Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand[†]

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Abstract

Just as Bruce Ackerman posited the rise of constitutional democracies in the world, Fareed Zakaria outlined a chilling aspect of it in the name of the parallel rise of illiberal democracies. The rise of illiberalism in emerging democracies can best be demonstrated in their draconic stance on free speech. In particular, in States such as Ethiopia and Thailand, the protection afforded to freedom of expression is markedly different from the protection of freedom of expression in liberal societies. Both Thailand and Ethiopia formally embrace liberal constitutional norms including freedom of speech. Nevertheless, both States continue to fall far behind in terms of the protection afforded to political speech in liberal democracies. Although the manifestations of the illiberal impulses in these States may vary, they demonstrate functional equivalence in terms of the similarities of how they respond to speech related offences. Despite these illiberal tendencies, however, there is also an interesting normatively appealing constitutional structure of these polities. The basic and underlying ideals of their normative constitutional architecture rest on a non-liberal model of constitutionalism which is distinct from the liberal model of constitutionalism. Both Ethiopia and Thailand provide interesting comparative study of free speech in non-liberal polities. The independent existence of both States and their distinctive historical contingencies help to illuminate the embedded socio-political, historical and ideological factors that inform their stance on free speech. This article argues that a non-liberal constitutionalism in free speech can be defended taking into account the various historical contingencies and political realities of both states. However, the article posits that this normative constitutional architecture has to be compatible with common principles of free speech norms drawn from international and comparative law. By doing so, it tries to explain discourses in non-liberal constitutionalism and the various historical and socio-political factors that drive such normative constitutional architecture.

Key terms: Free Speech, Non-Liberal Constitution, *Lèse-majesté*, Ethiopia, Thailand

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Introduction

Bruce Ackerman's optimistic outlook in *'the rise of world constitutionalism'* outlined the growing acceptance of constitutional democratic system of government in many States which *inter alia* embodies the protection of fundamental human rights and a system of judicial review.[1] Ackerman also highlights the increasing recognition of constitutions as fundamental law of States in many polities since the end of the Second World War. This is evident both in liberal and illiberal polities that embrace the idea of constitutionalism.[2] Most of these States' constitutions not only define the structure of power and functions of State institutions, but also provide for the protection of fundamental human rights and freedoms including freedom of expression.[3]

Nevertheless, the initial optimism in the triumph of liberal constitutionalism in the world began to be increasingly challenged as a new wave of illiberal democracies began to emerge. Just as Bruce Ackerman posited the rise of constitutional democracies in the world, Fareed Zakaria outlined a chilling aspect of it, in the name of the parallel *rise of illiberal democracy*.[4] While the thesis that the last man at the end of history may eventually embrace a liberal constitutional democratic State could still be plausible, the nature of polities that lack the fundamental precepts of liberal constitutionalism has become readily apparent.[5]

According to Zakaria, the recurrent problem of many emerging democracies has been the lack of consolidating liberal democratic constitutionalism. He points out that sustainable democracy and development of States requires not only democracy as understood in the sense of conducting regular elections, or the formal recognition of fundamental rights but rather the lack of consolidating liberal constitutionalism-

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[1] Bruce Ackerman, *The Rise of World Constitutionalism* 83 VA. L. REV. 771 (1997).

[2] The idea of non liberal or illiberal constitutionalism was originally proposed by Graham Walker, *The Idea of Nonliberal Constitutionalism* 39 ETHNICITY AND GROUP RIGHTS 155 (1997). For more recent discussions see Li-Ann Thio, *Constitutionalism in Illiberal Polities*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 133 (M Rosenfled and A Sajo eds., OUP, 2012). Li notes that Illiberal polities are varied and competing, which include many forms: illiberal, pre-liberal, non-liberal, or semi-liberal societies. *see* p. 134. Various forms of mixed polities that combine liberal and illiberal characters have also been discussed and include, "hybrid regime", "semi democracy", "virtual democracy", "electoral democracy", "pseudo democracy", "illiberal democracy", "semi-authoritarianism", "soft authoritarianism", "electoral authoritarianism" and Freedom House's "Partly Free" States, *See* Steven Levitsky and Lucan Way, *The Rise of Competitive Authoritarianism,* 13 JOURNAL OF DEMOCRACY 51 (2002)).

[3] Empirical studies show that more than 97% of the constitutions that were in force since 2006 have formally recognized the right to freedom of expression as a basic human right; *see* in this regard David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1200 (2011).

[4] Fareed Zakaria, *The Illiberal Rise of Democracy*, 76 FOREIGN AFFAIRS 22 (1997).

[5] See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

democracy in substance.[6] In most emerging democracies, beyond conducting regular elections the fundamental precepts of a liberal constitutional democracy such as rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property are significantly lacking.[7]

The most recent account of such taxonomy of illiberal polities is Mark Tushent's idea of *authoritarian constitutionalism*.[8] Tushent argues that, "authoritarian constitutionalism may best be defined by attributing moderately strong normative commitments to constitutionalism - not strategic calculations - to those controlling these nations".[9] According to Tushnet, what characterizes illiberal polities is their inability to observe the principles of constitutional democracy and the prospects of ensuring limited government in its exercise of power.[10] Although illiberal polities have a *modest normative commitment*[11] to ensure liberal constitutional values including freedom of expression, they continue to be significantly constrained in the full observance of fundamental freedoms including freedom of expression.[12]

While it is true that the rise of this illiberalism is a global phenomenon, in few emerging democracies such as Ethiopia and Thailand, the restrictions placed on freedom of expression in particular on core political speech has been one of the most troubling in recent decades.[13] Both States use discursive legal tools that make it impossible to demarcate the contours of political speech from speech that has serious

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[6] President Barrack Obama's remark referring to the problem of democracy and constitutionalism in Africa, during his historic visit as the First Seating Head of State of the United States to the African Union and Ethiopia on 28 July 2015, available at <https://www.whitehouse.gov/the-press-office/2015/07/28/remarks-president-obama-people-africa> 2015 (accessed on 15 August 2015).

[7] Zakaria *supra* note 4, at 22.

[8] Mark Tushnet, *Authoritarian Constitutionalism,* 100 CORNELL LAW REVIEW 391 (2015).

[9] *Ibid.,* at 397. Tushnet also classifies his theory of authoritarian constitutionalism into two sub-categories. Absolutist constitutionalism which has no constitutional limits to what the government can do but is not despotic; and mere rule of law constitutionalism characterized by observance of core rule of law publicity, prospectivity, and generality but is not fully normatively constitutionalist, *See* p. 415-21.

[10] *Ibid., at* 394. *See* also CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 20-21 (Cornel University Press 1940).

[11] Emphasis added.

[12] Tushnet, *supra* note 8.

[13] Until very recently, Ethiopia was ranked as the fourth most censored country in the world only next to Eritrea, North Korea and Saudi Arabia, See CPJ 10 Most Censored Countries (2015) <https://cpj.org/2015/04/10-most-censored-countries.php> (accessed on 20 March 2016). Regarding Thailand See Statement of the Office of the High Commissioner for Human Rights Press Briefing on Thailand and Mali (11 August 2015) , available at:
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E>
(accessed 10 Sep 2015).

and imminent threats to the national security and public order of these polities.[14] Although these seemingly *ad hoc* illiberal impulses of these polities seem to be of a temporary nature, the normative constitutional architecture of non-liberal polities is more resilient to change than one would like to admit.[15] Beyond a descriptive account of the manifestation of the illiberal impulses of these polities, few attempts have been made to explore a principled normative constitutional divergence of non-liberal polities from the liberal ones.

There are three fundamental factors that call for the exploration of the distinctive normative constitutional architecture of non-liberal polities such as Ethiopia and Thailand, in the particular context of free speech. First, there is an unnecessary characterisation of non-liberalism as a negation of liberalism and a belief that it has little significance for constitutionalism in free speech. This seemingly liberal arrogance emanates from the belief that liberal constitutionalism represents the highest form of normative constitutional development.[16] While this is true to a certain extent, the paper will try to demonstrate that this is not usually the case. Non-liberal normative constitutionalism distinct from the liberal model is defendable and might even be contemplated as an appropriate system of constitutional democracy.[17] The skepticism that non-liberal constitutionalism may give pretext to the unfettered power of dictators should not rule out a conception of constitutionalism distinct from the liberal model.[18] Moreover, we have to bear in mind that liberal constitutionalism has its own discontents - its covert forms of social exclusion; its reductive approach to knowledge; and those who criticize its notion of "individual autonomy rights as a form of naive and homogenizing universalism," that "unmask[s] the ethnic and moral "neutrality" of the liberal state as a covert form of coercion."[19]

Second as much as non-liberalism evokes anxiety from the liberal camp, liberalism itself evokes as much anxiety to non-liberals. In fact a persistent political rhetoric, if not normative, that one observes from the non-liberal camp is a rejection of the notion of liberalism and its more extreme variant, i.e. neo-liberalism.[20] In new

[14] Here I use the term discursive to describe the highly elusive nature of the crimes which makes it difficult to articulate the meaning and legal scope of the legal rules applicable which negates with the fundamental principle of certainty and predictability of criminal law.

[15] I use the term non-liberalism in preference to illiberalism as it captures the value neutral nature of a constitutional discourse distinct from the liberal model.

[16] Bruce P. Frohnen, *Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. 529, 533 (2011).

[17] Graham Walker, *The Mixed Constitution after Liberalism,* 4 CARDOZO J. INT'L & COMP. L. 311, 316 (1996).

[18] Walker, *supra* note 2, at 171.

[19] *Ibid.*, at 157.

[20] In this regard scholars and political elites from the non-liberal South position themselves as persistent objectors of liberalism and neo-liberalism. This has often served as a motivation to challenge the existing international economic order which does not take their interests seriously. While the call for a New International Economic Order (NIEO) has faded over the years, third world nationalism as an

emerging democracies such as Ethiopia and Thailand the rejection of the possibility to develop a non-liberal constitutional discourse can give impulses for discarding the very idea of constitutionalism and the generic virtues associated with it.[21] Moreover, liberals who are ready to contemplate a non-liberal constitutionalism usually find themselves between 'a rock and a hard place' in dealing with regimes with non-liberal constitutionalism.[22] They are cautious to prescribe any normative or institutional arrangement for these polities for fear of being seen as ethnocentric.[23] Consequently, accommodating non-liberal constitutionalism brings an ease - a compromise between defenders of liberal constitutionalism and those of non-liberal constitutionalism in dealing with normative and institutional problems associated with non-liberal polities.

Thirdly, exploring the possibilities of constructing a principled application of non-liberal constitutionalism offers possibilities for constitutional borrowing of liberal norms through the methodology of normative universalism. The increasing internationalisation of constitutional norms including freedom of expression and the development of common principles in the regulation of speech across societies have clearly demonstrated that free speech norms have transnational resonance. Accommodating a principled non-liberal constitutionalism enhances this possibility by pacifying the anxieties of non-liberal polities. Because of the above factors, it is imperative to explore the possibilities of looking into possible avenues for bridging the notional gap between liberal constitutionalism and non-liberal constitutionalism. It is with this understanding that the article sets out to explore the contemporary challenges to free speech in non-liberal polities, taking the case study of Ethiopia and Thailand.

1. Defining Non-Liberal Constitutionalism

In order to provide a framework for the subsequent discussions on non-liberal normative constitutionalism in free speech in Ethiopia and Thailand, it would be helpful first to disentangle the notional divergence between liberal constitutionalism and non-liberal constitutionalism. Admittedly, the conceptual disjuncture between liberal constitutionalism and non-liberal constitutionalism is very difficult to grasp as liberal constitutionalism itself, in rights discourse including free speech, is as varied as the non-liberal one. In the case of free speech for example, the normative constitutional architecture of liberal societies varies from a militant democracy

aspect of that political struggle still feeds the political ideology of non-liberal states such as Ethiopia and Thailand.

[21] This is particularly apparent when one looks at the constitutional discourse in Ethiopia where the government has consistently positioned itself as anti-liberal west. The notions of developmental state theory and its political counterpart, revolutionary democracy continue to be its ideological driving forces (see discussion in Sub-section 3.3 in this regard).

[22] Frohnen, *supra* note 16, at 533.

[23] *Ibid.*

approach with a reasonable limitation on free speech in Germany to a more complete protection of free speech in the United States. Nevertheless, despite these differences in the margins, the fundamental normative constitutional architecture of liberal societies is distinctively different from non-liberal ones.

Liberal constitutionalism is usually defined as a negation of non-liberalism. It presupposes the principle of self-government, rule of law, limits on the exercise of government power and the protection of basic freedoms including freedom of speech. Yet, all these important virtues of a liberal democratic society are not the fundamental precepts that typically distinguish liberal constitutionalism from its counterpart, non-liberal constitutionalism.[24] Two principal factors distinguish liberal normative constitutionalism from a non-liberal one. First it is based on the principle of *normative individualism,* which makes the rights of individuals and the autonomy of the human person as paramount in its constitutional dispensation.[25] Second, the precepts of a neutral State are deeply rooted in its principle of justice and vision of the good society.[26]

On the contrary, a normative conception of non-liberal constitutionalism does not make individual rights and autonomy the highest political aspirations or norms of the polity. It rather emphasizes on community norms emanating from ethnicity, culture, religion, history and the like. A non-liberal constitutionalism unlike a liberal one also advocates for a more proactive State power requiring it to structure a substantive vision of what the good life should look like by promoting some favorable pattern of life while demoting others.[27]

Nevertheless, despite these unique features of a non-liberal model of constitutionalism, the cultural embeddedness of this model of constitutionalism undeniably prompts illiberal impulses by restraining individual freedom in its effort to maintain a particularly favoured form of life and attitude in the larger society.[28] Therefore, it is evident that the protection afforded to fundamental freedoms including free speech, and the fundamental precepts of limited government, rule of law and basic democratic values are lacking in non-liberal constitutionalism. Thus, while legal and political reforms are needed in these polities, a principled application of the methodology of normative universalism by acknowledging non-liberal constitutionalism can be a useful method of striking a balance between cosmopolitan ambitions of human rights with local peculiarities.[29]

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[24] *Ibid.*, at 529.

[25] Emphasis added.

[26] Walker, *supra* note 17, at 315.

[27] *Ibid.*

[28] *Ibid.*

[29] See in this regard Sujit Choudhry, *Migration in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., OUP 2011); where he argues that the migration of

2. Ethiopia and Thailand as Important Case Studies

The study of normative constitutionalism in Ethiopia and Thailand is useful to understand the nature of non-liberal polities and the different manifestations of their illiberal impulses in particular, in the context of understanding the nature of normative constitutionalism in free speech. The first significant element is the increasing shrinking of free political speech in both States which demonstrates the existence of functional equivalence in comparative constitutional law study.[30] Although the silencing of dissent and political speech is apparent in many States, Ethiopia and Thailand, as will be demonstrated in this article, are some of the few countries where serious questions on the State of free speech have been raised by rights groups and UN agencies in more recent times.[31] Ethiopia and Thailand, after initially gaining a momentum towards democratic transition have begun a reversal of that process in almost the same period of watershed political events in both countries.[32] Both States continue to use discursive legal tools to silence their political opponents in an effort to maintain the political power of the governing elites and maintain their vision of national identity.

Ethiopia's democratic set back decisively began in the aftermath of the 2005 general elections, when the governing party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), began to launch a major crack down on political activists and human rights defenders.[33] In similar vein, Thailand's democratic reversal began in the aftermath of the 2006 coup, which led to incessant and polarized political battle between the Red Shirts (supporters of former Prime Minister Thaksin Shinawatra) and his opponents, the Yellow Shirts.[34] This rise of illiberalism in both States is particularly manifested in the area of freedom of

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constitutional ideas is taking increasingly cosmopolitan character, despite the many caveats involved in comparative constitutional law inquiry.

[30] On the significance of functional equivalence in comparative constitutional law study, see Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 371 (Mathias Reimann and Reinhard Zimmermann eds., OUP 2012). See also *R Hirschl, The Question of Case Selction in Comparative Constitutional Law*, 53 THE AMERICAN JOURNAL OF COMPARATIVE LAW 125 (2005).

[31] Although it is true that the appointment of Prime Minister Abiy Ahmed, has brought significant political concessions, the fundamental ideological principles of the EPRDF including the notion of revolutionary democracy and the developmental state doctrine have been endorsed by the party as its driving principles even after the appointment of Prime Minister Abiy Ahmed.

[32] According to Freedom House, Ethiopia is categorized as totally unfree (6 point score) while Thailand is partly free (with a 4 point score). *See* FREEDOM HOUSE, FREEDOM IN THE WORLD (2014).

[33] John W Harbeson, *Ethiopia's Extended Transition,* 16 JOURNAL OF DEMOCRACY 144 (2005); Terrence Lyons, *Ethiopia in 2005: The Beginning of a Transition?, CSIS Africa* Notes (2006).

[34] *See* Patrick Jory, *Karl Popper and Thailand's Political Crisis: The Monarchy as the Problem for an 'Open Society', in* THE OPEN SOCIETY AND ITS ENEMIES IN EAST ASIA: THE RELEVANCE OF THE POPPERIAN FRAMEWORK (Gregory CG Moore ed., Routledge 2014).

expression where they continue to use draconic measures which have significantly limited political speech and suffocated the democratic space.[35]

Another important factor for exploring normative constitutionalism in free speech in Ethiopia and Thailand is their cultural distinctiveness. A distinguished scholar on Ethiopia, Christopher Clapham, notes that Ethiopia is more akin to Thailand than it is to the rest of the African continent.[36] Ethiopia is a 'lone state' which has little cultural resemblance to most of its African neighboring States.[37] In the words of Samuel Huntington "[h]istorically, Ethiopia has existed as a civilization of its own… [o]nly Russian, Japanese and Ethiopian Civilizations, all three governed by highly centralized imperial authorities, were able to resist the onslaught of the West and maintain meaningful independent existence."[38] This independent existence has created very distinctive historical and cultural contingencies which feed and sustain its national identity. Similar to Ethiopia, Thailand has existed as the only South East Asia independent kingdom that did not fall under European colonialism in its entire history.[39] According to Leyland and Harding, this independent existence has been a *sine quanon* factor that determined many aspects of the identity, assumptions, and orientation of the modern Thai state.[40]

The independent existence of the two countries under strong aristocratic rule has significantly shaped many aspects of their social and political organisation and national identity, all of which have relevance for the study of freedom of expression in both states.[41] These elements of convergence are important in studying the constitutional protection of free speech in both States which can enlighten our understanding on the nature of normative constitutionalism in non-liberal polities. Beyond looking at the contemporary challenges of freedom of expression in these polities, the study could also provide normative and institutional arrangements that should be taken to promote openness while at the same time maintaining the national identities of these States by pacifying some of their anxieties.

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[35] *See* Freedom House, *supra* note 32; See also INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (IFHR), RESTRICTIONS ON FREEDOM OF EXPRESSION THROUGH THE LÈSE-MAJESTÉ LAW IN THAILAND (2009). Regarding Ethiopia *See*, Gedion T. Hessebon, *An Apologetics for Constitutionalism and Fundamental Rights: Freedom of Expression in Ethiopia* (LLM Thesis, Central European University, 2009). Amnesty International, *Dismantling Dissent: Intensified Crack Down on Free Speech in Ethiopia* (2011); FREEDOM HOUSE, FREEDOM IN THE WORLD (2015).

[36] Christopher Clapham, *Ethiopian Development: The Politics of Emulation*, 44 COMMONWEALTH & COMPARATIVE POLITICS 137 (2006).

[37] SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 136 (Simon and Schister 1996).

[38] *Ibid*., at 5.

[39] PETER LEYLAND AND ANDREW HARDING, THE CONSTITUTIONAL SYSTEM OF THAILAND: A CONTEXTUAL ANALYSIS 9 (Hart Publishing 2011).

[40] *Ibid*.

[41] *Ibid*.

2.1. Free speech and the rise of illiberalism in Ethiopia

The manifestation of the illiberal impulses of non-liberal polities is demonstrated by the strong stance that they have in regulating political speech. This is particularly manifested in the area of regulating hate speech. Although there are instances of other areas of speech regulation that have serious impact on political speech, the issue of hate speech regulation resonates as a significant element of its normative constitutional architecture which is rooted in protecting ethnic minorities and communitarian interests. Articulating the normative architecture of non-liberal societies Li Ann Thio notes that the contours of political speech in these societies are largely shaped by concerns to maintain ethnic and religious harmony. Similarly, in the case of Ethiopia one finds a strong stance in regulating hate speech to maintain the peaceful coexistence of its ethnic federal arrangement.

The case of *prosecutor v Hailu Shawel et al* arose in the context of the political crisis that ensued following the contested 2005 national election in Ethiopia.[42] Since taking power in 1991, EPRDF had largely won the national elections undisputedly, although serious concerns on whether these elections were 'free and fair' continued to be raised. The 2005 general election witnessed one of the most contested elections in the political history of Ethiopia. The results of the election showed a major setback for the EPRDF and a significant electoral victory for the major opposition political party, the Coalition for Unity and Democracy (CUD). The CUD won all the 23 parliamentary seats for Addis Ababa City Administration and all opposition political parties including CUD won more than 179 out of the 547 seats of the national parliament. Despite these, the opposition claimed that it won the elections and accused the government of vote rigging. International election observers also confirmed the occurrence of vote rigging and widespread electoral irregularities.[43] In the aftermath of the election, protesters demonstrated in the streets of Addis Ababa, to which security forces responded heavy-handedly leading to the death of more than 200 individuals.[44]

The political crisis following the election led to the imprisonment of CUD leaders, members of the civil society and individuals that were believed to be involved in inciting violence and attempting to overthrow the government and the constitutional order. It should be pointed out that much of the political debate during the election focused on important policy issues with little incidence of

[42] *Federal Public Prosecutor v. Hailu Shawel et al*, Federal High Court, Criminal Case Number 43246/99 (September 2007).

[43] VOA, Africa: *2005 Ethiopian Election: A Look Back*, (16 May 2010), available at: <https://www.voanews.com/a/article-2005-ethiopian-election-a-look-back-93947294/159888.html> (accessed 15 April 2016).

[44] *See* BBC News, Ethiopian Protesters 'Massacred', [<http://news.bbc.co.uk/1/hi/6064638.stm>] (accessed 10 March 2016).

incitement to genocide or hate speech.[45] Nevertheless, there were instances where speech that closely resemble hate speech or hate rhetoric was used in the political campaign leading to the general elections as well as in the immediate aftermath of the elections. As Iginio Gagliardone notes, the 2005 general elections in Ethiopia demonstrated "the fundamental juncture when the tension between politics, ethnicity, and the media, including new media, became evident".[46] This is yet another demonstration of the fact that the incidence of hate speech increases when political stakes are high such as during elections, economic crisis, poverty and periods of high unemployment.[47] Yared Legesse Mengistu argues that hate speech employed during the 2005 elections has some resemblance to the hate speech that was employed in the Rwandan Genocide.[48] This is, however, too much of a stretch. As will be shown in the subsequent discussion, much of the political debate was measured and could not in any way resemble the situation during the Rwandan Genocide.

In the case of *prosecutor v Hailu Shawel et al,* the indictment for the crime of incitement to genocide related to speech made by the leaders and members of the CUD during the election campaigns in 2005. The evidence presented in the Federal High Court particularly focused on a speech made by Bedru Adem, one of the prominent leaders of CUD, in Assela town, located in the regional State of Oromia. In his speech addressed to a large audience he made the following speech, "the power of the Federal Government is totally in the hands of Tigrayans and the EPRDF; and thus they should be shoved back to their former turf by the united power of the people".[49]

In making the case for the crime of incitement of genocide, the prosecutor tried to establish that some of the violence and loss of life that happened in the aftermath of the elections were attributed to the hate speech employed by the opposition.[50] The prosecutor also tried to indicate that as a result of the speech two houses of individuals who were ethnic Tigrayans were burnt and another Tigrayan was beaten and injured.[51]

The case of *Prosecutor v Elias Gebru Godana* is another case which demonstrates the difficulty of limiting political speech and protecting communitarian interests in

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[45] See Lyons, *supra* note 33.

[46] I. Gagliardone, *New Media and the Developmental State in Ethiopia*, 113 AFRICAN AFFAIRS 33 (2014).

[47] I. Gagliardone *et al, Mapping and Analyzing Hate Speech Online: Opportunities and Challenges for Ethiopia,* WORKING PAPER 9 (Oxford, 2014).

[48] Yared L. Mengistu, *Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws, in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 361 (M Herz and P Molnar eds., Cambridge University Press 2012).

[49] *Ibid.*, at 364.

[50] *Ibid.*

[51] Hessebon *supra* note 35, at 25.

states with a non-liberal constitutional structure. Elias was a journalist and editor of *Enqu* magazine who was prosecuted for incitement to hatred.[52] Although the indictment of Elias was for incitement to hatred rather than incitement to genocide, the case illustrates the complex issues involved in the regulation of hate speech and incitement to hatred, as well as incitement to genocide in multi-ethnic and multi-religious State such as Ethiopia. It also demonstrates the precarious position of journalists and political commentators in the context of the political statements they make in such complex socio-political and legal environment. Because of this it would be helpful to analyze the legal basis of the prosecution's evidence for incitement to hatred in the context of the legal limits of permissible political speech. Elias was charged with violation of Art 257 (e) of FDRE Criminal Code.[53] The details of his charge indicate that he was accused of attempting to destroy the unity of the people of Ethiopia by trying to instil hatred and conflict in the public in violation of the Criminal Code.[54] The specific charges related to an article written in *Enqu* magazine on its March 2012 issue. In the article titled "Whose and to whom are the statutes built and being built?" he asks readers questions including, "the Oromo people came to Ethiopia in the 16th Century, should we remind them that they are our new neighbours? Whose country are they going to secede from?[55] They should remember the contract and obligation they entered with Emperor Gelawdiwos".[56] The article further reads:

> the resistance and obstacle caused by those who claim to be Oromos to the effort by Emperor Menelik to strengthen the country that was weakened was unexpected and a betrayal. If they [those who claim to be Oromo] say that they are not Ethiopians they could have had the right to leave the country and go to the place where they came from. But instead, they said that they will remove their hosts [Ethiopians] who received them as guests and tried to overtake them. ...In this regard, the acts that Emperor Menelik allegedly committed, even if true, what choice did he has, unless we are unable to think? What is the injustice of this act? [57]

The case demonstrates the very complex and difficult nature of determining the contours of political speech and those that can be categorized as hate speech or incitement to hatred or incitement to genocide. The historical factors and simmering

[52] In this regard *see* also *Prosecutor v Elias Gebru Godana*, Federal High Court, File No 552/06 (20014).

[53] FDRE Criminal Code (2004). Art 257(e) reads:

> Whosoever, with the object of committing or supporting any of the acts provided under Articles 238-242,246-252 [offenses against the state]: launches or disseminates, systematically and with premeditation, by word of mouth, images or writings, inaccurate, hateful or subversive information or insinuations calculated to demoralize the public and to undermine its confidence or its will to resist [...] is punishable up to 10 years of imprisonment.

[54] *Prosecutor v Elias Gebru Godana, supra* note 52.

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

ethnic tensions in the country are manifest because of the perceived marginalization of the Oromos that constitute 35% of the population as the largest ethnic group in the country.[58] Oromo activists have argued that the Abyssinian culture (which represents the northern Christian dominated part of Ethiopia) is dominated by the Amhara and Tigrayans which has left much of the political, economic and cultural claims of the Oromo to the periphery. Moreover, more radical Oromo nationalists also perceive the campaign of 'integration' of the different regions and ethnic groups to the Ethiopian Empire by Emperor Menelik by the end of the 19th Century as a campaign of 'extermination' and even 'genocide'.[59] These sensitivities of political minority groups can trigger anger and resentment to statements that on face value appear normal and within the boundaries of political speech.

It is important to note that the prosecution's case rested not only on the expression *per se* but also demonstrated that some violent act occurred as a result of the speech. First, the prosecutor argued that the article included expressions which demoralized the Oromo people and undermined their Ethiopian identity.[60] Second, the prosecutor established that violence broke out as a result of the speech. In corroborating the evidence, the prosecution showed a letter from Jimma University, located in Oromia Regional State, where student protesters broke windows and other related property worth 39, 408 Birr.[61] Although there is no indication that the violence was caused by reading the article in which the charges against the accused are based, the prosecution's case clearly rested on this fact. The prosecution's evidence seems to demonstrate that any criminalization of hate speech should be construed as incitement to hatred and discrimination, which has the potential to cause violence. In many ways, the emerging jurisprudence on hate speech as well as general incitement law in Ethiopia and prosecutorial patterns clearly demonstrate that Ethiopian law favours a normative understanding that makes speech proscriptions to be contingent on a demonstration of the likelihood of the occurrence of a violent act. However, Yared Legesse Mengistu argues that Ethiopia's law on hate speech is dogmatically over-reliant on the truth of alleged facts rather than a demonstration of the likelihood of violence.[62]

The above cases clearly indicate that in States like Ethiopia where ethnic identity has become the defining feature of the body politic, its effort to regulate and contain radical nationalist and ethnic nationalist expressions is justified by its particular socio-political context. However, providing an appropriate normative framework on the limits of political speech and defining the meaning and scope of what constitutes

[58] See R Lefort, *Things Fall Apart: Will the Centre Hold* (Open Democracy, 19 November 2016), available at <https://www.opendemocracy.net/ren-lefort/ethiopia-s-crisis> (accessed December 15 2016).

[59] *Prosecutor v Elias Gebru Godan, supra* note 52.

[60] *Ibid.*

[61] *Ibid.*, See Annex of the list of property destroyed.

[62] Mengistu *supra* note 48, at 369.

incitement to genocide and incitement to hatred is important. As Susan Benesch rightly notes, defining the appropriate contours of what constitutes incitement to genocide and incitement to hatred would help to guard against the repression of legitimate political speech and its vitality to the democratic process.[63] This is particularly important in Ethiopia and many other African States where the general understanding that the violence and genocide in Rwanda was fueled by the incitement by the media has provided the political legitimacy to impose broad restrictions on political speech.[64] In this regard, the body of law on incitement to genocide under international and comparative law can provide significant normative insight in determining the boundaries of political speech and incitement law. Given the significance of international and comparative law in resolving the legal challenges involved in the regulation of free speech, Ethiopian courts can draw important insights by looking into this body of law in determining the contours of political speech in the context of incitement to genocide.

2.2. The *lèse-majesté* law and the silencing of political dissent in Thailand

Historically, the use of *lèse-majesté* laws can be traced to the French aristocratic tradition. Until the middle of the 18th century, strong absolute monarchical rule had created a strong legal apparatus to protect the monarchy as an institution and the king.[65] After the introduction of *Code Michaud* of 1629 by the recommendation of Cardinal Richelieu, the *lèse-majesté* law was extended to include offences against the church and defamatory statements on political matters.[66] Since its inception the *lèse-majesté* was directed at rival political elites in order to control political power.[67] Similarly, in the case of Thailand, although the *lèse-majesté* law was seemingly adopted to protect the reputation of the monarchy, anti-royalism has been used as a powerful political tool to dominate political power and galvanize public support in Thai society.

Generally, the Monarchy is a respected institution in Thailand. King Bhumibol Adulyadej, who has been head of State for more than 70 years is the longest serving monarch in the world and exerts a significant influence in Thai society. The king symbolizes the Thai nationhood and stands as the central element of the Thai 'civic religion' of 'nation, monarchy, and religion'.[68] The King as head of State is not only

[63] S. Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 488 (2008).

[64] J. Simon, *Of Hate and Genocide: In Africa Exploiting the Past,* COLUMBIA JOURNALISM REVIEW 9 (2006).

[65] D. Streckfuss, *Kings in the Age of Nations: The Paradox of lèse-majesté as Political Crime in Thailand*, 37 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 447 (1995).

[66] *Ibid.*

[67] *Ibid.*, at 446-47.

[68] Leyland and Harding *supra* note 39, at 32.

revered by Thai society but also a subject of extreme sensitivity.[69] As a result, the institution of the monarchy and the king are vigorously protected by law from any criticism. The 2007 Constitution of Thailand reads: ''[T]he King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action''.[70] It is interesting also to note that, despite the recent coup of May 2014 by the National Council for Peace and Order (NCPO) which abrogated the entire constitution of 2007, Chapter 2 of the Constitution which relates to the power of the monarchy and the status of the King is left untouched.

One of the major challenges that significantly constrained the protection of the right to freedom of expression in Thailand has been the *lèse-majesté* law, which criminalizes any criticism against the monarchy. Section 112 of the Thai Criminal Code, which falls under offences of national security stipulates "[w]hoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished (with) imprisonment of three to fifteen years."[71] It is noteworthy to emphasize that the offence of *lèse-majesté* is not treated as a case of defamation or libel but as serious national security issue which entails severe legal consequences leading to imprisonment of up to fifteen years. Beyond its legal implications, conviction for *lèse-majesté* is considered as cultural treason committed against Thainess. Moreover, unlike most jurisdictions, where a victim of a defamatory statement will lodge complaints, the law of *lèse-majesté*, because of its very conception as a national security issue, can be subject to prosecution by complaint from any person or by the prosecution's initiative.[72]

Political historians trace the first use of the *lèse-majesté* case in Thailand during the reign of King Chulalongkorn (1868-1910). When the King became displeased with the political comments made by a prominent journalist T.V.S. Wannapho, he ordered his imprisonment, making him the first political prisoner in the history of Thailand.[73] In modern history of Thailand, the first important *lèse-majesté* case is usually cited as the *Wira Musikaphong* case.[74] The case is significant because it typifies the way how the law of the *lèse-majesté* has been used as a political tool to muzzle and eliminate political opponents. The case was about a political speech made by Mr Wira, who was a member of a Democratic Party, known for its opposition to the military. During his election campaign, he made a speech in which he compared himself to a prince in the context of criticizing a political opponent. Part of his political speech included the following:

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[69] *Ibid.*, at 238.

[70] Constitution of Thailand (2007), Section 8.

[71] Penal Code of Thailand (1957).

[72] *See* IFHR, *supra* note 35.

[73] Robert F Martin, *Freedom of Expression in Southern Asia-Political Realities and Cultural Expectations: Freedom of Speech in Thailand,* 20 FREE SPEECH YEARBOOK 1 (1981).

[74] Streckfuss, *supra* note 65, at 449.

> If I were a prince now, I would not be standing here, speaking, making my throat hoarse and dry …I would be drinking some intoxicating liquors to make myself comfortable and happy.[75]

He was later charged with the offence of the *lèse-majesté*. It was argued that his metaphorical reference was directed at the king depicting him as lazy and one who does not care about the deplorable conditions of the poor.[76] Although Wira proclaimed his innocence and affirmed his loyalty to the king, the public exposure of the issue forced the military officials to galvanize popular protests which ultimately led to his prosecution. He was initially acquitted by a provincial court but later found guilty of the crime of *lèse-majesté* by an appellate court and sentenced to six years imprisonment.[77]

The case of Sulak Siravaksa, a social activist and scholar and his repeated prosecution for anti -royalists sentiments has been one of the most publicized in the history of Thailand. Although he himself is a royalist, his ardent criticism of the *lèse-majesté* law and some of his opinions on the role of the monarchy in Thai society has led him to five different *lèse-majesté* charges since 1984. Although he has not been convicted of *lèse-majesté*, he has been continuously harassed and arrested in order to silence his views on the monarchy.[78]

In the *Da Torpedo* case, Ms Daranee, a political activist and member of the United Front for Democracy against Dictatorship (UFDAD), was charged for three counts of violations of insulting the king and queen under the *lèse-majesté* law. The major aspect of her speech concerned a political speech made in 2008 in which she criticized the 2006 coup, the military leaders and their conservative allies. In her speech she also reiterated a widely held public view that the monarchy was behind the 2006 military coup that ousted Thaksin Shinawatra from power.[79] Ms Daranee was sentenced to eighteen years imprisonment under the *lèse-majesté* law.

In more recent times, the application of the *lèse-majesté* law has been more pronounced with greater coverage and intensity.[80] According to Strafuckus, until 2011 it is estimated that there were more than 170 political prisoners convicted on *lèse-majesté* charges.[81] According to Jory, the conviction rate for *lèse-majesté* offences

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[75] *Ibid.*, at 458.

[76] Leyland, *supra* note 39, at 241.

[77] *Ibid., at* 451.

[78] See Renowned Royalist Sulak Sued for lèse-majesté for Defaming ancient king (Prachatai, 17 Oct 2014), available at: <http://www.prachatai.com/english/node/4416>, see also King With King declining Health, Future of Monarchy in Thailand is Uncertain, available at: <http://www.nytimes.com/2015/09/21/world/with-king in-declining-health-future-of-monarchy-in thailand-is-uncertain.html?_r=0>

[79] Harding and Leyland, *supra* note 39, at 243.

[80] Amnesty *supra* note 35.

[81] Streckfuss *supra* note 66, at 205.

is also almost 100%.[82] The political pressure involved and the very nature of the crime as a discursive political crime make it almost impossible to raise defenses or deny the allegations.[83]

Since the beginning of the coup, NCPO has publicly stated that the top priority of the authorities is to prosecute critics of the monarchy.[84] Reports indicate that hundreds of individuals have been investigated for *lèse-majesté*, most of whom have been prosecuted under the military and criminal courts of Thailand.[85] NCPO has used *lèse-majesté* law in record number of prosecutions and jail terms.[86] *Lèse-majesté* offences can entail a sentence of as long as fifteen years.[87] Multiple offences of *lèse-majesté* law, including postings made in facebook, can lead to fifteen years imprisonment for each count. Recently, a military court sentenced Pongsak Sriboonpeng to sixty years in prison for committing the *lèse-majesté* offence, reduced later to 30 years in prison for pleading guilty.[88] This makes it the highest and harshest sentence recorded in the history of Thailand for a *lèse-majesté* offence.[89] The onslaught and crack down on free expression is particularly apparent in the context of new online media platforms such as facebook.

To conclude, the *lèse-majesté* law as currently understood by the courts of Thailand significantly departs from the regulation of defamation laws in many democratic States. It has been applied in such a way that any expression which does not have any effect on the reputation of the king or the monarchy can still fall under Art 112 of the Thai Penal Code. More importantly, the normal defences available in defamation cases such as the defence of truth are not available for the crime of *lèse-majesté*. This questions Thailand's international commitment under Art 19 of the ICCPR which provides for the right to freedom of expression. Despite the growing criticism from rights groups and the UN Office of the High Commissioner for Human Rights to amend or abolish the law, there has not been any legislative reform to this effect.[90] It should also be recalled that international and comparative law on free speech clearly establishes that core political speech made in the

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[82] *Ibid.*

[83] *Ibid., at* 205.

[84] Human Rights Watch World Report, 535 (2015).

[85] *Ibid.*

[86] Reuters Special Report, *Thai Junta Hits Royal Critics with Record Jail Time*, (3 Sep 2015), available at: <http://www.reuters.com/article/2015/09/04/us-military-convictions-thailand-special-idUSKCN0R400X20150904> (accessed 12 Sep 2015).

[87] *see* Sec.112 of Penal Code of Thailand (1957).

[88] BBC News, *Thai Courts Give Record Jail Terms for Insulting King* (7 August 2015), available at: <http://www.bbc.com/news/world-asia-33819814> (accessed 25 Sep 2015).

[89] *Ibid.*

[90] See OHCHR Press Briefing on Thailand and Mali (11 August 2015), available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16310&LangID=E> (accessed 10 Sep 2015).

democratic process, in particular in relation to public officials, should be given more heightened scrutiny in the application of defamation laws. One also notes that in the US constitutional dispensation, defamation of public officials can be established only if it can be shown that a speaker made reckless disregard of the truth of his statements.[91]

It should, however, be noted that given the wider respect that the monarchy enjoys in Thai society, it can be argued that possibilities for accommodating limitations on freedom of expression can be imposed through the *lèse-majesté* law. Historically the Thai monarchy as an autochthonic institution has evolved as a deep cultural element of Thai society. Because of this, it can be contemplated that the protection of the monarchy through defamation laws can be justified. It should also be recalled that, the institution of the monarchy in liberal democracies such as in the UK and Japan, has certain legal protections even if the law has rarely been used.[92] Nevertheless, the *lèse-majesté* law should only be invoked for a direct personal attack on the personality of the king or the institution of the monarchy. Moreover, the normal defences available for defamation cases such as the defence of truth should be available to a defendant. Given the increasing decriminalisation of defamation laws in many countries, possibilities for exploring non-penal measures should also be considered.

3. Exploring the Illiberal Impulses of Non-Liberal Constitutionalism in Free Speech

The preceding discussions on constitutionalism in free speech in non-liberal polities clearly show that the protection afforded to freedom of expression, in particular to core political speech is markedly different from liberal democratic societies. There are legal, socio-political, cultural and historical factors that explain the normative constitutional divergence in the protection of freedom of expression between liberal and non-liberal polities.

In her account of the soft constitutionalism in transitional democracies and non-liberal States, Li-Ann Thio emphasizes on the importance of looking into "nonbinding, deliberately created constitutionally significant norms" that form the soft laws of these States.[93] In what Thio describes as a 'positivist version of realism' she argues that the marginal role that courts and legal rules play in transitional and non-liberal democracies requires looking into the soft law - the ideological and socio-political factors that have significant role in "ordering constitutional relationships"

[91] *New York Times Co. v. Sullivan* 376 US 254, 84 S. Ct [1964].

[92] Article 19, *Impact of Defamation Law on Freedom of Expression in Thailand* (2009).

[93] Li-Ann Thio, *Soft Constitutional Law in Non-Liberal Asian Constitutional Democracies*, 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 766 (2010).

and normative conceptions in these States.[94] She notes that soft constitutional law in transitional democracies, because of its conceptual fluidity, has inherent fuzziness and lacks the certainty and accuracy when compared to legal norms. But she argues that "[w]hat [soft constitutional law] forsakes in terms of conceptual clarity, it gains in terms of capturing constitutional realities accurately".[95] Mark Tushnet similarly notes that a more nuanced understanding of constitutional norms can best be drawn by studying how high politics influences the conception of constitutional values in States.

In the case of Ethiopia and Thailand, the factors that explain their illiberal impulses are varied and may require further research. However, certain important common factors can be discerned which inform their stance on freedom of expression and typically characterize their non-liberal normative constitutionalism more broadly.

3.1. A Culture of respect

Some of the perplexing contemporary challenges to free speech in Ethiopia and Thailand discussed in the preceding sections of the paper cannot be answered by purely normative or institutional discussions. A significant factor that clearly manifests itself in their stance on free speech is their shared cultural contingencies. This is particularly informed by their aristocratic past, where monarchs ruled these nations with absolute political power and where any form of dissent to the ruler was seen as treason. In the case of Ethiopia the famous saying "you cannot plough the sky, neither can you sue the king" has been a deeply held cultural element of Ethiopian society.[96] It should also be noted that the 1955 Constitution of Ethiopia clearly states that the authority of the Emperor is absolute and that his dignity is inviolable. Although Ethiopia's transition to a Republic in 1974 has transformed many aspects of its social and political organisation, its aristocratic past which existed for millennia clearly has a significant influence in its stance on free speech and its democratic trajectory. The political culture of Ethiopia has been characterized by strong leaders typified by a personality cult with little constraints over personal power or willingness to compromise on dissenting views.[97]

Similarly, Thailand's national identity has been largely influenced by the monarchy. Robert Martin, noting the challenges of freedom of expression in Thai political culture has observed that Thai constitutionalism in freedom of expression is seriously hampered by a culture of respect for personality than a commitment to any political philosophy or a deeper understanding of the values of free expression. This culture of respect in Thai society has also been a significant factor for the influence

[94] *Ibid. See* also M. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution,* 54 AMERICAN JOURNAL OF COMPARATIVE LAW 87, 589 (2006).

[95] Thio, *supra* note 93, at 769.

[96] See Hessebon, *supra* note 35.

[97] *Ibid.*

of the monarchy as an important aspect of the national identity of Thailand. The Thai culture commonly known as *krengjai*, encourages modesty and respect towards other people. The public expression of opinions challenging authority is considered confrontational which is uncharacteristic of Thainess. Social scientists argue that these personal values have significant influence in the political behaviour and their attitude towards normative values such as freedom of expression.[98]

It should be recalled that this conclusion while not unique to the nature of non-liberal constitutionalism in States such as Ethiopia and Thailand, is more pronounced when it comes to these polities. Ronald Krotoszynski, comparing the free speech tradition of the United States, and those of Germany and France, notes that the latter's emphasis on dignity and the consequential over-protection to hate speech and their general approach to civility norms stems from "a culture of respect that democratized aristocratic forms of politesse and protected these interests through civil and criminal law".[99] Clearly cultural contingencies play a significant role in the current understanding of freedom of expression in many societies. Nevertheless, the culture of respect that resulted from a deeply hierarchical aristocratic society in Ethiopia and Thailand continues to have a more profound afterlife in their normative constitutionalism in free speech than in the case of most liberal societies.

3.2. The emphasis on communitarian norms

As indicated in the introductory part of this article, one of the most significant normative constitutional structures of non-liberal constitutionalism is its emphasis on group or communitarian values than individual rights. The fact that constitutionalism in non-liberal States gives emphasis to group rather than individual rights has a political undertone which implies that individual rights including freedom of expression do not form the normative core of their constitutional architecture.

In the case of Ethiopia, the ethnic federal constitutional arrangement overtly emphasizes on the protection of group identities rather than individual rights. At face value the constitution embraces both liberal individual rights and the rights of nations, nationalities and peoples.[100] Nevertheless, there are deeply embedded ideological factors that seem to feed a commitment to protect group rights than individual rights. The political elites of the current governing party, EPRDF, believe that the old Ethiopia they knew was dominated by *a* specific ethnic group's political power and culture. Historically the Amhara aristocracy had a significant

[98] Martin, *supra* note 73, at 5-6.

[99] RONALD KROTOSZYNSKI, THE FIRST AMENDMENT IN CROSS CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 135 (2009, New York University Press).

[100] *See* Arts 14 to 44 of FDRE Constitution.

political influence in shaping the national identity of the Ethiopian nation. Thus, at least at a political level, there was a clear desire by many other ethnic groups to exert their cultural identity in the newly reconstituted Ethiopian State by protecting minority ethnic groups under the federal arrangement of the Constitution.

In order to achieve this, they crafted a constitution which markedly favours the protection of ethnic groups over any other liberal democratic value including freedom of expression. The overall political legitimacy and State structure rests on the rhetoric of the protection of ethnic groups. In this regard it should be noted that the Ethiopian Constitution is one of the few constitutions in the world which provides for the right to secession of ethnic groups from the State.[101] This overt emphasis on communitarian or group rights has a political undertone which seems to undermine the protection of individual rights including freedom of expression.

This does not play out only at the political level but also normatively. The government has at times used hate speech expressions to silence political expressions as evidenced in the aftermath of the 2005 national election. The members of CUD, the then major opposition political party including the party leader Eng. Hailu Shawel and 130 other members of the party were charged with incitement to genocide.[102] Although the charges were later dropped, hate speech has continued to be one of the major contentious issues which can have a chilling effect on political speech.

In the case of Thailand, while many point out that the 'Asian values' debate is less pronounced, most scholars point out that its stance on individual rights including free speech is significantly influenced because of its emphasis to a collective identity of the Thai State.[103] Thailand's national constitutional identity has been shaped by the collective pride in being Thailand - land of the free.[104] Although, the State usually pacifies claims of self rule by ethnic minorities wary of ethnic tensions, the political culture has been significantly influenced by the collective identity of being Thai than the protection of individual rights including freedom of expression. In this regard Robert Martin notes:

> The sources of Thai national apathy toward freedom of speech (and politics in general) lies deep in political traditions and cultural expectations which provide the average citizen a stable economy, a reassuring sense of place in society, a vast degree of personal freedom and pride in the fact that Thailand -- land of the free--has never been subjugated by a foreign power.[105]

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[101] *Ibid.*, Art 39.

[102] *Federal Public Prosecutor v. Hailu Shawel et al, supra* note 42.

[103] Martin, *supra* note 73.

[104] *Ibid.*

[105] *Ibid.*, at 3.

This communitarian distinctive independent existence had profoundly shaped the national identity of the Thai State, which undermines individualized notions of rights including freedom of expression.

On balance, one could argue that given the political reality of both Ethiopia and Thailand which gives greater emphasis on communitarian norms, accommodating group rights/communitarian norms in non-liberal constitutionalism is appropriate. In fact critics of liberal constitutionalism point to the hyper-individualised notions of rights which have decimated the importance of communitarian norms and their social significance.[106] Pioneering libertarians such as Locke not only emphasized on individual freedom but also the community as fundamental to the good life.[107] Modern libertarians have also openly expressed their growing anxiety on the decline of community values in liberal societies.[108] Accordingly, accommodating non-liberal constitutionalism in free speech requires acknowledging this political reality and cultural contingency. The implications for example can be that there should be greater flexibility in the regulation of hate speech which takes into account their social context and political reality.

3.3. The Developmental State: the anti-thesis of the neutral State

Bertolt Brecht's most quoted aphorism "grub first, then ethics" best describes the recurrent ideological notion of the developmental State. Following the success of South East Asian economies and the support garnered by prominent economists including Mustaqh Khan, Dani Rodrik, Howard Stein and Joseph Stiglitz, the developmental State ideology has dominated the political economic landscape of most third world countries.[109] While the developmental State doctrine may appear an economic model largely dependent on State driven economic development, crucially, it is a political program. Political commentators point out that the developmental State ideology only makes passing reference to liberal democratic values such as respect for human rights including freedom of expression.[110]

Driven by the developmental State ideology, the fundamental political ideology of Ethiopia and Thailand rests on achieving sustained economic growth.[111] This

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[106] *See* Frohnen *supra* note 16.

[107] Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After*, *in* RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND PHILOSOPHICAL PERSPECTIVES 34, 40-43 (Bruce P. Frohnen and Kenneth L. Grasso eds., Univ. of Missouri Press 2009).

[108] *See* Frohnen, *supra* note 16.

[109] Sarah Vaughan, *Revolutionary Democratic State-Building: Party, State and People in the EPRDF's Ethiopia*, 5 JOURNAL OF EASTERN AFRICAN STUDIES 619,623 (2011).

[110] Adrian Leftwich, *Bringing Politics Back in: Towards a Model of the Developmental State*, 31 JOURNAL OF DEVELOPMENT STUDIES 400-427 (1995).

[111] *Ibid*. Although there has been a major political shift in terms of the political orientation of the party under the new Prime Minister, Abiy Ahmed, the ruling party, EPRDF, has reiterated its developmental state policy in its general congress held in 2018.

position has a political undertone which implies that a functional democratic system can only be established after reaching a certain level of economic development.[112] The developmental State theory has its appeals because of the realities of economic poverty that for so long has characterized much of the third world including Ethiopia and Thailand. It is true that the form and nature of how the notion of the developmental State ideology is applied in Ethiopia and Thailand could vary to a certain degree. It should also be pointed out that economically Thailand is more advanced than Ethiopia. However, the fundamental tenets of the developmental State ideology are identical.[113]

Proponents of the developmental State theory argue that significant economic development and poverty reduction have been achieved by repudiating the standard norms, practices and expectations of liberal democracies. East Asian political leaders, notably Lee Kwan Yew questioned and argued against the significance of a freedom of expression and the media for securing development or social harmony.[114] This interventionist vision of organizing society is markedly different from the notion of the neutral state, which serves as the organizing principle of liberal constitutionalism. The notion of the neutral state adopts a pacifist approach towards State power by preferring to be a neutral arbiter by allowing the market of goods and ideas to decide what the good life of the society should look like.[115]

This clash of values underlying the fundamental principles organizing and constituting the State creates normative divergence in liberal and non-liberal constitutionalism. In the context of freedom of expression, the ideology of the developmental State which forms one of the most significant organizing principles of Ethiopia and Thailand had important implications on their stance on freedom of expression. The ideology of the developmental State is defined by weak and subordinate civil society and political repression as key elements of its organizing principles. In an effort to maintain a stable and fast economic development, it presupposes that freedom of expression and a strong independent media can be counterproductive to its ambitious 'wish to catch up with the west'. Leftwich observes that the suppression of freedom of expression and civil society in general has been one of the key factors for the "constitution and continuity of developmental States."[116]

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[112] For a general discussion on constitutionalism and economic realities of states *See* Arun Thiruvengadam and Gedion Hessebon, ***Constitutionalism and Impoverishment: A Complex Dynamic***, *in* OXFROD HANDBOOK ON COMPARATIVE CONSTITUONAL LAW (Michael Rosenfeld and Andras Sajo eds., OUP 2012).

[113] See Leftwich, *supra* note 110.

[114] *Ibid.*

[115] Catriona McKinnon and Dario Castiglione, *Introduction: Reasonable Tolerance*, in THE CULTURE OF TOLERATION AND DIVERSE SOCIETIES: REASONABLE TOLERANCe 2 (Catriona McKinnon and Dario Castiglione eds., 2003).

[116] *See* Leftwich, *supra* note 110, at 418.

Clearly, it can be observed that non-liberal States such as Ethiopia and Thailand seem to embrace two contradictory vision of the good society. On one hand, they formally embrace liberal constitutional norms including the freedom of speech. On the other hand, their deeper ideological reason for organizing the State through the developmental State ideology negates their commitment to ensure the protection of basic democratic principles including the freedom of expression.

Conclusion

The study of contemporary challenges to free speech in non-liberal polities such as Ethiopia and Thailand is important to understand the manifestations of the illiberal impulses of these polities with a principled study of non-liberal constitutionalism. Crucially, however, it helps to articulate the reasons for their departure from the liberal model of constitutionalism in free speech and the opportunities to explore normative universalism in free speech. This article has tried to shed light on some of the contemporary challenges to free speech in Ethiopia and Thailand as a demonstration of this normative divergence between liberal and non-liberal constitutionalism. Understanding the nature of non-liberal constitutionalism both in law and high politics can also provide better opportunities for a more receptive attitude to liberal constitutional norms including free speech by accommodating some of their political realities and cultural contingencies.

Nevertheless, it should be admitted that in non-liberal polities such as Ethiopia and Thailand, the protection afforded to freedom of expression has been one of the most draconic in recent times. In the case of Ethiopia, the Anti-Terrorism Proclamation, in particular the prohibition of incitement to terrorism has had a significant effect in silencing political dissent and diminishing the vitality of free expression in the democratic process. Similarly, in Thailand, the use of the *lèse-majesté* law has had a similar effect. The discursive nature of these crimes makes it impossible to determine the contours of political speech from those that have serious and imminent threat to the national security of these states.

Thus, while acknowledging their political realities and cultural expectations, both Ethiopia and Thailand need to recognize the significance of freedom of expression by complying with the basic principles of free speech drawn from international and comparative law. In this regard comparative law in free speech can offer important lessons by drawing common principles on the regulation of speech which could have transnational resonance. By doing so, non-liberal constitutionalism can be validated as a defendable normative constitutional architecture by demonstrating that the political realities and cultural contingencies of States can be accommodated without compromising the cosmopolitan ambitions of human rights norms including free speech.

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