FREEDOM OF EXPRESSION IN ETHIOPIA: THE JURISPRUDENTIAL DEARTH

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Abstract

It is almost a decade and half since freedom of expression has been proclaimed as one of the fundamental rights and freedoms recognized in the FDRE Constitution. However, there is hardly any Ethiopian jurisprudence on freedom of expression to speak of at the moment. Although numerous cases (that clearly gave rise to issues implicating freedom of expression) have been entertained in our courts, we have yet to develop a body of standards, tests and doctrines pertaining to the scope, content and legitimate limitations of freedom of expression. This void of constitutional jurisprudence can indeed undermine freedom of expression.

Key words:

Freedom of Expression, FDRE Constitution, Ethiopia

Introduction

Freedom of expression is one of the fundamental rights guaranteed under the FDRE Constitution. Nevertheless, as is the case for most of the rights recognized in this Constitution, there is still no corpus of academic exposition and judicial doctrine developed to elucidate on such matters as the scope, content and limitations of freedom of expression. This article is not meant to fill this void. Rather, it is meant to establish the existence of this void, to explore its causes and possible implications.

The article starts with a brief overview of the traditional theoretical basis of freedom of expression. That will be followed by a cursory discussion of freedom of expression as provided under the FDRE Constitution. Then, some critical questions that might arise in relation to freedom of expression are discussed. The author argues that no authoritative answer has been given to these questions in the Ethiopian legal system and, as a result, there is a dearth of jurisprudence regarding freedom of expression in Ethiopia. An attempt is made to explore the cause for this jurisprudential dearth and some of its implications.

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1. Theoretical Basis of Freedom of Expression

Although not central to the principal objective of this article, which is to show the jurisprudential wasteland that freedom of expression has become in Ethiopia, in order to underscore the importance of the right, it would be helpful to explore the theoretical bases and underpinnings of freedom of expression. To this end, the main justifications that are often forwarded to establish the need to recognize and protect freedom of expression[1] need to be highlighted.

1.1- Freedom of Expression as a Prerequisite for the Search for Truth

One of the earliest and better known defenses of freedom of expression was presented by John Milton who wrote a pamphlet, titled *Areopagitica* in 1644, decrying a scheme of licensing publications (a system of censorship) introduced in England at the time. Depicting the system of *imprimatur* as a peculiar evil of the prelacy (playing on the anti-catholic sentiments that were prevalent in England then), unheard of in classical Greece and Rome and without support in Christian theology, Milton defended freedom of expression as a prerequisite for the already discovered truth to thrive and for undiscovered truth to be discovered. He argued that censorship will be "primely to the discouragement of all learning, and the stop of truth, not only by the disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil wisdom."[2]

This line of argument that defends freedom of expression as being a necessary precondition in the search for truth has been further developed by the utilitarian J.S Mill in his famous essay on 'Liberty'. Mill argued that without freedom of expression we might be deprived of the opportunity to learn the truth if we have not discovered it yet, and we cannot perfect our partial knowledge of the truth we have learnt, or will not have the opportunity to have a clearer

[1] One should bear in mind that there is an extensive body of literature on this subject, particularly emerging form the U.S and historically from English political philosophers of the enlightenment period. A review of this literature and its significance and relevance to Ethiopia merits a separate article. For a concise and up to date discussion of the theoretical justifications of free speech See, Eric Brandt(2005), *Freedom of Speech*, Second Edition, (Oxford University Press), pp 7-23, See also Alan Haworth, *Free Speech*, Routledge 1998.

[2] John Milton(1644,) *Areopagitica*, (The Harvard Classics. 1909–14), available at <http://www.bartleby.com/3/3/2.html>, last accessed on October 29, 2010.

understanding of received truths.[3] These philosophical views seem to have been judicially endorsed in the famous dissenting opinion of Justice Holmes of the U.S Supreme Court in *Abrams v. United States* wherein he forwarded the "market place of ideas" rationale for free speech.[4]

1.2- Freedom of Expression as a Pre Requisite for Self Governance

Another traditionally influential rationale of freedom of expression is the one expounded by A. Meiklejohn. This scholar and those who argue in favor of freedom of expression in a similar vein argue that the protection of free speech is justified since it is a prerequisite for self governance.[5] The proponents of this view claim that democracy, as a system of self governance requires that citizens be well informed of issues of public interest so they could make informed and intelligent decisions taking into account all available alternatives. While basically subscribing to this rationale of free speech, some believe that this rationale of free speech limits the scope of the freedom to political speech and communication only[6] while others are of the view that expressions that might not directly be characterized as being political such as art could be very influential in forming our political views and hence merit protection[7]. Although they might differ on the scope of protection, the proponents of both views seem to be in agreement that freedom of expression must be protected to enable citizens to govern themselves. Under Article 29(4) of the FDRE Constitution, it is provided that "the free flow of information, ideas and opinions… are essential

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[3] John Stuart Mill (1869), *On Liberty*, Chapter II: Of the Liberty of Thought and Discussion, available at < http://www.bartleby.com/130/2.html > and last accessed on October 29, 2010.

[4] *Abrams v. United States, 250 U.S. 616 (1919),* Justice Holmes opined "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very 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, and that truth is the only ground upon which their wishes safely can be carried out."

[5] See in general, Alexander Meiklejohn (2004), *Free speech and its relation to Self-government,* (Law Book Exchange Limited).

[6] Robert H Bork(1971-1972), 'Neutral Principles and Some First Amendment Problems', 47 *Ind. L.J. 1*, pp. 6-28.

[7] Alexander Meiklejohn(1961), 'The First Amendment Is an Absolute', *The Supreme Court Review, Vol.* 1961*, pp. 245-266.*

to the functioning of a democratic order". This assertion seems to imply that the necessity of freedom of expression for democratic governance has been the most dominant theoretical justification for the provision of the right in the Constitution.

1.3- Freedom of Expression as a Prerequisite for Personal Development

The other line of reasoning that is adopted to justify the protection of speech is one that makes human autonomy, personal development and fulfillment contingent on a person's freedom to express one's self as well as make independent choices of what is right and wrong, what is in good taste or bad taste. The argument goes, without such freedom, human beings cannot fully develop their personality and be autonomous moral agents with self respect[8]. Therefore, regardless of whether or not freedom of expression helps in the search for 'truth,' and in addition to the utility of freedom of expression in facilitating democratic governance, free speech is seen as something that is justified because it makes autonomous personal fulfillment and development possible.

The above discussion only highlights the most widely known traditional justifications of freedom of expression presented by philosophers and jurists of the English speaking world. Therefore it obviously cannot be taken to be comprehensive and exhaustive. Be this as it may, the author hopes that it can serve as a prelude to the discussion below.

2. Constitutional Guarantees of Freedom of Expression in Ethiopia

Freedom of expression was for the first time given juridical recognition in modern Ethiopia by the Revised 1955 Constitution.[9] The Eritrean Constitution of 1952 had already recognized freedom of expression as a right of all residents of Eritrea prior to the adoption of the 1955 Revised Constitution which was influenced by the Federation with Eritrea.[10] Freedom of expression was also a

[8] See Thomas Scanlon (Winter, 1972), 'A Theory of Freedom of Expression', *Philosophy and Public Affairs*, Vol. 1, No. 2, pp. 2015-226 and David A. J. Richards(Nov., 1974), 'Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment', *University of Pennsylvania Law Review*, Vol. 123, No. 1, pp. 45-91.

[9] See the 1955 *Revised Constitution of the Empire of Ethiopia*, Article 41.

[10] See The *Constitution of Eritrea*, Adopted by the Representative Assembly of Eritrea on July 10, 1952, Article 22(d). The fact that the Constitution of Eritrea recognized

right that was given recognition in the 1974 Draft Constitution.[11] The 1987 Constitution of the Peoples' Democratic Republic of Ethiopia, which had a clear socialist orientation, also gave recognition to freedom of expression.[12] Hence, at least on paper, freedom expression has been given recognition in Ethiopia for more than half a century. However, anybody who is familiar with modern Ethiopian history would know that these constitutional guarantees of freedom of expression were not effective in fostering political dissent and freedom of the press. On the ground, there was hardly any free press or freedom for political dissent despite what these constitutions provided.[13]

A dramatic change occurred as far as freedom of expression was concerned with the collapse of the 'Dergue'. Not only did the Transitional Charter recognize freedom of expression, [14] but freedom of the press and speech became a reality with an unprecedented proliferation of privately run newspapers and magazines.[15] The extent to which that freedom has subsisted till this day is a debatable issue, but what is certain is that in our constitutional history, freedom of expression was stipulated in the 1995 FDRE Constitution in the most elaborate manner.

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freedom of expression is obviously of interest here because at that point in time Eritrea was an autonomous unit federated with Ethiopia.

[11] See, *The Draft of the Proposed Ethiopian Constitution*, 1974(Presented to the Prime Minister on Hamle 29th, 1966 Ethiopian Calendar (August 9, 1974) and published on Addis Zemen Nehassie 4, 1966(August 14, 1974), Article 25(i). It provides that '…Every Ethiopian ….has the right to express any idea through the media of speech, press or any other medium. He has the right of access to the expression of others too.'

[12] See the *Constitution of the Peoples' Democratic Republic of Ethiopia (1987),* Article 47

[13] Be this as it may it is important to note that there were exceptional times even in modern Ethiopia in which dissent through the press and political speech were briefly tolerated prior to 1991. In the 1920's the progressive intellectuals who were infatuated with the then regent sharply criticized the 'old school' establishment and decried Ethiopia's backward state openly in the few newspapers that were in existence at that time. Furthermore, just before the 'Dergue' consolidated its hold on power during the 1974 Revolution, political dissent and views critical to the government on newspapers were the order of the day.

[14] See *Transitional Period Charter of Ethiopia* (1991), Article 1(a).

[15] See Shimelis Bonsa (2002), 'The State of the Private Press in Ethiopia', *Ethiopia The Challenge of Democracy from Below*, Edited by Bahru Zewde and Siegfried Pausewang, (Nordiska Afrikainstitutet, Uppsala and Forum for Social Studies: Addis Ababa), pp 184-165.

Article 29 of the FDRE Constitution provides for the 'Right of Thought, Opinion and Expression' in the following terms:

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 honor and reputation of individuals.
7) Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

In addition to enshrining freedom of expression as a fundamental 'democratic right', the Constitution stipulates that the third chapter of the Constitution (i.e. is its bill of rights) should be interpreted in accordance with the Universal Declaration of Human Rights (UDHR) and international human rights instruments ratified by Ethiopia. [16] Accordingly, one should always bear in mind that the relevant provisions of the UDHR, the ICCPR (International Covenant on Civil and Political Rights), the ACHPR (African Charter on Human and Peoples' Rights) and other pertinent human rights instruments ratified by Ethiopia should be read alongside this constitutional provision in order to have a full picture of the legal regime that is expected to accord protection to freedom of expression in Ethiopia.

[16] See FDRE Constitution Article 13(2), See also Gebremlak Gebregiorgis(2008), 'The Incorporation and Status of Human Rights Under the FDRE Constitution', *The Constitutional Protection of Human Rights in Ethiopia : Challenges and Prospects*, Ethiopian Human Rights Law Series Vol. 2, (AAU Law Faculty, AAU Printing Press), Girmachew Alemu & Sisay Alemahu (eds) pp 37-58.

3. Questions and Issues in Need of Answers

At the moment, there is a great deal of controversy as to the extent of the realization of the constitutional guarantee of freedom of expression in Ethiopia. Accusations by various human rights activists and 'champions' of freedom of the press relating to deliberate acts of stifling freedom of expression through unconstitutional and illegal means are vehemently denied by the government.[17] Yet leaving aside this controversy, there are a number of questions that need to be addressed when we come to limitations imposed on freedom of expression in Ethiopia through duly enacted laws. The questions that could be raised are not only pertaining to laws that have already been enacted but potential limitations that might be set in the future as well. In this section of the article, some of these questions are raised along with tentative answers. The objective of providing these answers is not to provide definitive and authoritative answers but to explore possible answers and provide a starting point for further inquiry and debate on the questions raised.

The first question relates to the implications of the characterization of freedom of expression as a 'democratic right' under the FDRE Constitution. The second question concerns the legitimate grounds for limiting freedom of expression under the FDRE Constitution. And the third question relates to the extent to which limitations on freedom of expression based on legitimate grounds can go in restricting the freedom. It should be underscored that these questions by no means provide a guideline for a comprehensive and systematic investigation of freedom of expression as enshrined under the FDRE Constitution. However, they are still questions worth dwelling upon, both from practical and academic points of view.

3.1- Freedom of Expression as a *Democratic* Right: Implications Explored

Freedom of expression is provided for under Chapter 3 of the FDRE Constitution, i.e. the bill of rights of the Constitution which embodies 'Fundamental Rights and Freedoms'. This chapter is divided in two parts. The first part provides for 'Human Rights' while the second part provides for

[17] See Freedom House, *Freedom of the Press 2008 - Ethiopia*, 29 April 2008, available at: <http://www.unhcr.org/refworld/docid/4871f602c.html> [accessed 16 January 2010], see also Committee to Protect Journalists (New York) Ethiopia: 2007 Press Freedom Summary, 5 February 2008, available at:

< http://allafrica.com/stories/200802060645.html > last viewed on January 16, 2009.

'Democratic Rights.'[18] This division of the fundamental rights and freedoms recognized by the Constitution obviously gives rise to a question as to the practical significance and implication of the division. The relevance of this question goes beyond freedom of expression and is also pertinent to all of the other rights embodied in the FDRE Constitution. The most relevant provision in this regard is Article 10 of the Constitution. This Article is found in Chapter 2 of the Constitution that lays down the 'Fundamental Principles of the Constitution'. Article 10(1) stipulates that 'Human rights and freedoms, *emanating from the nature of mankind*, are *inviolable and inalienable*' (emphasis added). It goes on to provide under Article 10(2) that 'Human and democratic rights of *citizens and peoples* shall be respected' (emphasis added).

Two things can be inferred tentatively from Article 10. The first tentative inference is that *human* rights and freedoms are derived from the nature of man and as such are universal. This is to mean that human rights are the rights of all human beings simply and merely by virtue of their humanity, as opposed to democratic rights which are the rights of citizens and 'peoples' derived from their juridical and political status. So this would seem to mean that in terms of the bearers of the right, human rights and democratic rights are different, the former being more inclusive than the later. The second tentative inference is that human rights are to be accorded a relatively more robust protection as 'inviolable and inalienable' rights as compared with democratic rights which are just to be 'respected'[19].

These tentative inferences are further reinforced when one consults the Minutes of the Council of Representatives of the Transitional Government during its deliberations on what was then the draft constitution. When one refers to this Minutes, one can see that the Chairperson of the Constitutional Drafting

[18] In the first part of the third chapter of the constitution, i.e. the part stipulating human rights, one would find the Rights to life, the Security of Person and Liberty, Prohibition against Inhuman Treatment, Right of Persons Arrested, Rights of Persons Accused, The Rights of Persons Held in Custody and Convicted Prisoners, Non-retroactivity of Criminal Law, Prohibition of Double Jeopardy, Right to Honour and Reputation, Right to Equality, Right to Privacy, Freedom of Religion, Belief and Opinion. In the Second part, i.e. the part providing for democratic rights, one finds Right of Thought, Opinion and Expression, The Right of Assembly, Demonstration and Petition, Freedom of Association, Freedom of Movement, Rights of Nationality, Marital, Personal and Family Rights, Rights of Women, Rights of Children, Right of Access to Justice, The Right to Vote and to be Elected, Rights of Nations, Nationalities, and Peoples, The Right to Property, Economic, Social and Cultural Rights, Rights of Labour, The Right to Development and Environmental Rights.

[19] Abadir Mohamed (2008), *The Human Rights Provisions of the FDRE Constitution in Light of the Theoretical Foundations of Human Rights*, (AAU Printing Press), p.85

Commission,[20] was of the opinion that a distinction should not and could not reasonably be made between the so called 'democratic' and 'human' rights since they are interdependent and inseparable.[21] He also argued that the idea that the two rights should be accorded a different degree of protection is inappropriate and contrary to what is provided in the international human rights conventions adopted under the auspices of the U.N.[22] A different view was forwarded by the then President and Chairperson of the Council, [23] who was of the opinion that human rights emanate from our humanity and cannot be subject to any limitations while democratic rights that arise out of citizenship and the status of people-hood or a membership in a particular group could be subject to limitations.[24] The views of the Chairperson of the Council won the day and were accepted by a majority of its members.[25] Unfortunately, the Minutes of the Constituent Assembly do not shed any light on the practical implications of the categorization of rights into human and democratic rights since the Constituent Assembly's discussion on the provisions in question did not take cognizance of the issue. [26]

One of the principal architects of the Constitution, while commenting on the Constitution, did not provide an explanation as to why it was necessary to make a distinction between 'human' and 'democratic' rights in the Constitution or what is the significance of the distinction. He noted that the classification of rights is "an accepted academic exercise", at times of some political and technical utility so long as "the indivisibility of human rights is kept in mind"; and asserted that "it is in this light that the constitutional categorization of fundamental rights and freedoms into human rights and democratic rights should be accepted."[27] This assertion of course gives no explanation as to the practical implications of categorizing freedom of expression as a "democratic right" as opposed to a "human right."

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[20] The late Kifle Wedajo, Chairperson of the Constitutional Drafting Commission

[21] See *Minutes of the 94th Regular Session of the Council of Representatives of the Transitional Government of Ethiopia* , Unpublished, p.23.

[22] *Ibid.*

[23] The President of the Transitional Government.

[24] *Id*., p.24.

[25] *Ibid.*

[26] See *Minutes of the Ethiopian Constituent Assembly* Vol. 2 (Unpublished) pp 12-13, Tikmit 30- Hidar 7, 1987, Addis Ababa.

[27] Fasil Nahum (1997), *Constitution for a Nation of Nations; the Ethiopian Prospect*, (Red Sea Press Inc.), pp. 111, 112.

A legal expert who served in the Transitional Government's Constitutional Drafting Commission which was responsible for the drafting of the FDRE Constitution, notes that although democratic rights enjoy lesser protection than human rights, the basis of the classification are unclear and ultimately the whole classification may be irrelevant.[28] However she did not elaborate in what respect "democratic rights" are to enjoy lesser protection than human rights.

According to an academic on Ethiopian constitutional law, "…all categories of rights are co-equally to be respected without having any superior claim to the other in terms of being prioritized or subordinated".[29] He goes on to note that "there isn't much of a method into the classification…" of rights in to democratic and human rights in the FDRE Constitution. [30]

Clearly, in light of the opinions above, there seems to be an agreement among the commentators who have addressed the issue at hand that the classification of rights in the FDRE Constitution into human and democratic rights is not based on any rational justification and that it does not have any practical significance. This view which is shared by the above quoted sources seems to be inconsistent with what is provided for under Article 10 of the Constitution and how that provision was understood by some of the key players in the adoption of the Constitution.[31]

As has been discussed above, one of the implications of Article 10 at least as understood by the Council of Representatives of the Transitional Government (who constituted a majority in the Council) seems to be that the constitutional protection of those rights that the Constitution categorizes as democratic rights does not extend to non citizens. This line of thought invites one to compare the distinction between fundamental freedoms belonging to everyone under Article 2 of the Canadian 'Charter of Rights and Freedoms' and democratic rights of citizens under Article 3 of the same charter. In this classification, the Canadian Charter stipulates that freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association are fundamental rights belonging to everyone and not limited to citizens.[32] It

[28] Meaza Ashenafi (2003), 'Ethiopia: Process of Democratization and Development', in Abdullahi Ahmed An-Naim ed., *Human Rights under African Constitutions*, (University of Pennsylvania Press), p.34.

[29] Tsegaye Regassa(2009), *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, Mizan Law Review, Vol.3, No.2. p.303

[30] *Id*., 305.

[31] *Supra* note 21, p.23.

[32] See *Canadian Charter of Rights and Freedoms*, Article 2.

provides for the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein as rights belonging to Canadian citizens only.[33] Hence, one can note that the Canadian Charter reserves for its citizens only rights that should inherently and in their very nature be reserved for citizens. As opposed to this, the Ethiopian Constitution seems to imply that many rights like freedom of expression are applicable only to citizens despite the fact that there is nothing in the nature of these rights that warrants reserving these rights to citizens only.

Furthermore the assertion that 'democratic rights' like freedom of expression do not emanate from the nature of mankind and as such are less deserving of constitutional protection is, to say the least, at the very fringe of plausibility within the realm of human rights. In relation to this, it is interesting to note that one of the widely accepted rationales for the protection of freedom of expression is the belief that this freedom is crucial for human autonomy and self realization.[34] Such views assert the existence of a direct link between human nature and freedom of expression. The interdependence, indivisibility and interrelatedness of human rights will undoubtedly render unacceptable any attempt to make a distinction in terms of the degree of protection merited particularly by civil and political rights.[35] Therefore, in the opinion of this author, Article 10 of the Constitution and the categorization of rights under Chapter three of the FDRE Constitution as 'Democratic' and 'Human Rights' should be seen as a classification without significant impact as suggested by the

[33] *Id*. Article 3.

[34] See the discussion of rationales of freedom of expression in section I of the article and in general, Thomas I. Emerson(1963), 'Toward a General Theory of the First Amendment', *Yale Law Journal* 72 877–956, and Frederick Schauer (1982), *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press).

[35] See *Vienna Declaration and Programme of Action, World Conference on Human Rights*, Vienna, 14-25 June 1993, available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?Open Document>, last viewed on January 15, 2010; See in particular paragraph 2 and Article 5 of the Declaration. The principle of universality, indivisibility, interdependence and interrelatedness of all human rights has also been endorsed by the African Commission on Human and People's Rights See *Purohit and Another v The Gambia*, 2003 African Human Rights Law Report 96 (ACHPR 2003) Paragraph 48, See also the Grand Bay (Mauritius) Declaration and Plan of Action (1999) adopted by the OAU Ministerial Conference on Human Rights, Article 1, Kigali Declaration (2003), Adopted by the AU Ministerial Conference on Human Rights, Article 1.

authorities whose views were discussed above.[36] This line of interpretation would preclude the absurd outcomes that contradict with the view commonly accepted among scholars and practitioners of international human rights.

Regardless of the position of this author and some of the commentators whose views were discussed above, the fact remains that the text of the Constitution is still susceptible to an interpretation that will construe freedom of expression and other rights found in the second part of the third chapter as rights of only citizens and as rights that deserve less protection than rights embodied in the first part of the same chapter. Though this implication has not been acted upon so far, the potential it bears should give rise to some concern since many Ethiopian born political activists in the Diaspora could be precluded from enjoying the freedoms of expression, association and so on. Perhaps, we can take the "Broadcasting Service Proclamation No.533/2007" and the "Freedom of the Mass Media and Access to Information Proclamation No. 590/2008"; both of which restrict participation in the ownership of media outlets to citizens only[37] as manifestations of a reading of freedom of expression as a right belonging to citizens only.

As has been noted already, another practical significance of Article 10 could be its not so subtle implication that democratic rights are to be accorded less protection than human rights. As far as freedom of expression is concerned since it often clashes head on with the right to honor and reputation[38], the right to privacy[39] and at times arguably against the freedom of religion of others[40], all of which are rights falling under the category of human rights of Chapter 3 of the FDRE Constitution, this could mean that whenever such a clash occurs,

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[36] The author concedes that the line of argument he is trying to push, even if supported by the authors cited above is not consistent with the original intent of some of the key players in the constitutional adoption process and as such it might be both problematic and mere wishful thinking.

[37] See Articles 23 of the Broadcasting Proclamation and Article 5 of the Freedom of the Mass Media and Access to Information Proclamation.

[38] See for example *Oberschlick (No 2) v Austria (1998) 25 EHRR 357 97/41, Lingens v Austria (1986) 8 EHRR 103 86/6* and, *New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964);* see also *Mogale and Others v Ephraim Seima*, The Supreme Court of Appeal of South Africa, Case No 575/04, see also Fred Khumalo *and others v Bantubonke Harrington Holomisa*, Constitutional Court of South Africa, Case CCT 53/01.

[39] See for example *Von Hannover v Germany* [2004] ECHR 294, European Court of Human Rights application no. 59320/00.

[40] See for example *Otto-Preminger-Institut v. Austria (1994)* ECHR, *I.A. v. Turkey*, Judgment of September 13, 2005; *Tatlav v. Turkey*, Judgment of May 2, 2006.

these rights should automatically prevail at the expense of freedom of expression. Unfortunately, though it has been more than a decade and half since the adoption of the FDRE Constitution, no jurisprudence has developed on the significance of the classification of fundamental rights and freedoms provided in the Constitution. The question will still persist until the emergence of a clear, authoritative and settled case law that affirms the formal equality of all fundamental rights and freedoms enshrined in the Constitution and that as a rule all such rights are to be enjoyed by 'everyone'. [41]

3.2- Grounds of Limiting Freedom of Expression

The first five sub-articles of Article 29 provide the rights associated with freedom of opinion and expression that are protected by the Constitution. Hence, these sub-articles tell us *what* is protected. Political speech, operating a press and expressing one's views and opinions through state media are among the various rights protected under Article 26. Sub-Articles 6 and 7 deal with the limitation of the rights enumerated in the preceding sub articles. While sub-Article 6 lays down the grounds and conditions for limiting freedom of expression, sub-Article 7 stipulates that "Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law".

If read by itself without taking sub-Article 6 into account, this article might be understood as saying that so long as a limitation of the right has a legal or statutory basis, it is acceptable. Such a reading is obviously very dangerous and must be rejected for two reasons. The first reason is the fact that such a reading will render sub-Article 6 meaningless and in effect negate it completely. If any limitation made in accordance with statutes was to be considered valid, then there would have been no need to provide grounds for limiting freedom of expression under sub-Article 6. This will render sub-Article 6 superfluous and will be contrary to the principle of positive interpretation.[42] Furthermore, such a reading will have to be rejected taking in to account international principles of human rights which the Constitution makes the benchmark for the interpretation

[41] In fact, many of the provisions in the second part of the third chapter of the FDRE Constitution, including Article 29, i.e. the Article pertaining to freedom of expression stipulate the rights they are providing for as rights to be enjoyed by 'Everyone' or 'Every person'. Only Articles 33 (Rights of Nationality), Article 38 (The Right to Vote and be Elected) , Article 39 (Rights of Nations, Nationalities and Peoples), Article 40 (The Right to Property), Article 41 (Economic, Social and Cultural Rights) and Article 43 (The Right to Development) are provided for Ethiopian Citizens, the Nations, Nationalities and Peoples of Ethiopia.

[42] Akhil Reed Amar (1998/99), 'Constitutional Redundancies and Clarifying Clauses, Seegers Lecture', *Valparaiso University Law Review*, p. 2.

of its bill of rights.[43] These principles would require that we reject a reading of sub-Article 7 that will validate all limitations of freedom of expression prescribed by law.[44] Therefore, sub-Article 7 should be seen as complementing sub-Article 6 and reiterating that so long as a limitation of freedom of expression is based on a law that meets the requirements of sub-Article 6, it would be considered legitimate. Such understanding will make sub-Article 6 the central article that needs to be analyzed in discussing the legitimate grounds for limiting freedom of expression.

Sub-Article 6 has three clauses. The first clause provides what kinds of limitations of freedom of expression are impermissible in addition to stating that limitations of freedom of expression can only be made through law. It provides that limitations on account of the *content* or *effect of the view point* expressed are not allowed. The first part of these prohibitions is a prohibition of "content based" limitation and seems to have been inspired by the US jurisprudence on "content based discrimination."[45] The second prohibition is a proscription of limitations on freedom of expression based on the "effect of the view point" of the expressed opinion. Its inspiration does not seem to be as obvious as that of the first prohibition. But one might contend that it is also inspired by US free speech jurisprudence on 'view point discrimination'.[46] This contention is fraught with troubles since the *effect* of a viewpoint is something different from the *viewpoint* itself. Hence, one could still argue that the U.S free speech jurisprudence prohibiting restrictions on speech based on the viewpoint reflected

[43] Article 13(3) of the FDRE Constitution and Article 19(3)of the ICCPR

[44] See in general Nihal Jayawickrama (2002), The Judicial Application of Human Rights Law*; National, Regional and International Jurisprudence*, (Cambridge University Press), pp 182-202 for a concise discussion of the principles of limitation of rights as developed by various international, regional and national human rights tribunals and courts. In addition to being prescribed by law, limitations of right must be necessary in a democratic society to advance the general welfare or the rights and freedoms of others, public health, public moral, safety, order or national security in order to be considered legitimate.

[45] See Keith Werhan (2004), *Freedom of Speech: A Reference Guide to the United States Constitution*, (Praeger Publishers), pp. 73-74 for a concise introduction of the US free speech doctrine regarding content based restrictions. See also *The_Oxford Companion to the Supreme Court of the United States*, Editors, Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman, (2005), Second Edition, (Oxford University Press) p. 949.

[46] See R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) in which the US Supreme Court held that a restriction of speech based on the view point expressed as opposed to being based exclusively on the proscribe-able nature of the speech is not valid.

in the speech is different from the prohibition of limiting freedom of expression based on the effect of the viewpoint of the speaker.

Naturally, questions might arise in relation to these impermissible grounds of limitation as stipulated under sub-Article 6. As far as content based limitation is concerned, one could ask if it is an absolute prohibition that would proscribe even limitations that are aimed at limiting the dissemination of materials with obscene content. Fortunately the answer for this query is quite obvious. Given that protecting the well-being of the youth is provided as an acceptable ground for limiting freedom of expression in the next clause of the same sub-article[47] and also taking into account the experience of other jurisdictions on the matter, one can safely assert that in relation to expression which contains obscenity, an exception can be made to limit freedom of expression on account of the obscene content.[48]

In addition to speech with obscene content, a question might arise as to the permissibility of limiting freedom of expression on account of its defamatory, profane or blasphemous content. Article 29(6) stipulates that preserving the honor and reputation of others is an acceptable ground for limiting freedom of expression. Hence as far as defamatory content of speech is concerned, the question could be answered by relying on the stipulations of Article 29(6).[49]

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[47] See FDRE Constitution Article 29(6), Second sentence.

[48] See *Miller v. California, 413 U.S. 15 (1973)* in which the US Supreme court has ruled that obscene speech falls outside the protection of the First Amendment. The Free Speech Jurisprudence of the US is of obvious relevance in relation to the question dealt with above since there is a striking similarity between the terms used to proscribe certain forms of restrictions on freedom of expression under Article 29(6) of the FDRE Constitution and the free speech jurisprudence of the US Supreme Court. See also the *Handyside v. United Kingdom (5493/72,* a case decided by the European Court of Human Rights in which the Court has affirmed that protection of morals is a legitimate ground for limiting freedom of expression.

[49] This assertion might not be entirely accurate when one takes in to account the fact that despite the general agreement that the need to protect the honor and reputation of others is a valid ground for restricting freedom of expression, there is an equally well established view to the effect that when an expression or communicative act pertains to public officials and figures or matters of public interest there should be a greater tolerance of freedom of expression even at the expense of the individuals whose honor and reputation might be tarnished by the expression. See , *New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964);* see also *Fred Khumalo and others v Bantubonke Harrington Holomisa*, Constitutional Court of South Africa, Case CCT 53/01, See also Yonas Birmeta (2008), 'Freedom of Expression and Crimes against Honor Under Ethiopian Law: An assessment of their Compatibility', *The Constitutional Protection of Human Rights in Ethiopia:*

However, the question relating to profane or blasphemous content, particularly, whether or not such content justifies limiting freedom of expression can not readily be answered by simply referring to Article 29(6).

Comparative and international experience on the matter is divided. In *Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952),* the US Supreme Court has held that restrictions on 'blasphemous' speech is unconstitutional. Contrary to this, the European Court of Human Rights had upheld restrictions on blasphemous speech and expression of opinion by asserting that the freedom of religion requires such restrictions.[50] A Court in South Africa has also upheld restrictions on expression of sacrilegious views asserting that such restriction is required by the right to dignity of the believers.[51] Which approach to the issue best fits the letter and spirit of the FDRE Constitution and the needs of our society is an open-ended question.

The prohibition of restrictions on speech based on the *effect of the viewpoint expressed* is also another delicate question that arises in relation to Article 29(6). Does it mean that freedom of expression cannot be limited even when the view expressed by the speaker has the effect of unleashing ethnic or religious conflict and violence? Answering this question either in the affirmative or negative without any qualification would be dangerous. If we simply say 'yes' it would mean that we are sanctioning violence, death and chaos for the sake of protecting free speech. If we simply say 'no', we might accord constitutional validity to drastic and disproportionate limitations of freedom of expression by the sate regardless of how remote and unlikely the danger of violence is. There is also the risk of silencing critiques in the guise of limiting freedom of expression in the interest of public order.

The best way to deal with this dilemma would be to accept that the impermissibility of effect-based limitation has some exceptions. These exceptions to the rule will permit effect based limitation in relation to expression or speech having some predetermined effects. Common sense and the experience of even the most liberal jurisdictions support this view.[52] In the

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Challenges and Prospects, Ethiopian Human Rights Law Series Vol. 2, AAU Law Faculty, (AAU Printing Press), Girmachew Alemu & Sisay Alemahu(eds).

[50] *I.A. v. Turkey, Application no. 42571/98 of 13 September 2005.*

[51] *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd and others*, a case before the High Court of South Africa (Witwatersrand Local Division).

[52] The position of the US Supreme Court in relation to fighting words is a case in point. See *Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)* in which the US Supreme court held that fighting words or words that are likely to provoke the

Ethiopian context, the candidates for such exceptional treatment will be speeches or expressions that have the effect of causing ethnic or religious strife. Narrowly designing such limitation is important to make sure that the exception will not swallow the rule.[53]

However, the requirement as to the proximity and probability of the threat before a limitation could be legitimately imposed cannot in the Ethiopian context be set as high as the US Supreme Court's *Brandenburg* "incitement of imminent lawless action" standard.[54] Granting the legislature some latitude on such matters might be quite advisable. So long as the legislation in place is genuinely designed and applied in a reasonable fashion and out of good faith to limit the expression of opinions that could cause ethnic or religious strife, limitations on freedom of expression should be considered acceptable.

Once again it is important to remember that such effect based limitation is an exception that has been read into the constitutional text and should be strictly construed as an exception. Specially, care should be taken to make sure that expressions of opinions that are unpalatable for the powers to be are not stifled through this exception. The view to be expressed must be such that there is *a reasonable and demonstrable likelihood* for it to cause religious or ethnic violence *in the foreseeable future* for it to be legitimately limited. Any legislation or its application that is not designed to restrict speech that poses such a danger should be considered unconstitutional. This exception to the prohibition of effect based restriction should include speech that is likely to

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average person to retaliation, and thereby cause a breach of the peace are beyond the scope of protection of the law.

[53] See *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992); to see the applicability of the rule that limitations of human rights should be construed narrowly.

[54] See *Brandenburg v. Ohio, 395 U.S. 444 (1969). In this case,* the US Supreme Court set the "incitement of imminent lawless action" test that should be employed in determining whether or not a speech is sufficiently inflammatory to justify restriction. The Court in this decision abandoned its earlier '*clear and present danger*' test. According to this new standard unless a speech, which is otherwise permissible (i.e. which is not illegal on account of being defamatory or obscene) cannot be forbidden unless it amounts to an incitement of imminent lawless action. Such a standard will be ill-suited in the Ethiopian context because of our ethnic and religious diversity which at times are sources of tension. One can easily imagine how any offensive remark about a certain religious or ethnic group, even if it does not qualify as an incitement to imminent lawless action, could easily result in violent conflict in our context.

provoke violence from collectivities like religious or ethnic groups, or that would trigger a violent reaction from a reasonable average individual. [55]

This approach that does not correspond with the 'clear and present danger' test or the 'incitement of imminent lawless action' test of the US Supreme Court[56] seems best suited for the Ethiopian context. The 'clear and present danger' test if taken quite literally, or the 'incitement of imminent lawless action' test as it is seems to be ill-suited in the Ethiopian context for two reasons. The first reason is the fact that the 'incitement of imminent lawless action' test is too exacting a standard to adopt in a country like Ethiopia. This is because according protection to speech that is not an incitement to imminent ethnic or religious violence but which still is an advocacy for such violence should not be tolerated. Obviously, tolerating such a speech will be a gravely irresponsible act. Making a distinction between advocacy and incitement seems to be playing with fire in light of the current reality of Ethiopia. Furthermore, the clear and present danger test with its convoluted history and excess baggage is clearly not advisable to be adopted in Ethiopia.

So far we have seen the clauses that provide the grounds which the FDRE Constitution has specifically singled out as being impermissible grounds of limiting freedom of expression. We have also tried to see what exceptions must reasonably be read into these clauses in light of the experience of other jurisdictions and the Ethiopian reality. However, limiting only, speech that could cause ethnic and religious violence does not seem to be reasonable. After all, there are other possible effects of speech that would justify limiting freedom of expression even in a democratic society. As far as these are concerned, the remaining two sentences or clauses of sub-Article 6 could give us a partial answer. The second clause provides that freedom of expression may be limited to protect the well-being of the youth and the honor and reputation of individuals. The third clause provides that any propaganda of war and the public expression of opinion intended to injure human dignity shall be prohibited by law. Hence, from these clauses it is clear that certain types of speech could be

[55] See *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) in which the US Supreme court held that fighting words or words that are likely to provoke the average person to retaliation, and thereby cause a breach of the peace are beyond the scope of protection of the law.

[56] The South African functional equivalent of this test is the "reasonable and justified" test. According to this standard that emanates from Article 36(1) of the South African Constitution, to conclude that a limitation of freedom of expression is justified, it must be a reasonable and justified limitation of the right to freedom of expression in an open and democratic society. See for example the *South African National Defence Union v Minister of Defence*, South African Constitutional Court CCT 22/98.

or should be limited based on the effect they might have and also based on the intention of the speaker.

The third clause of sub-Article 6 imposes an obligation on the legislature to enact laws that prohibit propaganda of war and also speech that is intended to injure human dignity. These could be taken as exceptions to the effect and content based limitation prohibition of the first clause. On the other hand, the second clause gives the legislature permission to enact laws that would protect the well being of the youth and the honor and reputation of individuals. This difference between giving permission in relation to the well being of the youth and imposing a duty in relation to propaganda of war and human dignity, could have been intended to reflect the importance attached to human dignity and peace by the framers of the Constitution. When one takes into account the horrors of civil war and various atrocities that were in the background of the constitution making process, this is quite understandable. So, from the second and the third provisions, the need to outlaw propaganda of war, and the protection of the well being of the youth, and the honor and reputation of individuals emerge as legitimate grounds of limiting freedom of expression on account of its effect. Hence, these constitute additional exceptions to the prohibition of effect and content based limitations that are imposed as a principle in the first clause of sub-Article 6.

To recap the discussion so far, sub-Article 6 of Article 29 has three clauses. The first one requires limitations on freedom of expression through laws that are not based on account of the effect or content of the law. This principle is supposed to guide all limitations on freedom of expression. The second clause *permits* limitations on freedom of expression for the sake of protecting the well-being of the youth and the honor and reputation of individuals while the third clause *requires* limitations to proscribe propaganda of war and protect human dignity. In addition to these four grounds of limiting freedom of expression, we have also read into the Constitution the prevention of ethnic and religious conflicts as a legitimate ground of limiting freedom of expression.

The discussion in relation to speech or publications that could have the effect of causing ethnic and religious conflict shows that reasonably and out of necessity the list of grounds for limiting freedom of expression, expressly mentioned in the Constitution cannot be taken as an exhaustive list. Though the list might appear to be exhaustive, it leaves out some grounds of limitation that are usually considered as legitimate grounds of limiting free speech such as national security[57] and the need to uphold the integrity of the judicial process

[57] See New York Times Co. v. United States, 403 U.S. 713 (1971) and *The Observer and The Guardian v. United Kingdom* ("The Spycatcher Case") European Court of Human Rights 216 Eur. Ct. H.R. (ser. A) (1991), See also *The Johannesburg*

and the fair trial rights of individuals.[58] This implies that the list cannot reasonably be taken as exhaustive. The danger of this implication is that it seems to invite additions of other "reasonable" grounds of limitation which might at the end of the day result in a very long list that would jeopardize freedom of expression.

Therefore, when introducing or acknowledging any new ground of limitation as constituting a legitimate ground of limiting free speech, extraordinary care should be taken. For instance, any such ground should be aimed at the protection of the fundamental rights of others like the right to a fair trial or it should be aimed at protecting a compelling state interest like national security. Furthermore, such new grounds to be read into the text by way of interpretation should be grounds of limiting freedom of expression recognized in established democracies or international human rights instruments Ethiopia has ratified.[59] Given that the Constitution, in principle, precludes limitation of freedom of expression based on the content or effect of the opinion being expressed, it should always be remembered that any ground of limitation is an exception and that such ground should be read very narrowly both in its introduction and construction.

3.3- Quantum of Limitations

Once we have a fair idea of what constitute legitimate grounds of limiting freedom of expression, then the next question would be to what extent could the state go in limiting the rights based on these grounds. How far can the state go in protecting human dignity, individual honor and reputation or the integrity of the judicial process? There are some points that are worth noting in relation to this. First, we might end up in a situation in which excessive limitations based

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Principles on National Security, Freedom of Expression and Access to Information, available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>, last viewed on January 15, 2010, These Principles were adopted on 1 October 1995 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. These Principles have been endorsed by Mr. Abid Hussein, the UN Special Rapporteur on Freedom of Opinion and Expression, in his reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in its annual resolutions on freedom of expression every year since 1996.

[58] See *Branzburg v. Hayes , 408 U.S. 665 (1972) and Gannett Co. v. DePasqual443 U.S. 368 (1979) and State v Mamabolo* CCT 44/00, *MidiTelevison v Director of Public Prosecution* Case No. 100/06.

[59] See Article 13(2) of the FDRE Constitution.

on legitimate grounds would severely undermine freedom of expression (even when there is a legitimate ground for limiting freedom of expression), unless some restrictions are set on the extent to which the state can limit freedom of expression. Therefore, some form of limitation on the limitations themselves is necessary.[60]

The text of the Constitution already sets a limitation on the form which the limitations can take. It provides that the limitations have to be made through law, and this rules out limitations that are not prescribed by the law even if they are based on a legitimate ground. Other than this formal requirement, the text of the Constitution does not provide any substantial restriction on limitations to be imposed on freedom of expression based on legitimate grounds. Hence, adopting some substantive restrictions on the limitations that could be set by the state on freedom of expression is necessary. That is why, in most democratic countries, the proportionality test/analysis (which requires that any limitation imposed on a right be proportionate to the legitimate aim being perused) is employed to distinguish acceptable and unacceptable limitations on human rights.[61]

There are also some other considerations that need to be taken into account, especially in relation to the purposes and nature of freedom of expression and also the specific Ethiopian context. It is very difficult to ascribe one single overriding purpose or function to freedom of expression. One cannot fail to acknowledge that debate on issues of public concern, facilitating self governance and the democratic process are some of the most important functions of freedom of expression.[62] In addition to these, freedom of expression seems to be of such a 'fragile' nature that limitations upon it could have an unintended "chilling effect" unless care is taken in designing and implementing laws limiting the freedom.[63] Particularly, in the Ethiopian context there is a need for being highly conscious of the nature and function of freedom of expression.

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[60] See the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984). Available at <http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/siracusa.html>, last viewed on January 15, 2010.

[61] Andrew Clapham (2007), *Human Rights: A Very Short Introduction*, (Oxford University Press) , p.99.

[62] See Article 29 (4) which provides that "…the fee flow of information, ideas and opinions …are essential to the functioning of a democratic order…" See also Meiklejohn (1961), *Supra note* 7.

[63] See Frederick Schauer (1978), 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect', *Boston University Law Review*, 58.

The political culture of Ethiopia is very intolerant of dissent and criticism in public.[64] A challenge or criticism of decisions (or policies), or questioning the competence of those in power had been considered as a rebellion and treason. This makes freedom of expression very fragile in Ethiopia and will also make the potential chilling effect of limitations on the freedom more pronounced. Hence, it's important to make sure that limitations, even those based on legitimate grounds will be carefully scrutinized when they relate to expression of opinions related with political matters. Such scrutiny must preclude the stifling of dissent while protecting the honor and reputation of individuals, national security and the like. Furthermore, given that it has the function of aiding self governance and facilitating the democratic process, a careful and critical scrutiny of the magnitude of restrictions on freedom of expression is crucial to protect people from various forms of interference and pressure in the exercise of their rights.

4. The State of the Freedom of Expression Jurisprudence in Ethiopia

The questions raised in the preceding sections are not simply of academic interest. The experience of the various jurisdictions that have been cited show that the questions are practical and require judicial answers, in addition to which academic discourse can have a significant contribution. These important questions do not have authoritative answers within our legal system. The present author has given some tentative answers as to how these questions should be addressed within our constitutional system. But these are tentative answers and there is hardly a body of case law or authoritative doctrinal writing that could be used to confirm or repudiate the answers provided above.[65] Neither the House of Federation (the body entrusted with the ultimate authority of interpreting the Constitution) nor the ordinary judiciary has developed settled and specific standards, tests and principles that could be used in resolving cases arising in

[64] *See infra* note 75.

[65] Of course, there is an impressive body of legislation (if not in terms of quality, at least in terms of volume) relating to freedom expression (See the "Freedom of the Mass Media and Access to Information Proclamation No. 590/2008" and the "Broadcasting Service Proclamation No.533/2007". Hence, one could argue that this corpus of legislation should be taken as part of an Ethiopian freedom of expression jurisprudence. However, such argument with all its merit is not convincing since the questions that arose in the previous section (Section 3), cannot be answered by referring only to the legislations in question. While conceding that these statues are important and could form part of an Ethiopian free speech jurisprudence, they will be quite inadequate by themselves.

relation to freedom of expression. In fact, the former has not yet rendered a constitutional interpretation that directly involves freedom of expression and so far it has not given any decision that would shed light on its position as far as Article 29 is concerned.[66] Furthermore, the ordinary courts which routinely entertain criminal and civil cases that have a direct bearing on freedom of expression have hardly addressed the questions raised above.

The author of this article will discuss the following few cases to illustrate the manner in which the ordinary courts have handled cases pertaining to freedom of expression without sufficiently taking into account the implications of Article 29.

In *Public Prosecutor v Asrat W.* (Cr. F.N 74910), the defendant was charged for failing to comply with Article 10(1), (2) (a) and 20 of the Press Proclamation No. 34/1992[67] and also Article 34(1) (a) of the Criminal Code.[68] The charges

[66] See *Journal of Constitutional Decisions* (Hamle 2000), Vol.1., Number 1, (House of Federations) in Amharic

[67] A Proclamation to Provide for the Freedom of the Press, Proclamation No. 34/1992. Article 10 of this Proclamation provides for the duty of the press to ensure the lawfulness of the contents of press products as follows; "(1) Every press has the duty to ensure that any press product it circulates is free from any content that can give rise to criminal and civil liability. (2) Without prejudice to the generality of sub-article 1 of this Article, any press shall have the duty to ensure that any press product it issues or circulates is free from: a. any criminal offence against the safety of the State or of the administration established in accordance with the Charter or of the national defence force; b. any defamation or false accusation against any individual nation/nationality, people or organization; c. any criminal instigation of one nationality against another or incitement of conflict between peoples; and d. any agitation for war. (3) Responsibility for carrying out the duties specified under sub-articles 1 and 2 of this Article shall lie as follows: a. in the case of a periodical press such as a newspaper, magazine or journal, on the concerned editor, journalists or publisher; b. in the case of press other than those specified under this sub-article 3(a), on the publisher; c. in the case any press product disseminated by radio or television, on the concerned journalist and program editor."

Article 20(1) of the same proclamation provides that;"Where any press is found to have failed to carry out its duties under sub-articles 1 and 2 of Article 10 of this Proclamation, the person liable pursuant to sub-article 3 of Article 10 shall, without prejudice to the liabilities and penalties under the Penal Code, be punishable with imprisonment for not less than one (1) year and not more than three (3) years or with a fine of not less than Birr ten thousand (Birr 10,000) and not more than fifty thousand (Birr 50,000) or with both such imprisonment and fine. "

[68] Article 34(1)(a) provides for ' Liability for Crimes Committed through the Mass Media' by stipulating that ' (1) Criminal liability for crimes committed through

arose in connection with a report published in a newspaper called *Seifenebelbal*. The report in question alleged that two individuals who were suspected of being OLF members and who were detained in secret prisons had died and their bodies had been thrown away in a certain locality in Addis Ababa. The accused argued that his newspaper has merely reported what was reported on the Voice of America Radio. The Court reasoned that, the accused as the editor-in-chief of the newspaper which carried this news had the ultimate duty to ensure the lawfulness of the content of whatever was published in the newspaper and particularly, he had the duty of taking into account the implications and potential effects of what was being published for the security of the state. Accordingly, the Court convicted the accused and sentenced him to one year of imprisonment.

It is interesting to note that the Court did not bother to ascertain what the exact criminal offense against the safety of the State or of the government or of the national defense force is? and whether all the factual elements of this offense have been fulfilled? Nor did the Court elaborate on the duty of the press to be conscious of the effects of what is being published on the security of the state. Particularly, the court did not raise any questions or shed any light as to the implications and compatibility of such a duty, i.e. the duty of newspapers and other publications to be mindful of their effects in line with the constitutionally guaranteed freedom of expression.

In the case of *Public Prosecutor v Takele K. and Daniel G.* (Cr. F.N 72175), the accused was charged with the violation of Article 10(1), 10 (2)(b) and 20(1) of the Press Proclamation No. 34/1992. The circumstances that constituted the factual ground for the charge relate to a report published on a newspaper called *Zarenew.* In this report it was alleged that a certain minister had asserted in a meeting that [measures] should be taken not only against members of the OLF armed forces but also all Oromos reflecting the organization's views. The defendant did not try to challenge either the factual or legal arguments presented against him, rather he informed the Court that he was only the nominal editor-in-chief and he was not involved in any capacity in the work of the news paper.[69] Accordingly, the Court convicted the accused although it suspended the sentence.

periodicals shall be as follows: (a) a person who was registered as editor in chief or deputy editor when the periodical was published shall be liable…'

[69] Trying to avoid the not so infrequent arrest and charges brought against them, actual editor in chiefs of privately owned newspapers used to hire a nominal editor-in-chief (an editor-in-chief in title or name only) who will take the fall for them whenever charges are pressed in relation with what is published in the newspaper. The New

Once again, the Court did not raise any questions as to the compatibility of freedom of expression as embodied in the Constitution and restricting freedom of expression on a matter of public interest. The Court did not inquire if imposing a duty on reporters to guarantee complete factual accuracy of all their reports, a strict liability of sorts without any qualification and excuse, is in conformity with the letter and spirit of the Constitution. Obviously, if a member of the cabinet had expressed the sort of opinion that the minister in question was allegedly said to have expressed, then it is something news-worthy and deserving public debate. Naturally the public has an interest in being informed of and subjecting to scrutiny the opinions held by public official on matters of public interest. So the court should have inquired as to who should bear the burden of proving the falsity or truthfulness of the reported statement? In light of the public interest to be kept informed on matters of public interest by the press, should the press bear the heavy burden of guaranteeing the truthfulness of everything that they publish? What should happen if a press outlet publishes something that is not true under a mistaken assumption that what is being published is true after engaging in a reasonable, however unfruitful, effort to verify the veracity of the publication? All these questions were germane to the case at hand and crucial in developing a jurisprudence of freedom of expression. These questions were not raised by the court at all.

In *Public Prosecutor v Mesfin N.* (Cr.F.N 71556), the defendant was accused of violating Article 10(1), 10 (2)(b) and 20(1) of the Press Proclamation No. 34/1992. The public prosecutor alleged that the accused had intentionally defamed the private complainants in the case. The Court acquitted the defendant since he was able to show to the satisfaction of the court the truthfulness of the report in question through documentary evidence. Once again no flags were raised to interrogate the legal basis for the criminal charge in light of the Constitution. To some extent, the questions that were raised in the previous paragraph as being germane for *Public Prosecutor v Takele K. and Daniel G.* (Cr. F.N 72175) are also relevant in this case.

In *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562), the public prosecutor's charge invoked Article 10(1), (2) (c) and 20(1) of the Press Proclamation No. 34/1992. The charges arose as a result of an opinion published in a religious newspaper called *Islamia*, the editor-in-chief of which was the accused. The article that was published in the newspaper accused the Minster of Education of harboring hatred against Ethiopian muslims and deliberately attempting to deny them their constitutionally guaranteed rights. These accusations were made in a rather colorful language and very strong words. The accused argued that the

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Criminal Code has provisions intended to put an end to this practice. See Article 43(1) (c) of the Criminal Code of the Federal Democratic Republic of Ethiopia.

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prosecutor has not proved the falsity of what was asserted in the piece published by the newspaper. The accused further argued that he should not be found guilty since the author of the piece in question was exercising his freedom of expression when he wrote the article in question.

As opposed to all the cases discussed above, the judge engaged in an analysis of freedom of expression under the FDRE Constitution. She asserted that although freedom of expression is enshrined under Article 29 of the FDRE Constitution, the right is not an absolute right. She went on to point out that there are certain circumstances under which the right could be limited according to Article 29(6) of the FDRE Constitution. The judge went further and asserted, and with all due respect erroneously, that the content and effect of a viewpoint are stipulated as legitimate grounds for the limitation of freedom of expression under Article 29(6) of the FDRE Constitution. However, as it has been discussed above, this is clearly the exact opposite of what the Constitution provides. To say the least, the judge misread Article 29(6) of the Constitution and concluded that it allows what it explicitly prohibits. As astonishing as this might be, Article 29(6) was construed as having a meaning that is diametrically opposed to its plain meaning.

While these cases cannot be said to be sufficiently large enough to draw definite conclusions regarding the state of jurisprudence of freedom of expression in Ethiopia, they can shed some light on the situation and enable us to make some inferences. The first thing one can note in relation to the above cases is that, in most of the cases, the courts went on and applied the statutory provisions invoked by the public prosecutor without any attempt to attenuate the concerns that might arise in connection with the adverse implications of these provisions for freedom of expression and the press. With the exception of one case in which the defendant invoked freedom of expression as a defense,[70] in all other cases, freedom of expression and the concerns attendant to it in relation to press crimes were not given any consideration in the decisions of the courts. Even in the case where freedom of expression was given consideration in the disposition of the case, its consideration obviously left a lot to be desired. To start with, the Court read the prohibition set down by the Constitution as permission and accordingly concluded that what are provided as illegitimate grounds for limiting freedom of expression are legitimate grounds of limiting the freedom.

Therefore, in all the above cases, one cannot see the courts inquiring whether or not the interest being advanced by the statutes that were invoked by the public prosecutor are interests that could be taken as legitimate grounds for

[70] *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562).

limiting freedom of expression in accordance with Article 29(6) of the Constitution. In the absence of such inquiry, it is no surprise that the courts have not proceeded to raise questions regarding the proportionality or the quantum of limitation. This is so because, reasonably, the judicial analysis of proportionality of limitations is always preceded by an inquiry as to the existence of legitimate grounds for limiting a right. Our courts seem to be oblivious to the need to inquire into the legitimacy of an objective meant to justify a limitation on freedom of expression; yet, one can hardly expect them to weigh the end to be served by a legislation with the intention of determining its proportionality with the degree or extent of limitation it imposes on freedom of expression.

Nevertheless, it should be noted that this observation is not being made out of ignorance of the fact that ordinary courts in Ethiopia have a limited role to play in interpreting the Constitution. However, even if we take the most conservative view on the matter, according to which the courts have no direct role in the enforcement of fundamental rights guaranteed by the Constitution, one cannot deny that ordinary courts can detect tensions that might exist between ordinary legislation and the Constitution and refer their queries to the House of Federation through the Council of Constitutional Inquiry.[71] Accordingly, even those who argue that ordinary courts are supposed to have a very passive role in enforcing fundamental freedoms will not deny the capacity and duty of courts to be sensitive to possible infringements of fundamental rights through ordinary statutes.

Despite this fact, the above cases show application of legislation without showing any regard to the apparent or real tension between the provisions being cited by a public prosecutor and the Constitution. For instance, in *Public Prosecutor v Ibrahim M.* (Cr.F.N 71562), the judge was clearly of the opinion that the legislation being relied upon by the prosecutor was one that imposed a limitation on freedom of expression based on the content of and effect of the viewpoint that is being expressed. Given that Article 29(6) of the Constitution rejects limitations on freedom of expression based on the content of and effect of the view point that is being expressed, the judge should have referred the matter to the Council of Constitutional Inquiry.

In light of this discussion, the most plausible conclusion is only one that underscores the dire state in which the jurisprudence of freedom of expression finds itself at the moment. Unfortunately, the judiciary, the Council of Constitutional Inquiry alongside the House of Federation, and the academia could not be said to have succeeded in giving meaning to Article 29 of the FDRE Constitution. The same could be said about many of the important

[71] Council of Constitutional Inquiry Proclamation *No.25012001,* Article 21 (1 &2).

provisions of the Constitution. But maintaining our focus on freedom of expression, we can observe the clear dearth of scholarly exposition and doctrinal writings that touch upon the questions raised in the preceding section of this article. Most unfortunately, the decisions of the ordinary courts and also that of the House of Federation and the Council of Constitutional Inquiry do not provide any consolation.

5. The Practical Implications of Our Jurisprudential Dearth in Freedom of Expression

The dearth, if not the virtual absence, of any case law and comprehensive doctrinal interpretation of freedom of expression that provide authoritative answers to the questions raised in Section 3 above is not to be lamented just because of the intellectual impoverishment that it indicates. This impoverishment has serious practical consequences that surpass the realm of juridical science. From a more practical point of view, this jurisprudential dearth means constant uncertainties as to what expressive conducts are protected and what is not protected under Article 29 of the FDRE Constitution. It also means lesser and weaker restraints on the state's ability to restrict freedom of expression. For the bearers of any civil and political right to fully enjoy their right, a strong guarantee of their right that seals off the core of the right from governmental interference is very crucial. Such strong guarantees can hardly be said to exist in the absence of a bright line that delineates the core of the protected sphere from the unprotected. The fact that we have not developed a meaningful freedom of expression jurisprudence in Ethiopia so far has meant that nobody can say for certain where this line is. This in turn makes freedom of expression more vulnerable to violation and it also has led to a situation where 'freedom of expression' has come closer to becoming a platitude rather than a concrete legal right.

As things stand today, like most provisions within the bill of rights of the FDRE Constitution, Article 29 appears to be a hazy and rosy assemblage of noble minded assertions the full potential of which has yet to be realized on the ground. A great deal of cynicism[72] surrounds these provisions of the Constitution because not so many seem to pay much attention to them except for the purpose of political rhetoric. They are not considered useful in resolving legal problems. Nor are they considered as giving rise to legally enforceable and tangible rights. Even in the circle of legal professionals, be it among

[72] Tsegaye Regassa (2009), 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia', *Mizan Law Review*, Vol.3, No.2. pp 305-306.

academics or practitioners, there is a view that human rights are a) the stuff of the naïve human rights activist who cannot be considered as a serious and hard nosed lawyer even if his professional training is in law; or, b) the stuff of the opportunist who is milking human rights for financial and political gain.

In the midst of all this skepticism that broods over freedom of expression and like liberties, the losers will be the bearers of these rights who are supposed to enjoy these fundamental rights. This loss might not be evident in material terms. However, the loss is immeasurable for those who believe that these freedoms originate from and are manifestations of the inherent worth and dignity of human beings.

Furthermore, the vulnerability of freedom of expression and its want of robust protection has obvious adverse implications for our democratic aspirations. The weak protection of freedom of expression inevitably and naturally results in an arrested democratic development. It stuns the emergence of a tolerant civic culture that prefers deliberation and dialogue over confrontation and violence. All these contribute to the persistence of violent conflicts and poverty in our society. The absence of public deliberation and discourse gives rise to many societal ills in every aspect of life.

6. The Causes Explored

When we inquire into the causes that might have resulted in the jurisprudential dearth we find ourselves in, many possible causes come to mind. One important cause that seems to have contributed significantly to the current dismal state of the jurisprudence of freedom of expression in Ethiopia seems to be the low threshold of tolerance that exist for political dissent and vocal critique in the country.[73] While the current government of Ethiopia has exhibited, relatively speaking, a greater deal of tolerance to political criticism and dissent compared with previous regimes, its level of tolerance still seems to fall short of what is provided under the FDRE Constitution.[74] The overwhelming dominance of the apparatus of power by one party means that the party's political imperative of prevailing over all opponents and critiques will lead to the suppression of freedom of expression.

[73] See *supra* note 17.

[74] See for example U.S Department of State, Bureau of Democracy, *Human Rights, and Labor 2008 Human Rights Reports: Ethiopia*, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm> and last accessed on October 29, 2010.

Furthermore, the *dominant-state* political culture of the state, which is not entirely friendly to freedom of expression, also compounds the problem.[75] Even when a deliberate policy is not pursued towards silencing the most potent critiques and potential challengers, the deeply rooted culture of perceiving opposition as rebellion and equating dissent with treason does not provide the most favorable setting for the development of free speech jurisprudence. The dominant political culture is such that critique and dissent is to be manifested either in oblique double entendre or in outright rebellion in the battlefield.[76]

This cultural orientation, deeply embedded in the dominant Ethiopian political psyche naturally favors passive acceptance of any limitation on freedom of expression relying on the truism that the freedom is not an absolute one. Here it should be underscored that what is being indicted as intolerant of dissent is the *dominant-state political culture* in modern Ethiopia. This does not negate the fact that the existence of a democratic political culture among various Ethiopian ethnic groups. Unfortunately the *dominant-state political culture* in modern Ethiopia had been impervious to the inspiration and lessons that should have been drawn from the democratic practices and traditions of such groups.

In addition to the above factors, the uncertainty and confusion that bedevils the judiciary as to its role in the enforcement of fundamental rights enshrined in the Constitution is also another important factor that might have contributed to the current jurisprudential state of freedom of expression in Ethiopia.[77] In this confusion, a significant portion of members of the legal profession have come to believe that the Constitution is off limits as far as the judiciary is concerned and that constitutional provisions could not be invoked in ordinary courts. While there is no evidence that this is a view that is dominant or even widespread, the fact remains that the judiciary in Ethiopia is quite weary of being seen engaged in any exercise that could be construed as a usurpation of the House of Federation's power of constitutional interpretation. One can hardly overemphasize the extent to which the judiciary's reluctance to expound on

[75] See Donald N. Levine (1965), *Wax and Gold: Tradition and Innovation in Ethiopian Culture*, (reprinted by Tsehai Publishers). See also, J. Abrink (2006), "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia in and Its Aftermath", *Journal of African Affairs*, p.193, see also Sarah Vaughan and Kjetil Tronvoll (2003), "*The Culture of Power in Contemporary Ethiopian Political Life,"* (Sida Studies), pp.32-35.

[76] *Ibid.*

[77] See Yonatan Tesfaye, 'Whose Power is It Anyways: The Courts and Constitutional Interpretation in Ethiopia', *Journal of Ethiopian Law*, Vol. 22, No. 1 for a discussion of the debate regarding the proper role of courts in interpreting and enforcing the constitution.

constitutional rights , at least by mediating access to these rights through various international human rights treaties, is hindering the development of our own human rights jurisprudence.

Furthermore, another factor that might contribute to the rudimentary condition of the jurisprudence on freedom of expression in Ethiopia at the moment is the fact that members of the legal profession have very little familiarity with the rationale, content and scope of freedom of expression as a legal right.[78] Their stay in law school and their professional experience seems to have hardly offered most legal experts with a meaningful knowledge of the legal issues that arise in relation to freedom of expression.

Conclusions

In this article, we have raised some questions pertaining to freedom of expression under the FDRE Constitution. Alongside these questions, some tentative answers for the questions have been forwarded. At the same time, the author has tried to show through a discussion of some cases that these questions have yet to be answered in an authoritative manner. This in turn leads to a conclusion that there is a jurisprudential dearth in Ethiopia as far as freedom of expression is concerned. The author has also explored the practical implications and causes of this void.

It has been argued that the void in jurisprudence regarding freedom of expression has adverse implications for the enjoyment of the right, for the dignity of the bearers of the right and for the development of a democratic order and culture that could help us overcome many of the political and economic challenges we face as a society. Furthermore, the author has argued that the causes of the jurisprudential dearth could be the logic of political power, the undemocratic political culture of the Ethiopian polity, the limited constitutional role of courts in interpreting the Constitution and the low level of familiarity Ethiopian lawyers have with the intricate issues that arise in relation to freedom of expression. Hopefully, the situation will not remain so dire and will change for the better. Of course, this can happen only if those entrusted with the task of constitutional interpretation, the judiciary and the legal academia discharge the duty they owe to society. ■

[78] Hopefully, the inclusion of a course on media law in the new curriculum of legal education will address this problem. See the *JLSRI Syllabi Catalogue* (2008), Unpublished, p. 520.