 64).

[731] *Ibid*; Kent Roach also notes that The US Patriot Act failed to attract many state because of the growing unpopularity of the US anti terrorism campaign as well as the complexity of the law; see at 375.

[732] The term bricolage was originally introduced to the field of social science by Claude Levi-Straus to refer to the use of an already existing material in order to construct a new one, rather than creating something entirely new without reference to a pre-existing phenomenon; See in this regard C Levi-Strauss, *The savage mind* (University of Chicago Press, 1966) 16-17;Tushnet argues that the method of using comparative law can be described as a bricolage, see Tushnet, The Possibilities of Comparative Constitutional Law (n 70) 1228-1229; See also D Shneeiderman, Exchanging Constitutions: Constitutional Bricolage in Canada (2002) *40 Osgoode Hall Law Journal* 401.

[733] See Gelber (n 66).

[734] *Ibid*, 83.

[735] Note that the UK Terrorism Act 2000 has already proscribed the incitement of terrorism outside of the UK under S 59-63; however, the UK Terrorism Act 2006 further expanded the scope of application of the law to include for the first time a comprehensive ban to direct and indirect encouragement and the glorification of terrorism.

In the context of Ethiopia, the 2009 ATP of Ethiopia was significantly influenced by the UK Terrorism Act 2000 and Terrorism Act 2006.[736] In fact, the legitimacy of the legislation has been vigorously defended by the State because it was borrowed from Britain, 'one of the most established democracies in the western world'.[737] This also reiterates that often States, justify the legitimacy and validity of their domestic laws not only by relying on international law, but also comparative law of other States.

The result of this migration of anti-constitutional norms has been particularly draconic in respect of its effect on political speech which is vital to democratic public discourse.[738] The use of anti-terror laws and the criminalization of the praising, glorifying and incitement of terrorism have resulted in stifling legitimate political dissent and criticism of government in many States.[739] Parallel to the legal developments at the international and national levels which gave legitimacy to the proscription of the incitement of terrorism, many national laws of States including Ethiopia, came up with laws without much serious thought, which had a drastic effect on political speech and the democratic space.[740] This is compounded by the lack of clarity in the definition of terrorism at the international level which prompted States to use vague anti-terrorism laws which had a serious effect on freedom of expression.[741]

---

[736] See Federal Democratic Republic of Ethiopia, 3rd House of Peoples Representatives (2008/2009), 4th year Adopted Proclamations, Public Discussions and Recommendations, Volume 7, 116-117. In the parliamentary proceedings, the late Prime Minster Meles Zenawi vehemently argued that the Anti Terrorism proclamation was copied word by word from the UK Anti Terrorism Act, making his case for the need to adopt the Anti Terrorism proclamation, cited in Kassa, Examining Some of the Raisons d'être (n 742).

[737] *Ibid*.

[738] Brooten (n 368) 7.

[739] See Cram (n 499).

[740] See Article 19 Comment Article 19, Comment on Anti-Terrorism Proclamation (n 653).

[741] Cram (n 499) 38.

4.2. The Rationale for Adopting the Anti-Terrorism Proclamation

Ethiopia has faced terrorist threats by militant political groups in different occasions. Most of the terrorist threats come from Al-Qaeda and its affiliates which include Somalia-based terrorist groups such as Al-Shabaab and the now defunct Al-Ittihad al-Islamiya.[742] Moreover, some of the dissident home grown armed groups including the OLF, the Ogaden National Liberation Front, and Ginbot7 Movement for Unity and Democracy (Ginbot7) have been allegedly implicated in some of these attacks. All these groups have been proscribed as terrorist groups by the National Parliament.[743] The government of Ethiopia has accused these groups for some of the alleged terrorist attacks including those that happened over a decade ago in different regions of the country including the bombings at Wabeshebelle Hotel in Diredawa.[744] It should also be

---

[742] See Letter dated 30 January 2002 from the Chargé d'affaires of the Permanent Mission of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter- terrorism, S/2002/137, 3, [<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/241/52/PDF/N0224152.pdf?OpenElement>] (accessed 15 October 2016); According to the Global Terrorism Index 2011, Ethiopia is ranked 37th, and is the least affected by terrorism when compared with its neighbouring countries including Somalia, Sudan, Kenya, Uganda and Eritrea which are respectively ranked 6th, 11th, 18th, 30th and 35th. The Global Terrorism Index measures the impact of terrorism in 158 countries since 2001 by aggregating four indicators: the number of terrorist incidents, fatalities, injuries and property damage, See WD Kassa Examining Some of the Raisons d'être for the Ethiopian Anti-terrorism Law' (2013) *7 Mizan Law Review* 52.

[743] DireTube news, *Ethiopian Parliament Named Five Groups as Terrorist* (14 June 2011) video link [<http://www.diretube.com/ethiopian-news-ethiopian-parliament-named-five-groups-as-terrorist-video_6e6bc3d3c.html>] (accessed 19 November 2015).

[744] RI Rotberg (Ed), *Battling Terrorism in the Horn of Africa* (Brookings Institution Press, 2005) 110.

recalled that the high profiled assassination attempt of former Egyptian president Hosni Mubarak in 1995 in Addis Ababa was also committed by terrorist groups.[745]

Nevertheless, as indicated in the preceding Chapter, the adoption of the ATP in 2009 was largely the result of political expedience rather than compelling demand of meeting national security needs of the State. This is evident when one looks at Ethiopia's report to the SCCTC which clearly showed that the existing ordinary criminal law was adequate to respond to the contemporary challenges of terrorism in Ethiopia.[746] Moreover, contemporary form of radical and militant Islam is alien to the social fabric of Ethiopian society. Historically, Ethiopia has epitomized religious tolerance by accommodating both Christianity and Islam for more than 1400 years. The overwhelming majority of Ethiopian Muslim population follows Sufism, a moderate form of Islam which has its own Ethiopian historical roots.[747] The few instances of terrorist attacks that were perpetrated were also associated with alien terrorist groups prominently based in Somalia.

---

[745] See New York Times, *Egyptian Group Says it Tried to Kill Mubarak,* [<http://www.nytimes.com/1995/07/05/world/egyptian-group-says-it-tried-to-kill-mubarak.html>] (accessed 20 July 2016).

[746] See Letter dated 31 October 2002 from the Permanent Representative of Ethiopia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution1373 (2001) concerning counter-terrorism S/2002/1234**,** un.org/doc/UNDOC/GEN/N02/690/69 (2002) 3 cited at Kassa Examining Some of the Some of the Raisons d'être (n 742) 52; This is related to a broader argument raised by many scholars, see in this regard MC Bassiouni, A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism' in MC Bassiouni (ed), *Legal Responses to International Terrorism* (Martinus Nijhoff, 1988) xviii.

[747] See J Abbink, An-Historical and Anthropological Approach to Islam in Ethiopia: Issues of Identity and Politics (1998) *11 Journal of African Cultural Studies* 109, in which he concludes that '*While Ethiopians Muslims have in recent years gone through a phase of revivalism and self-assertion, they have remained rather impervious to 'fundamentalist' ideological movements in both a social and political sense', see at 109.*

Furthermore, it is arguable whether the adoption of the ATP, in particular the proscription of incitement to terrorism is the best way to counter the threat of terrorism.[748] This leads to a deeper philosophical question on speech, and its effect on political violence. Frederick Schauer notes that the fundamental problem in establishing the causal connection in cases involving the encouragement of political violence including terrorism is the lack of empirical evidence on whether incitement in fact leads to an increase in political violence.[749] More importantly, he posits that in collective forms of political violence such as terrorism, it is difficult to definitively establish the causal connection between a speech act and the occurrence of a harmful conduct.[750] To resolve this, Schauer posits two fundamental notions of causation-the deterministic and probabilistic theories of causation.[751] The deterministic theory of causation argues that a speech act can only be considered as a cause of violent act if there exists 'a necessary and sufficient condition for the existence of the violent act'.[752] Accordingly, a speech act including incitement to terrorism would be considered as a cause of terrorism if terrorist acts would not have been committed but for the existence of the incitement to terrorism.[753]

Schauer concedes that the deterministic theory of causation is ill suited to establish a causal link between a speech act and its effect on violent conduct.[754] This is largely because of the difficulty in establishing causation involving a class of acts in collective forms of political

---

[748] L Mellinger, Illusion of Security: Why the Amended EU Framework Decision Criminalizing Incitement to Terrorism on the Internet Fails to Defend Europe from Terrorism (2009) *37 Syracuse Journal of International and Comparative Law* 339.

[749] F Schauer, Speech, Behaviour and the Interdependence of Fact and Value, in Kretzmer and Hazan (n 322) 43.

[750] *Ibid*.

[751] *Ibid.* .

[752] *Ibid*.

[753] *Ibid.*

[754] *Ibid*.

violence rather than isolated acts of violence.[755] A deterministic theory of causation might be appropriate for example to establish the causal link when dealing with a specific act that already occurred such as politically motivated murder and the factors which might have led to this act.[756] However, a deterministic theory of causation is ill suited when dealing with collective forms of violence such as whether incitement to terrorism causes acts of political violence. Economic poverty, social exclusion, lack of access to education and social services, political repression and a host of other factors can also be significant causal factors that increase the likelihood of a political violence. Moreover, the deterministic theory of causation does not readily respond to the question whether individuals who are already predisposed to commit terrorist acts, and the degree to which the incitement had effect in influencing their criminal disposition. Because of this, the deterministic theory of causation cannot adequately explain the causal connection between incitement and violent act.[757]

A more plausible alternative that Schauer proposes is the probabilistic theory of causation.[758] The probabilistic theory of causation contemplates that if a certain cause increases, if not conclusively, to the likelihood of the occurrence of an act then it can be considered as a reasonable ground to establish causation. In the context of terrorism, it can be argued that if incitement to terrorism in some way, if not deterministically, contributes to the commission of terrorist acts, there is a reasonable ground to establish a causal link between the speech act and the occurrence of the terrorist act.[759] Measured against the probabilistic theory of causation, it can be argued that incitement to terrorism can increase the likelihood of the commission of terrorist acts, albeit the fact it may not be the only reason for the increase in the likelihood in the commission of terrorist acts.[760]

---

[755] *Ibid.*

[756] *Ibid.*

[757] *Ibid*.

[758] *Ibid.*

[759] *Ibid.*

[760] *Ibid*; see also A Tsesis, Terrorist Speech and Social Media (2017) *70 Vanderbilt Law Review* 651.

Yet, this does not readily lead to the conclusion on the appropriateness of proscribing incitement to terrorism. Schauer rightly notes that normative and regulatory consequences emanating from this conclusion have to be seen entirely differently.[761] Although one might conclude that incitement to terrorism can contribute to the increase in the likelihood of the commission of terrorist acts, this does not mean that States have to adopt laws criminalizing the incitement of terrorism. There could be plenty of policy and regulatory options that can be contemplated. These may include enhanced surveillance and intelligence to prevent attacks, using more speech to counter hateful speech, education, improving the provision of adequate social and economic services and a host of other policy considerations.[762] Moreover, considerations should be made on whether the existing legal regime on incitement such as the prohibition of public provocation to commit a crime, and criminal solicitation under the criminal law can adequately respond to this new form of political violence.[763] In fact, Ethiopia's initial position as can be seen from its report to the SCCTC in 2006 was that the existing criminal law was adequate to respond to the threat of terrorism.[764]

All these factors clearly indicate that even if incitement to terrorism can increase to some extent the likelihood of the commission of terrorist acts, the existence of alternative policy and regulatory options demonstrate the need to craft narrowly tailored limitations on incitement to terrorism.[765] Given the embedded ideological significance of protecting publicly addressed expressions in the context of freedom of expression, any attempt at regulating public incitement to terrorism has to be narrowly construed.[766] The vitality of public expressions to

---

[761] *Ibid, 53.*

[762] See discussion in Chapter Six.

[763] See in this regard the discussion in Section 4.6 below.

[764] Ethiopia's Report to the UN Counter Terrorism Committee (n 746).

[765] As will be demonstrated in the subsequent sections of the thesis, this discussion of cause and effect with regard to speech and crime is not only relevant on a theoretical level but also at a normative level; See discussion on *R v Faraz* (n 876) below; see also discussion regarding causation in incitement to genocide in section 5.2.5.

[766] See Greenawalt, Speech, Crime and the Uses of Language (n 189) 111-112.

the democratic process and the availability of a host of policy and alternative regulatory options to counter-terrorism demand a very narrow definition of the meaning and content of incitement to terrorism under the counter-terrorism legal regime of Ethiopia.

4.3. The Challenges of Defining Terrorism

The difficulty of defining incitement to terrorism is compounded by the complex nature of the meaning and scope of terrorism as a distinct form of political violence. The absence of any comprehensive definition of terrorism under international law has exacerbated the legal complexity of defining terrorism. Initial attempts to define terrorism under international law had two broad approaches.[767] The first approach argues that defining terrorism is impossible, and emphasizes on pragmatic considerations of proscribing certain prohibited norms.[768] The second approach emphasizes on the importance of providing comprehensive definition of terrorism and contends that normative responses to a prohibited conduct can only be effective by defining that specific conduct.[769] Rosalyn Higgins argues that the second approach is more plausible in dealing with the definition, meaning and scope of what constitutes terrorism in international law.[770] She further notes that the difficulties associated with defining terrorism are not only ideological but also technical, and as such the definition of terrorism should address these factors.[771]

---

[767] R Young, The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation (2006) *29 Boston College International and Comparative Law Review* 29.

[768] R Higgins, The General Law of Terrorism, in R Higgins and M Flory (eds), *Terrorism and International Law* (Routledge, 1997) 14.

[769] *Ibid*.

[770] *Ibid.*

[771] *Ibid*; See also Saul, *Defining Terrorism in International Law* (Oxford University Press, 2010) 1.

Although the approach that emphasizes on crafting a comprehensive definition is more plausible, international law does not offer a readily available answer to the definitional problem. This is largely due to the fact that the international legal regime on terrorism does not provide any comprehensive definition on terrorism.[772] The international law on terrorism is sectoral in nature.[773] It regulates specific forms of terrorism such as terrorist financing, terrorist bombing, hijacking and similar prohibited acts.[774] This sectoral approach to defining terrorism has significant limitations. Although the acts proscribed may rightly constitute terrorist acts, it avoids other important considerations such as the ideological and political motive of the nature of the violence. Because of this, it is impossible to define terrorism merely by making reference to the prohibited act.[775] This makes it very difficult to draw a common working definition on terrorism based solely on prohibited forms of conduct.

Saul further notes that the problem with defining terrorism is not so much about its technical difficulties but rather the fact that it is ideologically and politically loaded.[776] The term terrorism embodies doctrinal, ideological, and jurisprudential issues that beg such questions as who is entitled to exercise violence, against whom, and for what purposes.[777] Rigorous recent attempts to come up with the definition of terrorism have also showed that the prospects of coming up with a comprehensive definition of terrorism is impossible due to the conceptual fluidity of the subject.[778] Jacqueline Hodgson and Victor Tadros, after closely looking into both

---

[772] J Petman, The Problem of Evil in International Law, in J Petman and J Klabbers, *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff, 2003) 133.

[773] M Lehto, Terrorism in International Law: an Empty Box or Pandora's Box, in Higgins and Flory (n 768) 296.

[774] *Ibid*.

[775] *Ibid,* 15.

[776] Saul, Defining Terrorism (n 771) 3.

[777] *Ibid*, 4.

[778] See JS Hodgson and V Tadros, The Impossibility of Defining Terrorism (2013) *16 New Criminal Law Review* 494 .

the international and national legal framework on counter-terrorism conclude that 'the standards of criminal justice that we expect in other areas of the law cannot be met in terrorism law'.[779] The elusive and vague nature of the notion of terrorism has led Higgins to conclude that 'it is a term without any legal significance'.[780] While these skepticisms are apparent, one should not abandon the continued endeavor to set the parameters of the definition of terrorism and draw some common ground which can limit the possibilities for abuse.

4.4. The Definition of Terrorism Under Ethiopian Law

The lack of a comprehensive definition of terrorism under international law has provided the opportunity for States with the flexibility to come up with a definition of terrorism taking into consideration their local context. This has also prompted many States including Ethiopia to incorporate different forms of political violence that they consider not only a threat to their national security but also political protests which arguably could form integral part of the democratic process.[781] However, as clearly indicated in the introductory section of this chapter, legislative developments on counter-terrorism in other States and the resulting migration of anti-terrorism laws had significant effect in the counter terrorism legislative framework of Ethiopia.[782] The ATP has been significantly influenced by the UK Terrorism Act 2000 and Terrorism Act 2006, and one finds many textual similarities in their anti-terrorism laws.[783] In the following sections, the thesis analyzes the definition of terrorism under Ethiopian law in light of

---

[779] *Ibid,* 526.

[780] Higgins (n 768) 28.

[781] See Human Rights Watch, Dismantling Dissent (n 651).

[782] Scheppele (n 64).

[783] WD Kassa, The Scope of the Definition of a Terrorist Act under Ethiopian Law: Appraisal of its Compatibility with Regional and International Instruments on Counterterrorism Instruments (2014) *8 Mizan Law Review* 374.

international and comparative law which provides a framework for the discussion on incitement to terrorism in the subsequent sections of the thesis.

Article 3 of the ATP defines terrorism in the following terms:

> Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:
> 1/ causes a person's death or serious bodily injury;
> 2/ creates serious risk to the safety or health of the public or section of the public;
> 3/ commits kidnapping or hostage taking;
> 4/ causes serious damage to property;
> 5/causes damage to natural resource, environment, historical or cultural heritages;
> 6/ endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
> 7/ threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death

As can be seen from the definition above, the material elements of the definition of terrorism under the ATP are similar to those provided under the UK Terrorism Act of 2000.[784] Similar to the UK Terrorism Act, the ATP provides the motive requirement as important element of the definition. The requirement that terrorism should have a political, religious, or ideological cause has been contentious. Some scholars posit that the motive element of the definition of terrorism may lead to ethnic and religious profiling that could have serious human rights implications which could be counterproductive to the fight against terrorism.[785] Others argue that terrorism as a distinct political violence carries with it a particular political message, however, repugnant it may be. Without the motive element as integral part of the definition, serious crimes such as murder will be difficult to dissociate from terrorism.[786]

---

[784] Cf Uk Terrorism Act 2000, S. 1.

[785] Cram (n 499); K Roach, *September 11: Consequences for Canada* (McGill-Queens University Press, 2003) 25–28.

[786] Saul, Defining Terrorism (n 771), Saul argues that '[d]efining terrorism by reference to its underlying political motives would help to distinguish terrorism conceptually from profit-oriented transnational

Terrorism, as a sui generis crime and distinct form of political violence implies that a particular terrorist intent is needed to establish the crime. Thus, it is apparent that terrorism cannot be defined by merely making reference to the prohibited act.[787] In order to identify terrorism as a sui generis crime, it should be defined by making reference to the motive and purpose of the violence. [788] Eventually, whatever the political, ideological, religious, ethnic, or philosophical motive that the terrorist wants to convey, that particular act is carried out to further a *public motive*[789], objective or purpose.[790] In this regard, the requirement that terrorism should have an ideological cause in the ATP, is similar to comparative legal developments in counter-terrorism including Australia, Canada, South Africa, UK and many other countries which explicitly provide for a motive-based definition of terrorism.[791]

The second element of the definition requires that the acts should be intended to intimidate the public or a section of the public or coerce, destabilize or destroy the fundamental political,

---

organized crime' and 'from ordinary crime which terrifies (such as armed robbery, serial rape, or mass murder)'', at 40.

[787] *Ibid*, 61.

[788] Higgins (n 768) 15.

[789] Saul (n 771) 61 (emphasis added), for a more detailed discussion on the question of motive in the definition of terrorism, see B Saul, The Curious Element of Motive in the Definitions of Terrorism, and K Roach, The Case for Defining Terrorism with Restraint, in A Lynch, E MacDonald and G Williams, *Law and Liberty in the War on Terror* (The Federation Express, 2007) 28-50.

[790] *Ibid*, see also UN Legislative Guide to the Universal Legal Regime Against Terrorism (New York, 20008), United Nations Office on Drugs and Crime, 26.

[791] See Terrorism Act 2000 (UK), s 1(1)(c); Criminal Code 1985 (Canada), s 83.1(1); Criminal Code Act 1995 (Australia), s 100.1(1); Terrorism Suppression Act 2002 (New Zealand), s 5; South African Protection of Constitutional Democracy against Terrorism and Related Activities Bill 2003, cl (1)(xxiv)(c); see also C Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (OUP, Oxford, 2002) 20–30.

constitutional, economic or social institutions of the country.[792] The intention of creating fear or intimidation of the public, as element of the definition of terrorism has historical roots. Usually, it is associated with the French revolution, where the Jacobins used the *red terror,* a system of repression and intimidation, as a form of political violence to exert their republican ideals in the public.[793] Because of this, many national laws including the UK Terrorism Act 2000, the Canadian Bill C-36 as well as the CEFDCT use the intention to create fear among the population, and the purpose of influencing or compelling the Government or an international organization as important elements of the definition of terrorism.[794] This aspect of the definition combines two conditions- creating fear, intimidation or terror, or coercing a government. Scholars argue that if the first element of creating fear, intimidation or terror is fulfilled, there is no need to demonstrate the second aspect of the definition.[795]

It should also be noted that ATP uses the stronger language of 'coercing' government unlike the UK Terrorism Act which uses the word 'influencing' government.[796] The UK experience shows that the Initial proposal to use the word 'coercing' the government was abandoned by the drafting committee.[797] Walter notes that the higher threshold of coercing a government is better formulated as it excludes legitimate public protests including large scale protests against government policy which potentially can be labeled as 'terrorism'.[798] Nevertheless, the ATP extends not only to acts intended to coerce a government but also to those 'destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the

---

[792] ATP Art 3.

[793] V Johnson, *The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris* (1990) *13 Boston College International and Comparative Law Review* 19–22.

[794] Cf UK Terrorism Act 2000 S.

[795] C Walter et al (ed) *Terrorism as a Challenge for National and International Law* (Springer, 2003) 6-7.

[796] Cf ATP Art 3 and S 1 of UK Terrorism Act 2000.

[797] See Walter (n 795).

[798] *Ibid*, 28.

country'.[799] Compared to the UK Terrorism Act, this aspect makes it more expansive in its scope.

The most controversial aspect of the ATP is its broad scope of application to the prohibited acts under Article 3 of the definition of terrorism.[800] Terrorism involves serious political violence, and as such the definition should be faithful to this reality. Comparative laws on terrorism and the international legal regime show that terrorism involves acts that *seriously* endanger life, damage property or economic loss.[801] Beyond this, however, the ATP includes acts such as causing damage to natural resources, environment, historical or cultural heritages;[802] endangering, seizing or putting under control, or causing serious interference or disruption of any public service.[803] This overtly broad and vague definition extends the reach of the ATP the risk of including minor forms of political protests and expressions which form integral part of the democratic process.

Similarly, the definition of terrorism as can be seen from comparative counter-terrorism laws extends to violent acts on private and public property including public utilities, information and communication facilities and other infrastructure.[804] It includes violent and non-violent but disruptive action against public facilities and infrastructure. For example, the UK Terrorism Act 2000 extends the definition of terrorism to *serious* disruption or damage to computer installations and property, and public utilities.[805] Similarly, the US Immigration and Nationality

---

[799] ATP Art 3.

[800] ATP Art 3 (1) to (7); See also Amnesty International, Dismantling Dissent (n 651).

[801] See Draft International Convention Against International Terrorism, Art 2 (1(a) and (b); See also Convention for the Suppression of Terrorist Financing Art 2(1) (b).

[802] ATP Art 3(5).

[803] ATP Art 3(6).

[804] Walter (n 795) 34. .

[805] UK Terrorism Act 2000, S 1.

Act includes 'substantial damage to property' as an element of a terrorist activity.[806] On the other hand, the CEFDCT includes '… *extensive* destruction to a Government facility, a transport system, an infrastructure facility, including an information system […] likely to endanger human life or result in major economic loss' as among the criminal acts that may constitute terrorism.[807] The UN Draft Comprehensive Convention Against International Terrorism also provides *'[s]erious* damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment' as element of the definition of terrorism.[808]

In this regard, it is important to point out that the US Patriots Act has a more precise and limited 'life threatening acts' in its definition of terrorism as opposed to the broad categories of prohibited acts provided under the ATP.[809] Despite the shocking nature of the terrorist acts perpetrated in 9/11, the Patriot Act confined the definition of terrorism to criminal acts that are dangerous to human life.[810] The US Patriot Act does not extend the definition of terrorism to capture such crimes as the destruction of property or disruption of electronic system or essential services.[811] However, the US Patriot Act unlike the ATP does not include a political or religious motive in the definition of terrorism.[812] Although some scholars point out some positive aspects of excluding the motive requirement from the perspective of human rights, for reasons explained in the foregoing discussions, the motive requirement as provided under Article 3 of the ATP should form an essential element of the definition of terrorism in order to

---

[806] The United States Immigration and Nationality Act 8 U.S.C. s 1182 (a) (3) (B).

[807] CEFDCT Art 1 (1) (d.

[808] Consolidated text prepared by the coordinator for discussion, A/59/894, Art 2 (b).

[809] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (US Patriot Act) Act of 2001, Public Law 107–56 (26 October 2001); See also Kent Roach (n 730) 380.

[810] US Patriots Act S. 802.

[811] *Ibid.*

[812] *Ibid.*

distinguish it as a distinct form of political violence differentiated from other ordinary criminal offences.[813]

As can be seen from the foregoing discussions, the definition of terrorism under the ATP encompasses criminal acts not only targeting life or the physical integrity of individuals, but also damage to public utilities, property and infrastructure.[814] From the perspective of freedom of expression, this creates a very difficult legal problem. It risks extending the definition to lawful protests which could create some disruption in public services and damage to property even if they are not violent. As discussed in the foregoing discussions, international and comparative law shows that these acts should have some nexus with the overall danger they create to life or physical integrity of individuals or some *serious* economic loss.[815] Thus, the qualifying term that terrorism entails a 'serious crime' is intended to distinguish ordinary crimes of a domestic or transnational nature from terrorist acts.[816] As Saul rightly notes, the criminalization of terrorism should not be used to proscribe trivial and ancillary crimes which can be effectively regulated by the ordinary criminal laws of States.[817] Because of this, it is important to recognize that the definition of terrorism under the ATP should be construed taking cognizance of the particular dangerousness and serious nature of the crime as a distinct form of political violence.

This definitional dilemma of including minor acts of destruction in public utilities or damage to property as acts of terrorism can be avoided by inserting an exclusionary clause, also called the 'political protest exception' or as what Saul calls the 'democratic protest exception' to the definition of terrorism.[818] In the Canadian Bill C-36 this was avoided by inserting an exclusionary

---

[813] See Saul, Defining Terrorism (n 771).

[814] ATP Art 3.

[815] See Draft UN Comprehensive Definition on Terrorism, Art 2.

[816] Saul, Defining terrorism (n 771) 59-60.

[817] *Ibid*, 23.

[818] See B Saul, *Terrorism in International and Transnational Criminal Law* (September 22, 2015), Blackstone's International Criminal Practice, JR WD Jones, M Zgonec-Rozej, Oxford University Press, UK,

clause which made exception to damage to property and public utilities from acts of terrorism only those that resulted 'other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)', a clause which makes reference to life threatening acts.[819] Similarly, both the AU Model Counter-Terrorism Law and the Australian anti-terrorism law provide an exclusionary clause in order to avoid the risk of including minor acts of protest, disobedience and disruption which form integral part of the democratic process in the definition of terrorism.[820]

The difficulty of including minor acts of political protest is not only apparent on a theoretical level, but also as a matter of empirical observation. In the recent public protests in Ethiopia which initially were largely peaceful, the government labeled the protesters collectively as terrorists and vowed to take action an effort to silence the political protest.[821] Kassa rightly argues that the lack of providing for the political protest exception under the ATP as a safeguard to exclude certain acts of political protest from the definition of terrorism risks including minor acts of political violence which are considered acceptable under the democratic process to be categorized under the definition of terrorism in Ethiopia.[822] As indicated in the

---

Forthcoming, 2017; Sydney Law School Research Paper No. 15/83. Available at SSRN: [<https://ssrn.com/abstract=2663890>] 31 (accessed 25 May 2016).

[819] Canadian Bill C-36 Art 83.01 (1) (b); See also Australian Criminal Code, s. 100.1(3); Terrorism Suppression Act 2002 (New Zealand), s. 5(5).

[820] African Union Model Law on Counter-Terrorism, Anti-Terrorism Law, Final Draft as Endorsed by the 17th Ordinary Session of the Assembly of the African Union Malabo, 30 June-1 July 2011, Art 39; Australian Criminal Code Act 1995 (Cth), s 100.1.

[821] The Nerve Africa, Oromo Protests Continue in Ethiopia as Government Labels Demonstrators as 'Terrorists' (17 December 2015) [<http://thenerveafrica.com/2065/oromo-protests-continue-ethiopia-government-labels-demonstrators-terrorists/>] (accessed 30 February 2015).

[822] Kassa, The Scope of Definition of a Terrorist Act (n 783), But Ben Saul further argues that political protests and resistance involving more serious forms of political violence should be excluded from the definition of terrorism; and argues that 'it is important to ensure that a definition of terrorism is not

foregoing discussions, this is a departure from comparative developments in counter-terrorism which clearly provide for a political protest exception in the definition of terrorism.[823] As Hodgson and Tadros wittily noted, an act in order to constitute as a terrorist act should correspond to 'the moral idea of terrorism'.[824] Because of the serious nature of the political violence that terrorism purports to exert to life or the physical integrity of individuals, the definition of this distinct form of violence should reflect its distinctive nature in that unlike ordinary crimes which are already prohibited in domestic laws of States, it represents a serious from of political violence.[825]

4.5. Overview of Incitement Law in Ethiopia

Before looking at the specific legal elements of the crime of incitement to terrorism, it would be helpful to highlight the general regulatory framework on incitement law in Ethiopia. In particular, the distinction between the crime of incitement from solicitation or instigation would help to inform the subsequent discussions regarding incitement to terrorism. Although some jurisdictions do not differentiate between public incitement from private act of incitement or more properly solicitation or inducement, criminal law scholars point out important differences which have significant relevance for the subsequent discussions in this

---

overbroad and is flexible enough to exclude violent resistance that has legitimate public policy justifications' See Saul, Defining Terrorism (n 771) 39.

[823] See for example Canadian Bill C-36 Art 83.01 (1) (b) and Australian Criminal Code Act 1995 (Cth), s 100.1 (Austl); See also J McCulloch, Counterterrorism Human Security and Globalization from Welfare to Warfare State? (2002-2003) *14 Current Issues in Criminal Justice* 285.

[824] Hodgson and Tadros (n 778) 496.

[825] Saul, Defining Terrorism (n 771) 23; this is also reflected in some international and domestic instruments on terrorism, which provide a qualifying phrase "serious" to emphasize the degree of violence entailed by terrorism, See also the Draft UN Comprehensive Convention against International Terrorism, Art 2.

Chapter.[826] The distinction between private forms of speech such as solicitations, conspiracy and other forms of complicity and incitements as distinct public acts provides significant contribution in conceptualizing the intricacies involved in guarding robust political speech and determining the contours of incitement law.

Solicitation involves a private act of communication involving a group of persons (the soliciter and the solicitee) who are identifiable and where the substantive crime to be committed is concrete by its nature.[827] Moreover, in solicitation the speaker has some control over the behavior of the person committing the crime.[828] Usually, criminal solicitation is committed as an accessory in the criminal act of another person. The offender is usually punishable when the actual crime is materialized as an accessory to the commission of the principal crime.[829] Solicitation as a separate crime is, thus, 'located in the instigator's contribution to the successfully committed crime'.[830] Moreover, the speaker has 'a definite criminal intent' and its criminalization is justified because the speaker aims for a concrete criminal result.[831] Because of this criminal solicitation is a mode of criminal liability which occurs contiguous with the commission of a principal offence and forms part of accessory liability in the participation of a principal crime committed by another person. In essence, it is similar to aiding and abetting, as the inciter soliciter participates in the concrete commission of a specific crime by another person, the solicitee.[832]

---

[826] M Kremnitzer and K Ghanayim, Incitement*,* Not Sedition*,* in Kretzmer and Hazan (n 322) 160; See also Greenawalt Speech, Crime and the Use of language (n 189); For the purpose of consistency, the word incitement will be sued to refer to public incitement and solicitation to refer to private acts of instigation.

[827] *Ibid*, 160.

[828] *Ibid*.

[829] *Ibid*, 161.

[830] *Ibid*, 161-162.

[831] Greenawalt, Speech, Crime and the Uses of Language (n 189) 111.

[832] See Timmermann, *Incitement in International Law* (Routledge, 2014) 243.

On the other hand, incitement represents a public act communicated to unspecified general audience to resort to unlawful act.[833] Incitement as a public act involves expressions which are addressed to unidentified audience and as such the inciter does not have control over the behavior of the person incited.[834] The criminalization of public incitement unlike criminal solicitation in which the soliciter is an accessory in the criminal act of another, is required by the particular dangerous nature of the crime and the fact that it is associated with an indeterminate number of people.[835] The lack of clarity in the specificity of the criminal act and the difficulty of ascertaining the incited person makes public incitement more difficult to establish than ordinary cases of solicitation. This is due to the fact that in cases involving incitement, establishing the causal chain is very difficult as the inciter does not have control over the behavior of the incited. The inciter does not exactly know how his expression leads to a violation of a protected legal interest or who will actually carry out the act.[836] In case of solicitation, there is more clarity in terms of the specificity of the crime to be committed, but a lesser dangerousness of the crime because of its private nature. On the other hand, in incitements, there is less clarity in terms of the specific crime to be committed (usually a general lawless action) in that there is a risk of 'an overall environment conducive to criminal activity and violence…' to the peaceful existence of the democratic order.[837] Thus, in case of incitements, the lesser degree of specificity of the crime and lack of connection with the audience is offset by the particular dangerousness of the crime.[838]

---

[833] *Ibid*.

[834] A Eser, The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective, in Kretzmer and Hazan (n 322) 124.

[835] *Ibid*.

[836] *Ibid*.

[837] Kremnitzer and Ghanayim (n 826) 164.

[838] *Ibid*.

In many jurisdictions, both inciters and soliciters together with principal offenders are not differentiated. They use a general notion of parties to a crime to criminalize inciters and principal offenders.[839] On the other hand, in other jurisdictions such as Germany Cameroon, Costa Rica, Sweden, Portugal and Switzerland, the criminal law makes a clear distinction between principal offenders and inciters.[840] In particular, German law makes a clear distinction between incitement and solicitation. Timmerman argues that incitement to commit a crime as a public act is proscribed under section 111 of the criminal code of Germany and is different from solicitation which forms part of complicity in a crime.[841] She notes that in German law solicitation and incitement are clearly distinguished by the use of different terms, *Anstiftung* which corresponds to instigation/solicitation, and *Aufstachelung*, which refers public incitement.[842]

Ethiopian law is similar to German law in that, the criminal law makes a clear distinction between instigation and incitement.[843] A distinguished scholar in criminal law of Ethiopia, Philippe Graven argues that incitements are 'independent offences' distinct from solicitations,

---

[839] See in this regards, England: Accessories and Abettors Act 1861, Section 8; France: Arts 121-6, 121-*7 NCR,* Italy: Art 110 *CP;* Latin America (with the exception of Costa Rica): Art 46 *CP,* which is comparable to German law; Denmark: S 23 Danish Penal Code; Austria: S.12 Austrian StGB; and some US States: e.g., S 30 in association with Ss 31,971 California Penal Code; S 20.00 New York Penal Code.

[840] See See, e.g., Cameroon: Art 97(1)(a) *CP;* Costa Rica: Art 46 *CP;* Sweden: Cap. 23 S 4 *BrB;* Portugal: Art 26 *CP;* and Switzerland: Art 24(1) Swiss Penal Code.

[841] Timmermann, Incitement in International Law (n 832) 237-238.

[842] *Ibid*.

[843] See P Graven, *An Introduction to Ethiopian Penal Law* (Oxford University Press, 1965) 105. The Revised Criminal Code in Art 36 refers to 'incitements', instead of solicitation or instigation; On other hand, it refers public incitements as public provocation to a crime, See for example Arts 269, 474.

as they addressed to a collectivity of general audience.[844] Graven, astutely observes that solicitations as private acts involve 'a causal relationship of an individual nature'.[845] Interestingly, Graven seems also to argue that instigation cannot be considered as inchoate crime under Ethiopian law.[846] He contends that the criminalization and punishment of instigation is contingent up on either the commission of the crime or at least an attempted commission of the principal offence.[847] He notes that incitements rather than solicitations are pure inchoate crimes that do not require the commission or attempted commission of the offence.[848] Graven's contention is that the dangerousness of incitements to public order justifies their intervention at a much earlier stage in the commission of a crime.[849] Drawing from the experience of German criminal law, Albin Eser similarly argues that incitements are criminalized because of their particular dangerousness.[850] Graven also provides evidentiary reasons to support the criminalization of public incitements. He argues that the difficulty of proving whether in fact a person has been incited and persuaded to commit a crime other than by making reference to the speech at hand makes it plausible to criminalize incitements.[851]

Moreover, under Ethiopian law solicitation is treated separate from accessories before the fact.[852] Graven notes that the *sine qua non* condition that distinguishes incitements and

---

[844] *Ibid*, 104, the reference to 'incitements' as 'provocation' under Ethiopian law seems to be influenced by its largely civil law orientation where incitements are usually referred to as 'provocations', See Akayesu TC para 557.

[845] Graven (n 843) 104.

[846] *Ibid*, 102.

[847] *Ibid* ; See also Revised Criminal Code Art 36(2).

[848] *Ibid*, 104.

[849] *Ibid*.

[850] See A Eser, Individual Criminal Responsibility, in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, 2002) 124.

[851] Graven (n 843).

[852] *Ibid*, 109.

solicitations from accessory before the fact is the causal link between what the inciter/instigator does and the incitee decides to do in the context of the commission of a crime.[853] Graven argues that in the case of incitement and instigation, the deciding factor for the commission of the crime is the 'preemptory influence' that the instigator exercises on the offender to commit a crime. On the other hand in accessory before the fact refers to situations where a person merely encourages another to commit a crime or helps in some way in which another person has already made up his mind to commit the crime.[854]

Incitement under Ethiopian law does not criminalize all forms of lawless action but is rather confined to a narrow set of serious crimes. As can be seen from the set of crimes listed in the Criminal Code, incitement covers specific types of serious crimes including incitement to genocide and war crimes,[855] incitement to disregard military orders,[856] and public incitement to commit a crime or defense thereof.[857] Although Graven includes other forms of private incitement such as incitement to refuse to pay taxes[858] and solicitation of corrupt practices,[859] they cannot be considered as public acts of incitement. These set of crimes are more suited to be categorized as solicitations which signify a causal relation of an individual nature between the instigator and the principal offender.

Broadly speaking, although both instigation and incitement are proscribed as criminal acts, the distinction is important in identifying the nature of the crime which help to illuminate in the general discussion of delimiting the boundaries of legitimate speech and inciting speech. As the

---

[853] *Ibid*, 100.

[854] *Ibid*; for discussion on the various forms of inchoate complicity in a crime, see C Kutz, The Philosophical Foundations of Complicity, in Deigh and Dolinko (n 1414) 147.

[855] Revised Criminal Code Art 274.

[856] *Ibid*, Art 332 .

[857] *Ibid*, Art 480.

[858] *Ibid*, Art 350.

[859] *Ibid*, Art 427.

subsequent discussions will demonstrate the distinction between private acts of instigation and public incitement has significant implications on freedom of expression. Whilst private acts of solicitation have little relevance for public discourse or the general deliberative function of free expression, public incitements have an indispensable ideological significance since they are intricately linked with the deliberative function of free speech in public discourse, forming an essential part of the right to freedom of expression. Any judicial scrutiny on the limits and scope of political speech has to be informed by this important notional difference.

4.6. Private Incitement to Terrorism Distinguished from Public Incitement to Terrorism

The ATP follows the definition provided under the Criminal Code in making a distinction between solicitation to terrorism and public incitement to terrorism.[860] Although this is not made explicit under the Criminal Code or the ATP, as discussed in the foregoing section, this distinction can be drawn from the various provisions of the criminal law and the ATP. Article 2 (6) of the ATP defines the crime of instigation, or more properly solicitation as 'to induce another person by persuasion, promises, money, gifts, threats or otherwise to commit an act of terrorism even if the incited offence is not attempted'.[861] Article 2 (6) of the ATP read together with Article 4 of the ATP proscribes solicitation or private incitement to commit terrorist acts and other forms of complicity including the planning, preparation, conspiracy and attempt of terrorist acts.[862] It reads:

> Article 4. Planning, Preparation, Conspiracy, Incitement and Attempt of Terrorist Act: Whosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article

---

[860] See ATP Art 2 (6) Cumm Art 4 Cf Article 6; here again one notices that the ATP used the word 'incitement' rather than the more accurate term instigation or solicitation.

[861] ATP Art 2(6) Cumm Art 4.

[862] The ATP uses the word incitement of terrorist acts.

Clearly, although Article 2 (6) and Article 4 of the ATP use the term 'incitement'; the definition reflects a private act of incitement or solicitation rather than a public act of incitement, to which the focus of this research is based. Incitement is a public act and as such the definition and formulation of the law should have reflected this fact. Thus the reference in Article 4 of the ATP should have been formulated as solicitation or inducement rather than incitement, while Article 6 should have been formulated as incitement to terrorism rather than the vague term 'encouragement' of terrorism.

This distinction is consistent with the major premise and the theoretical basis of the thesis in that since private acts of incitement or solicitation have little deliberative significance, they do not implicate significant freedom of expression issues. On the other hand public incitements, involving speech made to a general audience have important ideological significance in that their relevance and intricate link to public discourse requires a closer examination of their limitations.[863] Despite this significant notional difference between private acts of incitement and public incitement to terrorism, recent cases and prosecutorial trends in Ethiopia show that the two are often intermingled. Moreover, although the specific charges related with incitement to terrorism do include public speech acts of incitement, the basis of the charges is often made together with other inchoate crimes such as planning, preparation, conspiracy and attempt to commit terrorist acts. This compounds the difficulty of approaching cases involving incitement to terrorism with a principled application of both free speech doctrine and principles of criminal law as applied to cases involving incitements. Interestingly, as will be discussed in relation to incitement to genocide in the subsequent chapter, this same problem has also led to inconsistency and lack of clarity in the jurisprudence of the ICTR regarding public incitement as independent crime and solicitation to commit genocide as a mode of complicity in the commission of genocide.[864]

---

[863] See Greenawalt, Speech, Crime and the Uses of Language (n 189) 111-112.

[864] See Discussion in Chapter five.

The recent case of *Zone 9 bloggers*, one of the most high profile cases on incitement to terrorism in Ethiopia, demonstrates the difficulty of this lack of clarity in relation to the prosecution of incitement to terrorism cases on one hand and the related notions of solicitation, preparation, conspiracy to commit terrorist acts and possession of terrorist materials.[865] The charges were made based on private acts of speech under Article 4 of the ATP which proscribes the crime of planning, preparation, conspiracy and solicitation of terrorist acts, defined as '[creating] serious risk to the safety or health of the public or section of the public'.[866] The particular charges related to two principal issues. First, the 'security in box' training that the accused individuals took part through which the prosecution argued had helped them to bypass Information Network Security Agency security system protocols.[867] The 'security in box' training related to an online data security protection program which was provided to human rights activists in Kenya. Second, the prosecution based its charges on publications criticizing the government and other writings found in laptops and documentary evidence which linked the accused individuals to Ginbot7 and OLF terrorist groups.[868]

In relation to the question of possession of terrorist-related material, the Federal High Court ruled that possession of terrorist publication does not constitute the crime of planning, preparation, conspiracy and incitement of terrorism.[869] In reaching this conclusion, the Court argued that the mere possession of publications of terrorist groups without additional corroborative evidence cannot be said to violate Article 4 of the ATP.[870] In relation to the charge related to receiving training on security in box, the Court similarly ruled that the fact

---

[865] *የፌደራል ዓቃቢ ህግ v ሶሊያና ሺመልስ ገብረማሪያም እና ሌሎችም (ዞን9 ጦማርያን) የፌደራል* ከፍትኛ ፍርድ ቤት መ/ቁ/155040 (ጥቅምት 5, 2008 ዓ/ም) *Federal Prosecutor v Soliyana Shimeles Gebremariyam and Others*, Federal High Court File No. 155040 (16 October 2015).

[866] *Ibid, 3-5.*

[867] *Ibid*.

[868] *Ibid* 2-5.

[869] *Ibid*, 40.

[870] *Ibid*.

that the accused participated in this training cannot demonstrate that they committed the acts of preparation, planning, conspiring or inciting terrorist acts contrary to Article 3 (2) of the ATP.[871] In this regard, the Court emphasized the importance of context and looking into the purpose in which the training was provided for. It argued that from the evidence gathered, it was clear that the training was given for human rights activists and digital security related only to that particular purpose.[872] Accordingly, it held that this does not violate Article 4 of the ATP.[873] It also held that private communications of the defendants by phone made with different individuals including alleged members of terrorist groups does not in any way show that the accused were involved in inciting or training individuals to terrorism. [874] Accordingly, the Court unanimously decided to reject the case and acquitted the defendants.[875]

The Federal High Court's ruling on the issue of possession of terrorist material and the security inbox training is consistent with the developing comparative law on the issue of possession of terrorist material. For example, one can infer that the UK Terrorism Act 2006 criminalize possession of terrorist publications only when the individual intends to disseminate such information with the purpose of preparing the commission of terrorist acts or inciting terrorism, or in some other way assisting in the commission of terrorist acts.[876] Similarly, under the US

---

[871] *Ibid*, 41.

[872] *Ibid*.

[873] *Ibid*.

[874] *Ibid,* 40-41.

[875] *Ibid*.

[876] See *R v Faraz* (2012) EWCACrim 2820 (21 December 2012); See discussion below in Section, holding that possession or distribution of terrorist material is punishable only, if it was intended or that the accused was reckless at para 49, 53; see also S 2(2) (f) referring that possession of terrorist publication would only be punishable if a person 'has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e)', [which refers to various means of dissemination of terrorist publications]; and S 57 and S 58 Terrorism Act 2000 on the

material support statute, the US Supreme Court has held that for a terrorist associational offence to be upheld, the prosecution must prove that the accused has 'specifically intended' to further the terrorist cause of the group in some way.[877]

In relation to the indictment of the Zone 9 bloggers for incitement to terrorism, the case will be discussed in detail in the last section of the chapter, it suffices to say that their indictment was based on Article 4 (solicitation to terrorism) rather than Article 6 (incitement to terrorism) of the ATP.[878] Although the evidence presented at the Court clearly showed that the legal basis of the prosecution rested on articles written by the Zone 9 bloggers on the internet, they were charged with private incitement to terrorism under Article 4 of the ATP. Other recent prosecutorial trends in Ethiopia also demonstrate that the prosecution of individuals for private incitement to terrorism under Article 4 has been contiguous with or along with the alleged commission of other inchoate crimes. In other words, rather than standing as an independent form of crime, as is the case in case of public incitements, solicitations in general and privet incitement to terrorism in particular, are in most cases associated with other forms of complicity in the commission of a substantive crime. For example in the case of *Habtamu Ayalew et al*, another high profile case in Ethiopia, the defendant was charged with both conspiracy for terrorism and incitement to terrorism.[879] This implicitly seems to demonstrate that private incitements (Article 4), are part of participation in the commission of the crime of

---

proscription of possession of terrorist material principally is based if there is a reasonable suspicion that the possession of the material is intended for the preparation or instigation of an act of terrorism.

[877] Gelber (n 66) 97.

[878] See Discussion in Section 4.9.4.

[879] *የፌደራል ዓቃቢ ህግ ν ዘለለም ወርቅ አገኘሁ እና ሌሎችም*, *Federal prosecutor v Zelalem Workagegnehu and Others*, Federal High Court File No. 158194 (2015) (Case of Habtamu Ayalew, among the ten individuals charged under this charge four of the accused, Habtamu Ayalew and Danie Shibeshi, both members of leadership in (UDJ) and Abraha Desta of Tigray for Democracy and Sovereignty (Arena party) and Yeshiwas Assefa of Blue Party were released, see also , All Africa, Ethiopia Court Acquits Opposition Party Leaders [<http://allafrica.com/stories/201508242391.html>] (accessed 16 February 2016)

terrorism; on the other hand, public incitements to terrorism (Article 6) form distinct and independent crimes associated with speech addressed to a general public.

Nevertheless, it is plausible to conclude that the emerging case law in Ethiopia clearly shows the lack of clear understanding of the conceptual difference between solicitations as private acts (Article 4 ATP) and incitements as public acts (Article 6 of the ATP). This is not only important in understanding the different modes of liability pertaining to solicitation to terrorism and incitement to terrorism but more importantly in terms of its implications on the doctrinal significance of protecting public speech, which has unique attributes as a public good.

4.7. Definition of Public Incitement to Terrorism in Ethiopia

As discussed in the foregoing sections, although Article 6 does not explicitly refer to 'public incitement to terrorism', the reference in the provision to speech which 'is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement' clearly shows that it refers to public incitement to terrorism.[880] If one looks at the international and comparative laws governing the prohibition of incitement to terrorism, it is provided in a more explicit manner. For example the CECPT refers to 'public provocation of terrorism' as distinct from private acts of terrorism.[881] Saul notes that in many States the private incitement of criminal act, including terrorism, was already a criminal act before the adoption of the CECPT.[882] What was new in the advent of incitement to terrorism, as a sui generis crime was, thus, its public nature.

---

[880] ATP Art 6.

[881] See CECPT Art 5.

[882] B Saul, Speaking of Terror: Criminalizing Incitement to Violence (2005) *28 University of New South Wales Journal* 869.

Therefore, what makes incitement to terrorism difficult as a new form of crime in many States is its public aspect and its serious implications on political speech.[883] Article 6 is the most difficult provision of the ATP in terms of its impact on the constitutional protection of freedom of expression.[884] Since the adoption of the ATP in 2009, many members of the political opposition and human rights activists have been prosecuted under this provision.[885] Given its significant impact on political speech and the vitality of the democratic process, it is important to closely look into the legal requirements of incitement to terrorism in Ethiopia in light of both the general theory of freedom of expression, and the framework of international and comparative law.

Article 6 of the ATP which proscribes the prohibition of 'encouragement to terrorism' provides:

> Whosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism stipulated under Article 3 of this Proclamation is punishable with rigorous imprisonment from 10 to 20 years

As can be seen from the above provision, the prohibition of incitement to terrorism under Ethiopian law is phrased in such a broad and vague way that it is difficult to make a distinction between legitimate political speech and those that typically incite terrorist acts. The law covers not only prohibition of 'incitement' *per se* but also expands it to the prohibition of 'encouragement' or 'inducement'. The word 'incitement', as described in the above section, implies a more direct public act of communication to violence.[886] The inclusion of the words encouragement and inducement properly understood signify private acts associated with a material element of a crime and are usually dealt under the category of accessory before the

---

[883] *Ibid*.

[884] See, Article 19, Comment on Anti-Terrorism Proclamation (n 653).

[885] See *Federal Prosecutor v Andualem Arage and Others,* cited in Amnesty International, Dismantling Dissent (n 651), Where 24 individuals were charged with Incitement of Terrorism under Art 6 of the Anti Terrorism Proclamation, see at 13 ff.

[886] Article 19, Comment on Anti Terrorism proclamation (n 653) 9.

fact. The extension of the prohibition to the 'encouragement' or 'inducement' of terrorism further obscures the legitimate limit placed on freedom of expression in the context of the crime of incitement to terrorism.[887]

Unlike the UK Terrorism Act 2006, however, the ATP does not provide for the prohibition of 'apologie' or 'glorification' of terrorism understood as any form of praise or celebration of terrorism.[888] This can be seen as a positive aspect of the ATP in that it complies with the Secretary General's Guidelines on Countering Terrorism and international human rights law.[889] The Secretary General's Guideline expressly rejects the proscription of apologie or glorification of terrorism as it does 'not go so far as to incite or promote the commission of terrorist acts'.[890] Similarly, the UNSRFE, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression have called on States not to 'employ vague terms such as "glorifying" or "promoting" terrorism when restricting expression'.[891] Looked at from these international instruments, the exclusion of the glorification or apologie of terrorism from the proscription of incitement to terrorism can be considered as a positive aspect of the ATP. Nevertheless, the use of the words 'inducement', 'encouragement' or other 'inducement' as opposed to incitement, further complicates the legal definition of incitement to terrorism under Ethiopian Law.

---

[887] *Ibid*.

[888] Cf UK Terrorism Act 20006 S 1.

[889] Report of the Secretary-General, The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. DOC.A/63/337 (herein after Secretary General's Report).

[890] *Ibid*, para 61.

[891] International Mechanisms for Promoting Freedom of Expression, Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (21 December 2005).

Another significant challenge with the definition of incitement to terrorism under the ATP is the fact that it includes not only direct incitement but also 'indirect' encouragement and inducement, further lowering the threshold for establishing the crime of incitement to terrorism.[892] The inclusion of indirect incitement to terrorism, in particular complicates the difficulty of establishing the mens rea, i.e. the intention of the offender to incite terrorism as an essential element of the definition. The term 'indirect' encouragement coupled with a subjective element that the expression be understood by some members of the public as inciting terrorism, risks unintended legitimate political statements to be categorized under incitement to terrorism. In the case of the UK Terrorism Act 2006, this was certainly one of the contentious issues raised during the drafting process. It was argued that instead of establishing an objective requirement of intention or at least recklessness that such expressions would lead to incitement to terrorism, the law might extend to expressions that were communicated negligently.[893] Wary of the dangers of the use of this vague and obscure language in the definition of terrorism, the Secretary General's Report notes that incitement should only be understood as 'direct and public incitement to terrorism'.[894]

4.8. Elements of the Crime of Incitement to Terrorism in Ethiopia in Light of International and Comparative Law

The crime of incitement to terrorism involves five inter-related legal elements.[895] These include defining the mens rea of the speaker, the content of the speech, the context in which the speech was made, and the likelihood and imminence of the harm.[896] These requirements are

---

[892] ATP Art 6.

[893] Cram (n 499) 99.

[894] See Secretary General's Report.

[895] Y Ronen, Incitement to Terrorist Act and International Law (2010) *23 Leiden Journal of International Law* 663-670.

[896] See Saul, Speaking of Terror: Criminalizing Incitement to Violence (2005) *28 University of New South Wales Law Journal* 869.

drawn from the developing law on incitement to terrorism from international and comparative law that clearly indicate that incitement should be defined in a way that identifies those links between intention, risk, act, danger, and imminence and likelihood of the occurrence of the terrorist acts.[897] In order to unpack the intricate and complex set of legal standards used in defining incitement to terrorism and the contours of political speech under Ethiopian law, a detailed discussion on each element of the crime is in order. Although the discussion focuses on Ethiopian law, international and comparative law will be looked into in order to have a fuller understanding of the meaning of incitement to terrorism in the context of political speech.

4.8.1. Mens Rea

Fredrick Lawrence argues that in locating the contours of political speech, it is important not only to look into theories of freedom of expression but also criminal culpability theory.[898] In particular, he notes that looking into the *mens rea* of the speaker helps to unlock important indicators in distinguishing between protected speech and violence conducive speech.[899] Similarly in the case of incitement to terrorism, it is important first to establish the mental state in which the speaker acts before looking the different legal requirements of the law. In any criminal offence, the principle of criminal law requires that responsibility for crimes should be based on a guilty conscience.[900] In virtually all crimes the *mens rea* of the offender requires that the offender has either done the prohibited act intentionally- with the knowledge and understanding about the criminal act he commits or negligence- that under the circumstances a reasonable person would not have done the prohibited act, even if he did it unintentionally.[901]

---

[897] See Council of Europe Conference on Anti-terrorism legislation in Europe since 2001 and its impact on freedom of expression and information (Strasbourg, 25 November 2008).

[898] F Lawrence, Violence-Conducive Speech: Punishable Verbal Assault Or Protected Political Speech, in Kretzmer and Hazan (n 322) 13.

[899] *Ibid*.

[900] See A Ashworth and J Holder, *Principles of Criminal Law* (Oxford University Press, 2013) 193.

[901] Graven (n 843) 153.

If a person commits criminal acts outside of these states of mind, he is deemed to be criminally irresponsible.[902]

Nevertheless, one of the very difficult aspects of the ATP is its lack of clarity in terms of the mental requirements of the crime in order to establish a case for incitement to terrorism. From the operative phrase used in the proclamation, '[w]hosoever publishes or causes the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement... [of terrorist acts]', shows that the law requires intention rather than negligence to establish the mental element of the crime.[903] Moreover, under Ethiopian law unless the law specifically provides that particular offences are punishable by negligence, the presumption is that intention forms integral part of the requirement for any criminal offence.[904] This position can also be supported from the very purpose of the criminalization of incitement to terrorism. The objective of the prohibition of incitement to terrorism emanates from the need to prevent terrorist acts and radical political or religious ideologies that foment this new form of political violence. It is hardly conceivable to think that the law was intended to punish individuals who have no intention or objective to incite terrorism.

Intention as a state of mind of criminal culpability involves two aspects (doing an act with full knowledge of the criminality and consequence of your acts) and a second element of recklessness, also called *dolus eventualis*.[905] Recklessness or *dolus eventualis* as a *mens rea* element of the offender involves where an actor foresees and accepts the illegality of his action and continues his action although he is uncertain as to the outcome and consequence of his

---

[902] *Ibid, 152*.

[903] ATP Art 6.

[904] Revised Criminal Code Art 59 (2), provides that, 'Crimes committed by negligence are liable to punishment only if the law so expressly provides by reason of their nature, gravity or the danger they constitute to society'.

[905] See Graven (n 843) 156.

action.[906] Such is the case for example, where a driver who exceedingly drives far beyond the allowed speed limit; although he has no intention of causing accident and killing someone, if it can be established that he foresaw the consequences of his act and yet persisted with his act, then he fulfills the requirement of *dolus eventualis* or recklessness.[907]

Article 6 of the ATP is a verbatim copy of Section 1(1) of the UK Terrorism Act 2006. Although, the ATP as discussed above does not clearly show the required intent for incitement to terrorism, the UK Terrorism ACT 2006, which served as a model for the proclamation, can be indicative of some of the requirements with regard to the mental element of the crime of incitement to terrorism. The explanatory report of the UK Terrorism Act 2006 shows that at least there should be a minimum requirement of recklessness to establish a case for incitement of terrorism.[908] The suggestion that expressions that were communicated negligently should form integral part of the definition prompted an objection by an overwhelming majority of the parliament to reject the proposal.[909] In the case of the UK, such textual difficulty was resolved by requiring that the incitement to terrorism be established if only it can be shown that the defendant acted either intentionally (with full knowledge that his expression will incite terrorism) or recklessly (he acted with full knowledge of the consequences of his act, but was uncertain about the result).[910] The Explanatory note on Section 1(2) (b) of the UK Terrorism Act 2006 provides that a person commits an offence of incitement or encouragement of terrorism if he:

> (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

---

[906] *Ibid*.

[907] *Ibid*.

[908] See Explanatory Report of Terrorism Act 2006, (30 March 2006) para 30, [<http://www.legislation.gov.uk/ukpga/2006/11/notes/division/4/1>] (accessed 15 September 2016).

[909] See Cram (n 499) 99.

[910] *Ibid*, 97 ff.

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

Drawing from this and the general notion of incitement to terrorism, Scholars argue that to establish the *mens rea* of the offender in the case of incitement to terrorism at least, the mental state of recklessness should be shown.[911] Accordingly under UK Terrorism Act 2006, instead of establishing the initial proposal for an objective requirement of recklessness, the law opted for a subjective recklessness test.[912] In order to establish the crime of incitement or encouragement of terrorism, it suffices to show that 'a speaker knows or is aware of but indifferent to the likelihood that his expression would be understood by others to be an encouragement to terrorism'.[913] Judicial scrutiny of such cases should involve whether the recipients would likely understand the speech to encourage terrorism by putting himself in the mindset of the recipients.[914] Because of this, a person can be charged for the offence of inciting terrorism without the need to show that any member of the public has been in fact incited after hearing the speech.[915] Eventually, the decisive factor to establish the mental element of the crime of incitement to terrorism is thus, to show that a defendant was reckless that the

---

[911] *Ibid*.

[912] *Ibid*.

[913] *Ibid.*

[914] A Jones et al., *Blackstone's Guide to Terrorism Act* 2006 (2006) 17, cited in SA Marchand, An Ambiguous Response to a Real Threat, Criminalizing the Glorification of terrorism in Britain (2010) *42 George Washington International Law Review* 136.

[915] S 1(s) (a-b), (a), provides that 'it is irrelevant for the purposes of subsections (1) to (3): whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and, (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence'.

public would understand his expression, not his recklessness as to whether his expression would result in a terrorist act.'[916] Cram captures this dilemma astutely as follows:

> …the application of "recklessness" to the "conduct" element of the offence (the encouraging)- as opposed to the "results" element (the act of terrorism) means that a broader range of conduct is caught. Thus, it need not be shown that the defendant was reckless as to whether a terrorist act resulted from his speech, only a speaker was reckless as to how others would understand the words.[917]

It should, however be noted, that if the speech involves a direct call to engage in terrorist activities, establishing the *mens rea* is not difficult as it can be directly drawn from the very expression itself. Understanding the *mens rea* is more significant in the case of indirect forms of incitement to terrorism which does not involve a direct call to engage in terrorist activity. In particular in the context of determining the contours of political speech, establishing whether in fact the speaker intended to incite a terrorist act is an important element of establishing the crime of incitement to terrorism.[918] The CECPT clearly indicates that incitement to terrorism should be understood as 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence'.[919] Moreover**,** the Explanatory Report to the CECPT clearly indicates that the offence of incitement must be committed 'intentionally' for criminal liability to apply.[920] It nevertheless, gave the discretion to States to define the exact meaning of 'intentionally' to be interpreted under national law.[921] Similarly, under the Secretary General's Guidelines and, incitement to terrorism is defined as an intentional act.[922]

---

[916] Cram (n 499) 99; See also S Bronitt and J Stellios, Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' (2006) *30 Melbourne Law Review* 923.

[917] *Ibid*, 99.

[918] Ronen (n 895) 669.

[919] CECPT Art 5 (1).

[920] Explanatory Report on CECPT, paras 84-85.

[921] *Ibid.*

[922] See Secretary General's Guideline UN Doc. A/63/337 (28 August 2008) para 61.

The vague nature of the notion of indirect incitement to terrorism has been heavily criticized by the United Nations Office of High Commissioner for Human Rights (OHCHR), the UN Secretary General, the treaty monitoring bodies and special procedures, as well as various rights groups.[923] The potential danger that this very broad scope of indirect incitement to terrorism could have a chilling effect on political speech, have prompted these bodies to call governments to construe incitement to terrorism as 'direct call to engage in terrorist acts…'[924] Thus, the inclusion of implicit and indirect forms of incitement to terrorism can only be justified by a narrow application of the requirement of the mens rea of the speaker where it is established that he in fact intended to incite terrorist acts. This conceptual confusion should in the end be resolved by the requirement of likelihood for the commission of terrorist crimes. Eventually, any prosecution for incitement to terrorism would have to demonstrate that there is some likelihood of violence as a result of the speech.

The experience of the UK shows that in most cases the prosecution of incitement to terrorism cases have been associated with direct calls to engage in terrorist acts. In the case of *R v El-Faisal*, the Court of Appeal upheld a conviction of a Muslim Minister who made taped speeches calling followers to kill enemies of Islam, in particular Americans, Jews and Hindus.[925] He was convicted for the crime of soliciting murder contrary to the Offences Against the Person Act of 1861.[926] While his conviction was not based on the Terrorism Act 2006, the Court's assessment of the meaning of incitement could help in disentangling the requirements for convictions related with incitement cases.

In this particular case there were no particular victims or terrorist acts identified as element of the crime. The prosecution argue that 'the plain and ordinary meaning to be given to the appellant's words was that they were a general encouragement to his listeners to carry out acts

---

[923] See Joint Declaration of Special Rapporteur (n 502).

[924] *Ibid*.

[925] EWCA Crim 456 (24 March 2004) para 14.

[926] *Ibid*, para 14.

of terrorism, the violent overthrow of democracy and the extermination of non-Muslims and other classes of people'.[927] As such, unlike ordinary cases of criminal solicitation, here the case involved a general case of incitement to murder, addressed to unspecified audience. The Court also held that the incitement does not have to be addressed to a particular audience, and could be to anyone in the world.[928] Moreover, the Court held that 'the prosecution does not have to show that anyone was solicited or encouraged to murder as a result of what the defendant said, but the prosecution must prove that that was his intention when he uttered those words...'.[929] Thus, crucial to the determination of guilt was whether the 'defendant intended the words he used by way of solicitation or encouragement-in other words, those to whom he spoke in person or the tape recordings-to murder...'.[930]

In the context of the EU, the ECtHR in cases involving national securities issues with regard to Turkey has distinguished between expression with intent to discuss and explain the motivation and purpose for the use of terrorist violence and expression that promotes terrorist activities.[931] The Court ruled that while the former category of speech is protected the latter is

---

[927] *Ibid,* para 31.

[928] *Ibid,* para. 38.

[929] *Ibid*.

[930] *Ibid.*

[931] *Sürek and Őzdemir v Turkey* Application Nos. 23927/94 and 24277/94 (ECtHR, 8 July 1999), in which the Court ruled that interview with a PKK leader to pursue violent means to achieve his objective was protected as it was newsworthy; Cf *Sürek v Turkey*, Application No. 26682/95 (No. 1) (ECTHR, 8 July 1999) 353; noted that 'use of labels such as "the fascist Turkish army", "the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter"', amounts to 'an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence' and is not protected under Article 10; see at para 62.

not.[932] The Court also has held that expressions which were made in the context of a news report, without the intent to inflame or incite violence is a protected form of expression.[933]

4.8.2. The Content of the Speech

In analyzing whether a particular speech constitutes incitement to terrorism it is also important to look into the contents of the speech.[934] If the speaker communicates a speech which can be considered as a direct call to engage in terrorist acts, it is much easier to establish the crime of incitement to terrorism. It has also been argued that direct calls for the commission of an offence made in the context of a private incitement and criminal conspiracy as well as direct calls to commit immediate violence should not even fall under the discussion of incitement to terrorism and the debate over freedom of political speech.[935] Barendt argues that the proscription of public incitement to terrorism has relevance to the discussion of freedom of expression as it has important implications on political speech.[936] On the other hand a direct call to commit immediate crimes such as 'kill him, or slaughter these infidels' is beyond the discussion of freedom of expression.[937] He argues that these forms of direct calls to commit immediate crimes fall outside of the protection of freedom of expression because they do not have any deliberative significance and contribution to public discourse.[938] Although it can be contentious whether these forms of expressions are not expressions per se but very closely related to an act, most scholars would agree that these kinds of expressions are outside the discussion of freedom of expression as they lack informational content.[939]

---

[932] *Ibid*.

[933] *Ibid*.

[934] E Barendt, Incitement to, and Glorification of Terrorism, in Hare and Weinstein (n 279) 455.

[935] *Ibid*,

[936] *Ibid,* 446.

[937] *Ibid, 447.*

[938] *Ibid*.

[939] *Ibid*; see also Greenawalt, Speech, Crime and the Uses of Language (n 189).

Nevertheless, whether these acts fall outside of the scope of freedom of expression cannot be determined a priori, or ex ante. Because of this, it is important to point out that the more plausible approach should be to consider these forms of expressions as unprotected expressions rather than excluding them from the discussion of freedom of speech altogether.[940] Accordingly, even with a seemingly direct form of incitement to terrorism, all the legal requirements constituting the prohibition of incitement to terrorism have to be considered. A principled protection of political speech demands that there should be judicial scrutiny of the intention of the speaker, the context in which the speech was made as well as the likelihood that it would incite others to commit terrorist acts. In the US constitutional dispensation one learns that direct calls for lawless action such as 'we will take the fucking street later' were held to be constitutionally protected under the First Amendment as it could not pass the constitutional test of freedom of speech.[941] Although a definitive meaning as to what constitutes 'direct incitement' is difficult to articulate, one can draw an indicative definition from the 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind (DCCPSM.[942] According to the DCCPSM, 'direct incitement' requires 'specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion'.[943]

In the case of *Abu Hamza* (Mustafa Kamal Mustafa), a Muslim cleric in the UK was convicted for incitement to murder under the Offences Against the Person Act of 1861.[944] The evidence against him showed that he defended suicide bombings as martyrdom, and argued that '... the

---

[940] Se Healy (n 1044).

[941] *Hess v Indiana*, 414 U.S. 105 (1973).

[942] International Law Commission Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, Yearbook of the International Law Commission (1996, vol. II, Part Two) (DCCPSM) 17-22.

[943] *Ibid*; For a similar conclusion see also Akayesu TC para 557.

[944] *R v Abu Hamza* EWCA Crim 2918 (28 November2006).

only way to hunt the enemies of Islam is by taking your own life'.[945] The Jews, he said, were the biggest enemies of Islam and 'dirty monkeys who have to be fought'.[946] He asserted that the Holocaust and Hitler were sent by God to punish the Jews, and the killing of kuffars (non-believers) and spoke that '[t]here is no liquid that is loved by Allah more than the liquid of blood'.[947] He told his audience, '[t]he first thing to do, number one, to be trained of what you can do. ... [n]umber two, to monitor the targets which are the enemies of Islam. ... Every court is a target, and every brothel is a target. ... You have to bleed the enemy, whether you work alone, you work with a group or you work with your own family'.[948]

He was convicted and sentenced for seven years of imprisonment for the offence of incitement to murder in violation of the UK Offences against the Person Act of 1861. In rendering the judgment, Hughes J noted, '[y]ou used your authority to legitimize anger and to encourage your audience to believe that it gave rise to a duty to murder ... created a real danger to the lives of innocent people in different parts of the world'.[949] Although the defendant appealed his conviction on the applicability of Section 4 of the 1861 Act, arguing that the person inciting and the person incited should be British subjects, the Court of Appeal made it clear that '[t]here is nothing in the wording that suggests that the conspirators, or the person incited, should be British subjects'.[950]

As can be seen from the above cases, the experience of the UK in prosecuting cases of incitement to terrorism has largely relied on the common law and the Offences against the Person Act of 1861 which proscribes incitement to murder. Although the expectation was that the UK Terrorism Act 2006 proscribing the glorification and incitement of terrorism would be

---

[945] See F O'Donoghue, Glorification, Irish Terror and Abu Hamza (2006) *16 Criminal Law and Justice* 4.

[946] *Ibid*.

[947] *Ibid*.

[948] *Ibid*.

[949] *Ibid*.

[950] *R V Abu Hamza* (n 944) para 39.

used vigorously, there has only been very few cases reported so far.[951] Parker notes that the lack of reluctance in the use of the law clearly attests to the difficulty of using the notion of incitement to terrorism and the controversy surrounding the adoption of Terrorism Act 2006.[952]

One of the few cases commonly cited in the UK related to the incitement of terrorism is *R v Saleem*.[953] One of the principal defendants included *Abu Izzadeen* (Trevor Brooks), who was charged with the crime of incitement of terrorism. This makes him the first person to be charged and convicted for encouragement of terrorism in the UK.[954] The charges principally focused on speeches found in DVD that encouraged support for the *Mujahideen* in *Fallujah*, Iraq. In particular, the charges related to a highly emotive speech made during Ramadan, by the defendant at the Regents Park Mosque in November 2004 in which he said:

> fight the (unbelievers) with your money. Jihad with money, jihad with money. The jihad is to give money for weapons, for tanks, for RPGs, for MI6s. The Americans and British only understand one language. It's the language of blood. Because when they come to Baghdad, they only come with the language of murder and killing Muslims.[955]

The Court made it clear that through his speech Abu Izzadeen actually incited others to join the Jihad in Iraq and the insurgency and thereby take up arms against American and British forces

---

[951] E Parker, implementation of the UK Terrorism Act 2006-The Relationship between Counter Terrorism Law, Free Speech and the Muslim Community in the United Kingdom Versus the United States (2007) *21 Emory International Law review* 712.

[952] *Ibid*, 155-156.

[953] *R v Saleem and others*, EWCA Crim 920 (2009).

[954] Parker (n 951) 756, it is also important to note that although Abu Izzadeen's initial arrest was made based on violation of Section 1 of Terrorism Act 2006, he was later charged and convicted for violating S 59 of Terrorism Act 200 which proscribes incitement to terrorism overseas.

[955] Muslim faces prison over terror speeches', The Times (18th April 2008) https://www.thetimes.co.uk/article/muslim-extremist-abu-izzadeen-faces-prison-over-terror-speeches-xm0qckvgc22 (accessed 15 May 2016), Cited in Cram (n 499) 101.

in Iraq.[956] He was found guilty of inciting terrorism and sentenced to four years of imprisonment.[957]

Another case that is usually cited with regard to incitement of terrorism in the UK is the *Hodges* case.[958] In *Hodges*, the defendant Malcolm Hodges was charged for inciting terrorism under Section 1 of the Terrorism Act 2006. The charges related to a letter sent to several addresses in which he praised Osama Bin Laden and terrorist attacks including the 9/11 and the 7/7 London terrorist attacks. In particular, he wrote 'you are right to kill infidels' but are mistaken in targeting planes and the underground, suggesting appropriate targets would be four listed accountancy institutions as they are connected to the 'corrupt and decadent western society and economy of our enemy'.[959] In the letter he also wrote 'striking at these targets will be striking at the infidels where it hurts most…. a parcel or letter bomb would be most effective'.[960]

He pleaded guilty to the offence of encouraging terrorism and was sentenced to two years of imprisonment for inciting the commission of terrorist attacks in violation of Section 1 of Terrorism Act 2006.[961] In 2015, Mr Hodges was indicted again on another charge for the incitement and glorification of terrorism under Section 1 of Terrorism Act 2006. The charges related to letters sent between December 2014 and March 2015, in which Mr Hodges praised

---

[956] *R v Saleem and Others*, The Counter-Terrorism Division of the Crow's Prosecution Service CPS (Cases concluded 2008) https://www.cps.gov.uk/publications/prosecution/ctd_2008.html#a10 (accessed 10 October 2016).

[957] *Ibid*.

[958] *R v Malcolm Hodges*, https://www.cps.gov.uk/publications/prosecution/ctd_2008.html#a08

[959] *R v Malcolm Hodges*, The Counter-Terrorism Division of the Crown Prosecution Service (CPS) - cases concluded in 2008 [<https://www.cps.gov.uk/publications/prosecution/ctd_2008.html#a10](accessed 15 November 2016).

[960] *Ibid*.

[961] *Ibid*.

the acts of Islamic extremists and incited readers to engage in terrorist acts.[962] The speech included information on how a terrorist act can be carried out in UK and suggesting a number of possible targets. The evidence against him also found many copies of 'Inspire' magazine, published by the Islamic State of Iraq and the Levant. On 20 November 2015, he pleaded guilty to the offence of incitement and encouragement of terrorism in violation of Section 1 of the UK Terrorism Act 2006. He was sentenced to three years imprisonment.[963] The trial judge noted that by writing the letters, the accused was reckless as to whether or not a person reading the letter would be encouraged to engage in an act of terrorism.[964]

In most cases, however, incitement to terrorism involves an indirect or implicit form of speech. The vague nature of the meaning of indirect incitement to terrorism makes it difficult to establish the legal boundaries of freedom of expression from direct calls to engage in terrorist acts. This is all the more made complex because of the fact that common law, in particular Anglo-American law only proscribed direct incitement.[965] The inclusion of indirect incitement is a recent addition to the realm of criminal law in Agno-American legal tradition.[966]

---

[962] *R v Malcolm Hodges*, The Counter-Terrorism Division of the Crown Prosecution Service (CPS) - cases concluded in 2015, [<https://www.cps.gov.uk/publications/prosecution/ctd_2015.html#a19>] (accessed 17 November 2016).

[963] *Ibid*.

[964] *Ibid*.

[965] In the US First Amendment freedom of speech the notion of direct incitement is drawn from Judge Learned Hand's opinion in *Masses Publishing Co. v Patten,* 244 F. 535 (S.D.N.Y. 1917), rev'd by 246 F. 24 (2d Cir. 1917), where he emphasized that incitement to lawless action should be interpreted as meaning direct incitement to violate the law, distinguished as any criticism of the law itself. In interpreting incitement he noted that '[t]o counsel or advise a man to an act is to urge upon him either that it is in his interest or his duty to do it'.

[966] DG Barnum, Indirect Incitement and Freedom of Speech in Anglo-American Law (2006) *3 European Human Rights Law Review* 1.

Because of this some scholars have argued that the definition of incitement to terrorism should be confined only to direct incitement to terrorism.[967] Nevertheless, most scholars would also agree that the meaning of direct incitement to the commission of a crime including terrorism should also include implicit forms of incitement.[968] Ronen argues that the weight and influence of much of the speech fomenting terrorism emerges not out of direct orders to commit terrorist acts but in subtle yet powerful ways that nurtures the ideological basis to commit terrorist acts.[969] Because of this, the overriding consensus is that the prohibition of incitement to lawless action and, a fortiori, terrorism, should cover indirect incitement to terrorism. However, instead of using the language of indirect incitement to terrorism, it is more plausible to recognize direct but implicit forms of incitement.[970] This is consistent with the general developing law in relation to similar forms of collective forms of political violence such as incitement to genocide. The jurisprudence of international criminal tribunals has clearly established that incitement to genocide should only relate to direct forms of speech which can include implicit forms of incitement.[971]

The problem, of course is, in determining whether a speech on its face manifests itself as an indirect or more properly implicit form of incitement to terrorism. Drawing from the experience of anti-discrimination laws, Choudry argues that unlike direct incitement where the inciting speech can be inferred from the expression itself, implicit form of incitement includes expressions which have the *effect* of inciting, although this cannot be discerned from the face of the expression itself.[972] Larry Alexander similarly argues that a speaker can convey a message

---

[967] See Saul, Speaking of Terror (n 896); Ronen (n 895).

[968] Barendt, Incitement (n 934) 455.

[969] Ronen (n 895) 663.

[970] Barendt, Incitement (n 934) 455.

[971] See discussion in Chapter 4.

[972] T Choudhury, The Terrorism Act 2006, Discouraging Terrorism, in Hare and Weinstein (n 279) 468 (Emphasis added).

of inciting violence indirectly through the use of irony or similar implicit ways.[973] In such context, one would have to rely on the intent of the speaker, the overall context in which the speech was made as well as the likelihood that it would incite a terrorist act. This is particularly apparent because incitement in some sense also requires audience cooperation.[974]

The more recent case of *R v Faraz* is another significant decision on incitement to terrorism which helps to demonstrate the difficulty of determining the notion of indirect incitement to terrorism.[975] Moreover, the case also involved an explicit challenge of the defendant that his conviction violated is right to freedom of expression under the ECHR.[976] The case was concerned with Ahmed Faraz, who was the manager of the *Maktabah* bookshop in Birmingham. The charge of incitement to terrorism related to the dissemination of terrorist publications, including books, articles, videos and DVDs which principally involved the ideology of militant Islam.[977] The evidence shows that some of the publications included militant Islamic ideologies and encouraging jihad; footage of suicide bombings; video that purports to show the suffering of Muslims around the world; and interviews that defend terrorist attacks by Al-Qaeda.[978]

The Crown Court noted that the question in the particular case was whether the content contained in the publication under consideration 'is likely . . . (a) to be understood by some or all of the persons to whom [the publication] is or may become available . . . as a direct or indirect encouragement . . . to them to the commission . . . of acts of terrorism'.[979] The Crown Court decided that from the evidence gathered the publications do incite terrorism and

---

[973] *Ibid*.

[974] *Ibid*.

[975] See *R v Faraz* (n 876).

[976] *Ibid*, para 5.

[977] *Ibid*, para 8.

[978] *Ibid*.

[979] *Ibid*, para 14.

convicted the accused for the crime of incitement to terrorism for disseminating terrorist publications and sentenced him to three years imprisonment.[980]

Nevertheless, the Appeals Court reversed the decision and made some significant decisions. The appeal principally related to two issues.[981] On the first ground of appeal, the appellant argued that on a proper reading the publications do not incite acts of terrorism.[982] Second it also argued that his right to freedom of expression is unlawfully encroached as the publications encouraged only discussions of religious or political theory.[983] In relation to the first question, the Appeals Court acknowledged that the publications would encourage the commission of terrorist acts in '*Maktabah's* readership some who were more likely than others, particularly those who were already sympathetic to the objectives of militant Islam, to interpret any given text as encouragement'.[984] It noted that consideration of whether some of the readership of the publications would be encouraged to terrorism is appropriate. It also argued that to demonstrate this, adducing evidence that some of the terrorists which were involved in previous terrorist attacks had bought some of the publications sold by *Maktabah* is appropriate to demonstrate that the publications had indeed resulted in terrorist acts, although this was not required by Section 2 (8) of Terrorism Act 2006. However, the Appeals Court rejected the argument of the Crown Court and held that this cannot be attributed to the general conclusion that the publications incited terrorist acts. It noted:

> consideration of the composition of the readership of a publication for the purpose of judging the publications likely effect upon them is a quite separate and different exercise from consideration of evidence that people who had read it were in fact encouraged to commit terrorist offences. The danger here was the elision of the two.[985]

---

[980] *Ibid*, para 3.

[981] *Ibid*, para 43-58.

[982] *Ibid*, para 15.

[983] *Ibid*, para 13.

[984] *Ibid*, para 43

[985] *Ibid*.

The Appeals Court noted the prejudicial nature of the conclusion that because persons who were exposed to the publications had in fact committed terrorist acts that this proved the publications do encourage terrorism. First, it noted that it was not clear from the evidence that the individuals who were in possession of *Maktabah's* materials committed terrorist acts merely because of these publications or other publications and '[i]t was entirely possible that if they had been influenced at all they were influenced by that other material'.[986] Furthermore, it held that individuals who had a jihadi disposition usually acquire information from variety of sources as self-justification, and as such it cannot be held that they were encouraged to commit terrorist acts because of *Maktabah's* materials.[987] It argued that from the evidence gathered, the Court cannot establish the specific dates that the publication was available to the attackers, whether in fact they have read any part of the material and their particular effect on the offenders, and whether any of the previous attackers had any contact with the defendant.[988]

Moreover, the Court emphasized that '[t]he critical question posed was: ''Look at the section 2 tests: is it probable that the publication you are considering would be understood by a significant number of its readers as directly or indirectly encouraging terrorism?"'[989] It held that it could not be established at such.[990] The Appeals Court also rejected the argument of the prosecution which purported to show that out of the terrorist investigations conducted, 26% of them had possession of *Maktabah's* materials and that this showed that the materials encouraged terrorism.[991] The Court held that the figure does not include individuals who would still be disposed to commit to terrorist acts irrespective of the fact that they had *Maktabah's*

---

[986] *Ibid*, para 36.

[987] *Ibid*.

[988] *Ibid*.

[989] *Ibid*, para 47; It's not clear, however, how the court interpreted the requirements of S 2 o Terrorism Act 2006 as requiring 'a significant number of people' should be encouraged, as the law clearly seems to require that only 'some individuals' be encouraged; Cf Terrorism Act S 1 (1) and S 2 (3).

[990] *Ibid*.

[991] *Ibid*.

materials.[992] Moreover, the figure does not also show how many innocent Muslims who had the material and were not influenced by *Maktabah's* materials to commit terrorism. Because of these reasons it held that the '26% figure relied on by the prosecution is virtually nil, and certainly has no substantial probative value'.[993]

With regard to the second ground of the Appeal on the alleged violation of the appellant's right to freedom of expression, the Court argued that 'there is no risk that the article 10 right is unlawfully encroached'.[994] In reaching at this conclusion, however, the Court relied on the reasoning of the Crown Court which clearly noted that individuals cannot be criminalized for the religious and political views they hold but only for encouraging terrorism as defined in the Terrorism Act 2006.[995] The Court particularly focused on the fact that possession or distribution of terrorist material is punishable only, if it was intended or that the accused was reckless.[996] It held that a the fact that a defendant distributed a publication with 'real risk that it would be understood by a significant number of readers as encouraging the unlawful commission of terrorist offences' is not 'entitled to exemption (in consequence of article 10) merely because it expressed political or religious views'.[997] The Appeals Court gave some indication with regard to the standard that should be used to define indirect incitement to terrorism. Relying on the Crown Court's ruling it held that that 'the minimum requirement was that the publication encouraged by "necessary implication".'[998]

The notion of implicit or indirect forms of incitement, should, however be looked carefully as it has the potential to drastically affect robust political speech and public debate. Normative

---

[992] *Ibid*.

[993] *Ibid*.

[994] *Ibid*, para 57.

[995] *Ibid*.

[996] *Ibid*, para 52.

[997] *Ibid*, para 54

[998] *Ibid*, paras 49, 52, 53.

developments in international and comparative law provide that freedom of expression requires not only the right to express comfortable and politically correct expressions but also expressions that 'offend, shock and disturb'.[999] In the context of the contours of political speech and incitement to terrorism, the ECtHR has held that expressions that involve the use of strong and virulent language are protected under Article 10 of the ECHR.[1000]The case of *Incal v Turkey* is particularly illustrative on the importance of looking at the text of the speech in deciding the scope of incitement to lawless action including incitement to terrorism.[1001] The case concerned the conviction of Mr. Ibrahim Incal, who was member of the opposition party, the People's Labour Party, for violating the public incitement law of Turkey. His conviction related to leaflets written in protest to the measure of the government of Turkey, against small-scale illegal trading and the sprawl of squatters' camps around Izmir, a city which has Kurdish inhabitants. In the pamphlet, he particular appealed to 'all democratic patriots, and described the authorities actions as 'terror' and as part of a 'special war' being conducted 'in the country' against 'the Kurdish people'.[1002] It called on citizens to 'oppose' this situation, in particular by means of 'neighbourhood committees'.[1003]

In this case, the ECtHR largely relied on the content of the speech to decide whether the expression amounted to incitement to violence. In deciding that the expression was protected under Article 10 of the ECHR, it noted:

> The Court certainly sees in these phrases appeals to, among others, the population of Kurdish origin, urging them to band together to raise certain political demands. Although the reference to "neighbourhood committees" appears unclear, those appeals cannot, however, if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens.[1004]

---

[999] *Handyside v UK* (n 245) para 56.

[1000] *Gerger v Turkey*, ECHR 46, IHRL 2878 (ECHR) (1999), para 47.

[1001] *Incal v Turkey*, Appl. No. 22678/93, ECHR (1998) para 10.

[1002] *Ibid*.

[1003] *Ibid*.

[1004] *Ibid,* para 50.

The Court's ruling above was made despite the fact that the government had argued that 'it was apparent from the wording of the leaflets … that they were intended to foment an insurrection by one ethnic group against the State authorities'.[1005] The Court conceded that in other circumstances, 'it cannot be ruled out that such a text may conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action which might belie the sincerity of the aim declared by the leaflet's authors, the Court sees no reason to doubt it'.[1006]

The case of *Incal v Turkey* is a good illustration of the importance of text in the judicial scrutiny of incitement to lawless action, including terrorism. Despite the dissenting opinion of some of the judges, the Court's ruling by the majority clearly shows that in the absence of any indication from the context of the speech, the text of the speech becomes a decisive factor in the determination of the limits of political speech and incitement to lawless action. Crucially, however, the court emphasized the special position of political speech, by noting that the 'actions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion'.[1007] It added that the limitations on freedom of expression are much wider in relation to criticisms against government than a private person. In particular, it noted that when the interference with freedom of expression involves a political speech made by an opposition politician, it calls for 'the closest scrutiny'.[1008]

4.8.3. Context

Context plays a crucial role in determining the contours of legitimate political speech from incitement to terrorism. In his defense of freedom of expression and the importance of context

---

[1005] *Ibid,* para 57.

[1006] *Ibid*, para 51.

[1007] *Ibid,* para 54.

[1008] *Ibid,* para 46.

in determining the limits of free speech, John Stuart Mill gives a good illustration.[1009] Mill notes that if a speaker is engaged in conveying an important political message that corn dealers are starvers of the poor and that private property is a robbery and the major cause of the problem, this would rightly fall under the category of protected speech.[1010] But if this speech is made orally in a particular context where you have a hungry mob gathered before the house of a corn dealer, then this is a totally different matter, and such kind of speech can be punishable: Mill notes:

> [E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive investigation to some mischievous act. An opinion that corn dealers are starvers of the poor. . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard.[1011]

Mill's example is very illustrative of the significance of context in determining the contours of freedom of expression and lawless action. In the context of incitement to terrorism, considering the context is in particular significant due to the vague nature of the crime which makes it very difficult to demarcate legitimate political speech from those that typically incite terrorism. Any court deciding a case on freedom of expression should be informed by the context in which the speech was made in conjunction with the other elements of incitement to terrorism.

Considered as a pioneering case in the context of incitement to terrorism in Europe, *Leroy v France* represents another landmark case where the ECtHR ruled on a case involving indirect incitement to terrorism.[1012] *Leroy* concerned the conviction of a cartoonist for incitement to

---

[1009] JS Mill on Liberty (1956) 67-68, cited in .S. Mill, On Liberty (1956) 67-68 Cited in CE Baker, Scope of the First Amendment Freedom of Speech" (1977) *25 University of California Los Angeles Law* 969.

[1010] *Ibid*.

[1011] *Ibid*.

[1012] *Leroy v France*, Application No. 36109/03 (ECtHR, 2 October 2008); the original judgment is in French; the analysis in the case is based on the summary of the case released by the registrar in the news Release (2October 2008) as well as academic commentary on the case.

terrorism for publishing a drawing that purportedly supported the terrorist attacks of 9/11 in the World Trade Centre. The applicant submitted the drawing to Basque weekly newspaper *Ekaitza*, on 11 September 2001 and it was published on 13 September 2001. The drawing included a reproduction of the 9/11 attacks in a celebratory tone with a slogan that replicated the famous Sony advertising brand 'we have all dreamt of it…Hamas did it'. [1013] Mr Denis Leroy and the publishing director were convicted for violating Article 24 section 6 of the French Press Act of 1881 which proscribed incitement to and glorification of terrorism.[1014] The Pau Court of Appeal in France upheld the conviction of the defendant and fined them for 1, 500 Euros each in addition to publishing the judgment at their own expenses.[1015]

Mr. Leroy appealed his case to the ECtHR, and argued that the publication was intended to criticize American imperialism and its decline; and that this forms his fundamental freedom to political speech which is an important element of his right to freedom of expression.[1016] The ECtHR on its part argued that the expression showed just more than a criticism of American imperialism but also 'supported and glorified the latter's violent destruction' and as such amounts to the glorification and incitement of terrorism.[1017] It agreed with the respondent State's contention that the speaker by using the word 'we' was associating himself with terrorists.[1018] The Court concluded that there has not been violation of his right to freedom of expression under Article 10 of the ECHR.[1019]

[1013] *Leroy V France*, Application No. 36109/03, Press Release by the Registrar (2 October 2008) 2.

[1014] See Dirk Voorhoof, Commentary on Leroy v France (2009) [<http://merlin.obs.coe.int/iris/2009/2/article1.en.html>] (accessed 5 June 2016).

[1015] *Ibid*.

[1016] *Ibid*.

[1017] *Leroy v France*, (ECtHR, Press Release) 3.

[1018] *Ibid, 2*.

[1019] *Ibid*, 3.

In this case the court was more reliant on the context of the speech rather than the mere expression, as opposed to its finding in *Incal*.[1020] It argued that the fact that the drawing was published two days after the 9/11 attacks and the fact the publication was made in the Basque region, historically a region associated with serious political violence clearly showed the intention to incite violence.[1021] It also noted that many of the reactions of the readers showed clearly that there was likelihood that the drawing could have stirred up violence and disturbed the public order in the region.[1022] Moreover, the Court took into consideration some other outlier factors such as the fact that the fine imposed (1,500 Euros) was minimal, and the absence of criminal conviction in the form of incarceration. These factors led the ECtHR to conclude that there has not been violation of the applicant's right to freedom of expression.[1023]

4.8.4. Likelihood and Imminence of Harm

Incitement to terrorism similar to incitement to genocide is an *inchoate* crime in that the criminalization and punishment of the crime exists independent of the actual commission of the crime.[1024] In this regard Ronen argues that '[i]ncitement is an inchoate offence–the act advocated need not take place for the speech to be punishable'.[1025] Thus, the *actus reus* of the crime is the very expression itself. This is also consistent with the law on incitement to genocide. The sole criterion used to criminalize incitement to genocide is whether the speaker has intent to directly and publicly incite others to commit genocide.[1026]

[1020] Cf *Incal v Turkey* (n 1001) para 10.

[1021] *Leroy v France*, (ECtHR, Press Release) 3.

[1022] *Ibid*.

[1023] *Ibid*.

[1024] See Ronen (n 895) 667.

[1025] *Ibid*; See also Timmermann, Incitement in International Law (n 832) 230 .

[1026] See *Prosecutor v Akayesu* TC paras 560-562; see also Genocide Convention Art 3(c).

Nevertheless, assessment of whether a speech concerned would cause a potential harm with regard to the likelihood of the commission of terrorist act is indispensable in determining whether there exists incitement to terrorism.[1027] As Ronen notes '[c]learly, …. some risk of resulting harm must be identified, as without potential harm there is no justification for a criminal prohibition'.[1028] State practice in relation to this, as can be demonstrated from the 2006 Report of the SCCTC shows that in most States incitement to terrorism is punishable only on condition that there is a likelihood of the commission of a terrorist act.[1029] This was particularly required by the underlying rationale to protect freedom of expression in the context of the prohibition of incitement to terrorism.[1030]

Drawing from the existing international and comparative law on incitement to terrorism, one can also observe that consideration of the likelihood of the commission of the terrorist act should form an important factor in determining whether a speech constitutes incitement to terrorism. According to the CECPT, direct or indirect incitement to terrorism is only punishable, if the incitement 'causes a *danger* that one or more such offences may be committed'.[1031] The word 'danger' was used to imply that the criminalization and punishment of incitement to terrorism was based on a demonstration of the likelihood of the commission of the terrorist act.[1032] One can also observe a similar stipulation in the International Convention for the Suppression of the Financing of Terrorism.[1033]

[1027] E Brabandere, The Regulation of Incitement to Terrorism in International Law, in L Hennebel and H Tigroudja (eds.) *Balancing Liberty and Security: The Human Rights Pendulum* (Wolf Legal Publishers, 2012) 221-240.

[1028] Ronen (n 895) 667.

[1029] Report of the SCCTC 2006.

[1030] *Ibid*.

[1031] CECPT Art 5(1) Emphasis added.

[1032] Council of Europe Convention on Prevention of Terrorism Art 5 (1), noting that 'public provocation to commit a terrorist offence "means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether

Similarly, the Secretary General's Report provides that incitement to terrorism should be considered as a direct call to engage in terrorism and that the speech '*is directly causally responsible for increasing the actual likelihood of a terrorist act occurring'*.[1034] The report further explicitly required States to ensure that the prosecution of individuals for incitement to terrorism should be contingent on showing that 'it is likely to result in criminal action'.[1035] Eric Brabandere argues that, the Secretary General's Report in contrast to the 'danger' requirement under the CECPT requires that that incitement to terrorism should 'likely result' in the commission of a terrorist act and as such provides a much stricter condition.[1036]

If one looks at the history of the US constitutional experience on free speech, one notes that three standards on incitement have evolved in determining likelihood and imminence in incitement law. The first standard employed by the US Supreme Court in its early free speech cases was the bad tendency test.[1037] According to this test, any speech would be proscribed if it had 'any tendency . . . to produce bad acts, no matter how remote' the likelihood of the commission of the crime.[1038] Through time the US Supreme Court refined its standard on incitement to the clear and present danger doctrine.[1039] According to this doctrine:

> '[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring

---

or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.''

[1033] Convention on the Prevention of Terrorist Financing Art 2(3).

[1034] See Secretary General's Report, para 61.

[1035] *Ibid*.

[1036] Brabandere (n 1027) 231.

[1037] See GR Stone, The Origins of the "Bad Tendency" Test: Free Speech in Wartime (2002) *2002 Supreme Court Review* 427.

[1038] *Masses Publishing Co. v Patten* 244 F. 535 (S.D.N.Y. 1917).

[1039] *Abrams v United States* (n 230).

about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree'.

Over time the Supreme Court adopted its most stringent test of incitement law in *Brandenburg v Ohio*.[1040] In the case of *Brandenburg v Ohio* which governs current First Amendment law on freedom of speech, the US Supreme Court reversed the conviction of a Ku Klux Klan leader who had violated the Ohio criminal syndicalism statute. In overruling the decision, the Supreme Court noted:

> the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[1041]

Brandenburg stands as the most free speech protective standard by far than in any other State.[1042] According to the Brandenburg test, criminal advocacy including incitement to terrorism cannot be punished unless the speech is directed to inciting imminent lawless action and is likely to produce such action.[1043] Although the Brandenburg test is unique to the US constitutional experience, it nevertheless provides an important insight in assessing the contours of political speech in the context of incitement to terrorism in particular, and incitement law in general.

Although the *Brandenburg* test does not clearly indicate the test of likelihood or imminence in the commission of lawless action, drawing from privacy law, Thomas Healy argues that the likelihood of the commission of terrorist acts or lawless action in general should demonstrate the existence of 'probable cause' in the commission of lawless action. Healy argues that the requirement of probable cause requires that criminal advocacy should demonstrate the

---

[1040] *Brandenburg v Ohio* (n 319).

[1041] *Ibid,* para 447.

[1042] Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History (1975) *27 Stanford Law Review* 719, 755.

[1043] *Brandenburg v Ohio* (n 319) para 447.

existence of 'substantial chance' or 'fair probability' that the speech will lead to the commission of the criminal act.[1044] It is interesting to note that a similar conclusion was reached by the Appeals Court of the UK in assessing the notion of likelihood and imminence in the case of *R v Faraz.* The Court held that '…the requirement that it was "likely" that a publication would encourage acts of terrorism meant that it must be "probable" that the publication would have that effect'.[1045]

Similarly, with regard to the question of imminence, the *Brandenburg* test does not also provide a definitive standard on the temporal nexus that should exist between incitement and the commission of a lawless action. Healy argues the temporal nexus between the inciting speech and the commission of the lawless action should be in a matter of days.[1046] Nevertheless, providing a fixed time such as requiring that the inciting speech should have the potential to cause harm within matter of days deprives contextual analysis of particular speech acts confronted by courts. In particular, in collective forms of political violence such as terrorism and genocide, often the organized nature of the violence and the seriousness of the crimes make early intervention to prevent such harms necessary, consistent with the imminence requirement desirable. In this regard *R v Faraz* provides a more flexible normative standard in determining the temporal requirement of imminence in incitement to terrorism cases. In *R V Faraz* the UK Court of Appeals held that *'*what was required was an encouragement to commit such an act within a reasonable time' within the particular context of the purported inciting speech.[1047]

In general, as Justice Holmes argued 'every idea is an incitement'; what determines the contours of legitimate political speech from incitement to terrorism is the likelihood that that

---

[1044] T Healy, Brandenburg in a Time of Terror (2009) *84 Notre Dame Law Review* 60.

[1045] *R v Faraz* (n 876), para 49.

[1046] Healy (n 1044); Healy rues that 'criminal advocacy can be prohibited only if it is directed to, and is likely to, produce unlawful conduct within several days'; see at 7.

[1047] *R v Faraz* (n 876) para 49.

particular speech will in all likelihood lead to the commission of a terrorist act within a reasonable short period of time.[1048] Accordingly, the advocacy of communists for the dictatorship of the proletariat is intended to dismantle the existing democratic order of States and as such can plausibly be considered as advocacy of criminal act. But it is within the terrain of protected core political speech because it does not in all likelihood to lead to the commission of a lawless action, at least in the immediate future. While one can question the plausibility of adopting the *Brandenburg* test in the context of Ethiopia, it is reasonable to conclude that in cases involving incitement to terrorism, courts should be convinced that there is concrete evidence to demonstrate the likelihood of the commission of a terrorist act within a reasonable time.[1049] Incitement to terrorism or related forms of crimes involving criminal advocacy should not be decided in the abstract without examining the likelihood and imminence of the commission of a terrorist act.

4.9. Some Illustrative Cases on Incitement to Terrorism in Ethiopia and the Risks of Chilling Effect on Political Speech

The overtly broad and vague definition of incitement to terrorism in the ATP has had a serious effect on core political speech and the democratic space in Ethiopia.[1050] Although there have been many cases on incitement to terrorism in Ethiopia as has been discussed in the introductory part of this chapter, providing some context of the cases and the legal arguments presented would help to illuminate some of the legal complexity involved in defining the contours of political speech and incitement to terrorism.

[1048] See *Gitlow v New York*, 268 U.S. 652 (1925).

[1049] See Gedion, The Jurisprudential Dearth (n 57) 217; Although it is not clear where his normative conclusion emanates Gedion argues that the standard to be employed for incitement cases in Ethiopia, albeit in cases involving et 'reasonable and demonstrable likelihood for it to cause […]violence in the foreseeable future' See at 217.

[1050] Amnesty International,Dismantling Dissent (n 651), See also P Sekyere and B Asare, An Examination of Ethiopia's Anti-Terrorism Proclamation on Fundamental Human Rights (2016) *12 European Scientific Journal* 351.

4.9.1. *Prosecutor v Eskinder Nega*

The case of Eskinder Nega is one of the most high profile cases on freedom of expression in Ethiopia.[1051] Eskinder was one of the most prominent journalists in Ethiopia who used to contribute political opinions in different journals and magazines in the country regularly. Eskinder began his career in journalism after founding a local newspaper, *Ethiopis* in 1993. After the newspaper was shut down by the government, he later founded three other publications including an English weekly newspaper, and two other Amharic newspapers--*Habesha*, and *Dehai*. All the three publications were also later banned by the government. Eskinder continued his writing regularly in Diaspora-based online platforms including *Ethiomedia and Change,* both of whom are blocked in Ethiopia. Over the last two decades, Eskinder has been arrested in numerous occasions, largely in relation to his writings. Subsequent to the 2005 contested national election, Eskinder and his wife were convicted for the crime of outrages against the Constitution' and 'impairment of the defensive power of the State' and 'incitement to terrorism'.[1052] After spending 17 months in prison both were released on a pardon granted by the government.

The focus of the subsequent discussion relates to Eskinder's arrest and indictment on 14 September 2011. Eskinder was charged with attempt to commit terrorist acts in violation of Article 3 paragraphs 1-4 of the ATP; the crime of planning, preparation, conspiracy, incitement to terrorism (Article 4) of the ATP; incitement to terrorism in violation (Article 6) of the ATP; and the crime of treason and espionage, in violation of Articles 248 and 252 of the Revised Criminal Code.[1053] Eskinder was found guilty of the crimes and convicted to 18 years in prison. Many human rights organisations and the UN were critical of the decision. Most observers

---

[1051] *Federal Prosecutor V Eskinder Nega*, Criminal File No. 00180/04 (2011).

[1052] See Dismantling Dissent (n 651).

[1053] *Ibid*.

argue that his conviction was the result of his critical articles against the government.[1054] In particular, one of the principal grounds for conviction for the crime of incitement to terrorism has been widely reported because of its serious implications on freedom of expression.[1055] The subsequent discussion focuses on this last aspect of his conviction for the crime of incitement to terrorism.

Eskinder's conviction for incitement to terrorism was largely based on articles criticizing the government's political repression, and the dangers that this could have in the political process in Ethiopia. In particular, prior to his arrest on 14 September 2011, Eskinder published articles on the Arab Spring and the implications that this could have in the Ethiopian political context. However, he continuously reiterated nonviolence and the importance of peaceful struggle in his articles.[1056] The evidence presented at the court showed that the Federal High Court largely relied on the articles that Eskinder published at different times.[1057] On 13 July 2012, he was found guilty and sentenced to 18 years in prison.[1058]

The Federal High Court Judge Endeshaw Adane in ruling his conviction for incitement to terrorism and violence noted that Eskinder was abusing his right to freedom of expression and threatening national security of the State. As Eskinder's case shows, the reasons for his conviction were the fact that:

> Under the guise of freedom of speech and gathering, the suspect attempted to incite violence and overthrow the constitutional order. Judge Adane accused Mr. Nega of writing "articles that incited the public to bring the North African and Arab uprisings to Ethiopia" and indicated that evidence against the defendants included speeches, articles, e-mails, phone calls and social media messages. He warned that "[f]reedom of

---

[1054] *Ibid*.

[1055] *Ibid*.

[1056] *Ibid*.

[1057] *Ibid*; by hard evidence I mean evidence apart from the writings that could have implicated him in the terrorism charges.

[1058] *Ibid*, para 19.

> speech can be limited when it is used to undermine security and not used for the public interest" and concluded that "[t]here is no way other than democratic elections to attain power in the country, and what [the defendants] said is clearly against the Constitution".[1059]

The decision of the Federal High Court can be criticized from different angles. As discussed in the foregoing discussions an assessment of whether there exists incitement to terrorism should look not only the expression at face value, but also the context, the intention of the speaker, the likelihood and imminence of the harm, and whether the incitement relates to the advocacy of the commission of a terrorist act. No where does the Court try to analyze whether these conditions are met in convicting the defendant for the crime of incitement of terrorism. Comparative legislative developments and judicial opinions clearly indicate that these factors are significant in determining the contours of political speech from those that typically incite terrorist acts.

Moreover, the international jurisprudence on incitement shows that denouncing violence and dissociating oneself from any encouragement to lawless action including terrorism should be looked into in analyzing whether speech constitutes a political commentary or incitement.[1060] Eskinder made it clear that he denounces any calls for violence.[1061] Eskinder has repeatedly emphasized on peaceful political struggle for democratic transition. Eskinder had reiterated that 'Ethiopia needs change in a peaceful democratic manner'.[1062] His defense also showed a 70-minute video recording of a speech he made at a CUD public meeting, in which he reiterated

---

[1059] *Ibid*, para 17.

[1060] See *The Prosecutor v Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze Case* No.ICTR-99-52-T (3 December 2003) (hereinafter *Nahimana TC*) para 1024, noting that in case where a speech inciting genocide is made by the media, journalists have a responsibility to distance themselves from the contents of the message.

[1061] See See Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012 No. 62/2012 (Ethiopia) Communication addressed to the Government on 27 July 2012 (21 Nov 2012).

[1062] *Ibid*.

that any protests planned against government should be 'peaceful and legal'.[1063] The defence was thus, able to refute the prosecution's selective use of the evidence of Eskinder's speech and provide the broader context in which the speech was made. Here again the Court failed to look into this important factor in dealing with Eskinder's case.

Moreover, the conflation of the notion of incitement as a public act and similar inchoate crimes such as conspiracy, solicitation and attempt to commit terrorist acts has not been articulated by the Court. As argued in this chapter, the conflation of these notions has seriously undermined the judicial analysis of the notion of incitement as a distinct crime which has particular implications on political speech and freedom of expression more broadly. Eskinder's speech looked from both the principles of freedom of expression and criminal law, falls under protected core political speech. As consistently argued in the thesis, a democracy-based theory which places a distinctive importance to political speech requires that courts should have the most heightened scrutiny when dealing with limitations on freedom of political speech than any other form of speech. Moreover, both free speech doctrine and comparative developments in incitement law provide a high bar in scrutinizing incitement to terrorism as it has the potential to drastically limit core political speech. Because of this international and comparative law clearly provides that incitement to terrorism should be construed as a 'direct call to engage in terrorism'.[1064] Therefore, measured against both free speech doctrine, and international and comparative law on incitement to terrorism, there is no indication that Eskinder's speech can be considered as incitement to terrorism.

This is consistent with an international finding on Eskinder's case which decided that his conviction violated his right to freedom of expression. ON December 2012, The UN Working Group on Arbitrary Detentions after studying Eskinder's case concluded that:

[1063] *Ibid*.

[1064] Report of the Secretary-General, The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. DOC.A/63/337 (hereinafter Secretary General's Report) paras 61, 62.; See also Tsesis (n 760) 18; Ronen (n 895) 664.

> [t]he deprivation of liberty of Eskinder Nega is arbitrary in violation of articles 9, 10 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights,[.....] The Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Nega and adequate reparation to him.[1065]

The government of Ethiopia has not positively responded to such decision and he still remains in prison at large.[1066] Eskinder received the PEN/Barbara Goldsmith Freedom to Write Award in 2012 and Press Freedom Hero for IFEX in 2017 as acknowledgment of his contribution in the struggle for freedom of expression in Ethiopia.[1067]

4.9.2. *Prosecutor v Temesgen Desalegn*

The case of Temesgen Desalegn, who is also another well-known journalist in Ethiopia, offers another important case that can show the difficulties associated with incitement law and the boundaries of political speech.[1068] Although Temesgen's case is not associated with incitement of terrorism, his conviction for incitement to violence can give some important insights on the law of incitement in Ethiopia and the contours of political speech, particularly because there were interesting debates that informed the decision of the Federal High Court in the case with regard to freedom of expression. What makes Temsgen's case special is the fact that all the basis of his charge was associated only with his writings. Temesgen was convicted of three

---

[1065] UN Finding on Eskinder para 45.

[1066] See Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session, 14–23 November 2012 No. 62/2012 (Ethiopia) Communication addressed to the Government on 27 July 2012 (21 Nov 2012).

[1067] PEN/Barbara Goldsmith Freedom to Write Award https://pen.org/penbarbara-goldsmith-freedom-to-write-award/ (accessed 20 September 2015); Press Freedom Hero IFEX (28 April 2017) https://www.ifex.org/international/2017/04/28/eskinder-nega-wpfd/ (accessed 20 May 2017).

[1068] የፌደራል አቃቢ ህግ ν ተመስገን ደሳለኝ የየፌደራል ከፍተኛ ፍርድ ቤት ኮ/መ/ቁ 123875 (ጥቅምት 3, 2007 ዓ/ም) (*Federal Prosecutor v Temsgen Desalegn*, Federal High Court File No. 123875 (13 October 2014) (Subsequent discussion will focus on this decision)

offences against the State which include inciting the public to violence to overthrow the constitutional order (Article 43 (1) (a) and Article 257 (a)); Defamation of the State through false accusations (Article 43 1 (a) and Article 244); and spreading false rumors (Article 43 (1) (a) and Article 486 (a) of the Criminal Code.[1069] He was convicted for violating the aforementioned crimes and sentenced to three years imprisonment.[1070] For the purpose of this chapter, the focus will be the basis of the first charge on incitement to violence and the arguments presented at court that help to highlight some of the sticking points in defining the contours of political speech and incitement law.

Temesgen's conviction related to two articles that he wrote in *Feteh* magazine, a local newspaper which he founded and in which he regularly contributes.[1071] The first ground of his conviction was based on an article written in volume 04 No 149 of *Feteh* Magazine in 2011.[1072] In the article titled '*Mot Yemayferu Wetatoch*' loosely translated as 'a Youth that does not Fear Death' he emphasized on the special opportunities of being young as a force for change. In particular, he noted that 'being young meant revolution, change and bravery'.[1073] His article reflected on how the young people were a force for change in toppling Emperor Haile Selassie regime in the 1970s. He also highlighted on how 'the current generation does not fear death which was demonstrated in the [2005] national election and the subsequent political events that clearly showed a golden era in Ethiopian politics'.[1074] He emphasized that 'these events showed that being young meant revolution'.[1075] He further argued that 'the current Arab Spring

---

[1069] *Ibid*, 1.

[1070] *የፌደራል አቃቢ ህግ v ተመስገን ደሳለኝየየፌደራል* ከፍተኛ ፍርድ ቤት ክ/መ/ቁ 123875 የቅጣት ውሳኔ (ጥቅምት 17, 2007 ዓ/ም) (*Federal Prosecutor v Temsgen Desalegn*, Federal High Court File No. 123875, Judgment on Sentencing (27 October 2014) 3.

[1071] *Federal Prosecutor v Temesgen Desalegn* (n 1068) 1 ; *Feteh* (literally translated means Justice)

[1072] *Ibid*.

[1073] *Ibid.*

[1074] *Ibid*.

[1075] *Ibid*.

in North Africa and other Arab countries shows that being young meant change and part of a historical change'.[1076] He also argued that the current regime was repressive.[1077]

The second basis of the charge related to an article written by Temesgen on issue 5 no. 177 of '*Feteh*' magazine in 2012, titled 'Yefera Yimeles', (which means 'Let the Fearful Return').[1078] In the article, the defendant noted the bravery of Ethiopians against Italian invasion and their victory in the Battle of Adwa.[1079] The defendant also noted that 'if the youth stands up for its rights no force can stop it and that the current political context in Ethiopia forces you to be angry rather than being fearful'.[1080] By doing so the defendant after discussing the social, economic, and political problems in the country warned that 'if the Ethiopian people rise up no government security force can stop it'.[1081] Echoing an Ethiopian saying, he argued that 'there are no nine deaths but only one'.[1082] He further contended that 'the downfall of Hosni Mubarak's regime in Egypt is a good example that the Ethiopian people can learn from'.[1083] The prosecutor argued that through these writings the accused incited the public to violence and to dismantle the constitutional order of the State.[1084]

The defence on its part presented a number of arguments to support the view that Temsgen's speech forms core political speech protected under Article 29 of the Constitution and international human rights law.[1085] What is most remarkable about the arguments presented by

---

[1076] *Ibid.*

[1077] *Ibid.*

[1078] *Ibid, 2.*

[1079] *Ibid.*

[1080] *Ibid.*

[1081] *Ibid.*

[1082] *Ibid.*

[1083] *Ibid*.

[1084] *Ibid.*

[1085] *Ibid, 7.*

the defence is that it echoed the Meiklejohnian notion of democratic self-government and free speech by emphasizing that 'the core function of freedom of expression is to criticize government'.[1086] The defence further argued that according to Article 29 (6) of the Constitution content-based limitations are unconstitutional and as such the crimes of incitement to which the accused charged is unconstitutional.[1087] The defence further noted that only time, place and manner restrictions are allowed under the constitution.[1088] The basis of the argument was grounded on Article 29 (6) of the Constitution which provides:

> These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed

The argument of the defence is, of course, an erroneous interpretation of Article 29 (6). If one gives a careful consideration to the language of Article 29 (6) it is clear that content-based limitations can be imposed on freedom of expression. The words 'guided by the principle' clearly indicate that the rule should be that content-based limitations can be imposed in exceptional circumstances. Accordingly, the subsequent paragraph of Article 29 (6) shows that content-based limitations can indeed be imposed in order to protect the well-being of the youth, the honour and reputation of individuals, and the public expression of opinion intended to injure human dignity.[1089] It also prohibits any propaganda for war. However, the first paragraph of Article 29 (6) can have a significant interpretive role by demonstrating that any content-based limitations should have a closer scrutiny and thereby providing a presumption of unconstitutionality for content-based limitations.[1090]

Particular to note is the argument of the defence with regard to the imminence requirement in cases involving incitement. It argued that the government has the right to prevent any potential

---

[1086] *Ibid.*

[1087] *Ibid.*

[1088] *Ibid.*

[1089] Constitution of Ethiopia Art 29 (6).

[1090] See Constitution of Ethiopia Art 26.

harm resulting from the speech, but argued that in the particular case at hand there is no 'imminent and irreparable' harm manifested.[1091] The defence also argued that the defendant through his statements, 'a Youth that does not Fear Death' and that 'Revolution is Good' merely expressed his opinion and can not constitute incitement to violence.[1092] The defence further invoked the autonomy justification of freedom of expression by noting that the public knows what is right and wrong in public discourse and as such, it cannot be concluded that the speech at hand will lead to violence.[1093] Moreover, the defence argued that Temesgen's speech made a clear distinction between a call for 'change' and 'violence', implicitly noting that while the former is protected the latter is not.[1094] It further argued that the reference to the Arab Spring in his speech does not in any way indicate incitement to any concrete violent act. As such his speech was a call for the peaceful transfer of power through the constitutional process which is an integral part of the right to freedom of political speech.[1095]

Furthermore, the defence argued that his speech that the public should protest because the regime is repressive does not constitute incitement to violence and overthrow the constitutional order but rather the right to peaceful protest which is protected by the constitution.[1096] The defence also implicitly raised the importance of context in delimiting the contours of political speech by noting that the defendant's speech that 'the youth does not fear anyone and if they say no, nothing can stop them' cannot be construed as incitement to violence since it was made in the context of discussing the socio-political problems in the country.[1097] Because of the aforementioned reasons, the defence argued that the defendant's

---

[1091] *Prosecutor v Temesgen Desalegn* (n 1068) 9.

[1092] *Ibid.*

[1093] *Ibid.*

[1094] *Ibid*

[1095] *Ibid*

[1096] *Ibid.*

[1097] *Ibid.*

speech forms his right to freedom of expression which is protected under Article 29 of the constitution and international human rights instruments.[1098]

The Federal High Court ruled that the defendant through his articles titled 'A Youth that does not Fear Death' and 'Let the Fearful Return' has clearly stated that being young means revolution and revolution meant change.[1099] It noted further that through his writings, the defendant has incited the public by calling up the public that the current situation and government can be changed by overthrowing the government.[1100] The Court stated that by doing so, the defendant created a feeling on the part of the youth to be incited by making reference to how Emperor Haile Selassie's regime was toppled.[1101] The Court also noted that the reference in the defendant's speech to the Arab Spring was meant to show how it can be used as a good example for the people of Ethiopia and there by inciting young people to violence.[1102]

Of particular significance is the Court's ruling on the question of imminence. The Court erroneously responded to this crucial aspect of the defence by noting that the argument that the harm should be imminent can only be sustained if the legal basis of the argument was based on Article 27 (5) or Article 93 of the constitution.[1103] The Court made an erroneous interpretation of the constitution to disregard this crucial aspect of the case. Article 27 (5) provides for the limitation grounds of the right to freedom of religion. There is no legal or theoretical basis to assume a special treatment of this right and Article 29 which provides for the right to freedom of expression. On the other hand, Article 93 provides the legal grounds for

---

[1098] *Ibid.*

[1099] *Ibid, 11-12.*

[1100] *Ibid.*

[1101] *Ibid.*

[1102] *Ibid.*

[1103] *Ibid.*

the declaration of a state of emergency.[1104] Although the legal scrutiny for the declaration of a state of emergency is cumbersome, it does not in any way justify the exclusion for considering the imminence of the resulting harm in incitement cases. Both international and comparative law on incitement law clearly indicates the importance of considering the imminence and likelihood of the resulting harm in determining the boundaries of incitement law vis-à-vis political speech.[1105] Without considering this crucial element of the crime of incitement, there is a significant risk that many forms of legitimate political speech which are vital to robust public debate are included under broad and vague incitement laws.

In brief, measured against the constitutional principle of freedom of expression and international and comparative law on incitement law, Temesgen's speech can hardly be said to fulfil the legal requirements for incitement to lawless action. It is clear that his statements include strong criticism of government policy and even a call for the need of change in government. But he did not expressly call particular acts of violence or regime change in an unconstitutional manner. There is nothing in his articles to demonstrate that the statements would likely trigger violence let alone the overthrow of the government by violence. His statements can best be described as political hyperbole, and strong advocacy for constitutional change of government, which forms core protected political speech.

4.9.3. *Prosecutor V Zone 9 Bloggers*

The most recent and significant decision in relation to freedom of expression and incitement of terrorism is the case of the *Zone 9* bloggers.[1106] In this case, the Federal High Court made

---

[1104] The Constitution of Ethiopia Art 93; notable in terms of its constitutional significance is that it holds that the state of emergency cannot among others suspend, the prohibition of torture and inhuman treatment (Art 18), the right to equality (Art 25) and rights of nations and nationalities to self determination (Art 39).

[1105] See discussion in Section 4.8.5.

[1106] *Federal Prosecutor v Soliyana Shimeles Gebremariyam and Others* (n 865).

significant rulings which could have important implications on freedom of expression. Contrary to the previous cases of Eskinder Nega's and Temesgen Desalegn, the Federal High Court made interesting rulings that could have important implications for the protection of political speech in Ethiopia. The particular indictment of the Zone 9 bloggers shows that they were charged with violating the provisions of Article 4 and Article 3 (2) of the ATP by trying to incite a revolution similar to the Arab Spring in Ethiopia.[1107] What is interesting to note with regard to the decision of the Federal High Court is the fact that it was made against the prosecution's evidence which showed highly critical articles against the government of Ethiopia. In the article titled 'Slow Change or Revolution' they critiqued and analyzed on the pace of democratic reform in the country and argued that slow change includes many issues and as such takes time while revolution takes short time and can be triggered by few individuals who are committed to change.[1108]

The prosecution's evidence shows that in another article titled 'Can EPRDF Give up Power by Election?', the article argued that 'the members of the EPRDF would not leave power by election for fear of imprisonment as most of the members are corrupt and incapable'; and as they only have political loyalty'.[1109] Moreover, the prosecution argued that in an article titled 'the 1974 Revolution and the Role of Civil Society Organisations' the bloggers were inciting terrorist acts.[1110] In particular, the prosecution argued that that the bloggers were inciting terrorism by appealing to the public how civil society organizations including university students, teachers and employees organisations had a significant role in toppling previous regimes and that EPRDF will not easily give up power unless a similar revolution happens.[1111]

[1107] *Ibid*, 1-2.

[1108] *Ibid*.

[1109] *Ibid, 14.*

[1110] *Ibid*.

[1111] *Ibid*

The Federal High Court decided that all the above articles are protected forms of political speech which are guaranteed under the Constitution.[1112] In rejecting the prosecution's case, the Court ruled that the bloggers by writing critical articles against government were merely exercising their constitutional right to freedom of expression. The Court argued that political commentaries made in the different articles written by the bloggers do not demonstrate that they have violated the provisions of Article 3 (2) and Article 4 of the ATP on incitement to terrorism.[1113] Accordingly, it acquitted the defendants and ruled that the evidence presented does not show that their writings constitute incitement to terrorism. One can perhaps contemplate that the court's rather rigorous scrutiny for the requirements of the incitement of terrorism under Article 4 may have been required by the very nature of private incitements which require some more concrete criminal design than public incitements.[1114] Whilst it was noted in the preceding discussions that incitement does not require the commission or the attempted commission of the terrorist act, a crime of solicitation of terrorism would in most cases happen together with or contiguous with, or at least the attempted commission of the substantive offence. Moreover, the contiguous nature of the crime of solicitation of terrorism with planning, preparation, conspiracy and attempted commission of terrorist acts, makes establishing the elements of the crime merely relying on the speech very difficult. In general the Federal High Court's ruling is a significant precedent in demarcating the boundaries of political speech and incitement to the fledgling case law on freedom of expression in Ethiopia. It made it clear that despite the strong language criticizing government policy, if there is no direct call to commit terrorist acts, a speech cannot constitute incitement to terrorism.

[1112] *Ibid, 53.*

[1113] *Ibid, 44.*

[1114] *Ibid.*

4.9.4. Other Recent Decisions and Prosecutorial Trends

Two significant cases that arose subsequent to the political protests that began in the Oromiya region of Ethiopia in 2015 are the case of *Yonatan Tesfaye* and *Bekele Gerba and Others*.[1115] Yonatan formerly served as Spokesman for the opposition *Semayawi* party (Blue Party); while Bekele Gerba served as Deputy Chairman of the Oromo Federalist Party. Yonatan and Bekele as well as other senior leaders of the Oromo Federalist Congress party were charged for inciting terrorism in relation to the political protests.

Yonatan Tesfaye's case is unique in that his indictment and conviction for inciting terrorism was exclusively based on his Facebook posts. The charge in which Yonatan was indicted and convicted shows among others the following statements:

> road blockage, interrupting government works, and burning and destroying any material that is used as a means of oppression are means's of peaceful struggle; No property is worthier than human lives, lest it be destroyed, you can substitute a material with another one but, human life is irreplaceable!; making killer Mafia tyrants to bow down, It is only possible to save human lives by making killers and their arms destroyed, Let victory be for the People...everything is essential only if you are alive, everything is meaningless if your existence is endangered!; That is why I am telling you to destroy EPRDF's oppressive materials! I call you my generation, after we won and we are able to get our robbed money back, everything will be calm and stable; Now is the time to made our killers lame and history, Let victory for the People and make the message public... EPRDF is like catching the cloud! No more deception! Lest the authoritarian regime crumbled! We need a Democratic System! Let's establish a government of the people! Let's establish a transitional government! No more deception![1116] (sic)

The prosecution argued that through the above statements, the accused incited the public to terrorism and violence in violation of Article 4 of the ATP which proscribes planning, preparing, conspiring, inciting and attempting to commit terrorist acts.[1117] The Federal High Court convicted the accused for inciting terrorism and sentenced him to six years in prison.[1118]

[1115] *Federal Prosecutor v Yonatan Tesfaye*, Federal Public Prosecutor File No. 414/08 (2016) (Translated by the Ethiopian Human Rights Project, 2017).

[1116] *Ibid*.

[1117] *Ibid*.

Compared to the other cases, Yonatan's case can arguably resembles more direct form of incitement to terrorism. Although he spoke about his frustration in the context of the broader political problems and the democratic space in the country, arguably one might say that his statements amount to a direct call for violence. The statements also show that he urged the public by arguing that 'when the law is a means of oppression, violence will be the law of conscience' there by clearly justifying the use of violence.[1119] This is particularly compounded by the fact that while these statements were being posted in face book, there was a political protest in the country, albeit largely a peaceful one, which also involved violent ones. Nevertheless, the issue that would be raised in Yonatan's case is whether on objective analysis, his face book posts could have incited violence. In a country in which only 11.6 percent of the population has internet access; and Facebook users are merely 3. 5 million out of a population of 100 million people, one can question the likelihood of the statements inciting violence.[1120] No doubt that the speech forms a public speech addressed to a general audience but to what extent the facebook posts would create the likelihood of violence and risk of danger is not clear.

In the case of *Bekele Gerba et* al, the prosecution's charge shows that that the defendants were accused of inciting the public to violence by disseminating information that the integrated Addis Ababa Master Plan was aimed at destroying the culture and language of the Oromo people, and displacing them from their land.[1121] The prosecution also argued that by organizing

---

[1118] *Ibid*.

[1119] See BBC News, Ethiopian Politician Yonatan Tesfaye Guilty of Terror Charge (16 May 20178) {<http://www.bbc.com/news/world-africa-39933874>].

[1120] See Internet Word Stats [<http://www.internetworldstats.com/stats1.htm>] (accessed 13 November October 2016).

[1121] *የፌደራል አቃቢ ህግ v ጉርሜሳ አያኖ፡ በቀለ ገርባ እና ሌሎችም* የ ፌ/0/ ህግ/ ም/ቁ 452/08 (2008 ዓ/ም) (*Federal Prosecutor v Gurmesa Ayano, Bekelle gerba and Others* , Federal Public Prosecutor File No. 452/08

under the cover of the Oromo Federalist Congress party they were planning to implement the OLF's agenda of overthrowing the government by force.[1122] The prosecution further argued that by inciting the public to violence, they are responsible for the death of dozens of individuals, and injury to more than 122 people as well as the destruction property worth 124 million Birr.[1123] The overall context of the prosecution's case rested on a joint criminal activity involving many individuals, and not isolated cases of speech. Accordingly, the more appropriate charge should have been private act of incitement together with conspiracy and other forms of inchoate crimes rather than public incitement of terrorism.

Although the final outcome of this case is not decided, the statements in which the opposition were indicted cannot be said to fulfill the legal requirements of incitement to terrorism. Clearly, the resistance and opposition to the Integrated Addis Ababa Master Plan was a lawful right of protest expressed by the individuals on behalf of the Oromo people living in the surroundings of Addis Ababa. From the evidence presented, there is no indication that the accused individuals intended to incite any lawless action or violence. Calls for a lawful action and lawful resistance and pressure on government should be clearly distinguished from calls for a violent act such as the destruction of life or property. Accordingly, the case clearly falls under protected core political speech which purports to show the marginalization of the Oromo people in Ethiopian politics and the demands for consultation with local communities in the development endeavors of the State.

In general almost all the decisions, except the case of the *Zone 9 Bloggers*, Ethiopian courts made no reference to the significance of considering important benchmarks for delimiting the contours of political speech and incitement law. As discussed in the foregoing sections, international and comparative law on incitement, in particular, incitement to terrorism is

---

(2015) ; this case is still pending and the final outcome has not been decided; The analysis is based on the evidence and charges brought by the prosecutor for incitement to terrorism.

[1122] *Ibid*.

[1123] *Ibid*.

carefully crafted by giving due consideration not only to the content of the speech but also to the intention of the speaker, the context in which the speech was made, the likelihood and imminence of the harm and the particular form of lawless action prohibited. In particular, international and comparative law on incitement to terrorism clearly establishes the distinctive place of political speech and limits on this form of speech should have the highest scrutiny.[1124] Measured against these requirements, the different political statements made by the accused individuals cannot be construed as incitement to terrorism or lawless action more broadly.

Conclusion

The advent of the crime of incitement to terrorism subsequent to the adoption of Security Council Resolution 1624 has significantly increased the proscription of laws that criminalize incitement and glorification of terrorism in domestic legal orders. The migration of these anti-constitutional norms had significant effect in the state of freedom of expression in the world in general and in emerging and transitional democracies such Ethiopia, in particular. This has been compounded by the rapid migration of these anti-constitutional norms across domestic systems. States including Ethiopia have taken the UK Terrorism ACT 2006 as a model for criminalizing incitement to terrorism without seriously scrutinizing its implications on political speech.

In particular, in the context of Ethiopia, the ATP has been extensively used to prosecute many individuals for incitement to terrorism which has suffocated the political space and drastically affected the freedom of political speech which forms a vital aspect of freedom of expression. One of the key challenges in determining the contours of legitimate political speech and those that typically incite terrorist acts is the fact that it is *inchoate* crime. The determination of guilt is made without the need to show the actual resulting harm. This places the freedom of political speech in precarious position.

[1124] See discussion in Section 4.8 above.

The crime of incitement to terrorism is also further complicated by the highly discursive and vague nature of the crime. It negates fundamental principles of criminal law which require certainty and predictability in the prohibition of a criminal conduct.[1125] As can be seen from Article 6 of the ATP, the prohibition of incitement to terrorism under Ethiopian law is phrased in such vague and broad manner that it is difficult to distinguish legitimate speech made in the context of the democratic process from those that typically incite terrorist acts. Unless legal rules are drafted narrowly and carefully, the possibility for abuse is enormous.

Although the ATP does not clearly indicate the legal requirements for establishing the crime of incitement to terrorism, comparative legal developments show that it involves four inter-related legal elements for the prosecution to establish a case against alleged offenders. These include defining the *mens rea*, the content of the speech, the context in which the speech was made, and the imminence and likelihood of the materialization of harm.[1126] Measured against these elements, the application of the crime of incitement to terrorism under Ethiopian law lacks certainty and predictability which are fundamental principles of criminal law.

Moreover, the challenges of determining the boundaries of political speech and incitement law are manifest in another emerging international crime- the prohibition of incitement to genocide. Similar to the case of incitement to terrorism, the notion of incitement to genocide has been a difficult legal notion which could have a chilling effect on political speech. In particular, in the socio-political context of emerging and transitional democracies such as Ethiopia, which are ethnically and religiously diverse, the demands of containing ethnic strife and genocidal violence has made it difficult to maintain the vitality of political speech in the democratic process. The subsequent chapter will deal with this emerging crime in international and comparative law that would serve as the basis for analyzing the contours of political speech in the context of incitement to genocide in Ethiopia.

[1125] See Hodgson and Tadros (n 778) 526.

[1126] See Barendt, Incitement (n 934); Ronen (n 895).

CHAPTER FIVE

INCITEMENT TO GENOCIDE AND THE BOUNDARIES OF POLITICAL SPEECH IN ETHIOPIA

Similar to incitement to terrorism, incitement to genocide raises difficult questions on the limits of political speech in the context of incitement law. Determining the boundaries of political speech and incitement in collective forms of political violence in the context of Ethiopia is particularly difficult since it involves complex questions with regard to the mens rea, the causal link as well as the directness of the speech and the violent genocidal act. This chapter looks into another similar developing field of international criminal law, the notion of incitement to genocide. The discussion is particular important given the fact that genocidal violence in Rwanda and ethnic and religious strife in the broader context of Africa have been associated with genocidal speech.

In this regard this chapter analyzes the meaning and scope of incitement to genocide and its early development in the International Military Tribunal (IMT) at Nuremberg and the more recent cases of the ICTR. The chapter then discusses how the international jurisprudence on incitement to genocide can help in understanding its meaning and application under the domestic law of Ethiopia. The thesis also cautions on the dangers of creeping anti-constitutional norms, and the importance of free speech doctrine in protecting freedom of political speech in the context of analyzing the criminal law elements of incitement to genocide.

5.1. Incitement to Genocide in International Law: Meaning and Scope

The disastrous consequence of the Second World War and the genocide perpetrated by the Nazis has significantly influenced the emergence of international human rights protection

regime in the post war period.[1127] The genocide committed against the Jews in the Second World War has also galvanized the international effort to combat genocide as well as incitement to genocide and other forms of hate speech that drive its ideological basis.[1128] The adoption of the Genocide Convention in 1948 as one of the foremost and pioneering international human rights instruments was partly required by this international commitment to prevent future genocidal acts.[1129] The particular contribution of the Nazi propaganda machinery and the recognition that this formed the principal factor in fomenting the genocidal campaign employed by the Nazis had significant influence in the criminalization of incitement to genocide and proscribing incitement to hatred in many societies.[1130]

Genocide constitutes a crime of the highest order- a 'crime of crimes', which the international community has the obligation to prevent.[1131] The particular reprehensible nature of the crime requires States to take preventative measures to ensure that genocide does not occur in any of its forms. The fact that international law proscribes not only the commission of genocide, but also incitement to genocide reflects this international commitment to prevent genocide before the actual commission of genocidal acts.[1132] As argued in the preceding chapter, the fact that

---

[1127] T Buergenthal, The Evolving International Human Rights System (2006) *100 American Journal of International Law* 783

[1128] W Timmermann, The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda? (2005) *18 Leiden Journal of International Law* 260.

[1129] *Ibid*.

[1130] *Ibid*; But Timmerman notes that while incitement to genocide was proscribed under the Genocide Convention early on the post war period in 1948, 'hate propaganda did not receive international condemnation until 1966, when states parties' obligation to declare such propaganda illegal was enshrined in both the ICERD and the ICCPR'; See *Ibid*, at 260.

[1131] See Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2000).

[1132] W Schabas, Hate Speech in Rwanda: The Road to Genocide (2001) *46 McGill Law Journal* 151.

incitement in international law is confined to a narrow set of international crimes such as terrorism and genocide also reflects this legal and political reality in that the particular dangerousness of these crimes warrants their inchoate proscription.[1133]

Under the legal framework of international criminal law, direct and public incitement to genocide is proscribed in Article 3 (c) of the Genocide Convention, Article 2 (3) (c) of the International Criminal Tribunal for Rwanda (ICTR) Statute, Article 4 (3) (c) of the International Criminal Tribunal for former Yugoslavia (ICTY) Statute, and Article 25 (3) (e) of the Rome Statute of the International Criminal Court (ICC). [1134] Nevertheless, the structure and text of the Statute of the ICC seems to categorize incitement to genocide as a form of complicity rather than as independent crime as is the case in the Statutes of the ICTR and ICTY. Yet, Albin Eser argues that the text of Article 25 of the Statute of the ICC should also be interpreted the same as independent crime of incitement to genocide as those of the Statutes of the ICTR and ICTY.[1135] He also argues that even if the structure and text seems to place incitement to genocide as a form of complicity, incitement to genocide is an independent crime similar to the form it is envisaged in ICTR and ICTY.[1136] It should also be noted that the Statute of the ICTR proscribes direct and public incitement to genocide as independent crime, but also as a form of complicity in the commission of genocide.[1137] Agbor rightly notes that this inclusion of direct and public incitement to genocide both as an independent crime and as a form of complicity in the commission of genocide has created inconsistent and confusing jurisprudential outcomes in the

---

[1133] See Timmerman, Incitement in International Law (n 832).

[1134] See Statute of the International Criminal Tribunal for the Former Yugoslavia Art 4 (3) (c), Statute of the International Criminal Tribunal for Rwanda Art 2 (3) (c); and Statute of the International Criminal Court Art 25(3) (e); Note also that incitement was recognized in the Charter of the Nuremberg Tribunal (Art 6 (instigation)) and DCCPM (Art. 2 (f)).

[1135] Eser, Individual Criminal Responsibility (n 850) 806.

[1136] *Ibid*, 803.

[1137] Statute of the ICTR Art 6(1).

ICTR.[1138] The thesis will highlight in more detail this discussion in the last chapter of the subsequent sections of this chapter.[1139]

Article 3 of the Genocide Convention proscribes '[d]irect and public incitement to commit genocide'. Genocide, as defined in Article 2 of the Genocide Convention refers to acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[1140]

The *travaux préparatoires* of the Genocide Convention show that there were two major factors for the exclusion of political groups from the category of protected groups. First, it was thought that the inclusion of political groups in the definition of Genocide would involve the UN in internal politics and thereby affect the political neutrality of the UN.[1141] Second, it was also believed that international human rights law can adequately address the protection afforded to political groups.[1142] The fact that many delegates thought political groups would be included in the definition had prompted caution on the part of the delegates to come up with a narrow definition of incitement to genocide, wary of its particular implications on political speech.[1143] Thus, it is conspicuous that the concern for protecting freedom of expression, in particular

---

[1138] AG Agbor, The Problematic jurisprudence on Instigation under the Statute of the ICTR: The Consistencies, Inconsistencies and Misgivings of the Trial and Appeal Chambers of the ICTR (2013) *13 International Criminal Law Review* 429.

[1139] See Discussion on section 5.2.; See also the discussion in Chapter Six, Section 6.5.

[1140] Genocide Convention Art 2.

[1141] Ruhashyankiko, Special Rapporteur, Study of the Question of the Prevention and Punishment of the Crime of Genocide, 4 July 1978, E/CN.4/Sub.2/416, paras 79-87..

[1142] *Ibid*.

[1143] W Schabas, Hate Speech in Rwanda (n 1132) 166.

political speech played a key role in defining the meaning and scope of incitement to genocide as well as hate speech in the various international treaties.[1144] In this regard a distinguished scholar on genocide, William Schabas notes that '[t]he crime of incitement butts against the right to freedom of expression, and the conflict between these two concepts has informed the entire debate on the subject'.[1145] Similarly, Toby Mendel who was commissioned by the UN to undertake a major study on incitement to genocide notes that the *travaux préparatoires* on incitement to genocide show that the proscription of incitement to genocide under the Genocide Convention as well as the Statute of the ICC was formulated with a clear understanding of its implications on freedom of expression.[1146]

It is important to note from the outset that incitement to genocide should be distinguished from hate propaganda and other related forms of ethnic profiling. Schabas notes that hate propaganda does not fall under the regime of incitement to genocide.[1147] The developing case law on incitement in international law also clearly shows this notional difference. In *Akayesu*, the Trial Chamber noted that ethnic stereotyping and hate propaganda does not amount to incitement to genocide.[1148] Thus, clearly the qualification in the Genocide Convention to narrowly proscribe 'direct and public incitement of genocide' was intended to distinguish it from ordinary cases of incitement to hatred and hate speech by raising the legal threshold. Accordingly, the final version of the draft, which defines incitement to genocide as '[d]irect and

---

[1144] *Ibid*.

[1145] *Ibid* 149.

[1146] T Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, *For the UN Special Advisor on the Prevention of Genocide* (2006) 1; See also See Final outcome document Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF183/C.1IWGGP/L.4 (18 June 1998) at 3, reproduced as final in the Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/C.1/L.76/Add.3 at 2 (16 July 1998).

[1147] Schabas, Hate Speech in Rwanda (n 1132) 141.

[1148] *Akayesu TC* para 1021.

public incitement to commit genocide', was adopted taking cognizance of its particular implication on political speech.[1149]

Nevertheless, William Schabas staunchly argues for the inclusion of hate propaganda as a separate international crime. He argues that the meaning of direct and public incitement to genocide as articulated by the Genocide Convention does not address the problem of hate speech and hate propaganda which is a precursor, the 'road leading to genocide' itself.[1150] This view which is also shared by some other prominent scholars, fails to recognize the serious implications of criminal proscriptions on speech and the dangerous precedent that international law sets on domestic legal orders.[1151] As has been discussed in the preceding chapter, the lack of clear legal understanding on the notion of incitement to terrorism has provided States, in particular in emerging and transitional democracies with the political and legal legitimacy to suppress extensive restrictions on political speech. The report of the Working Group on General Principles at the Rome Conference shows that initial attempts to include incitement to other crimes such as incitement to war crimes, and incitement to crimes against humanity and incitement to aggression were defeated largely because of the serious implications that this can have on freedom of political speech.[1152]

[1149] Schabas, Hate Speech in Rwanda (n 1132) 166.

[1150] *Ibid.*

[1151] See Timmerman, The Relationship between Hate Propaganda and Incitement to Genocide (n 1128) arguing for a more expansive understanding of incitement to include incitement to war crimes; See also G Gordon, From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework (2008) *98 Journal of Criminal Law and Criminology* 853.

[1152] Report of the Working Group on General Principles of Criminal Law, UN Doc A/CONF183/C.1IWGGP/L.4 (18 June 1998) at 3, adopted unchanged in the final version, Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/C.1/L.76/Add.3 at 2 (16 July 1998).

As Saslow wittily observes defining what constitutes incitement to genocide is 'a notoriously problematic' legal challenge.[1153] Wilson similarly argues that the notion of incitement to genocide is one of the most controversial and challenging areas of international criminal law.[1154] Largely, this difficulty has been compounded by the existence of few cases on incitement to genocide as well as the lack of coherent and principled application of the legal elements for establishing such crime in the existing jurisprudence of international criminal tribunals. Moreover, as will be shown in the subsequent discussions, the academic literature and jurisprudence of international tribunals regarding the issue of incitement to genocide has overlooked the significance of looking into free speech doctrine as applied to the law of incitement.[1155] Despite this, however, most scholars on incitement to genocide have approached the subject from a purely criminal law perspective with little consideration for free speech issues intricately linked with the notion of incitement law. This further validates the general approach of the thesis which emphasizes on looking at the limits of political speech by combining both free speech doctrine and criminal culpability theory.[1156]

In the following sections the thesis will discuss the legal requirements for establishing the crime of direct and public incitement to genocide. The ICTR is one of the very few international tribunals that offer important lessons on defining the meaning of direct and public incitement to genocide. Although the IMT at Nuremberg and the cases of *Hans Fritzsche* and *Julius Streicher* 'marked, the birth of the jurisprudence on hate speech and incitement in international criminal law', more robust articulation on incitement to genocide was set out by the ICTR.[1157]

[1153] B Saslow, Public Enemy: The Public Element of Direct and Public Incitement To Commit Genocide (2016) *48 Case Western Reserve Journal of International Law* 418; See also R Wilson, *Inciting Genocides with Words* (2015)36 Michigan Journal of International Law 293.

[1154] Wilson (n 1153) 293.

[1155] See Baker, Genocide (n 68).

[1156] Mendel (n 1146) 21; See also Lawrence, Violence Conducive Speech (n 898) 12.

[1157] The legal basis of the prosecution was based on Charter of the IMT, Nuremberg, Art 6(c) which imposed criminal responsibility on 'leaders, organizers, instigators and accomplices participating in the

Moreover, there is little insight on the notion of incitement to genocide in comparative domestic legal systems, which further requires looking into international criminal law in dealing with the notion of incitement to genocide.[1158] So far, the ICTR remains the only international tribunal that indicted and convicted individuals for the crime of incitement to genocide.[1159] Consequently, the ICTR Tribunal has the most developed jurisprudence on the meaning and scope of incitement to genocide under international criminal law.[1160] The thesis will discuss the jurisprudential development of the notion of incitement to genocide tracing from its early development in the IMT at Nuremberg to the more recent cases of the ICTR.

5.2. Elements of the Crime of Incitement to Genocide in International Law

Both the emerging scholarship and jurisprudence on incitement to genocide show five inter-related factors in determining whether speech constitutes incitement to genocide.[1161] These are the public nature of the speech, the directness of the speech, the *mens rea* of the speaker, the context in which the speech was made, causation, and the likelihood and imminence of the genocidal violence. In doing so, the thesis employs both criminal culpability theory as well as a

---

formulation or execution of a common plan or conspiracy to commit' the crime of peace, war crimes, and crimes against humanity.

[1158] HJ Van Der Merwe, The Prosecution of Incitement to Genocide in South Africa, (2013) *16 Potchefstroomse Electronic Law Journal* 327, 329. The only domestic cases usually cited are the cases of *Leon Mugesera* I (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 (28 June 20005); and *Yvonne Basebya* (*The Prosecutor v Yvonne Basebeya*, Case number 09/748004-09, District Court of The Hague (1 March 2013); who was convicted for the crime of incitement to genocide for six years in the Netherlands; See [<http://www.internationalcrimesdatabase.org/Case/971/Basebya/>]; The Case of Mugesera while informative to understand the notion of incitement to genocide, was decided in a civil, immigration law suit, requiring a different evidentiary standards.

[1159] Saslow (n 1153) 419-420.

[1160] *Ibid*, 428.

[1161] Mendel (n 1146) 44-62.

free speech doctrine to analyze the boundaries of political speech vis-à-vis incitement to genocide and thereby draw important normative conclusions in this regard.

5.2.1. The 'Public' Nature of the Incitement

Mendel notes that there was little attention given to expound the meaning of the words 'public' and 'direct' incitement during the drafting process of the Genocide Convention.[1162] The *travaux préparatoires* of the Genocide Convention show that the United States because of its unique position on freedom of expression opposed for the inclusion of a provision that made incitement an inchoate crime.[1163] The US argued that any provision on incitement to genocide that included unsuccessful incitement would seriously undermine freedom of expression.[1164] Mendel notes that several other delegations supported this view on the basis that the proscription of incitement to genocide can be covered under other inchoate crimes such as conspiracy, attempt, solicitation and related forms of complicity which was later defeated by a vote.[1165] Because of this, the initial proposal by Venezuela that incitement to genocide should also include private incitement to genocide was defeated by five votes in favor with two abstentions.[1166] A compromising proposal by Belgium noted that since private incitement which is not contiguous or related to similar other inchoate crimes such as conspiracy or attempt

---

[1162] *Ibid,* 7.

[1163] Benesch notes that the delay in the ratification of the genocide Convection by the United States until 1988 and its eventual reservation to the convention that 'nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States', was clearly inspired by its implications on the First Amendment constitutional protection to freedom of speech; See 132 CONG. REC. S1355-01 (daily ed. Feb. 19, 1986) cited in S Benesch, Vile Crime or Inalienable Right: Defining Incitement to Genocide (2008) *48 Virginia Journal of International Law* 507-508.

[1164] Mendel (n 1146) 6.

[1165] *Ibid*.

[1166] Schabas, Hate Speech in Rwanda (n 1132) 151.

does not constitute any danger, the words 'or in private' should be deleted.[1167] Finally the Genocide Convention came up with the final version which defined incitement to genocide as 'direct and public incitement to genocide'.[1168]

The emphasis on public incitement as opposed to private incitement was clearly motivated by the particular dangerous nature of incitements as public acts.[1169] As pure inchoate offence, public incitement in general and the crime of incitement to genocide in particular does not require the actual commission or the attempted commission of the substantive crime.[1170] In *Prosecutor v Akayesu*, the Trial Chamber reaffirmed this position by noting that 'such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results' and as such 'genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator'.[1171] On the other hand, private incitement, or more properly, solicitation to commit genocide as a form of complicity is similar to the planning, preparation, conspiracy or attempt in that it is contiguous with the commission of the substantive offense.[1172]

[1167] Mendel (n 1146) 6.

[1168] Genocide Convention Art 3(c).

[1169] Mendel notes that 'Belgium proposed the compromise solution of deleting the phrase ''or in private'', which was supported by an argument that urging to genocide in private, which did not otherwise amount to another crime, such as conspiracy or attempt, did not present any danger', See Mendel (n 1146) 6; Cf Timmerman, Incitement in International Law (n 832) 846, where she argues that solicitation or private incitement to terrorism should also form part of the crime of incitement to genocide.

[1170] Mendel (n 1146) 8; For a general discussion on Inchoate crimes, see MT Cahill, Defining Inchoate Crime: an Incomplete Crime (2012) *9 Ohio State Journal of Criminal Law* 751.

[1171] *Akayesu TC* para 562.

[1172] Timmerman, Incitement in International Criminal law (2006) *88 International Review of the Red Cross* 846.

The *Akayesu* judgment provides the first 'direct precedent' in expounding the notion of directness in incitement to genocide.[1173] Akayesu served as Mayor of *Taba* Commune and he was a notable political figure during the Rwandan Genocide in 1994. Akayesu's indictment for direct and public incitement of genocide was largely based on a speech he made in a place called *Gishyeshye*, *Taba* in 19 April 1994.[1174] In his speech addressed to a crowd of 100 to 200 people, he urged Rwandese to 'eliminate the sole enemy: the accomplices of the *Inkotanyi'*, implicitly referring to the Tutsi.[1175] He was convicted of direct and public incitement to genocide. The Trial Chamber noted that a speech would constitute as public incitement 'where [it was] spoken aloud in a place that [is] public by definition'.[1176] This interpretation parallels the definition of public incitement to genocide in the DCCPSM which provides that:

> [t]he equally indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as by radio or television.[1177]

The Trial Chamber in *Akayesu* concluded that in either case, that is whether a speech is addressed in a public place, or communicated to the public through the mass media, the speech would constitute as public incitement.[1178] Nevertheless, Akayesu fails to provide a full account of the factors which are relevant in determining the 'public' nature of the speech in incitement to genocide and the approach that should be taken in defining its content.[1179] Although it noted

---

[1173] *Nahimana TC* para 1011.

[1174] *Akayesu TC* para 672.

[1175] *Ibid,* para. 709

[1176] *Ibid,* para 556; See also *Callixte Nzabonimana v The Prosecutor* Case No. ICTR-98-44D-A Nzabonimana (29 September 2014) (hereinafter *Nzabonimana AC*), para 126.

[1177] DCCPSM Commentary, p. 22.

[1178] *Akayesu TC* para 556.

[1179] Saslow (n 1153) 431.

that a speech is public when it is spoken in a public place, it did not expound what public place means or the nature of public speech more expansively.[1180]

Moreover, Akayesu's charges were base on Article 6 (1) of the ICTR Statute, which refers to mode of liability for complicity in the commission of genocide, rather than Article 2 (3) which proscribes direct and public incitement to genocide as independent crime.[1181] This conflation of the notion of solicitation as a form of complicity and incitement as a distinct and independent form of crime seems to be fuzzy in the jurisprudence of the ICTR.[1182] The Trial Chamber in *Akayesu* further noted, '[t]hat said, the form of participation through instigation stipulated in Article 6 (1) of the Statute involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator'.[1183] This holding, while acknowledging the difference between solicitation and incitement failed to clearly articulate the nature of solicitation as a distinct crime. It merely states that solicitation as a form of complicity is contingent up on the commission and attempted commission of the crime. The Trial Chamber's position seems to be informed by the realization that incitement as a public act is indeed the only pure inchoate crime.[1184] *Akayesu* while noting the distinction between incitement and solicitation, thus failed to clearly articulate the notional difference in these two forms of crimes in speech related offences.

[1180] *Ibid,* 431.

[1181] *Akayesu TC* para 471 ff.

[1182] See Agbor (n 1138) 429.

[1183] *Akayesu TC* Para 482.

[1184] Timmermann notes that in international law, only direct and public incitement to genocide constitutes a purely inchoate crime. She argues that incitement to other international crimes, such as crimes against humanity and war crimes is contingent up on either the commission or at least the attempted commission of the crime; moreover, the soliciter usually has a degree of influence over the solicitee, Timmerman, Incitement in International Law (n 832) 29-231.

Subsequent judgments of the ICTR provide more robust understanding on the meaning of 'public' incitement to genocide. For example, in the case of *prosecutor v Kalimanzira,* the basis of the Appeals Chamber to reverse the conviction of the Trial Chamber for speech relating to the *Jaguar* and *Kajyanama* Roadblocks (Grounds 8 and 9 of the indictment) was solely because of the private nature of the speech.[1185] The Appeals Chamber noted that 'the nature of his presence and exchanges with those at the roadblocks are more in line with a "conversation" which is consistent with the definition of private incitement found in the travaux préparatoires of the Genocide Convention' and as such does not constitute a public speech.[1186] Similarly, in *Ngirabatware*, the Trial Chamber noted that 'the travaux préparatoires indicate that "private" incitement, understood as more subtle forms of communication such as conversations, private meetings, or messages, was specifically removed from the Convention'.[1187]

Similarly, the private nature of the speech was a factor for the ICTR to consider that speeches made in road blocks to particular select individuals do not constitute public incitement to genocide. In this regard, the *Nahimana* case, commonly referred as the 'Media Trial Case', and considered one of the most significant cases on incitement to genocide since Nuremberg, provides more insights in expounding the 'public' nature of the speech in defining incitement to genocide.[1188] Nahimana served as professor of history and was founder of the infamous *Radio Télévision Libre des Mille Collines* (RTLM); while Jean-Bosco Barayagwiza was a lawyer and served as executive of the RTLM.[1189] Both Ferdinand Nahimana and Jean-Bosco Barayagwiza

---

[1185] *Callixte Kalimanzira v The Prosecutor*, *Case No. ICTR-05-88-A* (20 October 2010) (herein after *Kalimanzira AC*) para 159.

[1186] *Ibid*.

[1187] *The Prosecutor v Augustin Ngirabatware,* Case No. ICTR-99-54-T (20 December 2012) (hereinafter *Ngirabatware AC)* para 1355, citing *Kalimanzira AC* para 158.

[1188] See *Nahimana TC*; See also DF Orentlicher, Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v Nahimana, (2005) *12 New England Journal of International and Comparative Law* 17.

[1189] *Nahimana TC,* para 1099.

were also Ministers of the government of Rwanda. Hassan Ngeze was the owner of the *Kangura* newspaper and served as its editor.[1190]

The private nature of the speech in the case of *Jean-Bosco Barayagwiza*, was a factor for the *Nahimana* Appeals Chamber to partly reverse the Trial Chamber's ruling. The selected and limited nature of the audience in *Barayagwiza's* speech made the Appeals Chamber to conclude that the speech was private and hence cannot be convicted for incitement to genocide for that particular speech.[1191] In its ruling, the Appeals Chamber noted:

> In particular, the supervision of roadblocks cannot form the basis for the Appellant's conviction for direct and public incitement to commit genocide; while such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public.[1192]

Perhaps the most important decision in expounding the meaning of the 'public' nature of incitement to genocide is provided by the *Callixte Kalimanzira* Appeals Chamber. The Appeals Chamber after reviewing the case law of the ICTR provided important standards which help to define the public nature of the incitement. In reversing the decision of the Trial Chamber's ruling on the basis of a speech made at road block, the Appeals Chamber noted that:

> 'with the exception of the Kalimanzira Trial Judgment, all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area.[1193]

The *Callixte Kalimanzira* Appeals Judgment noted that the travaux préparatoires clearly show that private incitements, understood as '*subtle* forms of communication such as conversations, private meetings, or messages', were intentionally excluded from the definition of direct and

---

[1190] *Kangura* is a Kinyarwanda term meaning 'wake others up', See *Nahimana TC* para 124.

[1191] *Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze v The Prosecutor*, Case No. ICTR-99-52-A (28 November 2008) (hereinafter *Nahimana AC*) para 862.

[1192] *Ibid*.

[1193] *Callixte Kalimanzira* AC para 156.

public incitement to genocide. [1194] In overruling the Trial Chamber's judgment it noted that similar to the case of *Barayagwiza*, 'Kalimanzira's actions did not involve any form of mass communication such as a public speech. Instead, the nature of his presence and exchanges with those at the roadblocks are more in line with a "conversation''.'[1195]

Accordingly, the crucial factor in *Kalimanzira* Appeals Chamber Judgment for determining that the incitement is public was not whether it was spoken in a roadblock but whether it was directed at inciting a general audience as opposed to those present at the roadblocks. In other words, speech can be considered as public even in case of a speech at roadblock if it has public appeal. In this regard, the Appeals Chamber noted:

> With respect to the Jaguar roadblock, the Trial Chamber found that Kalimanzira "handed a rifle to Marcel Ntirusekanwa in the presence of several others who were also manning the roadblock," that he "told everyone present that the gun was to be used to kill Tutsis," and that "the gun and the instructions were disseminated to the group." Based on these findings, it appears that Kalimanzira's instructions were intended only for those manning the roadblock, not the general public.[1196]

However, in the *Kalimanzira* Appeal Judgment, the Appeals Chamber seems to construe that if a speech is made in an audience that ranges from 'over 100' to 'approximately 5,000 individuals' then the speech can be considered as public speech.[1197] Saslow rightly argues that putting a rigid number in order to decide the public nature of a speech is unhelpful. For example, a speaker addressing to twelve people who are members of the public in a meeting

---

[1194] *Ibid,* para, 158 (emphasis added).

[1195] *Ibid,* para 159

[1196] *Ibid,* para 162; See also similar conclusion for *Kalimanzira* speech at Kajyanama roadblock, in which the Appeals judgment reversed the trial Judgement by arguing that 'Kalimanzira's exhortations were addressed to individuals manning the Kajyanama roadblock' and hence can only be considered as private incitements, see ibid, at para 163.

[1197] *Ibid,* para 156, (footnote 410, 441); Cf *Nzabonimana AC* para 124, noting that 'it is thus unclear whether the Kalimanzira Appeals Chamber considered the size of the audience to be a requirement of public and direct..' incitement.'

can be considered as public speech if there is additional corroborative evidence that demonstrates its public nature.[1198]

Saslow observing the jurisprudence of the ICTR notes that there are two important factors in determining the 'public' nature of the speech in case of incitement to genocide. These include, the place factor, which seeks to look into the place where the speech was made; and looking into whether the audience is limited and select as opposed to a speech which has public appeal.[1199] From this perspective, two sets of legal arguments emerge in relation to the above ruling. The first which argues that by its very nature speech at roadblocks is inherently a private speech.[1200] A second but related argument notes that one has to consider the number of people who were in the audience, and requires that it should exceed a certain threshold of minimum number of people for a speech to be considered as 'public'.[1201]

The ICTR jurisprudence also shows that to determine the public nature of the speech it is important to look into the medium through which the speech is made.[1202] In particular, in deciding whether a speech made in a private context can be categorized as public speech, the jurisprudence of the ICTR shows that looking at the medium of the communication becomes essential. In the case of *Jean Kambanda*, who served as former Prime Minster of Rwanda, the Chamber in convicting him for incitement to genocide partly relied on the fact that a video

---

[1198] Saslow (n 1153) 440, where he argues that 'The number factor may inappropriately exclude speeches that target a small group of public individuals'; See also Separate Opinion of Judge Pocar in *Callixte Kalimanzira* AC paras 11 41-45, here he argued that looking into the number of individuals in the audience should not be a factor in determining 'the public nature of the incitement.

[1199] *Ibid*, 430; See also *Akayesu TC* para 556.

[1200] See for eg , *Ngirabatware AC* para 50.

[1201] *Ibid*.

[1202] *Nzabonimana AC* para 231.

record of his speech was broadcast to the public.[1203] Similarly in the case of *Georges Ruggiu*, his speech was considered as public because it was broadcast in a media, the RTLM.[1204]

The jurisprudence of the ICTR shows that the Tribunal instead of focusing on the nature and content of the speech to decide on the 'public' nature of the speech, it was preoccupied with rudimentary discussions of number of people addressed and the nature of the place where the speech is made. It is inappropriate to determine the public nature of a speech by looking into the number of people to whom the speech is addressed or whether it is spoken in a public place. In this regard the separate opinion of Judge Pocarmore is more convincing when he noted that the public nature of a speech should not be decided by looking into whether the speech was made in a public place.[1205]

Later in the *Nzabonimana*, the Appeals Chamber endorsed this view by noting that consideration of the number of individuals in the audience has only probative value and as such is not deterministic to the public nature of a speech.[1206] *Nzabonimana* concerned the case of a public official who made a speech in a meeting in *Murambi* in which he endorsed the killing of Tutsis.[1207] The Appeals Chamber affirmed the Trial Chamber's conviction for incitement to genocide noting that a speech addressed to as small group of people consisting of 30 individuals can still be considered as public speech.[1208] In relation to the argument that there should be some minimum number of people in order for a speech be considered as 'public', the *Nzabonimana* Appeals Chamber noted that if a speaker intends to convey his message publicly

---

[1203] *The Prosecutor v Jean Kambanda* Case No. ICTR 97-23-S (4 September 1998) para 39.

[1204] See *Prosecutor v Ruggiu*, Case No. ICTR-97-32-I (June 1, 2000) (hereinafter *Ruggiu TC*).

[1205] Separate Opinion of Judge Pocar in *Callixte Kalimanzira AC* paras 11 41-45.

[1206] *Callixte Nzabonimana v Prosecutor* AC, Case No. ICTR-98-44D-A (29 September 2014) para 231.

[1207] *Ibid*, noting that 'in the Appeals Chamber's view, it does not foreclose convictions based on communications to smaller audiences when the incriminating message is given in a public space to an unselected audience', see Ibid, at para 126.

[1208] *Nzabonimana AC* para 121.

and the audience is not select, a speech to a crowd of 30 people was considered as fulfilling the 'public' element of incitement to genocide.[1209] It argued that '[the words were spoken in a public space, were heard by several persons, including Tutsis, and contained a message directed to anyone in the area rather than selected persons' and as such fulfills the 'public' nature of incitement to genocide.[1210] On the other hand the *Nzabonimana* Appeals Chamber ruled that a speech involving a discussion in the presence of a journalist was considered as private because the speech was not disseminated to the general public and did not had a public appeal.[1211]

Recent comparative developments in incitement law in domestic systems also demonstrate this important distinction between incitement as a public act and solicitation as a private act of speech. In the trial of *Gauleiter Artur Greiser*, for instigation to extralegal execution and the extermination of Jews, the Polish Supreme Court underscored the distinction between solicitation as a private act and incitement as a public act.[1212] It argued that Greiser solicited the commission of the crimes as an intellectual perpetrator by exercising control over the principal perpetrators; and also made him responsible for his speeches and writings in which he publicly called for the commission of the crimes.[1213]

In general, the jurisprudence of the ICTR provides significant insights in framing and understanding the 'public' nature of the speech in the context of incitement to genocide. The public nature of the speech should be looked by emphasizing on whether it has a public appeal and is addressed to a general audience, and focusing on the content and nature of the speech. However, in determining the public or private nature of the speech, the jurisprudence of the

---

[1209] *Nzabonimana AC* para132.

[1210] *Ibid*.

[1211] *Ibid*, para 385-387.

[1212] *Trial of Gauleiter Artur Greiser* (Case 74), XIII United Nations War Crimes Commission 70-117, cited in Timmermann, Incitement in International Law (n 832)241.

[1213] *Ibid.*

ICTR and the literature on incitement to genocide overlooks the significance of public speech from the perspective of the doctrine of free speech. This is striking given the fact that the distinction between private and public speech was made bearing in mind the particular concern of proscribing incitements, and their effect on political speech. Overlooking this significant factor undermines the normative coherence in defining the public nature of the speech and the wider significance this could have in approaching the notion of incitement to genocide and defining the contours of permissible political speech.

5.2.2. The 'Directness' of the Incitement

Determining the directness of the speech in incitement to genocide is particularly vital in determining the boundaries of political speech and inciting speech.[1214] The underlying premise is that any ideologically loaded speech which has informational content and contribution to public discourse should be protected. On the other hand, a call for violence or lawless action, which has little deliberative significance, should be restricted.[1215] In the case of *Hans Fritzsche*, one of the pioneering cases on incitement in international criminal law, the IMT at Nuremberg acquitted the accused for inciting war crimes and crimes against humanity in relation to the extermination of Jews during Nazi Germany.[1216] The Tribunal conceded that, Fritzsche, through his speeches had indeed disseminated anti-Semitist propaganda and blamed the Jews for causing the war.[1217] The Tribunal noted that among others, Fritzsche, referring to the Jews had said that 'their fate had turned out "as unpleasant as the Führer predicted".'[1218] Nevertheless, the Tribunal argued that he 'did not urge persecution or extermination of Jews' and as such his

---

[1214] See Wilson (n 1153) 287.

[1215] Greenawalt, Speech, Crime and the Uses of Language (n 189) 111-112.

[1216] The International Military Tribunal, *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1October 1946) (Judgment of 1 October 1946) (herein after IM at Nuremberg) 526.

[1217] *Ibid,* 527.

[1218] *Ibid*.

speech cannot constitute incitement for the extermination of Jews by the German people.[1219] Although there were other outlier factors, resulting in his acquittal, it clearly indicates that the lack of 'directness' of the incitement was one of the major factors resulting in his acquittal.[1220]

On the other hand, in the case of *Julius Streicher*, commonly known as 'Jew-Baiter Number One', who was involved in extensive hate propaganda campaign in the genocide of Jews, his speech involved a direct call on the part of the German people to exterminate the Jews. Streicher's conviction is particularly important because the basis of his conviction entirely relied on his speeches, and articles published in a magazine called *Der Stürmer*.[1221] Although he was acquitted for war crimes for lack of sufficient evidence, he was convicted of violating crimes against humanity on the bases of his inciting anti-Semitic speech and sentenced to death.[1222]

In many of the twenty three articles of *Der Stürmer* published between 1938 and 1941, the defendant referred Jews as 'a germ and a pest... a parasite, an enemy, an evildoer, a disseminator of diseases *who must be destroyed in the interest of mankind*'.[1223] In another leading article published and which formed the basis of his conviction, Streicher argued:

> A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.[1224]

The IMT at Nuremberg concluded that 'Streicher's incitement to murder and extermination ....constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime Against Humanity'.[1225] As can be seen from the

---

[1219] *Ibid.*

[1220] Schabas, Hate Speech in Rwanda (n 1132) 162.

[1221] See Baker, Genocide (n 68) 16.

[1222] IMT at Nuremberg (n 1216) 529.

[1223] *Ibid*, 501 (emphasis added).

[1224] *Ibid*.

[1225] *Ibid*.

ruling of the Tribunal, the principal basis for the conviction of Streicher, as opposed to Fritzsche, was his direct call to exterminate the Jews.[1226] Although the IMT in Nuremberg set out a relatively short judgment and did not expound on many issues related with determining the notion of incitement to genocide, it nonetheless established a significant precedent and set the tone in making an important distinction between hate propaganda and incitement to genocide. This formed the principal basis why Streicher was convicted and Frizsche was acquitted.[1227]

Consistent with the decision of the IMT at Nuremberg, the case of *Nahimana* provides additional insights in interpreting the meaning of 'direct' incitement to genocide.[1228] In *Nahimana*, the Appeals Chamber reiterated that hate speech including incitement to hatred should be distinguished from incitement to genocide.[1229] It acknowledged that incitement to genocide can be preceded and accompanied by hate speech and incitement to hatred, but only

---

[1226] Schabas, Hate Speech in Rwanda (n 1132) 162.

[1227] It should also be noted Carl Schmitt and many other intellectual and influential figures that were supportive of the Nazi regime and even endorsed its ideological foundations were not prosecuted. Although investigation against Schmitt was made, his case was dropped because of the fact that it was believed that it would be virtually impossible to prosecute everyone who provided ideological support to the Nazis, and even to those who used hate speech and hate propaganda. But See M Salter et al, The Accidental Birth of Hate Crime in Transnational Criminal Law: Discrepancies' in the Prosecution for "Incitement to Genocide" during the Nuremberg Process involving the cases of Julius Streicher, Hans Fritzsche and Carl Schmitt (2013) 4 *Lancashire Law School Working Paper Series* 4; Salter et al also provide other non legal factors that led to different legal outcomes in the case of Streicher on one hand, and Fritzsche and Schmitt on the other. Salter et al, conclude that 'it is arguable that the explanation for the discrepancies' and divergent outcomes in these three cases was related less to the application of settled legal doctrine to material facts, than to the selective interpretation of the facts themselves, driven in part by the subjective impression created by these three individuals.' In particular they point out that the impolite and aggressive character of Streicher also played a part in his conviction; See Salter et al at 123.

[1228] See Nahimana TC, and Nahimana AC.

[1229] *Nahimana AC* paras 692- 693.

the former is prohibited under Article 2 (3) of the Statute of the ICTR.[1230] For example it noted that the RTLM broadcasts of 1 January 1994 were intended to '"warn" the Hutu majority against an impending "threat"' from the RPF and as such it 'heated up heads'.[1231] It also noted that the message was implicitly intended at the Hutu to take action to counter the threat. Nevertheless, in the absence of additional evidence, it cannot be said to constitute incitement to genocide.[1232] It further noted that statements that were intended 'to mobilize anger against the Tutsis and to make fun of them'.[1233] However, it held that while the speech may constitute 'an example of inflammatory speech', it cannot be considered as incitement to genocide.[1234] The ICTR jurisprudence also acknowledged the difference between incitement to hatred and incitement to genocide. This is affirmed in *Bikindi's* Trial Chamber judgment where the Chamber noted that '[t]he travaux préparatoires of the Genocide Convention supports this conclusion as the Genocide Convention was only intended to criminalize direct appeals to commit acts of genocide and not all forms of incitement to hatred'.[1235]

[1230] *Ibid*, 692.

[1231] *Ibid*, para 741, noting that '[t]he Appeals Chamber notes that the broadcast also wanted to "warn" the Hutu majority against an impending "threat". The implicit message was perhaps that the Hutu had to take action to counter that "threat". However, in the absence of other evidence to show that the message was actually a call to commit acts of genocide against the Tutsi, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.'

[1232] *Ibid,* 741.

[1233] *Ibid,* para 742.

[1234] *Ibid*.

[1235] *The prosecutor v Simon Bikindi*, Case No. ictr-01-72-T (2 December 2008)(hereinafter *Bikindi TC*) prara 388, citing travaux préparatoires of the Genocide Convention, UN ORGA, 6th Committee, 3rd Session, 86th meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948, p. 244-248, and UN ORGA, 6th Committee, 3rd Session, 87th meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948, p. 248-254

In *Akayesu*, the Trial Chamber noted that the element of directness requires that the incitement should be in 'direct form' as opposed to 'mere vague or indirect suggestion'.[1236] A rather ambiguous statement by the *Akayesu* Trial Chamber was its statement that 'incitement may be direct, and nonetheless implicit'.[1237] This expansive understanding of 'directness' may have been motivated by the realization of human ingenuity to convey messages of incitement in subtle and implicit but direct ways such as through euphemistic expressions.[1238] Marc Antony's oration over Caesar's body in Shakespeare's *Julius Caesar*, where he did not directly counsel his audience to attack Brutus but clearly intended to impassion them to do so, has been usually cited as a good illustration of implicit forms of inciting speech.[1239] Free speech scholars caution that extending the directness requirement to these implicit forms of expression can risk opening the door for manipulation and abuse.[1240] However, most scholars argue that rather than relying only on the textual directness of the speech, it is more important to rely on the intention of the speaker, the tone in which the speech was made, the effect of the speech on the audience and the broader context in which the speech was made.[1241]

[1236] *Akayesu TC* para 557.

[1237] *Ibid*.

[1238] Mendel (n 1146) 8.

[1239] William Shakespeare, The Tragedy of Julius Caesar, Act 3, Sc. 2. The commonly cited reference to this implicit form of incitement is Judge Learned Hand's Argument in *Masses Publishing Co. v. Patten* (n 1038), where he emphasized that in order to establish a case for a violation of incitement of a lawless action (in this case the Espionage Act), the prosecution should prove that the defendant had engaged in 'direct advocacy' of lawless action; but conceded that in some instances advocacy of lawless action can be indirect; See also *United States v Nearing*, 252 F 223, 228 (S D NY 1918), where Judge Hand recognized that 'there may be language, as, for instance, Mark Antony's funeral oration, which can in fact counsel violence while it even expressly discountenances it'.

[1240] See GR Stone, The Origins of the "Bad Tendency" Test: (n 1037) 427; See also Healy (n 1044) 35.

[1241] BJ Pew, How to Incite Crime with Words: Clarifying Brandenburg's Incitement Test with Speech Act Theory (2015) *2015 Brigham Young University Law Review*113, where drawing form Austin's speech act theory he argues that 'the illocutionary force cannot be derived from the literal words used; and concludes that 'the distinction between protected speech and unprotected encouragement to crime

Ultimately, the socio-cultural and linguistic context would have to be considered in deciding whether a speech can be interpreted as 'direct' incitement.[1242] For example, reference to a particular ethnic group can be inferred even if the speech used does not expressly mention such groups. The Trial Chamber in *Akayesu* noted that the fact that the accused did not say destroy the Tutsi, but made reference to the *Inkotanyi*, as accomplices of the Rwandan Patriotic Front (RPF) that need to be destroyed clearly amounted to a direct incitement to genocide.[1243] While the term *Inkotanyi* literally interpreted refers to warriors and also often to the members of the RPF, the Chamber established that there is no doubt that Akayesu was referring to the Tutsi, that it was a common reference to the Tutsis in general and that there was no doubt that the accused called the people present to mean that the Tutsi must be killed.[1244]

In the case of *Léon Mugesera*, one of the very few cases on incitement to genocide in domestic courts, the Canadian Supreme Court ruled that the statement '[w]ell, let me tell you, your home is in Ethiopia, we'll send all of you by the *Nyabarongo* so that you get there fast' was interpreted as direct incitement to genocide.[1245] Because of his speech, the Court affirmed that

---

can best be made by focusing on the utterance's illocutionary force'; On speech act theory see, JL Austin, *How to Do Things with Words* (Oxford University press, 1962); JR Searle, *Speech Acts: an Essay in the Philosophy of Language* (Cambridge University Press 1969).

[1242] *Akayesu TC* para 557.

[1243] *Ibid,* para 361.

[1244] *Ibid*.

[1245] *Mugesera* v Canada (n 1158) para 90; the context of sending the speech is believed to be motivated by the general theory and belief that the Tutsi came from Ethiopia; and hence justifying for the hateful rhetoric of murdering and expelling them to where they came. Although Mugesera argued that he was merely referring to the fact that the Tutsi should return to Ethiopia as did Ethiopian Jews (the Falasha(returned to Israel, the Canadian Supreme Court assisted by expert evidence established that ' it is clear that he is suggesting that the Tutsi corpses be sent back via the Nyabarongo River' see at para 94.

he was responsible for the killings that were committed in the *Gisenyi* region of Rwanda.[1246] Although at face value the statement does not seem to imply any direct call for the genocide of the Tutsi, the Court supported by expert testimony concluded that Mugesera was referring to killing and drowning the Tutsi in the *Nyabarongo* River.[1247] The decision, though a civil immigration case requiring a lesser proof of preponderance of evidence, is consistent with the general position of international criminal law in that directness should also include implicit forms of expression that unequivocally call up on the audience to commit genocidal acts.

Similarly, in *Nahimana*, the Appeals Chamber also upheld the Trial Chamber's decision that chanting '*tubatsembatsembe*' ('let's exterminate them!') at public meetings and demonstrations constitutes incitement to genocide.[1248] The reference 'them' was interpreted as referring to the Tutsi, and as such was held to constitute incitement to genocide.[1249] With regard to the article published in January 1994 in Kangura titled the 'The Last Lie', the following passage was held to constitute as incitement to genocide.

> Let's hope the *Inyenzi* will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice. All the Hutus are united…[1250]

The Appeals Chamber argued that the term '"accomplice" refers to the Tutsi in general, in light of the sentence which immediately follows' and as such it called up on the Hutu to exterminate

---

[1246] Schabas, Hate Speech in Rwanda (n 1132) 144.

[1247] *Mugesera v Canada* (n 1158) para 94.

[1248] *Nahimana TC* para 975; *Nahimana AC* paras 658, 760.

[1249] *Ibid;* See also *The Prosecutor v Yvonne Basebeya* (n 1158), where the District Court in the Hague convicted the defendant for incitement to genocide for six years and 8 months in relation to the Rwandan Genocide in violation of the Dutch Genocide Implementation Act and the Dutch Criminal Code Art 131 and sentenced to six years and eight months. The principal basis of her conviction based on her chants-'*Tubatsembatsembe'* (let's' exterminate them, referring the Tutsi) during the 1994 Rwandan genocide.

[1250] *Nahimana AC* para 771.

the Tutsi if the RPF was to attack again.[1251] Similarly, the reference 'If the *Inkotanyi* have decided to massacre us, the killing should be mutually done…', was held to constitute incitement to genocide.[1252] The Appeals Chamber argued that the reference to the *Inkotanyi* was intended at referring to the Tutsi, and construed it as appeal to the majority people to kill the Tutsi, which constitutes incitement to genocide.[1253]

Similarly, in the case of *Ruggiu*, the Trial Chamber interpreted 'go to work' as meaning '[g]o kill the Tutsis and Hutu political opponents of the interim government'.[1254] The Trial Chamber noted that:

> …[a]ll broadcasts were directed towards rallying the population against the "enemy", the RPF and those who were considered to be allies of the RPF, regardless of their ethnic background. He admits that RTLM broadcasts generally referred to those considered to be RPF allies *as RPF "accomplices".* The meaning of this term gradually expanded to include the civilian Tutsi population and Hutu politicians opposed to the Interim Government…[1255]

Moreover, it held that 'the widespread use of the term "*Inyenzi"* conferred the *de facto* meaning of "persons to be killed".[1256] Within the context of the civil war in 1994, the term '*Inyenzi'* became synonymous with the term *'Tutsi'.*[1257] The accused also acknowledged that the word *'Inyenzi'*, as used in a socio-political context, came to designate the Tutsis and as 'persons to be killed'.[1258]

[1251] *Ibid.*

[1252] *Ibid*, para 772.

[1253] *Ibid*.

[1254] *Ruggiu TC* para 44(iii)

[1255] *Ibid*.

[1256] *Ibid*.

[1257] *Ibid*.

[1258] *Ibid*; The term *Inyenzi*, means cockroach, although initially it referred to Tutsi assailants who occasionally attacked government forces, it eventually become to designate the Tutsis in general; See in this regard, *Nahimana TC* para 90 ff.

Drawing from Austin's and Searl's speech act theory, Bradley Pew argues that in order to determine the element of directness in more implicit forms of speech, the emphasis should be to look into the intention of the speaker and whether the audience has grasped his message as urging them for action.[1259] In other words, implicit forms of incitement should be seen in light of audience cooperation and prior understanding of the speaker and the audience to carry out some lawless action. Searl's speech act theory argues that:

> In indirect speech acts the speaker communicates to the hearer more than he actually says by way of relying on their mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference on the part of the hearer.[1260]

Accordingly, in analyzing direct but implicit forms of expressions incitement requires that courts should objectively look at what inferences the hearer would rationally make from the utterance. Pew argues that an utterance has an indirect 'directive illocutionary force if, given the circumstances under which the speaker made the utterance, the hearer would rationally infer from the words used that the speaker is urging her to engage in lawless action'.[1261]

In the context of political speech, an important distinction that emerges from the jurisprudence of the ICTR on incitement to genocide is the distinction between speech aimed at ethnic consciousness and incitement to genocide. The ICTR clearly established that while the former is protected form of expression, the latter is not. The Trial Chamber noted that:

> The Chamber considers that it is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred. This broadcast by Barayagwiza is the the former but not the latter. While the impact of these words, which are powerful, may well have been to move listeners to want to take action to remedy the discrimination recounted, such impact would be the result, in the Chamber's view, of the reality

---

[1259] Pew (n 1241) 1096.

[1260] JR Searle, *Indirect Speech Acts*, *in* P Cole and JL Morgan (eds), Syntax and Semantics (Academic Press, 1975) 59, 60, cited in Pew (n 1241) 1098.

[1261] Pew (n 1241) 1098.

> conveyed by the words rather than the words themselves. A communication such as this broadcast does not constitute incitement.[1262] (sic)

Similarly, in *Nahimana*, the Trial Chamber also made an important ruling in making a distinction between ethnic profiling and ethnic consciousness. It held that expressions intended to show the oppression of one ethnic group by another are clearly within the realms of protected speech.[1263] For example the Trial Chamber noted that expressions such as '70% of the taxis in Rwanda were owned by people of Tutsi ethnicity' falls under protected political speech.[1264] Although the accuracy of the statement may be contested, it held that since the expression is informational in nature, it falls under protected speech.[1265] Nevertheless, the Trial Chamber in *Nahimana* also held that when such expressions are made with bad intent such as 'they are the ones who have all the money', this may entail the desire by the speaker to express hostility and resentment of a particular ethnic group; and 'demonstrates the progression of ethnic consciousness to harmful ethnic stereotyping'.[1266] It further noted that while negative stereotyping itself does not constitute incitement to genocide it can be an 'indicator that incitement to violence was the intent of the statement'.[1267]

In brief, the Jurisprudence of the ICTR has been faithful to the language of Article 2 (3) in interpreting the meaning of 'directness' as element of the crime of incitement to genocide. However, some scholars have also criticized the approach the ICTR took in interpreting the meaning of directness, as element of the crime of incitement to genocide. For example, Alexander Zahar after observing the jurisprudence of the ICTR in the case of *Nahimana* has

---

[1262] *Nahimana TC* para 1020.

[1263] *Ibid*, 1019, 1020.

[1264] *Ibid* para 1021.

[1265] *Ibid*.

[1266] *Ibid*.

[1267] *Ibid,* para 1022.

criticized the meaning adopted by the Tribunal regarding 'direct' incitement.[1268] Although the *Nahimana* judgment is not the first case dealing with incitement to genocide, Zahar concedes that it is one of the most developed and robust cases in defining the meaning and scope of what constitutes incitement to genocide.[1269] But he notes that it has set a poor precedent.[1270] Zahar argues that no evidence produced by the prosecution was able to demonstrate the directness of the incitement and the Tribunal was '[unable] to come up with single example-whether broadcast on RTLM or printed in *Kangura*-of a blatant call on Hutu to hunt down and destroy the Tutsi ethnic group'.[1271] Zahar criticizes the Tribunal's ruling noting that the speech produced as evidence in the Tribunal constitutes an opinion rather than a call on the part of the audience to action. He argues that even if one was to agree that the speech constitutes incitement, it cannot constitute a direct form of incitement as required by the plain meaning of the Genocide Convention and the ICTR statute.[1272] Zahar argues that the evidence presented in *Nahimana* Judgment does not conspicuously demonstrate that the speech involved direct and public incitement to genocide. In particular, he contends that the evidence presented is selective, presenting only few lines of 13 passages out of the 59 issues of Kangura in case of Ngeze's, and 37 excerpts out of several thousand transcript pages of RTLM broadcasts, in the case of Nahimana and Barayagwiza.[1273]

Nevertheless, Zahar's position does not reflect the ICTR's careful articulation of the notion of directness and its general approach to incitement to genocide. Judicial scrutiny as to the 'directness' of the speech should establish that a speaker intended to convey a direct call to take a genocidal act by the audience. Zahar seems to have rather a very narrow conception of

---

[1268] A Zahar, The ICTR's ''Media'' Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide (2005) *16 Criminal Law Forum* 33.

[1269] *Ibid*, 33-34.

[1270] *Ibid*, 34.

[1271] *Ibid*, 37-38.

[1272] *Ibid*, 40.

[1273] *Ibid*, 37.

incitement to genocide. Drawing from the jurisprudence of the IMT at Nuremberg in the case of *Streicher*, he argues that the statement '[t]he Jews in Russia must be killed. They must be exterminated root and branch' is direct call for genocide as there is no shadow of doubt that the speaker intended the audience to commit the genocide. For example, in arguing that some of the evidence presented at the Nahimana Judgement does not constitute direct incitement, he gives the following passage as an example:

> One hundred thousand young men must be recruited rapidly. They should all stand up so that we will kill the Inkotanyi and exterminate them,...the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it. Then we will go on to Kibungo, Rusumo, Ruhengeri, Byumba, everywhere. We will rest after liberating our country.[1274]

Zahar, argues that in the above passage while the speaker 'calls on people to kill Tutsi, he does not unambiguously call on them to kill the Tutsi'.[1275] It is unclear what Zahar is trying to establish here. He seems to argue that because the speech does not involve a direct and unequivocal call to destroy a particular group, it is ambiguous, and as such it could mean look for the RPF members among the minority Tutsi.[1276]

Zahar's very narrow understanding of direct incitement to genocide is not desirable. First, the Nahimana case shows that the speaker intended to pass a message aimed at the destruction of a particular group, however this was expressed implicitly through such words as *Inkotanyi* or words of similar designation that clearly indicate reference to the Tutsi. Moreover, genocide as a crime not only includes intent to destroy an entire group, but also part of the group and incitement to genocide should be construed as intent to destroy part of that group.[1277]

[1274] *Nahimana TC* para 396; See also *Nahimana AC* para 756, affirming that this passage constitutes incitement to genocide.

[1275] Zahar (n 1268) 39.

[1276] *Ibid*.

[1277] Genocide Convention Art 2 '…with intent to destroy, in whole or in part..'; See also Nahimana

Moreover, in the socio-political context of non-liberal societies where group identity forms the central feature of public and political life, there has to be a measure of flexibility in articulating direct incitement to genocide. As Schabas rightly notes, most direct forms of incitement to genocide occur not in explicit ways but through euphemisms and implicit ways.[1278] Confining the definition merely to explicit calls for action to a particular group by name would deprive the purpose for which the convention purports to achieve in preventing genocide. Because of this the notion of incitement to genocide should also include implicit but direct forms of incitement to genocide. Moreover, speech that is *directed* at inciting genocide or any lawless action has little social value as it lacks any informational content and deliberative significance. Accordingly, Zahar's narrow position is neither supported by principles of criminal law nor free speech doctrine. Henceforth, while remaining faithful to the textual meaning of the genocide convention on 'direct and public incitement to genocide', accommodating socio-political and cultural variables is also essential in maintaining balance between the protection of political speech and incitement to genocide. In particular, instead of confining the debate to the use of semantics, the context in which a specific language is used in particular society and the intention of the speaker are important factors in considering the content of the speech and whether it constitutes incitement to genocide.

5.2.3. *Mens Rea*

The Genocide Convention defines the crime of genocide as 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[1279] This particular genocidal intent also applies to the crime of incitement to genocide in that publicly addressed expressions can only constitute incitement to genocide if the intention of the speaker was aimed at conveying a message aimed at destroying 'in whole or in part, a national, ethnical, racial or religious group'.[1280] Accordingly, incitement to genocide requires a specific intent (*dolus specialis*) to

[1278] Schabas, Hate Speech in Rwanda (n 1132) 160.

[1279] Genocide Convention Art 2.

[1280] Mendel (n 1146) 45.

destroy in whole or in part of a protected group through publicly addressed expressions.[1281] As the Trial Chamber in *Akeyesu* noted, the intent of the speaker and the purpose for which the speech was made and whether it was of a *bona fide* nature is an important indicator to determine responsibility for the crime of direct and public incitement to genocide.[1282]

The *travaux préparatoires* show that the initial proposal to include an additional requirement of motive was rejected in the belief that in the context of genocide both intent and motive for whatever cause was the same.[1283] Accordingly, it was believed that it would be redundant to include a motive requirement in the definition of genocide. This is markedly different from the definition of incitement to terrorism in which motive forms an important element of the definition. As explained in the preceding chapter, terrorism as a sui generis form of political violence can better be understood and defined by looking into the motive behind the commission of the act.

Although the discussion on the requirement of genocidal intent has been fairly discussed, there is little consideration of the required *mens rea* in the case of incitement to genocide in much of the academic literature and the jurisprudence of international criminal tribunals. Yet, there is some limited jurisprudence of international criminal tribunals that can support our understanding of the intent required in incitement to genocide. In case of *Hans Fritzsche*, who was indicted for 'deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities', although the IMT at Nuremberg noted that he had made intense and blatant anti-Semitic speeches and blamed the war and violence on Jews, his speech 'did not urge persecution or extermination of Jews'.[1284] In particular, the IMT noted that his speech cannot be construed that he intended to incite the German people for

---

[1281] *Akayesu TC* para 122

[1282] *Nahimana AC* 1001.

[1283] Ruhashyankiko (n 1141) paras 101-106.

[1284] IMT at Nuremberg (n 1216) 526.

exterminating and persecuting Jews; and as such it lacked any clear intent on the part of the speaker.[1285]

Accordingly, the 'prosecution's failure to prove Fritzsche's subjective knowledge of actual anti-Semitic atrocities represented a decisive factor' in his acquittal.[1286] A closer look at the prosecution of *Streicher* and *Fritzsche*, reveals that while the former was the 'first who originate[d] racist propaganda' and 'its creative source', the latter served as a mere 'conduit' for the war propaganda and the persecution of Jews.[1287] This finding is also reiterated in the *Nahimana* Appeals Chamber, where the Chamber emphasized that 'the reason Fritzsche was acquitted is not because his pronouncements were not explicit enough, but rather because they were not, implicitly or explicitly, 'intended to incite the German people to commit atrocities on conquered peoples'.[1288]

Similarly, in *Akayesu* the Trial Chamber held that it is 'satisfied beyond a reasonable doubt that the population understood Akayesu's call as one to kill the Tutsi'.[1289] The Tribunal interpreted the intention of incitement to genocide in the following terms:

> The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[1290]

[1285] *Ibid*; later on, however, Fritzsche was convicted for his anti-Semitic propaganda and sentenced for 9 years of hard labor under the German de-Nazification trials, See Salter (n 1227) 118.

[1286] Salter (n 1227) 42.

[1287] *Ibid*, 116.

[1288] *Nahimana AC* para 702.

[1289] *Akayesu TC* para 361, 673.

[1290] *Ibid*, Para 560.

The Trial Chamber noted that it has been proven without reasonable doubt that through his speech, Akayesu had 'intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group'.[1291] The Trial Chamber further noted that it is 'satisfied beyond a reasonable doubt that the population understood Akayesu's call as one to kill the Tutsi'.[1292] In *Kalimanzira*, the Appeals Chamber noted that 'a person may be found guilty of direct and public incitement to commit genocide, pursuant to Article 2 (3) (c) of the Statute if he or she directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*)'.[1293] In the case of *Leon Mugersa*, the Supreme Court of Canada inferred the intent of the speaker to incite genocide from the fact that he knew that the killings of the Tutsis were taking place when he made the speech.[1294]

As can be seen from the jurisprudence on incitement to genocide, the *mens rea* for incitement to genocide seems to have two inter-related requirements. The first relates to the intention of the inciter to arouse or provoke in the state of mind of the incitee to commit genocide. Second, the jurisprudence also shows that the intent to incite genocide also includes the intention of the inciter to see that the genocide be actually committed.[1295] Mendel notes that these two intent requirements are different and entail different evidentiary consequences.[1296] In particular, he contends that the difference between the two has effect in establishing the causal link between the incitement and the commission of genocidal acts. He argues that the first requirement focuses on creating a causal link between the incitement and the state of mind on the incitee to commit the crime of genocide.[1297] On the other hand, the latter

---

[1291] *Ibid*, para 674

[1292] *Ibid*, para 673.

[1293] *Kalimanzira AC* para 155, citing Nahimana AC, para. 677,

[1294] *Mugesera v Canada* (n 1158) para 96; Se also Benesch, Vile Crime (n 1163) 519.

[1295] Mendel (n 1146) 46.

[1296] *Ibid*.

[1297] *Ibid*.

requirement focuses on establishing causality between the incitement and the actual commission or the risk of the commission of genocide.[1298] Mendel argues that the first element of the *mens rea* of incitement is better in terms of understanding the *actus reus* of incitement to genocide. He contends that by adopting the first approach, one is also able to distinguish between incitement to genocide as an independent crime and solicitation as an element of complicity in the commission of genocide.[1299] However, Timmermann argues that the later requirement which emphasizes on the intent of the speaker to commit genocide is more plausible.[1300]

On the other hand, Albin Eser argues that in case of incitement to genocide, no specific intent is required to establish the *mens rea* of the speaker.[1301] He argues that it suffices to show that the speaker had knowledge and desire that his speech would incite listeners to commit acts of genocide.[1302] The very nature of the crime as direct and public incitement to commit genocide is obvious enough to exclude motive and specific intent as an element of the crime.[1303] On balance, Eser's view seems more convincing. Since the nature of the crime of direct and public incitement implies a clear intention by the inciter for the result, i.e genocide to materialize, it is immaterial whether the inciter's intention was merely to incite the incitee or to seek the result happen. To establish intention in incitement to genocide, it suffices to show that the incitement to commit genocide has the potential to incite mob violence, or at least, one individual will respond to the public appeal to the criminal action, i.e, the incitement.[1304] In the final analysis, since any prosecution for incitement to genocide has to establish a causal link between the speech and the genocide or the likelihood of the commission of genocide, the difference

---

[1298] *Ibid*.

[1299] *Ibid*.

[1300] Timmermann, Incitement in International Law (n 832) 219.

[1301] Eser, Individual Criminal Responsibility (n 850) 767, 806.

[1302] *Ibid*.

[1303] *Ibid*.

[1304] DCCPSM Commentary Art 2(3) (f), para 17.

between intent to incite the audience and intent to cause the result happen is eventually mitigated.

In most cases, establishing the evidence for incitement to genocide is difficult. Often international criminal tribunals rely on the content of the speech to prove the intent of the speaker.[1305] The Former High Commissioner of the OHCHR, Navi Pillay notes that in order to understand the intent of the speaker, it is important to look into the purpose of the speaker when conveying the message; and this can be drawn from the content of the speech itself as it can imply whether it was motivated by hatred or a genuine attempt aimed at ethnic consciousness regarding the demand for redistribution of political and economic power, as part of the political discourse.[1306] Although the directness of the incitement can be implicit, it can be argued that in most cases the very nature of the speech would establish the requisite intent. In the context of the general framework on hate speech, similar conclusions have been reached. For example, in the case of *Faurisson*, which is considered a seminal case on hate speech in international human rights law, the use of the words such as 'magic gas chamber', 'the myth of the gas chambers', and 'dirty trick', was indicative of the fact that the speech was not of a *bona fide* nature intended for expounding historical research, the dissemination of news and information, the public accountability of government authorities, but rather that it was intended at dehumanizing others and as such it was anti-Semitic in nature.[1307]

5.2.4. Context

The difficulty of articulating firm legal doctrines and legal rules on incitement in general and incitement to genocide in particular makes the importance of context in determining the

---

[1305] See *Nahimana TC* para 1001.

[1306] N Pillay, Freedom of Speech and Incitement to criminal Activity: A Delicate Balance (2008) *14 New England Journal of International and Comparative Law* 208.

[1307] *Faurisson v France* (n 462) para 10.

contours of political speech and lawless action paramount.[1308] As Gregory Gordon notes context plays a central importance in identifying the nature of the speech and whether it constitutes incitement to genocide.[1309] Looking at the context in which the speech was made and the external circumstance is crucial in order to fully grasp the meaning and content of what the speech entails.[1310]

In *Nahimana*, the Trial Chamber relied on context by noting that ethnic generalizations that provoke resentment on people against particular groups, was an 'indicator that incitement to violence was the intent' of the speaker when the speech is made in 'a genocidal environment'.[1311] It can be inferred that hate propaganda and ethnic profiling, while not in itself constituting the crime of incitement to genocide, can be indicative that the intent of the speaker was to incite genocide.[1312] In *Akayesu*, the Trial Chamber noted that '[it] is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience'.[1313] Similarly, in *Bikindi* the Trial Chamber argued that;

> To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication.[1314]

[1308] Mendel (n 1146) 56.

[1309] Gordon (n 1151) 173.

[1310] *Ibid*.

[1311] *Nahimana TC* Para 1022.

[1312] *Ibid*; But the *Nahimana AC* clearly noted that under the Genocide Convention 'only specific acts of direct and public incitement to commit genocide were sought to be criminalized and not hate propaganda or propaganda tending to provoke genocide', see at para 726.

[1313] *Akayesu TC* para 557.

[1314] *Bikindi TC* para 387.

Susan Benesch argues that in analyzing context as element of incitement to genocide, it is also important to understand the role and authority of the speaker over the audience and whether the audience is conditioned to respond and act up on that particular person.[1315] She argues that even if one was to speak some of the direct and public incitement to genocide similar to those that were spoken in the context of Rwandan genocide in Times Square, New York, one would almost certainly not think that genocide will occur.[1316] Because of this, Benesch argues that what is critical in looking at restrictions on freedom of speech and incitement to genocide is to look into the context and whether there is a reasonable likelihood that the speech would lead to a violent act in a particular social context.[1317] The content of the speech or the intention of the speaker is insufficient to define incitement to genocide from ordinary cases of hate speech; and the focus should be whether the speech at hand will lead to a reasonable likelihood of a violent act in a particular time and place.[1318] Benesch also notes that usually incitement to genocide occurs through a repeated use of hate speech and hate propaganda rather than an isolated case of speech.[1319] The repetition of the speech gives the false impression in asserting the truthfulness of the facts and instills hatred in the minds of the audience.[1320] Benesch's observation in this regard is consistent with the general claim of the thesis in the sense that instead of considering incitement to genocide as isolated act, it should be seen as a crime contiguous to a joint criminal enterprise and incidental to the broader context of the genocidal campaign.

Susan Benesch's insight is helpful in particular in the socio-political context of transitional democracies such as Ethiopia. Specifically, in a context where serious political issues are at stake such as ethnic strife and mass violence, the likelihood of genocidal violence is more

---

[1315] Benesch, Vile Crime (n 1163) 521.

[1316] *Ibid.*

[1317] *Ibid.*

[1318] *Ibid*, Benesch call this 'reasonably possible consequences' standard, See at 494.

[1319] *Ibid*.

[1320] *Ibid*, 525.

apparent. In these contexts, it is more likely that the incitement would influence its audience to take action. Hence, in assessing whether a speech constitutes incitement to genocide, courts would have to take these factors into account. On the other hand, they should also look into the effect of the speech in its totality and whether considering that particular context it was intended to incite genocide.

5.2.5. Causation

In emphasizing the philosophical rationale behind causation in criminal law, Michael Moore notes that the requirement of causation in criminal law mirrors the 'causation-drenched' nature of morality.[1321] He astutely observes that responsibility for causing harm is dependent up on the *blameworthiness* of the act and the possible attribution of the act to the actor.[1322] Nevertheless, establishing causation for speech related crimes and the resulting social harm has been an extremely difficult legal task. As Susan Benesch has wittily observed, the attempt to establish causation in incitement to genocide is like chasing a ghost.[1323] This is particularly true in dealing with cases involving collective forms of political violence such as genocide and terrorism as opposed to individualized crimes where it involves the commission of a specific criminal act such as murder. The broader support for the regulation of hate speech including incitement to genocide has been particularly influenced by the belief that some of the worst atrocities in the world such as the genocide of Jews during Nazi Germany, and the genocide in Rwanda and the Former Yugoslavia were caused as a result of hate propaganda and related speech acts.[1324] Although other outlier factors have also contributed to the genocide, it is plausible to argue that hate speech and incitement to genocide did contribute to the atrocities.

[1321] M Moore, Causation in the Criminal Law, in Deigh and Delinko (n 1414) 168; For a detailed discussion on causation, see the seminal work of HLA Hart and T Honoré, *Criminal Law: Causing, Etc., Others to Act', Causation in the Law* (Oxford University Press, 1985) 379.

[1322] *Ibid*, 168 (emphasis added).

[1323] *Ibid.*

[1324] P Dojčinović (ed.), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge, 2012).

While these questions relate to broader causal factors with regard to speech and acts of political violence, they do also arise in connection with individuals accused of inciting genocide, and whether the incitement has resulted in the commission of genocidal acts. This is particularly apparent when the genocidal act has actually happened, and when courts try to attribute the resulting genocidal act to the particular inciting speech at hand. The DCCPSM provides that the public nature of the appeal in incitements means that 'at least one individual will respond to the appeal and moreover, encourages the kind of "mob violence" in which a number of individuals engage in criminal conduct'.[1325] Similarly, in case of incitement to genocide, courts should be able to establish that there is 'a sufficient degree of causal link or risk of the result occurring […] between the statements and the proscribed result'.[1326]

The problem of establishing causation in incitement to genocide cases has been compounded particularly because of the fact that all the cases dealt under international criminal law, from the early case of *Streicher* to the more recent cases of ICTR have only dealt with cases where genocide has in fact occurred. Although incitement to genocide as inchoate crime does not require the actual commission of the crime, no single conviction has been made on unconsummated crime of incitement to genocide in international criminal tribunals.[1327] Yet, even in case of unconsummated or inchoate crime of incitement to genocide, causation is still relevant to demonstrate the causal link between the incitement and the likelihood that this would lead to a violent genocidal act.[1328]

Streicher provides the first case in international criminal law which gives important insights in the discussion of causation in incitement to genocide. The IMT at Nuremberg argued that through his speeches the accused 'incited the German people to active persecution' and to

---

[1325] DCCPSM, Commentary, 22.

[1326] Mendel (n 1146) 50.

[1327] *Nahimana AC* , para 678.

[1328] Benesch, Vile Crime (n 1163) 497-498.

'murder and extermination', constituting a crime against humanity.[1329] In *Streicher*, the required intent was sufficiently clear to establish the causal link between the speech and the genocidal act. Crucially, the Tribunal also established beyond reasonable doubt that Streicher had 'knowledge of the extermination of the Jews in the Occupied Eastern Territory'.[1330] Thus, it required that 'both the inciting words and the physical realization of their message' must be proved.[1331]

In articulating a historical account of the case of Julius Streicher and that of Carl Schmitt and the failure to prosecute the latter by the IMT, Michael Salter seems to raise implicitly the issue of causation. He argues that while Schmitt's earlier writing as well as his more direct involvement with the Nazi regime from 1933 to 1936 included anti-Semitic writings and support for national socialism, he stopped this before the Holocaust started. Nevertheless, 'Streicher [...] intensified his propaganda in coordination with Hitler's extermination programme' and as such was responsible for inciting genocide.[1332]

Nevertheless, as will be argued subsequently, it is difficult to argue that the IMT at Nuremberg was establishing a definite causal requirement between the speech and the resulting genocidal act. For example, it also held that his speech 'injected in to the minds of thousands of Germans which caused them to follow the policy of Jewish persecution and extermination'.[1333] The Tribunal seems to construe that the resulting genocidal acts occurred as a proof of attributing criminal responsibility for speech, as opposed to a definite causal requirement.[1334] As Gordon rightly notes 'the judgment does not posit a direct causal link between Streicher's publication

---

[1329] IMT at Nuremberg (n 1216)501.

[1330] *Ibid*, 502.

[1331] See JF Metzl, Rwandan genocide and the international law of radio jamming (1997) *91 American Journal of International Law* 637.

[1332] Salter et al (n 1227) 122.

[1333] IMT at Nuremberg (n 1216) 502.

[1334] *Ibid*.

and any specific acts of murder'.[1335] As will be discussed below, subsequent developments in the jurisprudence of incitement to genocide in the ICTR, demonstrate that instead of requiring a definitive requirement of causation, the Tribunals largely use evidence of genocidal acts to demonstrate proof that a particular inciting speech has in fact resulted in genocidal acts.

Wilson notes that the IMT also acknowledged that because there may have been intervening factors in play, the inciting speech may not have been the immediate and proximate cause of the killings of the Jews.[1336] After looking into both the jurisprudence as well as the details of the prosecutorial evidence in *Streicher*, he concludes that 'the IMT decision postulated a connection, not between the defendant's acts and concrete genocidal acts, but between the defendant's acts and the minds of other Germans, through the metaphor of viral contagion'.[1337] In effect, it did not establish a direct causation between Streicher's speech and the resulting genocidal act.[1338] However, as Wilson rightly notes, the IMT in its decision in *Streicher* seems to conflate the requirement of intent with causation.[1339] The issue of whether the speech in whatever forms has sufficiently contributed to the genocidal acts is distinct from the question whether his speech was intended at inciting individuals to commit genocide, requiring a different assessment. Moreover, instead of confining itself to analyzing whether Streicher's speech sufficiently contributed to the ensuing genocidal acts in their totality, it delved itself into a difficult task of establishing a definite causation of his speech with particular genocidal acts. This trend has continued in the subsequent cases of the ICTR which is confusing and incoherent.

[1335] Gordon (n 1151) 144.

[1336] Wilson (n 1153) 290.

[1337] *Ibid*, 6.

[1338] *Ibid*, See also *Nahimana TC* para 981, citing Streicher, where it confirmed that the Judgment in Streicher 'does not explicitly note a direct causal link between Streicher's publication and any specific acts of murder. Rather it characterizes his work as a poison "injected in to the minds of thousands of Germans which caused them to follow the National Socialists' policy of Jewish persecution and extermination".

[1339] Wilson (n 153) 285.

Similar to *Streicher*, the ICTR Trial Chamber in *Akayesu* held that '[t]he prosecution must prove a definite causation between the act characterized as incitement … and a specific offence'.[1340] It clearly demonstrated the importance of causation in incitement to genocide in that the evidence presented showed that shortly after his speech in which he made a public call for violence, two of the individuals he named in his speech were murdered.[1341] The Trial Chamber held that it is 'satisfied beyond a reasonable doubt that the population understood Akayesu's call as one to kill the Tutsi'.[1342] It further noted that 'there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba'.[1343] Finally it argued that it was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of *Taba*.[1344] Nevertheless, the Chamber contrary to the DCCPSM, also formally established that incitement to genocide is an inchoate crime, in which an accused can be convicted without a demonstration of a resulting genocidal harm.[1345] The *Akayesu* Trial Chamber also ruled that causation is 'not requisite to a finding of incitement'.[1346]

Similarly, in *Nahimana* the Trial Chamber established beyond reasonable doubt that there is a direct and clear causal connection between the speech the three accused individuals transmitted through the media and the resulting genocidal violence.[1347] In the Appeals Chamber, a crucial point was raised by the Appellant Negze challenging his conviction arguing that 'genocide would have occurred even if the Kangura articles had never existed'.[1348] In

---

[1340] *Akayesu TC* para 557.

[1341] *Ibid,* para 557

[1342] *Ibid*, para 673.

[1343] *Ibid,* para 674.

[1344] *Ibid,* para 673,

[1345] *Ibid,* para 562.

[1346] *Ibid*, para 1015.

[1347] *Nahimana TC* para 949; see also Wilson (n 1153) 290.

[1348] *Nahimana AC* para 766.

responding to this argument the Appeals Chamber dismissed his argument noting that 'it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequences'.[1349] Instead of substantiating and articulating the particular standard of causality needed to establish in incitement to genocide cases, the Appeals Chamber just dismissed the case noting that it is an inchoate crime and failed to resolve the question of causation in incitement to genocide. But the *Nahimana* Trial Chamber had initially also ruled that 'causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement'.[1350] This provides a significant precedent that should serve as guidance for framing the issue of causation in incitement to genocide.[1351] Gordon astutely observes that this ruling 'closed[the] door' regarding the issue of causation, particularly because the way the Tribunal framed the question was consistent with incitement law as well as questions related with the boundaries of political speech and incitement law.[1352]

Reflecting on the theoretical rationale in causation for speech acts, Kutz argues that we risk losing the broader moral canvas of complicity in a crime such as genocide if we adopt a rigorous requirement of direct causation.[1353] In relation to the decision in *Nahimana*, Kutz notes that the fact that on appeal the defense was able to convince the court that there was no direct causality between his expressions in support of RTLM's ideology and the unfolding of the massacre illustrates the difficulty of applying definite causation.[1354] Here again, Kutz's conclusion is consistent with the general position of this thesis that the nature of incitements as public acts addressed to a general audience, requires adherence to a probabilistic theory of causation rather than a definitive one.[1355] Incitements as public acts have a distinct nature from

---

[1349] *Ibid.*

[1350] *Nahimana TC* , para 1015.

[1351] Nahimana *TC,* para 1015.

[1352] Gordon (n 1151) 176.

[1353] C Kutz, The Philosophical Foundations of Complicity Law, in Deigh and Dolinko (n 1414) 160.

[1354] *Ibid*, 161.

[1355] Schauer, Speech, Behaviour and the Interdependence of Fact and Value (n 749) 50-51.

solicitations and other related forms of complicity to crime such as attempt, conspiracy, planning and preparatory acts. The fact that often genocide happens in a grand design of joint criminal enterprise, makes it difficult to establish that the genocide could not have happened but for Nahimana's hateful speech and incitement.

Wilson observes that the approach of the ICTR on causation has been largely motivated to identify a genocidal intent which the tribunal has found particularly arduous.[1356] For example, in *Bikindi* the Trial Chamber argued that the songs by the accused inspired the commission of the genocidal act and the 'broadcasts of Bikindi's songs had an amplifying effect on the genocide'.[1357] But he argues that no witness testified that because of his songs that he/she was influenced to commit the genocidal act and as such did not establish a direct causation.[1358] Similarly, in *Ngirabatware* the Trial Chamber made no reference to whether the speech has connection with the genocidal act, instead relying on the content of the speech-'kill Tutsis' as unequivocal affirmation of the intent of the speaker to incite a genocidal act.[1359] Henceforth, Wilson argues that the Tribunal has used causality as a means of proving the intent of the individual to rectify its evidentiary challenges to establish the *mens rea* of incitement to genocide.[1360] When the speech itself at face value is clear enough to consider it as unequivocal incitement to genocide, then the Tribunal does not usually consider the significance of causality.[1361]

The major problem in establishing collective causality in speech related crimes occurs because of the lack of a reference point from the perspective of theories of causation. Most scholars fail

---

[1356] Wilson (n 1153) 295.

[1357] *Bikindi TC,* para 264; See also *Simon Bikindi v The Prosecutor*, Case No. ICTR-01-72-A (18 March 2010) para 167.

[1358] Wilson (n 1153) 297.

[1359] *Ngirabatware TC,* para 1368.

[1360] Wilson (n 1153) 297-98.

[1361] *Ibid*.

to draw any theoretical framework when analyzing speech and violence. Thus, the perplexing question does incitement to terrorism increase terrorist attacks, or does incitement to genocide lead to genocidal acts, becomes a notorious legal and empirical question. Criminal law scholars point out that adopting a uniform theory of causation for all crimes is implausible and as such there is 'no uniform criterion of causation' in criminal law.[1362] They argue that each criminal conduct requires a different test of causation.[1363] The ultimate purpose of criminal law inquiry into causation is 'for judging under what conditions an event should be deemed the "result" of a person's conduct for the purpose of holding him criminally responsible'.[1364] As a result, the test to be employed in using one particular theory of causation over another depends on the purpose and nature of the crime and whether it is an optimal fit for that particular crime.[1365] Nevertheless, 'in each context the test of causation should be fixed and clearly discernible'.[1366]

In this regard Fredrick Schauer's insight is helpful. He notes that in a class of acts, including speech resulting in a certain social harm, the deterministic theory of causation (also called the *but for* test or the *conditio sine qua non* formula) which seeks to create a definite nexus between speech and harm is impossible.[1367] The deterministic theory of causation seeks to establish that the result of the harm would not have happened but for the act of the doer. While this theory has been criticized extensively, it is particularly problematic when it comes to establishing causation between speech and collective forms of political violence such as genocide.[1368] A more plausible alternative is adopting a probabilistic theory of causation which

---

[1362] PK Ryu, Causation in Criminal Law (1958) *106 University of Pennsylvania Law Review* 803.

[1363] *Ibid*.

[1364] *Ibid,* 775.

[1365] *Ibid.*

[1366] *Ibid,* 802.

[1367] Schauer, Speech, Behaviour and the Interdependence of Fact and Value (n 749) 50.

[1368] *Ibid*.

argues that although the speech is not the only and definitive cause of the social harm, it contributes substantially/sufficiently to the resulting harm.[1369]

The fact that the probabilistic theory of causation is a more appropriate criterion in establishing incitement to genocide does not mean that it is a universally applicable theory of causation. It only means that it a more appropriate theory of causation in case of incitement to genocide.[1370] As consistently argued in this thesis, incitement as a public act is addressed to a general audience where the speaker has no control over the conduct of the incitee. This requires that instead of seeking a definite causation between the speech and the genocide, it would have to be assessed on whether the particular inciting speech has caused a proximate and sufficient condition for the totality of the genocidal acts, rather than on individual assessment of the speech on particular genocidal acts. Wilson also argues that the ICTR, despite its inconsistency seems to establish a probabilistic theory of causation than a deterministic theory of causation.[1371] This does not, however, mean that attempt should not be made to demonstrate whether particular speech acts have in fact resulted in specific genocidal acts. Nevertheless, this should be seen merely as having a probative value in demonstrating as evidence that particular speech acts of individuals charged with incitement to genocide have in fact resulted in the commission of genocidal acts.[1372]

5.2.6. Likelihood and Imminence

Apart from the general requirement of causal connection between speech and a resulting genocidal act, Courts should also look into the likelihood and imminence requirement in cases involving incitement to genocide. Both in cases of consummated or unconsummated cases of incitement to genocide, causation should be integral part of responsibility for speech related

---

[1369] *Ibid*.

[1370] *Ibid*.

[1371] Wilson (n 1153) 301.

[1372] *Ibid*.

crimes including incitement to genocide. In case of unconsummated cases of incitement to genocide, causation has to demonstrate the likelihood and imminence of whether the incitement will lead to genocide in the foreseeable future and the proximate causation of the incitement to the genocide[1373]

If the moral philosophy behind criminalizing incitement is because of the responsibility of the speaker to the resulting crime, then an assessment of both the likelihood and the proximity, or the temporal gap between the speech and the crime has to be demonstrated.[1374] This is informed by an important policy rationale that intends to limit the extent of legal responsibility to the most proximate cause. The lack of considering this underlying rational will make legal responsibility for a crime to extend indefinitely.[1375] In this regard Susan Benesch notes that without considering the likelihood of occurrence of genocidal acts it would indeed be absurd to indict someone for incitement to genocide.[1376] In speech crimes, many other free speech scholars also argue that an assessment of the likelihood of violence should form an important element for any inchoate crime related with speech.[1377]

Mendel notes that without looking into the causal link between the speech and the likelihood of the risk of the genocidal act, there will be risk of jeopardizing the protection of political

---

[1373] Benesch, Vile Crime (n 1163) 522; It should be noted that the US, because of its robust protection on free speech, and wary of the notion of incitement to genocide and its effect on free speech took the position that any speech including incitement to genocide can only be proscribed if it leads to substantial likelihood to the commission of lawless action, in this case genocide; see Genocide Convention Implementation Act of 1987 (the Proxmire Act), IS U.S.C. S 1091 (1988) S. 1851, s. 1093(3).

[1374] Ryu (n 1362) 775.

[1375] Causation in the Law, Stanford Encyclopedia of Philosophy (2012) available at https://stanford.library.sydney.edu.au/archives/sum2012/entries/causation-law/

[1376] Benesch, Vile Crime (n 1163) 494.

[1377] Greenawalt, Speech, Crime and the Uses of Language (n 189) 653.

speech.[1378] Because of this in the context of incitement to genocide, establishing causation between the speech and the likelihood of genocidal act is essential in demarcating the boundaries of incitement to genocide and political speech. Similarly, in the 'Accidental Birth of Hate Crimes', Michael Salter, rightly notes that 'although the [prosecution] is not expected to prove that hate speech constituting the incitement resulted in the commission of a crime, questions of causation remain relevant issues within the overall trial context' of establishing the crime of incitement to genocide.[1379]

The question of likelihood and imminence are two inter-related requirements which are difficult to establish. In relation to the question of likelihood, as discussed in the previous chapter on incitement to terrorism, scholars argue that the likelihood of the commission of a lawless action should demonstrate the existence of 'probable cause' understood as the existence of 'substantial chance' or 'fair probability' that the speech will lead the commission of the criminal act.[1380] They argue that this provides a higher threshold which requires the State to show more than a reasonable suspicion that a crime is going to be committed in order to proscribe criminal advocacy.[1381] Scholars including Susan Benesch while arguing that the requirement of causation should demonstrate the likelihood of the commission of the genocidal act, they do not provide a particular test to be employed.[1382] Thomas Healy's proposition of 'probable cause' provides a much more articulate standard in considering incitement to genocide and incitement law in general. Accordingly, Healy's insight can be a helpful parameter in establishing the requirement of likelihood in incitement to genocide cases.[1383]

[1378] Mendel (n 1146) 50.

[1379] Salter et al (n 1227) 30.

[1380] *Ibid*.

[1381] *Ibid*.

[1382] See Benesch, Vile Crime (n 1163).

[1383] See Healy (n 1044).

The more difficult question is the issue of determining the requirement of imminence in incitement to genocide. Given the difficulty of establishing the precise and exact time where incitement triggers or has the potential to trigger genocide, locating the temporal requirement in the case of incitement is very difficult.[1384] But some insight can be found from the early prosecution of IMT for incitement to genocide. Salter et al, observe that the IMT judgment has expressly rejected the claim by the prosecution that anyone who may has been involved as '"instigator" or "accomplice" with the promotion of Nazism since 1919 was potentially caught by the "common plan" / "conspiracy" dimension of the Nuremberg Charter'.[1385] In responding to such claim, the Tribunal argued that it must not be overly broad and that it 'must not have been too far removed from the time of decision and of action'.[1386] Implicit in this ruling is a clear acknowledgement that criminal responsibility for speech cannot be invariably extended to unlimited period of time. Because of this there has to be sufficient and proximate causation between the speech and the ensuing genocidal act.[1387]

In general when one looks at the jurisprudence of international tribunals, there is a clear pattern that most of the speech constituting incitement to genocide was made during the time when the actual genocidal acts were taking place.[1388] This clearly demonstrates a close temporal nexus between the incitement and the potential risk of the commission of genocidal

---

[1384] See discussion on imminence in Chapter Four.

[1385] Salter et al (n 1227) 68.

[1386] *Ibid*.

[1387] *Ibid*, 52, noting that 'Fritzsche's "innocence" rested on this lack of evidence of an actual and proximate cause and encouragement of at least some prosecutorial activity through hate speech'.

[1388] See Mendel (n 1146) 50; See *Akayesu* TC para 674; But Wilson argues that the Nahimana TC also acknowledged that 'it acknowledged that RTLM broadcasts may not have been the immediate proximate cause of killings and that there may have been a number of intervening factors in addition to the communications' see Wilson (n 1153) 527, citing *Nahimana* TC , where it noted that the downing of the Rwandan president's plane may have triggered the genocide and argued that 'RTLM, Kangura, and CDR were the bullets in the gun', see at at para 953.

acts. Nevertheless, because of the continuing effect of a speech, there seems the recognition of the effect of inciting speech after some reasonable time after the speech was made. This realization seems to have prompted the ruling by the Appeals Chamber in *Nahimana* to note that even if the actual commission of the genocide began after 1 January 1994, the incitement to genocide was triggered before this date, to articles published as early as 6 April 1994.[1389] The Appeals Chamber reaffirmed that the crime of incitement to genocide 'is completed as soon as the [speech] in question is uttered or published, even though the effects of incitement may extend in time'.[1390]

Although it is difficult to provide a fixed time frame, it should be emphasized that there has to be some shorter temporal nexus between the inciting speech and the likelihood occurrence of a genocidal act. In *Nahimana*, the decision of the Appeals Chamber, although framed in the context of the temporal jurisdiction of the tribunal, shows that it reversed the initial finding by the Trial Chamber which considered articles of *Kangura* published from its first issue in May 1990 to March 1994. The Appeals Chamber noted that 'even if the incitement may extend in time' it would not consider publications of *Kangura* before 1994.[1391] It noted, however, that they could be considered as they have a probative value to establish the intent of the speaker.[1392] This evasive argument has not adequately responded to the question of imminence in incitement to genocide. The *Nahimana* ruling as well as the decisions of the ICTR in other incitement cases failed to adequately articulate the normative standards needed to establish imminence in incitement cases. Moreover, C. Edwin Baker argues that 'as to the publications of *Kangura*, the Reports present *absolutely no evidence or even factually-based allegations* of a

---

[1389] *Nahimana AC,* para 939; Nevertheless the Appeals Chamber noted that 'the real issue is whether the RTLM broadcasts before 6 April 1994 substantially contributed to extermination after that date', and concluded that 'it cannot be concluded that these broadcasts substantially contributed to the extermination of Tutsi civilians to extermination after that date.' at para 940.

[1390] *Nahimana AC,* para 723.

[1391] *Ibid,* para 723.

[1392] *Ibid,* para 725

direct connection between any article or advocacy published by *Kangura* and any of the later murders that collectively constituted the genocide'.[1393] In particular, he notes that 'the last statements published by *Kangura* in the middle of March [1994] were not "imminent" in relation to murders that began in April'. [1394]

In general, as discussed in Chapter Four, providing a fixed time such as requiring that the inciting speech should have the potential to cause harm within matter of days deprives contextual analysis of particular speech acts confronted by courts. It suffices to say that courts should seriously scrutinize whether the particular inciting speech can cause an imminent lawless action in which lawful intervention to avert the danger would not be possible in the particular circumstances.

5.3. The Dangers of Creeping Migration of Anti-Constitutional Ideas in Incitement to Genocide and Hate Speech

Despite some of the inconsistency in expounding the notion of incitement to genocide, the jurisprudence of international criminal tribunals offers important lessons in determining the contours of political speech and incitement to genocide. Unlike the amorphous and vague notion of incitement to terrorism, incitement to genocide has been construed narrowly and faithful to its original language, 'direct and public incitement to genocide'. This interpretation offers significant contribution to enrich the fledgling jurisprudence on the crime of incitement to genocide in emerging and transitional democracies such as Ethiopia. By doing so it offers an important lesson in protecting robust political speech while at the same time preventing the possibility for genocidal acts and ethnic strife in these societies.

Often, however, hate speech and incitement to genocide laws have been used to silence political speech in many societies drastically affecting the ability of individuals to participate in

---

[1393] Baker, Genocide (n 68) 10.

[1394] *Ibid*, 11.

the political process.[1395] The historical association of serious forms of political violence such as the genocide of the Jews in Nazi Germany and that of the genocide in Rwanda and the former Yugoslavia with the propaganda machinery which precipitated the violence in these States has galvanized international support to ban hate speech and incitement to genocide.[1396] This emphasis on the criminalization of speech as a means of preventing genocide and other related forms of ethnic strife continues to have a creeping migration of anti-constitutional norms in domestic legal orders.[1397] The prosecutorial trend in international tribunals also overlooks significant aspects of free speech doctrine that could have provided balance in analyzing incitement to genocide and the broader approach that should be taken in relation to speech related crimes.

In the context of many emerging and transitional democracies in Africa, international laws on incitement and some of the precedent set out by international tribunals such as the *Nahimana* case have often been invoked as excuse for broad and vague restrictions on political speech.[1398] In his Partly Dissenting Opinion in the *Nahimana* Appeals Chamber, Judge Theodore Meron astutely observes that in emerging democracies, the *Media Trial case* (*Nahimana* case) has been used as a precedent for restricting political speech and justifying extensive restrictions on freedom of expression by many African States.[1399] In similar vein, C. Edwin Baker, who testified as expert witness in the *Nahimana* case in articulating his criticism against the judgment notes that:

> The press is an extraordinarily convenient scapegoat and its suppression routinely convenient. This tendency exists in all democracies but possibly most strongly in nations still developing politically and economically, especially when (as is often the case) these governments are looking for quick "fixes" to deeper problems or when they fear

---

[1395] Baker, Genocide (n 68) 5; See also J Simon, Of Hate Speech and Genocide in Africa: Exploiting the Past (2006) *Columbia Journalism Review* 9.

[1396] See Dojčinović (n 1324); Timmerman Incitement in International Law (n 832).

[1397] Baker, Genocide (n 68); Simon (n 1395).

[1398] See Simon (n 1395).

[1399] Partly Dissenting Opinion of Judge Meron in *Nahimana AC.*

> political or popular opposition inspired in part by the government's own faults. This tendency suggests the practical importance of avoiding any legal precedent that would seemingly or rhetorically justify limitations on the press freedom that democratic, economic, and social development depends.[1400]

In articulating the significance of crafting narrowly tailored limits on political speech in the context of incitement, Joel Simon similarly observes that 'without clearly articulated international standards on incitement, many African governments will continue to exploit the perceived correlation between hate speech and genocide to stifle legitimate criticism and suppress independent reporting'.[1401]

Similarly, in the context of Ethiopia, the government has used broad and vague laws on hate speech and incitement to genocide which had drastic effect on political speech.[1402] This was particularly evident since the contested national election in 2005. The members of the CUD, the then major opposition political party including the party chairman, the late Engineer Hailu Shawel together with 130 individuals were charged with incitement to genocide, subsequent to the violence that erupted after the election.[1403] Although the charges were later dropped, hate speech and the rhetoric of incitement to genocide continue to be one of the major contentious issues that could have a chilling effect on political speech. In recent times, the government has also justified blocking social media sites and online platforms as well as broader restrictions on freedom of expression based on allegations of the increase of hate speech.[1404]

[1400] Baker, Genocide (n 68) 3.

[1401] Simon (n 1395) 9.

[1402] Gagliardone, Mapping Hate Speech (n 601) 33.

[1403] *Federal Public Prosecutor v Hailu Shawel*, Criminal Charge Number 432/1998 (2005).

[1404] See Relief Web, *World Leaders Debate International Security Challenges*, (21 Sept 2016) [<http://reliefweb.int/report/world/world-leaders-debate-international-security-challenges-calling-concerted-efforts-curb>] (accessed 10 February 2017).

The fact that hate speech and hate rhetoric has become the defining nature of political debate in contemporary Ethiopia can be witnessed by the fact that in the recent address of the Prime Minster to the UN General Assembly, the country's head of State, Prime Minster Haile Mariam Desalegn pointed out the use of hate speech in social media as one of the foremost legal and political challenges of the State.[1405] However, despite the popular belief that the use of hate speech has increased through online media platforms, recent studies on hate speech in Ethiopia clearly show that the use of online hate speech is at best marginal and significantly low.[1406] Yet, the general belief that the use of hate speech has increased in the country and the consequential belief that more regulation is needed continues to feed the government's stance on the importance of increased regulation.

The fact that the government's political legitimacy and program is founded on the protection of minority rights makes it also easier to manipulate the political process in order to silence political speech.[1407] Although some Ethiopian Scholars acknowledge that hate speech may be important to "shield" marginalized and historically disadvantaged ethnic groups from verbal abuse,[1408] the current legal and political framework drastically affects the ability to make

---

[1405] UN News Centre, *Ethiopian Leader at UN Assembly Decries Use of Social Media to Spread Messages of Hate and Bigotry*, (21 September 2016) [<https://www.google.ie/search?q=hailemariam+desalegn+UN+general+asemebly+on+social+media+and+hate+spech+online&ie=utf-8&oe=utf-8&client=firefox-b&gws_rd=cr&ei=PK1KWbexHMSMgAahuLnABg>] (accessed 20 January 2017)

[1406] See Gagliardone, Mapping Hate Speech (n 601).

[1407] See Mengistu (n 52) 371.

[1408] *Ibid*, 354; But here Yared when using the word verbal abuse seems to confuse the notion of fighting words which are outside the protection of freedom of expression, *prima facie*; and hate speech laws; there is a general consensus that fighting words or insulting words that can trigger imminent lawless action fall outside of the protection of freedom of expression; See in this regard *Chaplinsky v New Hampshire* (n 315).

legitimate political expressions which can suffocate the vitality of the democratic process.[1409] In this regard, the general creeping migration of anti-constitutional norms from international law to the domestic legal order should be looked closely. In the case of freedom of expression, the combination of the inquiry into free speech doctrine and criminal culpability theory can mitigate this migration of anti-constitutional norms. By doing so, the demands of preventing hate speech and incitement to genocide and the need for protecting robust political speech can be justified through a principled application of free speech doctrine and criminal culpability theory.

5.4. The Demands of Hate Speech Regulation in a Pluralist State

Hate Speech including incitement to genocide raises difficult legal and socio-political issues that test the limits of political speech in a democracy.[1410] Hate speech also provides an interesting insight on the challenges of protecting freedom of expression particularly because national idiosyncrasies make it difficult to draw common principles on the regulation of hate speech across societies.[1411] Discussions of hate speech are also significant as they help to highlight the different approaches of normative constitutional theory in non-liberal constitutions which

---

[1409] Many scholars have contended that hate speech laws should be banned because of the fact that they perpetuate inequality of different groups that have been disadvantaged and as such it itself is antithetical to the democratic process, see in this regard, Martin Lawrence, CA MacKinnon, *Only Words* (n 677); LJ Lederer and R Delgado (eds), *The Price We Pay: the Case against Racist Speech, Hate Propaganda and Pornography* (Hill and Wang, 1995). However, other scholars argue that has been that hate speech should be protected as it enables minority or disadvantaged groups to negotiate their position in a democratic society, see in this regard CE Baker, Of Course, More Than Words (1994) *61 University of Chicago Law Review* 1181.

[1410] Rosenfeld, in Herz and Molnar (n 52) 288.

[1411] *Ibid*.

emphasize on group rights, and liberal constitutions which are largely driven by principles of normative individualism.[1412]

From a sociological point of view, feminist scholars and critical race theorists have staunchly argued against the use of hate speech and pornography by noting that it degrades and dehumanizes minority voices in society.[1413] They argue that hate speech and various forms of verbal abuses, and racial slurs either in the form of speech, graffiti in public places, or the burning or desecration of religious books or symbols targeted against particular groups in society result in the psychological harm on these groups.[1414] They also point out two broader social factors that require the regulation of hate speech in any democratic society. The first relates to the general belief that hate speech has the potential to perpetuate or increase social inequality of minority groups.[1415] Second, scholars also point out that hate speech targeted at minority racial, ethnic or religious groups has the potential to increase the likelihood of violence against these groups.[1416]

Looked from a democracy based-theory of free speech perspective, hate speech also suffocates public discourse by dominating public debate to dwell on questions of identity and race and overlooking public reason and more significant areas of concern in the democratic polity such as corruption, absence of rule of law, economic and political inequality, and other important

---

[1412] See Walker (n 546).

[1413] CA Mackinnon, Only words (n 677); MJ Matsuda et al. (eds.) Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment (Westview, 1993); R Delgado, First Amendment Formalism Is Giving Way to First Amendment Legal Realism (1994) *29 Harvard Civil-Rights Civil Liberties Law Review* 169; CR Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus (1990) *1990 Duke Law Journal* 431.

[1414] LW Sumner, Criminalizing Expression: Hate Speech and Obscenity in J Deigh, D Dolinko, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press, 2011) 24.

[1415] *Ibid*.

[1416] *Ibid*.

public policy issues.[1417] Ashutosh Bhagwat rightly notes that hate speech 'far from advancing democratic self-governance, actually detracts from it because such speech silences important voices, and the ideas expressed by hate speech ... have no legitimate role in a liberal democracy'.[1418] Similarly, Sumner argues that hate speech that targets specific groups is not usually intended to engage with the audience rationally but ridiculing and humiliating these groups.[1419]

In the context of Ethiopia, since the new constitutional order was established in 1995, the question of hate speech has recurred in part because of the ethnic federalism that the State upholds and its particular emphasis on the protection of minority groups.[1420] The use of social media and other online platforms has also provided an additional opportunity to disseminate online hate speech, albeit its limited nature.[1421] For example, the Oromo activist Jawar Mohammed has been accused by many Ethiopians for incitement of hatred and genocide.[1422] One of the most controversial aspects of his speeches includes a speech he made addressing the Oromo community in Atlanta, in the US. In his speech, he said, 'in the area where I grew, 99% of the population is a Muslim, so if any one tries to mess with us we will hit their neck by a machete'.[1423] He was speaking this in the context of acknowledging the importance of Muslim-Oromo ethno-religious solidarity and its implications in Ethiopian politics. One finds similar hate rhetoric and hate speech in what has become an increasingly polarized political discourse in the country.

[1417] *Ibid*.

[1418] Bhagwat (n 1705) 111.

[1419] Sumner (n 1414) 24.

[1420] See Constitution of Ethiopia Art 39.

[1421] Gagliardone, Mapping Hate Speech (n 601) 32.

[1422] See Zehabesha, *Jawar Mohammed, A Mission of Inciting Hate and Genocide: A documentary* (12 July 2013) [<http://www.zehabesha.com/jawar-mohammed-a-mission-of-inciting-hate-and-genocide/>] (accessed 12 October 2014).

[1423] *Ibid*.

The polarized nature of the political discourse in the country and the perceived belief that much of the economic and political power in the country is controlled by the minority Tigrayan elites has exacerbated hate rhetoric and the use of expressions which have serious implications on hate speech regulation and questions on the limits of political speech.[1424] The historical allegations of marginalization of the Oromo and other communities, and the demand for greater economic and political power as well as their cultural accommodation has also added another dimension to the debate on hate speech in the political discourse of the country.[1425] Historically, the use of hate speech has also been used as a way of degrading and ridiculing different ethnic groups, in particular minority ethnic groups in the country's political history.[1426] The use of derogatory terms was often employed which had the effect of degrading and ridiculing minority ethnic groups. For example, the Oromos were referred as '*Galla'*; the Afar's have been referred as '*Teltal'* or '*Adal';* the Welayta's have been called '*Wolllamo'*, and other ethnic groups in the South of Ethiopia were also called *'Shankilla'* etc.[1427] It is difficult to assume that only minority groups have been victimized in terms of the use of ethnic slurs; even dominant ethnic groups have been labeled as such. More recently, the Tigrayans have been referred as '*Ts'ila'* and even the Amharas, traditionally considered as the powerhouse of Ethiopian Empire, have also been the subject of ridicule. Although it is difficult to conclude that the use of these derogatory terms was confined to minority groups and perpetuate ethnic inequality, ethnic epithets continue to play a role in fomenting hate speech in the country.[1428]

[1424] R Lefort, *Unrest in Ethiopia: The Ultimate Warning Shot*, (Open Democracy, 2 February 2016) [<https://www.opendemocracy.net/ren-lefort/unrest-in-ethiopia-ultimate-warning-shot>] (accessed 5 March 2017).

[1425] See, SM Mollenhauer, Millions on the Margins: Music, Ethnicity, and Censorship among the Oromo of Ethiopia (PhD Thesis, University of California Riverside, 2011).

[1426] *Ibid*.

[1427] *Ibid*.

[1428] See Gagliardone, Mapping Hate Speech (n 601).

Although it is true that the discussion of hate speech encompasses various forms of proscribed speech including memory laws, offensive speech and various other forms of hateful expressions, the discussion will focus on the notion of incitement to genocide. In this regard Yared Legesse Mengistu also argues that any justification for limits on political speech in the context of Ethiopia should only be justified if it only has implications for inciting genocide.[1429] By articulating the appropriate boundaries of incitement to genocide, the risk of chilling effect on political speech and public discourse can be mitigated.

5.5. Definition and Scope of Incitement to Genocide in Ethiopia

The definition of genocide and incitement to genocide under Ethiopian law is largely adopted from the Genocide Convention. Ethiopia became a State party to the Genocide Convention in 1949.[1430] The Penal Code which was originally adopted in 1957 proscribes both genocide and incitement to genocide.[1431] Although the Revised Criminal Code that was adopted in 2005 made some modifications to the Penal Code of 1957, no significant changes have been made in relation to the definition of genocide and incitement to genocide.[1432]

Before looking at the legal elements of the definition of incitement to genocide, it would be helpful to briefly highlight the definition of genocide in Ethiopian law as it has certain unique features that depart from the definition provided under the Genocide Convention.

Article 269 of the Revised Criminal Code which provides for the definition of genocide reads:

> Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious or political group, organizes, orders or engages in:
> (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or

---

[1429] Mengistu (n 52) 360.

[1430] See (n 37).

[1431] Penal Code of the Empire Ethiopia, Penal Code Proclamation No. 158 (1957) Art 286.

[1432] Revised Criminal Code Art 274.

(b) measures to prevent the propagation or continued survival of its members or their progeny; or
(c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance,
is punishable with rigorous imprisonment from five years to twenty-five years, or, in more serious cases, with life imprisonment or death

As can be seen from Article 269 of the Revised Criminal Code, the definition is markedly different from the Genocide Convention with regard to the scope of the protected groups. Unlike the Genocide Convention whose scope is limited to four identified groups, namely national, ethnical, racial or religious group, the Ethiopian law is more expansive and includes political groups as protected groups.[1433] This was intentionally designed to address the problem of genocide and similar forms of political violence in the country, in particular in relation to the destruction of political groups.[1434] Moreover, Article 269 of the Criminal Code seems to be expansive in that it also includes a nation, nationality and groups identifiable by a particular color as additional protected groups. This reflects the constitutional commitment of the State to protect minority groups which forms the ethnic federal democratic order of the polity.[1435]

Article 274 of the Revised Criminal Code which proscribes incitement to genocide reads:

Whoever, with the object of committing, permitting or supporting any of the crimes provided for in the preceding Articles (which includes Article 269):
(a) publicly provokes or encourages, by word of mouth, images or writings; or
(b) conspires towards or plans with another, urges the formation of, or himself forms a band or group, joins such a band or group, adheres to its schemes or obeys its instructions, is punishable with rigorous imprisonment not exceeding five years.

[1433] Genocide Convention Art 2.

[1434] See Y Haile-Mariam, The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court (1999) *22 Hastings International and Comparative Law Review* 667.

[1435] The fact that the Ethiopian constitution allows not only self determination but also for the right of secession of ethnic groups is a radical demonstration of this constitutional reality; See Constitution of Ethiopia Art 39.

The reference in Article 274 '[w]hosoever, with the object of committing, permitting or supporting any of the crimes provided for in the preceding articles' seems to expand the notion of incitement to genocide to cases of incitement to war crimes and crimes against humanity. If one accepts this interpretation, this would be a clear departure from international law which confines the notion of incitement only to genocide. There is a risk that the inclusion of incitement to war crimes and crimes against humanity could further undermine the protection of political speech, given the very complex and fuzzy nature of the law of incitement.[1436]

Article 274 of the Criminal Code conceives incitement to genocide as a public act, consistent with the Genocide Convention. The reference in Article 274 whosoever 'publicly provokes or encourages' clearly indicates that the criminal law was intended at the proscription of speech acts addressed to the general public as opposed to private forms of solicitation. As consistently argued in this thesis, the particular concern with the proscription of incitement as a public act, should be looked carefully as it encroaches upon an important normative value attached to public discourse.[1437] Because the boundaries of incitement and political speech cannot be decided a priori, any limitation on public speech should be informed by this policy rationale by recognizing the ideological significance of protecting publicly addressed expressions and providing narrowly tailored restrictions.[1438]

Beyond this, however, the text of Article 247 of the Criminal Code does not explicitly state whether incitement should be direct. Unlike the Genocide Convention which explicitly proscribes '[d]irect and public incitement to commit genocide', Ethiopian law does not provide whether the incitement should be direct.[1439] Yet, one can plausibly argue that since the Genocide Convention clearly provides for direct forms of incitement, Ethiopian law should also comply with this requirement of the definition of incitement to genocide. The jurisprudence of

---

[1436] See Simon (n 1395).

[1437] See Greenawalt, Speech, Crime and the Uses of Language (n 189) 112-112

[1438] *Ibid*.

[1439] See Genocide Convention Art 3(C).

international criminal tribunals as discussed in the foregoing discussions clearly establishes that incitement to genocide has to be conceived as a direct form of incitement and excludes indirect and vague forms of incitement from the definition of incitement to genocide.[1440] Confining the notion of incitement to genocide, only to direct form of incitement was motivated by the particular concern that the proscription of incitement could have on political speech. Accordingly, both principles of criminal law and free speech doctrine require a narrow conception of incitement to genocide confined to its original meaning 'direct and public' incitement to genocide.[1441] The application of incitement to genocide under Article 247 of the Revised Criminal Code in the context of Ethiopia should also comply with this requirement in order to ensure both the prevention of genocidal acts and the protection of robust political speech.

Nevertheless, an assessment of whether a speech constitutes incitement to genocide has to also establish the *mens rea* of the speaker, causation, and the likelihood and imminence of whether a speech would lead to some genocidal act in the near future.[1442] All these requirements, which are discussed in the introductory part of this chapter, should also have relevance in the context of the legal requirements for establishing a case for incitement to genocide in the legal framework of Ethiopia. Although there is a dearth of literature and jurisprudence on incitement to genocide in Ethiopia, the every effort has been made to include some of the most prominent cases and the problematic aspects of the jurisprudence of Ethiopian courts in understanding incitement law and the limits of political speech.

[1440] See *Akayesu TC* , para 557.

[1441] Genocide Convention Art 2(3).

[1442] See Benesch, Vile Crime (n 1163) 519-528.

5.6. The Jurisprudence of Ethiopian Courts on Incitement to Genocide

Although it is very difficult to get the full account of the case law on incitement to genocide in Ethiopia, some of the following cases will help to illustrate the normative challenges of articulating incitement to genocide and the contours of political speech in the fledgling jurisprudence of Ethiopian courts. By relying on international and comparative law, the objective is to highlight some of the contentious legal issues involved in articulating the legal limits of political speech and incitement to genocide.

5.6.1. *Special Prosecutor v Colonel Mengistu Haile Mariam & Others*

The case *of Special prosecutor* v *Mengistu Haile Mariam and Others* [1443] is the first African trial where an entire regime was prosecuted for the crime of genocide, incitement to genocide and crime against humanity.[1444] The trial took over 12 years to complete, involving over 720 witness testimonies, and numerous documentary and audio visual evidences. Although the particular case of *Mengistu Haile Mariam* is said to have included 72 former highest officials of the *Derg*, the prosecution of individuals involved in *Derg's* genocide in Ethiopia included more than 5198 former *Derg* officials in various regions of the country. The figure of the victims of the 'red terror' campaign which resulted in the 'genocide' of political groups and crimes against humanity ranges from five hundred thousand to 1.5 million.[1445] But the particular case of *Mengistu Haile Mariam* on genocide, incitement to genocide and crimes against humanity is related to the killing of 8752 persons, and the disappearance of 2611 people, as well as the

---

[1443] ልዩ ዓቃቤ ሕግ v ኮለኔል መንግሥቱ ኃ/ሚርያምእና ሌሎችም የፊደሬል ጠቅላይፍርድ ቤት የወ/ማቁ 3A181 (ማዞት18 ቀን 2000 ዓ/ም) *Special Prosecutor v Mengistu Haile Mariam and Others*, Criminal File No. 3A181 (11 January 2007) (herein after *Mengistu Haile Mariam FSC*).

[1444] F Tiba, The Mengistu Genocide Trial in Ethiopia (2007) *5 Journal of International Criminal Justice* 514.

[1445] *Ibid*, 516.

torture of 1837 other victims.[1446] The *Derg's* Marxist campaign of exterminating political groups has often been described as 'one of the most systematic uses of mass murder by the state ever witnessed in Africa'.[1447]

The case of *Mengistu Haile Mariam* is also the first case on incitement to genocide that was decided by Ethiopian courts and one of the very few cases in the prosecution of incitement to genocide in domestic courts. As outlined in the previous sections of the thesis, there is little case law on incitement to genocide on domestic systems. The two cases that are usually reported include the case of *Léon Mugesera* and *Yvonne Basebeya*.[1448] In Addition to these two cases, the *Mengistu Haile Mariam* case is one of the few cases reported under international law. The case provides another important contribution to the dearth of jurisprudence and literature on incitement to genocide. In particular in relation to the inclusion of political groups in the definition of genocide, the Mengistu trial has been described as 'the most famous conviction for "genocide" against political groups'.[1449] The prosecution's case rested on the crime of genocide, incitement to genocide as well as crimes against humanity committed during the *Derg* regime (1974-1991). The accused individuals included the former Head of State Mengistu Haile Mariam, who was tried in absentia, and 73 former senior officials of the *Derg* regime.[1450]

[1446] *Ibid*, 514.

[1447] A de Waal, '*Evil Days: 30 Years of War and Famine in Ethiopia*', 101 (Africa Watch, September 1991) 309.

[1448] See *Mugesera v Canada* (n 1158) ; *The Prosecutor v Yvonne Basebeya* (n 1158)

[1449] J Wouters and S Verhoeven, Wouters, The Domestic Prosecution of Genocide (December 1, 2010). Leuven Centre for Global Governance Studies Working Paper No. 55. Available at SSRN: https://ssrn.com/abstract=1766554 or http://dx.doi.org/10.2139/ssrn.1766554 ,12.

[1450] F Tiba, Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia (July 24, 2015). Available at SSRN: https://ssrn.com/abstract=2635374 or http://dx.doi.org/10.2139/ssrn.2635374 312.

The Special Prosecution Office established under the then Transitional Government of Ethiopia, filed the case to the Special High Court, later reestablished as the Federal High Court. The particular charge on incitement to genocide in violation of Article 286 of the Penal Code, reads:[1451]

> All the defendants are accused of causing the death of thousands of members of different political groups in Addis Ababa and throughout the country, which they labeled as 'anti-people' and 'reactionary', by arming and organizing leaders of Kebeles, Revolutionary Guards, Cadres and 'revolutionary comrades' as well as inciting and openly calling for the destruction of members of political groups through public speech, pictures and writings in the public media and in various public meetings on different dates and months from 1975 to 1983. [1452]

The Federal High Court had to rule, among others, on two important preliminary legal issues related with the crime of genocide, incitement to genocide and crimes against humanity.[1453] First it had to decide whether the inclusion of political groups as protected groups in the definition of the domestic law is consistent with the Genocide Convention. Second, the Federal High Court had to rule whether the charge for incitement to genocide and genocide can be prosecuted as independent crimes for the same act.[1454]

On the question of the inclusion of political groups as protected groups under the Revised Criminal Code, the Federal High Court ruled that it s consistent with the Genocide Convention 'as it broadened, rather than restricted the protection afforded to human rights'.[1455] Moreover, in responding to the related allegations of the defence that political groups are not legally

---

[1451] The Charges were made under Art 286 of the Old Penal Code; but the content of the law in relation to incitement to genocide under the Revised Criminal Code Art 274 of is identical in its content.

[1452] GA Aneme, The Anatomy of Special Prosecutor v Colonel Mengistu Haile Mariam et al. (1994-2008) (2009) *4 International Journal of Ethiopian Studies* 3-4; See *also Mengistu Haile Mariam FSC*, 16-17.

[1453] *Special Prosecutor v Haile Mariam* (Mengistu) and 173 others, Preliminary objections, Criminal File No 1/87, 1988 EC [GC], ILDC 555 (ET 1995), 9th October 1995, Federal High Court (ORIL)) (hereinafter Mengistu Haile Mariam Preliminary Objections).

[1454] *Ibid*.

[1455] *Ibid*.

registered and recognized parties, the Court emphasized that [i]t was the accused's targeting of the victims as a group for political reasons' which is important to consider and as such it was immaterial whether they were registered or not.[1456]In relation to the question of whether incitement to genocide can form the basis of the charge together with the crime of genocide, first the Federal High Court held that '[t]here were circumstances where acts committed with a single criminal intent would constitute independent crimes' and argued that incitement to genocide can also be considered as independent crime.[1457] Nevertheless, the Court also argued that in order to establish the crime of incitement to genocide, 'the time and place of incitement, the people incited, and the acts committed as a result' should be clearly articulated.[1458]

On appeal, the Federal Supreme Court affirmed the decision of the Federal High Court. It argued that the inclusion of political groups in the protected category in the definition of genocide is compatible with the Genocide Convention.[1459] The Federal Supreme Court emphasized that although it is true that Article 281 of the Penal Code was adopted taking inspiration from the Genocide Convention, it is the prerogative of a State to extend protection to political groups under its domestic law.[1460] It further noted that there is no explicit prohibition under the Genocide Convention for the inclusion of political groups from the list of protected groups under domestic law.[1461] The court also stated that contrary to many countries that did not extend the inclusion of political groups from the list of protected groups, Ethiopia's inclusion of political groups as protected groups under the crime of genocide when the criminal law was adopted in 1957 shows the 'progressive outlook of the State'.[1462] It noted that this expansive protection strengthened the implementation of the Genocide Convention and it

---

[1456] *Ibid.*.

[1457] *Ibid*, H4.

[1458] *Ibid*.

[1459] *Ibid*, H1.

[1460] *Mengistu Haile Mariam FSC*, 69.

[1462] *Ibid*, 70.

cannot be criticized for it.[1463] The Court interpreted that the term 'political groups' as meaning a group of individuals organized under a common political outlook and thought'.[1464] It noted that 'in other words those individuals formed under common political outlook and thought can be considered as 'members of a political group'.[1465]

The Federal Supreme Court's ruling on the inclusion of political groups as protected groups may sound it is consistent when looked from the objective of preventing genocidal acts. The inclusion of political groups, *a fortiori* can serve that purpose by allowing domestic systems to include political groups from the definition of genocide. Nevertheless, it also risks reversing the international consensus on the meaning and definition of genocide and the risk of the fragmentation of international norms which have developed among the community of States.[1466] Moreover, when one looks the inclusion of political groups from the perspective of incitement to genocide, it adds another quagmire of legal complexity as it risks having serious implications on political speech. The travaux préparatoires clearly show that the exclusion of political groups from the definition of genocide was required by the serious implications such proscription of incitement to genocide may have in the domestic legal framework.[1467] Furthermore, as the travaux préparatoires show the exclusion of political groups was made intentionally because it was believed that the protection afforded to these groups through international human rights norms is adequate to serve their interest and protection.[1468] It should also be recalled that from a prosecutorial perspective, crimes committed against political groups amount to violation of crimes against humanity and could have been prosecuted as such.[1469]

[1463] *Ibid*.

[1464] *Ibid*.

[1465] *Ibid,* 68.

[1466] See Mendel (n 1146); Schabas, Hate Speech in Rwanda (n 1132).

[1467] See Mendel (n 1146).

[1468] See Schabas, Hate Speech in Rwanda (n 1132)

[1469] *Ibid.*

Under international criminal law, the notion of genocide and incitement to genocide is only confined to four of the protected groups-national, ethnical, racial or religious groups.[1470] This is also consistently reaffirmed in the jurisprudence of international criminal tribunals. For example, the *Nahimana* Appeals Chamber made it clear that although political groups may form victims of a wider genocidal violence, the meaning and definition of genocide is confined only to intent to destroy national, ethnical, racial or religious group. [1471] Similarly, the *Akayesu* Trial Chamber noted that although the genocide occurred concomitant with the conflict with the Rwandan government and RPF forces, it is 'fundamentally different' in the sense that it specifically targeted the Tutsi as part of the plan to exterminate them, in which most of the victims were civilians.[1472] And as such this fulfils the definition of genocide understood in this context as intent to destroy the Tutsi ethnic group.[1473]

With regard to the legality of indicting the *Derg* officials for genocide and incitement to genocide, it can be argued that it is consistent with principles of international criminal law and the jurisprudence of international tribunals on genocide. Incitement to genocide is an inchoate crime. As the ICTR has repeatedly established in its jurisprudence the crime is committed the moment the speech is uttered.[1474] There is no reason why an individual cannot be indicted both for genocide and incitement to genocide as both require different forms of liability. This was made clear in the *Akayesu* Trial Chamber's finding in which the accused was convicted both for

---

[1470] Genocide Convention Art 2.

[1471] The *Nahimana AC* also concluded that only the listed groups are protected groups under the meaning of genocide. It argued that '[e]ven if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide' *Nahimana* AC 496.

[1472] *Akayesu TC* 128.

[1473] *Ibid*, para 112-116, 128.

[1474] *Ibid*, 562; *Nahimana Ac* para 687.

genocide and incitement to genocide.[1475] The Trial Chamber acknowledged that it is important to consider the issue because of the fact that the accumulation of criminal charges may offend against the principle of double jeopardy or substantive *non bis in idem* in criminal law.[1476] It noted that this issue was first raised in the *Tadic* case where the ICTY Tribunal made it clear that the issue is relevant only in so far as sentencing is concerned.[1477] But even in such cases if the material element of the crime is distinct, cumulative convictions can occur.[1478] It noted 'for example, in relation to one particular beating, the accused received 7 years imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war'.[1479] The Chamber also noted that '[t]his practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime'.[1480] Similarly, the *Nahimana* Trial Chamber held that the conviction of the three accused individuals for the crimes of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and crimes against humanity is justified as they constitute 'materially distinct elements of a crime'.[1481]

With regard to the content of the speech, the indictment and conviction of *Derg* officials for the crime of incitement to genocide under Article 286 of the Penal Code relied on various public speeches made by *Derg* officials.[1482] As the case indicates there were different public speeches

---

[1475] *Akayesu* TC para 462.

[1476] *Ibid.*

[1477] *Ibid*.

[1478] *Ibid*.

[1479] *Ibid*, Para 43-464.

[1480] *Ibid*, Para 465

[1481] *Ibid*, Para 1090.

[1482] The basis of the Charge was based on the old Penal Code in Art 286, which is textually the same with Art 274 of the Revised Criminal Code of 2005; The Penal Code which proscribes on incitement to genocide reads: Art 286. - *Provocation and Preparation.*

made by officials of the *Derg* in different public meetings as well as through the media which called up on the Ethiopian people for the extermination of political groups that were considered 'anti-revolutionary, reactionary and anti-people'.[1483] The principal victims of such incitement to genocide were members of the EPRP, constituting university students and most of the intelligentsia of the time which the *Derg* considered as counter-revolutionary and enemy of the State. But it also included members of other underground political groups which the *Derg* similarly labeled as anti-revolutionary, reactionary and anti-people.

One of the principal evidences presented for incitement to genocide against the *Derg* officials included a video of a speech made by Major Legesse Asfaw on behalf of the *Derg* calling up the public for the destruction of political groups who are opposed to the *Derg*.[1484] The video evidence obtained from the Ethiopian Television and Radio Corporation shows that he made the speech in a ceremony of taking of oath of office for the Addis Ababa Council. In his speech he stated that 'the Provisional Military Administration together and in coordination with the City Council and progressive forces has been taking free measures and we shall continue to do this'.[1485] The common reference to take 'free measures' (or *netsa ermija* in Amharic), became a common nuance that justified mass murder and the 'genocide' of political groups.[1486]

Whosoever, with the object of committing, permitting or supporting any of the acts provided for in the preceding articles: (a) publicly encourages them, by word of mouth, images or writings; or (b) conspires towards or plans with another, urges the formation of, or himself forms a band or group, joins such a band or group, adheres to its schemes or obeys its instructions, is punishable with rigorous imprisonment not exceeding five years.

[1483] *Mengistu Haile Mariam FSC,* 16.

[1484] Major Legesse Asfaw was one of the central figures in Derg's genocidal campaign one of the most infamous Derg officials who ordered the bombing of Civilians in Hawzen (Tigray), See Tiba, The Mengistu Genocide Trial in Ethiopia (n 1444) 517.

[1485] *Mengistu Haile Mariam FSC*, 23.

[1486] J Wiebel, Let the Red Terror Intensify: Political Violence, Governance and Society in Urban Ethiopia 1976-1978 (2015) *48 International Journal of African Historical Studies* 13-30.

Although it is not clear whether it was presented at the Court, the Head of State who was also the President of the Provisional Military Council and Chairman of the *Derg*, Mengistu Haile Mariam also made various inciting speeches at public assemblies and the media. One among the most prominent of these speeches is a speech he made at *Mesekel* Square in Addis Ababa on 17 April 1976 in which he smashed three bottles with red liquid in which he stated that the bottles represented the blood of imperialism, feudalism and bureaucratic capitalism and that they will be destroyed.[1487] He addressed the crowd, 'we will avenge the blood of our comrades double- and triple-fold' and further announced that the revolution 'has advanced from the defensive to the offensive position'.[1488] The two hundred thousand crowd gathered responding to his speech chanted 'terror has passed from the revolutionary camp to the anti-revolutionary camp'.[1489] Although one can arguably challenge that this does not fulfill the requirement of the definition of 'direct and public incitement' to genocide of political groups, many argue that this symbolic act represented what was to follow as the beginning of the red terror campaign in which hundreds of thousands of individuals were massacred in an organized form of political violence.[1490] Wiebel astutely observes that this symbolic act of a Head of State spilling blood in front of two hundred thousand demonstrators and which was televised to the public became one of the 'enduring icons of the *Derg's* violence'.[1491]

The Federal Supreme Court noted that the *Derg* under the red terror campaign through public meetings, television, radio and other media outlets called up on the public for the elimination of what it called anti-revolutionary, anti-people, and reactionary forces.[1492] It noted that the speeches were made in Addis Ababa and in different places in the country in which they 'incited

---

[1487] *Ibid*, 10.

[1488] *Ibid*.

[1489] *Ibid*.

[1490] Tiba, Mass Trials (n 1450) 309.

[1491] Wiebel (n 1486) 10.

[1492] *Ibid*.

and encouraged' the public by naming particular political groups and those whom they considered as anti-revolutionary which resulted in the killing of thousands of individuals.[1493] The Federal Supreme Court also argued that even if some of the members of the *Derg* may not have made the speeches directly, they have condoned and gave their implied consent to the incitement of the genocide.[1494] The Court also emphasized that the various public speeches made by the *Derg* officials were made not as isolated forms of individual speech but were made on behalf of the *Derg* and its policy of genocidal campaign against the political opposition.[1495] Accordingly, the Federal Supreme Court convicted the defendants for incitement to genocide and genocide and sentenced them to death.[1496]

In finding the *Derg* officials guilty for incitement to genocide, the Federal Supreme Court also relied on the general objective of the *Derg* in openly declaring the genocidal campaign to what it characterized anti-revolutionary groups through the red terror campaign. In order to establish collective criminal responsibility for incitement to genocide, the Supreme Court analyzed and used the following factors as evidence for the crime of incitement to genocide- a Media statement on the killings stated that similar measures will be taken on individuals who oppose the *Derg* and the revolution and that such measures will not be considered as measures against innocent individuals;[1497] the Decision of the General Council of the *Derg* on 19 November 1976 which underscored on the authority of any official of the *Derg* to take all necessary measures against counter-revolutionaries;[1498] the decision by the Chairman of the *Derg* outlining his priorities that destroying all enemies of the revolution and reactionary forces and publicly

---

[1493] *Ibid,* 15, 16.

[1494] *Mengistu Haile Mariam FSC*, 21.

[1495] *Ibid*.

[1496] *Ibid,* 94-95; note that initially the accused individuals were convicted for war crimes, genocide and incitement to genocide and sentenced to life imprisonment by the Federal High Court, see *Prosecutor v Mengistu Haile Mariam,* Federal High Court File No.

[1497] *Ibid*, 21.

[1498] *Ibid, 24.*

ordering all members of the *Derg* to take all necessary measures to this effect;[1499] *Derg's* declaration by the national radio calling up on all Ethiopians to launch and expand as well as support the red terror campaign;[1500] and the fact that in carrying out its genocidal campaign, among others, the *Derg* had organized various offices, including the Information Command Office for its propaganda activities.[1501]

The Federal Supreme Court made it clear that the defendants directly or indirectly participated in the genocidal campaign of eliminating political groups by collectively organizing and leading the *Derg* government and inciting the public for their extermination.[1502] Accordingly, what was crucial to the finding of guilt for incitement to genocide was not based on the individual speech made by members of the *Derg* but rather because of their common plan on behalf of the *Derg* as a political organization with the objective to incite and encourage for the extermination of opposition political groups.[1503] The Court also quoted a commonly used Ethiopian saying 'one can't say that he is clean from the blood' when the time for accountability comes, in attributing responsibility of *Derg* Officials for genocidal acts.[1504] The Federal Supreme Court emphasized that since its establishment under proclamation no 2/1974, subsequent to the downfall of Emperor Haile Selassie, the proclamation explicitly mentions the *Derg* as an organization that functions under its members as Head of State and will be responsible for every decision that the government makes.[1505] Thus, it argued that the legal responsibility for incitement to genocide attaches to all *Derg* officials collectively.[1506] It seems that due to evidentiary difficulties, the Federal Supreme Court considered the charge of incitement to genocide not on

---

[1499] *Ibid.*

[1500] *Ibid.*

[1501] *Ibid,* 24

[1502] *Mengistu Haile Mariam FSC,* 25.

[1503] *Ibid*, 22.

[1504] *Ibid*

[1505] *Ibid*

[1506] *Ibid*.

the basis of each individual's particular speech, but rather to all speeches made collectively on behalf of the *Derg*. The Court found the defendants guilty of incitement to genocide, not for their individual inciting speeches but as members of the *Derg* for making incitement to genocide through their public speeches and the media as part of their collective criminal design of exterminating members of the political opposition.[1507]

When looked from the perspective of the enormous evidentiary difficulties that post conflict societies face in the prosecution of international crimes, the approach of the Federal Supreme Court in attributing criminal responsibility of *Derg* officials for incitement to genocide collectively may seem plausible. Moreover, it has also appeals to collective criminal responsibility theory in that as part of the collective criminal design of exterminating political groups, the defendants as members of the organization carried out the incitement to genocide and the genocidal campaign. This was made easier because of the clear and well structured manner of the way the *Derg* was organized and the manner in which it carried out its executions. The evidence clearly shows that decisions for the killing of individuals were made collectively by the different committees of the *Derg*. If the prosecution had involved independent media personnel and members of the general public who were not members of the *Derg* but had been involved in the incitement to genocide, this would have raised serious evidentiary difficulties unless it was based on proof of specific speech made by particular individuals. Therefore, unlike the Rwandan case, where journalists and other members of the public who were not members of the ruling party or members other political parties affiliated with the government were prosecuted merely for their inciting speech, the Ethiopian case on incitement to genocide was confined to the members of the *Derg*, the ruling party. This has mitigated the challenge of providing specific proof of the inciting speech made by each indicted individual, merely confining itself to the collective responsibility of officials of the *Derg* for incitement to genocide as members of the *Derg*.

[1507] *Ibid,* 37.

The *Nahimana* case provides helpful insight regarding responsibility for incitement to genocide when an individual did not directly make a public speech but through the use of the media and bears superior responsibility for incitement to genocide. The Appeals Chamber in *Nahimana* made it clear that three of the convicted individuals, Nahimana, Barayagwiza, and Ngeze bear superior responsibility for controlling the content of the speech disseminated in the media.[1508] The Appeals Chamber clearly established that through the ownership and control of the RTLM radio and Kangura newspaper the defendants were responsible for incitement to genocide.[1509] Superior responsibility according to Article 6 (3) of the statute of the ICTR is established based on the totality of evidence presented.[1510] It also held that the crime of direct and public incitement does not require 'direct personal knowledge, or full and perfect awareness of the criminal discourse' to establish the *mens rea* of direct and public incitement.[1511] It merely suffices to demonstrate that the superior 'knew or had reason to know' that his subordinate was about to commit or had committed a criminal act.[1512] The 'reason to know' standard is met when the accused had 'some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates' and such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates.[1513] In attributing responsibility, it looked into the effective control and superior position of the accused, the *mens rea*, and whether necessary and reasonable measures were taken to prevent the incitement to genocide by the superior.[1514] In *Nahimana* the Trial

---

[1508] *Nahimana AC*, Para 789 ff.

[1509] *Ibid*.

[1510] *Ibid.*

[1511] *Ibid* , para 791.

[1512] *Ibid*.

[1513] *Ibid*.

[1514] *Ibid*, para 792, noting that '[h]having found that Appellant had the power to prevent or punish the broadcasting of criminal discourse by RTLM, the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none'.

Chamber, as also affirmed by the Appeals Chamber, made it clear that '[t]he positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself. The editor of *Kangura* and the journalists who broadcast on RTLM did not distance themselves from the message of ethnic hatred. Rather they purveyed the message'.[1515] The Chamber made it clear that when the media conveys a message that incites ethnic hatred and violence by individuals for different reasons, a clear distancing from the particular content and a counter message would be appropriate to ensure that no harm results from the particular message.[1516]

In this regard, the Federal Supreme Court's ruling also shows that few of the *Derg* officials who objected to the incitement to genocide and the overall genocidal campaign of the *Derg* were acquitted as they clearly distanced from such measures.[1517] Overall, although the *Nahimana* case shows a more direct form of responsibility for the control and management of media outlet, for incitement to genocide it informs that responsibility for incitement to genocide can be incurred even if one is not directly involved in making the speech. The organized nature of *Derg's* genocidal campaign and its open declaration of the red terror as a form of political violence to exterminate the EPRP and other political groups clearly show a clear command structure and superior responsibility which can be attributed to the *Derg* officials in general.

The *Mengistu Haile Mariam* case shows that there was little debate on the issue of whether the speech was direct or public, and did not clearly establish the causal link between the speech and the genocidal act. Article 286 of the Penal Code requires that the speech be public, and hence from the Federal Supreme Court's ruling and the evidence gathered, the incitement to genocide included various forms of public speech that called for the extermination of opposition political groups.[1518] However, it should have articulated this more clearly as both the

---

[1515] *Nahimana TC,* para 1024.

[1516] *Ibid.*

[1517] See *Mengistu Haile Mariam FSC.*

[1518] *Ibid*.

Genocide Convention and the jurisprudence on incitement to genocide require that the incitement be 'public'. This also helps to guard against the important underlying value of protecting freedom of expression and incitement to genocide and develop a consistent jurisprudence in that regard.

With regard to the directness of the speech, although the Federal Supreme Court and the Federal High Court did not explicitly provide this requirement, it is clear that from the Genocide Convention as well as the established case law on incitement to genocide that the speech be a direct incitement as opposed to a vague and indirect one.[1519] Nevertheless, implicitly, one may argue that given the clear and open call for the extermination of political groups launched by the *Derg* under the red terror campaign through public speeches made in public assemblies and through the media, there is little doubt that the evidence demonstrates fulfilling the requirement of 'directness' of incitement to genocide as required by the Genocide Convention.[1520]

With regard to the temporal jurisdiction and the causal link between the inciting speech and the genocide, the *Mengistu Haile Mariam* case did not also expound in this element of the crime of incitement to genocide. However, the evidence clearly establishes that from the official launch of the red terror campaign on 4 February 1977 to the downfall of the Derg in 1991, the incitement to genocide has gone together with the genocidal campaign in a protracted manner.[1521] Unlike Rwanda where the intensity and widespread nature of the genocide occurred in less than a year, the Ethiopian case is different. Although the red terror campaign lasted for two years (1977-1978), the genocidal campaign of exterminating political

---

[1519] Genocide Convention Art 3(c); *Akayesu TC,* para 557.

[1520] See Wiebel (n 1486).

[1521] The Red Terror Campaign lasted from 1976 to 1978; but it can be argued that the overall atrocities of the Derg and the genocidal campaign persisted until its downfall in 20 May 1991, See Tiba, Mass Trials (n 1450) 307.

groups was evident in the whole 17 year rule of the *Derg* (1974-1991).[1522] In other words, the intensity and genocidal campaign was more apparent during the red terror period, but the jurisdiction of the Court extended to the genocide committed against political groups opposed to the *Derg* since its establishment in 1974 to its downfall in 1991.

In relation to the particular issue of whether the incitement to genocide had in fact resulted in the genocidal killing of particular individuals, the Court failed to clearly articulate this. The Federal Supreme Court framed the argument in terms of the collective causality attributed by the different public speeches of the *Derg* officials and the media campaign of the *Derg* and that this sufficiently contributed to the genocide in general.[1523] Unlike the jurisprudence of international tribunals that at least provided some evidence of concrete causal link between a speech and a resulting genocidal killing, the *Mengistu Haile Mariam* case fails to demonstrate that at least as evidentiary or probative value that particular speeches have in fact resulted in the killing of individuals or group of individuals.[1524] Moreover, as argued in the foregoing discussions, in establishing the case for incitement to genocide, there should also be a close temporal nexus between the speech uttered and resulting genocidal act. In the *Mengistu Haile Mariam's* case, both the Federal High Court and the Supreme Court did not expound this important element of the crime of incitement to genocide.

In brief although the *Mengistu Haile Mariam* case has not clearly demonstrated the legal elements for establishing the crime of incitement to genocide and their conviction for such crime, it raises no significant free speech concerns. The *Derg's* incitement for genocide and call for the extermination of political groups which it labeled as anti-revolutionary, reactionary and anti-people was a 'direct and public' call for the extermination of political groups.[1525] The Mengistu case also illustrates another important conclusion in that most often, incitement to

---

[1522] *Ibid.*

[1523] *Mengistu Haile Mariam FSC*, 20.

[1524] See *Akayesu TC* para 674.

[1525] See Wiebel (n 1486).

genocide campaigns happen not as isolated forms of speech made by individuals but rather through a common plan and collective criminal design to achieve the objective of exterminating particular groups.[1526] In this regard the *Mengistu Haile Mariam* case is an important precedent in expounding the notion of incitement to genocide and the legal complexities involved in establishing the elements of the crime which can provide fresh insight to the dearth of jurisprudence in international criminal tribunals.

5.6.2. *Prosecutor v Hailu Shawel and Others*

As the *Mengistu Haile Mariam case* indicates often delimiting the boundaries of political speech and incitement to genocide in the context where an actual genocidal violence had occurred is much easier and does not raise serious free speech concerns. The difficulty lies when the substantive crime, genocide, has not occurred and the prosecution's case solely rests on the speech of a particular individual. Incitement to genocide has been 'unequivocally recognized as an inchoate crime' in that the prosecution and conviction for the crime can be established without the need to show that there has been a resulting genocidal act.[1527] Although the jurisprudence of the ICTR acknowledged that convictions for unconsummated or inchoate crime of incitement to genocide would occur in exceptional circumstances, it affirmed that prosecution and conviction for incitement to genocide is possible without the need to show a resulting harm.[1528] This fact puts the protection of political speech in precarious position. In particular, in post genocide societies such as Ethiopia and Rwanda, where lingering anxieties still persist and where ethnicity and group identity forms the defining nature of the

---

[1526] See Dojčinović (n 1324).

[1527] Timmermann, Incitement in International Criminal Law (n 1172) 846.

[1528] *Akayesu TC*, para 562, noting that 'the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure.'

constitutional identity of these States, the risk of abuse of hate speech and incitement to genocide is apparent.[1529]

The case of *prosecutor v Hailu Shawel et al* arose in the context of the political crisis that ensued following the contested 2005 national election.[1530] Since taking power in 1991, EPRDF had largely won the national elections undisputedly, although serious concerns on whether these elections were 'free and fair' continued to be raised. The 2005 national election witnessed one of the most contested national elections in the political history of Ethiopia.[1531] The opening up of the political space, which came about after the political crisis of the ruling party, the EPRDF enabled for a more open political debate between the ruling party and the opposition. The political process leading to the election also showed a fair amount of media coverage of the debates on policy issues hitherto unknown in the country's political history.[1532] The results of the election showed a major setback for the EPRDF and a significant electoral victory for the major opposition political party, the CDU. The CDU won all the 47 parliamentary seats of Addis Ababa City Administration as well as 272 seats out of the 547 seats of the national parliament. Despite these, the opposition claimed that it won the national election and accused the government that votes were rigged. International election observers also confirmed vote rigging and significant electoral irregularities.[1533] In the aftermath of the election, protesters demonstrated in the streets of Addis Ababa, which security forces responded heavy-handedly leading to the death of 200 individuals.[1534]

[1529] *Federal Prosecutor v Hailu Shawel et al*, Criminal Case Number 43246/99 (September 2007).

[1530] *Ibid*.

[1532] Gagliardone New Media (n 45) 1.

[1533] VOA, Africa: *2005 Ethiopian Election: A Look Back*, (16 May 2010) [<https://www.voanews.com/a/article-2005-ethiopian-election-a-look-back-93947294/159888.html>] (accessed 15 April 2016).

[1534] See BBC News, Ethiopian Protesters 'Massacred' (n 46).

The political crisis following the election led to the imprisonment of CUD leaders, members of the civil society and individuals that were believed to be involved in inciting violence and attempting to overthrow the government and the constitutional order. It should be pointed out from the outset that much of the political debate during the election focused on important policy issues with little incidence of incitement to genocide or hate speech.[1535] Nevertheless, there were instances where speech that closely resemblance hate speech or hate rhetoric was used in the political campaign leading to the national election as well as in the immediate aftermath of the election. As Iginio Gagliardone notes, the 2005 national election in Ethiopia demonstrated 'the fundamental juncture when the tension between politics, ethnicity, and the media, including new media, became evident'.[1536] This is yet another demonstration of the fact that the incidence of hate speech increases when political stakes are high such as during elections, economic crisis, poverty and periods of high unemployment.[1537] Yared Legesse Mengistu argues that hate speech employed in the 2005 national election has some resemblance to the hate speech that was employed in the Rwandan genocide.[1538] This is, however, too much of a stretch. As will be shown in the subsequent discussion, much of the political debate was measured and could not in any way resemble to the situation during the Rwandan genocide.

In the case of *prosecutor v Hailu Shawel et al,* the indictment for the crime of incitement to genocide related to speech made by the leaders and members of the CUD during the election campaign in 2005. The evidence presented in the Federal High Court particularly focused on a speech made by Bedru Adem, one of the prominent leaders of the CUD in Assela town, which is located in the regional State of Oromiya. In his speech addressed to a large audience he made the following speech, 'the power of the Federal Government is totally in the hands of Tigrayans

---

[1535] See T Lyons, Ethiopia in 2005: the Beginning of a Transition (Centre for Strategic and international Studies 2006).

[1536] Gagliardone, New Media (n 45) 33.

[1537] Gagliardone, Mapping Hate speech in Ethiopia (n 601) 9.

[1538] Mengistu (n 52) 361.

and the EPRDF; and thus they should be shoved back to their former turf by the United power of the people'.[1539]

In making the case for the crime of incitement of genocide, the prosecutor tried to establish that some of the violence and loss of life that happened in the aftermath of the elections were attributed to the hate speech employed by the opposition.[1540] The prosecutor also tried to indicate that as a result of the speech two houses of individuals who were ethnic Tigrayans were burnt and another Tigrayan was beaten and injured.[1541] This later evidence presented by the prosecutor seems to signify that Ethiopian law on hate speech as well as general incitement law is based on the tacit assumption that the criminalization of speech has to be based on the demonstration of a plausible occurrence of a violent act.[1542] The Court ruled that the speech concerned can only be labelled as 'hate speech' and as such does not constitute incitement to genocide.[1543]

In looking at this particular case, first, it is important to point out that focusing on specific words that a speaker used, and withdrawing it from the general statements that an individual made and the overall context can also jeopardize the protection of political speech. In the context of Ethiopia, the importance of context should be particularly highlighted as selective use of speech for prosecution can seriously undermine the robust protection of political speech. In the evidence presented at court a video recording of the speech only mentioned the alleged inciting words, detaching it from much of the context in which it was spoken. The case shows that although the accused Bedru while addressing his audience has explicitly stated that he has 'great respect and love for the people of Tigray', this was not presented as evidence in

---

[1539] Mengistu (n 52) 364.

[1540] *Ibid.*

[1541] Timothewos, An Apologetics for Constitutionalism (n 113) 25.

[1542] See also in this regard የፌደራል ዐቃ ቢ ህግ ኤሊያስ ገብ ሩ ጎዳና, የ/ፌ /ዐ/ሕ /መ /ቁ 552/06 (2006) (*Prosecutor v Elias Gebru Godana*, Federal Prosecution File No 552/06 (20014).

[1543] See *Prosecutor v Hailu Shawel* (n 1529).

court. This aspect of the speech was deliberately removed from the video evidence. Moreover, subsequent programs of the national television also showed selected speech made by Bedru and other members of the CUD in order to garner public support for the prosecution. The fact that the national television which is the principal source of information in the country, is controlled by the government made it extremely difficult to challenge the government's narrative. This is also another demonstration of the fact that often the underlying problem in emerging in transitional democracies such as Ethiopia with regard to ethnic strife and genocidal violence does not lie in the inciting speech per se but in the suppression of speech itself, where the political opposition and the larger public is deprived the opportunity for different viewpoints and challenge the government's narrative.[1544]

It should also be emphasized that although the government blamed the opposition for inflammatory hate speech and incitement of genocide, the government through the media it controls also at times employed hate rhetoric to galvanize its political support. In particular, the government argued that the opposition was trying to create a political crisis similar to what happened in the Rwandan genocide. For example, in a televised interview, the late Prime Minster Meles Zenawi made the following speech:

> I call on the people of Ethiopia to punish opposition parties who are promoting an ideology of hatred and divisiveness by denying them their votes at election on May 15. Their policies are geared toward creating hatred and rifts between ethnic groups similar to the policies of the Interhamwe when Hutu militia massacred Tutsi in Rwanda. It is a dangerous policy that leads the nation to violence and bloodshed.[1545]

Although on the face of it, this may be considered as a core protected speech under the right to freedom of expression, the fact that it was addressed by the Head of State had an effect in creating a climate of fear. Moreover, reference to *Interhamwe* was frequently used in the programs and documentary of the national State television with the aim of demonizing the

---

[1544] See Baker, Genocide (n 68).

[1545] Ethiopian Review, Concerned Ethiopians in the United States (2005) 'Deconstructing Meles Zenawi's Response to US Congress' [<http://www.ethiopianreview.com/2005/jul/001OpinionJuly1_2005_Re_Meles_Letter.html>], cited in Gagliardone, Mapping Hate Speech (n 601) 34.

opposition and galvanizing political support in the process.[1546] Therefore, it has to be emphasized that much of the problem in this climate of fear and hate rhetoric was not because of the hate speech per se but rather the absence of independent media outlets and independent voices that could have provided a check and refuted some of the unfounded allegations and thereby providing a different narrative to the political debate. In this regard, one notes that State sponsored incitement to genocide has also been one of the manifestations of exercising State power.[1547]

Measured against the emerging international and comparative jurisprudence on incitement to genocide, it is hardly conceivable to consider the speech by Bedru Adem as constituting incitement to genocide. As the *Nahimana* judgment clearly noted it is also important to note the distinction between speech aimed at ethnic consciousness from incitement to hatred and incitement to genocide. In *Nahimana*, the Trial Chamber established that speech which was intended to show the control and concentration of economic and political power in one ethnic group amounts to ethnic consciousness and as such cannot be considered as incitement to genocide.[1548] This has significant implications for the protection of political speech in multi-ethnic and multi-religious societies such as Ethiopia. It provides a democratic platform to debate on the demands for equality by ethnic groups for economic and political power. In particular, in the context of Ethiopia in which historical accounts of political oppression and marginalization of ethnic groups continue to be contested, the protection of these forms of expressions can provide a democratic platform for dialogue and genuine socio-political demands that should be addressed by the State.[1549]

Moreover, what one also draws from the jurisprudence of incitement in international tribunals is a clear distinction between incitement to genocide on one hand and hate propaganda

---

[1546] Gagliardone, Mapping Hate Speech (n 601) 33.

[1547] *Ibid*.

[1548] See *Nahimana TC,* para 1020-1021.

[1549] See Mollenhauer (n 1425).

including ethnic and religious profiling on the other.[1550] Although hate propaganda and ethnic profiling and various forms of offensive speech that constitute incitement to hatred and discrimination are in most cases proscribed forms of speech, it has to be seen entirely differently from incitement to genocide.[1551] Given the serious political and legal implications of prosecuting someone for incitement to genocide, it should be made clear that it is distinct from incitement to hatred.

In brief, measured against the definition of the Genocide Convention on incitement to genocide and the jurisprudence of international criminal tribunals, it could hardly be said that the *Hailu Shawel* case falls under incitement to genocide. The jurisprudence of international criminal tribunals clearly establishes that the content of the speech, the intention of the speaker, the context in which the speech was made and whether the likelihood of genocidal act occurring as a result of the speech has to be analyzed.[1552] The allegations in which the *Hailu Shawel* case was based cannot be said to fulfill these requirements. Moreover, the speech was made in a political rally forming an important element of 'core political speech' which has to be given far broader protection because of its central importance to the democratic process. In this regard Ethiopian Courts should be guided by the emerging jurisprudence in international and comparative law, which can serve as a reference point to clearly articulate the appropriate boundaries of incitement to genocide, and maintain robust protection of political speech.

5.6.3. *Prosecutor v Elias Gebru Godana*

The recent case of *Prosecutor v Elias Gebru Godana* is concerned with a journalist and editor of *Enqu* magazine who was prosecuted for incitement to hatred.[1553] Although the indictment of Elias was for incitement to hatred rather than incitement to genocide, the case illustrates the

---

[1550] *Nahimana* TC, Para 1022.

[1551] See ICCPR Art 20.

[1552] See Discussion in Section 5.2 above.

[1553] See *Prosecutor v Elias Gebru Godana* (n 1542).

complex issues involved in the regulation of hate speech and incitement to hatred, as well as incitement to genocide in multi-ethnic and multi-religious State such as Ethiopia. It also demonstrates the precarious position of journalists and political commentators in the context of the political statements they make in such complex socio-political and legal environment. Because of this it would be helpful to analyze the legal basis of the prosecution's evidence for incitement to hatred in the context of the legal limits of permissible political speech.

Elias was charged with violation of Article 257 (e) of the Revised Criminal Code.[1554] The details of his charge indicate that he was accused of attempting to destroy the unity of the people of Ethiopia by trying to instil hatred and conflict in the public in violation of the Revised Criminal Code.[1555] The specific charges related to an article written in *Enqu* magazine on March 2012 of its issue. In the article titled 'Whose and to whom are the statutes built and being built?' he asks readers with questions including, 'the Oromo people came to Ethiopia in the 16th Century, should we remind them that they are our new neighbours? Whose country are they going to secede from?[1556] They should remember the contract and obligation they entered with Emperor Gelawdiyos'.[1557] The article further reads:

> the resistance and obstacle caused by those who claim to be Oromos to the effort by Emperor Menelik to strengthen the country that was weakened was unexpected and a betrayal. If they (those who claim to be Oromo) say that they are not Ethiopians they could have had the right to leave the country and go to the place where they came from. But instead, they said that they will remove their hosts (Ethiopians) who received them as guests and tried to overtake them. ...In this regard, the acts that Emperor

---

[1554] *Ibid,* Art 257(e) reads 'Article 257.- Provocation and Preparation Whoever, with the object of committing or supporting any of the acts provided under Articles 238-242,246-252 (offenses against the state): launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate, hateful or subversive information or insinuations calculated to demoralize the public and to undermine its confidence or its will to resist…[is punishable up to 10 years of imprisonment].

[1555] *Ibid.*

[1556] *Ibid.*

[1557] *Ibid*.

> Menelik allegedly committed, even if true, what choice did he had? Unless we are unable to think. What is the injustice of this act?[1558]

The case demonstrates the very complex and difficult nature of determining the contours of political speech and those that can be categorized as hate speech or incitement to hatred or incitement to genocide. The historical factors simmering ethnic tensions in the country are manifest because of the perceived marginalization of the Oromos that constitute 35% of the population as the largest ethnic group in the country.[1559] Oromo activists have argued that the Abyssinia culture (which represents the northern Christian dominated part of Ethiopia) is dominated by the Amhara and Tigrayans which has left much of the political, economic and cultural claims of the Oromo to the periphery. Moreover, more radical Oromo nationalists also perceive the campaign of 'integration' of the different regions and ethnic groups to the Ethiopian Empire by Emperor Menelik by the end of the 19th Century as a campaign of 'extermination' and even 'genocide'.[1560] These sensitivities of political minority groups can trigger anger and resentment to statements that on face value appear normal and within the boundaries of political speech.

It is important to note that the prosecution's case rested not only on the expression *per se* but also demonstrated that some violent act occurred as a result of the speech. First, the prosecutor argued that the article included expressions which demoralized the Oromo people and undermined their Ethiopian identity.[1561] Second, and most importantly, the prosecutor established that violence broke out as a result of the speech. In corroborating the evidence, the prosecution showed a letter from Jimma University, located in Oromiya Regional State, where student protesters broke windows and other related property worth 39, 408 Birr.[1562] Although

---

[1558] *Ibid.*

[1559] See R Lefort, *Things Fall Apart: Will the Centre Hold* (Open Democracy, 19 November 2016) [<https://www.opendemocracy.net/ren-lefort/ethiopia-s-crisis>] (accessed December 15 2016).

[1560] *Prosecutor v Elias Gebru Godan* (n 1542) below.

[1561] *Ibid.*

[1562] *Ibid,* See Annex of the list of property destroyed.

there is no indication that the violence was caused by reading the article in which the charges of the accused is based, the prosecution's case clearly rested on this fact.

The prosecution's evidence seems to demonstrate that any criminalization of hate speech should be construed as incitement to hatred and discrimination, which has the potential to cause violence. In many ways, the emerging jurisprudence on hate speech as well as general incitement law in Ethiopia and prosecutorial patterns clearly demonstrate that Ethiopian law favours a normative understanding that makes speech proscriptions to be contingent on a demonstration of the likelihood of the occurrence of a violent act. However, Yared Legesse Mengistu argues that Ethiopia's law on hate speech is dogmatically over-reliant on the truth of alleged facts rather than a demonstration of the likelihood of violence.[1563] Nevertheless, Yared's argument can be attacked on several grounds. First, the recent jurisprudence of Ethiopian courts and prosecutorial patterns on hate speech demonstrates that the fundamental legal ingredient for convicting individuals for incitement to hatred is the likelihood that it would lead to violence or some form of ethnic strife.[1564] Mengistu largely relies on cases that arose out of the repealed press proclamation, which while informative cannot be taken as authoritative and reflecting the current state of the law. In this regard, Gedion Timonthewos similarly argues that the jurisprudence of Ethiopian courts on hate speech and the general basis of any prosecution for hate speech is based on a demonstration of a violent act or the likelihood of a violent act as a result of the speech.[1565] In many cases involving hate speech, the jurisprudence of Ethiopian courts also supports this position.[1566] It is true that in some cases where the alleged facts materially require proof of alleged facts, Ethiopian courts may require proof of the alleged fact.[1567] Nevertheless, the truth of alleged facts does not form the material

---

[1563] Mengistu (n 52) 369.

[1564] See *Prosecutor v Elias Gebru Godana* (n 1542).

[1565] *Ibid*.

[1566] *Ibid*.

[1567] *Ibid*.

element of the crime for hate speech and incitement to hatred in Ethiopia.[1568] Mengistu's argument also overlooks many areas of speech in public discourse where the truth and falsity of the facts is irrelevant. Public discourse and significant aspect of political speech is shaped by opinions and public reason rather than facts and as such it should have a marginal role in the context of the discussions of the limits of political speech.[1569]

Seen from the perspective of free speech doctrine and international and comparative law, the article which forms the bases of the prosecution in *Elias Gebru Godana's* case does not constitute incitement to genocide or incitement to hatred. The article does not in any way advocate violence or call for any kind of action by its listeners. The article forms core political speech which is essential for the democratic process. The debate between Ethiopian nationalists and ethnic nationalists forms one of the most important political debates of the time.[1570] As such, any peaceful expression of political opinions and positions that may be offensive but do not constitute incitement to hatred should be allowed. The special role that freedom of expression plays in the democratic process calls for more heightened scrutiny of limits on political speech.[1571] It is true that the article expresses strong and even offensive language which can undermine social cohesion and sense of common Ethiopian identity among the Oromo community in Ethiopia. But it does not in any way indicate a call for violence.

In general, in a State like Ethiopia where ethnic identity has become the defining feature of the body politic, its effort to regulate and contain radical nationalist and ethnic nationalist expressions is justified by its particular socio-political context. However, providing an appropriate normative framework on the limits of political speech and defining the meaning

---

[1568] *Ibid*.

[1569] See Cohen, Truth and Public Reason (2009) *37 Philosophy and Public Affairs* 2; while he articulates the role of truth in public discourse, he concedes that much of deliberative public discourse requires value judgments and as such have limited role in political arguments.

[1570] See Lefort (n 1424).

[1571] See also Post, Participatory Democracy (n 250), Weinstein, Participatory Democracy (n 250).

and scope of what constitutes incitement to genocide and incitement to hatred is important. As Susan Benesch rightly notes, defining the appropriate contours of what constitutes incitement to genocide and incitement to hatred would help to guard against the repression of legitimate political speech and its vitality to the democratic process.[1572] This is particularly important in Ethiopia and many other African States where the general understanding that the violence and genocide in Rwanda was fueled by the incitement by the media has provided the political legitimacy to impose broad restrictions on political speech.[1573] In this regard, the body of law on incitement to genocide under international and comparative law can provide significant normative insight in determining the boundaries of political speech and incitement law. Given the significance of international and comparative law in resolving the legal challenges involved in the regulation of free speech, Ethiopian courts can draw important insights by looking into this body of law in determining the contours of political speech in the context of incitement to genocide.

Conclusion

The regulation of hate speech and incitement to genocide in pluralist societies which have ethnic and religious diversity is justified by the desire to contain violence and discrimination emanating from hateful and genocidal speech. Similarly, in the case of Ethiopia, the laws on hate speech and incitement to genocide were crafted with the objective of meeting these social demands in line with its federal constitutional democratic order. Although the law and jurisprudence of Ethiopian courts does not offer a more nuanced understanding of hate speech and incitement to genocide, international and comparative law, in particular the experience of the ICTR offers a significant normative basis in expounding the notion of incitement to genocide and the boundaries of political speech.

[1572] Benesch, Vile Crime (n 1163) 488.

[1573] Simon (n 1395) 9.

To a large part, the jurisprudence of the ICTR has tried to be faithful in interpreting the meaning of 'direct and public incitement to genocide' under the Genocide Convention. And there are significant normative conclusions which offer important lessons to emerging and transitional democracies such as Ethiopia that are grappling with the demands of hate speech regulation with the protection of political speech. Nevertheless, the jurisprudence of the ICTR also overlooks the importance of free speech doctrine and principles of international human rights law that could have enriched its jurisprudence. Given the fact that the ICTR is the only international tribunal that offers the jurisprudence on incitement to genocide and the broader discussion on speech and criminal responsibility, this lacuna can set a dangerous precedent both at the international and domestic level in approaching the limits of political speech and responsibility for speech-related crimes.

In its current state, the hate speech and incitement to genocide laws in Ethiopia could have a chilling effect on political speech. By drawing the doctrinal import of a democracy-based theory of free speech as well as criminal culpability theory developed under the jurisprudence of international criminal tribunals, Ethiopian courts will be better positioned in meeting both the demands of the State in containing ethnic strife and genocidal acts, as well as maintaining the continued vitality of political speech to the democratic process.

CHAPTER SIX

BALANCING THE PROTECTION OF ROBUST POLITICAL SPEECH WITH INCITEMENT LAW: THE NEED FOR ALTERNATIVE REGULATORY RESPONSES

Delimiting the boundaries of political speech and incitement law is an extremely difficult task.[1574] In the preceding chapters, the thesis has dealt at great length in articulating the normative boundaries of political speech and incitement law, in particular in the context of incitement to terrorism and incitement to genocide. These discussions provide important doctrinal import and normative basis for the regulation of political speech in Ethiopia. The overall position of the thesis is based on the fact that limits on political speech should have scrupulous scrutiny as they encroach on the normative core of free speech which is vital to democratic public discourse. Beyond this, however, looking into alternative regulatory responses and why terrorism and genocide and various forms of political violence in society can equally be countered by using different regulatory responses should be explored.[1575]

In this chapter, the thesis will discuss three interrelated issues. First, the thesis discusses why it is important to identify the normative core of free speech and other outlier issues that require lesser protection. Second, it highlights why vague and broad restrictions on freedom of expression can have a chilling effect on political speech and a narrow proscription is needed to mitigate this. Thirdly, it argues that because political speech and public discourse informs the demand for the robust protection of freedom of expression, the emphasis should be in proscribing different forms of private speech acts which have little deliberative significance to public discourse. By doing so, this chapter provides the regulatory and policy alternatives as well as the emphasis that should be made in future prosecutorial patterns in speech-related crimes.

[1574] See Pillay (n 1306).

[1575] See Schauer, Speech, Behaviour and the Interdependence of Fact and Value (n 749).

6.1. The Importance of Free Speech Doctrine in Incitement Law and the Need to Identify Political Speech as 'Normative Core'

At first, it is important to emphasize that issues involving freedom of expression cannot be resolved by purely normative considerations.[1576] Because of this, appeals to legal theory, in particular, a democracy based-theory of free speech that underscores the distinctive place of core political speech and democratic public discourse can offer important lessons to courts in resolving various disputes involving free speech.[1577] Underscoring the distinctive function of free speech to democratic public discourse, and the central importance of political speech as a high-value speech should be the first important aspect in ensuring the vigorous protection of free speech in public discourse.[1578] This doctrinal import is not only useful at a theoretical level but also normatively in that it helps to unlock some of the perplexing problems that courts face in the course of adjudicating cases involving freedom of expression.[1579]

It is true that the philosophical rationale for the protection of freedom of expression is rooted in advancing various human values including dignity, autonomy, personal development, search for truth and other important social values.[1580] These diverse interests served by free expression help to ensure individuals to advance these important human values which have wider significance to human flourishing and to the socio-political development of States. However, principally, the democratic function of free speech has particular significance because

---

[1576] See Weinstein, Participatory Democracy (n 250) 634.

[1577] *Ibid*.

[1578] Sunstein, Democracy and the Problem of Free Speech (n 280) 121 ff.

[1579] See Weinstein, Participatory Democracy (n 250) 634.

[1580] Smolla, Free Speech in an Open Society (n 124) 14-17; See also T Emerson, Towards a General Theory of the First Amendment (1963) *72 Yale Law Journal* 877 ; arguing that there are multiple rationales and different values to be served by freedom of expression, See at 879 ff.

of its distinctive role in ensuring the vitality of democratic public discourse.[1581] There is a remarkable unanimity of legal opinion which emphasizes the central importance of protecting political speech to the vitality of democratic public discourse.[1582] From its original formulation by the philosopher, Alexander Meiklejohn to the more recent works of prominent free speech scholars including Cass Sunstein, James Weinstein and Robert Post, the centrality of political speech to public discourse has been extensively articulated.[1583] This position is also supported by numerous decisions of international and domestic courts which place the democratic function of free speech as the principal basis for the theoretical justification of the protection of free speech.

The distinctive place of free speech to democratic public discourse entails that political speech, which forms its normative core, should be vigorously protected. This entails that there should be a rigorous scrutiny for any limitations placed on political speech. In this regard Cass Sunstein notes:

> [political deliberation] is securely protected against government when the State tries to ban political speech, it is subject to the strongest presumption of unconstitutionality. Without a showing of likely, immediate and grave harm, government cannot regulate political speech.[1584]

This normative conclusion is not only reflective of the current state of free speech law in the US but supported by numerous studies of decisions of different courts and legal opinions across different societies as well as the framework of international human rights law.[1585] Although there are few instances where the normative constitutional theory of the particular States is more dignitarian, they are at best marginal. Even in such exceptional cases where dignity and

---

[1581] See Meiklejohn, Self-Government (n 14).

[1582] See Krotoszynski (n 107); Post, Participatory Democracy (n 250); Weinstein, Participatory Democracy (n 250) and Sunstein, Democracy and the Problem of Free Speech (n 280)

[1583] *Ibid*.

[1584] Sunstein, Democracy and the Problem of Free Speech (n 280) 122.

[1585] Krotoszynski (n 107).

other values form the central normative constitutional theory of these States, they have clearly articulated the particular nexus between free speech and democratic public discourse.[1586]

In the particular context of incitement law, Edwin Baker contends that in looking at the limits of political speech and incitement law, both principles of criminal law and free speech doctrine have significant relevance.[1587] He argues that 'any broad conception of incitement must be rejected in the realm of political speech, a category where more stringent protections of speech and the press apply'.[1588] Similarly, Fredrick Lawrence emphasizes that the limits of political speech in the context of incitement law should be informed by free speech doctrine and criminal culpability theory in order to ensure the robust protection of political speech.[1589]

Nevertheless, the current state of the law on incitement to terrorism and genocide in international and comparative law gave little consideration to the importance of looking at free speech doctrine. In the context of incitement to genocide, the jurisprudence of the ICTR shows that it preferred to focus and confine itself into analyzing the issues from criminal law and criminal culpability theory. This is striking given the fact that although the narrow proscription of 'direct and public incitement to genocide' in Article 2 (3) (c) of the ICTR Statute was informed by particular concern for protecting political speech, it gave little consideration for analyzing this important doctrinal import.[1590] The ICTR's jurisprudence clearly shows a structural deficit in looking at the importance of looking into free speech doctrine in resolving cases involving incitement to genocide. The robust protection of political speech can be balanced with the demand for preventing genocidal speech, only by looking into both free speech doctrine and criminal culpability theory.

[1586] *Ibid*.

[1587] Bake, Genocide (n 68) 25.

[1588] *Ibid*.

[1589] Lawrence, Violence Conducive Speech (n 898) 12.

[1590] See Schabas, Hate Speech in Rwanda (n 1132); Mendel (n 1146); Baker, Genocide (n 68).

What is troubling is the fact that this marginal consideration in analyzing basic constitutional principles on the limits of political speech and principles and doctrines of free speech in the context of incitement to genocide has its genesis since the early prosecution in the IMT. Telford Taylor, who initially served as assistant to the Chief Prosecutor Robert Jackson in the initial twenty-four Nazi war criminals and later as Chief Prosecutor for the subsequent cases, notes that one of the Chief criticisms of the prosecution for incitement in the *Streicher* case was 'the inadequate attention to the values involved in 'constitutional guarantee of liberty' including free speech.[1591]

What is more concerning is also the fact that the ICTR at times seemed to reject the particular importance of closely scrutinizing the limits placed on political speech. The ICTR Trial Chamber in *Nahimana* argued that because genocidal acts occur in the context of an ethnic majority in support of the government, 'ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered'.[1592] It further noted that the foundational basis of the argument for a rigorous protection of political speech is informed by the fear of censorship from government elected by the majority and the need to protect minority political views, in the case at hand the inciting speech is situated 'not as a threat to national security but rather in defence of national security, aligning it with State power rather than in opposition to it'.[1593] Similarly, Benesch argues that one of the key factors why free speech doctrine does not adequately respond to determining the meaning of incitement to genocide is the fact that unlike most free speech cases the presumption against State intervention does not work in genocide cases where most of the

---

[1591] Baker, Genocide (n 68) 17.

[1592] *Nahimana TC*, para 1008; See also Benesch, Vile Crime (n 1163) 495, where she argues: '[f]irst, free speech doctrine seeks to protect individuals against state repression, but incitement to genocide is speech in the service of the state, since genocide is a major organizational feat that so far has generally been carried out by state employees, albeit often aided by civilians'.

[1593] *Nahimana TC,* para 1009.

crime has been committed by the State through propaganda against minority groups.[1594] Benesch argues that 'there is less to lose by restricting incitement to genocide and much more to lose by not restricting it'.[1595] This broad and dangerous interpretive trend opens a slippery slope for legitimizing repressive measures against political dissent and broad restrictions on freedom of expression which can have a significant chilling effect on the vitality of the democratic process.

Benesch's position and the reasoning of the ICTR in *Nahimana* Trial Chamber can also be attacked from a different perspective. In the first place, whether there is an ethnic minority or ethnic majority, anyone who is in power has the tendency to suppress expression that threatens its political power. This is not only informed by theoretical assumptions of free speech doctrine but in many ways from empirical observation of many multi-ethnic societies, in particular in the context of Africa. For example, in the case of Ethiopia, although many tend to believe that the Ethnic Tigrayans continue to dominate economic and political power in the country, this has not abated hate speech and many forms of hate speech and genocidal speech to continue.[1596] In parallel, there has been increasing suppression of political speech that has been one of the most draconic in recent decades.[1597] Whether political power is in the hands of ethnic majority or minority should not be the benchmark for scrutinizing the potential restrictions on speech. Moreover, speech that constitutes incitement cannot be determined a priori, the risk of restricting political speech would always be there unless narrowly tailored limitations are available to guarantee its robust protection. Even where Benesch criticizes the inability of the argument from the search for truth to counter genocidal and hate speech, she seems to take for granted that the search for truth and the marketplace of ideas forms the

---

[1594] Benesch, Vile Crime (n 1163) 495

[1595] *Ibid*.

[1596] See AL Dahir, Bearing the Brunt: EEthiopia's Crisis is a Result of Decades of Land Disputes and Ethnic Power Battles (Quartz, 30 October 2016) [<https://qz.com/822258/ethiopias-ordinary-tigray-minority-is-caught-in-the-middle-of-oromo-protests/>] (accessed 5 December 2016).

[1597] See Amnesty International, Dismantling Dissent (n 651).

major doctrinal basis of the protection of free speech; when in fact a democracy-based justification that underscores political speech and public discourse, distinctively informs the fundamental theoretical basis of free speech protection in international and comparative law.[1598]

The above position of the ICTR in the *Nahimana* Trial Chamber was later reversed by the Appeals Chamber judgment. The Appeals Chamber rightly noted that it has 'difficulty' in accepting the reasoning by the Trial Chamber.[1599] While it did not expound the reasons for its rejection of the Trial Chamber's reasoning, it clearly declined to accept the Trial Chamber's reasoning.[1600] In *Bikindi*, the Trial Chamber expanded this argument noting that restrictions on freedom of expression should be informed by the distinctive place of political speech to public discourse.[1601] It concluded that, although the particular dangerousness of the crime of inciting genocide requires the criminalization of such conduct it 'appreciates the precarious nature of restricting speech and discouraging political opinion through the criminalization of certain kinds of expression' such as incitement to genocide.[1602]

In this regard, the only significant ruling which seems to be informed by the particular significance of political speech to democratic public discourse is Judge Theodor Meron's Partly Dissenting Opinion.[1603] In his dissent, Judge Meron clearly articulated the approach that should be taken in analyzing limitations on freedom of expression, including in the context of

---

[1598] Benesch, Vile Crime (n 1163) 496.

[1599] *Nahimana* AC para 713, noting that 'the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government's agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide'

[1600] *Ibid*.

[1601] *Bikindi TC,* para 396.

[1602] *Ibid,* para 396.

[1603] Partly Dissenting Opinion of Judge Meron, *Nahimana AC* para 10.

incitement to genocide and how this should inform the tribunal's assessment.[1604] Judge Meron's approach in analyzing incitement to genocide does not only refer to criminal law approach but underscores the significance of free speech doctrine in that it gives due attention to the vulnerability of this form of speech to abuse.[1605] In his partly dissenting opinion, Judge Meron argued that '[b]ecause of the extent to which hate speech and political discourse are often intertwined, the Tribunal should be especially reluctant to justify criminal sanctions for unpopular speech'.[1606] In particular, his observation that limits on political speech in transitional democracies should be more rigorously scrutinized is informed by the particular vulnerability for abuse to such form of speech:

> 'The protection of speech, even speech that is unsettling and uncomfortable, is important in enabling political opposition, especially in emerging democracies. As amicus curiae in the instant case, the Open Society Justice Initiative has brought to the Tribunal's attention numerous examples of regimes' suppressing criticism by claiming that their opponents were engaged in criminal incitement. Such efforts at suppression are particularly acute where political parties correspond to ethnic cleavages. As a result, regimes often charge critical journalists and political opponents with "incitement to rebellion" or "incitement to hatred." The threat of criminal prosecution for legitimate dissent is disturbingly common, and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes. "[S]weepingly overbroad definitions of what constitutes actionable incitement enabled governments to threaten and often punish the very sort of probing, often critical, commentary about government that is of vital importance to a free society." In short, overly permissive interpretations of incitement can and do lead to the criminalization of political dissent'.[1607]

Judge Meron's partly dissenting opinion has a significant contribution to the current structure of legal reasoning on incitement cases in international criminal law. First, it feels the gap in the jurisprudence of international criminal law that gives little and marginal consideration to free speech doctrine and principles of free speech that inform the regulatory framework of incitement law. Second, it also underscores the particular importance of protecting core

---

[1604] *Ibid.*

[1605] *Ibid.*

[1606] *Ibid,* para 9.

[1607] *Ibid*, para 10 (foot note omitted).

political speech in 'nascent democracies'.[1608] The possibility to use incitement law as a pretext of silencing political dissent, as Judge Meron notes, is apparent in the subsequent emphasis by multi-ethnic States that invoked the prosecution of RTLM to justify their suppression of legitimate political speech.[1609] The significance and utility of this approach lies in the fact that inciting speech cannot be identified *a priori* or '*ex-ante*'.[1610] Accordingly, in determining the contours of political speech and inciting speech, one should not only be confined to analysis of criminal law but also crucially, to free speech doctrine and the policy rationales why limitations on core political speech should be scrutinized narrowly.[1611]

Although the above discussion has largely focused in the context of incitement to genocide, similar conclusions can be reached when it comes to incitement to terrorism, and in fact in cases involving incitement law in general.[1612] The discussions in Chapter four clearly demonstrate that the advent of incitement to terrorism as a new form of crime in international law has had a drastic effect in many democratic societies.[1613] Although containing the ideological basis of terrorism that fuels this renewed form of political violence is justified, this has to be informed by the significance of protecting political speech which forms an integral part of democratic public discourse. This is particularly important given the fact that the notion of incitement to terrorism has been a vague and difficult legal concept which makes it difficult for courts to delimit its legal boundaries and the contours of political speech.[1614] A democracy-based theory of free speech that distinctively places the importance of political speech can mitigate the regulatory challenges related with the notion of incitement to terrorism in a similar vein.

[1608] *Ibid*, para 11.

[1609] *Ibid,* para 10.

[1610] *Ibid.*

[1611] *Ibid.*

[1612] See Gelber(n 66).

[1613] See Discussion in Chapter Four.

[1614] See Cram, Terror and the War on Dissent (n 499).

In the context of Ethiopia, the structure of the constitution and the history of the minutes of the constitutional assembly clearly indicate that there is a particular focus on protecting political speech and ensuring the vitality of free expression to democratic public discourse.[1615] In dealing with criminal sanctions for speech including incitement law, courts should be informed by this important underlying philosophical rationale in protecting political speech. This would help to develop, a coherent and principled application of freedom of expression while at the same time maintaining the security and public order demands of the State.

6.2. The Risks of Broad and Vague Proscription of Incitement Law and Its Chilling Effect on Political Speech

The foregoing discussions clearly demonstrate the risks of broad and vague proscriptions on incitement to terrorism and incitement to genocide which continue to have 'chilling effect' on political speech in Ethiopia and many other transitional democracies.[1616] Fredrick Schauer, one of the early exponents of the chilling effect doctrine provides a brief definition that captures the essence of the doctrine. According to Schauer '[a] chilling effect occurs when individuals seeking to engage in activity protected by [free speech] are deterred from so doing by governmental regulation not specifically directed at that protected activity'.[1617] Essentially, '[t]he very essence of a chilling effect is an act of deterrence'.[1618] Whether it is people that are deterred or an activity, the fundamental basis of the assumption of chilling effect doctrine rests

---

[1615] See Timothewos, An Apologetics for Constitutionalism (n 113) 25.

[1616] Taking Schauer's definition vagueness can be defined as defined as 'the inherent imprecision of the regulatory rule which makes both determination and prediction extremely difficult'; See F Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect (1978) *58 Boston University Law Review* 688.

[1617] *Ibid*, 693.

[1618] *Ibid,* 689.

on the fear of punishment for speech offences.[1619] Although civil liability and fines for speech offences can have a chilling effect on political speech, it is more pronounced in the case of criminal responses which have the risk of imprisonment. In particular, incitement to terrorism and incitement to genocide because of their nature entail serious criminal sanctions with draconic chilling effect on political speech.[1620]

It is important to point out that the laws proscribing incitement to terrorism or incitement to genocide are enacted to suppress terrorist speech and genocidal speech and as such the purpose of the law to proscribe and even 'chill' these forms of expressions is indeed legitimate. What is essential is not then this '*benign* deterrence'-the intentional suppression of these forms of expression for which the law was enacted, but rather, the '*invidious* chilling' effect of the law-which unduly discourages political speech and creates a general atmosphere of self-censorship.[1621] The risk of prosecution and the resulting chilling effect suffocates public discourse and silences dissenting voices which have the potential to simmer tension in the larger public and trigger violent responses to political problems in society.

As Kim Lane Scheppele observes, in recent times the first wave of the migration of human rights norms to domestic legal orders is increasingly challenged by a second wave of the migration of anti-constitutional norms.[1622] Although Scheppele's discussion largely focuses on the post 9/11 counter-terrorism campaign and its consequential effect on the emergence of anti-constitutional norms, her idea of migration of anti-constitutional norms informs the dangers of this trend in many areas of speech regulation including the jurisprudence of international tribunals on incitement to genocide and their similar anti-constitutional effect in domestic legal orders.[1623]

[1619] *Ibid.*

[1620] See Baker, Genocide (n 68); Gelber (n 66).

[1621] Schauer, Fear, Risk and the First Amendment (n 1616) 690.

[1622] Scheppele (n 64) 350.

[1623] Simon (n 1395); Baker, Genocide (n 68).

The absence of free speech doctrine in analyzing incitement to genocide cases as well as the overall emphasis on the prosecution of speech acts as the principal basis to prevent genocidal acts and ethnic strife raises serious concerns on the protection of political speech.

Although the chilling effect doctrine has been extensively covered, there has been little attempt to demonstrate the serious implications of anti-constitutional norms and their draconic effect in the domestic legal order of States empirically.[1624] The thesis has clearly demonstrated the risk of overbroad laws and their impact on political speech in the context of Ethiopia. Gedion Timothewos, observing the application of incitement laws in Ethiopia concludes that the pattern of cases in Ethiopia clearly show that most of the prosecutions focused on core political speech, or expressions which were critical of the government or in some way portrayed the government in unfavorable manner and this he argues continues to have a chilling effect on the exercise of the right to freedom of expression.[1625] The broad and vague nature of the laws and the general uncertainty of the specific conduct covered under incitement law has resulted in silencing dissenting voices and shrinking the political space in general.[1626] The fact that both the crime of incitement to terrorism and incitement to genocide, represent crimes of the highest order entailing very serious punishments on speakers also further reinforces the chilling effect of these laws. Similarly, the chilling effect of incitement to genocide and incitement to hatred laws is particularly apparent in post-genocidal societies such as Ethiopia where past history of ethnic strife and violence can give a political and legal ground to impose serious restrictions on political speech.[1627]

[1624] See Gelber (n 66), Schauer, Speech, Behaviour and the Interdependence of Fact and Value (n 749); See also L Kendrick, Speech, Intent and the Chilling Effect (2013) *54 William and Mary Law Review* 1633; D Dent and AT kenyon, Defamation Law's Chilling Effect: A Comaprative Analysis of US and Australian Newspapers ((2004) 9 *Media & Arts Law Review* 89.

[1625] Timothewos, An Apologetics for Constitutionalism (n 113) 25.

[1626] See also Dismantling Dissent (n 651).

[1627] Salter et al (n 1227) 4.

Fredrick Schauer notes that the chilling effect doctrine plays a significant role in the formulation of legal rules in the context of incitement law and broader issues related to freedom of speech.[1628] It informs that the costs of criminal proscriptions on free speech are so high that a narrowly tailored set of legal limitations will help to avoid their 'chilling effect' on freedom of expression. Free speech is an 'affirmative value'' in that its wider significance and multiplier effect to the vitality of democratic public discourse requires not only barring government limitations on speech but also encouraging speech.[1629] As Schauer rightly notes, identifying that there exists a chilling effect has little significance if we fail to articulate why incitement law should be narrowly regulated and provide a range of regulatory responses that could adequately avert the social evil that the law purports to addresses.[1630] In the following sections, the thesis will discuss a wide range of regulatory and public policy responses to avert these social evils which help to mitigate the draconic effect of incitement laws in political speech.

6.3. The Need for Alternative Regulatory Responses

Most of the emphasis on the criminalization of speech including incitement to terrorism and incitement to genocide emanates from a very narrow understanding of the nature of free speech as well as the fact that much of what these forms of speech bans purport to avoid such as discrimination and violence can equally be achieved by adopting alternative regulatory and public policy responses. As Fredrick Schauer notes, although one acknowledges the contribution of incitement to violence and discrimination, regulatory responses emanating from

[1628] Schauer, Fear, Risk and the First Amendment (n 1616) 688.

[1629] *Ibid*, 691.

[1630] *Ibid.*

this conclusion have to be seen entirely differently.[1631] The general trend which overtly emphasizes on the criminalization of speech overlooks significant regulatory and public policy responses that can adequately counter inciting speech without undermining robust political speech and its vitality to the democratic process.[1632] In particular, when the purported inciting speech is associated with collective forms of political violence such as terrorism and genocide, locating the inciting speech from legitimate political speech and criticism of government becomes an extremely complex task. The fact that incitement as inchoate crime is criminalized merely based on the speech *per se*, without the need for any other corroborative evidence makes the potential of suppressing political speech and undermining robust public discourse evident.[1633]

Because of this, it is essential to explore the various regulatory alternatives that help to mediate and maintain a balance between the demands of preventing violence and the equally significant need to protect robust political speech. In this regard, various alternatives can be envisaged. The regulation of private speech such as fighting words and true threats provide significant regulatory alternatives for speech crimes. Moreover, focusing future prosecutorial trends on the regulation of private forms of speech such as solicitations, attempts, and conspiracy and exploring how more access to speech can counter hate speech are significant aspects of this endeavour. In providing these alternative regulatory options, the thesis does not purport to show that political speech in public discourse should not be regulated. It only helps to strengthen the position taken regarding the importance of a narrow application of incitement law and the significance of providing narrow limits on political speech in public discourse.

[1631] See Schauer, Speech, Behaviour and the Independence of fact and Value (n 749), where he argues that '..the truth or falsity of the empirical causal claim is independent of the normative and regulatory consequences that might flow from its truth' ; see at 44.

[1632] *Ibid*.

[1633] See Baker, Genocide (n 68).

6.4. Importing First Amendment Doctrine

It is true that the US constitutional experience can be unhelpful regarding the regulation of political speech in public discourse. Essentially because the US First Amendment law on freedom of speech provides no specific limits on hate speech in the context of political speech.[1634] According to established First Amendment doctrine, hate speech including Neo-Nazi marches, racist speech, desecration of religious symbols, terrorist speech and many other forms of political speech are protected.[1635] The thesis has argued in the preceding sections why this approach does not meet the demands of hate speech regulation in pluralist societies such as Ethiopia.

Nevertheless, American free speech doctrine is not based on an unqualified right to freedom of expression but rather only to speech made in the context of public discourse and the deliberative process of democratic self-government.[1636] Simply put, even in the US constitutional dispensation '… the right of free speech is not absolute at all times and under all circumstance. It does not mean the right to speak everything'.[1637] In this regard James Weinstein astutely observes what most scholars overlook in the debate on hate speech:

> Much of the discussion on the constitutionality of hate speech regulation suffers from a failure to specify the type of regulation under discussion. In debates about the regulation of 'hate speech', it is often impossible to tell whether the discussion concerns a broad ban on all public expression of racist ideas or a much narrower regulation such as campus speech codes or prohibition of racist fighting words. Indeed, sometimes, hate crime legislation-penalty enhancement for racially motivated crimes, such as murder, assault, and arson –is indiscriminately thrown into the hate speech spot. The problem

---

[1634] R Post, Racist Speech, Democracy, and the First Amendment (1991) *32 William and Mary Law Review* 267, 325–26.

[1635] *Ibid.*

[1636] See Post, Participatory Democracy (n 250); Weinstein, Participatory Democracy (n 250); Meiklejohn, Self-Government (n 14).

[1637] *Chaplinsky v New Hampshire* (n 315) noting that '[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances', see at 571.

> with failing to distinguish broad hate speech regulation from narrower ones, and both types of hate speech regulation from hate speech crime legislation is that the free speech doctrine has a very different bearing on each type of regulation.[1638]

Accordingly, the underlying policy rationale for an elevated protection of core political speech and public discussion emanates 'because it has the attributes of a public good'.[1639] As Daniel A. Farber notes '[p]olitical speech might well be considered a "double" public good. Because information contained in political speech is one public good, and political participation, which is often guided by such information, is a second public good'.[1640] Similarly, Donald Meiklejohn reflecting on the political thought of Alexander Meiklejohn and the US Supreme Court's approach to free speech in *New York Times v Sullivan*[1641] notes that it provided 'the occasion for conceiving political expression, not as a private right against the government, but as a public procedure to which the government is subject'.[1642] In articulating the underlying basis of a free speech theory he emphasizes on '[t]he significance of this emphasis on political speech as a public function'.[1643] Even staunch advocates of free speech and public discourse such as Robert Post argue that nonpublic speech that has little relevance to democratic public discourse can be regulated.[1644] Although these forms of restrictions are more common in relation to hate speech, they are considered as appropriate limits on free speech in many other forms of expressions including terrorist speech.[1645] This collectivist view resonates the original statement

---

[1638] J Weinstein, *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine* (Westview Press, 1999) 52.

[1639] DA Farber, Free Speech without Romance: Public Choice and the First Amendment (1991) *105 Harvard Law Review* 556.

[1640] *Ibid,* 563.

[1641] *New York Times v Sullivan* (n 312).

[1642] D Meiklejohn, Public Speech and the First Amendment (1967) *55 Georgetown Law Journal* 234.

[1643] *Ibid.*

[1644] Post, *Constitutional Domains* (Harvard University Press, 1995) 311–12, 323–29.

[1645] See Tsesis (n 760).

of the Meiklejohnian understanding on the importance of free speech in ensuring rich and robust public debate.[1646]

It should also be noted that some of the confusion and often the call for more regulation on hate speech and incitement to genocide occurs because of the lack of understanding the theoretical import of protecting core political speech. For example, when Yared Legesse Mengistu argues that hate speech helps to 'shield' minority ethnic groups from 'verbal abuse' in Ethiopia, he clearly seems to imply that fighting words are protected forms of speech, when in fact even in liberal democracies such forms of speech are proscribed.[1647]

In this regard, two broad categories of private speech can be regulated consistent with the theoretical underpinnings of freedom of expression. These are the doctrines of fighting words and true threats. Their limited deliberative significance, the danger of immediate violence; the psychological harm as a result of the verbal abuse; the general offense inflicted when such language is used; and the destructive long-term effects from the attitudes reinforced by abusive remarks requires banning fighting words and true threats.[1648] Thus, First Amendment doctrine on free speech can offer important lessons on why more regulation can be justified in private speech/nonpublic speech and thereby contain some of the anxieties in relation to public order and dignitarian concerns which are usually associated with hate speech and incitement law in multi-ethnic societies such as Ethiopia. In the context of the Jurisprudence of ICTR on incitement, it should also be noted that there is a clear acknowledgement of the importance of using the doctrine of true threats and fighting words as appropriate limits on free speech.[1649]

6.4.1. The Fighting Words Doctrine

[1646] See Meiklejohn, Self-Government (n 14)

[1647] Mengistu (n 52) 352.

[1648] Bhagwat (n 1705) 111; Heyman (n 169)181.

[1649] Partly Dissenting Opinion of Judge Meron, *Nahimana AC,* para 11.

The fighting words doctrine as developed by the US Supreme Court established that face-to-face insults directed at a particular individual or group of individuals and likely to provoke an average addressee to fight are not protected under the First Amendment freedom of speech.[1650] Although in most States this form of speech will also be a proscribed form of speech, the US constitutional experience is particularly important because it offers a principled application of firm legal doctrines that help to expound why such form of speech is proscribed and the legal principles governing this doctrine.

The US Supreme Court established the doctrine of fighting words as unprotected forms of expression in *Chaplinsky v New Hampshire*.[1651] The case concerned about a man named Chaplinsky, a Jehovah witness who was proselytizing to people passing by a street. In doing so, however, he was also shouting and annoying some people. He was told by a police officer to be calm and 'go slow'.[1652] Nevertheless, Chaplinsky responded by insulting the police officer- 'a damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists'.[1653] Chaplinsky was charged and convicted of violating a New Hampshire legislation that criminalized addressing 'any offensive, derisive or annoying word to any other person . . . [or] call[ing] him by any offensive or derisive name'.[1654] The Supreme Court upheld the conviction noting that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace **....** [Such] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit

---

[1650] *Chaplinsky v New Hampshire* (n 315) ruling that the prevention of and punishment for 'fighting words' is constitutional, see at at 572.

[1651] *Ibid.*

[1652] *State v Chaplinsky*, 91 N.H. 310, 313 (1941).

[1653] *Chaplinsky v New Hampshire* (n 315) at 569.

[1654] Chapter 378, S 2, of the Public Laws of New Hampshire, cited at Ibid.

> that may be derived from them is clearly outweighed by the social interest in order and morality.[1655]

As can be seen from the *Chaplinsky* ruling, what is crucial in the proscription of fighting words is the fact that these forms of expressions would lead to the prospect of immediate violence to the average addressee. Moreover, the Court also implicitly seems to construe that fighting words have little deliberative significance and the exposition of ideas as they do not have informational content. [1656] The speaker's aim is to dehumanize, demoralize and demean the audience rather than engage in any meaningful dialogue. And as such even if the audience because of his physical condition or circumstances may not be provoked to violence, the doctrine of fighting words requires that these forms of expressions are out of the reach of freedom of speech.[1657]

In constructing the normative standard on what kinds of expressions constitute fighting words and what the prospect of violence should look like, the Supreme Court noted that 'words likely to cause an average addressee to fight' are proscribed.[1658] One also finds similar formulations under the American *Model Penal Code's* section on disorderly conduct, which is adopted by many jurisdictions.[1659] According to the Model Penal Code, one must purposely or recklessly create a risk of 'public inconvenience, annoyance or alarm' by making 'offensively coarse utterance, gesture or display' or by addressing 'abusive language to any person present'.[1660]

[1655] *Ibid,* para 571-572.

[1656] Greenawalt, Speech, Crime and the Uses of Language (n 189) 307.

[1657] However, See Greenawalt, Insults and Epithets (1990) *42 Rutgers Law Review* 287; where he argues that there may be particular groups of people who are less likely to respond violently such as women or members of a particular minority ethnic group, and as such '[t]he standard should be whether provoking violence is a substantial probability' and as such the 'inquiry should not concentrate on the perceived capacity of a particular victim to respond physically', see at 297-299.

[1658] *Ibid,* para 573.

[1659] *Chaplinsky v New Hampshire* (n 315) *at 573.*

[1660] Model Penal Code S.2(1)(b) (1962).

The Code also forbids harassment, if a speaker 'insults, taunts or challenges another in a manner likely to provoke violent or disorderly response'.[1661]

This is also strikingly similar to the provisions in Ethiopian Revised Criminal Code dealing with hate speech.[1662] Although the fighting words doctrine is not expressly articulated by Ethiopian courts, the provisions of the criminal law clearly proscribe these forms of expressions. The doctrine of fighting words can offer an additional theoretical and normative insight on why such forms of expressions are prohibited and articulating the broader dichotomy of private and public speech, and why limits on the later should be scrutinized more rigorously because of their ideological significance.

Scholars argue that these forms of speech may include racial and other epithets targeting particular groups such words as 'wop, kike, spick, Polack, nigger, pansy, cunt, honkey, slanteyes and WASP. As well as insulting words that are not directed at particular individuals or groups such as 'You are a stupid bastard' etc...[1663] In the context of Ethiopia, one can contemplate that similar forms of racial epithets targeting certain ethnic and religious grounds such words as 'Tsila', 'Galla', Shanqila' 'Teltal' Wollamo, and many other forms of racial epithets can be banned and criminalized consistent with this doctrinal import.

In general, ethnic and racial epithets and slurs or other similar forms of expressions directed at certain individuals or groups based on their race, religion, sex, ethnicity, sexual orientation and other forms of similar grounds are unprotected forms of expression. The fighting words doctrine offers an important approach to counter hate speech and respond to dignitarian concerns and the limits that can be placed on private speech that help to mitigate some of the

---

[1661] *Ibid*, S 250.4; See also Greenawalt, Insults and Epithets (n 1657) 294.

[1662] See revised Criminal Code Art 615: 'anyone directly addressing the victim, or referring to him, offends him in his honour by insult or injury, or outrages him by gesture or in any other manner' is punishable.

[1663] Greenawalt, Insults and Epithets (n 1657) 291.

argument coming from critical race theorists, feminists and other scholars on the psychological harm that is inflicted because of hate speech.

6.4.2. The Doctrine of True Threats

The doctrine of true threats as developed by the US Supreme Court holds that speech which is directed at threatening and intimidating an individual or group of individuals directly is an unprotected form of speech. In *Virginia v Black* the US Supreme Court articulated the notion of true threats as '[t]hose statements in which the speaker aims to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals'.[1664] The Court emphasized that if the intention of the speaker is to threaten and intimidate the audience rather than engage in a rational public debate, then limits can be placed on these forms of speech.[1665]

First Amendment scholars including Alexander Tsesis have argued that the doctrine of true threats can be used to address contemporary forms of political violence such as incitement to terrorism.[1666] Others have articulated the utility of adopting the doctrine of true threats to counter hate speech.[1667] Whatever the proposition, it is clear that the doctrine of true threats offers an important normative basis to put appropriate limitations on speech which has little relevance to public discourse. In pluralist States such as Ethiopia, these regulatory options offer

---

[1664] *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001), rev'd en banc, 290 F.3d 1058 (9th Cir. 2002)*, where a US Appellate Court held that threatening speech such as putting the names and addresses of physicians who undertake abortion by prolife group in a website was considered as threatening and outside the scope of the first amendment protecting freedom of speech, see at 1072; See also *United States v Fullmer*, 584 F.3d 132, 137–38 (2009).

[1665] *Virginia v Black* 538 US 343 (2003) at 359.

[1666] Tsesis, Terrorist Speech (n 760) 667.

[1667] See Greenawalt, Insults and Epithets (n 1657).

significant lessons on how to regulate hate speech and terrorist speech without at the same time affecting the vitality of political speech to public discourse and the democratic political order.

This is also consistent with the existing regulatory framework of on incitement under the Criminal Code of Ethiopia, which provides for limitations on these forms of speech.[1668] In fact, a closer look at the emerging case law on hate speech in Ethiopia seems to implicitly endorse the view that any prosecution for hate speech has to demonstrate the prospect of violence as a contingent requirement for conviction.[1669] The availability of these regulatory frameworks underscores why public speech which has ideological significance because of its intricate notional connection with public discourse should be vigorously protected while threatening and insulting speech should be proscribed. Through a principled application of the doctrine of true threats, it is plausible to argue that robust public debate can be enhanced while at the same time ensuring the demands of maintaining public order.

6.5. More Heightened Regulation of Complicity and Other Forms of Inchoate Crimes

Consistent with the theoretical underpinnings of the thesis in protecting core political speech as a public good, criminal law proscriptions and future prosecutorial trends should focus on private forms of speech such as solicitations and conspiracy and related forms of inchoate crimes such as attempt to counter terrorist and genocidal speech.[1670] One of the major reasons for overlooking the significance of free speech doctrine in the jurisprudence of the ICTR lies in failing to understand the embedded philosophical assumption in relation to incitement as a

---

[1668] See Revised Criminal Code Art 580, proscribing Intimidation: 'Whoever threatens. another with danger or injury so serious as to induce in him a state of alarm or agitation…'

[1669] See *Federal Prosecutor v Elias Gebru Godana* (n 1542).

[1670] Greenawalt, Speech, Crime and the Uses of Language (n 189) 111-112.

public act.[1671] Similar oversights can be seen in approaching the crime of incitement to terrorism.[1672] Because of this conceptual significance and its implications in the regulation of free speech, a more nuanced discussion would help to shed light on why the prosecutorial focus should be in regulating 'private inciting speech' rather than public speech.[1673] As argued in the preceding discussions, incitement as a public act is ideologically significant in that it purports to address a general audience which is intricately linked with the democratic function of free speech and public discourse.[1674] Moreover, as a pure inchoate crime, the prosecution for incitement is based solely on the speech act alone as *actus reus* of the crime.[1675]

In the context of incitement to genocide, the travaux préparatoires clearly show that the initial inception of the narrow proscription of incitement to genocide was articulated with particular concern for protecting robust political speech.[1676] The attempt at resolving some of the dilemma involved in conceiving direct and public incitement should also be aimed at both preventing genocide and maintaining robust political speech. The troubling nature of this particular nature of the crime can be seen in the Trial of *Simon Bikindi*, whose music and

---

[1671] *Ibid.*

[1672] See for example Gelber (n 66).

[1673] A more flexible understanding of complicity or instigation shows that the incitement need not be public and direct to convict someone on incitement to genocide as a form of complicity (See *Akayesu* AC 478-483; similarly Timmermann, Incitement in International Criminal Law (n 1025), argues that 'it is submitted that incitement or instigation per se should also be regarded as an inchoate crime. Aside from the fact that this would be a more coherent approach, the inherently dangerous nature of acts of instigation, in that they set things in motion and plant the idea of the crime in the principal perpetrator's mind, would appear to favour such an interpretation'; See at 846.

[1674] Greenawalt, Speech, Crime and the Uses of Language (n 189) 111-112.

[1675] *Akayesu TC*, para 561; see also Timmermann, Incitement in International Criminal Law (n 1172) 825.

[1676] See *Bikindi TC,* prara 388, citing travaux préparatoires of the Genocide Convention, UN ORGA, 6th Committee, 3rd Session, 86th meeting.

speeches formed the major basis of the prosecution's evidence.[1677] Although Simon Bikindi was charged with six different counts of genocide, conspiracy to commit genocide, complicity in the commission of genocide and crimes against humanity, he was convicted only for the crime of incitement to genocide.[1678]

On the other hand, solicitation and other forms of complicity such as attempt and conspiracy to commit criminal acts are associated with or contiguous to the commission of concrete criminal acts. [1679] In other words, these kinds of crimes usually require something more substantive than just the speech for their criminalization. Moreover, the speech is often directed at particular individuals in a private setting with little relevance for public discourse and as such does not raise serious issues of frees speech.[1680] Similarly, Eric Heinze notes that while the vitality of free speech to public discourse demands its vigorous protection, legal liability for other private forms of speech such as solicitation and conspiracy addressed to identifiable individuals to engage in a concrete criminal act should be restricted more vigorously.[1681]

After observing the history of international prosecutions for incitement to genocide, Wilson astutely observes that although the conventional belief is that the crime of genocide and war crimes were the result of propaganda resulting from public speech, the evidence clearly shows that the prosecution of these individuals was based on their participatory responsibility contiguous with the commission of a grand criminal enterprise.[1682] The Nuremberg trials demonstrated that no direct evidence was produced to show that the public incitement influenced individuals that participated in the persecution and extermination of Jews.[1683]

[1677] See *Bikindi TC*.

[1678] *Ibid, 441, 460-461.*

[1679] Greenawalt , Speech Crime and the Uses of Language (n 189) 111-112.

[1680] *Ibid.*

[1681] Heinze (n 15) 171.

[1682] Wilson (n 1153) 284.

[1683] *Ibid*.

Similarly, after looking extensively the experience of international criminal prosecutions in ICTY and ICTR Dojčinović concludes:

> from the analytical and prosecutorial point of view [...] so-called 'linkage evidences', consisting of a content analysis of the propagandistic utterances, including images, and music and their media platforms, may ultimately demonstrate the *intent* of the system and the *authority* personified in an individual, a suspect or an accused, to put into operation a specific criminal policy. Such forms of organizational structures are important evidentiary indicators of *conspiracy to commit a crime*. In ICTY and ICTR cases, the equivalent doctrine is *joint criminal enterprise* (JCE). *As a matter of fact and evidence*, any effective propagandistic campaign at the leadership level in modern times must be an enterprise and not merely a personal attempt at instigating groups and individuals to commit a crime.[1684]

Dojčinović clearly makes the conclusion that most often, incitement and hate speech does not occur as an isolated act of public speech but as part of a collective criminal design.[1685] He argues that both in terms of its cognitive intent and criminal design hate speech including incitement to genocide involves a collective intent to further shared goals and objectives as part of a joint criminal enterprise rather than isolated instances of public speech made in the context of public discourse.[1686] Social scientists such as Richard Carver have also questioned the extent to which the media played a role in the Rwandan genocide, emphasizing on outlier factors which precipitated the violence.[1687] Similarly, on the basis of one hundred interviews of convicted perpetrators in a Kigali prison, Rwandan cultural anthropologist Charles Mironko found that many ordinary villagers either did not receive genocidal radio transmissions or did not interpret them in the way they were intended.[1688] Scott Straus's reaches similar

---

[1684] Dojčinović(n 1324) 10.

[1685] *Ibid.*

[1686] *Ibid.*

[1687] R Carver, Broadcasting & Political Transition: Rwanda and Beyond, in R Fardon & G Furniss (eds) *African Broadcast Culture in Transition* (James Currey Publishers, 2000) 188.

[1688] C Mironko, The Effect of RTLM's Rhetoric of Ethnic Hatred in Rural Rwanda, in A Thompson, *The Media and The Rwanda Genocide* (Pluto Press, 2007) 125, 129–30.

conclusions.[1689] Both Mironko and Straus's respondents reported that that peer pressure from male neighbors and kin exerted more influence on their participation in killing than did government and radio propaganda.[1690] This conclusion remarkably demonstrates the conclusion that isolated forms of public speech should not be the subject of prosecution, and why the focus should be on solicitation, conspiracy, attempt, and other forms of complicity and private forms of speech.

In this regard, the more recent prosecutorial focus of international prosecutions on complicity to genocide rather than incitement to genocide for speech related acts is consistent with the theoretical underpinnings and doctrinal assumptions of free speech which underwrites the ideological significance of protecting public speech. The increasing number of international prosecutions including *Dario Kordi´c*[1691] and *Radoslav Brdanin*[1692] with complicity to commit

---

[1689] S Straus, *The Order of genocide: Race, Power, and War in Rwanda* (Cornell University Press, 2006); Straus, after interviewing over 200 perpetrators in the Rwandan genocide concludes that none of the interviewees mentioned the RTLM as being the most important reason for committing the genocidal acts, see at 249–255; see also S Straus, What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda's 'Radio Machete', (2007) *35 Politics and Society* 626.

[1690] *Ibid;* See also Wilson (n 1153) 22-23.

[1691] *The Prosecutor v Dario Kordic and Mario Cerkez*, CT/P.I.S./926e, ICTY AC (17 December 2004); holding that '[t]he Appeals Chamber also holds that it was reasonable to find that Kordi, as the responsible regional politician, planned and instigated the crimes which occurred in Ahmic on 16 April 1993 and its associated hamlets Šantići, Pirići, and Nadioci' with the aim of ethnically cleansing the area, see at para 483.

[1692] *Prosecutor v Radoslav Brdanin* AC, IT-99-36-A (3 April 2007), conforming the trial Chamber's finding that ''that Brđanin intended to induce the commission of these crimes, thereby finding that the subjective element requirement had been met', (see at para 312); and found him guilty for 'a direct incitement to deport and forcibly transfer non-Serbs from the territory of the ARK', citing *Prosecutor v Radoslav Brdanin,* TC IT-99-36-T (1 September 2004) at para 574-575.

genocide in the ICTY—as well as the indictment of *Ahmad Harun*,[1693] *Callixte Mbarushimana*,[1694] *William Ruto and Joshua Arap Sang*[1695] for complicity in war crimes and crimes against humanity in the ICC for being responsible for various forms of private acts of inciting speech is consistent with the theoretical basis of the thesis.[1696] This current prosecutorial trend in the ICC and other international criminal tribunals is commendable. The prosecutions show more reliance on complicity and other related private speech acts than public incitement as forming the basis of the prosecution for incitement to genocide, crimes against humanity and other international crimes.

The importance of the distinction between private incitements is not only confined in the context of incitement to genocide but also incitement to terrorism and the broader context of general incitement law. Although the rationale for proscribing incitement to terrorism was motivated by the recognition for containing radical religious sentiments that fuel terrorism as a political violence, it can be argued that in States such as the United States, the counter-terrorism effort has been effective without affecting core principles of the First Amendment in protecting political speech.[1697] This lack of understanding on the particular chilling effect of incitement to terrorism to public speech is often ignored or overlooked by constitutional law scholars. For example in the most recent analysis of the effect of post 9/11 counter-terrorism laws on free speech, Katherin Gelber has made an important contribution to the draconic effect of these laws on free speech. Yet, her entire analysis largely rests on a generic claim that

---

[1693] *The Prosecutor v Ahmad Muhammad Harun* ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC-02/05-01/07.

[1694] *The Prosecutor v Callixte Mbarushimana* ICC-01/04-01/10 (On 16 December 2011, Pre-Trial Chamber dropped the case for insufficiency of evidence).

[1695] *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ICC-01/09-01/11(case terminated because of insufficiency of evidence on 5 April 2016, Trial Chamber).

[1696] See Dojčinović (n 1324) 10.

[1697] See however, Healy (n 1044); and Gelber (n 66); noting that more speech limiting restrictions have been placed in the post of 9/11 era.

counter-terrorism laws have resulted in 'speech-limiting' laws without making this significant conceptual distinction.[1698]

The material support for terrorism statute and some of the emerging case law on incitement to terrorism, such as the al-Timimi case, show that the law often bans concrete terrorist acts when individuals are incited in a private context with a clear criminal design to carry out an attack.[1699] The al-Timimi case which is the first post 9/11 case related with terrorist speech, the conviction primarily relied on a private speech in which he counseled and solicited a small group of Muslims in Virginia to join the *Mujahideen* and fight what he called the enemies of Islam. He was convicted of material support to terrorism and sentenced to life imprisonment. Although some scholars argue that the case raises questions on freedom of speech, given the fact that al-Timimi's speech is in line with a private speech and criminal solicitation and advocacy for a crime, it has little deliberative significance.[1700] Because of its marginal significance to public discourse and given the fact that al-Timimi clearly intended to solicit his listeners to join a terrorist organization, it cannot be said that it violates the freedom of political speech.[1701]

[1698] See Gelber (n 66).

[1699] *al-Timimi v Jackson*, 379 F. App'x 435 (6th Cir. 2010),cert. denied 131 S. Ct. 475 (2010)

[1700] Cf Healy (n 1044) 67-70, Healy Challenges Greenawalt's view which presupposes distinction between public ideological solicitations and private advocacy noting the difficulty of articulating the differences between private speech and public speech. However, the thesis for reasons discussed herein and the foregoing chapters argues that there is some reasonable ground to distinguish public from private speech both in the context of terrorism and genocide that can inform regulatory responses to frees speech.

[1701] See however, Healy (n 1044) 4 arguing that '[u]nder a literal reading of Brandenburg, al-Timimi's speech seems clearly protected', Cf RS Tanenbaum, Preaching Terror: Free Speech or War-Time Incitement (2006) *55 American University Law Review* 818, where he argues that an concludes that '..Brandenburg has never been applied to a private speech case. A non-Brandenburg approach to private speech allows for wider latitude outside strict temporal considerations in determining whether, and/or

These judicial and prosecutorial trends which focus on private forms of criminal solicitation than public incitements enhance a principled application of free speech doctrine and criminal culpability theory informed by the overriding value of protecting public speech. Consistent with the fundamental premise of protecting public speech which has ideological relevance to public discourse, one can also argue that the recent case of *Holder v humanitarian law project is* consistent with free speech doctrine and criminal culpability theory that emphasizes on proscribing private speech.[1702] In *Holder v Humanitarian Law Project*, the US Supreme Court made it clear that independent advocacy of criminal activity is not proscribed by the material support statute.[1703]

It should also be recalled that in most jurisdictions, solicitations to crime including private acts of incitement to terrorism were a crime before the advent of the notion of incitement to terrorism in the international scene. Saul notes that what was distinctively dangerous in terms of its implications on political speech was the proscription of public acts of speech as incitement to terrorism.[1704] Similarly, Ashutosh Bhagwat, taking the US experience on incitement law rightly notes that criminal conspiracy and organized forms of solicitation to commit terrorism are criminalized and do not raise any free speech challenges.[1705]

---

at what point, private speech may be prosecuted', and as such argues that it is not a protected form of speech (footnotes omitted).

[1702] 130 S.Ct. 2705 (2010), holding that ' "personnel" does not cover advocacy by those acting entirely independently of a foreign terrorist organization, and the ordinary meaning of "service," which refers to concerted activity, not *independent advocacy*. Context confirms that meaning: Independently advocating for a cause is different from the prohibited act of providing a service ''to a foreign terrorist organization.'' S 2339B(a)(1). Thus, any independent advocacy in which plaintiffs wish to engage is not prohibited by S 2339B' at 2709. (emphasis added).

[1703] *Holder v Humanitarian Law Project* Cite as 130 S.Ct. 2705 (2010), see at 2707, 2709, 2721, 2722.

[1704] Saul, Speaking of Terror (n 896) 869.

[1705] A Bhagwat, Free Speech Without Democracy (2015) *49 University of California, Davis* 119.

In the context of Ethiopia, the focus of the regulatory framework on incitement law in collective forms of violence such as terrorism and genocide should be more aligned with crimes of complicity such as solicitation, conspiracy and attempt which are contiguous with the commission of concrete criminal acts. The current prosecutorial trend in Ethiopia on incitement to genocide and incitement to terrorism is excessively reliant on prosecution of publicly addressed expressions which are usually intricately linked with political speech made in the context of public discourse.[1706] This is partly due to the fact that the prosecutorial trend in Ethiopia is neither informed by the significance of the embedded ideological significance of protecting publicly expressed speech, nor the importance of the legal distinction between solicitation, as a private act and incitement as a public act.[1707] Ethiopian Courts should be cognizant of this doctrinal significance in looking at cases involving incitement to genocide and incitement to terrorism.

In the context of terrorism, the public appeals to terrorism in Ethiopia is not motivated by religious factors, any form of 'terrorist violence' is less likely to result from public speech, but more from coordinated forms of organized criminal activity to which the proscription of solicitations, conspiracy, attempt and other forms of complicity is more suited to deal with.[1708] The ATP clearly provides the legal ground to focus on future prosecutorial patterns on solicitations to terrorism rather than public incitements.[1709] In an interesting parallel with the notion of solicitation and other forms of complicity in genocide under international criminal law, the ATP explicitly proscribes the planning, preparation, conspiracy, solicitation and attempt

---

[1706] See discussion in chapter four and chapter five.

[1707] See discussion in Chapter Four and Five.

[1708] See Abbink (n 747).

[1709] ATP Art 2(6) Cumm Art 4; note also that solicitation to terrorism does not require the commission or attempted commission of terrorism, See ATP Art 2(6) noting that '[[solicitation] means to induce another person by persuasion, promises, money, gifts, threats or otherwise to commit an act of terrorism even if the incited offence is not attempted'.

of terrorist acts, and these forms of complicity in terrorist acts should inform the focus of future prosecutorial trends.[1710]

Similarly, in the context of incitement to genocide, as the *Mengistu Haile Mariam* case clearly illustrated, the genocide of political groups in Ethiopia in the 1970s and 80s was made possible by the organized nature of the violence and the incitement to genocide.[1711] The Supreme Court has repeatedly established that the *Derg* officials were convicted not on their individual inciting speeches but as part of the wider policy of exterminating political groups by the *Derg*.[1712] Overall, a principled application of free speech doctrine and criminal culpability theory demands that the prosecutorial focus should be on private forms of inciting speech. By focusing on the prosecution for private speech acts, the danger of chilling effect on political speech and its special attribute as a public good can be mitigated.

6.6. Media Self-Regulation

Often described as the fourth estate, the press and media play a vital role in ensuring that the right to freedom of expression is adequately protected. While the emergence of the internet has created a more diverse way of ensuring the diffusion of ideas, the press and mainstream media outlets still provide some of the strongest means of ensuring the dissemination of information and ideas.[1713] The press and media also serve as a check on abuse of government power by exposing maladministration and corruption to the wider public and increase greater government accountability. Because of this, the uncensored and uninhibited operation of the media forms the cornerstone of a democratic society and ensures that the right to freedom of

---

[1710] *Ibid*.

[1711] See *Mengistu Haile Mariam FSC*.

[1712] *Ibid,* 21.

[1713] See J Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press, 2915) 31.

expression is protected adequately.[1714] In the context of the jurisprudence of the German Constitutional Court, the special place of the media, guaranteed in Article 5 of the Basic Law has also been emphasized in a serious of decisions. Emphasizing on the social function of the media, the Court noted that the freedom of the media plays a role of a 'serving freedom' which is essential not only for the rights of the speaker but also ensures that the larger public has the opportunity to listen to diverse views.[1715]

It is logical to infer from this that to the extent they undertake this function as a public watchdog institution they should be subject to special legal regime and protection.[1716] This demand for special protection provides certain kinds of privileges and protections for media personnel including that barriers for access be removed and access to sources of information, ensuring professional secrecy such as protection of journalistic sources, immunity for informational activity carried out with due diligence and facilitation of distribution.[1717] It should also be recalled that the development of a fault-based system of liability for the press and the media which differs from the rest of the commercial sector which is regulated under strict liability clearly shows a preferential treatment for the media industry.[1718] More importantly, there should also be a self-regulatory framework which can provide the opportunity for independent media to set the ethical and legal standards for responsible media reporting.

Self-regulation of the press and mass media provides an important regulatory framework to ensure the robust protection of political speech and public discourse. To take UNESCO's definition, self-regulation can be loosely defined as a 'combination of standards setting out the

---

[1714] *Rafael Marques de Morais v Angola* (n 516) (29 March 2005).

[1715] See BVrefGE, 57, 295 (1981), in Baden-Baden Nomos, Decisions of the bundesverfassungsgericht Vol 2 (1998) 31, 199, 313, 386, 474, 587, cited in Grimm, Freedom of Speech in a Globalized World, in in Hare and Weinstein (n 279) 16.

[1716] Zeno-Zencovich (n 256) 16; See also *Animal Defenders International v the United Kingdom,* Application No. 48876/08, Para 100, (ECTHR, GC2013).

[1717] See in this regard HRC Concluding observations on Kuwait (CCPR/CO/69/KWT).

[1718] Zeno-Zencovich (n 256) 6.

appropriate codes of behavior for the media that are necessary to support freedom of expression, and process how those behaviours will be monitored or held to account'.[1719] There are plenty of factors that reinforce the need to strengthen self-regulation of the press and media as an important element of protecting freedom of expression. Often because the press and mainstream media outlets are the major means of the dissemination of ideas, they are also the major targets of government censorship and prosecutions. Journalists are constantly prosecuted and harassed by governments.[1720] For journalists, bloggers, and other individuals working in mainstream media, the dissemination of information and commentary on public affairs is a regular function. Because of this, they become the most common targets for persecution by governments and powerful non-State actors.[1721] Andrew Puddephatt notes that self-regulation enhances the independence and autonomy of the media and thereby strengthening the democratic process by guarding against undue government interference.[1722] It also can enhance greater compliance to the ethical and norms of behavior expected from journalists by exerting peer pressure. But more fundamentally, it mitigates the chilling effect of aggressive enforcement of hate speech and criminal incitement laws. [1723]

As Miklós Haraszti observes, the importance of self-regulation is particularly relevant in the context of emerging and transitional democracies. He argues that self-regulation provides the opportunity to be critiqued and corrected by peers and colleagues working in the same

---

[1719] A Puddephatt, *The Importance of Self Regulation of Media in Upholding Freedom of Expression* (UNESCO, 2911) 11.

[1720] concluding observations on Algeria (CCPR/C/DZA/CO/3); concluding observations on Costa Rica (CCPR/C/CRI/CO/5); concluding observations on Sudan (CCPR/C/SDN/CO/3).

[1721] For extensive discussion on this issues see UNESCO, "Press Freedom, Safety of Journalists and Impunity" (2008). See also Human Rights Council Resolution on the Safety of Journalists A/HRC/21/L.6, 21 September 2012.

[1722] Puddephatt (n 1719) 16-17.

[1723] *Ibid*.

profession rather than facing prosecution by the heavy hand of the State.[1724] He also argues that self-regulation helps to enhance the media's credibility with the public by convincing the public on responsible and ethical media reporting. In emerging and transitional democracies which are new to independent press such as Ethiopia, it provides the occasion to facilitate the transition from 'government-owned, State-controlled press to one owned and controlled by civil society'.[1725]

Given the draconic effect of the criminalization of speech, more efforts should also be made on responsible and ethical reporting in the media and the professional association settings of the mass communication media. Most free speech scholars would argue that various form of standards and norms developed by professional media associations regarding the ethical demands of the profession are outlier cases which do not drastically affect core protected political speech.[1726] By adopting such rules, journalists and professionals working in the press and the mass communication media can regulate the different modes of conduct and behavior expected from their professional peers, while at the same time containing the possible heavy hand of the State in terms of the criminalization of speech. The importance of self-regulation in the particular context of Ethiopia should be seriously considered as most of the prosecutions have included journalists working in different media outlets.

In order to ensure the realization of a self-regulatory framework for independent media and press, one of the most common independent bodies that often scholars refer to is a Press

---

[1724] Miklós Haraszti, The merits of Media Self-Regulation *Balancing Rights and Responsibilities in Adeline Hulin and Jon Smith, Media Self regulation* (Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, 2008) 12.

[1725] *Ibid*.

[1726] See R Post, Between Governance and Management : The History and Theory of the Public Forum (1987) *34 University of California Los Angeles Law Review* 1714

Council.[1727] The Press Council is constituted of journalists, editors, members of the public and individuals from independent civil society organizations. In order to ensure its operational independence scholars argue that individuals from government and State authorities should be excluded from membership. The Press Council can establish its working rules and procedures in carrying out its responsibilities.[1728] While most established democracies such as Germany, Netherlands, and many Scandinavian countries had already Press Councils, there has been a proliferation of press council also in transitional democracies in Europe such as in Bosnia and Herzegovina, Bulgaria, Georgia and Armenia. This has facilitated the independence and autonomy of the press and media and thereby guarded against State intrusion in carrying out their functions.[1729]

6.7. More Speech to Counter Terrorist and Genocidal Speech

The overt emphasis on the criminalization of speech in the context of contemporary forms of political violence including terrorism and genocide overlooks the significance of freedom of expression and open democratic discourse and its ability to pacify these forms of political violence. The opportunity for providing more access to speech and media can be a powerful means of countering hate speech and containing violence and discrimination to which these laws are aimed at. Many scholars have pointed out that in order to contain discrimination and violence, to which the basic rationale for proscribing speech is based, there should be equal focus that underscores the importance of entrenching important constitutional values such as freedom of expression, empowering and protecting minority groups, and addressing deeper socio-political factors that drive these forms of political violence.[1730]

[1727] See AJ Campbell, Self-Regulation and the Media (1999) *5 Federal Communications Law Journal* 746-749.

[1728] *Ibid*.

[1729] See, UNESCO, Professional Journalism and Self-Regulation and Self-Regulation New Media: Old Dilemmas in South East Europe and Turkey (2011) 19-23.

[1730] Emerson, *The System of Freedom of Expression* (n 187) 7, 53.

As Meiklejohn warns, the breakdown of democratic self-government usually happens not because of inciting speech but rather the suppression of speech itself.[1731] Similarly, Thomas Emerson argues that a system of free expression provides a normative framework where any societal conflict and disagreement can be resolved through discussion and reason.[1732] To the contrary emphasizing only on the suppression of free expression conceals deeper societal problems that fuel tension and violence, including genocide and terrorism. A key component of this endeavor should be providing appropriate avenues for the free expression of individuals and groups whose interests are not appropriately represented in the political system.

This is particularly relevant in the case of Ethiopia. In the context of incitement to terrorism, as the thesis demonstrated in chapter four, the adoption of SC Res 1624, which triggered the proliferation of legislations proscribing incitement to terrorism, came as a response to the ills of the West in trying to contain radical Islamic terrorism, subsequent to the London bombings.[1733] It was a particular problem associated with the challenges of multi-culturalism and the challenges of containing radical Islam in these societies. All these factors hardly exist in contemporary Ethiopia. Religious inspired political violence is alien to the social fabric of the Ethiopian society.[1734] Although few radical elements may exist, terrorism as a political violence, in particular, those inspired by radical Islam, is alien to the Ethiopian social fabric.[1735] The prosecutorial trend clearly shows that many of the individuals charged with incitement to terrorism are from the political opposition and journalists.[1736] This raises serious questions on the legitimacy of the law in addressing genuine security and public order challenges encountered by the State. As Larry Alexander notes even if one was to believe that there are

---

[1731] Meiklejohn, Self-Government (n 14) 68.

[1732] T Emerson, *The System of Freedom of Expression* (n 187) 7, 53.

[1733] See Cram (n 499).

[1734] See Abbink (n 747).

[1735] *Ibid.*

[1736] See, Amnesty International, Dismantling Dissent (n 651).

few radical and violent ideologies of religious or political nature, it is more 'principled to fight violent speech with counter-speech, and incorrect and subversive teachings with correct and legitimate ones'.[1737]

In the context of genocide, if one looks at the reasons for the genocide of Jews during Nazi Germany, most of the discussion is preoccupied on the role of the Nazi propaganda machine in the genocide.[1738] Similarly, in case of Rwanda most of the literature focuses on how the media played a vital role in the commission of the Rwandan genocide.[1739] Nevertheless, discussions on the state of free speech and free media in these regimes have been discussed marginally.[1740] Although it is true that hate speech and hate propaganda did contribute to the commission of the crimes, they fail to equally articulate how various forms of speech repression such as book burnings and political persecutions led to the silence of many during Nazi Germany.[1741] Similarly, Dojčinović notes that the genocide in the former Yugoslavia under Slobodan Milosevic was achieved by controlling the media outlets and shattering any possibilities to counter the hate speech.[1742]

This marginal consideration on the effect of the suppression of open and free discussion on the genocide of Jews is similarly reflected in the jurisprudence of the IMT.[1743] In one of the leading volumes on hate speech and international criminal law, Predrag Dojčinović notes that much of the anti-Semitic propaganda and hate speech was fomented by the control of the media and false information disseminated by the Nazi propaganda machine.[1744] Dojčinović observes that

---

[1737] L Alexander, Incitement and Freedom of Speech, in Kretzmer and Hazan (n 322) 118.

[1738] See Salter et al (n 1227).

[1739] See Baker, Genocide (n 68).

[1740] *Ibid;* Simon (n 1395).

[1741] *Ibid*.

[1742] See Dojčinović (n 1324).

[1743] See Salter et al (n 1227).

[1744] Dojčinović (n 1324) 2.

> '[t]he fact that from 1933 onwards, Hitler and his party had nearly complete control over the media in Germany, meaning, for instance, that "more than 2,000 newspapers by 1939" were in Nazi hands, and that the control of any of these anti-Semitic publications, or all of them together, might have "caused" or contributed to the persecution and extermination, was never mentioned in the Streicher judgment'.[1745]

Similarly, in case of Rwanda, scholars do not substantiate how political repression and the lack of adequate protection of political speech contributed to the genocidal acts.[1746] In case of Rwanda, prominent scholars on genocide point out that since the country's independence in 1960 to the time leading to the genocide, Rwanda media was controlled by the government with little possibility for the independent press and the protection of political speech in the country.[1747] This is also acknowledged in the jurisprudence of the ICTR on incitement to genocide but only marginally.[1748]

Clearly, what is significantly lacking in the jurisprudence of international criminal tribunals is consideration of the fact that the monopoly of speech and public debate by specific dominant ethnic groups. A major factor in the creation of a genocidal environment in many of these societies was censorship rather than genocidal speech *per se*. In Nazi Germany, this was manifested by controlling the media and promoting the master race theory and the hatred for the Jews as well as book burnings and political persecution for those that contested these ideas.[1749] In Rwanda, the regime that was in power tried to galvanize its power by spreading hatred against another ethnic group often using false information and unfounded

---

[1745] *Ibid, 5.*

[1746] Baker, Genocide (n 68).

[1747] See The most comprehensive report on the Rwandan Genocide, African Union, *Rwanda: The Preventable Genocide* (July 2000): [<http://www.refworld.org/docid/4d1da8752.html>] (accessed 5 June) July 2017); BW Ndiaye, Report by Mr B.W NdiayVe Special Rapporteur, on his mission to Rwanda from 8 to 17April 1993, UN ESCOR, 50th Sess., Provisional Agenda Item 12, UN Doc. ECN.411994/Add.1 (1993) at para. 56; See also Schabas, Hate Speech in Rwanda (n 1132) 145

[1748] Baker, Genocide (n 68).

[1749] Dojčinović (n 1324) 1-2.

allegations.[1750] In all these circumstances, speech alone did not create the genocidal environment but rather the control and suppression of speech. In this regard, Benesch notes that pre-genocidal governments including those of Germany and Rwanda in order to influence and control public opinion had to destroy the opposition press and silence political opponents.[1751]

The aforementioned facts clearly question the overt emphasis on the criminalization of speech as the sole solution to prevent genocidal and terrorist violence. When there are plenty of social and political factors including political repression, discrimination, lack of adequate protection of political speech, economic inequality, the monopoly of political power by political elites and the erosion of democratic values which have significant contribution in increasing hostility among different social groups in society, why should speech alone be treated as the major cause of these kinds of violent acts. The Current political reality in many transitional democracies also demonstrates the dangers of suppression of speech rather than the lack of proscription of inciting speech as a major serious concern for the political order and stability of these States.[1752] In the case of Ethiopia, one also observes similar political realities in that the control of media platforms by the government and broad and vague proscriptions on free speech have suffocated the political discourse in the country. This has increased the potential to foment tension and trigger violent responses from a wide variety of political actors in the political scene, as evidenced by recent events.[1753] Moreover, empirical studies conducted recently show that inciting speech and hate speech in, particular, is marginal in the political discourse of the country.[1754]

[1750] African Union, *Rwanda: The Preventable Genocide* (n 1747).

[1751] Benesch, Vile crime (n 1163) 496.

[1752] See Baker, Genocide (n 68).

[1753] See Amnesty International, Dismantling Dissent (n 651).

[1754] Gagliardone, Mapping Hate Speech (n 601).

The above factors require faith in the importance of open democratic discourse and its ability to contain violent forms of political protests in society. Although the proscription of inciting speech is justified by its particular dangerousness to the security and public order of the State, this should be balanced against the distinctive role of free speech to democratic public discourse. The historical evidence of mass atrocities and violence in many societies shows that in most cases, the lack of open and democratic discourse, rule of law, equal opportunity in the political process, and violation of basic freedoms are the principal factors that simmer and trigger violent responses in these societies.

Conclusion

The foregoing discussions which provide for a wide variety of alternative regulatory responses to inciting speech can offer important doctrinal and regulatory import to transitional democracies such as Ethiopia. The discussions also emphasize the importance of confining the prohibition of incitement to terrorism and incitement to genocide and broader limits on core political speech, to narrowly tailored set of limitations. The risk of the chilling effect of incitement law on political speech which is vital to democratic public discourse requires States to explore a wide variety of public policy and regulatory responses. The danger of overemphasizing on the criminalization of speech also overlooks deeper societal problems including political repression, lack of democratic governance and appropriate avenues for expressing grievances that fuel violence. This is particularly concerning given the fact that incitement as a pure inchoate crime, merely rests on the speech act alone. Because of the inherent danger of silencing a much needed political discourse, exploring other regulatory and public policy responses to violent conducive speech should be explored. In this regard, the importance of focusing on the regulation of private inciting speech than public speech should inform the regulatory focus and pattern of prosecutorial trends. The doctrine of true threats, fighting words and other forms of private speech regulation, provide useful lessons in this regard. Moreover, exploring self-regulatory frameworks for the media as well as consolidating a system of free expression and constitutionalism in the context of Ethiopia would help to pacify

tension in society and contain violent responses. It also helps to consolidate its democratic trajectory and constitutionalism and build public confidence in resolving societal conflicts through the democratic process.

CONCLUSION AND RECOMMENDATION

Freedom of expression and political speech as a life-blood of democracy forms the bedrock of any democratic political order worthy of its name. In particular, in emerging and transitional democracies such as Ethiopia, the protection of freedom of political speech ensures faith in the political process and an opportunity to consolidate the democratic trajectory of these States by providing a democratic platform to resolve complex socio-political problems in their societies. A system of free expression that underscores the distinctive place of political speech in a democracy provides a significant normative basis in articulating the permissible limits of political speech and containing violent terrorist and genocidal speech that threaten the democratic political order of these polities.

Yet, as vital as political speech is to the democratic political order of democratic States, often delimiting the boundaries of permissible political speech and inciting speech is an extremely complex legal task. The advent of new collective security challenges encountered by States in the wake of 9/11 and the resulting proscription of incitement to terrorism has added another quagmire in determining the legal contours of permissible political speech and inciting speech. While this migration of anti-constitutional ideas is more manifest in the area of incitement to terrorism law, one also finds a similar trend in the context of hate speech and incitement to genocide laws. In both cases, the migration of these anti-constitutional ideas has reinforced and justified the increase in speech regulation in many States. In the context of Ethiopia, this had a direct and significant effect on the state of political speech in the country. The increasing prosecution of individuals for incitement to terrorism and incitement to genocide had a chilling effect on political speech which suffocated the democratic space and the ability of individuals to participate in the democratic process.

Free speech is a political principle as much as it is a normative value. There are no easy and quick solutions to the complex legal problems related in articulating the normative boundaries of permissible political speech and violence conducive speech in a particular society. The

position and attitude of each society to freedom of expression is informed by its political history, its cultural contingencies and constitutional identity. Nevertheless, international and comparative law in free speech serves as a significant methodological tool in resolving legal problems associated with the regulation of speech in a particular society. This has become all the more evident because of the increasing convergence of norms as a result of the migration of constitutional and anti constitutional ideas across legal systems and the demand to counter similar security and public order challenges of States. The increasing convergence of international norms has not only created the occasion for comparative learning but also significantly narrowed the traditional distinction between established western democracies and emerging and transitional democracies.[1755]

A realistic account of comparative constitutional law engagement requires the possibility of developing a normative constitutional theory of free speech and principles of law that are suited to emerging and transitional polities such as Ethiopia. It should also be recalled that even in established Western democracies in which claims of a much more suitable socio-political and cultural context is said to exist, the historical evidence shows that State power has been used to silence political dissidents and those that do not fit with the dominant political narratives of the State. In the US, in which many scholars consider as a model with regard to the protection of political speech, the espionage act and sedition act were used to prosecute political dissidents. The history of free speech in the US shows that there were more than 2,100 individuals who were prosecuted under the sedition and espionage acts. In 1918 alone, more than 250 individuals were convicted under the Espionage Act in less than a year.[1756] After the Second World War, the red scare and fear of the spread of communist ideology after the Second World War had created speech limitations which now would be considered unacceptable in any democratic society. Although the degree of the restriction may differ among countries,

---

[1755] See Gelber (n 66).

[1756] CE Wells, Discussing the First Amendment (2003) *101 Michigan Law Review* 1582; See also RJ Goldstein, *Political Repression in Modern America from 1870 to 1976* (University of Illinois Press, 20001)113.

increasing speech-limiting laws also continue to be observed in the aftermath of the threat of international terrorism.

These factors demonstrate, contrary to the detractors of comparative law study in free speech, the continued relevance of comparative study in free speech. The increasing convergence of norms both from international and comparative law, in particular as a reaction to the collective security challenges of States. In this broader context, international and comparative law can also serve as an important source of wisdom in regulating violent conducive speech in the context of contemporary forms of political violence such as incitement to terrorism and genocide in the context of Ethiopia. In this regard the utility and significance of comparative law on freedom of expression can provide important doctrinal and normative principles that help to determine the boundaries of political speech and incitement law in the constitutional and legal framework of Ethiopia. The increasing convergence of constitutional norms required by both the migration of constitutional ideas across different States and the framework of international can provide significant norms insights in delimiting the boundaries of political speech and the demand of maintaining order and security. international and comparative law has tremendous utility in the study of the crimes of incitement to terrorism and incitement to genocide while at the same time maintaining the vitality of permissible political speech in the context of the constitutional framework of Ethiopia. In this regard, the following important insights can be drawn from comparative learning in free speech regulation in the context of incitement law:

- Free speech doctrine and the rationale for protecting freedom of expression has important significance not only in underscoring the underlying justifications on why we protect freedom of expression, but more importantly in resolving legal problems associated with the regulation of incitement law and the boundaries of political speech. This theoretical rationale which emphasizes on the free speech-democracy nexus is not only distinctively American but also supported by the emerging case law in international and comparative law. The jurisprudence of the human rights committee and the various regional human rights bodies have repeatedly reiterated that the fundamental theoretical rationale for the

protection of freedom of expression lies because of its distinctive role in the promotion of democratic public discourse. A democracy-based theory of free speech which emphasizes on the distinctive place of political speech and its deliberative significance in democratic public discourse is both conceptually sound and normatively attractive to the constitutional framework of emerging and transitional democracies like Ethiopia. This collectivist view which conceives free speech as a public good and on its broader societal significance than an individual right has great structural resonance to the non-liberal normative constitutional theory of States such as Ethiopia whose fundamental constitutional principle is premised on the protection of collective rights. This understanding is not only faithful to the original Meiklejohnian conception of free speech as intricately linked with democratic self-government and its deliberative significance, but also to the normative constitutional architecture of emerging and transitional democracies that aspire to consolidate their democratic trajectory from their authoritarian past.

- Consistent with the theoretical rationale of protecting core political speech and deliberative democratic public discourse, conceiving speech as a public good than a private form of speech has also tremendous normative utility in making distinction between incitement in the context of terrorism and genocide on one hand, and guarding core political speech on the other. Much of the inconsistency in articulating the normative boundaries of permissible political speech and incitement also comes from the lack this important distinction. The regulation of political speech in the context of incitement to terrorism and genocide both at the international and domestic levels fails to articulate this distinction.

- The significance of freedom of political speech as a public good also requires that the focus of the regulatory framework to counter genocidal and terrorist speech should focus on private forms of speech rather than public incitements. Public incitements to commit a crime including in the context of terrorism and genocide, because of their 'ideological appeal' have deliberative significance in any democratic State. Because of this there is more reason to punish private encouragements or solicitations and other related form of

inchoate crimes rather than public incitements. A democracy-based theory of free speech requires that judicial scrutiny and the overall regulatory framework on incitement should be informed by this significant doctrinal rationale.

- There is no doubt that the current state of democracy and political speech in Ethiopia falls short of Ethiopia's obligation under intentional human rights and the expectations of a democratic State that is committed to constitutional democracy and the guarantee of basic freedoms. Although Ethiopia clearly has some modest normative commitment to free speech in the broader context of its federal democratic constitutional order, the vigorous application and implementation of the crime of incitements terrorism and incitement to genocide and hate speech laws have drastically affected the robust protection of political speech in the democratic process. This is particularly compounded by the vague and broad nature of the laws proscribing these forms of political violence. The general state of uncertainty of the laws has created a chilling effect on political speech in the country.

- These factors clearly require narrowly tailored limits on incitement law understood as directly and causally reasonable for the commission of immediate political violence which makes lawful intervention by law enforcement agencies impossible. In assessing the contours of legitimate political speech and incitement to terrorism and genocide, such factors as the content of the speech, the context and the tone in which the speech was made, the intent of the speaker, and whether the speech at hand will lead to some concrete terrorist or genocidal violence within a reasonable short time after the speech was made are important factors that would have to be looked into in determining the limits of political speech. In this regard, international and comparative law offers important lessons for emerging and transitional democracies such as Ethiopia in resolving the dilemmas of maintaining order and security on one hand, and ensuring the vitality of political speech to the democratic process, on the other.

- In terms of its broader constitutional architecture, Ethiopia should also reconcile its soft authoritarian constitutional structures manifested in the ideological foundations of the ruling party, the EPRDF with its laudable normative constitutional framework. As it stands the formal constitutional structures including the constitutional text, and the jurisprudence of Ethiopian Courts has been overshadowed by party politics and the informal structures of its constitutional practice. A democratic constitutional framework and system of free expression that underscores the unique place of political speech in a democratic society requires the importance of reconciling this asymmetry between its soft authoritarian inclinations with its robust constitutional framework.

- The historical evidence of mass atrocities and contemporary forms of political violence including terrorism shows that in most cases, the historical antecedents simmering tension and conflict in society are driven by deeper socio-political problems. More importantly, the lack of a system of free expression and protection of basic democratic values takes the lion's share as one of the most significant factors for these tragic political outcomes. From early totalitarian regimes like Nazi Germany to the more recent genocidal violence in Yugoslavia and Rwanda, often the factors for ethnic strife and genocidal violence are the result of political repression and the lack of a system of free expression and the guarantee of basic democratic freedoms.

- These conclusions clearly require the significance of ensuring freedom of expression and political speech in any democratic society. In particular, in the socio-political context of emerging and transitional democracies, a system of free expression ensures the peaceful resolution of conflicts in society and containing violent responses to socio-economic problems in these countries. It should also be recalled that without a background of the protection of freedom of expression and basic values of constitutional democracy, elections not only provide little to the democratic trajectory of the states but can also be counterproductive to that effort. This reiterates the continued endeavor of protecting basic constitutional values including the freedom of political speech in emerging and transitional

democracies like Ethiopia, which helps to ensure faith in the political process and consolidating the democratic trajectory and socio-economic development of these states.

Bibliography

I. Books

Abraham K, *Ethiopia from Bullets to the Ballet Box: the Bumpy Road to Democracy and the Political Economy of Transition* (The Red Sea Press, 1994)

Alexander L , *Is There a Right of Freedom of Expression?* (Cambridge University Press 2005)

Alston P and Goodman R, *International Human Rights* (Oxford University Press, 2012)

Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2004)

Ashworth A and Holder J, *Principles of Criminal Law* (Oxford University Press, 2013)

Asrat G, *Sovereignty and Democracy in Ethiopia* (2015) (ገብሩ አስራት: ሉኣላዊ ነትና ዲሞክራሲ በኢትዮጵያ (2007 ዓ/ም)

Austin J, *How to Do Things with Words* (Harvard University Press,1962)

Baker CE, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989)

Barendt E, *Freedom of Speech* (Oxford University Press, 2005)

Bassiouni MC (ed), *Legal Responses to International Terrorism* (Martinus Nijhoff, 1988)

Baxi U, *The Future of Human Rights* (Oxford University Press, 2012)

Beatson J and Cripps Y, *Freedom of Expression and Freedom of Information : Essays in Honour of Sir David Williams* (Oxford University Press, 2000)

Beer L, *Freedom of Expression in Japan: A Study of Law, Politics and Society* (Kodansha Int'l, Ltd. 1984)

Belavusau U, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Routledge, 2013)

Berlin I, *Two Concepts of Liberty*, Originally published in Four Essays of Liberty (Clarendon Press, 1969)

Bollinger L, *The Tolerant Society* (Oxford University Press, 1986)

Bunker MD, *Critiquing Free Speech First Amendment Theory and the Challenge of Interdisciplinarity* (Lawrence Erlbaum Associates Publishers, 2001)

Bury JB, *A History of Freedom of Thought* (Cambridge University Press, 2004)

Cassese A, et al (eds), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press, 2002)

Chafee Z, *Free Speech in the United States* (Harvard University Press, 1942)

Childe VG, *Man Makes Himself* (New American Library, 1951)

Choudhry S, (ed) *The Migration of Constitutional Ideas* (Cambridge University Press, 2006)

Cohen J, *Freedom of Expression* (1993) 22 *Philosophy and Public Affairs* 221

Cram I, *Terror and the War on Dissent: Freedom of Expression in the Age of Al-Qaeeda* (Springer, 2009)

Currie I and de Wal J, *The Bill of Rights Handbook* (2005) 361.

Curley E, *The Collected Works of Spinoza* (Princeton University Press, 1985)

de Zayas A and Martín ÁR, Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the Un Human Rights Committee (2012) *59 Netherlands International Law Review* 434

Dickerson DL and Tragger R, *Freedom of Expression in the 21st Century* (Pine Forge Press, 1999)

Diamond L and Plattner MF, (eds) *Nationalism, Ethnic Conflict and Democracy* (Johns Hopkins University Press, 1994)

Dijk V and Hoof V, *Report of the Committee of Ministers, in Theory and Practice of the European Convention on Human Rights* (Kluwer, 1990)

Dojčinović P, (ed.), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge, 2012)

Duff RA, *Spinoza's Political and Ethical Philosophy* (James MacLehose and Sons, 1903)

Dworkin R, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1999)

____ ____, *A Matter of Principle* (Oxford University Press, 1986)

____ ____, *Taking Rights Seriously* (Harvard University Press, 1978)

Easterly W, *Tyranny of Experts: Economists, Dictators and the Forgotten Rights of the Poor* (Basic Books, 2014)

Egan S, *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional, 2011)

Emerson T, *The System of Freedom of Expression* (Random House, Incorporated 1970)

Fardon R and Furniss G, (eds) *African Broadcast Cultures :Radio in Transition* (James Curry Publishers, 2000)

Fish S, *There's No Such Thing as Free Speech: and It's a Good Thing Too* (Oxford University Press, 1994)

Freeman M, *Human Rights an Interdisciplinary Approach* (2011)

Fuller LL, *The Morality of Law*, (Yale University Press, 1969)

Golash D, (ed) *Freedom of Expression in a Diverse World* (Springer, 2010)

Gelber K, *Free Speech After 9/11* (Oxford University Press, 2016)

Gigler BS, *Development as Freedom in Digital Age: Experience of the Rural Poor in Bolivia* (World Bank, 2015)

Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003)

Ginsburg T and A Simpser, (eds) *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2014)

Graven P, *An Introduction into Ethiopian Penal Law* (Haile Selassie I University, 1965)

Greenawalt K, *Speech, Crime and the Uses of Language* (Oxford University Press, 1989)

Grossfeld B, *Core Questions of Comparative Law* (Carolina Academic Press, 2005)

Haiman F, *Speech and Law in a Free Society* (University of Chicago Press,1981)

Hulin A and Smith J, (eds) Media Self regulation (Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, 2008)

Hare I and Weinstein J, (eds) *Extreme Speech and Democracy*, (Oxford University Press, 2009)

Hart HLA and Honoré T, *'Criminal Law: Causing, Etc., Others to Act', Causation in the Law* (Oxford University Press, 1985)

Hart HLA, *The concept of Law* (Oxford University Press, 1961)

Heinze E, *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016)

Herman E and Chomsky N, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon, 1988)

Herz M and Molnar P, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012)

Higgins R and Flory M, (eds), *Terrorism and International Law* (Routledge, 1997)

Hirschel R, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014)

Holden B, *Understanding Liberal Democracy* (Harvester Wheatsheaf, 1993)

Huntington S, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schister, 1996)

Jackson VC and Tushnet MV, *Comparative Constitutional Law* (Foundation Press, 2014)

James B (ed), *Media and Good Governance* (UNESCO, 2005)

Jansen SC, *Censorship: The Knot That Binds Power and Knowledge* (Oxford University Pres 1991)

Jellinek G, *The Theory of the Unifications of States* (1882)

____ ____, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* (1895)

Jones A, et al., Blackstone's Guide to Terrorism Act 2006 (2006)

Legesse A, *Oromo Democracy: An Indigenous African Political System* (Red Sea Press, 2000)

Legrand P, *Fragments on Law-as-Culture* (Kluwer, 1999)

Legrand P and Munday R, (eds) *Comparative Legal Studies: Traditions and Transition* (Cambridge University Press, 2003)

Levi-Strauss C, *The savage mind* (University of Chicago Press, 1966)

Locke J, *A Letter Concerning Toleration* (1685).

Kebede E, '*Sanction*' (2015) (እንዳለጌታ ከበደ: *ማዕቀብ* (2007 ዓ/ም)

Kretzmer D andHazan FK (Eds) *Freedom of Speech and Incitement against Democracy* (Martinus Nijhoff Publishers, 2000)

Mackinnon CA, *Only words* (Harvard University Press 1993)

Macovei M, *Freedom of Expression: A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (Council of Europe, 2004).

Matsuda MJ, et al. (eds.) *Words that Wound: Critical race Theory, Assaultive Speech and the First Amendment* (Westview, 1993)

Meiklejohn A , *Free Speech and Its Relation to Self-Government* (Harper Brothers Publsihers, 1948) (Reprinted by the Lawbook Exchange, Ltd 2002)

____ ____, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965)

Mill JS, On Liberty (1859) (Crofts Classics, 1947)

Milton J , *Areopagitica,* (Speech to the English Parliament in 1644), in PF Allen (ed) (Columbia University Press, 1931-1938)

Nahom F, *Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press, 1997)

Nowak M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2005)

Oboler EM, *The Fear of the Word: Censorship and Sex* (Scarecrow Press, 1974)

Ojienda T, *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives in Sub-Saharan Africa* (Pretoria University Law Press, 2013)

Orford A, (ed*) International Law and its Others* (Cambridge University Press, 2006)

Orwell G, *1984 Nineteen Eighty-Four* (Penguin Classics, 1986)

Paterson O, *Freedom* (New York Basic Books, 1991)

Paul JCN and Clapham CS, *Ethiopian Constitutional Development: a Sourcebook* (Oxford University Press, 1967)

Petman J and Klabbers J, *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff, 2003)

Post R, *Constitutional Domains* (Harvard University Press, 1995)

Radsch C, (ed) *World Trends in Freedom of Expression and Media Development* (UNESCO, 2014)

Rawls J, *Political Liberalism* (Columbia University Press, 1993)

Reimann M and Zimmermann R, (Ed), *Oxford Handbook on Comparative Law* (Oxford University Press, 2012)

Redish M, *Money Talks: Speech, Economic Power and the Values of Democracy* (New York University Press, 2001)

____ ____, *Freedom of Expression: A Critical Analysis* (Michie Co. 1984)

Reta MC, *The Quest for Press Freedom in Ethiopia: One Hundred Years of History of the Media in Ethiopia* (University Press America, 2013)

Richards D.AJ, *Free Speech and the Politics of Identity* (Oxford Univesity Press, 1999)

____ ____, *Toleration and the Constitution* (Oxford University Press, 1989)

Rosenfeld M and Sajo A, *Oxfrod Handbook on Comparative Constitutional Law* (Oxford University Press, 2012)

Rotberg RI, (Ed), *Battling Terrorism in the Horn of Africa* (Brookings Institution Press, 2005)

Schauer F, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982)

Searle JR, *Speech Acts: an Essay in the Philosophy of Language* (Cambridge University Press, 1969 1969)

Sen A, *Development as Freedom* (Oxford University Press, 1999)

____ ____*Poverty and Famines: An essay on Entitlement and Deprivation* (Oxford University Press, 1994)

Soeteman A (ed), *Pluralism and Law* (Springer, 2001)

Shaw MN, *International Law* (Cambridge University Press, 2008)

Smolla R, *Free Speech in an Open Society* (Alfred A. Knopf Inc., 1992)

Spinoza B, *Tractatus Theologico-Politicus* (1670) in AG Wernham Translation (Oxford University Press, Oxford 1958)

Straus S, *The Order of Genocide: Race, Power, and War in Rwanda* (Cornell University Press, 2006)

Thompson A(ed) *The Media and The Rwanda Genocide* (Pluto Press, 2007)

Tully J, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995)

Waluchow W (ed), *Free expression: Essays in Law and Philosophy* (Clarendon Press 1994)

Walker C, *Blackstone's Guide to the Anti-Terrorism Legislation* (OUP, Oxford, 2002)

Wilson RA, (ed) *Human Rights in the War on Terror* (Cambridge University Press, 2005)

Yew LK, From First World to Third World: the Singapore Story 1965-2000 (Singapore Press Holdings, 2000)

World Bank, *The Right to Tell: The Role of Mass Media in Economic Development* (2002)

Zeno-Zencovich V, *Freedom of Expression: A Critical and Comparative Analysis* (Routledge, 2008)

Zewde B, *A History of Modern Ethiopia, 1855–1991* (Ohio University Press, 2002)

Zewde B, *The Quest for Socialist Utopia: The Ethiopian Student Movement, C. 1960-1974* (Addis Ababa University Presss, 2014)

Zick T, *The Cosmopolitan First Amendment, Protecting Transborder and Expressive and Religious Liberties* (Cambridge University Press, 2014)

Lynch A, MacDonald E, and GWilliams (eds), Law and Liberty in the War on Terror (Federation Press, 2007)

II. Articles

Abbink J, An-Historical and Anthropological Approach to Islam in Ethiopia: Issues of Identity and Politics(1998) *11 Journal of African Cultural Studies* 110

Abbink J, Religion in Public Spaces: Emerging Muslim-Christian Polemics in Ethiopia (2011) *110 African Affairs* 253

Addo MK, Practice of United Nations human rights treaty bodies in the reconciliation of cultural diversity with universal respect for human rights (2010) *32 Human Rights Quarterly* 601

Ackerman B, 'The Rise of World Constitutionalism' (1997) *1 Virginia Law Review* 771

Albertus M and Menaldo V, Dictators as Founding Fathers? The Role of Constitutions under Autocracy (2012) *24 Economics and Politics* 279

Alexander L, Free Speech and Speaker's Intent (1995) *12 Contituional Commentary* 1019

Aneme GA, The Anatomy of Special Prosecutor v Colonel Mengistu Haile Mariam et al.(1994-2008) (2009) *6 International Journal of Ethiopian Studies* 1

Bach JN, Abyotawi Democracy: Neither Revolutionary nor Democratic, a Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia (2011) *5 Journal of Eastern African Studies* 642

Bhagwat A, Free Speech without Democracy (2015) *49 University of California Davis Law Review* 59

Baker CE, Is Democracy a Sound Basis for a Free Speech Principle (2011) *97 Virginia Law Review* 515

____ ____, Autonomy and Free Speech (2010) *27 Constitutional Commentary* 251

____ ____, Genocide, Press Freedom and the Case of Hassan Ngeze (2004) *University of Pennsylvania Law School, Public Law Working Paper No. 46*. Available at SSRN: [<https://ssrn.com/abstract=480762>] or [<http://dx.doi.org/10.2139/ssrn.480762 >] (accessed 3 March 2015)

____ ____, Of Course, More Than Words (1994) 61 *The University of Chicago Law Review* 1181

____ ____, Scope of the First Amendment Freedom of Speeech (1977) *25 UCLA Law Review* 964

Barendt E, Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court (2009) *1 Journal of Media Law* 49

Barnum DG, Indirect Incitement and Freedom of Speech in Anglo-American Law (2006) 3 *European Human Rights Law Review* 1

Berti E, Ancient Greek Dialectic as Expression of Freedom of Thought and Speech (1978) 39 *Journal of the History of Ideas* 347

Bhagwat A, Free Speech without Democracy (2015) *49 University of California* Davis 103.

Blasi V, The Checking Value in First Amendment Theory (1977) *2 AMerican Bar Foundation Journal* 521

Bleich E, Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe (2014) *40 Journal of Ethics and Migration Studies* 283

Brennan WJ, The First Amendment and the Meiklejohn Interpretation of the First Amendment (1965) *79 Harvard Law Review* 1

Bronitt S and Stellios J, Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' (2006) *30 Melbourne Law Review* 923

Brooten L, Political Speech and the Law (2015) *The International Encyclopedia of Digital Communication and Society* 1

Bork R, Neutral Principles and Some First Amendment Problems' (1971) *47 Indiana Law Journal* 1

Bulto TS, Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory (2011) *9 African Journal of International and Comparative Law* 123

Bugarič B, A Crisis of Constitutional Democracy in Post-Communist Europe, 'Lands In-between Democracy and Authoritarianism (2015) *13 International Journal of Constitutional Law* 219

Buergenthal T, The Evolving International Human Rights System (2006) 100 *American Journal of International Law* 783

Cahill MT, Defining Inchoate Crime: an Incomplete Crime (2012) 9 *Ohio State Journal of Criminal Law* 751

Cassese A, Terrorism is also Disrupting Some Crucial Legal Categories of International Law (2001) *12 European Journal of International Law* 993

Carmi GE, Dignity-The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification (2007) *9 University of Pennsylvania Journal of Constitutional Law* 957

Civic M, The Right to Freedom of Expression as the Principla Component of the Preservation of Personal Dignity: An Arguemnt for Internaitonal Protection Within All Nations and Across All Borders (1997) *4 University of Pennsylvania Journal of Law and Social Change* 117

Clapham C, Ethiopian Development: The Politics of Emulation (2006) *44 Commonwealth & Comparative Politics*137

Cole MW, Mind the Gap: State Capacity and the Implementation of Human Rights Treaties (2015) *69 International Organization* 405

Coase RH, The Market Place of Goods and the Market Place of Ideas (1974) *64 The American Economic Review* 384

Coase RH, Advertising and Free Speech (1977) *6 The Journal of Legal Studies* 1

*Cohen J, Freedom of expression (*1993) *22 Philosophy and Public Affairs* 207

Coliver S, Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1998) *20 Human Rights Quarterly* 12

Davis J and Rosenberg J, The Incoherent Structure of Free Speech Law (2011) *19 William and Mary Bill of Rights Journal* 131

Davidson HR, The International Criminal Tribunal for Rwanda's Decision in The Prosecutor v. Ferdinand Nahimana et al.: The Past, Present, and Future of International Incitement Law (2004) *17 Leiden Journal of International Law* 505

Delgado R, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, (1982) *17 Harvard Civil Rights-Civil Liberties Law Review* 133

Director A, *The Parity of the Economic Market Place* (1964) *7 Journal of Economics and Law* 1

Donnelly J, Cultural Relativism and Universal Human Rights (1984) 6 *Human Rights Quarterly* 400.

Dodek A, A Tale of Two Maps : The Limits of Universalism in Comparative Judicial Review (2009) *47 Osgoode Hall Law Journal* 287

Donoho DL, Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards (1991) *27 Stanford Journal of International Law* 345

Eberle EJ, The Methodology of Comparative Law (2011) *16 Roger Williams University Law Review* 52

Eberle EJ, The Method and Role of Comparative Law (2009) *8 Washington University Global Studies Law Review* 451

Emerson T, Towards a General Theory of the First Amendment (1963) *72 Yale Law Journal* 877

Farber DA, Free Speech without Romance: Public Choice and the First Amendment (1991) 105 *Harvard Law Review* 556

Fiseha A, Constitutional Adjudication in Ethiopia, Exploring the Experience of the House of Federation in Ethiopia (2007) *1 Mizan Law Review* 1

Fesseha Y, Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Ethiopian Constitutional Review (2006) *14 African Journal of International and Comparative Law* 53

Fesseha Y, Whose Power is It Anyway: The Courts and Constitutional Interpretation in Ethiopia (2008) *22 Journal of Ethiopian Law* 144

Fiss O, Free Speech and Social Structure (1986) *71 Iowa Law Review* 1411

Fredman S, Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law (2015) *64 International and Comparative Law Quarterly* 631

Gagliardone I, et al, *Mapping and Analyzing Hate Speech Online: Opportunities and Challenges for Ethiopia*, *Working Paper* (Oxford, 2014)

____ ____, New Media and the Developmental State in Ethiopia (2014) *113 African Affairs* 279.

Galston WA, Two Concepts of Liberalism(1995) *105 Ethics* 516

Gordon G , From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework (2008) *98 Journal of Criminal Law and Criminology* 853

Greenawalt K, Insults and Epithets : Are They Protected Speec (1990) *42 Rudgers Law Review* 287

____ ___, Free Speech Justifications (1989) *89 Columbia Law Review* 119

Grossfeld B and Eberle EJ, Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers (2003) *38 Texas International Law Journal* 29

Grossman C, *Challenges to Freedom of Expression Within the Inter-American System: A Jurisprudential Analysis* (2012) *34 Human Rights Quarterly* 361

Gunther G, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, (1975) *27 Stanford Law Review* 719

Haile M, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the Republic's Cucullus Non Facit Monachum (2005) *1 Cardozo Journal of International and Comaprative Law* 1

Hagmann T and Abbink J, Twenty Years of Revolutionary Democratic Ethiopia, 1991 to 2011 (2011) *5 Journal of Eastern African Studies* 584

Harbeson J, Ethiopia's Extended Transition (2005) *16 Journal of Democracy* 144

Healy T, Brandenburg in a Time of Terror (2009) *84 Notre Dame Law Review* 655

Heyman SJ, "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression" (1999) 78 *Boston University Law Review* 1282

Hirschel R, the Question of Case Selection in Comparative Constitutional Law (2005) *53 American Journal of Comparative Law* 127

Hamelink CJ, Human Rights: the Implementation Gap (1998) *5 Journal of International Communication* 54

Hudson A, Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights (2007) *25 Berkeley Journal of International Law* 203

Idris I, The Place of International Conventions in the 1994 Federal Democratic Republic of Ethiopia (2000) *20 Ethiopian Journal of Law*113

Ibhawoh B, Between Culture and Constitutions: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) *22 Human Rights Quarterly* 838

Jarymowicz T, Robert Post's Theory of Freedom of Speech: A Critique of the Reductive Conception of Political Liberty (2014) *40 Philosophy & Social Criticism* 107

Johnson V, *The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror,and the Revolutionary Tribunal of Paris* (1990) *13 Boston College International and Comparative Law Review* 19

Kendrick L, Speech, Intent and the Chilling Effect (2013) *54 William and Mary Law Review* 1633

Kahn-Freund O, On Uses and Misuses of Comparative Law (1974) *37 The Modern Law Review* 1

Kassa WD, Examining Some of the Raisons d'être for the Ethiopian Anti-Terrorism Law (2013) 7 *Mizan Law Review* 49

Kassa WD, The Scope of Definition of a Terrorist Act under Ethiopian Law:Appraisal of its Compatibility with Regional and International Counter-terrorism Instruments (2014*) 8 Mizan Law Review* 371

Kumm M, The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law (2013) *20 Indiana Journal of Global Legal Studies* 605

Legrand P, European Legal Systems Are Not Converging (1996) *45 International and Comparative Law Quarterly* 52

Levitsky S and Way L, The Rise of Competitive Authoritarianism (2002) *13 Journal of Democracy* 51

Law DS and Versteeg M, The Evolution and Ideology of Global Constitutionalism (2011) *99 California Law Review* 1163

Lynch A, et al, *Law and Liberty in the War on Terror* (The Federation Express, 2007)

Matsuda MJ, Public Response to Racist Speech: Considering the Victim's Story (1986) *87 Michigan Law Review* 2320

Marchand SA, An Ambiguous Response to a Real Threat, Criminalizing the Glorification of terrorism in Britain (2010) *42 George Washington International Law Review* 136

McCulloch J, Counter-terrorism Human Security and Globalization from Welfare to Warfare State? (2003) *14 Current Issues in Criminal Justice* 285

Meiklejohn A, The First Amendment is Absolute (1961) *1 Supreme Court Review 2*55

Meiklejohn D, Public Speech and the First Amendment (1967) *55 Georgetown Law Journal* 234

Mellinger L, Illusion of Security: Why the Amended EU Framework Decision Criminalizing Incitement to Terrorism on the Internet Fails to Defend Europe from Terrorism (2009)*37 Syracuse Journal of International and Comparative Law* 339

McChesney F, Commercial Speech in the Professions: The Supreme Court's Question and Questionable Answer (1985), *134 University of Pennsylvania Law Review* 45

McCrudden CJ, *Human Dignity and Judicial Interpretation of Human Rights* (2008) *19 European Journal of International Law* 655

Mendel T, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred, For the UN Special Advisor on the Prevention of Genocide* (2006)

Metzl JF, 'Rwandan genocide and the International law of Radio Jamming' (1997) *91 American Journal of International Law* 637

Nega B, No Short Cut to Stability: Democratic Accountability and Sustainable Development in Ethiopia (2010) *77 Social Research* 1401

Niedrich A, Emphasizing Substance: Making the Case for a Shift in Political Speech Jurisprudence (2010) *44 University of Michigan Journal of Law reform* 1019

O'Flaherty M, Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34 (2012) 12 *Human Rights Law Review* 627

____ ____ Article 19 UDHR : *Contemporary Challenges and Opportunities for Freedom of Expression* (2009) available at: [<http://www.hks.harvard.edu/cchrp/events/2009/month03/article19.pdf>] (accessed 30 November 2013)

O'Donoghue F, Glorification, Irish Terror and Abu Hamza (2006) 16 *Criminal Law and Justice* 4

Orentlicher DF, Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v Nahimana, (2005) *12 New England Journal of International and Comparative Law* 17

Palmer M.SR, Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution (2006) *54 American Journal of Comparative Law* 589

Parker E, implementation of the UK Terrorism Act 2006-The Relationship Between Counter-Terrorism Law, Free Speech and the Muslim Community in the United Kingdom Versus the United States (2007) *21 Emory International Law review* 712

Paust J, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content (1984) *27 Howard Law Journal* 145

Pitts E, Spinoza on Freedom of Expression (1986) *47 Journal of the History of Ideas* 21.

Pokempner D, A Shrinking Realm: Freedom of Expression Since 9/11 (Human Rights Watch World Report, 2007)

Posner R, Free Speech in an Economic Perspective (1986) *20 Suffolk University Law Review* 1

Post RC, Participatory Democracy and Free Speech (2011) *97 Virginia Law Review* 477

____ ____, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse (1993) *64 University of Colorado Law Review* 1109

____ ____, Racist Speech, Democracy, and the First Amendment (1991) 32 *William and Mary Law Review* 267

Pryor F, Capitalism and Freedom? (2010) *34 Economic Systems* 9;

Raz J, Freedom of Expression and Personal Identification (1991) *11 Oxford Journal of Legal Studies* 302

Redish MH, The Value of Free Speech (1982) *130 University of Pennsylvania Law Review* 591

Regassa T, Making legal sense of human rights: the judicial Role in Protecting Human rights in Ethiopia (2009) *3 Mizan Law Review* 288

Robilant A, A Symposium on Ran Hirschel's Comparative Matters : the Renaissance of Comparative Constitutional Law Big Questions Comparative Law (1992) *96 Boston University Law Review* 1325

Roach K, *September 11: Consequences for Canada* (McGill-Queens University Press, 2003)

Ross TJ, 'Test of Democracy: Ethiopia's Mass Media and Freedom of Information Proclamation, A' (2009) *114 Penn State Law Review* 1047

Rostboll CF, Freedom of Expression, Deliberation, Autonomy and Respect 2011) *10 European Journal of Political Theory* 5

Saslow B, Public Enemy: The Public Element of Direct and Public Incitement To Commit Genocide (2016) *48 Case Western Reserve Journal of International Law* 418

Saul B, Terrorism in International and Transnational Criminal Law (September 22, 2015) Blackstone's International Criminal Practice, J.R.W.D. Jones, M. Zgonec-Rozej, Oxford University Press, UK, Forthcoming, 2017; Sydney Law School Research Paper No. 15/83. Available at SSRN: [<https://ssrn.com/abstract=2663890>] (accessed13 April 2016) 31

____ ____, Speaking of Terror: Criminalizing Incitement to Violence (2005) *28 University of New South Wales Journal* 869

Sekyere P and Asare B, An Examination of Ethiopia's Anti-Terrorism Proclamation on Fundamental Human Rights (2016) *12 European Scientific Journal* 351

Sen A, Human Rights and Asian Values (25 May 1997) *16th Morgenthau Memorial Lecture on Ethics and Foreign Policy* 1

____ ____, Food and Freedom (1989) 17 *World Development* 769

Schwöbel C, Organic Global Constitutionalism (2010) *23 Leiden Journal of International Law* 529

Saunders C, Towards a Global Constitutional Gene Pool (2009) *4 National Taiwan University Law Review* 3

Stone A, The Comparative Constitutional Law of Freedom of Expression (July 1, 2010) 476 University of Melbourne Legal Studies Research Paper Available at SSRN: [<https://ssrn.com/abstract=1633231 or http://dx.doi.org/10.2139/ssrn.1633231 >] (accessed 5 December 2015)

Scanlon TM, Why Not Base Free Speech on Autonomy Or Democracy? (2011) *97 Virginia Law r Review* 541

____ ____, Freedom of Expression and Categories of Expression (1978) *40 University of Pittsburgh Law Review*

____ ____, A Theory of Freedom of Expression (1972) *1 Philosophy & Public Affairs* 204

Schauer F, The Exceptional First Amendment (February 2005), *KSG Working Paper No. RWP05-021*, available at SSRN: https://ssrn.com/abstract=668543 or http://dx.doi.org/10.2139/ssrn.668543

____ ____, Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) *58 Boston University Law Review* 689.

Sunstein CR, Free Speech Now (1992) *59 University of Chicago Law Review* 255

____ ____Preferences and Politics (1991) *20 Philosophy and Public Affairs* 1

Sharland A, Focus on Article 10 of the ECHR (2009) *14 Judicial Review* 63

Salter M, et al, The Accidental Birth of Hate Crime in Transnational Criminal Law: Discrepancies' in the Prosecution for "Incitement to Genocide" during the Nuremberg Process involving the cases of Julius Streicher, Hans Fritzsche and Carl Schmitt (2013) *4 Lancashire Law School Working Paper Series* 4

Straus S, What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda's 'Radio Machete', (2007) *5 Politics and Society* 626

Sen A, Food and Freedom (1989) *17 World Development* 769

Simon J, Of Hate Speech and Genocide in Africa: Exploiting the Past (2006) *Columbia Journalism Review* 9

Szasz P, The Security Council Starts Legislating (2002) *96 American Journal of International Law* 901

Spataro A, 'Why Do People Become Terrorists? A Prosecutor's Experiences', (2008) *6 Journal of International Criminal Justice* 509

Saul B, Speaking of Terror: Criminalizing Incitement to Violence (2005) 28 *University of New South Wales Journal* 870

Teshome-Bahiru W, Media and Multi-Party Elections in Africa: The Case of Ethiopia (2009) *6 International Journal of Human Sciences* 91

Thio L, Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies (2010) *8 International Journal of Constitutional Law* 766

Tsesis A, Terrorist Speech and Social Media (2017) 70 Vanderbilt Law Review 651

Timmermann W, The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda? (2005) *18 Leiden Journal of International Law* 257

Timothewos G, Freedom of Expression in Ethiopia: the Jurisprudential Dearth (2010) *4 Mizan Law Review* 201

Tushnet M, The Boundaries of Comparative Law (2017) *13 European Constitutional Law Review* 13.

___ ___, Authoritarian Constitutionalism (2015) *100 Cornell Law Review* 391

___ ___, The Possibilities of Comparative Constitutional Law (1999) *108 Yale Law Journal* 1225

___ ___, The Inevitable Globalization of Constitutional Law (2009) *49 Virginia Journal of International Law* 985

Stone GR, The Origins of the "Bad Tendency" Test: Free Speech in Wartime (2002) 2002 Supreme Court review 427

Tanenbaum RS, Preaching Terror: Free Speech or Wartime Incitement (2005) *55 American University Law review* 785

Van Der Merwe HJ, The Prosecution of Incitement to Genocide in South Africa, (2013) 16 Potchefstroomse Electronic Law Journal

Vaughan S, Revolutionary Democratic State-Building: Party, State and People in the EPRDF's Ethiopia' (2011) 5 *Journal of Eastern African Studies* 619

Waldron J, Is Dignity the Foundation of Human Rights Waldron (2013) *NYU School of Law, Public Law Research Paper No. 12-73*, available at SSRN: [<https://ssrn.com/abstract=2196074 or http://dx.doi.org/10.2139/ssrn.2196074 >] (available 7 August 2015)

Walker G, The Idea of Non-Liberal Constitutionalism (1997) *39 Ethnicity and Group Rights* 155

Weinstein J, Participatory Democracy as the Central Value of American Free Speech Doctrine (2011) *97 Virginia Law Review 491*

Wiebel J, Let the Red Terror Intensify: Political Violence, Governance and Society in Urban Ethiopia 1976-1978 (2015) *48 International Journal of African Historical Studies 13-30*

Wilson R, *Inciting Genocides with Words* (2015)*36 Michigan* Journal of International Law 293.

Weinrib J, What Is the Purpose of Freedom of Expression (2009) *67 University of Toronto Faculty of Law Review* 177

Zakaria F, The Rise of Illiberal Democracy (1997) *76 Foreign Affairs* 22

Zewde B, Hayla-Sellase: From Progressive to Reactionary' (1995) *2 Northeast African Studies* 99

III. Internet Sources

World Leaders Debate International Security Challenges, Relief Web (21 Sept 2016) [<http://reliefweb.int/report/world/world-leaders-debate-international-security-challenges-calling-concerted-efforts-curb>] (Accessed 10 February 2017)

Ethiopian Leader at UN Assembly Decries Use of Social Media to Spread Messages of Hate and Bigotry, UN News Centre (21 September 2016) <[https://www.google.ie/search?q=hailemariam+desalegn+UN+general+asemebly+on+social+media+and+hate+spech+online&ie=utf-8&oe=utf-8&client=firefox-b&gws_rd=cr&ei=PK1KWbexHMSMgAahuLnABg>] (accessed 20 January 2017)

VOA-Africa , 2005 Ethiopian Election: A Look Back, (16 May 2010) <[https://www.voanews.com/a/article-2005-ethiopian-election-a-look-back-93947294/159888.html>] (accessed 15 April 2016)

Concerned Ethiopians in the United States (2005) 'Deconstructing Meles Zenawi's Response to US Congress' Ethiopian Review [<http://www.ethiopianreview.com/2005/jul/001OpinionJuly1_2005_Re_Meles_Letter.html>]

R Lefort, Things Fall Apart: Will the Centre Hold (Open Democracy, 19 November 2016) [<https://www.opendemocracy.net/ren-lefort/ethiopia-s-crisis>] (accessed December 15 2016).

Causation in the Law, Stanford Encyclopedia of Philosophy (2012) available at [<https://stanford.library.sydney.edu.au/archives/sum2012/entries/causation-law/>]

Ethiopia Human Rights Practices, 1993, U.S. Department of State (1994) [<http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/Ethiopia.html>] (accessed 10 October 2015)

Asrat Woldeyes of Ethiopia, Doctor and Dissenter Dies, New York Times (17 May 1999) [<http://www.nytimes.com/1999/05/17/world/asrat-woldeyes-of-ethiopia-doctor-and-dissenter-dies.html>] (accessed 16 February 2015)

Pen International, [<http://www.pen-international.org/pen-world/centres-news/>] (accessed 1 December 2013)

World Bank [<http://www.worldbank.org/en/country/ethiopia/overview>] (accessed 15 March 2014)

OECD DAC Statistics Ethiopia 2011 [<http://www.oecd.org/dac/stats/ETH.gif>] (accessed on 12 January 2014)

R Lefort, Unrest in Ethiopia: The Ultimate Warning Shot, Open Democracy (2 February 2016) [<https://www.opendemocracy.net/ren-lefort/unrest-in-ethiopia-ultimate-warning-shot>] (accessed 5 March 2017)

Locke J, Two Treatises of Government [<http://www.efm.bris.ac.uk/het/locke/government.pdf>] (accessed 11 February 205)

Zehabesha, Jawar Mohammed, A Mission of Inciting Hate and Genocide: A documentary (12 July 2013, [<http://www.zehabesha.com/jawar-mohammed-a-mission-of-inciting-hate-and-genocide/>] (accessed 12 October 2014)

Africa Watch (September 1991), 'Evil Days: 30 Years of War and Famine in Ethiopia', 101, Human Rights Watch [website], < http://www.hrw.org/sites/default/fi les/reports/Ethiopia919.pdf > (accessed 25 February 2013)

Explanatory Report of Terrorism Act 2006, (30 March 2006) [<http://www.legislation.gov.uk/ukpga/2006/11/notes/division/4/1>] (accessed 15 September 2016).

The Washington Post, *Ethiopia's Stifled Press* , 9 February 2015 [<http://www.washingtonpost.com/opinions/crackdown-in-ethiopia/2015/02/08/ad1e6bce-abef-11e4-ad71-7b9eba0f87d6_story.html>] [accessed on 10 April 2015]

The Guardian , *Ethiopia's Media Crack Down is Bad News for Africa*', (23 January 2015) <[http://www.theguardian.com/world/2015/jan/23/ethiopias-media-crackdown-is-bad-news-for-africa>] (accessed 12 April 2015)

[< http://www.britannica.com/EBchecked/topic/607675/Gabre-Medhin-Tsegaye>] [last accessed on 2 December 2013]

Internet World Stats, "Africa," November 6, 2014, [< http://www.internetworldstats.com/africa.htm#et>]

The Economist, The Noose Tightens: Bloggers and Journalists who Criticise the Government are Under the Cosh [<http://www.economist.com/news/middle-east-and-africa/21611119-bloggers-and-journalists-who-criticise-government-are-under-cosh-noose>] (accessed 14 November 2015)

Amnesty International, *Justice Under Fire: Trials of Opposition Leaders, Journalists and Human Rights Defenders in Ethiopia* (29 July 2011) [<https://www.amnesty.org/en/documents/AFR25/002/2011/en/>] [accessed on 7 April 2015]

Frontline Defenders, *Ethiopia: Closure of independent newspaper Addis Neger and exile of its Chief Editors* (10 December 2009) [<http://www.frontlinedefenders.org/node/2286>] (accessed 6 April 2015).

Human Rights Watch, *Ethiopia: Government Repression Undermines Poll,(* 24 May 2010) [<http://www.hrw.org/news/2010/05/24/ethiopia-government-repression-undermines-poll>] (accessed on 10 April 2015)

President Barrack Obama, during his historic visit as First Seating Head of State of the United States to the African Union and Ethiopia on 28 July 2015 [<https://www.whitehouse.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa>] 2015 (Accessed on 15 August 2015)

PEN/Barbara Goldsmith Freedom to Write Award [<https://pen.org/penbarbara-goldsmith-freedom-to-write-award/>] (accessed 20 September 2015)

Press Freedom Hero IFEX (28 April 2017) [<https://www.ifex.org/international/2017/04/28/eskinder-nega-wpfd/> (accessed 20 May 2017)

Committee to Protect Journalists (CPJ) reported in 2015 that Ethiopia is currently the 4th most censored country in the word, see CPJ *10 Most Censored Countries* [<https://cpj.org/2015/04/10-most-censored-countries.php>] (accessed 10 July 2016)

Martial Law and the Criminalization of Thought in Thailand (2014) The Asia Pacific Journal: Japan focus [<https://www.radcliffe.harvard.edu/news/in-news/martial-law-and-criminalization-thought-in-thailand>] (accessed 14 September 2015)

Ethiopia's Economic Miracle Running Out of Steam, Why It's Time for East Africa's Big Success Story to Change the Way it Does Business, Foreign Policy [<https://foreignpolicy.com/2015/04/16/ethiopias-economic-miracle-is-running-out-of-steam-east-africa/>]

Citizen Lab, *Hacking Team and the Targeting of Ethiopian Journalists*, (<https://citizenlab.org/2014/02/hacking-team-targeting-ethiopian-journalists/>) *(accessed 9 April 2015)*

Human Rights Watch 'One Hundred ways of putting pressure: Violations of freedom of expression and association in Ethiopia' (2010) [<http://www.hrw.org/en/reports/2010/03/24/one-hundred-ways-putting-pressure>] (accessed 5 April 2015)

DireTube news, Ethiopian parliament named five groups as terrorist (14 June 2011) video link [<http://www.diretube.com/ethiopian-news-ethiopian-parliament-named-five-groups-as-terrorist-video_6e6bc3d3c.html>] (accessed 19 November 2015)

Muslim faces prison over terror speeches', The Times (18th April 2008) [<https://www.thetimes.co.uk/article/muslim-extremist-abu-izzadeen-faces-prison-over-terror-speeches-xm0qckvgc22>] (accessed 15 May 2016)

Gada System: An Indigenous Socio-Political System of the Oromo (UNESCO, 2016) [<https://ich.unesco.org/en/RL/gada-system-an-indigenous-democratic-socio-political-system-of-the-oromo-01164>] (accessed 12 January 2017)

New York Times, Egyptian Group Says it Tried to Kill Mubarak, [<http://www.nytimes.com/1995/07/05/world/egyptian-group-says-it-tried-to-kill-mubarak.html>] (accessed 20 July 2016)

Ruhashyankiko, Special Rapporteur, Study of the Question of the Prevention and Punishment of the Crime of Genocide, 4 July 1978, E/CN.4/Sub.2/416

Human Rights Watch, Journalism is not a crime: Violations of Media Freedom in Ethiopia (2015).

IV. Unpublished Works

Asfaw T, *The Contribution of Native Ethiopian Philosophers: Zara Yacob and Wolde Hiwot* (MA Thesis Addis Ababa University , 2004)

Mollenhauer SM, Millions on the Margins: Music, Ethnicity, and Censorship among the Oromo of Ethiopia (Phd Thesis, University of California Riverside, 2011)

Guider A, *Freedom of Expression and the Enlightenment* (Unpublished LLM thesis, 2015)

G Timothewos, An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia, a Comparative Study (unpublished LL.M Thesis, Central European University, 2009)

መሰንበት አሰፋ : ኢትዮጵያ ያፀደቀቻቸው አለም አቀፍና አህጉራዊ የሰብአዊ መብት ስምምነቶች በፌዴራል ፍርድ ቤቶች ያላቸው ተፈፃሚነትና ያሉ ችግሮችና ተግዳሮቶች, በ ኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፓብሊክ መንግስት የፍትህና የህግ ስርዓት ምርምር ኢንስቲትዩት (ግንቦት *20, 2005)* (M Tadeg, Application of International Human Rights Treaties in Ethiopia, a Research Commissioned by the Ethiopian Legal and Justice Research Institute (unpublished, 28 May 2013)) available at [<https://www.academia.edu/10307647/Application_of_Internaitonal_Human_Rights_Treaties_in_Ethiopia_Amharic_>]

Zenebework Tadess (ed) *Development and Public Access to Information in Ethiopia: Proceedings of the Symposium of the Forum for Social Studies* (2000).

Asfaw T, *The Contribution of Native Ethiopian Philosophers: Zara Yacob and Wolde Hiwot* (MA Thesis Addis Ababa University , 2004).

V. Reports of Intergovernmental Organizations

African Union, Report of International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide* (July 2000)

Apologie Du Terrorisme'' and ''Incitement to Terrorism'', Committee of Experts on Terrorism (CODEXTER), Secretariat Memorandum, Prepared by the Directorate General of Legal Affairs, 3rd Meeting Strasbourg (6-8 July 2004)

Frank La Rue, *Ten Key Challenges to Freedom of Expression in the Next Decade*, Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and expression (UNSRFE), A/HRC/14/23/Add.2, vol 12534 (2010).

OHCHR, *The Prohibition of Incitement to Hatred in Africa: Comparative Review and Proposal for a Threshold*, Expert Meeting (Nairobi, Kenya, 6-7 April 2011)

OHCHR, *Human Rights, Terrorism and Counter-Terrorism* : Fact Sheet No. 32. (Geneva, 20008)

BW Ndiaye, Report by Mr B.W NdiayVe Special Rapporteur, on his mission to Rwanda from 8 to 17April 1993, UN ESCOR, 50th Sess., Provisional Agenda Item 12, UN Doc. CN.411994/Add.1 (1993)

Report of the Secretary-General, 'The protection of human rights and fundamental freedoms while countering terrorism', UN Doc. A/63/337 (28 August 2008)

International Telecommunications Union Report, *Measuring the Information Society* (2014).

UN Legislative Guide to the Universal Legal Regime Against Terrorism (New York, 20008)

Moges YG, Collective Criminal Responsibility in the Case of *Special prosecutor v Colonel Mengistu Haile Mariam et al* (Unpublished LLM Thesis, Addis Ababa University School of Law, 2010)

Dziyauddin H, A Comparative Study of Freedom of Expression and the Right to Privacy in Relation to the Press in Malaysia and the United Kingdom" (Phd Thesis University of Newcastle Uptontyne 2005)

Ethiopia Media Sustainability Index (IREX Report on Ethiopia, 2012)

VI. NGO Reports

Human Rights Watch, *They Know Everything We do: Telecom and Internet Surveillance in Ethiopia* (2014)

Amnesty International, 'Dismantling Dissent : Intensified Crackdown on Free Speech in Ethiopia' (2011).

Article 19, Comment on Anti-Terrorism Proclamation of Ethiopia (March 2010).

Freedom House, *Freedom on the Net: a Global Assessment of Internet and Digital Media* (2013)

Artilce 19, *The Legal Framework on Freedom of Expression in Ethiopia* (2003)

Human Rights Watch, *Journalism is not a crime: Violations of Media Freedom in Ethiopia* (2015).