An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia

A Comparative Study

By Gedion T. Hessebon

LL.M LONG THESIS

SUPERVISOR: Professor Renata Uitz

Central European University

1051 Budapest, Nador Ucta 9

Hungary

Table of Contents

Abstract

In the Ethiopian state, the political culture and history of the state coupled with tensions that arise from the heterogeneity of the body politic pose challenges to constitutionalism and freedoms like freedom of expression. The experience of the US and South Africa show that constitutionalism faces and had faced challenges even in countries we consider to be well established constitutionalist states. The relative success of constitutionalism in this countries reveals that constitutionalism is a work in progress in which contextualization of abstract normative ideals has to be undertaken by a functionally judicial body. Constitutionalism could also overcome some of the major challenges it faces in Ethiopia if it was to be conceived as a work in progress wherein the Council of Constitutional Inquiry or even a future Constitutional Court lead the way in the process of contextualization.

Introduction

In what could be considered the third wave of democratization, Ethiopia had had made a decisive transition by officially becoming a Federal Democratic Republic with a constitution that has an extensive bill of rights. This transition has occurred, debatably on paper in 1995 with the Transitional Charter serving as a prelude. However, it seems the Constitution has not been too successful in restraining the excesses of the political branches and safeguarding the freedoms it proclaims to protect. The adoption of the constitution has yet to turn Ethiopia into a constitutional democracy. It is sometimes contended that this gap between what the constitution envisages and the reality on the ground is inevitable and even desirable. Such arguments are premised on a characterization of the Ethiopian political environment as being hardly conducive if not outright hostile to constitutionalism. Especially the ethnic and religious diversity that dominates the political landscape in Ethiopia and the autocratic political culture that is predominant are cited as factors that make constitutionalism impractical in Ethiopia. These factors, predating the Constitution have been present throughout the history of the Ethiopian state and as a result assumed an air of permanence. The purpose of this is paper is to argue that constitutionalism is a project that could be salvaged despite the difficulties it faces. It is argued her that this could be done through a system of constitutional review that contextualizes and enforces the normative ideals and principles of constitutionalism in Ethiopia.

In the first chapter of the paper the author will explore some definitional issues and address the question of methodology. As a background to the main thesis, this chapter will try to forward a clear and comprehensive working definition of constitutionalism. Furthermore, there will also be a discussion of the comparative methodology that the author has adopted. The methodological discussion will also explain the choice of the US and South Africa for the comparison and also

the choice to focus on freedom of expression.

In the second chapter, there will be a discussion of the discordance between the constitutional guarantee of freedom of expression and the reality on the ground in which political dissent and opposition has become a risky affair. Specifically, the discussion will focus on the political speech, freedom of the press and the broadcast media. An attempt will be made to show the risks carried by political speech, the barge of prosecutions the press is subjected to and the threat it faces from the new press law and also the commandeering of state owned broadcasters for the partisan purposes of the ruling party. The discussion in the second chapter will go on to explore ethnic and religious heterogeneity and also a violent prone autocratic political culture as factors that could make constitutionalism difficult or even dangerous. The challenge of protecting freedom of expression in such a hostile political environment will be used to illustrate this point. This will be followed by a discussion of the free speech jurisprudence of the US and the RSA. This discussion is meant to provide insight not just in to how these two states protect free speech but also to understand how constitutionalism can overcome.

Ultimately, the thesis will demonstrate that constitutionalism is a work in progress and that its success has never an instant success even the celebrated constitutional democracies like the US and South Africa. The thesis will show the centrality of constitutional review as a mechanism of enforcing and contextualizing the normative ideals and principles of constitutionalism. The thesis will also show that with a mindset that views constitutionalism as a work in progress and an effective system of constitutional review, constitutionalism could become successful in Ethiopia as well.

1. Background; Notes on Definition and Methodology

In this chapter, as a background to the discussion in subsequent chapters, there will be a discussion of the notion of constitutionalism and also a discussion of the purpose and methodology of the paper. In the first sub section of the chapter the author will discuss the notion of constitutionalism and its various conceptions. The discussion will be concluded by adopting a comprehensive working definition of constitutionalism for the purposes of the thesis. In the second section of this Chapter, the focus will be on the scope of the paper, the comparative methodology the author has chosen and also the need this paper is expected to meet.

1.1The Notion of Constitutionalism and its Relation to Fundamental Rights and Democracy

As many of the "isms" we use and abuse, constitutionalism is a concept many of us would find difficult to define. Despite this difficulty and the author's limitations, this research undertaking requires a working definition of the notion of constitutionalism. Without defining what it is, one can hardly make the case for or against the concept. In this section, the author will discuss constitutionalism and try to adopt a working definition of the concept for the purpose of this thesis. The discussion will specially focus on the relationship of constitutionalism to fundamental freedoms and democracy.

In many of the discussions relating to what constitutionalism is, one can see two conceptions of the notion. Of course these are neither mutually exclusive nor diametrically opposed conceptions of constitutionalism. Their principal difference lies in the scope and breadth of their portrayal of the concept. The first conception, which we might call the minimalist conception of constitutionalism,

would take constitutionalism to be nothing more than a government limited by law[1]. According to the other point of view, which we might call the expansionist conception of constitutionalism; in addition to a limited government, constitutionalism will also entail popular sovereignty and a guarantee of fundamental freedoms.

McIlwaim asserts that "…in all its successive phases, constitutionalism has one essential quality; it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotistic government, the government of will instead of law." [2] This statement, encapsulates the essence of the minimalist conception of constitutionalism. To a person who subscribes to this view, a state would qualify as a constitutionalist state even if it is not a democratic state or a state that guarantees respect for fundamental human rights, as long as the government is one limited by law. The criterion is whether or not there is a binding legal limitation on the power of government. If the answer to this question, in relation to a certain state is in the affirmative, then that state could be deemed as a constitutionalist state. It might be a state with universal suffrage and a periodically elected government or it might be a hereditary monarchy with no democratic pretensions. It might be a state with an extensive bill of rights that guarantees all sorts of liberties and freedoms or it could be a state that accords no formal guarantee of such liberties. So long as the government is limited by law, so long as the will of the government or the sovereign is subject to legal constraints; that state will qualify as a constitutionalist state. So, this

[1] This notion of government limited by law is not the same thing with the principle of rule of law. Rule of law requires the exercises its powers through the instrumentality and on the basis of laws. Though there is no widespread consensus on the meaning of rule of law, especially given the various conceptions of the notion in different jurisdictions, the classic, though often criticized Diciena conception of rule of law has three elements; no sanction with out a clear breach of law established before a court of law, equality before the law regardless of the rank or condition of a person and finally primacy of ordinary laws as a source of rights and obligation. Rule of law is meant principally to preclude arbitrary exercise of power while constitutionalism is strives to limit the powers of government even when the exercise of such powers is not arbitrary and with clear statutory authorization. A government limited by law, when it signifies constitutionalism is analytically distinct and broader from rule of law in that it sets limitation of governmental power, be it arbitrarily or rationally exercised as a desirable goal. The objective of having a limited government goes far beyond the desire to ensure equality before the law, avoid retroactivity of laws or rule by fiat and aims at protecting a sphere of liberty free from governmental interference. See in general, A. Sajo, Limiting Government: An Introduction to Constitutionalism , CEU Press 1999, pp 205-217; see also M. Neuman, The Rule of Law, Politicizing Ethics, Ashgate 2002, pp 1-2

[2] C. H. McIlwaim, Constitutionalism: Ancient and Modern, Liberty Fund Inc., 2007 (Originally Published by Cornell University, 1940), p. 21

conception has a rather low threshold of constitutionalism.

On the other hand, the expansive view of constitutionalism would add on top of legal limitations on governments, guarantees of a democracy and fundamental rights as the defining features of constitutionalism. It is not enough that there are constraints on the powers of government. These limitations on the powers of government must be complemented by popular sovereignty and recognition and respect for fundamental freedoms. Such a view can be reflected in U. K. Preuss's claim that ; " constitutionalism encompasses institutional devices and procedures which determine the formation, structure and orderly functioning of government, and it embodies the basic ideas, principles and values of a polity which aspires to give its members a share in government"[3]. He goes on to assert "…in the last analysis constitutionalism involves much deeper than the idea of limited government, important as this undoubtedly is"[4]. A similar view is reflected by U. K. Preuss in a book he coauthored wherein it is asserted that "constitutionalism is the philosophical source and the institutional embodiment of political freedom"[5].

In a less contemporary and less scholarly work, T. Paine stresses the inherence of a democratic element in constitutionalism from the perspective of the making of the constitution itself by maintaining that the essence of constitutionalism is the act of a people constituting government through a written and supreme law[6]. L.Henkin asserts that contemporary constitutionalism demands, *inter alia* , popular sovereignty, democratic and representative governance and respect for individual rights[7]. M. Rosenfeld also opines that the term constitutionalism in its contemporary and wider sense includes respect for the

[3] U. K. Preuss, The Political Meaning of Constitutionalism; in R. Bellamy ed., Constitutionalism, Democracy and Sovereignty: American and European Perspectives, Avebury 1996, p. 12. A similar view is reflected by U. K. Preuss in a book he coauthored. Constitutionalism has been described as " the philosophical source and the institutional embodiment of political freedom"

[4] Id, p. 25

[5] J. Elster, C. Offe and U. K. Preuss, Institutional Design in Post Communist Societies, Cambridge University Press1998, p. 63

[6] T.C. Gray, Constitutionalism; An Analytical Framework: in J.R. Pennock and J.W. Chapman ed., Constitutionalism, 1979, New York University Press, P.189

[7] L. Henkin, A New Birth of Constitutionalism : Genetic Influences and Genetic Defects, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, Duke University 1994, pp. 41-42

protection of fundamental rights[8]. A. Sajo points out "constitutionalism is the restriction of state power in the preservation of public peace. It seeks to cool current passions without forfeiting government inefficiency."[9] This quote can arguably be interpreted as a definition of constitutionalism in the minimalist sense. However, Sajo asserts this to be an inadequate definition of constitutionalism and note that the concept is one that "resists the oppression of definition"[10]. Furthermore, his subsequent discussion of the concept of constitutionalism shows his understanding of constitutionalism to be intimately associated with fundamental rights[11]. It is interesting to note that almost all of the scholars that adopt the expansive view of constitutionalism from a post WWII – post Cold War temporal vantage point. This paradigm of the authors makes their views of special significance for this thesis since the focal jurisdiction of this study; Ethiopia is a country that had a painful experience with a brutal Marxist military regime before the adoption of its current constitution.

But as has been pointed out earlier, the two conceptions of constitutionalism though different are not contradictory. They both underscore that constitutionalism implies a limited government. While the expansionist view incorporates certain values and ideals as integral elements of constitutionalism, the minimalist view seems to be indifferent at to the inherence or otherwise of popular sovereignty and fundamental freedoms in the concept of constitutionalism.

A. Constitutionalism and Fundamental Rights

Regardless of the conception of constitutionalism one might subscribe to; be it a minimalist or expansionist view of the concept, constitutionalism will be related with fundamental rights. If one envisages constitutionalism in the expansionist i.e. the broader and contemporary sense; then constitutionalism will be directly related with fundamental rights. This relation will not only be direct

8 M. Rosenfeld, Modern Constitutionalism as Interplay between Identity and Diversity, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, Duke University 1994, p.1
9 A. Sajo, Limiting Government: An Introduction to Constitutionalism, CEU Press 1999, p.9
10 Ibid
11 Id., pp 9-14

but obvious and evident as well. This is so because the expansionist conception of constitutionalism considers the constitutionalist state, by its very definition, to be a state in which fundamental rights are enshrined in a supreme law, above and beyond the reach of the ordinary political process. It is a state in which the constitution serves as a bulwark of fundamental rights against the vagaries of the majority and the government.

On the other hand, if one was to adopt the minimalist conception of constitutionalism, the relationship of fundamental rights and constitutionalism might not be so apparent. However, a closer analysis of even the minimalist conception of constitutionalism would reveal an intrinsic relationship between fundamental rights and constitutionalism. The minimalist conception of constitutionalism insists constitutionalism is nothing but a government limited by laws. This view seems to make it conceivable to have a constitutionalist state in which fundamental rights are not respected. However, the very idea of a "limited government" begets as of necessity the idea of liberty and freedom. If a government is limited by law, to the extent that it is limited citizens would be free. By limiting government, constitutionalism empowers the governed to do what they please, by constraining the "leviathan", constitutionalism liberates the people. Therefore even the minimalist conception of constitutionalism cannot deny the existence of a relationship between constitutionalism and human rights. Constitutionalism, although indirectly would advance fundamental rights even in a state where it exist in a strictly minimalist sense.

So ultimately, constitutionalism in both the minimalist and expansionist sense would advance fundamental rights; more directly and effectively in the latter case, indirectly and less effectively in the former. It should be borne in mind; however, that a minimalist conception of constitutionalism would result not only in a less effective and an indirect protection of human rights but also in a vague and confined regime of human rights. So long as what we have is a government limited by law and there is no positive stipulation of fundamental rights, fundamental rights could not be fully secure.

B. Constitutionalism and Democracy

The modern conception of constitutionalism, which we have dubbed as the expansive conception of constitutionalism considers democracy to be an inherent element of constitutionalism. The constitutionalist state is by definition a democratic state wherein the constitution itself and the state machinery is premised on the principle of popular sovereignty. Contrary to this view, the minimalist conception of constitutionalism is neutral about the relationship of constitutionalism and democracy. For someone who accepts the minimalist conception of constitutionalism, it is possible to conceive of both a democratic constitutionalist state and an undemocratic constitutionalist state[12]. Popular sovereignty and enfranchisement in the form of universal suffrage are not considered to be inherent elements of constitutionalism according to this view.

For the purpose of this thesis, the author would use the term constitutionalism in the more contemporaneous and expansive manner, as a normative concept that requires not only a government limited by law but a state committed to democratic governance and fundamental rights. As such, constitutionalism would be taken as "an ideal that may be more or less approximated by different types of constitutions and is built on certain *prescriptions* and certain *proscriptions*."[13] These prescriptions and proscriptions are meant to guarantee fundamental rights along side a democratic and limited government. In the context of this thesis, constitutionalism is not meant to be a mere designation or a description of a particular form of government.

C. Constitutional Review

The notion of constitutionalism when used in this expansive and contemporary sense also includes a system of constitutional review for the enforcement of the fundamental rights recognized by a constitutional order[14]. Constitutionalism implies that, in addition to a democratic form of government

[12] D.P. Franklin and M. J. Baun ed., Political Culture and Constitutionalism; A Comparative Approach, M.E. Sharper Inc.,1995, p.5

[13] N. Dorsen and et al ed., Comparative Constitutionalism, Thomson West, 2003, p. 10.

[14] Henkin's list of the demands of constitutionalism includes "institutions to monitor and assure respect for the constitutional blue print, for limitations on government, and individual rights". L. Henkin, A New Birth of

and fundamental rights, there is a need for constitutional review so that all acts of the government contrary to constitutional norms could be challenged and invalidated. This way a bill of rights with in a constitution will not be a mere declaration for rights but will be a catalogue of binding legal norms that are justicable and enforceable, be it in the ordinary courts or in the a special organ set up for the purpose of constitutional review. The logic of *Marbury v. Madison* (1803) has become dominant in constitutional discourse to the extent that constitutional review has become to be seen as a *Sine qua non* for constitutionalism. Though there is plenty of divergence on the particular institutional form that constitutional review could take, there seems to be a degree of consensus as to the importance of constitutional review for constitutionalism[15].

As we have noted earlier, constitutionalism is a normative ideal that includes certain proscriptions and prescriptions. Constitutional review is not only a means of ascertaining if these prescriptions and proscriptions have been breached or ignored but also a means of rectifying such breaches. The necessity of constitutional review arises logically from the normative aspect of constitutionalism. If constitutionalism sets standards of behavior which are meant to prohibit certain kinds of conduct and prescribe a certain course of action, the effective operation of a constitutionalist system will as of necessity incorporate a mechanism for ascertaining whether or not the standards of behavior stipulated by a constitution are being observed. Constitutional review is an aspect of contemporary constitutionalism that meets this necessity[*].

In conclusions of this section, it can be said that, the notion of constitutionalism in its contemporary and expansive understanding has three interrelated elements. These are justicabel and enforceable fundamental rights, a democratic form of governance and a system of constitutional review.

Constitutionalism : Genetic Influences and Genetic Defects, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, Duke University 1994, pp. 41-42

[15] A. Sajo, Limiting Government: An Introduction to Constitutionalism, CEU Press 1999, pp. 232-238

[*] The above discussion of constitutional review is only meant to show that constitutional review is considered to be part and parcel of the modern notion of constitutionalism. The author will provide a more elaborate discussion of the functions of constitutional review in a constitutionalist states the subsequent parts of the paper after discussing the experience of the US and South African Constitutional systems. See below, section 5.3 pp 87-92

1. 2 The Why and the How of the Apologetics

Constitutionalism, especially in the sense conceived in the preceding section is not an easy ideal to approximate. Despite the fact that most countries have adopted constitutions that guarantee fundamental freedoms and proclaim a democratic form of government, not so many countries have been able to live up to the standards set by their constitutions. Unfortunately, Ethiopia seems to be one among such countries.

Some would argue that this is inevitable or even desirable. Others are indifferent about it. Such skepticism, hostility or indifference towards constitutionalism and the guarantees implicit in it come from different quarters and assume different shapes. In the opinion of the author, some of these attitudes and positions merit being explored and responded to due to the sincerity of the people who hold them, their prevalence or due to the legitimate concerns that underlie them. Others might deserve a response due to their capacity to prevent constitutionalism from taking root in Ethiopia in the foreseeable future.

In the 21st century, one might find it difficult to come across in the mainstream an academic or politician who would advocate against or even question the worth and sanctity of human dignity, a foundational premise of constitutionalism. Be it based on an assortment of secular humanistic philosophies or religious teaching, human dignity seems to have attained as an abstract ideal a near universal acceptance. To the extent that it advances these ideal, constitutionalism would not be subjected to hostility, indifference or skepticism. All these would emerge rather in relation to the nitty-gritty demands of constitutionalism. The question would be, is constitutionalism feasible, and is it realistic in a country like Ethiopia? Is it a good idea to have it with all its strictures where there is a constant threat of conflict and violence? How could constitutionalism be actualized in the context of grave political fragility?

Presuming that such queries need to be answered, one would have to ponder how best this could be done. The above questions that cast doubt on the viability of a true constitutionalist order in a country like Ethiopia arise from very practical and pragmatic considerations. Hence, they deserve equally pragmatic and practical answers. That is why in this paper the scope of the discussion is narrowed down to constitutionalism as a guarantee of freedom of expression. Such, focus on a specific right, namely freedom of expression, is meant to facilitate a pragmatic consideration of how constitutionalism should and could work in Ethiopia despite the odds.

The choice of freedom of expression stems from its vulnerability more than most other classic liberties guaranteed by constitutionalism to charges of impracticality in a country like Ethiopia. People would hardly question or challenge the practicality of constitutional guarantees of the right to life even in conflict prone and impoverished states like Ethiopia. Freedom of speech on the other hand, is highly susceptible to being characterized as a dangerous and alien luxury in the cultural and political context of Ethiopia. Therefore, a defense for freedom of expression would constitute an *afortiori* defense of all core fundamental rights guaranteed by constitutionalism. That is why this apologetics of constitutionalism focuses on freedom of expression.

The focus on freedom of expression is also an out come of the strong symbiotic relationship between constitutionalism and freedom of expression. Freedom of expression, as a fundamental liberty in its own right and as a prerequisite for a working of democracy is one of the political rights that are of paramount importance in a constitutional democracy. If democracy is understood as a system of self governance in which the citizens of a country take active part in public affairs, then it is clear that such self governance will require an informed citizenry and a space for criticizing the conduct of government[16]. To the extent that constitutionalism demands popular sovereignty and these sovereignty

[16] F. R. Strong**,** Judicial Function in Constitutional Limitation of Governmental Power ,1997 Carolina Academic Press**,** PP. 76-77; see also Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995

is exercised through the electoral process and the instrumentality of a representative government, the importance of freedom of expression in a constitutionalist state can hardly be over emphasized. The electorates' effective control of its elected officials and the whole operation of a representative democracy are inconceivable where freedom of expression does not exist. Freedom of expression is essential for the electorate to make informed decisions and assert not just a nominal but effective sovereignty. Freedom of expression as a fundamental right and as a right of such significance for democracy is hence the quintessential limitation on governmental power and an integral element of constitutionalism. The fact that freedom of expression is such a crucial right in a constitutional democracy also justifies the choice of freedom of expression as the focal point of this study.

In addition to the focus on a particular right namely freedom of expression, a "contextualist comparative"[17] approach seems to be helpful in ensuring that the defense to be put in favor of constitutionalism is pragmatic and practical. Taking into account the experience of other jurisdiction through a comparative study of constitutionalism and freedom of expression seems naturally well suited to gain practical insights about the matter under inquiry. The choice of South Africa and the United States as comparators is a result of the accessibility of materials from these jurisdictions in general. Furthermore, the fact that both have above average credentials on constitutionalism, the latter's rich freedom of expression jurisprudence and the former's affinity to Ethiopia as an African state are also factors that have figured in the choice of a comparator.

To recap the discussion so far in this chapter, we have defined constitutionalism as a normative concept that requires not only a government limited by law but a state committed to democratic governance and fundamental rights. We have also pointed out that constitutionalism could be challenged as impractical and dangerous in countries like Ethiopia where political stability is quite precarious. Furthermore, it has been noted that a focus on freedom of expression and a comparative approach are best suited to meet

[17] M. Tushnet, Some Reflections on Method in Comparative Constitutional Law, in Choudry ed, The Migration of Constitutional Ideas, 2006 pp. 68-80

this challenge by providing a defense for constitutionalism.

2. Constitutionalism and Freedom of Expression in Ethiopia

In the preceding chapter it has been pointed out that it is preferable to focus on a particular right, namely freedom of expression, in presenting a defense of constitutionalism as far as this thesis is concerned. In the first section of this chapter, the author will discuss the provision of the FDRE Constitution that guarantees freedom of expression. This cursory discussion of Article 26 of the Constitution will be followed by a section in the same chapter in which the incongruence between the constitutional provision and the reality on the ground will be discussed. In the last section of this chapter, there will be a more detailed discussion of the factors that are purported to be the causes for this incongruence.

2.1 The FDRE Constitution and Freedom of Expression

Freedom of expression is one of the fundamental rights recognized by the Constitution of the Federal Democratic Republic Ethiopia (herein after the FDRE). The third chapter of the FDRE constitution which provides for fundamental rights is divided in two parts. Part one is entitled "Human Rights" and part two is entitled "Democratic Rights". In this classification of fundamental rights, the Constitution places freedom of expression under the category of democratic rights. As intriguing as these categorization and its implications might be, neither the Minutes of the Constitutional Assembly nor any subsequent jurisprudence or doctrinal writing sheds light on the significance of the distinction.

Even Fasil Nahum, one of the architects of the Constitution fails to provide an explanation as to why this classification was necessary or what its significance is. After noting that 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"; he asserts "it is in this light that the constitutional categorization of fundamental rights and freedoms into human rights and democratic rights should be

accepted"[18]. This assertion of course gives no explanation as to what the implications of categorizing freedom of expression as a "democratic right" as opposed to a "human rights" is.

Meaza Ashenafi, one of the legal experts who served in the Transitional Government's Constitution Commission which was responsible for the drafting of the FDRE Constitution, notes that although democratic rights are supposed to enjoy less protection than human rights, she concedes that the basis of the classification are unclear and ultimately the whole classification may be irrelevant[19]. Furthermore, she fails to elaborate at all in what respect "democratic rights" are to enjoy less protection than human rights. Therefore, the author of this paper, while noting the classification attaches no significance to it[20]. Unfortunately, though it has been more than a decade and half since the adoption of the FDRE Constitution no jurisprudence has developed on the question of the significance of the classification.

The Constitution clearly stipulates that freedom of expression "shall include freedom to seek, receive and impart information and ideas of all kinds" in any form and through any media[21] . It also enshrines freedom of the press and other media, with a guarantee of access to information of public interest and a prohibition of any form of censorship[22] . Furthermore, the Constitution stipulates that the press shall, as

---

[18] See, Fasil Nahum, Constitution for a Nation of Nations; the Ethiopian Prospect, 1997, the Red Sea Press Inc., pp 111-112.

[19] Meaza Ashenafi, Ethiopia: Process of Democratization and Development, in Abdullahi Ahemed An-Naim ed., Human Rights Under African Constitutions, 2003 University of Pennsylvania Press, p.34.

[20] Despite the views of the above authorities, it is interesting to note that article 10 of the constitution provides that democratic rights are reserved to citizens and peoples while human rights and freedoms emanate from the nature of mankind and are inviolable and inalienable. The clear implication of the provision 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 though 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 as being fundamental right belonging to everyone and not limited to citizens. As opposed to this, the Ethiopian Constitution seems to imply that freedom of expression is restricted to citizens only. Though this implication has not been acted up on, so far, the potential it bears should give rise to great concern since many Ethiopian born political activists in the Diaspora could be precluded from enjoying freedom of expression, association and so on. This is a rather curious and interesting aspect of the bill of rights under the Ethiopian Constitution which merits an independent investigation. However, due to the limited scope of the paper, obviously such investigation can not be undertaken here.

[21] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, Article 29 (2).

[22] Id., Artilce 29(3)

an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions[23] . More specifically, it provides that state controlled or financed media should be operated in a manner ensuring their capacity to entertain diversity in the expression of opinion[24] .

Finally, the Constitution lays down the guiding principles and grounds for limitations of the freedom of expression. The principle that freedom of expression cannot be limited on account of the content or effect of the point of view expressed has been laid down as a guiding principle[25] . On the other hand, protection of the well being of the youth, honor and reputation of individuals has been enumerated as legitimate grounds for legal limitations of freedom of expression[26] . The Constitution also envisages the prohibition of propaganda of war and expression of opinion intended to injure human dignity[27] . Naturally, the Constitution provides that all limitations on freedom of expression have to be effected only through laws which are in conformity with the above guiding principles and based on the enumerated grounds[28].

From the discussions of the Constitutional Assembly on Article 29, one can gather that the Assembly had especially focused on some aspects of the article as guarantees of freedom of expression. These include; prohibition of restrictions of freedom of expression based on the content or effect of the view expressed, ability of the state owned media to entertain diversified views, prohibition of censorship or any form of prior restraint and finally the grounds of limitation of freedom of expression[29]. The discussion on these topics in the Assembly, although not as extensive as one would expect it to be, provides sufficient material to interpret Article 29 in a manner friendly to freedom of expression. The discussion underscores how emphatically the Assembly wanted to proscribe restrictions on political

23 Id., Artilce 29(4)
24 Id., Artilce 29(5)
25 Id., Artilce 29(6)
26 Ibid
27 Ibid
28 Ibid
29 Ethiopian Constitutional Assembly Minute,(Unpublished, Amharic) Volume 2, Tikimt 30- Hidar 7, 1987 Ethiopian Calendar, pp.113-123.

speech critical to the government and censorship in its various forms[30]. The discussion also indicates the desire of the Assembly to make constitutional commitments that will ensure the accessibility of state owned media to all views in the political spectrum and to provide strict substantive and procedural confines on what constitutes justified limitations of freedom of expression[31].

In addition to the promises of such an 'originalist' route of interpreting the Constitution, the Constitution's own explicit adoption of a comparative interpretation of the fundamental rights enshrined in it opens the door for a robust interpretation of Article 29[32]. When compared to interpreted in light of the UDHR(Universal Declaration of Human Rights), the ICCPR(International Covenant on Civil and Political Rights) and the ACHPR (African Charter of Human and People's Rights); Article 29 seems to have the potential to accord strong guarantees of freedom of expression

When we see these three instruments, the ACHPR provides for freedom of expression in the least elaborate manner and with its characteristically disconcerting claw back[33]. The ICCPR and the UDHR recognize freedom of expression in identical terms, the only difference being the fact that the former also provides for the acceptable forms and grounds of limiting freedom of expression[34]. When we compare these instruments, Article 29 of the FDRE Constitution is in fact more elaborate and arguably more protective of freedom of expression, prompting the question as to what value comparative interpretation will add to the equation. But to understand the value to be added by comparative interpretation, one will have to think of the international instruments in question not just to mean the texts of the ICCPR, the UDHR or the ACHPR but as including the jurisprudence be it in the form of case law, declaration or general comment that has been developed by the treaty bodies entrusted with

[30] Ibid

[31] Ibid

[32] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, Article 13(2) provides 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. Therefore, in interpreting Article 29 of the Constitution, one has to take in to account the UDHR, the ICCPR, and the ACHPR with the corresponding jurisprudence of the Human Rights Committee and the African Commission of Human and People's Rights.

[33] ARTICLE 9 of the ACHPR Provides; 1 every individual shall have the right to receive information.2. Every individual shall have the right to express and disseminate his opinions within the law.

[34] See Article 19 of the ICCPR and Article 19 of the UDHR.

the task of elaborating up and enforcing these instruments. For instance one can take; The *Declaration of Principles of Freedom of Expression was adopted by the ACHPR in October 2002* adopted by the African Commission of Human and Peoples' Right, General Comment 10 of the Human Rights Committee, the work of the office of the UN Special Rapporteur on Freedom of Opinion and Expression and also the case law of the African Commission as examples. Though the African Commission has yet to attain the recognition enjoyed by other continental human rights organs, it has nevertheless developed a progressive case law that is well attuned to the human rights problems of the continent[35].

In Conclusion of this section, it will be safe to say that the FDRE Constitution be it in terms of its text, history and the interpretative avenues of comparison that it opens is potentially quite protective of freedom of expression. . In the subsequent sections section, we will see what the reality on the ground is and how freedom of expression is suppressed despite the guarantees the Constitution purports to provide.

2.2 Falling Short: A Typology of Cases of Incongruence

The promise the FDRE Constitution holds for the protection of freedom of expression, as is the case for many of the fundamental rights enshrined in the Constitution, has yet to be realized in a meaningful manner. In all fairness, one has to concede that with the downfall of the *Deurge* regime, there has been a dramatic and positive change in terms of respect for freedom of expression and other fundamental rights as well. Measured against the practice of previous regimes, the FDRE has arguably a more defensible track record in relation to human rights. But measured against the provisions of the third chapter of the FDRE Constitution, one can see that the state is falling short of the constitutional promise of respect for fundamental rights. This incongruence between the constitutional standards and actual practice could be demonstrated in three specific aspects of freedom of expression in subsequent

[35] See The African Human Rights Law Reports, an annual publication of the Pretoria University Center for Human Rights

sections. The purpose of the discussion to follow is to illustrate and not to exhaustively catalog the disconcerting gap between constitutional norms and the actual behavior of the state in reality.

A. Political Speech

Since the Transitional Government Charter in 1991 and the subsequent 1995 FDRE Constitution recognize freedom of expression, in a clear departure of the hitherto norm and practice, some people began to make public political speeches critical and in opposition to the government . Prior to the 1991 Charter, the ruling junta *Deurge* was one of the most brutal and atrocious military regimes in the world with a communist orientation and preceding this regime the state was under absolutist feudal Emperors. Obviously both the absolutist feudal system of governance and the communist military regime were heavily autocratic. In these systems, political dissent and opposition was inconceivable. Dissent was violently suppressed and political dissent more often than not took violent forms since the dissenters knew very well the futility expressing ones dissent peacefully. Ethiopian history is filled with the vicious cycle of violent political dissent against the government of the day and violent suppression of the dissent by the government. The 1960 abortive and bloody *coup d'état* against the Emperor, the various armed peasant rebellions in *Tigray, Bale and Gojam* from 1943 on wards the reign of red terror unleashed by the Military regime after the 1974 revolution all attest to the violent and autocratic streak in the Ethiopian political culture[36].

After the adoption of the Transitional charter, those who started to express critical views against the government included people in academia, civil society and newly emerging opposition parties. However, such endeavor had often proved to be a highly risky business. The government fired 41 professors from the Addis Ababa University in April 1993, reportedly for expressing anti government views[37]. The authorities cited the need to "quell campus political activity" as a justification for the

[36] See Bahru Zewde, A history of modern Ethiopia, 1855-1991 , James Curry, Ohio University Press, Addis Ababa University Press, 2001

[37] US Department of State, *ETHIOPIA HUMAN RIGHTS PRACTICES,1994,* FEBRUARY 1995, http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Ethiopia.html, last viewed on December 22, 2008

dismissal of the professors[38]. Unfortunately, this proved to be only a light prelude to more serious instances of alleged repression of those who expressed political views contrary to those held by the ruling party. Many of the later cases related with political speech in fact involved these professors who had been dismissed from Addis Ababa University. The well publicized case of Professor Asrat Woldeyes, Professor Mesfin Wolde Mariam and Dr. Taye Wolde Semayat are notable in this regard. In most of these cases, the accused were charged with inciting and conspiring a violent revolt against the government.

The earliest case that of *Professor Asrat*, related to a speech he delivered in a political rally wherein he alleged the current TPLF (the *Tigrien* People's Liberation Front) government to be an illegal occupier and talked about resistance of the *Amhara* against the Italian occupiers[39]. He made the speech the leader of an ethnic based (the All Amhara Peoples Organization) opposition party that was formed after the establishment of the Transitional government. The party was founded to protect the right of the Amhara from what its founders perceived to be the government's policy of persecuting Amharas'. In another case, *Professor Mesfin* and *Dr. Berhnu* were charged with incitement of violent revolt in relation to a speech they delivered about academic freedom to the students of Addis Ababa University in a panel discussion[40]. *Dr Taye Woldesemayat* was convicted for conspiracy of armed revolt and terrorist activities in relation to a political discussion group that he was part of[41]. The Federal Supreme Court which in its appellate review of the case found this group to have become associated with and assumed the leadership of an illegal political party involved in terrorist activities and planning to wage an armed struggle[42].

In the most recent case, that of *Hailu Shaule and et*al, many of the 131 defendants were charged with

[38] Theodore M.Vestal, Ethiopia: A Post Cold War African State, Greenwood Publishing Group, 1999, p.56

[39] Jonathan Steele, *Asrat Woldeyes: an extraordinary life*, June 12, 1999, *The Guardian* http://www.ethiopolitics.com/articles/Asrat_Woldeyes.htm, last viewed on December 22, 2008

[40] *Ethiopian academics arrested* , BBC Tuesday, 8 May, 2001, http://news.bbc.co.uk/2/hi/africa/1319278.stm, Last Viewed on December 22, 2008

[41] *Dr. Taye Woldesemayat etal v Public Prosecutor*, Criminal Case File No 4348, Federal Supreme Court 1994 Ethiopian Calendar(unpublished and available with the author)

[42] Ibid

high treason, genocide, outrages against the constitution, obstruction of the exercise of constitutional powers, armed rising or civil war and impairment of the defensive powers of the state[43]. The accused were convicted for some of these crimes mainly based on the speeches they made as political candidates and civil society leaders[44].

For instance, the public prosecutor alleged that; the call made by the political opposition to the public to refrain from socializing with the informants of the security services of the government, the speech of one such leader who said in a political rally that "we shall return them back to where they came from"(construed by the prosecutor as referring to the members of the *Tigre* ethnic group) alongside the burning of the houses of two and the beating up of one individual of *Tigre* origin constituted an attempted genocide[45]. The statements of the opposition calling for a transitional unity government and impeaching the credibility of the electoral board and the courts and calling for demonstrations were alleged to constitute outrages against the constitutional order[46]. While most of the accused were charged with multiple offenses, some of them being charged with 7 offenses, most of the crimes were alleged to have been committed through the speeches and statements of the accused in political rallies, meetings and televised debates. Among the accused were human rights activists who were leading the efforts of the civic society to monitor the election and whose utterances during such advocacy were made partially the basis for the criminal charges.

Almost all of the above cases are perceived as being politically motivated prosecutions aiming to suppress dissent and political opposition by the supporters of the accused and international human rights advocates [47]. If one was to accept this perception as a reflection of the reality, obviously it would

[43] Criminal Charge Number 432/1998, Federal Public Prosecutor(unpublished and available with the author)
[44] The genocide charge was first amended to attempted genocide and then dropped by the public prosecutor.
[45] Ibid
[46] Ibid
[47] Theodore M.Vestal, Ethiopia: A Post Cold War African State, Greenwood Publishing Group, 1999, p 59;see also Eric Pace , *Asrat Woldeyes of Ethiopia, Doctor and Dissenter, Dies*, New York Times, Published: May 17, 1999, last viewed on December 22, 2008 http://query.nytimes.com/gst/fullpage.html?res=9C02E4D9143EF934A25756C0A96F958260; Amnesty International, *Amnesty International Report 1995 - Ethiopia*, 1 January 1995. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/3ae6a9fc8.html , accessed 10 December 2008; see also Network for

mean that the core of freedom of expression, political speech critical of the government, is being suppressed in defiance of the Constitution. On the other hand the government asserts that it had a bona fide case against the accused in all these instances and this has been confirmed through fair trials before independent and impartial tribunals.

If one was to accept this version of the story, the adverse implications for freedom of expression are still very grave. The latter point of view would have us believe that well respected academicians, human rights activists and leaders of the political opposition are constantly and repeatedly engaged in the most serious and heinous crimes one can imagine through the speeches and statements they make. If such people have in fact abused freedom of expression so blatantly, then the wisdom of having freedom of expression is made questionable. It would mean that the constitutional order lacks the minimum degree of consciousness to be effectively operational and is under constant threat necessitating an extremely vigilant state zealous in prosecuting these crimes. Such a state of affairs would naturally have and certainly had quite a chilling effect on political speech.

Therefore, regardless of whether or not the prosecutions noted above are bona fide or bogus, in good faith or out of malice, the bottom line is that anybody with some sense of self preservation will have to think twice before making a political speech. Despite the constitutional guarantees, the situation at hand makes political speech a risky business one would be advised to avoid, something only the adventurous and daring would venture in. Regardless of the debate as to the factual merit of the above prosecutions, the chilling effect the prosecutions had on political debate and freedom of expression is undeniable.

The *Hailu Shawel and etal* case took an interesting turn after the conviction of the accused. Most of the

Education and Academic Rights (NEAR) , *Ethiopia Political Scientist Released* , www.nearinternational.org/alert-detail.asp?alertid=102 - 10k; see also Amnesty International USA, *Ethiopia Political repression must stop,* August 2007 http://www.amnestyusa.org/document.php?id=ENGAFR250132007&lang=e

accused, who were sentenced to life imprisonment, were pardoned and released from prison[48]. The involvement and role of elders in facilitating the pardon has become quite controversial and has reinforced the view that the prosecution was from the outset politically motivated. Professor Ephrem Issac, the leader of the local elders and notables group which was instrumental in facilitating the pardon is on record as saying that the Prime Minister was willing to drop the charges and release the accused before the court could make its final judgment[49]. One of the pardoned political leaders who has asserted that their pardon was not an ordinary pardon but was rather the result of the mediation of the elders had her pardon rescinded and is currently serving her life sentence because she was unwilling to take back this statement[50].

B. Freedom of the Press

As has been noted above, the FDRE Constitution recognizes freedom of the press as part of freedom of expression and accords it protection specifically by prohibiting any form of censorship and by guaranteeing access to information. Despite these constitutional guarantees, freedom of the press in Ethiopia is under constant threat and in the defense. While the Constitution proclaims that the press as an institution shall enjoy legal protection, what one sees on the ground is actually quite the reverse. Even if one was to ignore the undocumented and innumerable allegations of harassment of the press,[51] there is still a clear pattern of the criminal justice system being deployed to the determinant of

[48] Formally, the pardon was granted by the President of the Republic up on the recommendation of the Pardon Board in accordance with Pardon Proclamation No. 395/2004. However, the controversial petition for the pardon was made to the Prime Minster by the convicts and was relayed to him by the elders who were mediating between the ruling party and the convicted opposition leaders.

[49] Professor Ephrem Issac, An Interview with Ethiopian Television Network(operating in the USA), available on http://www.ethiotube.net/video/2175/Prof-Ephrem-Issac-on-ETN, last viewed on March 2, 2009.

[50] Ethiopia's pardoned critic jailed , http://news.bbc.co.uk/2/hi/africa/7804302.stm, last viewed on March 02, 2009

[51] Amare Aregawi, Editor in Chief of a well regarded local news paper and Araya Tesfa Mariam, another journalist are quite illustrative in this regard. Both suffered brutal attacks that threatened their life after reviving threats relating to their reporting activities. The former was publishing investigative reports regarding an Ethiopian born Saudi Billionaire while the later was writing an expose about the core party within the ruling coalitional. See, Committee to Protect Journalists, *Suspects held in brutal attack on editor*, last viewed on December 22, 2008http://cpj.org/2008/11/suspects-held-in-brutal-attack-on-editor.php; see also Ethiopian Human Rights Council, *Stop Violating the Human Rights of Journalists*, 67th Special Report,

freedom of the press. Members of the 'free press' or those who run private newspapers and magazines are constantly prosecuted for contempt of court, defamation, spreading false rumors and most recently for attempted genocide, outrages against the constitution and impairment of the defensive power of the state. On top of this the new press law passed at the end of 2008 threatens to spell new dangers to freedom of the press. For the sake of convenience, the danger the new press law poses to the freedom of the press and how the criminal justice system has undermined freedom of the press will be discussed in separate sub sections.

i. The Criminal prosecution of Journalists and Freedom of the Press

From the above criminal charges, the most frequent one to be leveled against journalists working in these publications is the crime of "inciting the public through false rumors" based on Article 486 of the Criminal Code. This article provides that whoever starts or spreads false rumors, suspicions or false charges against the government or public authorities or their activities, thereby disturbing or inflaming public opinion or creating public disturbance, commits the crime of incitement of the public through false rumors and is punishable by up to three years rigorous imprisonment. If one is apprehensive about the broad sweep and ambiguity of this provision and the danger it poses to freedom of expression, its interpretation by courts does very little to sooth such concerns.

In the case of *Nebyu Eyasu and Adem Kemal*, who were the Editor in Chief and the General Manager of a local magazine in which a poem was published which lamented what the author asserted to be "tribalisation of the country in the name of democracy", the accused were charged with inciting the public through false rumors[52]. The First Instance Court operating under the Transitional Charter acquitted the defendants. It reasoned that nothing in the poem shows that it is directed against the government, that the poem was not news or reporting of facts so it cannot be false or true. Most importantly, the Court relied on the fact that the poem has not been proven to have brought about or is

23www.ehrco.org/Reports/special67.pdf, last viewed on December 22, 2008

[52] Nebyu Eyasu and et al v Central Public Prosecutors Office, Criminal Case file number 7/85, Ethiopian Calendar 1986(Unpublished and available with the author)

likely to bring any public disturbance. Unfortunately, such magnanimity was not to be manifested in later decisions.

In the case of *Werku Alemayheu and Teshalin Mengesha,* the accused were charged with inciting the public through false rumors for a news report in which they asserted that "the desert men" (i.e. the ex rebels) had showered themselves with high military titles without mastery of military science[53]. The Federal High Court, satisfied that the public prosecutor had made a sufficiently strong case to establish a primia facie guilt decided that the accused needed to submit their defense. The accused petitioned the Court to summon the military officials they have written about as defense witnesses. The Court ruled against the petition of the accused. It reasoned that the Generals in question had been promoted to their current position by the competent authority which deemed them fit for the post. The Court went on to assert that there was no reason to ask them to testify regarding the promotion process, any such attempt would be in violation of the personal dignity of the individual. Although the Court's ruling is apparently on an interlocutory matter, it is very revealing of how the criminal justice system could be employed to punish views that are critical of the conduct of the government. The Court was a lot more sensitive to the 'indignity' that would be suffered by the Generals if they were to testify about their qualifications than it was about the freedom of the press the law in questions imperiled.

Leykun Engida and *Abraham Geberekidan* were also convicted and sentenced for spreading false news. They were charged with an alleged false report that the foreign minister was about to resign and that Ethiopia was training Eritrean rebels[54]. In the case of *Tsion Girma*, the editor in chief of a newspaper was convicted for inciting the public through false rumors by misidentifying the Judge in the Criminal trial of an Ethiopian pop star charged with manslaughter for a hit and run. This trial was popularly

[53] Worku Alemayehu and et al v Public Prosecutor, Criminal Case file number 19/88, Ethiopian Calendar 1990(Unpublished and available with the author)

[54] HALF-YEARLY CASELIST [To 31 December 2006] International PEN Writers in Prison Committee, p.6, retrieved from www.pensweden.org/caselists/caselist-2007-jan.pdf, last viewed on December 21,2008

perceived to be a politically motivated prosecution[55].

In addition to charges of incitement through false rumors, contempt of court and defamation are criminal offenses with which journalists are normally charged with. In relation to the case of the pop singer "Teddy Afro", the editor in Chief of a local weekly newspaper was convicted for publishing an interview of the defense counsel in which the latter allegedly made statement contemptuous to the court[56].

The most serious charges to be brought against the free press so far were brought in a recent high profile trial of leaders of civic organizations, political opposition parties and journalists[57]. In this case, about 20 journalists were convicted for outrages against the constitution and impairment of the defensive power of the state[58]. The journalists almost invariably reported favorably on the statements and activities of the opposition and editorialized along the same lines as the opposition parties and were critical of the government. The public prosecutor alleged that the accused committed outrage against the constitution; tried to discredit and undermine Constitutional organs like the Electoral Board and the Judiciary by denying their independence, advocated for the establishment of a national unity government contrary to the constitution, denounced the constitutional order and the electoral results called for demonstrations for the violent overthrow of the constitutional order and the government by siding with the opposition parties.

Furthermore, the public prosecutor alleged that the accused had committed the offense of impairing the

[55] The situation of Human Rights Defenders in the East and Horn of Africa, Report to the Forum on the participation of NGOs at the 44th Session of the African Commission on Human and People's Rights (ACHPR) , by EAST AND HORN OF AFRICA HUMAN RIGHTS DEFENDERS PROJECT (EHAHRDP), p.17 http://74.125.77.132/search?q=cache:9lFTud4Ymu0J:www.defenddefenders.org/documents/EHAHRDP%2520Report%2520for%2520the%252044th%2520Session%2520of%2520the%2520ACHPR.pdf+ethiopia+freedom+of+the+press+misidentification+of+judge+pop+star&hl=en&ct=clnk&cd=8

[56] Committee to Protect Journalists, *Ethiopian judge detains editor over pop singer case*, http://cpj.org/2008/08/ethiopian-judge-detains-editor-over-pop-singer-cas.php, last viewed on December 22,2008

[57] Criminal Charge Number 432/1998, Federal Public Prosecutor(unpublished and available with the author)

[58]

defensive power of the state by spreading false news aimed at dividing the defense forces and inciting a mutiny at a time when the state faced a threat of invasion by a neighboring country. Furthermore, the prosecutor alleged that there had been an attempted genocide. When enumerating the acts that purportedly constituted the attempted genocide and alleged that 1) a certain Nure Hussine, belonging to the *Tigrine* ethnic group had been stoned and seriously injured, 2) the houses of two individuals belonging to the *Tigrne* ethnic group had been burnt down, 3) members of the *Tigre* ethnic group had been exposed to distress and made to feel threatened based on their ethnic group 4) there had been a call to ban socializing with members and sympathizers of the ruling party.

The pattern that emerges form the above cases is that of criminal prosecution of journalists in instances where their publication has been critical of the government or has somehow casted the government in an unfavorable light. In the majority of the cases the effect of the publication and also the factually inaccurate component in the publication has been made a basis for prosecution. These prosecutions have many adverse consequences for the press. To begin with the sheer number and frequency of the prosecutions is bound to have a chilling effect. There seems to be hardly any news paper, apart from those owned by the government or those focusing on entertainment and sports, which has avoided being dragged to the courts. This has created, in the authors view a justified feeling of being persecuted among journalists. Furthermore, the fact that minor factual errors are being used as excuses for prosecution makes the work of journalist and editors dangerous since they will have to make sure that that there is no factual inaccuracy in their publication or else avoid publishing anything that could ire the government. The prosecution and conviction of a large number of news papers after the 2005 election has been particularly consequential and there has been a marked decline both in the quantity and vigor of news papers critical of the government.

ii. The New Mass Media and Freedom of Information Law

The newly enacted and controversial press law injects in this situation two other major sources of concern for freedom of the press. These first source of concern is found under Article 42(2) which provides that "where the Federal or Regional public prosecutor as the case may be, has *sufficient reason to believe* that the periodical or book which is about to be disseminated contains illegal matter which would, if disseminated, lead to a clear and present grave danger to the national security which could not otherwise be averted through a subsequent imposition of sanctions, may issue an order to impound the periodical" [emphasis added][59]. It is interesting to note that there is a discrepancy between the Amharic and English versions of Article 42(2). While the English version provides that the public prosecutor shall issue the impounding order, the Amharic version provides that the public prosecutor shall seek for the order from a court. The law has not been put to practice as of yet and the practical effect of the discrepancy has not been seen yet. Given the fact that the Amharic version is always supposed to be the controlling version in the Ethiopian legal system, it is safe to expect that the Amharic version will prevail[60].

Even when one sticks to the Amharic version, which is the controlling one, the public prosecutor itself is authorized to issue an impounding order in exceptionally urgent cases, and the courts ordinarily would have the power to effect a prior restraint over the press. The potential for abuse of this provision is very alarming. A recent impounding carried on prior to the promulgation of this law could be telling of what one could expect the practice to be like under this provision. The occurrence concerned an entertainment magazine that carried extensive coverage of the trial of an Ethiopian singer for manslaughter, which among some sectors is considered to be a politically motivated prosecution for

[59] Proclamation to Provide for Freedom of Information and Mass Media and Access to Information, Proclamation No 590/2008.

[60] Federal Negarit Gazeta Establishment Proclamation No.3/1995, Article 2(4) providing that "The Federal Negarit Gazeta shall be published in both the Amharic and English Languages; in case of discrepancy between the two versions the Amharic shall prevail."

~;

certain songs of the singer which were critical of the government[61]. The police impounded 10.000 copies of the magazine before dissemination and detained some of the journalists working on the magazine.

The other concern relating to the new legislation arises from the provisions concerning freedom of information. The law, quiet commendably recognizes freedom of access to information as an important prerequisite for freedom of expression and the press[62]. Based on this premise it imposes an obligation to provide information to the public and the press on all public bodies. Then it provides a list of grounds that could legitimately be used to deny a request for information by the authorities[63]. This list spanning ten very long articles include, among other things, cabinet documents as documents that by definition are deemed to be inaccessible to the public[64]. Although formally, the legislation is laid down freedom of information as a rule and denial of information as an exception, given the broad, vague and extensive grounds upon which information could be denied, the exception seems to have swallowed the rule.

These two aspects of the new law are only some of the disconcerting elements which pose a grave threat to freedom of the press. The overall effect of this law seems to be detrimental to freedom of the press and very likely to dampen robust criticism of the government on the press. Especially the power of the public prosecutor to impose prior restraint by impounding publications will undoubtedly lead to self censorship. Even a temporary impounding of 48 hours a publication could result in serious damages for a daily or weekly publication. Under the heavy weigh of such damages, closing shop or resorting to self censorship seem inevitable.

---

61 *Ethiopian police detain editor, impound magazine over pop icon story*, Committee to Protect Journalists, http://cpj.org/2008/05/ethiopian-police-detain-editor-impound-magazine-ov.php, last viewed on December, 22, 2008

62 Proclamation to Provide for Freedom of Information and Mass Media and Access to Information, Proclamation No 590/2008, Article 12

63 Id, Article 16-26

64 Id, Article 24

C. The Broadcast Media

The peculiar importance of the broadcast media and rules related to it for freedom of expression has to be understood in light of some practical realties of a Sub Saharan African State. In such states, including Ethiopia due to various reasons, including illiteracy, economic and cultural factors, the best medium for the widest possible dissemination of one's ideas are electronic mass media like Radio and Television. More than 80% of Ethiopians live in rural areas and 57.8 % are illiterate[65]. Hence, the broadcast media, especially the radio, is naturally the most important media for exercising freedom of expression in these settings. Regardless of how many newspapers might be published in the capital catering for the needs of the urban population, as far as the majority of Ethiopians are concerned the radio is the single most important means through which they could seek and enjoy the guarantees of freedom of expression.

So far, there are only two radio stations and one TV station with a broadcasting coverage that is nearly nationwide[66]. There are also about 20 FM radio stations broadcasting to and in the vicinity of major urban centers throughout the country[67]. With the exception of two private and one community FM radios all other broadcast media outlets are owned either by the Federal Government directly, by the ruling party or by regional governments[68].

Although there are many interested in obtaining a license for Radio and TV stations in Ethiopia, the government has been reluctant to issue licenses. Despite the fact that a law providing for the issuance of licenses for Radio and TV stations have been in place as early as 1999, as has been noted above with

[65] CIA World Fact Book, *Ethiopia*, accessed on December 20, 2008, https://www.cia.gov/library/publications/the-world-factbook/print/et.html

[66] Gebremedhin Simon Gebretsadik, African Media Development Initiative Ethiopia: Research Findings and Conclusions, BBC World Service Trust, p. 16

[67] Id., pp 16-17

[68] Ibid, although political parties are not allowed to operate Radio and TV stations, the ruling party operates two radio stations registered as private but owned by endowments owned by the party.

the exception of the two FM radio stations in Addis Ababa which became operational in 2007, there is no independent media in Ethiopia at this time. From the two private FM radio stations, one is operated by a government supporter[69], while the other exclusively focuses on entertainment and social issues conspicuously avoiding political and current affairs. Although the Voice of America and the Deutsche Welle have daily broadcasts to Ethiopia in three local languages, such broadcasts are regularly jammed[70]. Therefore, the state controlled radio and television stations dominate the broadcast media scene in Ethiopia.

Even if the state was to freely grant them licenses for broadcasting to private broadcasters, it is very unlikely that they will have the financial and technological capacity to broadcast nationwide. Therefore, more than anything the way the state operates the media under its control is decisive as to whether or not one can "seek, receive and impart" information and ideas in Ethiopia. Even if the state is not prosecuting and harassing dissenters, so long as the dominant media is open only for a single point of view, freedom of expression would be effectively stifled.

That is why, as we noted earlier, the FDRE Constitution provides that state controlled or financed media should be operated in a manner ensuring their capacity to entertain diversity in the expression of opinion[71]. Both the text and trauvaux preparatorias , of the Constitution show a strong opposition to the previous practice in which state owned media would serve as nothing more than an instruments for the propaganda of those in power. These would lead one to expect in Ethiopia a state media that is open to divergent political views and opinions. The reality could hardly be further from this expectation. What one sees in the State TV and Radio, with the brief exception of the few months preceding the 2005 National Election, is an increasingly monotonous and uniform stream of the views and opinions of the ruling party.

---

69 Freedom House, *Freedom of the Press 2008 - Ethiopia*, 29 April 2008. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/4871f602c.html [accessed 20 December 2008]

70 Ibid

71 FDRE Constitution Article 29(5)

Reporting on an interview conducted with journalists from the state owned media in December 2006, representatives of the International Press Institute pointed out;

> the government's political appointments within the media organizations—for instance Ethiopian Television—shaped the organization's content by deciding on the story, the story's angle and who undertook the assignment. It was stated by journalists that the planning came directly from the Ministry of Information. Journalists also said that the same story from the same angle would appear across all state media[72].

In relation to this, it is noted in the panelists of the International Research & Exchange Board that the "state media, both print and broadcast, is fully controlled by the government, although it employs professionals to staff and manage it. Panelists characterized these as 'government mouthpieces.' They noted that state media do not cover opposition activities, except in a negative way"[73]. In the US Department of State Country report as well, it is noted that "Prior to the May 15 national elections, government-controlled media provided unprecedented access to opposition views, but after the election they generally reflected only the views of the government and the ruling EPRDF coalition"[74]. In the statements of the former general manager of the Ethiopian Television and Radio Enterprise Selome Tdesse, "Many officials consider the state media simply as a public relations outlet of their respective ministries or agencies."[75]Despite the fact that their establishment proclamations proclaim the Ethiopian Television and Radio to be autonomous from the government and run by a Board appointed by parliament, the government has been able to prevail over a rare display of defiance by the Parliament in having the Minister of Information as a chair person of the boards[76].

---

[72] International Press Institute, *Watch List Report Ethiopia May 2007 Update*, http://www.freemedia.at/cms/ipi/watchlist_detail.html?country=KW0155,viewd on December, 08, 2008.

[73] Media Sustainability Index (MSI) Africa, *MSI Africa 2006-2007* http://www.irex.org/programs/MSI_Africa/ethiopia.asp, last viewed on December 15, 2008

[74] 2008US Department of State, *Country Reports on Human Rights Practices - 2005,*Released by the Bureau of Democracy, Human Rights, and Labor March 8, 2006, http://www.state.gov/g/drl/rls/hrrpt/2005/61569.htm, viewed on December 15, 2008

[75] Selome Tadesse, former general manager of the Ethiopian Television and Radio Enterprise, speaking on the role of the state media in a society that is in transition. Organized by Envisioning Ethiopia, an adhoc forum created to promote knowledge-based public discourse, the dialogue on media held at UNECA, http://www.addisfortune.com/Vol%207%20No%20354%20%20Archive/Index.htm, accessed on December 20, 2008

[76] Article 19 Global Campaign for Free Expression, *The Legal Frame Work for Freedom of Expression in Ethiopia*, pp30-

The monopoly that the state and the ruling party have over the airwaves has very adverse implications for freedom of expression. By denying its critics and opponents the most effective medium of mass communication, the government has severely undermined freedom of speech. It has also substantially restricted the right of the general public to get access to different perspectives on public issues including views that are not palatable for the government.

In conclusion of this chapter, it is rather evident that the constitutional guarantee of freedom of expression has hardly become a reality. The picture that emerges from the above discussion is an environment in which there is little tolerance for political speech critical to the government, especially when the speech is made by those mounting a political challenge to the ruling party. This repression of political dissent and opposition spills over to the press and as can be seen from the discussion so far the freedom of the press is severely undermined by repressive laws and overzealous prosecution. The specter of prosecution of the press has recently increased significantly with the introduction of an anti terror bill to parliament. This law among other things criminalizes sympathetic reporting by the press of terrorist groups[77]. Making matters worse, contrary to the constitutional requirements of article 29(5), the state owned broadcast media has became inaccessible to views different to those held by the government. In the subsequent section of this chapter we will explore some of the causes and explanations that underlie this reality of incongruence between the constitution and facts on the ground.

31www.article19.org/pdfs/publications/ethiopia-legal-framework-for-foe.pdf, last viewed on December, 20 2008

[77]. See Yonas Abiye, Ethiopia: Country Moves to Strengthen Anti-Terrorism Law Media Warned Not to Serve Terrorist Purposes , Daily Monitor, 2 June 2009, available on http://allafrica.com/stories/200906020244.html , last viewed on June 18, 2009

3. Speech and Constitutionalism amidst Poverty, War and Conflict

Confronted with the incongruence between the provisions of the FDRE Constitution which purport to safeguard freedom of expression on the one hand and the severe restriction on the enjoyment of the right that one can see on the ground, it is only natural to inquire what the reason behind this incongruence is. Especially when one takes into account that the failure to respect the constitutional guarantee of freedom of expression is part of a systematic pattern of stifling political dissent and opposition, these questions as to the cause of the incongruence assume an added importance.

At this juncture, it is worth noting that the gap between constitutional norms and actual practice is not limited to freedom of expression. What is true for freedom of expression is true for most of the constitutionally guaranteed fundamental rights, albeit to a varying degree, and hence is reflective of the dismal state of constitutionalism in Ethiopia. Particularly recent trends related to the legislative initiatives and other measures of the government, which seem to have the effect of shrinking the sphere for public debate on political matters and chilling political opposition, reinforce the view that there is a systemic pattern of neutralizing all potential sources of organized dissent[78]. The Constitution has not proved to be an effective limit on the governments nor has it fared well in fostering democracy and fundamental rights like freedom of expression[79]. It seems fair to assert that, Ethiopia, as is the case in many other countries has become a country with a showpiece constitution; a constitution that proclaims, that promises and exhorts but that does no bind, a constitution without constitutionalism. Many hypotheses could be forwarded to explain this state of affairs. In the subsequent subs sections of

[78] Most not worthy in this regard is the recently enacted law regarding NGO's. This legislation proscribes any NGO which receives more that 10% of its funding from foreign sources from engaging in advocacy works related with human rights, democracy and judicial reform. Given that almost all NGO's working on these areas and which are critical of the government work on get their funding from abroad, the law in effect is pushing out from the public sphere most civic actors independent from the government. In synergy with laws and measures targeting the free press, political parties, the Civil Societies bill effectively leaves the state as the sole organized actor in the realm of public debate.

[79] For a detailed and factual run down of the state of fundamental rights in Ethiopia currently, see 2008 Human Rights Reports: Ethiopia , US Department of State Bureau of Democracy, Human Rights, and Labor,February 25, 2009, available on http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm, last viewed on March 2, 2008

this chapter we will discuss several possible political and economic explanations for the mismatch between the constitutional text and practice. The political explanation will revolve around the political culture of Ethiopia, its ethnic and religious heterogeneity and also the prevalence of a one party dominance. The economic 'explanation' will touch up on the relationship of democracy and poverty.

3.1. Political Culture, Heterogeneity And one Party Dominance

One might try to explain the low level of constitutionalism in terms of the political culture of Ethiopia which is violence prone and that puts a very low premium, if any to start with, on political debate, dialogue and legal norms protecting dissent . It is also possible to explain the situation as a function of the institutionalized dominance and control by the ruling party of the whole state apparatus that extends from the security and armed forces to the civil service and to the judiciary. Finally, one could argue that the potential for ethnic and religious conflicts prevailing in Ethiopia make aspirations towards constitutionalism unrealistic.

At the outset it is tempting to dismiss the above explanations as self serving arguments of people who want to perpetuate the current state of affairs, but doing so would be a mistake. All the above reasons are not sufficient to assert that constitutionalism or freedoms of expression are in and of themselves undesirable. However, the above explanations point to the practical challenges to constitutionalism and freedom of expression that cast a serious doubt as to their feasibility or practicability in the cultural, political and social setting of Ethiopia. So, the above considerations, although not strong enough to challenge constitutionalism at a normative level raise some doubts as to its practical application in Ethiopia.

The practical challenge that is posed to constitutionalism and freedom of expression by the political culture, history and contemporary realties seem to be rather obvious. The strictly hierarchical political and social structure we are accustomed to historically equate dissent with revolt and treason. Be it in the family, the church or the state, open discussion, debate and dialogue are not common. The flow of

information is always from the top to the bottom in the form of a command or an indisputable authoritative statement of the "truth" which cannot be questioned or doubted in any manner. Grievances are not to be forwarded to an open debate. They might be expressed in the most roundabout way through double intender *qene* or might lead to actual rebellion but hardly are they to be expressed directly in an open and public forum. The overall cultural and historical pattern celebrates martial strength and the use of such strength to stamp out all form of dissent which is always expected to lead to an armed rebellion by one's opponents[80].

Furthermore, in the traditional Ethiopian state the king, who is supposed to be the embodiment of justice, is not bound by any written laws which could limit his power and protect the rights of his subjects. He was above the law and hardly constrained by any notion of fundamental rights. As the old Ethiopian saying goes "One cannot till the sky nor sue the king"[81]. The thinking behind these saying is still very much alive in how the state is perceived by the public and in how public officials function. A testament to this reality is the fact that although Ethiopia has ratified many international human rights instruments which constitute an "integral part of the law of the land", these instruments are hardly invoked to enforce the rights enshrined therein. There is no human rights jurisprudence in Ethiopia to speak of, be it based on the Constitution or the international instruments ratified by the state. These are

---

[80] Commenting upon the "submit or rebel" physic deeply embedded in the Ethiopian political culture the renowned Ethiopianist and Sociologist Donald Levin notes, the combination of a culture of mistrust and glorification of marital virtues results in a dichotomy of obeying the powers to be or staging a violent revolt. Such culture leaves no room for expression of dissent in peaceful manner through dialogue. Donald N. Levine, ETHIOPIA'S MISSED CHANCES–1960, 1974, 1991, 1998, 2005–AND NOW: An Ethiopian Dilemma: Deep Structures, Wrenching Processes, University of Chicago, pp 10-13, retrieved from http://www.ethiopolitics.com/pdfiles/AnEthiopian%20Dilemma_dl_WMU.pdf, last accessed on December 22,2008

[81] Perhaps this saying would reflect the realty of most parts of the world currently. Even in countries that have a full fledged democracy at this point in time, such an attitude might have prevailed in the past. Such attitudes are very much alive in Ethiopia at the moment among the public and officials of the state. Hence it is among the biggest hurdles that constitutionalism will have to overcome if it is to succeed. So long as the state and officials acting in the name of the state are seen as being above the law, a law unto themselves, constitutionalism could hardly take root.

all historical, political and cultural factors that make freedom of expression fostered by constitutionalism a very difficult ideal to realize in Ethiopia.

This factors arising from the political history and culture of the state are accentuated by the total dominance of the EPRDF (the Ethiopian Peoples Revolutionary Front) over the entire state apparatus. After its military victory over the *Durge*, the EPRDF has been in complete control of the constituion making process and the institutions that were formed based on the constitution. Though the dominance of the EPRDF was put to the test in the 2005 National Election, the party has came out of the election with a more firm grip of the state machinery. The election and the subsequent crises have further polarized politics in Ethiopia and chilled the press, political dissent and opposition.

On top of all these, potential ethnic or religious conflicts have their own bearing on constitutionalism and freedom of expression. Parekh argues; "In an ethnically and religiously diverse society lacking shared values, or in a society unused to discussing its differences in public and articulating them in neat ideological terms, elections might also prove deeply divisive....what is true of elections is equally true of other liberal democracy institutions and practices."[82]Opinions relating these matters come in different hues and shapes and from various corners, but the basic argument emphasizes the risk of ethnic or religious conflict provoked by abuse of fundamental freedoms, especially the freedom of expression[83]. Discussing freedom of expression in Uganda, Rwanda and Ethiopia, Allen and Stremalu argue that the aggressive constraints on freedom of expression that the governments of these states impose are justified[84]. Citing concerns that arise from the role of the Radio Station Mille Collines in the

[82] B. Parekh, Cultural Particularity of Liberal Democracy, in Prospect for Democracy, ed by D. Held, Polity Press 1992, p. 197; see also,*A.Lijphart,CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES,*Journal of Democracy Volume 15, Number 2, pp 96-97

[83] M.C. Bratton and N.V. De Walle, Democratic Experiments in Africa, Cambridge University Press, 1997, p.39;. M. Monshipouri, Democratization, Liberalization and Human Right in the The Third World, Lynne Rienner Publishers Inc 1995, pp 38-39; the author notes that third world countries are characterized by ethnic discord which leads to political instability and could be worsened by democratization. He points out that fear of the instability and civil war that could be precipitated by the ethnic heterogeneity in such countries is a factor that contributes to the emergence of repression and autocratic rule.

[84] T. Allen and N. Stremalu, Media Policy, Peace and State Reconstruction, Crisis States Development research center, Discussion Paper No 8, March 2005, pp. 2-13, available on http://www.research4development.info/PDF/Outputs/CrisisStates/dp08.pdf

Rwandan Genocide and similar fears that exist in all these countries, Allen and Stremalu argue against what they consider to be the ill advised application of the high standards of freedom of expression of advanced democracies in countries like Ethiopia.

3.2 Economic Depravity and Constitutionalism; Poverty as a cause for the incongruence

It is sometimes argued that in a society where the majority is struggling to meet the daily needs of survival, primacy should be given to socio economic rights as opposed to civil and political rights. Many scholars argue that a certain degree of economic affluence is a precondition for the existence of a functional democratic system in a society[85]. Such scholars express their pessimism about democratization in Africa due to the economic conditions of many African states[86]. Echoing Lipset's assertion, many scholars argue that economic development is a requisite for democracy[87]. Some, while not explicitly subscribing to the view that a well developed economy is a requisite for a democratic system, note that the absence of such conditions creates an unfavorable situation for the emergence of a constitutionalist state[88]. Especially in the "developmental state" theory which is popular among some circles in Ethiopia, it is argued that there is a need to have a strong state with a one party hegemony lasting for a long period of years so that sustainable development can be brought about.

The theory is embedded with an implicit thesis that, civil and political rights could be legitimately curtailed and constitutional 'niceties' ignored in order to have a strong government unhindered by dissent and constitutional strictures. The legitimacy of the government would stem essentially not from its constitutional mandate or popular will but from its success in bringing about economic development. Hence, freedoms like freedom of expression could be readily restricted until the socio

[85] M.C. Bratton and N.V. De Walle, Democratic Experiments in Africa, Cambridge University Press, 1997, p. 237

[86] D.Potter and others ,Democratization, Polity Press 1997, p.247

[87] S. M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* ,The American Political Science Review, Vol. 53, No. 1, p.75;see also M.Monshipouri, *Supra* note 82, pp 26-27; see also G.Sorensen, Democracy and Democratization, West View Press1993,pp 25-28, Sorensen argues that modernization and wealth expressed in high literacy rate and urbanization as well as a bourgeoisie middle class are preconditions for a democracy.

[88] C.Clapham, *Democratization in Africa;Obstacles and prospects*, Third World Quarterly , 1993 Vol 14, No 3, p.423

economic situation in a country have improved to such an extent that it could sustain a mature liberal democracy; till then, one has to do with 'revolutionary democracy'. The whole idea behind the argument is that; 1. A somehow well developed economy is a precondition for the true enjoyment of fundamental rights and the realization of constitutionalism and 2. That strict adherence to constitutionalism and the freedoms it embodies impede efforts to alleviate poverty.

The fear is that if constitutionalism means a limited government, then it would mean that a government with limited capability to deal with the diverse economic and social problems the country faces. Given the imperative of bringing out of extreme poverty as many people as possible as quickly as possible, there is a tendency to favor a strong government unfettered by too many constitutional norms specifically designed to constrain it. Besides, the argument would go, when people are so preoccupied by the question of their survival due to famine, HIV and malaria, freedom of expression and the like seem to be unnecessary distractions and luxuries only the privileged few will like to indulge in . Put more bluntly, the argument would go, bread and butter before rights and democracy.

These arguments could be discredited as having a morally indefensible conception of the human nature that overlooks the important values of equality and dignity of human beings. Furthermore such arguments are always suspect of being self serving arguments of the powers to be, intended to serve as intellectual smoke screens to perpetuate one self in power. Unfortunately, to ensure this thesis will have a manageable scope, the economic explanations will not be addressed in a satisfactory detail. Still, some remarks about them seem to be in order.

To begin with it must be remembered that a constitutionalist state with limited government does not mean a weak and enfeebled government. Not only could the notions of a limited government, fundamental rights and democracy could be reconciled with a government that takes robust measures to fight poverty, but they could be considered as being very helpful in ensuring the effectiveness of these measures. Many have argued to show the positive contribution of a functioning democracy in ushering

economic growth[89]. Even if such arguments were not convincing and if constitutionalism was to be proved to have little or no impact on economic growth, so long us the ultimate goal of working for economic growth is to rid individuals from the material constraints that imped him/her from leading a life s/he considers to be worth living, a life s/he considers to be the good life, economic growth with out the liberties to pursue ones vision of the good life is pointless. This is to mean that on top of or regardless of its instrumental value for economic growth constitutionalism is worth having due to its importance in facilitating the liberty that make life truly worth living. This perspective, advanced by Amatyar Sen, views freedoms like free speech as being not just instrumental in bringing about development but as being constitutive of it[90]. The argument is that development should be viewed as the negation of both economic and political "unfreedoms" simultaneously. So, economic growth decoupled from freedoms guaranteed by constitutionalism could not be considered as development to begin with.

While acknowledging that the issue of constitutionalism in low income countries might need an independent and more in depth treatment, the focus of this paper will remain on the political factors and explanations we have discussed in the preceding sub section. This is so because, when one compares the political explanation with the economic one's in the Ethiopian context, the former seem to be more deserving of attention than the former. The economic difficulties of Ethiopia and repression of freedom of expression might have some tenuous and indirect link but the political factors considered above have a direct and substantial relationship on the success or failure of constitutionalism in Ethiopia. Besides, trying to address both the economic and political factors in the same paper might be too ambitious a project for a paper of this size.

In concluding this chapter, it can be said that the FDRE constitution seems to provide ample protection

89 The Right to Tell : The Role of Mass Media in Economic Development,2002 The International Bank for Reconstruction and Development / The World Bank , available at,http://www.worldbank.org/wbi/RighttoTell/righttotellOverview.pdf

90 See in general, A .Sen , Development As Freedom, Oxford University Press 1999

for freedom of expression but this protection has not been realized on the ground. Various justifications present themselves as explanations for this unfortunate reality. We have considered the political and economic factors that pose or are purported to pose a challenge to constitutionalism in Ethiopia. It has also been pointed out that the political challenges for constitutionalism shall be the focus of this paper . This has been justified by the weight of the political challenges which make them more deserving of a response and also the limited scope of what could be reasonably accomplished in this paper. In the subsequent parts of the paper, comparative analysis of freedom of expression and constitutionalism in the US and the South Africa will be undertaken to facilitate the defense of constitutionalism in Ethiopia.

4. Freedom of Expression and Constitutionalism in South Africa and the US

In the preceding chapters of this thesis, we have established that there is a deficit of constitutionalism and lack of effective protection of free speech in Ethiopia which is supposedly explained and at times even justified by various political factors. In the subsequent sections of this paper the author will undertake a comparative study of constitutionalism and freedom of expression in the US and South Africa. The first section of the discussion will focus on the political challenge and obstacles to constitutionalism and freedom of expression in these two jurisdictions. The second section will be an exploration of constitutional protection of freedom of expression in South Africa and the US. The third section will be a discussion of the features of constitutionalism in these two jurisdictions that have enabled constitutionalism to overcome its contemporary and historical challenges. In addition to this features, the discussion in the third and last section will present the author's reflections on the lessons of constitutionalism that the protection of freedom of expression in these two countries offers to Ethiopia. The main aim of this Chapter is to identify lessons in constitutionalism that Ethiopia could get from these two jurisdictions in order to remedy its big deficit in constitutionalism.

4.1 Challenges for Constitutionalism and Freedom of Expression in South Africa and the United States

Both the US and the South Africa are, at the moment countries that are noted for their strong constitutional systems. The leading place of US Constitutionalism in the world, for more that two centuries, needs no elaboration. South Africa, the new kid on the constitutionalist block has also established an impressive reputation as a constitutionalist state in a relatively short period of time. This has meant that, besides other things, in both jurisdictions freedom of expression is accorded strong protection. However, constitutionalism and freedom of expression have not taken root in these countries in the most ideal environment. Just as there are certain challenges to constitutionalism and freedom of expression in Ethiopia constitutionalism has faced some serious challenges in the US and

South Africa. In the subsequent subsections, we will explore these challenges.

A. South Africa

The Republic of South Africa is currently considered to be one of the most notable countries in the world when it comes to constitutional success stories. The transition of South Africa from a system of apartheid to a multi racial constitutional democracy is one of the most celebrated triumphs of constitutionalism in the late 20th century. Given the prestige and success of the South African Constitutional system at this point in time, it could be easy to overlook the fact that constitutionalism has triumphed against the odds in South Africa. The wounds of apartheid and the deeply rooted racial tensions which are accentuated by disparity in income and wealth had made South Africa an unlikely country in which constitutionalism could thrive[91]. As much as South African constitutionalism has been praised and has won accolades, the process leading up to its establishment was not easy and its success was far from guaranteed.

In the beginning of the 1990's South Africa was ridden with violence, no less in its brutality and intensity to political violence in Ethiopia. This violence was noted to be a danger that dampened hopes of successful transition to democracy in South Africa[92]. Hill, while predicting in 1983 the possibility of successful change in South Africa that would satisfy the demands of the black majority opined that the prospects are slim and that even if negotiated settlements are reached at such negotiations will occur with in the background of a civil war[93]. The negotiations between the National Party and African National Congress, leading to the adoption of the new constitutional order have reached the brink of

[91] Pierre du Toit, State Building and Democracy in Southern Africa, US Institute of peace Press, First Published in 1995, p. 2 and 181

[92] R. Lee and L. Schlemmer, Transition to Democracy; Policy Perspectives 1991, Oxford University Press Cape Town 1991, p.263

[93] C.R Hill, Changes in South Africa, Rex Collings London 1983, p. 195 and 197

collapse more than once due to violent opposition to the talks both from blacks and whites[94]. On top of the racial division and tension that characterized South Africa, there is also an ethnic dimension to the tension that was ever present in the South African society and which is still, if not more, potent in the post apartheid era[95]. Further more, despite its economic strength and impressive GDP, the majority of South Africans still find themselves trapped in poverty and illiteracy providing a fertile ground for political violence and conflict[96].

Prior to 1994, that is prior to the Interim Constitution which foresaw the current Constitution, freedom of expression was not guaranteed as a fundamental right in the South African legal system. It was considered to be "…merely a residual freedom enjoying no constitutional or other legislative protection"[97]. Hence, freedom of expression was in theory a residual right and the state was free to restrain this freedom to any extent it wanted and go even so far as totally abolish it[98]. This might not be a very odd thing within common law countries where there is no entrenched bill of rights and where the principle of parliamentary sovereignty holds sway. But what was peculiar about the South African situation is that the parliament, which was to begin with elected by a racially defined electoral minority[99], has came up with a host of restrictive legislations that had in effect negated freedom of expression.

Prior to the commencement of the new constitutional order in South Africa, there were reported to be no less than 120 laws that restricted what could be published, resulting in self censorship by the press, which was weary of the ever present danger of prosecution[100]. These laws, purporting to protect the

94 See A. Sparks, Tomorrow is Another Country, Hill and Wang 1995

95 D.L Horowitz, A Democratic South Africa?, University of California Press, 1991, p. 85/ see also S.Gloppen, South Africa: The Battle Over the Constitution , Ashgate Dartmouth 1997, p. 21

96 J.K, Berman, Political Violence in South Africa, South African Institute of Race Relations, 1993, p.13

97 Y. Burns, Media Law, Butterworths 1990, p.70

98 Id., 69

99 Only white persons were qualified to vote in parliamentary elections prior to 1983 and every white, colored and Indian adult could vote after 1983 see G. Carpenter, Introduction to South African Constitutional Law, Butterworths 1987, p.344

100 A. Spark, Beyond The Miracle; Inside the New South Africa, The University of Chicago Press 2003, p. 65

internal security of the state from communist subversion dictated what could and could not be published by the press and banned designated individuals from all public gatherings and set in place a gag order on any report of the activities or utterances of such people and designated organizations. Furthermore, electronic broadcasting was monopolized and used as a medium for state propaganda[101]. The press, the broadcasting scene and in terms of political speech, South Africa had a very systematic and extensive repression of freedom of expression. All these has changed for the better in South Africa [102]. However, as the discussion so far demonstrates, the political culture permeated by violence, the legacy of apartheid, racial and ethnic tensions are formidable challenges that constitutionalism has faced from its inception till the present day in South Africa.

B. The United States

Constitutionalism and the freedoms it guarantees and, specifically freedom of expression has not gone unchallenged in the US. In various occasions, freedom of expression has been put to the test. Especially fears of sedition and foreign aggression have posed grave challenges to constitutionalism in the US. Not long after the adoption of the constitution, under the threat of a war with France and a fear that the domestic opposition of the government might engage in subversive activities, political opposition and dissent has been under prosecution based on the Alien and Sedition Act of 1798[103]. During the Civil War as well, freedom of speech was under assault. Fears of communist subversion immediately after the First World War and also in the McCarthy era have resulted lead to a similar problems[104]. (In our subsequent discussion of the free speech jurisprudence of the US Supreme Court, the Sedition acts of 1789 and 1917 and will be discussed in greater detail).The Vietnam War and the political malaise it had lead to have been causes of adverse consequences for freedom of expression as well. There are also

[101] Id, p. 69
[102] D.S.K. Culhane, *NO EASY TALK: SOUTH AFRICA AND THE SUPPRESSION OF POLITICAL SPEECH,*17 Fordham International Law Journal. 1994
[103] G.R.Stone, Perilous Times; Free Speech in War Times, W.W. Norton and Company 2004, p.46
[104] See in general, G.R.Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 California Law Review 1378

concerns that the 'war on terror have had such an effect of undermining constitutionalism[105]. Generally speaking, despite the prominence of the US as a constitutionalist sate, more than once the alignment of political polarization and fear of foreign aggression or subversion have created an environment that was hostile for freedom of expression and conducive for repression.

In conclusion of this section, it suffices to underscore that, contrary to what conventional wisdom will suggest, there have been serious challenges to constitutionalism in both the United States and South Africa. In the next section, the focus will be on the constitutional guarantee that is effectively provided to freedom of expression in these two jurisdictions despite these challenges.

4.2 Freedom of Expression in South Africa and the United States

In this section we are going to see in detail the protection that is accorded to freedom of expression in the US and South Africa. By discussing their constitutional case law on freedom of expression, an attempt will be made to flesh out the doctrinal contours of free speech in these two jurisdictions. The whole purpose of the section is to show the extent to which freedom of expression is effectively protected in the two countries despite the challenges we have touched up on in the preceding section. This discussion will in turn facilitate out inquiry in to, how despite the challenges we have talked of in the previous section constitutionalism has been able to succeed in the US and South Africa.

A. South Africa

Among the thirty four constitutional principles agreed upon by the multi party negotiations leading to the South African transition in 1993, one was that fundamental rights, freedoms and civil liberties would be provided for and protected by entrenched and justiciable provisions.[106] Accordingly, the

[105] David Cole, The New War McCarthyism: Repeating History in the War on terrorism, available at http://www.law.harvard.edu/students/orgs/crcl/vol38_1/cole.pdf, last viewed on May 25, 2009

[106] Section II, Constitutional Principles, Schedule Four of the Interim Constitution of 1993. Before the entry in to force of the Constitution, the Constitutional Court had to review the Draft Constitution adopted by the Constitutional Assembly to verify the conformity of the draft with these constitutional principles. The provision of the draft constitution which providing for freedom of expression had not been objected to by anyone and hence was not subjected to scrutiny in the

South African Constitution has a bill of justiciable fundamental rights among which is found freedom of expression. Under Section 16 of the Constitution, it is provided that;

1. Everyone has the right to freedom of expression, which includes-
    a. freedom of the press and other media;
    b. freedom to receive or impart information or ideas;
    c. freedom of artistic creativity; and
    d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to-
    a. propaganda for war;
    b. incitement of imminent violence; or
    c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

This provision is in substance, almost identical with the provision in the Ethiopian Constitution which provides for freedom of expression under article 29. However, in practice, the two provisions have not been able to accord protection to freedom of expression to the same degree. Obviously, the situation in relation to freedom of expression in South Africa is a far cry from the situation in Ethiopia. In South Africa, both in actual fact and popular perception prosecution and arrest for political speech and for expression of opinions critical to the government have become a thing of the past. Freedom of expression is not only proclaimed as a fundamental right in the constitution, but is respected in practice even against the wishes of the government. The Constitution has been successful in limiting the government, guaranteeing a democratic form of government and safeguarding fundamental rights, hence making South Africa not only a state with a constitution but with a functioning constitutionalism.

The crucial role of judicial review by the Constitutional Court and other court's in fostering constitutionalism is amply demonstrated in relation to freedom of expression. This can be seen by a thematic survey the case law of the Constitutional Court and other important cases decided by other

certification proceedings. *CONSTITUTIONAL COURT OF SOUTH AFRICA, Case CCT 23/96 CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996*

judicial organs on issue related with freedom of expression and also the statutory and administrative framework of the South African Broadcasting Corporation and the Broadcasting Authority.

i.. Freedom of Expression and Defamation

Most cases before South African Courts that give rise to constitutional issues in relation to freedom of expression stem from alleged defamatory publications by the press. Suits are instituted by private parties, mostly politicians and other public figures alleging that they have been defamed by press publications. One of the land mark cases of such kind was the *National Media and Others v Bogoshi* Case No 579/96 (hereinafter the *Bogoshi* Case) decided by the Supreme Court of Appeal of South Africa. In this case, the appellants were owners publishers, editors and distributors of a certain news paper. The issue raised in the appeal was whether or not strict liability (liability with out fault) for false defamatory statements which was the law based on an earlier precedent of the same court was still a good law.

The Supreme Court of Appeal after considering the position taken on this issue (strict liability for false defamatory statements) by the US Supreme Court, by the German Federal Constitutional Law, the ECHR and also courts in the Netherlands, England. Australia and New Zealand and also taking in to account the importance of freedom of expression and the chilling effect strict liability might have on freedom of expression decided to overrule the earlier precedent. The Supreme Court of Appeal held that;

> If we recognize, as we must the democratic imperative that the common good is best served by the free flow of information and that task of the media in the process, it must be clear that strict liability can not be defended and must have been rejected in *Pakendorf*. Much has been written about the "chilling" effect of defamation action but nothing can be more chilling than the prospect of being molested in damages for even the slightest error.

Justice Hefera, stated that the court was merely overruling a bad common law rule and replacing it with a new rule which is that; "the publication in the press of false defamatory allegations of

fact will not be regarded as unlawful if, up on a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time". The nature, extent and tone of the allegation were laid down as factors to be considered on deciding up on the reasonableness of the publication. The Court also inquired if lack of knowledge of the wrongfulness of the publication could be a defense in a defamation case even if the lack of knowledge arose from the negligence of the publisher. The Court answered this question in the negative. Hence, the cumulative result was that a publication of false defamatory statement that is reasonable will not give rise to liability in the absence of negligence on the part of the publisher. After establishing this new common law rule, the Court assessed its comparability with the Interim Constitution recalling the holding of the Constitutional Court on the matter of indirect horizontal application of the bill of rights in the *Du Plessis case*. The Court then opined that it is satisfied that the new rule it has laid down achieves the right balance between the right to protect one's reputation and freedom of expression.

Related issues to those that were considered by the Supreme Court of Appeals in the *Bogoshi* case arose in a later case presented before the Constitutional Court. In the *Fred Khumalo and others v Holomisa CCT 33/01*, the main issue of contention was whether or not to the extent it does not require a plaintiff to plead that a defamatory statement is false, the law of defamation is unduly infringing up on freedom of expression. As the common law stood then, falsity was not an element of the delict of defamation. In deciding up on this matter, the Constitutional Court took cognizance of the fact that "the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name" which is a constitutive part of dignity.

The Constitutional Court although acknowledging the great importance of freedom of expression in a democratic society noted that it is not of paramount value and must be construed in the context of the value of dignity, freedom and equality. Here it should be noted that the Court

conceived dignity as inclusive of the publics' “estimation of the worth or value of the individual". Then the Court inquired if the law of defamation as it stood at that time stroke the appropriate balance between the requirements of individual dignity and freedom of expression. The Court noted that the Common law considered truth of the defamatory statement proved by the defendant alongside public interest in the published matter as a defense. In addition to this, based on the *Bogoshi* precedent, even a publisher who can not prove the truth of a statement could raise as a defense absence of negligence and reasonableness of the publication as a defense. Hence, the Court held that the common law as it is does not result in an undue burden on the press or bring about a chilling effect has stroke the right balance between dignity and freedom of expression.

In a dicta of this case, the Court building up on and at the same time qualifying the *Du Plessis* ruling held that due to the intensity of the constitutional right in question and the potential invasion of the right freedom of expression is a right that is of direct horizontal application in this kind of cases[107]. Such ruling was based on an interpretation of Article 8 of the Constitution. Since article 8 of the final Constitution has introduced direct horizontal application and in effect rendered *Du Plessis* obsolete this dictum of the Court has opened the door for the ordinary courts to interpret article 16 of the Constitution and play a more prominent and direct role in the development of the jurisprudence of freedom of expression as it relates to private parties.

Accordingly, not so much the Constitutional Court but the Supreme Court of Appeal has been active in developing the case law on defamation in line with the constitutional norms protecting dignity and freedom of expression. For instance, in the *Mogale and Others v Seima* Case NO 574/04, the Supreme Court of Appeal has held that the impact of freedom of expression on the

[107] In *Du Plessis and others v De Klerk and others* CASE NO CCT 8/95 and , Constitutional Court , interpreting the Bill of right under the Interim Constitution had held that with the exception of cases in which the common law is to be applied, the bill of right is of direct horizontal application(directly applicable even in litigation not involving the state and that is exclusively among private parties). In the *Fred Khumalo and others v Holomisa CCT 33/01,* the Constitutional Court has brought the common law under the domain of direct horizontal applicability. While this expands the domain for the direct horizontal applicability of the bill of rights, the Court has made direct horizontal applicability conditional on the appropriateness of such application in relation to the right in question in each case.

law of defamation should not be limited to the grounds of defense or justification but should also extend to the interpretation of the defamatory statement and also the quantum of compensation. Hence, the Court reasoned that when interpreting the alleged defamatory statements care should be taken not to protect the over sensitivity of the plaintiff and that the compensation should not be punitive. In *TAC v Rath and Others* Case NO 2807/05, we can see the High Court trying to carefully strike a balance between freedom of expression and the dignity of the members of an association which has been allegedly defamed[108].

There are many interesting things that one ought to take note of in the above cases. It is interesting to see that the South African courts have been very sensitive to the chilling effect that too many prosecutions over defamation could bring about on the press. At the same time, the courts were concerned about the damage that could arise to the reputation, honor and dignity of individuals by unbridled defamatory false charges made by the press. By protecting the press from liability so long as the false defamatory statement is reasonable under the circumstances, the courts seem to have managed to strike a fine balance between the competing interests of the right to ones reputation and freedom of the press.

ii. Judicial Review; Balancing Freedom of Expression and Administration of Justice

Administration of justice is also another area where controversies relating to freedom of expression have been entertained by the Constitutional Court of South Africa. In the *State v Mamabolo* CCT 44/00, the issue was whether or not the crime of scandalizing the court, a from of contempt of court, amounts to an unjustified interference in the freedom of expression. The Court analyzed the problem from a comparative perspective after which it concluded that there is a need in the interest of

[108] In this case, partly decided in favor of Treatment Action Campaign (TAC), the issue was whether or not the defamatory and factually inaccurate aggressive campaign the respondents had conducted against the applicant should to their liability. The respondents have alleged in their public campaigns that TAC is a front of big pharmaceutical companies and is financed by such companies to pressure the government to buy expensive anti retroviral medicines. The HIGH COURT OF SOUTH AFRICA (Cape of Good Hope Provincial Division) decided in favor of the applicant noting that the defamatory false statements were not reasonable considering all the relevant circumstances. *TAC v Rath and Others* Case NO 2807/05 HIGH COURT OF SOUTH AFRICA (Cape of Good Hope Provincial Division).

maintaining the integrity of the judicial system to retain the offence of scandalizing courts in a circumscribed manner. It inquired in to whether or not the limitation on freedom of expression occasioned by the offense is justified in light of Section 36 of the Constitution which is the general limitations clause of the Constitution. The Court held that the limitation is "reasonable and justified in an open and democratic society based on dignity, equality and freedom taking in to account all relevant factors". The Court reasoned that given the narrow scope of the crime the balance of reasonable justification is met by the offense.

The other case in relation to administration of justice and freedom of expression concerned a prior restraint sought by the public prosecutor against a TV broadcast of a documentary about a certain crime. The prosecutor fearing that the documentary might prejudice the criminal charges it would bring against the suspect sought to enjoin the defendant from broadcasting the documentary. By the time the case reached the Supreme Court of Appeals, the prosecutor and the TV station had resolved their dispute and the documentary has already been aired hence the case was a 'moot' controversy. Nevertheless, the Supreme Court of Appeals went on to deal with the case since it considered that similar cases are likely to arise in the future. In this case, *MidiTelevison v Director of Public Prosecutions* Case NO 100/06. The Court declined to adopt the extensive protection provided by the US Supreme Court against prior restraint reasoning that the text and historical setting of the First Amendment is not in consonance with the South African Constitution. It pointed out that so long as the limitation is reasonable and justified in a free and democratic society in accordance with Section 36 if the Constitution, prior restraint could be an acceptable limitation of freedom of expression. It interpreted this article as requiring a comparison of the extent of limitation that is placed up on a right on the one hand and the purpose, importance and effect of the intrusion on the right on the other hand. The Court held that a prohibition of a publication that poses a real risk of a demonstrable and substantial prejudice to the administration of justice is a limitation of freedom of expression that passes

the test of reasonable justification. It also opined that ' a real risk of a demonstrable and substantial prejudice' could serve as a test not only for prior restraints in the interest of administration of justice but also for the protection of other interests.

In the above cases, just as was the cases with the defamation cases, we see the South African Constitutional Court and the Supreme Court of Appeal trying to strike a delicate balance between two competing interests. We see that the courts take in to account the experience and jurisprudence of various leading jurisdictions but resist the blind application of standards developed in such jurisdictions. In the above cases, the courts have provided protection to the integrity and fairness of the judicial process while at the same time protecting freedom of expression. The case law developed by the courts does not give journalists license to write what ever they want about courts and cases passing through the judicial process. The retention of the offence of contempt of court and the possibility of prior restraint when a publication poses a real risk of a demonstrable and substantial prejudice to the fairness of a trial limit freedom of the press. However, the limitations are narrow, necessary and reasonable. Therefore, the limitations do not unduly undermine the freedom of the judiciary and leave the press plenty of room function as it sees fit in a democratic society.

iii. Judicial Review. Balancing Freedom of Expression and Other Interests

In the *South African National Defence Union v Minister of Defence* CCT 22/98, the Constitutional Court had to deal with the issue of whether or not a legislation that prohibited members of the armed forces from participating in protest actions was constitutional. The Court first asserted that the legislation that imposes such a restriction is a clear infringement of the freedom of expression of members of the armed forces. After establishing this, it went on to inquire in to whether or not this infringement is a reasonable and justified limitation of the right to freedom of expression in an open and democratic society accordance with Article 36(1) of the Constitution. To answer this question the Court, in accordance with what is prescribed under Article 36(1) took in to account the nature of the

right being limited, the importance and purpose of the limitation, the nature and extent of the limitation and also the relation between the limitation and its purpose. The Court noted the importance of freedom of expression both for the society and for the individual; it also stressed of the importance of ensuring that members of the defense force act in a manner that encourages confidence and trust in the dispassionate observation of their duties. The Court went on to point out that though the Constitution under Section 199(7) requires members of the armed forces to perform their duties dispassionately, it does not require that they loose the rights and obligations of citizenship in other aspects of their lives. The Court held that the prohibition from taking part in protest action as it is put in the legislation in question a sweeping prohibition which entails a grave incursion on the fundamental right of soldiers and hence is inconsistent with the Constitution.

In the *Jamiat-Ul-Ulama of Trnasval v Johncom Media Investment Ltd and others,* a case before the High Court of South Africa (Witwatersrand Local Division), the applicant sought an order to restrain the respondent from publishing cartoons, caricatures or drawings of the Prophet Mohamed. This action was instituted after a Danish newspaper published such cartoons followed by newspapers in other parts of Europe. The High Court, in disposing of this matter reiterated the importance of freedom of expression while noting that "Although freedom of expression is fundamental in our democratic society, it is not of paramount value. It must be construed in the context of other values enshrined in the Constitution, in particular the values of human dignity, freedom and equality." The Court underscored that human dignity informs constitutional adjudication at all levels and that the limitation of freedom of expression sought by the applicants is justifiable in the interest of human dignity. The Court went on to point out that the limitation will foster national unity and the healing of past divisions and building of a united society.

In the above two cases, as was true for the cases discussed above, the Constitutional Court and the High Court have came up with decisions that were sensitive to the demands of freedom of expression while

at the same time being cognizant of the existence of other important societal interests. While it has ultimately decided that soldiers can not be denied the right to protest, the Constitutional Court reached this decision after carefully considering the need to have the armed sources discharge their duties dispassionately. The High Court's decision to issue a prior restraint was also given after carefully weighing the effect of the publication of the cartoons on the dignity of Muslim citizens in the context of the South African society and the implications of such a restraint for freedom of expression. In both cases we see the South African courts demonstrating a keen awareness of the peculiarities of the South African state and a commitment to various and at times competing norms and principles enshrined in their Constitution.

iv. Freedom of Expression through the Air Waves

In the apartheid era the National Party had a monopoly of the air waves through the South African Broadcasting Corporation (SABC) which was state owned and under the direct control of the government of the day[109]. The government used the SABC's radio and television broadcast for its own propaganda, stifling freedom of expression on the air waves. One of the first institutions to be overhauled in the transition of South Africa through agreements reached the multi party CODESA talks was the SABC [110]. It was clear that if truly democratic elections were to be conducted and a genuine transition to take place, the broadcasting scene has to be changed dramatically.

This change took two forms. The first aspect of the change was to bring an end to the near monopoly the state had over broadcasting. This was achieved by licensing new community owned and private owned radio broadcasters. Soon, TV broadcasters also joined in the act. The second aspect of the change was the turning of the mammoth SABC, with its multiple TV and Radio stations in to a public

[109] Ruth Teer-Tomaselli and Keyan G Tomaselli ,Reconstituting Public Service Broadcasting: Media and Democracy During Transition in South Africa ,Centre for Cultural and Media Studies University of Natal , p.2

[110] Tusi Fokane, THE TRANSFORMATION OF BROADCASTING IN SOUTH AFRICA, The Freedom of Expression Institute (FXI) and the Netherlands Institute for Southern Africa (NIZA) May 2003,pp 5-6

broadcaster[111]. The Corporation which has been directly and institutionally under the control of the government and was acting as a mouth piece of the government of the day had its institutional tie with the government severed, and set up as an independent public service broadcaster administered by an independent board which sets the policies of the Corporation and oversees its operation; all with a view of insuring its independence and impartiality[112]. The appointment of the first round of Board members was a very public and unique affair that was nationally televised. A special panel was established which solicited nominations of candidates for Board members of the SABC. The panel short listed no less than 80 candidates and interviewed them publicly, then selected a list of nominees for the President who had a final say on who was to be appointed[113].

The above changes had been reinforced by the establishment of an Independent Broadcasting Authority, which was later changed in to an Independent Communication Authority which oversees all broadcasters as a regulatory body through the Independent Broadcasting Act NO 153 of 1993(amended in 1994,95 and 96). The Authority is governed by its own Council and in addition to licensing private and community broadcasters it has also a function of overseeing that the SBCA is operating in line with its mandate as an independent public broadcaster. The Authority's oversight function could be demonstrated by the recent hearings it is conducting against the SABC for the alleged ban the broadcaster has made on the appearance of certain commentators on its programs[114]. Although the inquiry commissioned by the broadcaster itself has found that such bans have been made contrary to the statutory mandate and official policies of the broadcaster, the SABC has denied the allegations in

111 Clive Barnett , The Contradictions of Broadcasting Reform in Post-Apartheid South Africa;Whose News? *Control of the Media in Africa* ,Review of African Political Economy, Vol. 25, No. 78, (Dec., 1998), p 553

112 The Broadcasting Act 4 of 1999

113 Tusi Fokane, THE TRANSFORMATION OF BROADCASTING IN SOUTH AFRICA, The Freedom of Expression Institute (FXI) and the Netherlands Institute for Southern Africa (NIZA) May 2003,p 23

114 JOCELYN NEWMARCH , SABC tells Icasa hearing there was no blacklisting , Business Day Posted to the web on: 12 March 2009 ,available at http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A957530, last Viewed March 16, 2009.

this hearing which is currently underway[115].

As a second tire of institutional guarantee of the changes brought about in the broadcasting seen are found the Courts which review the decisions and acts of the ICBA. The *Radio Pretoria v The Chair Person of the Independent Communications Authority of South Africa and the Independent Communications Authority(ICA)* Case 296/06, a case seen on appeal by the Supreme Court of Appeals of South Africa is instructive in this regard. This case was initiated as a result of the denial of a community radio license by the respondent to the applicant. The Supreme Court of Appeals found that the denial of the license was based on an erroneous interpretation of the Broadcasting Act 4 of 1999 and a misguided appreciation of the intended area of broadcasting of the applicant. Based on this finding the Court ordered the respondent to reconsider the applicants' application for a community broadcasting license.

As we can see from the discussion above the transformation of the broadcasting scene in South Africa is a result of the ending of the government monopoly in broadcasting and also the reorganization of the state owned broadcasters as public broadcasters with autonomy from the government. These changes have been reinforced by the Independent Communication Authority and the judicial oversight of the courts. The end result has been the emergence of private and community broadcasters providing a medium for the voice of all segments of South African society and a public broadcaster that is relatively more capable of entertaining a diversity of perspectives.

[115] See the SOUTH AFRICAN BROADCASTING CORPORATION COMMISSION OF ENQUIRY INTO BLACKLISTING AND RELATED MATTERS REPORT, 2006, available at www.fxi.org.za/pages/Media%20n%20ICTs/SABCComplaint/SABCBLACKLISTREPORT.pdf , last viewd on March 16, 2009.

B. The United States

In any study of constitutionalism and freedom of expression, it's hardly possible to overemphasis the appeal of looking in to the American experience. For all its short comings and contentions about its exceptionalsim[116], the bold American experiment with these normative ideals happens to be among the longest, if not the longest and most successful. That is why despite the evident differences in the socio economic and historical realities of Ethiopia and the US, the latter's experience with constitutionalism and free speech is of interest in this study.

i. Free Speech in the US: Political Speech

Freedom of expression is provided for in the American Constitution in the First Amendment which reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This text which forbids Congress from enacting any law that abridges freedom of speech and the press has been understood in different ways and its true meaning is subject an intense ongoing debate. To say the least, its meaning is far from certain[117]. The schools of thought in that have different views as to how this provision should be understood could broadly divided in to two.

On the one hand, there are the absolutists who argue that the first amendment rules out any law that is intended to regulate free speech in order to protect other interests and balance the competing interests of free speech and other public interests[118]. People with this view; oppose any approach to the first

[116] See, Justice Scalia's comments in, A. Scalia and S.Bryer, *A Conversation Between U.S Supreme Court Justices*, 3 International Journal of Constitutional Law 2005, 519-541

[117] L.W. Levy, Emergence of A Free Press, Oxford University press 1985, p.281

[118] Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995, pp 5-6; see also A. Melklejhon, The First Amendment is an Absolute, in P.B.Kurlad (ed), Free Speech and Association; The Supreme Court and the First Amendment,University of Chicago Press, 1975 pp 2-4

amendment that views free speech as being amenable to 'balancing' and reasonable 'limitations'. They understand the first amendment as providing an absolute shield to speech from any governmental regulation and a radical break from the English legal heritage of the common law[119]. Hence, according to their view speech is immune from any public interference and any interference, regardless of the underlying justification or interest it is purported to advance is unconstitutional.

On the other hand, there are those who argue that freedom of expression, just like all other freedoms could be subject to limitation when such limitations are required to advance competing interests that could outweigh it[120]. So, proponents of this view would consider limiting free speech when the balance tilts in favor of another interest a justified and constitutional interference. Unlike the absolutists, those on the opposing side of the spectrum would not consider limitations of freedom of expression as being automatically unconstitutional. The constitutionality or otherwise of the limitation is to be decided after carefully weighing the benefit and harm that would ensue as a result of the limitation.

Both of these views have influenced the interpretation of the first amendment, historically the absolutist view had not had the upper hand. Since the adoption of the first amendment till the First World War, what some author's call the forgotten years of free speech, the first amendment was seen as proscribing mainly prior restraint or censorship[121]. According to the prevailing view at that time which was based on Blackstone's Commentaries on the common law, subsequent punishments of speech or publications which had the tendency to cause harm was constitutional[122]. This bad tendency test meant that so long us the public authorities are not imposing prior restraint, subsequent sanctions against speech

[119] See H. Black, *THE BILL OF RIGHTS* ,New York University Law Review, Vol. 35, April 1960

[120] Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995, p. 7; see also A. Melklejhon, The First Amendment is an Absolute, in P.B.Kurlad (ed), Free Speech and Association; The Supreme Court and the First Amendment,University of Chicago Press, 1975 pp 7-8

[121] Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995, p.4

[122] D.M. Rabban, Free Speech in Its Forgotten Years, Cambridge University Press 1997, p. 132

considered to have the tendency to cause unlawful acts was not considered to be contrary to the first amendment[123]. Under these circumstances, the first amendment did not offer robust protection to free speech.

This is illustrated most evidently by the infamous sedition act of 1798 and the political prosecutions that were based on it. This act made it an offense to criticize the President and other public officials. It effectively made dissent and criticism of governmental policy tantamount to sedition.[124] The law in its inception and enforcement targeted members of the 'Republican' faction which was opposing the incumbent 'Federalists' and was regarded by the Federalists as posing a grave threat to the continued existence and security of the Union in a widely anticipated war with France[125]. Although the law was very controversial to begin with and later on repudiated as being unconstitutional not long after it has been repealed, the shift from the bad tendency test to a more free speech protective test has taken a longer time. After the sedition act, the Civil war years are noted to be significance in terms of their impact on free speech. Though the level of repression of dissent had reached the extent of the Sedition act, there was a degree of repression of free speech[126]. The significance of the sedition act especially in relation of free speech in the US is that it has became an important reference point to show an interference with free speech that is blatantly unconstitutional.

The First World War and its immediate aftermath are considered to be a milestone as far as free speech is concerned in the US. Prior to this time, there was hardly any body of case law regarding free speech

[123] A classic restatement of this position is reflected in the *Patterson v. Colorado, 205 U.S. 454 (1907)* case wherein Justice Holmes opined regarding freedom of speech "...the main purpose of such constitutional provisions is 'to prevent all such previous restraints up on publication as had been practiced by other governments', and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare"

[124] G.R.Stone, Perilous Times; Free Speech in war Times, W.W. Norton and Company 2004, p.46

[125] Id.,pp 25-26

[126] Id.,p. 80

based on the first amendment. The bad tendency test accompanied by the proscription of prior restraint and rooted in a common law understanding of free speech unperturbed by the first amendment were firmly in place. Based on the Espionage Acts of 1917, a number of prosecutions were carried out against those who opposed American involvement in the First World War and who were espousing communism and other forms of radical political opinions. During this prosecution of communists, pacifists and anarchists based on these two legislations, the Supreme Court got an opportunity to begin the task of developing a jurisprudence based on the fist amendment. The *Schenk, Debs* and *Frohwerk* cases are notable in this regard.

In *Schenk v United States 249 U.S 47 (1919),* the appellant was an official of the Socialist party. He was accused and convicted of violating the Espionage Act by circulating leaflets which attacked conscription for the first the war. The leaflets were said to have obstructed recruitment and enlistment of soldiers and also incited insubordination in the military forces. In *Debs v U.S , 249 U.S. 211 (1919),* the appellant was a leader of the Communist party who had been a candidate of his party for the office of the President of the US. He was charged with inciting and causing insubordination, disloyalty and mutiny in the armed forces and for obstructing recruitment of soldiers through his speech about socialism in violation of the Espionage Act. In *Frohwerk v. United States,* 249 *US* 204 (1919), the appellant was convicted for his involvement in the production and distribution of a publication that severely criticized US involvement in the war. He was convicted for conspiring in contravention of the Espionage Act to cause disloyalty, mutiny, and refusal of duty in the armed services of the US.

The overall effect of these cases was to reinforce the bad tendency test. The Supreme Court upheld the conviction of the accused based on these two laws, the constitutionality of which was not subjected to any significant review by the Court. However, Justice Holme's who wrote the majorities opinion in all three cases had mentioned the phrase “clear and present danger” in an *obiter dicta* in the *Schenk* case. This phrase was to gain a great significance later on but, one can hardly argue that clear and a present

danger test was applied or effectively introduced in these cases. Apart from the *Schenk* case in which a fleeting remark was made to the notion of "clear and present danger", in the two other cases which were decided contemporaneously with *Schenk* , there was no mention of a clear and present danger test.

However, a scholarly comment on these cases ingeniously construed(misconstrued) the *Schenk* decision as having introduced a new test, namely clear and present danger, as a test that limitations of free speech in such cases need to meet[127]. Given that there was no reference to clear and present danger as a test in *Frohwerk* and *Debs,* the conclusion that clear and present danger was a passing observation in the *Schenk* cases seems to be more convincing than the opposing view128. The reconstruction of the clear and present danger dicta by Chafee was adopted by Justice Holmes and Branides who begun to dissent in subsequent free speech cases making the clear and present danger test the center piece of their advocacy for a more robust protection of free speech by political dissenters[129].

In *Abrams v. United States*, 250 *U.S.* 616 (1919), the appellant were Russian Immigrants calling for a general strike to oppose US involvement in Russia. They were convicted for conspiring to violate the Espionage Act. Where the case was brought before the Supreme Court, the majority upheld the conviction asserting that the first amendment issues that are raised in the case have been addressed in *Schenk* and *Frohwerk.* Justice Holmes, who accepted the authority of the *Schenk* and *Frohwerk* decision went on to argue that the "silly leaflets" distributed by the appellant did not constitute a clear and present danger justifying their suppression. This opinion by Justice Holmes casts the clear and present dicta in *Schenk* as the test that should be applied in determining whether or not a suppression of dissent is constitutionally justified. As formulated in *Schenk,* the clear and present danger test would require the trier of fact to inquire "whether the words used are used in such circumstances and are of

---

127 Z. Chafee ,*Freedom of Speech in War Time,* Harvard Law Review, Vol. 32, No. 8 ,p.967 and 969

128 D.M. Rabban, Free Speech in Its Forgotten Years, Cambridge University Press 1997, pp. 285-286

129 D.M. Rabban, Free Speech in Its Forgotten Years, Cambridge University Press 1997, p 346

such a nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity and degree."

In *Gitlow v. New York, 268 U.S. 652 (1925),* the appellant was convicted for criminal anarchy due to the fact that he arranged the publication of a left wing manifesto. The majority held that the state's anarchy law was a reasonable exercise of the police powers of the state of New York and upheld the conviction. Justice Holmes dissented arguing that the applicable test in such cases should be the clear and present danger test and when one applies this test the conviction would be a violation of the first amendment.

In *Whitney v. California, 274 U.S. 357 (1927),* the appellant was convicted based on a state criminal syndicalism law for attending a communist party conference. The majority upheld the conviction reasoning that the law in question is a reasonable exercise of the police powers of the state. While concurring in the decision and upholding the conviction, Justice Brandise furnished a different basis for upholding the conviction and the constitutionality of the law that underlined the conviction. He reiterated the clear and present danger test and argued that the central question should be that of determining whether or not there is a serious, clear and imminent danger. He underscored the need to distinguish between advocacy and incitement, preparation and attempt, assembly and conspiracy and opined that unless the incidence of evil is so imminent that it focuses the opportunity of further discussion, speech should not be suppressed.

The dissenting and concurring opinions of Justice Holmes and Brandeis, although unable to carry the day during the red scare of the 1920's were much influential than that of the majorities opinion in the subsequent development of US fee speech jurisprudence. These opinions by the justices were very influential in two respects. One was the fact that they expounded the clear and present danger test which gained more acceptance later on and which accorded more protection to free speech as compared to the bad tendency test. In addition to this, the opinions by these two Justices were of great

significance for the eloquent exposition of rationales or justifications of free speech. These rationales have informed later decisions and thought on free speech and have became very influential.

In the *Abrams* case, 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. That at any rate is the theory of our Constitution."

This rational for free speech reflects Mill's justification for free speech that characterized free speech as an essential precondition for the pursuit of truth[130]. In the *Whitney* case, Justice Brandies opined that the final end of the state is to make human beings free to develop their faculties and that liberty is both a means and an end in itself. So, in addition to being indispensable for the finding and spreading of political truth, Justice Brandise reasoned that public discussion is a political duty.

Reflecting these opinions and building up on them, theories that provide justification of free speech have became an integral part of the scholarly and judicial discourse on free speech in America. The most recurrent justifications for free speech include;

- free speech as an instrument facilitating the search for truth, often associated with John Stuart Mill and the market place of ideas analogy by Justice Holmes

- free speech as an essential precondition for facilitating self governance by the people

[130] J.S.Mill ,On Liberty,London: Longman, Roberts & Green, 1869; Bartleby.com, 1999. www.bartleby.com/130/. [Date of Printout], Chapter II: Of the Liberty of Thought and Discussion

- free speech as a means through which individual self fulfillment, autonomy and development could be attained

- free speech as a means of creating a more tolerant society that can entertain divers views and opinions

- free speech as a means of checking abuse of power by public officials and a bulwark from tyranny and corruption[131].

The holding of the majority in *Whitney* and *Gitlow* was overruled in *Dennis v. United States*, 341 *U.S.* 494 (1951). In this case, the applicant was indicted for violating the conspiracy provisions of the Smith Act. The appellant's conviction was upheld by the Supreme Court, but the Court stated that it considers the Holmes-Brandise clear and present danger test to be controlling as opposed to the majorities approach in *Whitney* and *Gitlow.* In his opinion for the plurality, Chief Justice Vinson reasoned that the case requires the application of the clear and present danger test. But he introduced a reformulated version of the test that has been first formed by Judge Hand of the appeals court in a case called *Mases*. According to this reformulated version of the test, "in each case we must ask whether the gravity of the evil discounted by its improbability justifies the invasion of free speech as is necessary to avoid the danger".

In this long succession of cases about political dissent, the most recent case to be decided by the

[131] See H. Tribe, American Constitutional Law, 2nd ed The Foundation Press Inc 1988, p. 785; Stone and others, Constitutional Law, 5th ed Aspen 2005, p.1054; A. Melklejhon, The First Amendment is an Absolute, in P.B.Kurlad (ed), Free Speech and Association; The Supreme Court and the First Amendment,University of Chicago Press, 1975 pp. 9-11; W. Sadurski, Freedom of speech and Its Limits, Kluwer Academic Publishers, 1999, pp. 8-31;see also Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995. see also C. E. Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA Law Review p.964; see also M. H. Redish, *The Value of Free Speech*, 120 University of Pennsylvania Law Review, pp 591-596; see also K. Greenwalt, *Free Speech Justifications*, 89 Columbia Law Review 130-154;T.I. Emerson, Towards A general Theory of the First Amendment, Vintage Books 1963, p.3

Supreme Court is *Brandenburg v. Ohio*, 395 U.S. 444 (1969). This decision in which the Warren Court gave a unanimous decision in a *Per Curiam* opinion was regarding members of the KluKluxKlan who were convicted based on a state crime syndicalism legislation fro advocating for violent unlawful acts. The legislation up on which they were convicted was similar to the legislation that was the basis for conviction in the *Whiteny* case. The Court took *Dennis* as its point of departure, pointing out that *Dennis* has discredited the decision in *Whiteny* Case. The Court criticized the statute in question for failing to distinguish between mere advocacy and incitement to imminent lawless action[132]. The Court held that unless advocacy is directed at inciting or producing imminent lawless action and is likely to incite or produce such action, mere advocacy for use of force or violation of laws can not be prohibited. Hence, the legislation was said to be a violation of the first amendment and the conviction overturned.

This decision in effect seems to have brought to an end to the clear and preens danger test. The new line that has been drawn as far as political speech and agitation is concerned seems to be a line that would allow public authorities to suppress only political speech that incites or produces imminent lawless action. Justice Douglas and Black, who wrote separate concurring opinions emphatically, argued that they understand this decision as doing away with the clear and present danger test. Justice Douglas opined that the new line as far as the first amendment is concerned is the one that separates ideas from overt acts and unless a speech is accompanied by action it should be immune from persecution. Since the full implication of *Brandenburg* has not been borne out in subsequent cases before the Court, it is difficult to assert that the ascendancy of the almost absolutist view on the first amendment is for certain. What is certain however that is this case, provides a basis for a strong protection of political dissent, debate and agitation.

When considering issue related with free speech in the US, it is important to take note of that fact that

[132] This decision is not with out its critiques, Owens Fiss, Freedom of Speech and Political Violence, see R. C. Almagor ed, Democracy and The Limits of Tolerance, University of Michigan 2000, pp 71-79

there is a system of classification or categorization of speech that is very determinative of the extent to which the speech is going to be protected by the First Amendment. As can be seen in *Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)* and elaborated up on in *R. A. V. v. City of St. Paul, 505 U.S. 377 (1992)* there are two tires of speech at the bottom of which are found low value speech[133]. As the Court enunciated in *Chaplinsky* this consists of certain well defined and narrowly limited classes of speech the prevention and punishment of which has hardly been thought to raise any constitutional problem; these include speech that is obscene, profane, libelous and insulting or fighting words. These have been deemed by the Court as being not essential parts of any exposition of ideas. Regarding libel, in addition to the traditional libel laws which protect an individual, the Supreme Court has also upheld group anit-defamation laws. In *Beauharnais v. Illinois, 343 U.S. 250 (1952),* the Court upheld such a law noting the history of tragic racial relations and tensions in the state, reasoning that there is no reason why libel against a definite group can not be prohibited just as it is prohibited against an individual.

ii. Freedom of the Press

Coming to the freedom of the press in particular, the US Supreme Court has interpreted and applied the First amendment in a number of cases delineating the protection the press is entitled to under the first amendment. One of the most important protections the press is accorded to by the First Amendment as interpreted by the Supreme Court is the prohibition of prior restraint. In relation to this, the two most

[133] Schauer argues that the first amendment is a play in three acts. In the first act one has to make distinction between what constitutes speech and what does not constitute an act of speech. Only conduct deemed to be speech will be protected under the First Amendment Free Speech. Then the second act will be to come up with sub categories of speech based on the content of the speech then in the third atc determine the level of protection to be accorded to each sub category of speech. See F. Schauer, *Categories and the First Amendment: A Play in Three Acts* (1981) 34

Vanderbilt Law Review 265.; see also Cass R. Sunstein, Democracy and the Problem of Free Speech, The Free Press 1995, pp 121-165 and 8-11, Sunstein argues that political speech as the core of high value speech should be accorded primacy in the First Amendment protection it receives.

notable cases are *Near v. Minnesota, 283 U.S. 697 (1931)* and *New York Times v. United States, 403 U.S. 713 (1971)* usually referred to as the Pentagon Papers case. In *Near v Minnesota,* the appellant who was a publisher of a periodical in the state of Minnesota was enjoined by the state courts for perpetuity from publishing or circulating any malicious, scandalous or defamatory pubic nuisance. The restraining order was meant to stop the appellant from publishing news that implicated public officials in the state for being involved with organized crime. The Supreme Court held that the chief purpose of the First Amendment is to prevent previous restraints. The Court reasoned that unless exceptional circumstances like the fact that a publication would obstruct recruiting services, contains sailing dates or number and location of troops or obscenity, prior restraint would be an infringement of the freedom of the press under the First Amendment. However, the Court noted that the prohibition of prior restraint dose not necessarily mean that the publisher is to be immune from all subsequent lawful prosecutions.

The *Pentagon Papers* cases involved a secret study conducted by the US Government about the Vietnam War. The New York Times and the Washington Post obtained a copy of the report from a former employee of the Pentagon with out authorization by the government. The papers intended to publish some parts of the study and the government sought to get a court order restraining them from undertaking this publication. In a Percuriam opinion, the Court stated that there is a heavy presumption against the constitutionality of prior restraint that results in a heavy burden of proof on the part of those who seek prior restraint against publication and that the government has failed to meet this burden. Other than a general claim that the publication of the study will undermine national security and the success of military operations in Vietnam that were ongoing on at that time, the Government has not been able to show the Court specifically how the publication will be against national security interests. In his concurring opinion, Justice Brennan regretted the issuance of an injunction by the lower courts to begin with. He reiterated, citing the precedent of *Near v Minnesota* that prior restrains could be justified in a very narrow class of cases such us when the government has alleged and proved “that

publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea"

In addition to prior restraint which is in effect censorship, the other issues of concern in relation to freedom of the press are defamation or libel, publications connected with the administration of justice and taxation and other regulatory issues. As far as defamation by the press is concerned, the case that is of the most relevance and interest in the study would be the *New York Times Co. v. Sullivan, 376 U.S. 254 (1964).* In this case, the appellant had published an advertisement to solicit funds by civil rights activists. The advertisement contained defamatory and factually inaccurate statements about the respondent who was a police commissioner in Montgomery Alabama. He sued the New York Times successfully in his home state and was awarded a significant amount of money in damages. In a rare unanimous decision, the Supreme Court overturned the decision of the State Courts. It held that neither factual error nor defamatory content suffice to remove the constitutional shield from criticism of official conduct. The Court went on to state that unless there is actual malice which is constituted by knowledge of the falsity of a publication or reckless disregard about the same, there should be no recovery of punitive damages by public officials even when they have been defamed by false statements. This decision accords a strong protection to criticism of public officials by ensuring that even when a statement is a "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" or false the speaker or publisher will be protected in the interest of fostering open debate on public issues.

In *Hustler Magazine v. Falwell , 485 U.S. 46 (1988)* the Court had to had to address a related issue. In the said case, the respondent who a well was known minister (pastor) had obtained 150,000 dollar damage in the lower courts for infliction of intentional emotional distress. The claim of the respondent arose as a result of a parody published in the appellant magazine which intimated that the respondent has been engaged in a drunkard and incestuous sexual relationship. The Court ruled against the

respondent. It held that public figures and officials may not recover damages for the infliction of emotional distress with out showing actual malice. The Court reasoned that given the fact that the publication was that of a parody, not meant to be taken as a report of actual or true events, the respondents' interest in maintaining his reputation is not seriously jeopardized.

However, while shielding the press from punitive damages by public officials and public figures for defamatory false hood by setting a stringent actual malice test, it has held that this standard is not applicable to private citizens even when the defamatory falsehood was uttered or published in a discussion of a public issue. This holding which was pronounced in *Gertz v. Welch, 418 U.S. 323 (1974),* was based on the premise that unlike public officials and figures, private individuals are more vulnerable to injury by such statements and hence more deserving of recovery of damages for their injury. Public figures and officials on the other hand, could easily access various media outlets through which they could counter and refute inaccurate and defamatory statements made against them.

Another fault line in relation to the freedom of the press concerns publications by the press in connection to administration of justice by the judiciary. In *Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976),* a state court which was about to start a high profile murder trial ordered the press no to publicize the confessions of the accused or other facts strongly implicative of guilt on the part of the accused. The Supreme Court, while acknowledging the fair trial interest of the accused held that the order by the trial court is not a permissible means of enforcing the fair trial rights. The Court opined that the First amendment provides special protection against orders that impose prior restraint and such restraint is the most serious and the least tolerable infringement of freedom of the press.

In *Branzburg v. Hayes , 408 U.S. 665 (1972),* the appellant was required to testify before a grand jury in connection with a series of articles he published about drug use. The appellant argued that such testimony will force him to divulge the identity of confidential sources for his story and that the First

Amendment protection of the freedom of the press entitles him to decline the subpoena to appear before the grand jury. The Court held that reporters are not immune from such subpoenas so long as the subpoenas are issued in good faith and are not meant to harass the reporters. This decision seems to deny journalists any claim of special treatment and privileges that sets them apart from the general public[134]. In *Gannett Co. v. DePasqual443 U.S. 368 (1979),* the Court held that the public and the press could be legitimately excluded from pretrial hearings but the Court distinguished this case when a controversy arose over the exclusion of the press and the public from a trial. In *Richmond Newspapers Inc. v. Virginia , 448 U.S. 555 (1980),* the court held that the right to attend a trial was implicit in the First Amendment. It distinguished this case from the *De Pasqual* case on the basis that the *DePasqual* case concerned pretrial publicity while the Richmond Newspapers case concerns public access to trial.

Another recurrent issue of concern in relation to freedom of the press under the first amendment has been the issue of taxation. The Supreme Court had expounded the implications of the First Amendment in connection to taxation of the press in a number of occasions. In *Grosjean v. American Press Co., 297 U.S. 233, 244 (1936),* the Court had to rule on the validity of a 2% license tax for levied on publishers of various press products for the privilege of engaging in such business. The Court held the tax to be a violation of the first amendment protection of the freedom of the press and hence unconstitutional. In its reasoning, the Court took in to account how the unpopular taxes of the Crown on the press in the colonies had been one of the grievances that had propelled the framers of the US constitution to demand independence. The court also pointed out that the tax would have a detrimental effect on the circulation and advertising revenues of the press. The Court condemned the tax as being unconstitutional because "in the light of its history and of its *present setting*[135], it is seen to be a

[134] This is reinforced by the Courts holding in *Pell v. Procunier , 417 U.S. 817 (1974)* that the Constitution does not require the government to accord special access to information that is not shared by the public generally to the press.

[135] At the time the tax on the press was adopted, the political settings in Louisiana were very acrimonious as a result of the antagonism between the press and other interest groups in the State which were in solid opposition to the then Senator

deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."(Italics added) This quoted statement and the latter interpretations of this precedent by the Court in subsequent cases indicate that the Court has also taken in to consideration the malignant political motives of the legislature for levying the tax in disposing of this case.

In *Pell v. Procunier , 417 U.S. 817 (1974),* at issue before the Court was the validity of an ink and paper use tax imposed on use of ink and paper for publication. In addition to singling out the press for such kind of tax, due to the exemption of the first $100,000 worth of ink and paper consumed by a publication substantial part of the collected revenue through this tax was from a handful of news papers, the Star Tribune being the source of roughly two third of the revenue collected from this tax. The Court distinguished this case from *Grosjean* due to the fact that unlike *Grosjean* the political settings in this case do not indicate censorial motives on the part of the legislature.

The Court however, went on to assert that "[d]ifferential taxation of the press...places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." The Court held the tax to be unconstitutional since the Minnesota Commission of Revenue has failed to show such a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. In *Ark. Writers' Project v. Ragland, 481 U.S. 221 (1987),* the Court applied the same standard of 'counter balancing interest of compelling importance' to repudiate a tax regime in Arkansas that granted a discriminatory exemption from sales tax to some of the press based on their form and content.

---

and former Governor Huey Long and his policies. The Senator's political machine was in control of the stet legislature and the taxation bill was widely seen as an attack on the press with political and censorial motives. See R. C. Cortner, The Kingfish and the Constitution; Huey Long, The First Amendment, and the Emergence of the Modern Press in Modern America, Greenwood Press 1996.

iii. The broadcast Media

The freedom of the press that is accorded to the print media has also been extended to the broadcast media. However, the broadcast media is subjected to special regulations such as fairness requirements and restriction on use of indecent words or time of broadcasting of material with profane or indecent content and of course the requirement to obtain a license[136]. These regulations clearly abridge the freedom of expression of broadcasters and would be deemed unacceptable had they been imposed on news papers. However, there are two principal justifications that had normally been advanced in favor of the constitutionality of these regulations. These are the spectrum scarcity and pervasiveness rationales which are unique to the broadcast media only[137]. The first reason is that the broadcast media is very pervasive in its nature. This has been taken as a justification for regulating the content, frequency and time of broadcasting of advertisement and indecent or obscene materials. This regulation is especially meant for the protection of minors. In addition to the pervasive nature of the broadcasting media, another important factor that justifies special regulation is the limited availability of frequencies for broadcasting. Unlike the print media, the number of radio and TV stations that could operate is not infinite. The airwaves can entertain a limited number of broadcasters. Hence, there is a need to regulate the allocation of the scarce frequencies.

The Federal Communications Commission has been established by Congress based on the commerce clause of the Constitution to undertake these regulations. The regulatory framework and norms of the FCC have been reviewed by the Supreme Court in a number of occasions shedding light on the implications of the First Amendment to the broadcasting sector. Of special interest for the purposes of this paper would be *Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969)* . In this case, the Court upheld the fairness doctrine of the FCC which was challenged by the appellant. The appellant,

136 R. J. Wagman, The First Amendment Book, Pharosa Books 1991, pp. 128-134
137

who had been required by the FFC to comply with the requirements of this doctrine and provide an opportunity to reply to a certain Mr. Cook who has been subjected to personal attack in its broadcast, challenged the constitutionality of the doctrine. The Court reasoned that since the broadcasters have been allocated a scarce public resource, they are proxies or fiduciaries of the public who could legitimately be required to abide by requirements of fairness. This decision and the doctrine it upheld gave the privately owned broadcasters a character of public broadcasters who have the task of ensuring the fair utilization of scarce public resources. However, with technological advancements diminishing the validity of the rationale of 'spectrum scarcity' and also with the onset of the deregulation trend in the Regan era, the fairness doctrine and similar regulations became less and less acceptable in the US.

C. Freedom of Expression South Africa v the US

After the discussion in the preceding sub sections, one could safely assert that though the specific standards employed and the approaches adopted in these two jurisdictions differ, freedom of expression is accorded ample protection for political debate and dissent. In South Africa, the Constitutional Court and also the ordinary courts have repeatedly declined to follow the approach of the US Supreme Court and have asserted that unlike the US in South Africa equality, dignity and freedom are the foundational values as opposed to free speech. While the US Supreme Court has been quite hostile to prior restraint the South African Constitutional Court has been more accommodating to prior restraint so long as the restraint is to avert a real risk of a demonstrable prejudice to the administration of justice or a similar interest. Furthermore, while the US Supreme Court uses incitement of imminent lawless action as a criterion of determining whether or not interference with free speech is constitutional or not, the South African Constitutional Court asks whether or not the limitation is reasonable and justified.

As far as defamation of public figures is concerned, the US Supreme Court has the actual malice test while the South African Constitutional Court has expressly declined to adopt such a standard and

instead endorsed a test that protects only reasonable statements made with out negligence. The over all picture one would get is that freedom of speech is protected by more exacting standards and through a more robust approach in the US than in South Africa. The South African Court has relied on the foundational values of the South African Constitution, namely freedom, dignity and equality; especially the dignity; to allow restrictions on free speech inconformity with the general limitation clause of the Constitution. This general limitation clause, Article 36 requires that a limitation be justified and reasonable in an open and democratic society based on human dignity, equality and freedom. This clause enshrines a proportionality test in its explication of what constitutes a reasonable and justified limitation. In addition to these, the approach of the two countries in ensuring diversity of views on the air waves is also different. In South Africa, a public broadcaster financed from State coffers has been the main guarantee for the accessibility of the air waves to divers views. In the United States, the approach is quite different.

Generally speaking, the approach of the South African Constitutional Court seems to be less protective of free speech than the US Supreme Court. But all in all, the protection of freedom of expression in both countries is sufficient to facilitate political debate and dissent free from prosecution, to foster robust, a free and independent press and also broadcasting media that entertains a variety of views. This has been accomplished despite the various challenges to constitutionalism prevalent in both jurisdictions. In the next section, the discussion will focus on the salient feature of the constitutionalism in these two countries that have been crucial for this success.

5. Salient Features of Constitutionalism in South Africa and the United States: Constitutionalism Reconsidered

In the preceding chapter of the thesis, we have been able to establish that constitutionalism faces many challenges in South Africa and the US and that despite these challenges constitutionalism has prevailed in these two countries. In this section we are going inquire in to the features of constitutionalism in these two jurisdictions that have been crucial for its success. The purpose of this discussion is to answer how constitutionalism has been able to overcome challenges that arise from the political history, culture and heterogeneity of sates that are ill suited for constitutionalism. The constitution making process in South Africa, separation of powers in the US and constitutional/judicial review will be discussed as the salient features of the constitutional order of these two countries.

5.1. South Africa: Constitution making and Constitutional Review

The Republic of South Africa in relative terms has a long history of parliamentary 'democracy' that gave a voice in the affairs of state for white South Africans, at times even to Indians and 'coloreds'. Especially, in the years preceding apartheid, in addition to a parliament that was elected by the white citizens, there was also an independent judiciary, and a free press. Hence, even if South Africa did not have a full fledge constitutional democracy prior to 1996, it can be said that it had some experience with democratic institutions and practices to some degree. However, after the second world war, with the onset of apartheid in the most systemic and thorough fashion under the aegis of the Afrikaner's National Party, little was left of the democratic institutions and tradition of South Africa which to start with were very distorted[138]. The system of apartheid although functioning on the basis of a written constitution had few pretenses of being a genuine democracy and was the farthest thing from a

[138] H. Ebrahim, The Soul of A Nation, Cape Town/Oxford University Press, 1998, p.13

constitutionalist state. It still paid some homage to legalistic pretensions to give the system a veneer of legitimacy but prior to the demise of apartheid South Africa could hardly be described as a constitutionalist state by any stretch of the imagination. Hence, one can talk of constitutionalism in South Africa in the true sense of the term only after 1996.

To understand constitutionalism in South Africa starting from 1996 there are two salient features of South African constitutionalism one ought to take note of. The first is the constitution making process in South Africa that ushered a new era of constitutionalism and the second is the South African Constitutional Court that is one of the most important, if not the single most important actors that are playing a leading role in fostering constitutionalism in South Africa. Since the demise of apartheid, South Africa has been able to transform it self in to a truly constitutionalist polity. The land of apartheid is now hailed as the rainbow nation. In the subsequent discussions, we will see how the constitution making process and the Constitutional Court have a uniquely decisive influence in this transformation.

A. The Constitution Making Process of South Africa

The constitution making process in South Africa was preceded by long and bitter negotiations between the African National Congress (hereinafter the ANC) and the Afrikaner's National Party (hereinafter the NP). Before the formal negotiations begun in the CODESA and even before the preliminary talks about talks, there were a series of secret talks held between the leaders of the NP and the ANC[139]. There were many reasons that induced the two players to start negotiations. Although the apartheid regime was at that time militarily strong enough to crush any resistance and hold on to power, its continued existence was becoming more and more costly and untenable. The deep and violent unrest in the black population of South Africa, international isolation and consequent economic woes, the demise of the communist bloc which the NP feared was bent on orchestrating a Marxist revolution through ANC

[139] Some of this talks were informal and secret, held at the time when the ANC was baned in South Africa, the other talks were well publicized and formal such resulting in documents like the Groote Schurrr and Pretoria Minutes which laid the ground work for further negotiations. See H. Ebrahim, The Soul of A Nation, Cape Town/Oxford University Press, 1998, p 44 AND 61

contributed in making the continued existence of apartheid in its form at that time both difficult and unnecessary[140]. It became clear for the leadership of the NP that unless they reform apartheid, they risked the privileged and affluent lifestyle of white South Africans. On the other hand, for the leaders of the ANC, it was clear that getting rid of apartheid through violence and military action or revolution was almost impossible in the near future. The regime in power was still strong in military terms, so a negotiated political settlement was the only viable option for the ANC and its allies to attain their goals.

A South African politician aptly described the situation that these parties found themselves in by saying " they were like two squabbling drunks; they could threaten one another with much shouting and finger-wagging, but neither could land a knock-out blow and in the end, they had to lean on one another to stay upright"[141]. Under these circumstances wherein neither party could completely dictate the terms and where the imperative of reaching a settlement was equally felt by both the constitutional arrangements agreed up on were naturally geared at limiting government, ensuring popular sovereignty and guaranteeing fundamental rights. Popular sovereignty and a democratic constitution was the priority for the ANC which was playing for ultimate control of the state machinery after the negotiations. At the same time, a limited government that respects fundamental rights was one of the major concerns of the NP which saw this as necessary to make sure that a new majoritarian black government will not take measures designed for retribution and to strip white South Africans of their wealth. So at the end of the final formal talks of the Convention for Democratic South Africa (CODESA) between different parties, principally the NP and the ANC thirty four constitutional principles were agreed up on as being binding signposts for the subsequent exercise of constitution making[142]. It was also agreed that a constitutional court would have to examine the final constitution

[140] H. Ebrahim, The Soul of A Nation, Cape Town/Oxford University Press, 1998, pp 25-26
[141] Sparks, Tomorrow is Another Country, Hill and Wang 1995,p.152
[142] H. Ebrahim, The Soul of A Nation, Cape Town/Oxford University Press, 1998, pp223-235

before it comes in to force and ensure that it is in conformity with these principles[143].

So, when the Constitutional Assembly operating with in the frame work of an interim constitution started the process of constitution making, it did not start from scratch and it did not have a free reign. In addition to other procedural safeguards that were intended to make sure that one party would not dominate the constitution making process, the agreements in the prior negotiation articulated in to thirty four constitutional principles provided a binding frame work that ensure the draft constitution will be democratic and also attuned to the need to limit government and respect fundamental rights[144]. Under these circumstances, although ANC had a majority in the constitutional assembly and although it was a forgone conclusion that it will be the governing party after the adoption of the constitution, it could not dictate the terms and have a constitution that would optimize its power in a future government. This unique process was a very important factor that contributed to the success of constitutionalism in South Africa. Had the ANC came to power through armed struggle after a complete military victory over its adversary, the urge to wiled unlimited power and the temptation to disregard fundamental rights would have been too much to resist and constitutionalism would have probably not fared so well.

B. The Constitutional Court of South Africa and Judicial Review

The Constitutional Court of South Africa has played a crucial role in the development of constitutionalism in South Africa[145]. The drafters of the South African Constitution has not simply proclaimed it to be the supreme law of the land that prevails over laws and decisions contrary to it, but they have also set up an institution charged with the duty of ensuring the supremacy of the Constitution by deciding on controversies on the constitutionality of laws and other acts of the government. Even

[143] Ibid
[144] S.Gloppen, South Africa: The Battle Over the Constitution , Ashgate Dartmouth 1997, p.269
[145] H.Klug, Constituting Democracy, Cambridge press 2000, p.142

though there were different views as to the actual structure, composition and jurisdiction of a future Court that will enforce the Constitution, the drafters were from the outset in agreement as to the need of a judicial enforcement of the Constitution[146]. The Constitutional Court has a very unique role in the South African Constitutional order since it is an institution that is neither tainted by complicity with the system of apartheid nor subservient to the pervasive dominance the ANC has in the new South Africa. From the onset of the democratic transition of South Africa, shedding the legacy of apartheid and avoiding the specter of a one party tyranny have been the greatest challenges for constitutionalism. The Constitutional Courts novelty and its composition assured that it was free, in perception and reality from the legacy of apartheid. At the same time, its institutional structure and composition ensured its independence from the political branches which have become under the complete control of the ANC led majority. These have made the Court a very unique institution in South Africa capable of commanding the trust of all sides in a deeply divided and polarized society. Hence the Court has been able to foster constitutionalism despite the odds and contributed immensely to chart a new way for South Africa.

The Constitution Court of South Africa predates the Constitution and was initially inaugurated based on the interim Constitution[147]. The Interim Constitution entrusted the Court with the task of ensuring that

[146] R. Spitz and M. Charskalson, The Politics of Transition, Hart Publishing 2000, p.142; The Court is composed of eleven judges with a non renewable term of 12 years. (Sections 167(1) and 176(1) of the Constitution of the Republic of South Africa (RSA)The Judges other than the Chief Justice and the deputy are appointed by the President of the Republic from nominees presented to him by a judicial council which is constituted by appointees of the president, representatives of the legal profession, the judiciary, the academia and parties in parliament. (Section 174& 175 of the Constitution of the RSA)Like most of its counterparts in the other parts of the world, the Court has the power to undertake both abstract and concrete judicial review[146]. In addition to disputes between organs of the federal and state governments, it is also empowered to entertain individual complaints. (Section 167(4) of the Constitution of the RSA) In these respect, the South African Constitutional Court resembles most of the European Constitutional Courts. The South African scheme of judicial review although centralized (in the sense that constitutional adjudication is reserved to a tribunal separate from the ordinary judiciary) to some extent, leaves room for the ordinary courts to undertake judicial review. Section 167 (4) of the RSA Constitution provides a list of matters that fall with in the exclusive original jurisdiction of the Constitutional Court. On other Constitutional matters, the High Court and the Supreme Court Appeals have the competence to adjudicate though their decisions are subject to appeal to the Constitutional Court and especially decisions about the constitutionality of parliamentary statues have to be confirmed by the Constitutional Court before taking effect. See also Section 167 (5), 168(3) and 169, see also Z. Motala and C. Ramaphosa, Constitutional Law; Analysis and Cases, Oxford 2002 ,pp58-59 In this sense, judicial review is only partially centralized.

[147] 1994 Interim Constitution of South Africa, Section (98)

the final Constitution adopted by the Constitutional Assembly was in conformity with the constitutional principles agreed up on by the political parties in their negotiations leading to the Interim Constitution[148]. Based on this mandate, the Court had to review the first draft of the constitution and it had declined to certify it since it found that some of its provisions were not in conformity with the agreed up on constitutional principles[149]. Even after the coming in to force of the final Constitution, the Court has a power to review the Constitutionality of amendments to the Constitution[150].

In addition to this unique role the Court played in the coming to force of the new Constitutional order in South Africa, the Court's importance in the constitutional order arises from its active effort in developing the constitutional jurisprudence of South Africa. When the court started is work, South Africa was an international pariah state with one of the worst records in human rights. The Court has developed an impressive body of case law and has fostered constitutionalism in South Africa in a relatively short period of time that has made South Africa one of the foremost constitutionalist states not just in Africa but through out the world.

The Court has accomplished this through a judicious use of international and comparative sources[151]. While the Court has developed a constitutional jurisprudence that takes in to account the South African context, it has also taken the case laws of various jurisdictions[152] . The use of comparative constitutional law has been quite crucial in the Court's development of its own case law. This can be demonstrated by the fact that,

> the total number of references to foreign law in the four years from 1994 to September 1997 amounts to 1201 (in approximately 300 cases).In the period from September 1997 to September 2000, in excess of 350 foreign cases have been cited in cases dealing with

[148] 1994 Interim Constitution of South Africa, Section 71(2)
[149] *Certification of the Constitution of The Republic of South Africa, 1996 CCT 23/96*
[150] Section 167(4)(d) of the Constitution of the RSA
[151] M.A. Burnham,CULTIVATING A SEEDLING CHARTER: SOUTH AFRICA'S COURT GROWS ITS CONSTITUTION, 3 Michigan Journal of Race & Law 1997, p.32
[152] M.A. Burnham,CULTIVATING A SEEDLING CHARTER: SOUTH AFRICA'S COURT GROWS ITS CONSTITUTION, 3 Michigan Journal of Race & Law 1997, p.55 ;See also Francois du Bois & Daniel Visser , The Influence of Foreign Law in South Africa,13 Transnational Law & Contemporary Problems 2003,p.656

constitutional issues, while 301 citations in this category occurred during the period between October 2001 to December 2003.[153]

The use of such comparative case law from various jurisdictions has, however, been as selective as it has been extensive. The court has hardly undertaken wholesale importation of the case law of any state. As gathered from the discussions of the case law of the court in free speech, the Court had adopted foreign case laws to the South African setting and it has rejected those it has considered unsuitable. But even when it ultimately rejects the case law of the leading jurisdictions in comparative constitutional law, it makes an effort to consider them so long us they are relevant to the issue it is considering[154]. This practice of the Court is supported by the Constitution which states that the Court must consider international law and could consider the case law of other countries in its interpretation of the bill or rights[155].

But while talking about the Constitutional Court, it is important not to be mislead in to assuming that the Court is the only judicial organ that is engaged in the task of protecting fundamental rights in the Constitution. In addition to the Constitutional Court, the ordinary court also has some role to play in fostering constitutionalism in South Africa in two important ways. The first is the role of the courts in developing ordinary private laws in accordance with the spirit and objective of the Bill of Rights of Constitution[156]. By interpreting Section 35(3) of the interim constitution, which is the equivalent of article 39(2)the final Constitution, as an endorsement of the doctrine of indirect horizontal effect the South African constitutional court has opened an important avenue for the ordinary courts to develop constitutionalism in South Africa[157]. As can be gathered from the *Carmichele v Minister of Safety and*

153 Francois du Bois & Daniel Visser , The Influence of Foreign Law in South Africa,13 Transnational Law & Contemporary Problems 2003,p.644

154 Jeremy Sarkin, THE EFFECT OF CONSTITUTIONAL BORROWINGS ON THE DRAFTING OF SOUTH AFRICA'S BILL OF RIGHTS AND INTERPRETATION OF HUMAN RIGHTS PROVISIONS**,** 1 University of Pennsylvania Journal of Constitutional Law 1997, p. 179

155 Section 39 (1) (b) and (c) of the Constitution of the RSA

156 Section 39(2) of the Constitution of the RSA

157 The application of this doctrine would mean that the bill of rights, although not directly applicable in the cases between private parties will be indirectly applicable to the extent that they influence the development and interpretation of the

Security CCT 48/00 and the *Fred Khumalo and others v Holomisa CCT 33/01* when the Bill of Rights can not be considered directly applicable between private parties, the values, spirit and purport of the the bill of rights permeate the common law in all its aspects including private litigation. Hence, ordinary courts in interpreting and applying laws in private litigation are expected give indirect horizontal effect to the bill of rights and develop the common law in line with the spirit, purport and values of the same. According to *Fred Khumalo and others v Holomisa CCT 33/01,* article 8 of the Constitution also empowers the ordinary Courts to give direct horizontal effect to the bill of rights when such application is found to be appropriate.

In addition to this, some of the ordinary courts have the power to review the constitutionality of legislations and administrative acts[158]. Although their power does not extend to invalidating a legislation of the parliament, they can determine its inconsistency with the Constitution and suspend its applicability in the case presented before them[159]. Their determination as to the unconstitutionality of a legislation will have to be endorsed by the Constitutional Court if the law in question is to be invalidated[160]. This is a very important power for the ordinary courts that allows them to partake in judicial review of legislations. Through these two tracks (direct and indirect horizontal application of the bill of rights plus constitutional judicial review by specified courts), ordinary courts complement the work of the Constitutional Court and contribute to constitutionalism in South Africa.

common and statutory private law applicable in the case between the private parties. This matter will be discussed in greater detail later on. See Francois du Bois & Daniel Visser , The Influence of Foreign Law in South Africa,13 Transnational Law & Contemporary Problems 2003,p.634;*Du Plessis v DeKlerk* CASE NO CCT 8/95

158 Jeremy Sarkin, THE EFFECT OF CONSTITUTIONAL BORROWINGS ON THE DRAFTING OF SOUTH AFRICA'S BILL OF RIGHTS AND INTERPRETATION OF HUMAN RIGHTS PROVISIONS**,** 1 University of Pennsylvania Journal of Constitutional Law 1997, p. 190,Sections1 68 and 169 of the Constitution of RSA

159 Sections 167(5) and 172 of the Constitution of the RSA

160 Ibid

5.2. US: Judicial Review and Separation of Power as Guarantees of Freedom of Expression

As can be seen from the discussion in the earlier section, the First Amendment, as interpreted by the US Supreme Court provides a strong protection to Freedom of the expression; particularly expression of political opinion and dissent, freedom of the press and broadcasting media. However, it should be noted that these protection has not be as robust as it is now at all times and in all circumstances. Starting with the infamous sedition act of 1798 there has been a number of occasions in which the constitutional guarantee of Freedom of expression has been ignored and breached[161]. Especially during the Civil War, WWI and the red scare in the immediate aftermath of the First World War, the era of McCarthyism' after the Second World War and the Vietnam war could be taken as some of the most noteworthy periods in which freedom of expression was under peril.

However, when seen in balance, if one is to think of freedom of expression as a principle or ideal to be approximated to the maximum extent possible, the US would be one of the societies that has been able to approximate this ideal to a great extent . Though far from perfect, the overall track record of the State in respecting freedom of expression and the Constitution that embodies the right has been positive. By and large, the Constitution could be said to have set a limit on the state, ensured popular sovereignty and fundamental rights .Hence it would be very naive to think of the Constitutionalism in the US as thing of perfection and as being static. Seeing it as a work in progress would be closer to reality.

[161] See in general Perilous Times; Free Speech in war Times, W.W. Norton and Company 2004;Craig Smith ed., Silencing the Opposition; Government Strategies of Suppression of Freedom of Expression, 1996 State University of New York; see also,G.R.Stone, *Free Speech in the Age of McCarthy; A Cautionary Tale*,93 California Law Review 2005,pp 1387-1412

If one was to ask what is behind this work in progress, this continuous process of refinement and rejuvenation, two principles emerge at the center of this process. The first principle is the principle of judicial review. Emerson identifies an independent judiciary with the power of judicial review as one of the main legal institutions along side a written constitution and an independent bar up on which freedom of expression depends up on.[162] Black, after noting that the US Constitution sets up a scheme of limited governments through a system of separation of powers goes on to argue that the umpire as to whether or not a particular department has overstepped the limits of its power must be an "institution with a satisfactory degree of independence from the active policy making branches of government" and must be a specialist trained in the presentation and evaluation of evidence and arguments[163]. Bickecl, after making a distinction between two aspects of governmental action, namely the "immediate, necessarily intended and practical effects" on the one hand and the "unintended or unappreciated bearing on values we hold to have a more general and permanent interest, goes on to argue that the judicial branch is more qualified to be conscious of this distinction and make sure the immediate and necessary will not trample over the value of general interest[164]. He points out that "judges have the... leisure, the training and the insulation..." required for this task[165].

Generally speaking, there seems to be a consensus as to the crucial role of the judiciary in enforcing the first amendment and protecting free speech[166]. Ely asserts that "virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech, publication and political association." [167] Strong, while acknowledging that the Supreme Court has tended to follow the lead of the political branches when there is speech implicating foreign relations policy is concerned asserts that

[162] Emerson, Towards A general Theory of the First Amendment, Vintage Books 1963, p 30

[163] See, excerpts of Charles L. Black, The Building Work of Judicial Review, in J.H Garve and T. A. Aleinikoff, Modern Constitutional Theory: A Reader, 3rd ed 1994,West Publishing, See, A.M.Bickel, The Least Dangerous Branch, 2nd ed Yale University Press 1986, pp24-25

[164] See, A.M.Bickel, The Least Dangerous Branch, 2nd ed Yale University Press 1986, pp24-25

[165] Ibid

[166] Even those who do not accept the validity of the assertion that the judiciary has played an important role in protecting free speech in the US concede the existence of such a consensus among most scholars. See R. F. Nagel, Constitutional Cultures; The Mentality and Consequences of Judicial Review, University of California Press 1989, pp27-29

[167] J. Ely, Democracy and Distrust, Harvard University Press 1980, p. 105.

"there is a uniform strength in the Courts record in the defense of citizens' criticism of government internal policy".[168]

Most of the cases that have been discussed above attest to the importance of the judiciary in enforcing rights and ensuring that the constitutional limits set on governmental power are respected by the executive and the legislature. Deliberately or inadvertently, the legislature and the executive exercise their powers in a manner that infringes up on the freedom of expression in violation of the constitution. Sometimes such infringements are motivated by malevolent political calculations or perceived threats or dangers to the welfare of the nations. Had there not been an independent Court that reviews legislative and administrative actions in light of the Constitution, freedom of expression would have been doomed to falter and wither away. The process of judicial review had not been essential not only in quashing governmental acts found to be contrary to the first Amendment. Equally important has been its work in the exposition and elucidation of the meaning of the First Amendment. The First Amendment, as it is and from its plain reading is arguably not readily applicable. Even if one is an absolutist and was to argue that the First Amendment means what it says and that there could be no law regulating speech, such a stand would still leave a number of questions an unanswered. When do we say a certain conduct constitutes a speech and not an act? Is a law imposing taxes on the press against the first amendment?

In addressing a number of questions that are related with determining which sorts of actions by the government constitute a violation of the freedom of expression, the Court develops standards for judicial review like the 'bad tendency' 'clear and present danger' or the 'incitement of imminent lawless action'. Regardless of the substantive merit or demerit of these standards, the important thing to

[168] Judicial Function in Constitutional Limitation of Governmental Power F. R. Strong, 1997 Carolina Academic Press, p. 70.

take in to account is that these are glosses to the constitutional text that brings it alive. They give the nebulous principle of free speech and free press concrete shape and form. They facilitate a clearer and sharper understanding of the requirements of the Constitution. The case law of the Courts with the comment and critique of scholars gives flesh to the bare bones of the Constitution. To be able to undertake this crucial task, the independence of the Court from the other branches of government and the moral authority it has been able to garner throughout the years is of great significance.

The other principle that has underpinned constitutionalism in the US is the principle of separation of powers. This principle complemented by the principle of checks and balances has meant that that political power is not accumulated in the hands of a particular person or a group of persons. To the contrary, power is divided horizontally and vertically. There is a division of political power between the states and the federal government and also between the various branches of government. These branches of government have been structured in such a manner that they will have the competence and will to check the excess of the other. The inner contrivance of the Federal Government makes a bid to attain a complete control of power a very difficult task. Even if not out of care for fundamental rights being encroached up on, out of their own self interest rivals and political foes in other branches of government will assert their power to check the excess of one another[169].

[169] James Madison, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, The Federalist No. 51.

5.3 Beyond Freedom of Expression; Constitutionalism Revisited

In the preceding sections of this chapter, we have seen the challenges to constitutionalism in the US and South Africa, the extent to which freedom of expression is protected despite these challenges and also how these challenges have been overcame. This section is meant to build on the last section which has identified separation of power, constitutional review and also the constitution making process as salient features of constitutionalism in the two jurisdictions. Further more this section is supposed to provide a second look at constitutionalism from based on the insights gained from the protection of freedom of expression in the South African and US constitutional orders.

Though we have identified the above three distinct features as being crucial to the success of constitutionalism, the subsequent discussion will largely focus on constitutional review. This is so because as far as the constitution making process in South Africa and the American form of separation of powers and checks and balances are concerned, the utility and practicality of these features as lessons in constitutionalism for Ethiopia is limited. If Ethiopia was in the process of adopting a new constitution perhaps the lessons from the constitution making process of South Africa would have been quite important. But that is not the case at this point in time. The same could be said about separation of powers and checks and balances molded on the US Constitution. If Ethiopia was in the process of writing a new constitution or undertaking major constitutional reforms through amendments, then merit and demerits of such a model could deserve more attention in this paper. In relation to this, it should be mentioned that in South Africa where the parliament and the executive are both controlled by a single party (the head of the later is elected by the former just like in a parliamentary system of government) constitutionalism is doing fine. Clearly, a presidential form of government with a system

of checks and balances designed in line with the US model is not a perquisite for constitutionalism. However, with the exception of some odd jurisdictions with the doctrine of parliamentary sovereignty, separation of powers and checks and balances in the form of constitutional review by a body independent from the political branches of government is sin qua non for constitutionalism.

Therefore, the subsequent discussion on the lessons in constitutionalism will focus on constitutional review and present the author's s perspectives on constitutional review and its importance for constitutionalism. This is supposed to provide us with an opportunity to revisit an the issue of constitutionalism and constitutional review which has been barely touched up on in the first chapter. The author will argue that constitutionalism is a work in progress that requires a process of contextualizing certain normative ideals and principles. Furthermore, the author will argue that spearheading and overseeing this process is a task that should be primarily entrusted to a judicial organ.

A. Constitutionalism as a Work in progress

At this point in time both the US and South Africa is considered to be countries with strong credentials in constitutionalism. The governments of both states are constrained by constitutional norms that set out the powers they posses and how these powers are to be exercised. The Constitutions lay down the fundamental rights of citizens and subject the governments to the popular will of the citizens as expressed through the democratic process. But as we have seen in relation to freedom of expression, the ideal of a constitutionalist state had not always been adhered to in these states and nor is it perfectly implemented even today. Constitutionalism as a project has always been a work in progress.

If we take the US, it is a country that could boast the longest history with a written constitution that aspired to found a constitutionalist state. But as one can note from the episodes in its history such as the prosecution of dissenters by way of the sedition act of 1798, rule by emergency powers during the civil war, the Sedition Act of 1917, the red scare after the first world war, the era of McCarthyism after the Second World War and also attempts to suppress dissent during the Vietnam war one can

hardly dispute the fact that the record of the US in terms of constitutionalism and freedom of expression is far from perfect. The way dissent has been handled in times of political tension and war has at times undermined constitutionalism and freedom of expression in the US. In South Africa, in addition to the fact that constitutionalism is a rather recent phenomena one can say that freedom of expression is not entirely out of the bush. The disturbing tendency of political manipulation of the SABC and also the sensitivity of politicians in the ruling party towards criticism and their attitude towards the judiciary gives rise to concern. In short freedom of expression has not been around in these states forever and nor has it been perfect. It has not simply taken off in the most ideal circumstances and flourished; the reality as we have seen earlier is more complicated than this.

The experience of this leading jurisdictions show that constitutionalism is a wok in progress. It has to start somewhere, even under challenging circumstances and would never be fully completed. The struggle for a constitutionalist state was not over in the US when the Constitution and the bill of rights were adopted. As far as freedom of expression is concerned it has taken more than a century before the Supreme Court was even sized with the matter of delineating the contours of the freedom. Even then, it took almost half a century before the Court came up with a jurisprudence that effectively accorded protection to those who espoused political opinions radically opposed to those held by the majority. It has taken South Africa a shorter period of time to accomplish the same goals if one starts counting from the onset of political transition in that state. But in neither case was constitutionalism an instant success. It is always faced with difficult challenges and set backs which had to be overcome.

B. Contextualization

Though we can safely assert that there is constitutionalism and freedom of expression in both the US and the South Africa, one can not fail to note that these two countries have very different historical, cultural, political and economic settings. The assertion that freedom of expression is respected in both states and that both are constitutionalist states should not mislead us in to thinking that the same issues are raised in both jurisdictions and are answered in the same manner. For instance, the question of how

public service broadcasters should be regulated is not an issue of significance as far as freedom of expression is concerned in the US. However, this issue is of paramount importance in South Africa due to political, historical and economic factors that exist in South Africa but not in the US. In South Africa, due to the SABC's historically exclusive control of the airwaves and also for economic reasons, how the SABC operates and how it is run is a crucial issue for freedom of expression. No broadcaster can compete with the SABC and have the geographic coverage and also the resources to broadcast in all 11 languages being used in South Africa. Unlike SABC there is no public service broadcaster in America with such control over the 'commanding heights' of the broadcasting scene; so questions of public service broadcasting and how it should be managed are not burning issues the US.

Further more, even if the same issues and questions arise, they will hardly be answered in the same manner. For example, as far as defamation of public figures and officials is concerned, the Constitutional Court of South Africa has declined to adopt the solution adopted by the US Supreme Court. The same is true as far as prior restraint is concerned. When rejecting the actual malice test in relation to defamation of public figures and while rejecting the clear and present danger test in other cases, the South African Constitutional Court has pointed out to the differences in terms of the constitutional history, tradition and ordering of values of the two systems. So, the specific tests, doctrines and standards found in this two jurisdictions are not uniform. If we were to call these 'rules' for the sake of convince, then one can say that these two jurisdictions have different sets of rules regarding freedom of expression. However, these different rules have in substance effectively ensured adherence to certain principles and respect for some core values. So, though different on the level of rules applied on some specific cases, the two jurisdictions have as their common denominator effective and substantive adherence to the same normative values and principles. The difference in rules is a result of attempts to contextualize the common normative values and principles in to local settings. The test for successful contextualization is adapting the universal values and principles of constitutionalism to local conditions while maintaining their essence and ensuring that respect for the values and

adherence to the principles is effectively and substantially ensured.

C. Constitutional Review as an Act of Contextualization and Balancing

If constitutionalism is a work in progress that requires contextualization of its principles and values, then what we learn from the experience of the two jurisdictions compared in this paper is that the judiciary plays an enormously crucial role in this process. The importance of the role of the judiciary in this regard could hardly be overemphasized. As we can see with the supreme court of the US and the Constitutional Court of South Africa, judicial review and enforcement of fundamental rights is indispensable for constitutionalism.

The fundamental rights that would be recognized in a constitutionalist state are more often than not very vague and susceptible for different interpretations and understandings. Constitutionalism, through the instrumentality of these fundamental rights and also other norms sets boundaries beyond which the government can not legitimately exercise its powers. Due to the abstract and vague nature of the universal normative *values and principles* of constitutionalism, there is a natural need to expound up on them and give them meaning for application in the form of concert doctrines tests and standards or *Rules.* Though the political branches of government, i.e., the executive and the legislature would interpret constitutional norms in the course of their day to day activities, their interpretation can not be considered as the final and ultimate interpretation of the normative *values and principles* of constitutionalism with out defeating the whole notion of a limited government. This is so because, naturally, the interpretation of the legislature and the executive will be inclined to expand their powers and competence at the expense of the fundamental rights of citizens especially that of those with limited representation in the upper echelons of power. Hence, the final and authoritative interpretation of the normative *values and principles* of constitutionalism would have to be undertaken by a body with professional competence, institutional independence from majoritarian politics and the least

capacity if not ambition for political self aggrandizement. Only such a body will be able to reduce the normative *values and principles* of constitutionalism in to operational *rules* which are in conformity with the ideals constitutionalism stands for[170].

The work of the South African Constitutional Court and that of the US Supreme Court in these two constitutional jurisdictions attest to these fact. If the RSA had adopted its bill of right and left its fate in the hands of the executive and the legislature, perhaps freedom of expression would probably not have been in its current favorable shape. If the US Supreme Court had kept its hands of the first amendment as was the case till the early 20th Century, freedom of expression would probably have not fared this well. These Courts have developed a body of case law that gave meaning to the relatively abstract values and principles embodied in there respective Constitutions contextualizing them in the form of various standards and test for judicial reviews. The later rules have provided guidance for lower courts and also for the other branches of government. As much as the interpretive function of the Courts, it should be emphasized that they had also a contextualizing function. This is to mean that in the way they reduced the normative values and principles in to rules, they take in to account the particular historical, political, social, cultural and economic setting of the country.

Further more, in addition to the interpretive and contextualizing function; these Courts have a function of maintaining the overall equilibrium of constitutional normative ideals. Even when the political branches are acting in the good faith and with no desire to expand the domain of their power and consolidate it, sometimes striking the right balance between the competing normative values and principles of constitutionalism is such a delicate task that they might err. At times, free speech could undermine national security and the accord between ethnic and religious groups in a country; it could also undermine the effectiveness of the administration of justice or personality rights such as privacy. Due to the pressures of their political responsibilities and also the all too human desire to enhance and

[170] See, excerpts of Charles L. Black, The Building Work of Judicial Review, in J.H Garve and T. A. Aleinikoff, Modern Constitutional Theory: A Reader, 3rd ed 1994,West Publishing, pp202-208 See, A.M.Bickel, The Least Dangerous Branch, 2nd ed Yale University Press 1986, pp24-25

perpetuate ones power, the legislature and executive might not always make the right call in their attempt to strike the balance between such competing interests. For this reason, a review of their acts and decisions by a body that is not under the same pressures as the political branches, with a greater reservoir of expertise and a lesser drive of self entrenchment is required for the job. Such a body, which is relatively is relatively less ambitious in its derive for political gain and aggrandizement is better suited to strike the right balance between competing interests that maintain the overall equilibrium of constitutional normative ideals. So, in short the work of the South African Constitutional Court and the US Supreme Court could be explained as the contextualization of abstract normative values and principles of constitutionalism and the balancing of competing interests through the rules they develop.

In concluding this section, it can be said that constitutionalism needs a mind set that thinks of it as a work in progress, a process of contextualizing abstract and universal normative ideals and principles in to concert rules and standards and finally a judicial/quasi-judicial organ that is capable of undertaking such contextualization.

6. Bringing the Lessons Home; Salvaging Constitutionalism in Ethiopia

In the discussion so far, we have been able to establish the poor state of constitutionalism in Ethiopia as has been demonstrated by the prevailing condition of freedom of expression. Specifically we have identified political speech, the freedom of the press and the broadcasting media as the principal problematic areas. We have also seen how these problematic issues of freedom of expression are handled in South Africa and the US.

In concluding the discussion of freedom of expression in these two jurisdictions, an attempt has also been made to draw some lessons in constitutionalism beyond freedom of expression from both jurisdictions. These are the importance of judicial review, contextualization and also the nature of constitutionalism as a work in progress. In this part of the paper, I will try to discuss these lessons in relation to constitutionalism in Ethiopia. The discussion is meant to show how constitutionalism in general and freedom of expression in particular could be entrenched in Ethiopia with out undermining national accord among various ethnic and religious groups and despite the political culture and history that gravitates towards a vicious circle of repressions and violent rebellion. I would argue that with the appropriate institutional frame work in place and the right dispensation of all the relevant players, constitutionalism will in fact advance efforts to create a new political culture and maintain national accord. This part of the paper will have three sections. In the first section, the I will try to have the lessons in constitutionalism bear up on the Ethiopian situation while in the second section the focus will be to demonstrate the practical implication and application of these lessons in relation to the problematic areas of freedom of expression in Ethiopia. In the final section of this chapter I will discuss the limitations of the approach presented and demonstrated in the other two sections.

6.1 The Mindset, the Process and the Agent

In the previous chapter, we have discussed the need to view constitutionalism as a work in progress. In addition to adopting such a mind set about it, the author has pointed out the need for a process of contextualizing the normative ideals and principles of constitutionalism in to concrete rules and standards through the agency of a judicial organ entrusted with the task of constitutional review. All these have been asserted to be crucial for the success of constitutionalism despite adversity. In this sub section we will discuss the mindset, process and agent we have deemed to be necessary for the success of a genuinely constitutionalist system in relation to Ethiopia. The aim is to see what the lessons derived in the earlier chapters imply for Ethiopia.

A. The Mind Set: Constitutionalism as a Work in Progress

When talking about democracy, human rights or constitutionalism in Ethiopia in popular discourse there are two tendencies. On the one hand are those who portray the practices of the US and Western Europe as being almost perfect, inadvertently implying that it is beyond reach for a country like Ethiopia. The tendency is to think of the US democracy for example as having worked seamlessly for all these years with out much trouble and difficulty.

On the other hand are those who are quick to point out that constitutionalism even in established democracies does not work as smoothly as it might appear from a distance and that building a functioning democracy takes time. They like to remind everyone that "democracies are not built overnight". It is no coincidence that those in power are more often than not favoring the latter point of view which they use as a convenient excuse to justify the fact that almost two decades after a change of regimes, constitutionalism is still in shambles. Hence, the follies of too much emphasis on the fact that constitutionalism takes time to take root are evident. It could lead to complacency and serve as an

excuse for those in power to drag their feet. On the other hand, failing to acknowledge the inescapable reality that constitutionalism is a project that is a work in progress and that in any country it is faced with challenges will be unrealistic. Such unrealistic views will inevitably lead to disillusion and frustration when one is forced to confront the harsh reality on the ground.

The more useful approach in Ethiopia would be to acknowledge that constitutionalism and the freedoms it guarantees face some serious challenges. Constitutionalism can not bee seen as a very distant destination, as a democratic and human rights nirvana that we might get to through a glorious revolution. The experience of South Africa and the US is instructive in these regard. It took the US more than a century and half to develop a free speech jurisprudence that is highly protective of freedom of expression. It was a process filled with set backs and challenges that had to be overcame. South Africa had turned it self from a state with a plethora of censorship laws to a country with a robust and critical independent media and press with in a matter of few years. However, the process of transition was beset by all sorts of challenges and the odds were stacked against it. Even at this point in time both the US and South Africa has issues to deal with in relation to freedom of expression and can not take anything for granted.

Constitutionalism is a journey and not a destiny, a process and not an outcome. At the same time it is important to note that this process has to start some where. The assertion that constitutionalism is not a destiny is not meant to be taken as an excuses for staying put at where we are. By adopting a constitution that enshrines fundamental rights and gives recognition to popular sovereignty Ethiopia had started that journey. Yet Constitutionalism has hardly been making progress in Ethiopia since the adoption of the FDRE Constitution. As one can note from the discussion of problems related with freedom of expression, the process seems to have been brought to a halt after the adoption of the Constitution. The subsequent parts of the paper will deal with how the process could move along and make real progress. But through out the discussion and all efforts directed at advancing the cause of constitutionalism in Ethiopia, one should bear in mind the work in progress nature of the project.

Hence, the status quo should be deemed unacceptable while being aware of the fact that progress rather than perfection in constitutionalism is the aim. Such a mind set must be adopted by all relevant actors if constitutionalism is to overcome its challenges in Ethiopia.

B. The process: Contextualization and Balancing

As we have seen in the earlier discussion, in both the US and South Africa, constitutionalism did not always give rise to the same questions and even when it did, the same solutions were not adopted. Local conditions and circumstances were taken in to account in contextualizing the abstract values and balancing competing interests. In the Ethiopian context, the greatest concern in relation to constitutionalism, as has been pointed out earlier, arise from ethnic or religious polarization that could result in conflict. Furthermore, the repressive political culture which invariably begets armed rebellion is also another challenge for constitutionalism in the Ethiopian context.

If constitutionalism would require that the abstract and universal normative ideals and principles be reduced to concrete standards and rules that are well adopted to this concern arising from heterogeneity and an autocratic political culture. The standards and rules must be able to stay true to the values of constitutionalism and at the same time ensure that the abuse or reckless use of such freedoms will not precipitate religious or ethnic conflicts. While safeguarding freedoms like freedom of expression to the maximum extent possible such rules must give the legislator and the executive room to prohibit acts that would lead to religious and ethnic clashes.

At the same time, the standards and rules to be adopted must be such that they will ensure a decisive break from the political culture that insulated the powers to be from criticism and political opposition. Only a break from this culture would break the cycle of repression and rebellion. Due to the embedded nature of this culture in the political physic of the nation, the process of contextualizing must come up with standards and rules that are very sensitive to the special propensity of repression that is a characteristic of political power in Ethiopia. The rules must provide a clear and bright line that proscribes arbitrary use of power that tramples on fundamental freedoms.

In short, the process of contextualization and balancing should result in rules and standards that would cut some slack to the government in suppressing abuse and reckless use of freedoms that would cause ethnic and religious strife. At the same time, the standards must be quite uncompromising in prohibiting governmental intervention in fundamental rights that is more in line with the autocratic culture instead of the democratic aspirations of Ethiopia. Making the distinction between the two cases, that is the instances in which there should be a deferral to the government in order not to restrain it too much from maintaining peace among ethnic and religious groups and the cases in which its actions should be subjected to stringent review might not always be an easy task. In the next sub section, the discussion will revolve around who should undertake this difficult task.

C. The Agent: Council of Constitutional Inquiry

The need to contextualize the values of constitutionalism might be a truism. A question that is begotten by this need is the question of who shall undertake this task of contextualization and balancing. This question, framed as an inquiry in to which institution is best suited to interpret the constitution authoritatively is a very controversial issue in Ethiopia. The discussion so far invites us to view constitutional interpretation as being more than the settlement or adjudication of discreet and isolated constitutional disputes. Rather it would bring in to the picture a dimension of constitutional interpretation that projects it as a means of meeting the need for contextualizing the values of constitutionalism and of balancing competing interests. When seen from this perspective, it is clear that the task would require an institution that has the technical competence, a relatively limited self interest in enhancing its power at the expense of fundamental rights and impartiality from the usual suspects who are most likely to be embroiled in constitutional disputes. The Constitutional Court of South Africa and the US Supreme Court could be seen as institutions with these qualities engaged in this business of contextualizing and balancing.

According to the FDRE Constitution, the task of interpreting the Constitution is given to the House of

Federation composed of the representatives of all the nations, nationalities and peoples of Ethiopia[171]. This body is the upper house of the parliament but it has no legislative powers. In addition to the power of constitutional interpretation, it also has the power of adopting the formula for the allocation federal budgetary grants to the regional states and also the power to decide up on questions of self determination and resolve disputes among nations, nationalities and peoples. Members of the House are elected from the legislative houses of the regional States although the states have the option of holding direct elections for or adopting other mechanisms to determine who represents the Nations Nationalities Peoples inhabiting their territories. Each ethnic group is represented by at least one representative, an additional one seat being allocated for every one million members it has.

Just like their counterparts in the lower house, members of the HOF are also politicians. The framers of the Constitution argued that as a covenant between NNPs the Constitution is a unique political and legal document the authoritative interpretation of which can not be entrusted to a hand full of professional judges[172]. However, recognizing the need for technical skills for the interpretation of the Constitution and also the practical difficulties of having a House with more than 100 members discharge what is essentially a judicial task; the framers of the Constitution have provided for the establishment of a Council of Constitutional Inquiry. As envisaged in the Constitution, this Council was supposed to provide the necessary technical support to the HOF by way of recommendations on constitutional cases submitted to the House. Later legislations regarding the HOF and the CCI have elaborated on the relationship of the two institutions[173]. This legislation and the practice so far in which the HOF has been very deferential to the recommendations of the Council have made the CCI a

---

171 Artcile 62(1) of the FDRE Constitution; See in General Yonatan T. Fesseha, *Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia*, 22Journal of Ethiopian Law 2008, pp128-144 in which the author argues that CCI and the HOF have a monopoly over constitutional review and that the ordinary courts are excluded from the whole endeavor.

172 Assefa Fiseha, *FEDERALISM AND THE ADJUDICATION OF CONSTITUTIONAL ISSUES: THE ETHIOPIAN EXPERIENCE* ,Netherlands International Law Review 2005, pp 15-16 http://journals.cambridge.org/download.php?file=%2FNLR%2FNLR52_01%2FS0165070X0500001Xa.pdf&code=360f9153c1ffe5b501f7ea49a2a202a6

173 Council of Constitutional Inquiry Proclamation *No.25012001*and Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001

very important actor in Constitutional interpretation. So far, the HOF has not reversed any of the recommendations of the CCI which are becoming tantamount to decisions. Nevertheless, it will be still a mistake to consider the CCI as a defacto Constitutional Court[174]. Though in the long run there is a possibility that it might evolve in to a defacto Constitutional Court, this is contingent on many political factors and at the moment very unlikely. Any such shift would need the blessing of the political party that is in control of both houses. The moment the CCI starts handing down decisions or recommendations not to the liking of the party, it is very possible that it would have its wings clipped. The CCI's subservient position to the HOF, a purely political body diminishes the hope of the Council evolving through time and practice in to an impartial and independent Constitutional adjudicator that could undertake the task of contextualizing and balancing. Hence, as many people interested on the topic argue, the establishment of a Constitutional Court seems to be a necessity. However, till such a Court is established, the only alternative available seems to be making the best out of the CCI with in the current constitutional and regulatory frame work.

Making the best out of the CCI is easier said than done. What it would require would be to engage the CCI consistently in the task of contextualization and balancing by brining strategically selected constitutional cases before it. It only takes the slightest familiarity with current political realities in Ethiopia to predict that the CCI would unceremoniously decide against challenges of laws and acts which have the blessing of the ruling party. Be this as it may, engaging the CCI consistently and strategically might have a number of advantages. The first advantage would be, even if the Council was to decide most of the times in favor of the State, the whole exercise of litigating on constitutional issues could be considered as an important development for constitutionalism in Ethiopia. Furthermore, in the long run, the Council might be gently induced through such engagement to become more assertive and

[174] The CCI has so far decided only on four cases in the entire 15 years of its existence. It has received seventy two petitions but has declined to rule up on most of them ruling that they did not require constitutional interpretation. See, Mgbako and etal, *SILENCING THE ETHIOPIAN COURTS: NONJUDICIAL CONSTITUTIONAL REVIEW AND ITS IMPACT ON HUMAN RIGHTS,* FORDHAM INTERNATIONAL LAW JOURNAL ,Vol. 32:259,pp 292-293. available at http://law.fordham.edu/publications/articles/300flspub17468.pdf

protective of fundamental rights. Most importantly such engagement with the Council might be a very instructive experience as a dress rehearsal for the political actors and the legal system in Ethiopia as to how constitutionalism should function through judicial review of legislative and administrative acts. The importance of engaging the CCI should be seen as having a significance that goes far beyond the individual complaint that might be presented before it in each case but it should rather be seen in light of the long term implications it will have in the political and legal system. By bringing various and well selected cases to it and assiduously publicizing these cases to highlight the function of the Council and raise its profile the CCI could be used as prototype Constitutional Court till a full fledged Constitutional Court is established in Ethiopia. One might ask who would be the ideal candidates for the job of engaging the CCI in such fashion. The obvious answer would be the Human Rights NGOs and advocacy groups, opposition political parties and perhaps academics working on human rights and constitutional issues. Due to the recently enacted charities and civil societies proclamation, most human rights NGOs might be closed down and work under sever financial strains. Further more opposition political parties and academics might also have various limitations which might hamper them from undertaking such activities. But despite these difficulties, the author hopes that these groups will endeavor to promote constitutionalism in Ethiopia by engaging the CCI.

6.2 Contextualizing freedom of expression; A Demonstration of the process

In this section of the paper the focus will be on freedom of expression. I will try to show how the CCI or a Constitutional Court attempting to contextualize freedom of expression in Ethiopia and balance it with other fundamental rights should go about the task. So this is, one might say a demonstration of how a process of contextualization could be undertaken in Ethiopia to foster constitutionalism despite the challenges it faces.

When any tribunal, be it the CCI or a future Constitutional Court begins the task of contextualization

and balancing, it must be noted that it does not begin the task from scratch. Nor does it have a free reign in this regard. The Constitution is not a catalog of completely abstract principles and values. It does not simply say freedom of expression shall be a considered a fundamental constitutional value or principle. The principle has been reduced to a binding legal norm and given content and specificity. Hence, the Constitutional text should always be considered as the starting point.

The Council would not have been able to talk about the contextualization and balancing of freedom of expression had these freedom not been enshrined in the Constitution in the first place. So, the Council is restricted in its work as far as what is to be contextualized and balanced is concerned. Further more, to the extent that the Constitutional drafters and the assembly that adopted it have given content and specificity to the principle the task of contextualization could be considered as having been commenced. Freedom of expression has been elaborated in seven sub articles in the FDRE Constitution in relative detail and specificity. Therefore, the Council/ a Court is clearly not and should not be at liberty to fashion its own conception of freedom of expression as it pleases. It does not write on an empty slate.

Taking Article 27 of the FDRE as a starting point for this exercise of reviewing the problematic areas of freedom of expression; the following structure emerges from the provision. The first five sub articles provide the rights associated with freedom of opinion and expression that are recognized and supposed to be protected by the constitution. Hence, these sub articles tell us *what* is protected. Political speech, operating a press and expressing ones views and opinions through state financed or state controlled media are among the various rights protected under article 26.

Sub article 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 the various freedom of expression, sub article 7 is a rather curious provision that stipulates “Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law”. If read by itself with out taking in to account sub article 6, 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 should obviously be rejected for two reasons. The first reason is because 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 conditions and grounds for limiting the right under sub article 6. Further more, such a reading will have to be rejected taking in to account the international principles of Human Rights which the Constitution makes the bench mark for the interpretation of its bill of rights. 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.

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 reviewing the problematic areas of freedom of expression in Ethiopia. Sub article 6 has three clauses. The first clause provides what kind of limitations of freedom of expression are impermissible in addition to stating that limitation 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 prohibition is a prohibition of "content based" limitation and seems to have been inspired by the US jurisprudence on "content based discrimination"[175]. The second prohibition is a proscription of "effect based" limitation. Its inspiration does not seem to be that obvious as the first prohibition. But one might contend that it is also inspired by US free speech jurisprudence.

Some questions might arise in relation to these impermissible grounds of limitation and in this regard knowing the inspiration or material source of the clause might be useful. 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

[175]See, *R. A. V. v. City of St. Paul, 505 U.S. 377 (1992)*

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 the right in the next clause and also taking in to account the US jurisprudence 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 its obscene content[176].

The prohibition of effect based limitation seems to be more delicate. Does it mean that freedom of expression can not be limited even when the view expressed by the speaker has the effect of unleashing ethnic or religious conflict and violence? Answering this question be it in the affirmative or negative with out any qualifications would be dangerous. If we simply say yes, it would mean that we are sanctioning violence, death and chaos for the sake of protecting fee speech. If we simply say no we might be opening the door for the public authorities to limit any speech they would deem capable of unleashing violence regardless of how remote and unlikely such danger is. The best way to deal with this dilemma would be to accept that the impermissibility of effect based limitation has some exceptions and that in relation to these exceptional effects of speech effect based limitation is permissible. Common sense and the experience of even the most reputably liberal jurisdiction as far as free speech is concerned support this view.

Under the Ethiopian context the most reasonable candidates for such exceptional treatment will be speech or expression of an opinion that has 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. However, the requirement as to the degree of proximity and probability of the threat before a limitation could be legitimately imposed can not in the Ethiopian context be set as high as the US Supreme Court's *Brandenburg* "incitement of imminent lawless action" standard. 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 opinion

[176]See, *R. A. V. v. City of St. Paul, 505 U.S. 377 (1992)*

that could cause ethnic or religious strife, limitation on freedom of expression should be considered acceptable. However, once again it is important to remember that such effect based limitation is an exception that has been read in to the constitutional text and as such should be strictly construed as an exception. Specially, care should be taken to make sure that expression of an opinion that is unpalatable for the powers to be is 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 application of a legislation that is not meant to limit or has the effect of limiting speech that does not pose such danger should be considered unconstitutional.

This approach that does not corresponded with the clear and present danger test or the incitement of imminent lawless action seems best suited for the Ethiopian context for two reasons. The clear and present danger if taken quite literally or the incitement of imminent law less action seem to be ill suited for the Ethiopian context. The imminent incitement of imminent lawless action is too exacting a standard to adopt because in a country like Ethiopia, according protection to speech that is not an imminent incitement to ethnic or religious violence but which still is an advocacy for such violence should not be tolerated. 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. On the other hand, 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 tired to see what exceptions must reasonably be read in to these clauses in light of the experience of other jurisdictions and the Ethiopian reality.

However, limiting speech that could cause ethnic and religious violence only 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 as well the public expression of opinion intended to injure human dignity shall be prohibited by law. Hence, from these two clauses it is clear that certain types of speech could be or should be as the case may be limited based on the effect they might have and also on 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. These differences, that is the one 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, seem to be intended to reflect the importance attached to human dignity and peace by the framers of the constitution . When one takes in to 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 provision human the need to outlaw propaganda of war, and also the protection of the well being of the youth and also 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 limitation that is 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 be 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 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 in to 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 can not be taken as being 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 and the need to uphold the integrity of the judicial process and the fair trial rights of individuals. This implies that the list can not reasonably be taken as an exhaustive and a closed list. 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 fair trial rights or it should be aimed at protecting a compelling state interest like national security. Furthermore, such new grounds to be read in to the text by way of interpretation should be grounds of limiting freedom of expression recognized in most established democracies. 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 both in its introduction and construction such ground should be narrowly read.

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. The first

is that 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 then we might end up in a situation in which excessive limitations based on legitimate grounds would severely undermine freedom of expression. There fore some form of limitation on the limitations themselves is necessary. 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 hence ruling out limitations that are not prescribed by law even if they are based on a legitimate ground. Other than this formal requirement, the Constitutions text does not provide any substantial restriction on limitations to be imposed on the freedom of expression based on legitimate grounds of limitation. Hence, adopting some substantive restriction on the limitations that could be set by that state on freedom of expression is necessary. The most widely used solution in most democratic jurisdiction these days is the proportionality analysis which requires that any limitation imposed on a right should be proportionate to the legitimate aim being perused by that limitation.

In addition to these, there are also some other considerations that need to be taken in to 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. Be this as it may one can not fail to acknowledge that debate on issues of public concern, facilitating self governance and the democratic process are some of the most important functions o freedom of expression. In addition to this, 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.

Particularly in the Ethiopian context there is a need for being highly conscious of the nature and function of freedom of expression. The political culture and history of Ethiopia is very intolerant of dissent and criticism in public of the person who is on the apex of the state be that a king, a president or a prime minister. A challenge or criticism of the decisions, policies or questioning the competence of

those in powers had been considered as tantamount to a rebellion and treason. This makes freedom of expression more fragile in Ethiopia than most other states and will also make the potential chilling effect of limitations on the freedom more pronounced. Hence, its important to make sure that limitations even on legitimate grounds will be carefully scrutinized when they relate to expression of opinions related with politics. Such scrutiny must preclude the stifling of dissent under the guise of protecting the honor and reputation of individuals or national security and the like.

Further more, taking note of the fact that freedom of expression has the function of aiding self governance and facilitating the democratic process, sensitivity to the difficulty of people in rural areas and under poverty to various forms of interference and pressure in the exercise of their rights is essential in the Ethiopian context. Such sensitivity would help us pay special attention as to how the broadcast media is being operated and how the state might use its many points of access to the poor to interfere with the exercise of their rights. Especially in the distribution of goods and services be they fertilizer for farmers or distribution of food aid for people in arid areas the potential to politicize the provision of these goods and other services as well for partisan purposes is something to look out for. The vulnerability of the poor and the rural population for predatory politicking, manipulation and exclusion from independent sources of information or forums to air ones opinion is a very grave threat for freedom of expression in the Ethiopian context.

So far what we have done is discus the text of the Constitution as a starting point for a process of contextualization and balancing by the CCI or a future Constitutional Court. . The discussion so far could be taken as a reconstruction of the text of the Constitution as a framework for contextualization and balancing. As we have noted earlier, this reconstruction is in itself a continuation of the contextualizing and balancing process that has been commenced by the adoption of the Constitution. It builds upon the text of the constitution as a foundation and provides a frame work for further contextualization and balancing.

In the subsequent sub sections, we are going to apply this framework and analyze the problematic

practices and legislations pertaining to freedom of expression in Ethiopia. The discussion will be divided in to two sub sections. In the first section we will see a typical *easy case* in which a straight forward application of the above reconstructed frame work would solve our problem. The second category of cases will be those that require careful consideration taking in to account the challenges to constitutionalism that are prevalent in Ethiopia. This are *hard cases* in which the Council or a Court has to undertake the process of contextualization with all the judicial acumen it can muster.

A. The Easy Cases

The phrase easy cases could be easily misleading and even a legal cliché that might lead to confusions. In the sense I am employing the term in this section, an easy case is a case presented before the CCI or a future Court where the unconstitutionality of a law or a governmental act is quite evident and where the legislation or act does not serve any legitimate public interest. These are cases in which the act or legislation in question clearly does not fall in one of the grounds of limitation of freedom of expression provided explicitly under the constitution or the ones which we have read in to the constitution. The interference in such cases arises more from the desire of public officials to insulate themselves from criticism and repress dissent. The CCI should show no tolerance to such kind of interference and should invalidate them unceremoniously An example of such a case would be the Article 486 of the FDRE Criminal Code.

Article 486 provides of the FDRE Criminal Code provides for the offense of inciting the public through false rumors. As we have seen in our earlier discussions, it is one of the most often cited criminal provisions that is invoked by the public prosecutor against members of the private press. When one analyzes the material elements of the offense, one can see that it has three elements. The provision criminalizes starting or spreading a false rumor, suspicion or charge targeting public authorities, their activities or the government there by inflaming or disturbing public opinion or creating the danger of public disturbances. Hence, the provision criminalizes the spreading or starting of false information about the government, its officials and their activities if such information is such as to inflame or

disturb public opinion or create the danger of public disturbances. So, falsity of the information or opinion spread or started by some one is the first element of the offense. The second is the target of the rumor, charge or suspicion. The third element of the offense is the effect of such false information on the opinion of the public or the likelihood of a public disturbance. The last two elements are respectively concerned with the content and effect of a written or oral utterance.

Article 29(5) of the FDRE Constitution in principle prohibits limitation on freedom of expression based on the content or effect of an expression of opinion. Article 486 and prosecutions based up on it seem to be in violation of this constitutional provision. If this criminal provision is to be redeemed from being considered unconstitutional, one has to show that the ground for limitation, though it is content or effect based, falls under the exceptional permissible grounds of limiting freedom of expression provided under Article 29(5). These legitimate grounds for limiting freedom of expression are the well being of the youth, human dignity, the reputation of the honor and reputation of others and also the prevention of propaganda of war . In addition to this, based on the experience of other jurisdictions and the dictates of reason we have said that national security and the fair trial interest of others or the integrity of the judicial process and also the need to prevent religious or ethnic clashes might warrant limiting freedom of expression in exception circumstances.

Article 486 can not reasonably and in good faith construed as a limitation justified under any of this permissible grounds of limiting freedom of expression. The nearest the aims of this Article 486 could come to the appearance of being a permissible ground of limitation is if it is to be construed as a provision aiming to maintain public order. But it is interesting to note that the material elements required for successful prosecution under the provision could be met by showing mere disturbance or inflammation of public opinion. The interpretation of the Courts also supports this view. The question is, if the prevention of ' disturbance or inflammation of public opinion', what ever that means, a legitimate ground for limiting freedom of expression. Any reasonable reading of Article 29(5) of the Constitution, even with the utmost sympathy to the government, would show that this is not a

permissible ground for limiting freedom of expression.

In relation to Article 486, its clear that the purpose of the law, which is a reproduction of the Imperial Penal Code is to protect the government from sever criticism. Any body who wants to criticize the government would have to make sure that her/ his statements are true and that it will not have the effect of inflaming or disturbing public opinion. Ensuring the truthfulness of all utterances concerning the government is too much of a burden even for the most resourceful journalist or government critic. Many journalist and critics of the government and also political opponents aim at inflaming public opinion with their opinions. After all creating an outrage in public opinion about the conduct of public affairs is what most political criticism and debate are about. If one is expected with the threat of criminal sanctions to ensure all the factual basis of his opinions are true, that is if a distinction between fact and opinion is possible to begin with, it will severely inhibit open discussion and debate about public affairs.

It is to be recalled that in the earlier discussions we have asserted that in fostering constitutionalism there is a need to have a mindset that views constitutionalism as a work in progress and as requiring a process of contextualizing. Thinking of constitutionalism as a work in progress requires the work to start somewhere and there to be a progress. Striking down such laws which are patently unconstitutional should be the beginning of the task of the CCI. As far as contextualizing is concerned, Article 486 provides of the Criminal Code presents a case where the autocratic traditions are very much in play and where the government is not acting to avert ethnic or religious violence. In such a case, the CCI should serve as an interlocutor of the normative ideals and principles of constitutionalism and decisively repudiate our autocratic political traditions in favor of our democratic aspirations.

B. The Hard Cases

The hard cases are cases in which there is a prima facie relation between legislation or a governmental act that infringes up on freedom of expression and the legitimate grounds of limitation we have

discussed earlier. However, the degree of the relation and also the intensity and extent of the infringement leaves room for questioning whether or not the infringement is justified or not. For example if an ethnically slanted criticism of the government is suppressed, this infringement apparently has some relation with the legitimate interest of maintaining ethnic a national accord and averting ethnic conflicts. At the same time there could be concerns as to the downsides of such infringement. The fear that the speech will cause ethnic conflict might be very speculative or the suppression of these speeches might have a chilling effect on opinions relating to important issue of public interest. One can easily imagine cases where a speaker will allege that all the top officers of the armed forces hail from the same ethnic group and air some pinions based on this factual allegation. Should such a speech be suppressed to promote harmonious ethnic relationship regardless of the tone of the speaker, his intentions and the targeted audience and such other factors? Should the falsity or truthfulness of the factual assertion matter? Many such questions could arise in these kinds of hard cases.

A very good example of such a case will be the one that could arise from Article 42(2) of the new press law which provides that "where the Federal or Regional public prosecutor as the case may be, has sufficient reason to believe that the periodical or book which is about to be disseminated contains illegal matter which would, if disseminated, lead to a clear and present grave danger to the national security which could not otherwise be averted through a subsequent imposition of sanctions, may issue an order to impound the periodical". This provision authorizes public prosecutors to impose prior restraint on the press. They are authorized to do this when they have sufficient reason to believe the publication in question has an illegal content and poses a clear and present danger to national security which can not be averted through subsequent measures.

Many questions relating to the constitutionality of this provision could be raised. Such questions will of course mainly revolve around the permissibility of prior restraint, the clarity of the notions of 'clear and present danger' and also 'illegal matter' and also the compatibility of such discretionary powers of imposing prior restraint with freedom of expression. Unlike the case of Article 486 of the Criminal

Code, however, the unconstitutionality of the Article 42(2) of the new press law is not that apparent. It seems to require a more nuanced analysis and careful consideration.

The first question to ask in reviewing the constitutionality of this provision would be whether or not its ostensible purpose constitutes a legitimate ground for limiting freedom of expression. From the text of the provision its purpose appears to be the protection of national security from the publication of illegal matter. This is so because the public prosecutor is authorized to order the impounding of a periodical or a book only if the material to be published is illegal and poses a clear and present danger to national security. From these two cumulative conditions of illegality of the material being published and a clear and present danger to national security one can easily infer that the purpose of the law is to protect national security from clear and present dangers posed against it by the publication of illegal materials. Before we answer the question whether or not this is a purpose that falls with in the permissible grounds of limitation, it might be advisable to clarify the curious term 'illegal matter'. Obviously the information or opinion to be published it self can not in and by itself be illegal. So, the characterization of a material to be published as being illegal is rather absurd. If we are to makes sense of this term, we have to understand it as referring to a material obtained through illegal means or a material the publication of which will be illegal. Having clarified this, we can easily agree that the purpose to be served by the provision in question falls with in the ambit of the permissible grounds of limitation of freedom of expression we have enumerated previously.

It is true that national security has not been provided as a ground for limiting freedom of expression under Article 29 of the Constitution but we have said that a reasonable construction of the provision that takes in to account the jurisprudence of established democracies will require that national security be recognized as a legitimate ground of limiting freedom of expression. Therefore, the fact that article 42 sets out to avert clear and present dangers to national security posed by the publication of information obtained illegally or the publication of which is in itself illegal might be deemed a legitimate aim the pursuit of which is not constitutionally objectionable.

So, the next question we will have to address will be whether or not the constitutionally unobjectionable aim has been perused in a constitutionally unobjectionable way. The means the legislator has chosen to protect national security from the publication of illegally obtained materials or materials the publication of which is illegal and the publication of which poses a clear and present danger to national security is to authorize the impounding of such publication before dissemination to the public. The power to impose such prior restraint has been give to the judiciary up on request by the public prosecutor or in urgent circumstances by the public prosecutor with out there being a need to apply for an order of impounding from the Court. The questions we would have to answer then would be whether or not prior restraint is constitutional and even if it is to the extent that the public prosecutor could impose such a restraint with out having to go to court the interference with the freedom of expression is constitutional.

In answering these questions we have to bear in mind two things. The first thing is that even if the law or administrative act in question peruses a legitimate aim the degree in terms of scope or extent and also intensity of the interference it occasions might be disproportionate to the aim being perused. In that case the interference will constitute a violation of the freedom in question. The other thing we have to bear in mind is in gauging the proportionality of the interference with the aim being perused, the approach to constitutional review being advocated for here, which is constitutional review as a process of contextualization, requires us to take in to account local settings and circumstances. The proportionality of interference can not be assessed in a vacuum that detached from the contemporary realities on the ground and the relevant historical and cultural factors. Therefore, when we asses whether or not prior restraint and the imposition of such restraint by the pubic prosecutor are compatible with freedom of expression, we have to ask our selves whether or not such interference is proportional to the legitimate aim being perused in the Ethiopian context.

Given what we have discussed in the second chapter, the potential of abuse by the public prosecutors of article 42 of the new press law is obvious. One could say, almost certainly, that the pubic prosecutors

are going to interpret national security very generously and using such extensive construction of the notion they will liberally invoke Article 42 of the new press law and impound any thing that they prefer not to be published. Of course when we say prefer, it will hardly be the desire of the public prosecutors that will be decisive. Most likely than not, the decision of what should be impounded by invoking Article 42 is to be decided by the security forces and political overlords which whose bidding the public prosecutor will do. Given the political culture and current realities of Ethiopia which favor repression of views that are critical of the government of the day and which conflate the political security of a ruling party or clique with national security, the is no doubt that Article 43 will facilitate indirect censorship.

When we compare the likelihood of an 'illegal matter' which would pose a clear and present danger to nation's security being published on the press with the likelihood of Article 42 being abused by the public prosecutor, we are comparing something the occurrence of which is almost certain with something which is rather improbable. In the Ethiopian context, one can have no doubt that Artciel 42 will be abused by the public persecutor and it will lead to self censorship and ruin the free press the very existence of which is questionable at the moment. This assertion might seem to reflect a view that is too skeptical of the public prosecutors office. But when one considers the role these office have played so far and is still playing in undermining freedom of the press, such a view is vindicated.

It might be true that there could be some exceptionally rare circumstances in which a news paper or periodical is to publish something obtained illegally or something that is classified and the publication of such information might present a clear and present danger to national security. Such a scenario, though highly unlikely is not inconceivable. On top of these, Article 42 envisions an extremely urgent situation in which the public persecutor can not bring the matter to the attention of the courts to obtain an order for the impounding from a court of law. Such a scenario sounds even more improbable that the earlier scenario. The chance of such a situation materializing in reality is almost incomparable with the chances of Article 42 being abused by the public prosecutor. To make an understatement, the later is

more likely to happen than the former. So, Article 42 is catering trying to take care of a risk against national security that is almost negligible due to its improbability by creating a real and substantial risk to the fundamental freedom of expression.

Furthermore, it should be noted that Article 42 is in effect giving the public prosecutor the power to censor the press and would have a 'chilling effect' on the press. This is so because, the public prosecutor could broadly interpret article 42 and invoke it to impound what ever it deems to be illegal and a clear and present danger to national security. Even if a court reviews the order of the public prosecutor and rescind it, the news paper or periodical will probably suffer huge losses through the ordeal. The news paper might be released after 72 hours of course, but by then the news is stale and the damage already done. Article 42 provides that the public prosecutor will be liable for malicious use of the powers it has under the said article. But one can easily imagine how difficult it will be for the press to show the malice in the invocation of Article 42 by the public prosecutor. Even where malice on the part of the public prosecutor is shown, the civil or criminal liability of the public prosecutor will hardly undo the damage done to the press by abuse of the power to impound. The public prosecutor might not even have to invoke Article 42. The mere threat to invoke it might do the trick. An editor faced with the choice of a protracted court battle with the public prosecutor to have an order to of impounding rescinded would be more likely to avoid the hustle and be compelled to censor his publication in conformity with the wishes of the public prosecutor.

In fact, very much aware of these dangers that exist in the Ethiopian context, the FDRE Constitution provides that any form of censorship is prohibited and that the press should enjoy legal protection to ensure its operational independence in the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order. Therefore, is Article 42 of the new press law disproportionate to the aim it pursues and hence, it is contrary to the letter and spirit of the constitution which prohibits censorship in all its form and which entitles the press for special protection. Hence, the CCI or a future Court should invalidate Article 42 for being unconstitutional to

the extent that it gives the public prosecutor the power to impound a periodical or book prior to dissemination.

This still leaves the question regarding the constitutionality of impounding or prior restraint based on a court order. This question pertains to the situation in which based on Article 42 the public prosecutor seeks for a court order to impound a periodical or book prior to dissemination. The legal basis for the order is the same; clear and present danger to national security and illegal content of the material to be published. The only difference is that the order will be issued by a Judge and not a prosecutor. Is this difference significant enough to render the interference on the same grounds consistent with the Constitution? We have concluded that prior restraint by way of an impounding order issued by the public prosecutor against a publication of a material deemed by him/ her to be illegal and constituting a clear and present danger to national security is unconstitutional. This conclusion was based on an argument that given the Ethiopian context the public prosecutor's office would tend abuse this power and the interference to be occasioned through this interference will be very disproportionate to the aim being pursued. Could the same be said about the judiciary? Can the ordinary courts be expected to act in a significantly different manner?

Prior restraint is an interference with freedom of expression that is considered to be among the most disconcerting forms of interference[177]. The hostility to prior restraint is of course more pronounced in some jurisdictions than in others, nevertheless the fact remains; prior restraint is the most dreaded form of interference. But even in the jurisdictions where the hostility to prior restraint is quite high, such as in the US, as an exceptional protection against very rare and specific type of threats, prior restraint is considered valid[178]. Given that at times the damage by a publication of certain information will be irreversibly prejudicial to the fair trial rights of an individual or to national security, prior restraints seem to be a necessary evil. The situation is no different in Ethiopia. Therefore, the idea of the

[177] See infra *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*

[178] See infra *New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Near v. Minnesota, 283 U.S. 697 (1931) and MidiTelevison v Director of Public Prosecutions* Case NO 100/06

existence of prior restraints by itself should not lead to an automatic conclusion that the restraint is unconstitutional.

If we have accepted national security or fair trial rights of an accused as legitimate grounds of limiting freedom of expression and if we also concede that in exceptional circumstances such limitation would necessarily have to be in the form of a prior restraint to be effective, then the question would be by whom and under what circumstances should such prior restraint be imposed to be considered constitutionally unobjectionable. Unless the circumstances are narrowly drawn to avoid a disproportionate burden on freedom of expression and unless the power to impose them is vested in a body that could be make impartial and fair decisions, prior restraint would be unconstitutional. When we say impartial and fair it should be understood as implying institutional independence and objectivity in deciding whether or not prior restraints are called for in the particular case n question. As far as impartiality and fairness of a decision is concerned one can not think of a body that could be more impartial and fair than the Courts. Hence to the extent that the power of issuing an order to impound is given to a Judge as opposed to a public prosecutor, article 42 is not objectionable.

Once we have accepted that Courts are the right bodies for the determination of whether or not prior restraint is to be imposed, the question will be under what circumstances courts should have such power. Even if the judiciary is filled with the wisest, most impartial and objective judges one could imagine that an absolutely discretionary power to determine what could and could not be published will be quite contrary to the whole idea of constitutionalism. Obviously there have to be some clear bounds and guidelines that narrowly delineate the circumstances under which prior restraint could be imposed. The clarity of the guidelines and their proportionality in terms of how narrowly the restriction has been set are very crucial. Other wise, not only in the Ethiopian context but also in other jurisdictions as well, the consequences could be disastrous for freedom of expression.

So, the question will be has the legislator provided clear and narrowly drawn restrictions that ensure the proportionality of the limitation with the aim pursued? Under Article 42, the legislator has provided

that prior restraint by way of impounding is to take place only if;

1. The material to be published is illegal.
2. If it poses a clear and present grave danger to national security if disseminated
3. The danger can not be otherwise averted.

We have already noted the lack of clarity regarding the term the term “illegal matter” and suggested that it could be constructed as meaning information obtained illegally or a classified information the publication of which is illegal in itself. If the lack of clarity in the first condition is resolved this way, the clarity of the other conditions seems to be not that problematic. Perhaps just as a precaution, the CCI or a Court undertaking such a review might want to elaborate on the notion of national security to make sure that it will not be confused, as it is usually the case in Ethiopia, with the security of a party in government. After all one can not expect mathematical precision and clarity in law since we deal with words, as opposed to numbers. As far as the proportionality of prior restraint imposed on freedom of the press when all these three conditions are met, the three conditions have made prior restraint by way of impounding a very rare and exceptional measure to be taken as a last resort to protect national security. Therefore, one can say that the burden to be imposed is proportional to the benefit to be derived from the restriction or the legitimate aim being pursued by the limitation. Hence, Article 42 is constitutionally unobjectionable to the extent that it gives a court of law the power to impose a prior restraint under exceptional circumstances to protect national security from grave, clear and present dangers occasioned by an illegal publication and that could not be averted otherwise.

6.3 Limitations of Contextualization

In the two preceding sub sections, the author has presented contextualization o f constitutional ideals and principles by the Council of Constitutional Inquiry with a mind sent that constitutionalism is a work in progress. This approach has been presented as a way of making constitutionalism work in the Ethiopian context where an autocratic and violent political culture is accompanied by ethnic and

religious diversity and tension. In this section, the author will discuss the limitations of this approach.

The approach advocated for in this paper requires that all actors in the political and legal system adopt a view about constitutionalism as a work in progress; it requires an active Constitutional Inquiry Council engaging vigorously in constitutional review, contextualizing the abstract universal ideals of constitutionalism to fit the Ethiopian setting. As the demonstration in the preceding section shows this would have different implications in hard and easy cases. In the easy cases, that are cases where vestiges of the autocratic past which are inconsistent with the constitutional order set by the FDRE Constitution are evident, the Council of Constitutional Inquiry should unequivocally repudiate such acts or legislations. In these easy cases, what we have is a patently unconstitutional legislation or administrative act. The legislation or administrative act in question pursue a goal that is clearly outside the grounds of limitation of rights that are provided for in the constitution or that could be read in to it by interpretation. The Council of Constitutional Inquiry should use the opportunities this kind of cases offer and draw bright lines that would provide a clear break from our past of unlimited governmental powers. In the hard cases, where the administrative act or legislation under review has some relation with legitimate grounds of limiting a right, especially when the act or law is geared towards averting ethnic and religious violence, a more nuanced proportionality review has been recommended.

When we come to the practical limitation of this approach, we have to talk about the elephant in the room. That is the political will of the powers to be and their commitment to constitutionalism. The approach advocated for in the previous sections has an implied assumption. The assumption is that, the majority if not all unconstitutional acts and laws are carried out or enacted with out knowledge of their unconstitutionality by those in government. In other word the assumption has been, that due to the influence of the deeply rooted political culture that favors repression and also out of excessive zeal to maintain peace and root out subversive activities those in power steps the bounds set by the constitution inadvertently. This rather faltering assumption as is that deliberate and wanton unconstitutional acts are

the exception rather than the norm. But clearly, this assumption could be dead wrong. If that is the case, as is very probable, then no amount of contextualization will help the situation and trying to engage the CCI, thinking of constitutionalism as a work in progress will all be an exercise in futility. Where the main actors in the political systems do not obey and are not committed to the secondary rules, in the Hartian sense, constitutionalism is a lost cause till those at the helm of the machinery of state have a change of heart or are changed themselves.

Given the post election crises in Ethiopia, many who shared the optimistic assumption implicit in the approach advocated for in the paper, or those who were at least agnostic about it have come to firmly believe that the assumption is not well founded. The author of this paper would like to differ judgment on this issue and will be content to make the following observations. So, long us the main political actors ,principally the EPRDF or any other entity that might succeed it, do not have a genuine commitment for constitutionalism, nothing in this paper w ill be of help in salvaging constitutionalism. However, even if such a commitment exists, the challenges we have discussed under chapter two of these paper will exist. The approach presented in this paper will be of help in making constitutionalism work despite those formidable challenges provided there is a genuine political commitment for constitutionalism among those in control of the state machinery.

Conclusion

In the first chapter of this thesis, we have inquired in to the meaning of the notion of constitutionalism. That discussion has revealed that in its contemporary sense constitutionalism goes beyond the classical understanding of the concept as a limited government and includes among other things explicit recognition of fundamental rights, popular sovereignty and constitutional review. We have also noted that these interrelated elements reinforce one another and this is most evident as far as freedom of expression is concerned.

The discussion in the second chapter has established that the FDRE Constitution has recognizes freedom of expression as a fundamental right and amply provides for its protection. How ever, as our survey of prosecution of political speech, the repeated prosecution of those running private news papers, the new press law and the electronic media scene reveals freedom of expression is not accorded in reality the protection the FDRE Constitution purports to grant it. In the third chapter, we have identified the autocratic political culture of the Ethiopian state, the heterogeneity of the polity and its vulnerability to political violence as some of the factors that have contributed to the incongruence between what the FDRE Constitution provides and the reality on the ground.

In the fourth chapter we surveyed the jurisprudence of the US and South Africa on freedom of expression. Particularly the focus was on cases that pertained to political speech, freedom of the press. The regulatory scheme of the broadcasting scene was briefly touched upon. This survey had been preceded by a discussion of the challenges to constitutionalism and freedom of expression that have existed in these two jurisdictions at different times. The overall discussion in the fourth chapter had demonstrated that freedom of expression is respected in the US and South Africa despite the serious challenges that exist in both countries.

The fifth chapter of the thesis had fleshed out certain features of constitutionalism in South Africa and the US as the salient features of constitutionalism that have been crucial in the protection of freedom of

expression. In this discussion, constitutional review has emerged as an important feature of constitutionalism that is behind the success of constitutionalism against the odds in these two jurisdictions. Elaborating on the role of constitutional review in this regard the fifth chapter has suggested that constitutionalism should be seen as a work in progress and a process of contextualization in which constitutional review is of a crucial importance.

In the sixth chapter, there has been an attempt to make these lessons about constitutionalism; constitutional review and freedom of expression bear up on the Ethiopian situation. The sixth chapter had underscored of the need to adopt a view of constitutionalism as a work in progress. Such a view needs to be adopted to avoid the frustration that results from unrealistic expectations and to highlight the unacceptability of the current status quo for any state with serious aspirations to become a full-fledged constitutionalist state. Further more, the sixth chapter has emphasized the need to kick start a process of contextualizing the normative ideals and principles of constitutionalism in to specific standards and rules that take in to account the Ethiopian context. In addition to this, the chapter has underlined the unique role the Council of Constitutional Council in the process.

In conclusion of this thesis, the following remarks seem to be in order. The FDRE Constitution, regardless of the controversy regarding the lack of participation in adoption could be taken as a milestone in the history of the Ethiopian State. It provided for, for the first time in Ethiopian history, an elaborate set of fundamental rights and representative democracy. However, these trappings of a constitutionalist state have yet to be transformed in to actual limits on the power of the government and in to real safeguards for the liberty of the individual. There is no easy answer to how this could be accomplished. Among some quarters, regime change is seen as the silver bullet that will solve all the problems. Among other, economic growth and development are seen as the answer to all the difficulties we are facing.

In the main thrust of the of this thesis is to bring in to the picture the frequently overlooked importance of constitutionalism as process based, juridicalized , contextualist alternative for fostering democracy

and fundamental freedoms. Regardless of our economic fortunes or which political group is in power unless we embrace and institutionalize constitutionalism in this manner, the cycle of repression, conflict and violence will persist. An impressive GDP and per capita income nor a change of hands at the helm of power will do the trick. If a democratic order that upholds fundamental rights is to succeed in Ethiopia despite our political culture and heterogeneity, constitutionalism as a process of contextualization and as a continuous process overseen by a functionally judicial organ seem to be the way to go about it.

Bibliography

Books and Journal Articles

1. . Bratton M.C and N.V. De Walle, Democratic Experiments in Africa, Cambridge University Press, 1997.
2. . Lee R and L. Schlemmer, Transition to Democracy; Policy Perspectives 1991, Oxford University Press Cape Town 1991.
3. Amatyr Sen, Development As Freedom, Oxford University Press 1999.
4. Assefa Fiseha**,** *FEDERALISM AND THE ADJUDICATION OF CONSTITUTIONAL ISSUES: THE ETHIOPIAN EXPERIENCE*, Netherlands International Law Review 2005.
5. Bahru Zewde, A history of modern Ethiopia, 1855-1991 , James Curry, Ohio University Press, Addis Ababa University Press, 2001.
6. Baker C. E., *The Scope of the First Amendment Freedom of Speech*, 25 UCLA Law Review.
7. Berman J.K,, Political Violence in South Africa, South African Institute of Race Relations, 1993.
8. Bickel A.M, The Least Dangerous Branch, 2nd ed Yale University Press 1986.
9. Burnham, M.A,. *CULTIVATING A SEEDLING CHARTER: SOUTH AFRICA'S COURT GROWS ITS CONSTITUTION*, 3 Michigan Journal of Race & Law 1997.
10. Burns Y., Media Law, Butterworths 1990
11. C.R Hill, Changes in South Africa, Rex Collings London 1983.
12. Carpenter G., Introduction to South African Constitutional Law, Butterworths 1987. H. Black, *THE BILL OF RIGHTS* ,New York University Law Review, Vol. 35, April 1960 .
13. Clapham C., *Democratization in Africa;Obstacles and prospects*, Third World Quarterly , 1993 Vol 14, No 3.
14. Clive Barnett, *The Contradictions of Broadcasting Reform in Post-Apartheid South Africa;Whose News? Control of the Media in Africa* ,Review of African Political Economy, Vol.

25, No. 78, (Dec., 1998), p 553

15. Cortner R. C., The Kingfish and the Constitution; Huey Long, The First Amendment, and the Emergence of the Modern Press in Modern America, Greenwood Press 1996.
16. Culhane D.S.K., *NO EASY TALK: SOUTH AFRICA AND THE SUPPRESSION OF POLITICAL SPEECH*, 17 Fordham International Law Journal. 1994.
17. Dorsen N. and et al ed., Comparative Constitutionalism, Thomson West, 2003.
18. Ebrahim H., The Soul of A Nation, Cape Town/Oxford University Press.
19. Elster J., C. Offe and U. K. Preuss, Institutional Design in Post Communist Societies, Cambridge University Press1998
20. Ely, Democracy and Distrust, 1980 Harvard University Press.
21. Emerson T.I., Towards A general Theory of the First Amendment, Vintage Books 1963.
22. Fasil Nahum, Constitution for a Nation of Nations; the Ethiopian Prospect, 1997, the Red Sea Press Inc.
23. Francois du Bois & Daniel Visser , The Influence of Foreign Law in South Africa,13 Transnational Law & Contemporary Problems 2003.
24. Franklin D.P. and M. J. Baun ed., Political Culture and Constitutionalism; A Comparative Approach, M.E. Sharper Inc., 1995.
25. Garve J.H and T. A. Aleinikoff, Modern Constitutional Theory: A Reader, 3rd ed 1994,West Publishing
26. Gloppen S., South Africa: The Battle Over the Constitution , Ashgate Dartmouth 1997.
27. Gray T.C., Constitutionalism; An Analytical Framework: in J.R. Pennock and J.W. Chapman ed., Constitutionalism, 1979, New York University Press.
28. Greenwalt K., *Free Speech Justifications*, 89 Columbia Law Review.
29. Henkin L., A New Birth of Constitutionalism: Genetic Influences and Genetic Defects, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives,

Duke University 1994.

30. Horowitz D.L, A Democratic South Africa?, University of California Press, 1991.
31. Jeremy Sarkin, *THE EFFECT OF CONSTITUTIONAL BORROWINGS ON THE DRAFTING OF SOUTH AFRICA'S BILL OF RIGHTS AND INTERPRETATION OF HUMAN RIGHTS PROVISIONS*, 1 University of Pennsylvania Journal of Constitutional Law 1997
32. Klug H., Constituting Democracy, Cambridge press 2000.
33. Levy L.W., Emergence of A Free Press, Oxford University press 1985.
34. Lijphart A, *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES,* Journal of Democracy Volume 15, Number 2.
35. Lipset, S. M. *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* ,The American Political Science Review, Vol. 53, No. 1.
36. McIlwaim C. H., Constitutionalism: Ancient and Modern, Liberty Fund Inc., 2007 (Originally Published by Cornell University, 1940).
37. Meaza Ashenafi, Ethiopia: Process of Democratization and Development, in Abdullahi Ahemed An-Naim ed., Human Rights Under African Constitutions, 2003 University of Pennsylvania Press.
38. Melklejhon A., The First Amendment is an Absolute, in P.B.Kurlad (ed), Free Speech and Association; The Supreme Court and the First Amendment,University of Chicago Press, 1975.
39. Mgbako and etal, *SILENCING THE ETHIOPIAN COURTS: NONJUDICIAL CONSTITUTIONAL REVIEW AND ITS IMPACT ON HUMAN RIGHTS,* FORDHAM INTERNATIONAL LAW JOURNAL, Vol. 32.
40. Mill J.S., On Liberty, London: Longman, Roberts & Green, 1869.
41. Monshipouri M., Democratization, Liberalization and Human Right in the The Third World, Lynne Rienner Publishers Inc 1995.
42. Motala Z.and Ramaphosa C., Constitutional Law; Analysis and Cases, Oxford 2002.

43. Nagel F. R., Constitutional Cultures: The Mentality and Consequences of Judicial Review, University of California Press 1993.

44. Neuman M., The Rule of Law, Politicizing Ethics, Ashgate 2002.

45. Parekh, Cultural Particularity of Liberal Democracy, in Prospect for Democracy, ed by D. Held, Polity Press 1992.

46. Pierre du Toit, State Building and Democracy in Southern Africa, US Institute of peace Press, First Published in 1995.

47. Potter D.and others, Democratization, Polity Press 1997.

48. Preuss U. K., The Political Meaning of Constitutionalism; in R. Bellamy ed., Constitutionalism, Democracy and Sovereignty: American and European Perspectives, Avebury 1996.

49. Rabban D.M., Free Speech in Its Forgotten Years, Cambridge University Press 1997.

50. Redish M. H., *The Value of Free Speech*, 120 University of Pennsylvania Law Review.

51. Rosenfeld M., Modern Constitutionalism as Interplay between Identity and Diversity, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, Duke University 1994.

52. Ruth Teer-Tomaselli and Keyan G Tomaselli ,Reconstituting Public Service Broadcasting: Media and Democracy During Transition in South Africa ,Centre for Cultural and Media Studies University of Natal , p.2.

53. Sadurski W., Freedom of speech and Its Limits, Kluwer Academic Publishers, 1999, pp. 8-31

54. Sajo A., Limiting Government: An Introduction to Constitutionalism, CEU Press 1999.

55. Scalia A. and Bryer S, *A Conversation Between U.S Supreme Court Justices*, 3 International Journal of Constitutional Law 2005.

56. Schauer F., *Categories and the First Amendment: A Play in Three Acts* 34Vanderbilt Law Review. (1981).

57. Sorensen G., Democracy and Democratization, West View Press1993.

58. Spark A., Beyond The Miracle; Inside the New South Africa, The University of Chicago Press 2003.

59. Sparks A., Tomorrow is Another Country, Hill and Wang 1995.

60. Spitz R. and M. Charskalson, The Politics of Transition, Hart Publishing 2000

61. Stone G.R., *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 California Law Review 1378.

62. Stone G.R., Perilous Times; Free Speech in War Times, W.W. Norton and Company 2004.

63. Stone and others, Constitutional Law, 5th ed Aspen 2005.

64. Strong .F. R., Judicial Function in Constitutional Limitation of Governmental Power, Carolina Academic Press 1997.

65. Sunstein Cass R., Democracy and the Problem of Free Speech, The Free Press 1995.

66. Theodore M.Vestal, Ethiopia: A Post Cold War African State, Greenwood Publishing Group, 1999.

67. Tribe H., American Constitutional Law, 2nd ed The Foundation Press Inc 1988.

68. Tushnet M., Some Reflections on Method in Comparative Constitutional Law, in Choudry ed, The Migration of Constitutional Ideas, 2006.

69. Tusi Fokane, THE TRANSFORMATION OF BROADCASTING IN SOUTH AFRICA, The Freedom of Expression Institute (FXI) and the Netherlands Institute for Southern Africa (NIZA) May 2003.

70. Wagman R. J., The First Amendment Book, Pharosa Books 1991, pp. 128-134.

71. Yonatan T. Fesseha, *Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia*, 22Journal of Ethiopian Law 2008

Cases

Ethiopia

72. *Dr. Taye Woldesemayat etal v Public Prosecutor,* Criminal Case File No 4348, Federal Supreme Court 1994 Ethiopian Calendar(unpublished and available with the author)

73. *Hailu Shawel v Federal Public Prosecutor* Criminal Case Number 43246, Published Meskerem 2000 Ethiopian Calander/ September 2007

Nebyu Eyasu and et al v Central Public Prosecutors Office, Criminal Case file number 7/85, Ethiopian Calendar 1986(Unpublished and available with the author).

South Africa

74. *Certification of the Constitution of The Republic of South Africa, 1996 CCT 23/96*

75. *Du Plessis and others v De Klerk and others* CASE NO CCT 8/95.

76. *Fred Khumalo and others v Holomisa CCT 33/01*

77. *Jamiat-Ul-Ulama of Trnasval v Johncom Media Investment Ltd and others*

78. *MidiTelevison v Director of Public Prosecutions* Case NO 100/06

79. *Mogale and Others v Seima* Case NO 574/04

80. *National Media and Others v Bogoshi* Case No 579/96

81. *South African National Defence Union v Minister of Defence* CCT 22/98

82. Sparks, Tomorrow is Another Country, Hill and Wang 1995

83. *State v Mamabolo* CCT 44/00

84. *TAC v Rath and Others* Case NO 2807/05

85. *Worku Alemayehu and et al v Public Prosecutor*, Criminal Case file number 19/88, Ethiopian Calendar 1990(Unpublished and available with the author).

United States

86. *Abrams v. United States,* 250 *U.S.* 616 (1919)

87. *Ark. Writers' Project v. Ragland, 481 U.S. 221 (1987).*

88. *Beauharnais v. Illinois, 343 U.S. 250 (1952)*

89. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

90. *Branzburg v. Hayes , 408 U.S. 665 (1972).*

91. *Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)*

92. *Debs v U.S, 249 U.S. 211 (1919).*

93. *Frohwerk v. United States*, 249 *US* 204 (1919).

94. *Gannett Co. v. DePasqual443 U.S. 368 (1979)*

95. *Gertz v. Welch, 418 U.S. 323 (1974).*

96. *Gitlow v. New York, 268 U.S. 652 (1925).*

97. *Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).*

98. *Hustler Magazine v. Falwell , 485 U.S. 46 (1988)*

99. *Near v. Minnesota, 283 U.S. 697 (1931)*

100. *Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976).*

101. *New York Times Co. v. Sullivan, 376 U.S. 254 (1964).*

102. *New York Times v. United States, 403 U.S. 713 (1971)*

103. *Pell v. Procunier , 417 U.S. 817 (1974)*

104. *R. A. V. v. City of St. Paul, 505 U.S. 377 (1992)*

105. *Richmond Newspapers Inc. v. Virginia , 448 U.S. 555 (1980)*

106. *Schenk v United States 249 U.S 47 (1919)*

107. *Whitney v. California, 274 U.S. 357 (1927)*

Treaties, Laws and Various Legal Instruments

108. African Charter of Human and Peoples Rights

109. Consolidation of the House of the Federation and Definition of its Powers and

Responsibilities Proclamation No. 251/2001.

110. Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1/1995.

111. Constitution of the Republic of South Africa (1996)

112. Constitutional Principles, Schedule Four of the Interim Constitution of 1993.

113. Council of Constitutional Inquiry Proclamation *No.25012001*.

114. Federal Negarit Gazeta Establishment Proclamation No.3/1995

115. International Covenant of Civil and Political Rights(1966)

116. Proclamation to Provide for Freedom of Information and Mass Media and Access to Information, Proclamation No 590/2008.

117. Proclamation to Provide for Freedom of Information and Mass Media and Access to Information, Proclamation No 590/2008, Article 12

118. The Broadcasting Act 4 of 1999(South Africa)

119. Universal Declaration of Human Rights(1948)

Other Resources

120. Allen T. and N. Stremalu, Media Policy, Peace and State Reconstruction, Crisis States Development research center, Discussion Paper No 8, March 2005, available on http://www.research4development.info/PDF/Outputs/CrisisStates/dp08.pdf

121. Amnesty International USA, *Ethiopia Political repression must stop*, August 2007 http://www.amnestyusa.org/document.php?id=ENGAFR250132007&lang=e.

122. Amnesty International, *Amnesty International Report 1995 - Ethiopia*, 1 January 1995. Online. UNHCR Refworld, available at:

http://www.unhcr.org/refworld/docid/3ae6a9fc8.html , accessed 10 December 2008.

123. Article 19 Global Campaign for Free Expression, *The Legal Frame Work for Freedom of Expression in Ethiopia*, pp30-31www.article19.org/pdfs/publications/ethiopia-legal-framework-for-foe.pdf, last viewed on December, 20 2008.

124. BBC, Ethiopia's pardoned critic jailed , http://news.bbc.co.uk/2/hi/africa/7804302.stm, last viewed on March 02, 2009.

125. CIA World Fact Book, *Ethiopia*, accessed on December 20, 2008, https://www.cia.gov/library/publications/the-world-factbook/print/et.html

126. Committee to Protect Journalists, *Ethiopian judge detains editor over pop singer case*, http://cpj.org/2008/08/ethiopian-judge-detains-editor-over-pop-singer-cas.php, last viewed on December 22, 2008.

127. Committee to Protect Journalists, *Suspects held in brutal attack on editor*, last viewed on December 22, 2008http://cpj.org/2008/11/suspects-held-in-brutal-attack-on-editor.php.

128. David Cole, The New War McCarthyism: Repeating History in the War on terrorism, available at http://www.law.harvard.edu/students/orgs/crcl/vol38_1/cole.pdf, last viewed on May 25, 2009.

129. Donald N. Levine, ETHIOPIA'S MISSED CHANCES–1960, 1974, 1991, 1998, 2005–AND NOW: An Ethiopian Dilemma: Deep Structures, Wrenching Processes, University of Chicago, pp 10-13, retrieved from http://www.ethiopolitics.com/pdfiles/AnEthiopian%20Dilemma_dl_WMU.pdf, last accessed on December 22,2008.

130. Eric Pace , *Asrat Woldeyes of Ethiopia, Doctor and Dissenter, Dies*, New York Times, Published: May 17, 1999, last viewed on December 22, 2008 http://query.nytimes.com/gst/fullpage.html?res=9C02E4D9143EF934A25756C0A96F958260.

131. *Ethiopian academics arrested*, BBC Tuesday, 8 May, 2001,

http://news.bbc.co.uk/2/hi/africa/1319278.stm, Last Viewed on December 22, 2008.

132. Ethiopian Constitutional Assembly Minute,(Unpublished, Amharic) Volume 2, Tikimt 30- Hidar 7, 1987 Ethiopian Calendar.

133. Ethiopian Human Rights Council, *Stop Violating the Human Rights of Journalists*, 67th Special Report, 23www.ehrco.org/Reports/special67.pdf, last viewed on December 22, 2008.

134. Ethiopian police detain editor, impound magazine over pop icon story, Committee to Protect Journalists.

135. Freedom House, *Freedom of the Press 2008 - Ethiopia*, 29 April 2008. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/4871f602c.html [accessed 20 December 2008].

136. Gebremedhin Simon Gebretsadik, African Media Development Initiative Ethiopia: Research Findings and Conclusions, BBC World Service Trust.

137. HALF-YEARLY CASELIST [To 31 December 2006] International PEN Writers in Prison Committee, p.6, retrieved from www.pensweden.org/caselists/caselist-2007-jan.pdf, last viewed on December 21, 2008.

138. International Press Institute, Watch List Report Ethiopia May 2007 Update,http://www.freemedia.at/cms/ipi/watchlist_detail.html?country=KW0155,viewd on December, 08, 2008.

139. JOCELYN NEWMARCH , SABC tells Icasa hearing there was no blacklisting , Business Day Posted to the web on: 12 March 2009 ,available at http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A957530, last Viewed March 16, 2009.

140. Jonathan Steele, *Asrat Woldeyes: an extraordinary life*, June 12, 1999, *The Guardian* http://www.ethiopolitics.com/articles/Asrat_Woldeyes.htm, last viewed on December 22, 2008

141. Media Sustainability Index (MSI) Africa, *MSI Africa 2006-2007* http://www.irex.org/programs/MSI_Africa/ethiopia.asp, last viewed on December 15, 2008.

142. Professor Ephrem Issac, An Interview with Ethiopian Television Network(operating in the USA), available on http://www.ethiotube.net/video/2175/Prof-Ephrem-Issac-on-ETN, last viewed on March 2, 2009.

143. see also Network for Education and Academic Rights (NEAR) , *Ethiopia Political Scientist Released* , www.nearinternational.org/alert-detail.asp?alertid=102 - 10k.

144. Selome Tadesse, former general manager of the Ethiopian Television and Radio Enterprise, speaking on the role of the state media in a society that is in transition. Organized by Envisioning Ethiopia, an adhoc forum created to promote knowledge-based public discourse, the dialogue on media held at UNECA, http://www.addisfortune.com/Vol%207%20No%20354%20%20Archive/Index.htm, accessed on December 20, 2008.

145. SOUTH AFRICAN BROADCASTING CORPORATION COMMISSION OF ENQUIRY INTO BLACKLISTING AND RELATED MATTERS REPORT, 2006, available at www.fxi.org.za/pages/Media%20n%20ICTs/SABCComplaint/SABCBLACKLISTREPORT.pdf , last viewd on March 16, 2009.

146. The situation of Human Rights Defenders in the East and Horn of Africa, Report to the Forum on the participation of NGOs at the 44th Session of the African Commission on Human and People's Rights (ACHPR) , by EAST AND HORN OF AFRICA HUMAN RIGHTS DEFENDERS PROJECT (EHAHRDP) available on http://74.125.77.132/search?q=cache:9lFTud4Ymu0J:www.defenddefenders.org/documents/EHAHRDP%2520Report%2520for%2520the%252044th%2520Session%2520of%2520the%2520ACHPR.pdf+ethiopia+freedom+of+the+press+misidentification+of+judge+pop+star&hl=en&ct=clnk&cd=8

147. the The Right to Tell : The Role of Mass Media in Economic Development,2002 The International Bank for Reconstruction and Development / The World Bank , available at,http://www.worldbank.org/wbi/RighttoTell/righttotellOverview.pdf.

148. Universal Declaration of Human Rights.

149. US Department of State Bureau of Democracy, Human Rights, and Labor, 2008 Human Rights Reports: Ethiopia, February 25, 2009, available on http://www.state.gov/g/drl/rls/hrrpt/2008/af/119001.htm, last viewed on March 2, 2008.

150. US Department of State Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - *2005* March 8, 2006, http://www.state.gov/g/drl/rls/hrrpt/2005/61569.htm, viewed on December 15, 2008.

151. US Department of State, *ETHIOPIA HUMAN RIGHTS PRACTICES,1994,* FEBRUARY1995, http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Ethiopia.html, last viewed on December 22, 2008

152. Yonas Abiye, Ethiopia: Country Moves to Strengthen Anti-Terrorism Law Media Warned Not to Serve Terrorist Purposes , Daily Monitor, 2 June 2009, available on http://allafrica.com/stories/200906020244.html , last viewed on June 18, 2009.