

THE JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL RIGHT TO FREEDOM OF EXPRESSION IN ETHIOPIA: THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

Hanan Marelign Zeleke* and Getachew Assefa Woldemariam**

Abstract

This article claims that Ethiopian courts interpret the grounds of limitation of the constitutional right to freedom of expression extremely broadly, in a manner that unjustifiably restricts the right. By reviewing selected decisions handed down by the federal courts, the article attempts to show the prevailing interpretive approaches adopted by the judiciary. It evaluates the existing approaches of the Ethiopian courts in light of the methodological approaches of selected comparative national and international judicial practices. It will attempt to show that the judiciary's failure to interpret freedom of expression optimally has to do in part with its inability to adopt a helpful interpretative approach. Moreover, the Ethiopian courts' efforts to interpret relevant legislation in light of Ethiopia's international commitment to human rights and the constitutional protection of freedom of expression leave much to be desired. The article argues that the deployment of the principle of proportionality as an interpretive methodology can help the Ethiopian judiciary to enforce the constitutional right to freedom of expression optimally.

Key-terms: Freedom of Expression, FDRE Constitution, interpretation, Proportionality Analysis, Judiciary

* LL.B., LL.M.; PhD in Law candidate (Bahir Dar University). He can be reached at: hananmarelign@gmail.com

** LLB, LLM, PhD, Associate Professor, College of Law and Governance Studies, Addis Ababa University. He can be reached at: getachew.assefa@aaau.edu.et

Introduction

This article examines the judicial interpretation of the right to freedom of expression contained in the Ethiopian Constitution. According to the Constitution, judicial powers, both at the Federal and State levels, are vested in the courts.¹ It requires Ethiopian courts to adhere to it and guarantee its observance.² Furthermore, article 3 of the Federal Courts Proclamation No. 1234/2021 provides that the Federal Courts have jurisdiction over, among others, cases arising under the Constitution, federal laws and international treaties accepted and ratified by Ethiopia.³

By reviewing some selected decisions rendered by the Federal Courts, the article attempts to show the prevailing interpretive approaches adopted by the judiciary. It evaluates the existing approaches of the Ethiopian courts in light of the ideas and practices of interpretation of the right to freedom of expression in international human rights systems and comparative constitutional jurisprudence. The article wants to show that the approaches of interpretation of the constitutional right to freedom of expression currently employed by the federal courts of Ethiopia fail to properly enforce the right. It argues that the adoption of proportionality analysis as an interpretive methodology can address this problem.

Although the issue of incompatibility of ordinary legislation with the Constitution has been discussed fairly well in the academic circle⁴, the

¹ The Constitution of the Federal Democratic Republic of Ethiopia, 1995, *Federal Negarit Gazette*. Proclamation No.1, 1st year, No.1, art. 79. [hereinafter, the FDRE Constitution]

² See the FDRE constitution, art. 9(2).

³ The Federal Courts Proclamation No.1234/2021, *Federal Negarit Gazette*, (2021), art. 3.

⁴ See, for example, Adem Kassie, *Limiting Limitations of Human Rights under the FDRE and Regional Constitutions*, Ethiopian Constitutional Law Series, Vol. 4, (2011), p. 85; Wondwossen Demissie, *Contextual Legal Analysis of Terrorism Prosecutions Involving Journalists and Politicians in Ethiopia*, PhD. Dissertation, Flinders University, (2017), p. 167.

interpretation of the right to freedom of expression and its limitation does not seem to have received enough attention and analysis in the Ethiopian context. This article intends to fill this gap. In this regard, the article will discuss cases decided under recently repealed laws⁵ to show that the basic approach of the Ethiopian courts concerning constitutional rights, specifically freedom of expression, has not changed much.

The overall conclusion of this article is that the failure of courts to enforce the constitutional right to freedom of expression has in part to do with their inability to adopt a helpful interpretive approach. As a result, the right to freedom of expression has been interpreted in such a way that sub-constitutional laws and governmental actions restricting freedom of expression were given a great deal of deference to the detriment of the right. Therefore, the authors propose proportionality analysis as an interpretive methodology that can help the courts to effectively balance the protection of the right to freedom of expression with other competing interests consistent with the constitutional requirements.

The article proceeds as follows. Following this introductory section, Section one presents the theory of proportionality analysis, and its application in other jurisdictions, in order to create the necessary understanding of this methodological approach. Section two deals with international and comparative jurisprudence on the right to freedom of expression. This is necessary to show how the scope and meaning of this right is delimited by the interpretation of national and international judicial and quasi-judicial bodies. Section three explores the judicial

⁵ Freedom of the Mass Media and Access to information Proclamation No. 590/2008, *Federal Negarit Gazeta*, (2008); and Broadcasting Service Proclamation No.533/2007, *Federal Negarit Gazeta*, (2007). These laws are no longer in force but court decisions based on them are examined to draw a broader picture of the state of jurisprudence of Ethiopian courts in the interpretation of the right to freedom of expression.

interpretation of the right to freedom of expression in Ethiopia and will show the limitations in the interpretive approaches of the Ethiopian courts in giving effect to the constitutional right to freedom of expression. The article concludes by summarizing the main findings.

1. An Overview of the Principle of Proportionality Analysis

According to Robert Alexy, proportionality analysis is the law of competing principles by which conflict (or competition) between constitutional norms is resolved.⁶ Alexy states that constitutional norms, most important of which are constitutional rights, are principles, as opposed to rules. “The decisive point in distinguishing rules from principles”, says Alexy, “is that principles are norms which require that something be realized to the greatest extent possible given the factual and legal possibilities” while “rules are norms which are always either fulfilled or not”.⁷ Thus, if two principles conflict, that conflict is resolved by the outweighing of one principle by the other countervailing principle in the given factual circumstance.⁸ For example, if a court is confronted with a case in which it is asked to consider limiting the constitutional right to freedom of expression of a person in order to protect the honour and reputation of another individual—the latter right also enjoying a constitutional protection—then the question arises as to how the court should determine whether or not it will put a limitation on the freedom of expression, and, if so, the degree of limitation it will make in order to protect the countervailing interest, i.e., the honour and reputation of the other individual. One way the courts can do so is by weighing the first

⁶ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers, tr., OUP, 2002), p. 50.

⁷ *Id.*, pp. 47-48.

⁸ *Id.* On the contrary, “a conflict between rules can only be resolved in that either an appropriate exception is read into one of the rules, or at least one of the rules is declared invalid”; *Id.*, p. 49.

right (freedom of expression) against the second right (honour and reputation) based on the factual circumstance in which the case is presented. This is what is known as proportionality analysis.

The concept of proportionality analysis, with its roots in German administrative law but propelled into high repute by the German Constitutional Court, has become one of the most successful legal transplants adopted by judicial bodies like the South African constitutional court and Canadian supreme court as well as by regional and international judicial and quasi-judicial bodies.⁹ The principle of proportionality is mostly associated with the limitation clauses in constitutional bills of rights. Even though the components of the proportionality test that are used to weigh competing constitutional principles against one another might vary from jurisdiction to jurisdiction, its most complete version has four elements.¹⁰ The first element is the legitimacy of the goal that the state is trying to accomplish with its limitation on individual rights. The goal must be significant enough to justify the interference with a right in order to secure the countervailing right or interest.¹¹ Under many constitutions and international human rights instruments, permissible grounds for limiting constitutional rights—often referred to as countervailing interests—include national security, public morality, public order, the well-being of the youth, and the rights of others. Therefore, courts must

⁹ Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law, (2008), p. 81. The instruments that contain limitation clauses do not mention the terms ‘proportionality’ or ‘proportionality balancing’. To explain the test established by the limitation clauses, they were developed by judicial jurisprudence and academic literature.

¹⁰ Francisco J. Urbina, *A Critique of Proportionality*, The American Journal of Jurisprudence 57 (2012) p. 49.

¹¹ *Id.*

verify that the interest a government seeks to advance is constitutionally legitimate.¹²

The second element involves an assessment of the suitability of the actions taken by the government to further the goal or interest identified at the first stage. The crucial consideration under this test is whether the measure taken is reasonably related to the stated goal.¹³ Courts need to establish whether a suitable balance between the necessity of limiting the constitutional right and the significance of the desired outcome of securing the countervailing interest has been achieved.¹⁴

The third element is a necessity test. This part of the proportionality test focuses on whether the government has placed more restrictions on the constitutional right in question than are necessary to protect the countervailing interest(s). The rule is that when limiting rights, the least restrictive ways must be chosen.¹⁵ These three requirements must be met for a state action that proposes to limit rights to be constitutionally valid; otherwise, the outcome would be ruled unconstitutional and unlawful. If, however, a right's restriction complies with all three requirements noted above, the investigation will pass to the fourth stage, which Robert Alexy calls "balancing" or "proportionality *stricto sensu*".¹⁶ The assessment here takes the form of a cost-benefit analysis. This phase weighs the anticipated advantage of the restriction against the detriment to the right that is sought to be limited to assess which is more constitutionally

¹² *Id.*

¹³ *Id.*

¹⁴ See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, University of Toronto Law Journal 57 (2007): p. 385.

¹⁵ See Francisco, *supra* note 10, p. 49.

¹⁶ Robert Alexy, *Construction of Constitutional Rights*, Journal of Law and Ethics of Human Rights 4 (1), (2011), p. 23.

valuable. Hence, balancing is at the very core of the proportionality test.¹⁷ These conditions have to be met for the government's restriction on rights to be constitutionally permissible. A court that makes a determination on the question of limitation of constitutional rights is said to have engaged in proportionality analysis.

The proportionality principle is criticized on certain grounds. Some scholars such as Benedikt Pirker argue that proportionality analysis is something vague and that everybody forms a personal view of where the balance between the two competing interests lies. In other words, there is a fear of danger of subjective evaluations by adjudicators and of technical difficulties in applying a proportionality test successfully.¹⁸ Stavros Tsakyrakis also claims that the concept of proportionality represents an erroneous pursuit of accuracy and objectivity in the settlement of human rights disputes.¹⁹ In his view, the proportionality principle is sufficiently vague to encompass a wide range of reasons and human actions.²⁰ Similarly, Grégoire Webber contends that it is absurd to calculate human rights according to a cost-benefit analysis by a proportionality test.²¹ Nevertheless, as the subsequent discussion in this article will show, this approach to the interpretation of constitutional rights is widely accepted. The requirement that a constitutional rights interpreter makes an assessment of a constitutional right and its countervailing constitutional interest side by side places an appropriate restraint on unwarranted discretion of constitutional rights interpreters. It also guides the

¹⁷ *Id.*, p. 21.

¹⁸ Benedikt Pirker, *Proportionality Analysis, and Models of Judicial Review: A Theoretical and Comparative Study*, Europa Law Publishing (2013), p. 14.

¹⁹ Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, International Journal of Constitutional Law 7(3), (2009), p. 468.

²⁰ *Id.*, p. 469.

²¹ Grégoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights*, (2009), p. 87.

legislature that enacts sub-constitutional laws enforcing the limitation clauses in a constitution to make sure that such laws are consistent with the requirements of the constitution.²²

Many courts engage in a proportionality analysis when they consider whether it is permissible for the government to limit rights in pursuit of a countervailing interest or policy objective.²³ The proportionality principle aids in the objective assessment and decision-making of constitutional concerns in general and fundamental rights in particular by limiting limitations on rights in an objective fashion. It provides the judiciary with useful guidance on how to carry out its duties. Professor Moshe Cohen-Eliya and Iddo Porat characterize the proportionality principle as being fundamentally a demand for reason when governments limit rights: a shift from authority to justification.²⁴ Similarly, Robert Alexy contends that governments should justify interferences with rights, and the distinction between justified and unjustified interferences in fundamental rights is inextricably linked to proportionality analysis.²⁵

2. Comparative and Theoretical Overview of the Interpretation of Freedom of Expression

This section examines the jurisprudence extant on the freedom of expression in international human rights law and comparative constitutional practice in order to draw some lessons from the widely practiced approaches of interpretation of freedom of expression in those

²² Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (2010), pp. 145-146.

²³ Dieter, *supra* note 14, p. 385.

²⁴ Moshe Cohen-Eliya and Iddo Porat, *Proportionality and the Culture of Justification*, the American Journal of Comparative Law 59(2) (2011), p. 463.

²⁵ Robert Alexy, *Human Dignity and Proportionality Analysis*, 16 Joaçabav 3, (2015), p. 83.

systems. Considering that the interpretation of freedom of expression under both international human rights instruments and other domestic jurisdictions deal with the same set of rights issues, an understanding of the interpretive approaches of these systems is believed to shed light on related issues we have in Ethiopia. In this regard, it is noteworthy that the international Courts and quasi-judicial bodies offer advanced interpretation of the laws on freedom of expression.²⁶ The African Human Rights Commission and the UN Human Rights Committee, to whose establishment treaties Ethiopia is a party²⁷, are the most pertinent ones. The ruling of the European Court of Human Rights should also be taken into account for ideation purposes as it has an extensive body of case law interpreting the right to freedom of expression.²⁸ It helps to see the meaning and scope of freedom of expression in these various jurisdictions whose interpretation and enforcement depict nuances based on historical and other contexts.²⁹

In the case of the European Court of Human Rights (ECtHR), for example, although it has recognized that member states have a "margin of appreciation" when imposing a restriction on rights by their domestic laws, the Court has stated in the context of the *Autronic AG v. Switzerland* that interferences that are governed by law must be

²⁶ Pursuant to article 13(2) of the Ethiopian Constitution, the relevant provisions of international and regional instruments adopted by Ethiopia and their jurisprudence should be read together with freedom of expression provisions of the Constitution. This is necessary in order to have a full picture of the legal regime governing freedom of expression that is expected to accord protection to the right.

²⁷ It should be noted that Ethiopia is not a party to the Optional Protocol to the ICCPR of 1966 that established the Human Rights Committee but it is a party to the International Covenant on Civil and Political Rights that is adopted in the same year.

²⁸ Andargachew Tiruneh, *Ethiopia's post 1991 Media Landscape: The Legal Perspective* (2017), p. 11.

²⁹ Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, the Annals of the American Academy of Political and Social Science 603, (2006), p. 202.

"adequately accessible" and properly transparent.³⁰ This is an important decision regarding the legality test to make acceptable limitations. In this case, the Court evaluated "whether the justifications offered by national authorities to explain the actual measures of 'intervention' they employ are relevant and sufficient" in order to satisfy the second requirement of article 10(2) of the Convention, namely pursuing legitimate ends.³¹

Regarding the legitimate aims that outweigh and thereby justify the limitation of freedom of expression in any given circumstance, the ECtHR has tended to give different weight to the different goals to restrict freedom of expression. Overall, the ECtHR has held that factors such as the division of limitation goals into subjective and objective ones determine the extent of any restrictions on freedom of expression.³² Subjective limitation aims are goals that allow states to have some level of flexibility in enforcing rights while objective limitation goals require states to strictly follow standards in enforcing rights. In other words, the state should have a large margin of appreciation for subjective goals, but not for objective ones. The state should apply the objective norm rather than its judgment if there is a standard.³³ However, it is understood that because of the diversity in culture and legal tradition of each member state, there is no consensus to set uniform European human rights standards.³⁴

³⁰ *Autronic AG v. Switzerland*, cited in Asmelash Yohannes, *Striking the Balance between Conforming to Human Rights Standards and Enacting Anti-terrorism Legislation: A Challenge of the 21st Century (An Ethiopian Perspective)*, PhD Dissertation, University of Lincoln, (2014), p. 82.

³¹ *Handy side v. the UK*, 7 December 1976, Series A no. 24, Para. 49.

³² See Andargachew, *supra* note 28, p. 54.

³³ *Id.*

³⁴ George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxford Journal of Legal Studies 4 (2006), p. 705.

The ECtHR frequently uses the term “margin of appreciation” to describe the scope of the mandate of the state to limit a right, which includes proportionality analysis within it. It is a way of giving deference to a member State by taking into account the particulars of the State concerned in determining the legitimacy of the restrictions placed on the right in question.³⁵ Generally, a State is considered to have acted within its legal bounds if the intervention is acceptable in a democratic society, all things considered. Thus, states have a certain margin of appreciation for evaluating the necessity and proportionality requirements in balancing freedom of expression and other national interests.³⁶ One component of the margin of appreciation is the proportionality of the interference. If the defendant State does not provide evidence to support its assertions that restricting freedom of expression is necessary, that state will be seen to have acted excessively. It is also disproportional when the state has other options and the interference with the right is unnecessary.³⁷

In the case law of the West, political discussion enjoys a wide degree of protection. For instance, in *Lingens v Austria*,³⁸ the ECtHR held that speaking about “political topics and political persons” is crucial to the operation of democracies. The ECtHR concluded that, as a result, it is harder to argue that intervention is required in this form of expression than in others. In *Castell v. Spain*,³⁹ two additional safeguards for political speech were established by the ECtHR. First, it is important to give criticism of the government more protection. Secondly, elected officials,

³⁵ Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality*, (2012), p. 4.

³⁶ Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, German Law Journal 8 (2007), p. 711.

³⁷ See Andargachew, *supra* note 28, p. 56.

³⁸ *Lingens v Austria*, (8 July 1986), Series A no.103, Para.42.

³⁹ *Castell v. Spain*, cited in Andargachew, *supra* note 28, p. 163.

particularly opposition members, have a right to an extra security when they criticize the political system or the incumbent administration.⁴⁰

The proportionality method of interpretation is also endorsed by the African Commission on Human and Peoples' Rights. In the case of *Constitutional Rights Project and Others v. Nigeria*,⁴¹ the African Commission stated that the spread of ideas may be constrained by the law.⁴² The freedom to speak and disseminate one's opinions, which is protected by international law, cannot be disregarded by national legislation; doing so renders the right to free expression ineffective.⁴³ The goal of codifying certain rights in international law and the entire purpose of treaty-making would be defeated if national laws were allowed to take precedence over international law. Rights must only be restricted to the extent strictly necessary and proportionate to the desired purpose, never to the point where they become illusory, and laws limiting rights must serve a valid state interest. They must also be acceptable in a democratic society.⁴⁴

The principles of necessity and proportionality are expressly established by several countries as criteria for limiting constitutional rights. For instance, the Constitution of South Africa outlines in great detail how a right should be curtailed. It elaborates on what is typically referred to as being "essential in a democratic society".⁴⁵ This suggests that instead of

⁴⁰ *Id.*

⁴¹ *Constitutional Rights Project and Others v. Nigeria*, cited in Adem, *supra* note 4, p. 89.

⁴² The Case was brought before the African Commission on Human and Peoples' Rights by Constitutional Rights Project and Others (NGO) against Decree No.5 of 1984 of Nigeria that does not provide any judicial appeal of sentences.

⁴³ *Id.*

⁴⁴ *Media Rights Agenda and Others v. Nigeria*, (2000) AHRLR 200 (ACHPR) (1998), Para.69.

⁴⁵ Constitution of the Republic of South Africa No. 108, as adopted on 8 May 1996 and amended on 11 October 1996, art. 36.

mechanically following a sequential checklist, the Constitutional Court of South Africa (CCSA) must engage in a balancing exercise and reach a broad conclusion on proportionality.⁴⁶

It further states:

Limitations on constitutional rights can pass constitutional muster only if the Court concludes that considering the nature and importance of the right and the extent to which it is limited, such limitation is justified concerning the purpose, importance, and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.⁴⁷

The most crucial step in safeguarding freedom of expression from excessive government interference is the stage of proportionality analysis. It is difficult for the judiciary to protect the right to freedom of expression without carefully examining whether the restriction is required and appropriate for the goal being sought.⁴⁸ That means a framework for analysis is established by evaluating the legitimacy of legislation through the lens of proportionality.

The Federal Constitutional Court (FCC) of Germany has also made a name for itself by applying a proportionality test when interpreting constitutional rights that apply to freedom of expression. This test has since become an essential and fundamental component of German constitutional law.⁴⁹

⁴⁶ Stephen Gardbaum, *Limiting Constitutional Rights*, UCLA Law Review 54 (2007), p. 841.

⁴⁷ *Id.*

⁴⁸ Henok Abebe, *Freedom of Expression and the Ethiopian Anti-Terrorism Proclamation: A Comparative Analysis*, Haramaya Law Review 5(1), (2016), p. 96.

⁴⁹ See Stephen, *supra* note 46, p. 839.

Furthermore, the UN Human Rights Committee (HRC), in its ruling on *Nicholas Toonen v. Australia*, held that any restrictions placed on the right to freedom of expression must be “proportionate and essential” to the goal the government is trying to accomplish.⁵⁰ The restriction must be required and must adopt the least restrictive method for allowing the right to continue to be exercised. As noted earlier, the restriction on freedom of expression is also put through the triple test by the African Commission on Human and People's Rights (ACHPR). The Commission, in its ruling on *Scanlen and Holderness v. Zimbabwe*⁵¹ stated that a law that introduced an onerous regime for the accreditation of journalists violated the rights to freedom of expression and to receive information.⁵² In the instant case, the ACHPR used the legality, legitimacy, and proportionality tests in its decision.⁵³

As the above discussion shows, the HRC, the ACHPR, and the ECtHR have examined the proper contours of the right to freedom of expression using the legitimacy, necessity, and proportionality (balancing) criteria. Comparative constitutional practice highlighted in the preceding paragraphs also point in the same direction, lending credence to our

⁵⁰ *Nicholas Toonen v. Australia*, Communication No 488/1992, UN Human Rights Committee (1994), Para 8.3.

⁵¹ *Scanlen and Holderness v Zimbabwe*, Commission Communication Number 297\05 (African Commission on Human and People's Rights 2009). The case was brought against a legislation known as the *Access to information and Protection of Privacy Act*, which provides that “No journalist shall exercise the rights provided in Section 78 in Zimbabwe without being accredited by the Media and Information Commission.” It was claimed that compulsory accreditation of journalists, irrespective of the quality of accrediting agency, interferes with freedom of expression.

⁵² *Id.*, Para.124.

⁵³ The argument was that the law that introduced onerous regime for accreditation of journalists to access information did not go happily with the principle of freedom of expression. However, it does not mean that the requirement of accreditation of journalists to access information by its own is against the principle of legality, legitimacy and proportionality.

claim that proportionality analysis yields a helpful methodological approach in the interpretation of constitutional rights.

3. Judicial Interpretation of the Right to Freedom of Expression in Ethiopia

We begin this section by reviewing some decisions handed down by federal courts in cases related to freedom of expression. As noted in the introductory part of this article, this discussion is necessary to illuminate some of the interpretation problems involved relating to freedom of expression. In *Yonatan Tesfaye v. Public Prosecutor*, the prosecutor charged the defendant with a violation of article 6 of the Anti-Terrorism Proclamation No. 652/2009 (then in force).⁵⁴ Yonatan Tesfaye, the former spokesperson of Semayawi Party (the Blue Party), was charged with “encouragement of terrorism” in connection with comments that he made on social media in which he claimed the government had used disproportionate force against demonstrators.

According to the charge, the defendant was disseminating information that could inspire readers to engage in terrorism. It was stated in the charge that closing roads and destroying and burning property of the government constituted terrorism and that he aimed to encourage the riot started by the Oromo Liberation Front in the Oromia Region. Yonatan Tesfaye denied the accusation by stating that he was only using his right to freedom of expression by criticizing the government’s failure to take proportionate measures against protesters and his political opinion about the need to have democratic governance in Ethiopia.⁵⁵ He was also charged with making statements such as “a democratic system

⁵⁴ *Public Prosecutor v. Yonatan Tesfaye*, Criminal File No 178547, Federal High Court of Ethiopia, Lideta District, Judgment, (17 May, 2009).

⁵⁵ *Id.*, P. 6.

is required! Let's establish a transitional administration together! End the deception now!"⁵⁶

The Ethiopian Federal High Court rejected the defendant's argument, ruling that article 29(6) of the Constitution places exceptions on the right to freedom of expression and that the defendant went beyond the limit by posting inciting articles on his Facebook page to prolong the protest and incite violence. The Court further stated that his call for the destruction of government property and regime change is an incitement to violence.⁵⁷ The Court found the accused guilty of encouraging terrorism through a Facebook post, without specifying what constituted "encouragement of terrorism"⁵⁸ and without providing enough explanation of the basis for its decision.

In the case, the Court failed to scrutinize the rights-limiting law in light of the Constitution's permissible restrictions on freedom of expression. As discussed earlier, legislation that limits the rights guaranteed in the Constitution, must pass three tests to pass the constitutional muster. The legal requirement that a limitation must be provided by law is the first test. It is understood that limitations on freedom of expression should only be imposed by laws that are essential to protect an established legitimate goal.⁵⁹ This principle is stated in the first clause of article 29 (6) of the FDRE Constitution, which says in part, "These rights can be curtailed only by laws." This means that the state must first pass

⁵⁶ *Id.*

⁵⁷ *Id.*, P. 7.

⁵⁸ Yohanes Eneyew, *Assessing the limitations to freedom of expression on the internet in Ethiopia against the African Charter on Human and Peoples' Rights*, African Human Rights Law Journal 20, (2020), p. 329.

⁵⁹ Andrew Clapham, *Human Rights: A Very Short Introduction*, (2007), pp. 96-97.

subsidiary laws on which to base its interference, and this requirement prevents arbitrary actions.

The legitimacy test is the second requirement for restrictions on freedom of expression, which states that there must be a genuine and overriding interest to restrict freedom of expression.⁶⁰ According to the FDRE Constitution, the purpose of interference includes four objectives listed under article 29 (6). The well-being of the youth, and individual honor and reputation are given as the grounds of limiting freedom of expression. Furthermore, any propaganda for war, and the public expression of opinion intended to injure human dignity are unequivocally prohibited by the Constitution. The third component of the test requires that restrictions on freedom of expression must be 'necessary' to safeguard the interest mentioned in the second part of the test.⁶¹ The Court should have examined the necessity test in the case but it failed.

Moreover, the three sub-criteria must be met in applying the principle of proportionality to an infringement of a basic right. The first criterion is that a statute restricting a basic right must be an appropriate means or suitable to a legitimate end, and the second is the necessity test which requires that the means used to limit the right must be least restrictive to achieve the law's purpose.⁶² Finally, the burden placed on a right must be proportionate to the advantage that the law secures.⁶³ The court should

⁶⁰ Toby Mendel, *Restricting Freedom of Expression: Standards and Principles, Background Paper for Meeting Hosted by UN Special Rapporteur on Freedom of Opinion and Expression*, Centre for Law and Democracy, (2010), p. 13.

⁶¹ *Id.*, p. 17.

⁶² Donald P. Kommers, *Germany: Balancing Rights and Duties* in Jeffrey Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study*, (2006), p. 202.

⁶³ *Id.*

also have considered the three sub-criteria to determine whether the interference is acceptable or not.

The first step in analyzing this case would be to determine the legality of restricting the constitutional right to freedom of expression by invoking the public interest of combating incitement to terrorism. This would be done by analyzing the nature of the right to freedom of expression, whether the right is limitable or not. From the reading of article 29(6) of the FDRE Constitution, the right to freedom of expression is a limitable right, and hence, regarding the legal test, it is legal so far as it is made by the legislature mandated to enact laws that limit rights as per article 55(1) of the FDRE Constitution. However, the anti-terrorism law on which the Court's decision was based provided a wide and ambiguous definition of a terrorist act that has major implications for the right to freedom of expression and makes it challenging to distinguish between justified political opposition and terrorist activities. This is problematic because the language of the proclamation could be interpreted in a variety of ways and could therefore facilitate and encourage the infringement of the right to freedom of expression.⁶⁴ Any interference with the right to freedom of expression should be sufficiently clear and narrowly drawn to pass the constitutional muster.

Even if the limitation on the right to freedom of expression is acceptable, it should still pass the legitimacy test. Regarding the legitimacy test, the court in its reasoning simply accepts the constitutional limits without requiring the government to justify whether the need to limit the right in question is legitimate or not as per the Constitution. The conflicting issue is the interest of the accused to express his political opinion on the one

⁶⁴ Hiruy Wubie, *Some Points of the Ethiopian Anti-Terrorism Law from Human Rights perspective*, Journal of Ethiopian Law 25(2), (2012), p. 40.

hand and the interest of the state to combat the incitement of terrorism on the other. The gist of the claim of the public prosecutor was that the defendant's Facebook post constituted an incitement to violence, and hence, could legitimately be restricted. The court should have evaluated whether there was incitement to terrorism by taking into account the context, the speaker's intention, the likelihood and imminence of the harm, and whether the incitement was directed at encouraging the commission of a terrorist act.⁶⁵ The court never attempted to determine if these requirements were met to find the defendant guilty of inciting terrorism. These standards help define the contours of political speech and incitement of terrorism.⁶⁶

It seems to us very plausible that if the Court looked at the case in the light of the above analytical steps, it would have found Yonathan's speech within the limits of protected core political speech. However, the Court did not deploy any discernable methodology to arrive at the conclusion it reached in the case. Engaging in proportionality analysis in this case by weighing the factual claims made by the prosecutor to restrict Yonathan's freedom of expression on the one hand and the extent to which the defendant's action might have affected public interest (which is a protection against incitement of terrorist acts) on the other, could have helped the Court to arrive at a different and fairer decision.

⁶⁵ Ben Saul, *Speaking of Terror: Criminalizing Incitement to Violence*, University of New South Wales Law Journal 28, (2008), p. 669. Saul argues that paying appropriate consideration to the speech's content as well as the speaker's intention, the context in which the statement was delivered, the likelihood and imminence of the harm that the statement would lead to a commission of a terrorist act are helpful requirements to determine whether a certain statement is punishable under incitement law. In his view, the likelihood and the imminence of the harm is the fundamental one to punish incitement. An expression that fails to meet these requirements does not amount to an incitement to terrorism.

⁶⁶ *Id.*

The Court in fact would need to look at cases such as the above in the light of the significance of the right to freedom of expression and the kind of protection it needs against government's interference. In this regard, the protection of unconventional ideas and viewpoints need heightened protection.⁶⁷ In the Western World, the right to freedom of expression enjoys a high level of protection. A good example is the decision of the ECtHR in which it stressed that the right to "freedom of expression applies not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population."⁶⁸ Moreover, the ECtHR has ruled that statements that employ strong or virulent language are protected under article 10 of the European Convention on Human Rights in the context of identifying the contour of political speech and incitement to terrorism.⁶⁹

In the *Federal Public Prosecutor (FPP) v. Andualem Arage and others*,⁷⁰ Andualem Arage and other defendants were charged for their spoken and written calls for an insurrection akin to the so-called "Arab Spring" taking place at the time in North Africa and the Middle East. The charge further alleged that the defendants, by using their constitutional right to freedom of expression and association, had been enlisting and training

⁶⁷ Elisabeth Zoller, *Foreword: Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?*, Indiana Law Journal 84(3), (2009), p. 803.

⁶⁸ *Handyside v the United Kingdom*, Application No. 5493/72, European Court of Human Rights (ECHR), (1976).

⁶⁹ *Gerger v Turkey*, European Court of Human Rights 46, IHRL 2878 (ECHR) (1999), para. 47.

⁷⁰ *Federal Public Prosecutor v. Andualem Arage and others*, Criminal File No.112546, Federal High Court of Ethiopia, Lideta District, Judgment, 27 June (2012) (involving 24 defendants, among whom six were journalists, two were leaders of the opposition Unity for Democracy and Justice (UDJ) party, two were members of other political opposition parties, and the remaining nine were members of the outlawed Ginbot 7 Movement for Justice, Freedom, and Democracy). There are neither official nor authorized translations of the case's Amharic original text. The translation of this and other cases in the article is the authors'.

members, forming a covert network, and preparing travel and communication manuals intended to influence the government by destabilizing political, social, economic, and constitutional institutions. The prosecution's sole reliance on written or verbal communication to support its claims connected to terrorism sends a specific message about the conduct that is considered to be terroristic.⁷¹ Many freedom-of-expression-related items such as interviews and videos were produced as evidence to prove the defendants' involvement in terrorist activities.⁷²

The Federal High Court of Ethiopia in its decision reasoned that:

The suspects tried to stir up violence and topple the government under the cover of exercising their right to assembly and freedom of expression. Their articles, speeches, and phone calls incited the people to bring about the North African and Arab uprisings in Ethiopia. These were indicated by evidence produced against the defendants. There is no other method to get power in the country except through democratic elections, and what the defendants claimed is obviously against the Constitution, thus the right to freedom of expression can be restricted when it is used to compromise security and not used for the sake of the public interest.⁷³

Although the Court acknowledged that the majority of the prosecution's evidence related to the defendants' written or spoken statements, it did not make an effort to determine whether these statements were protected by the freedom of expression set out under article 29 (6) of the FDRE

⁷¹ *Id.*

⁷² *Id.*, P. 43. For instance, in an interview with Ethiopian Satellite Television (ESAT), Andualem Aragie, referring to the Arab spring, was quoted as saying: 'We are tired of living without freedom and we are ready to make any sacrifices' to bring change'. This was used as piece of evidence to prove his participation in terrorist activity.

⁷³ See Para. 17.

Constitution and international human rights treaties to which Ethiopia is a party. That means, it did not consider the lawfulness or the legitimacy of the expressions of the defendants by engaging in the weighing of the two competing interests that a proper freedom of expression analysis requires. For example, the court should have at least examined standards of incitement to terrorism to distinguish it from political expression.⁷⁴

According to both international and comparative laws on incitement to terrorism, the limits of incitement law on political speech must be determined by taking into account the imminence and possibility of the resultant harm.⁷⁵ The *Incal v. Turkey* case is a good example of how crucial it is to consider the speech's content when determining the extent of incitement to terrorism.⁷⁶ In this case, the ECtHR principally relied on the speech's content to determine whether the speech constituted an incitement to violence.⁷⁷ Without taking into account these essential components of incitement to terrorism, there is a real risk that several forms of acceptable political expression that are essential to lively public discourse may be considered to be incitement to terrorism.⁷⁸ It is obvious from their written and verbal expressions that they are strongly critical of government policies and even call for political change. They did not, however, specifically call any specific acts of violence or methods of unconstitutional regime change. In *Federal Public Prosecutor (FPP) v.*

⁷⁴ See Ben Saul, *supra* note 65, p. 669.

⁷⁵ Eric De Brabandere, *The Regulation of Incitement to Terrorism in International Law*, in L. Hennebel and H. Tigroudja (eds.) *Balancing Liberty and Security: The Human Rights Pendulum* (2012), pp. 221-240.

⁷⁶ *Ibrahim Incal v Turkey*, Appeal Number, 22678/93, ECHR (1978), Para.10. The case saw Mr. Ibrahim Incal, a member of the opposition People's Labor Party, being found guilty of breaking Turkey's rule against public incitement. His conviction was due to pamphlets that were written in opposition to Turkish government measures.

⁷⁷ *Id.*

⁷⁸ Although the above case may be exclusive to European experience, it nonetheless provides valuable insight into determining the contour of political expression when it comes to inciting terrorism.

Andualem Arage and others, the prosecution did not establish whether the expression made by the defendants fulfills the requirements for incitement of lawless action and, further, the Court did not weigh the two competing interests based on the factual and legal circumstances.

Instead, the Court simply concluded that “by making the expressions through written and spoken statements, the defendants have exceeded the limit on their freedom of expression and have therefore committed the alleged terrorism crime.”⁷⁹ In doing so, the Court depended on the Constitution’s article 29(7), which says that anyone who violates any law may be held accountable.⁸⁰ The constitutional validity of the restriction was at issue in this case because the Court failed to locate which provision of the ordinary law was violated to make the defendants liable for crossing the scope of freedom of expression. The Court must cite the provision of the law that was infringed. The constitutionality of the restriction was raised in the case by the defendants and the Court was asked to comment on that. However, the constitutionality of the restriction was taken for granted by the Court. Whether the expression in question was covered by article 29 (7) of the Constitution was not addressed by the Court. The government must have been required to show both the law’s (the provision of the law) constitutionality and the proportionality of the action taken vis-à-vis the public security interest. The FDRE Constitution’s Art. 29(7), which provides that the right to freedom of expression may be restricted by any ‘law’ without any substantive requirements, seems to be the foundation upon which the Court based its ruling. The term ‘law’ is not defined in the Constitution. This raises the possibility of inconsistent application of the right to freedom of expression and its restrictions.⁸¹ We believe that the

⁷⁹ *Id.*

⁸⁰ See the FDRE Constitution, art. 29(7).

⁸¹ Adem, *supra* note 4, p. 85.

provisions of article 29(7) must be anchored to the more elaborate limitation clause in article 29(6). The latter refers to 'law', and the reference to 'law' in Article 29(7) must be interpreted consistently with the law required under article 29(6), which is intended to govern limitation measures that the government may impose.

The Court's erroneous conclusion in the case under consideration was also pointed out by another scholar, Wondwossen Demissie. He noted that although the defendants' actions were solely situations of exercising one's right to free speech and political involvement, the prosecution presented them as participants of terrorist activity without evidence and the Court upheld this claim. He further observed that oral testimony from the prosecution only established that the accused made written or verbal statements.⁸² The Court ruled that it has the legal authority to declare that the defendants' statements violated article 29 of the FDRE Constitution. By doing this, the Court has agreed that the alleged conduct of the defendants exceeded the scope of freedom of expression.⁸³ Without confirming that any of the four prerequisites have been met (legality, legitimacy, proportionality, and necessity), the Court declared that the defendants' statements violated article 29 of the Constitution.

Any limitations on freedom of expression that are to be considered 'laws' under the ICCPR must be written precisely enough to allow a person to govern their behavior.⁸⁴ The Court concluded that the defendants' utterances and expressions exceeded their freedom of expression without first confirming that the requirements for making such a decision had been met. If a specific restriction, permitted by the Constitution, is made

⁸² Wondwossen, *supra* note 4, p. 167.

⁸³ *Id.*, P. 176.

⁸⁴ UN Human Rights Committee (HRC) General Comment 34, art 19, Freedoms of Opinion and Expression, (12 September 2011), CCPR/C/GC/34, para. 25.

by law, the Court must scrutinize the legislation and analyze how the issue in expression fits within the parameters of the law that justifiably forbids the expression.⁸⁵ In the instant case, the divergent political views were clearly the basis for the prosecution. As it is said, the Court emphasized that the defendants made some provocative written and verbal statements intended to support bringing the uprising in the Arab world and North Africa to Ethiopia, which resulted in the loss of many lives, destruction of property, and bodily harm, in upholding that the defendants had gone beyond the bounds of their freedom of expression.⁸⁶

One of the reasons given by the Court is that “accountability results from violating legal restrictions on the exercise of the right to freedom of expression. They have used their freedom of expression to incite seizing government power by unconstitutional means. According to article 9(3) of the Constitution, they cannot assume office without an election.”⁸⁷ The Court referred to article 9(3) of the Constitution, which forbids the assumption of state power unconstitutionally, as legislation that restricts freedom of expression. However, the Court lacked any factual basis to find a violation of the aforementioned constitutional provision.

⁸⁵ In relation to the argument being presented here, it might be thought that we are bestowing on the Court a power to interpret the Constitution in the strict sense of the term when we say it needed to review the compatibility of the law with the Constitution. However, according to Proclamation No. 798/2013, the courts can determine whether a law it is dealing with is consistent with the Constitution or not, and if it finds inconsistency, it then will send the matter to the Council of Constitutional Inquiry. Furthermore, determination of meaning and scope of the constitutional right to freedom of expression in line with the limitation clause of the constitution is an inherent role of the courts.

⁸⁶ *Federal Puplic Prosecutor v. Andualem Arage and others*, Criminal File No. 112546, Federal High Court of Ethiopia, Judgment, (27 June 2012), pp. 61, 64 & 65.

⁸⁷ *Id.*, p. 50 & 51. See also art. 9 (3) which states that “It is prohibited to assume state powers in any manner other than provided under the constitution”.

The prosecution claimed that the defendants intentionally encouraged political and social unrest through written communication⁸⁸ by going beyond the bounds of the freedom of expression provided by the FDRE Constitution to bring about the Arab Spring or civil disobedience in Ethiopia. Some of the accused, such as Birhanu Nega, have communicated verbally and in writing utilizing various media to further political causes.⁸⁹ The defendants' communication that 'public disobedience rather than election is what should be done in Ethiopia' was one of the justifications for the Court to find the accused guilty. According to the Court, this indicated that they were exerting pressure on the government by exploiting freedom of expression to try to gain government power by unconstitutional means.⁹⁰

We argue that proper use of interpretive approaches to constitutional rights, such as proportionality analysis, would have enabled the court to arrive at a different decision. The constitutional provisions specified in article 29(6) must be respected when the right to freedom of expression is interfered with. Article 29 of the FDRE Constitution supports the defendants' assertion that their expressions are protected in the absence of the special statute that article 29(6) contemplates. As a result, the Court's use of article 29 to conclude that the defendants have gone beyond the scope of their constitutionally recognized freedom of

⁸⁸ For example, Eskinder Nega was accused that he expressed his view that the current situation in Ethiopia is comparable, if not worse than, to that of the places where uprising had occurred and such uprisings are inevitable in Ethiopia. It was further stated that Eskinder asserted that it was necessary to put peaceful and legal opposition from words to practice. The charges against him were largely based on his political opinion in different newspapers such as an English weekly newspaper; the Habesha and Dehai Amharic newspapers.

⁸⁹ *Federal Public Prosecutor v. Andualem Arage and others*, Criminal File No. 112546, Federal High Court of Ethiopia, Judgment, (27 June 2012), pp. 58 & 61 (Translation the Authors).

⁹⁰ *Id.*, p. 62.

expression does not comport with either the letter or the spirit of article 29 of the Constitution. Two interests are at stake in this situation: the right to freedom of expression in one hand and the interest of the government to fight terrorism on the other hand. As stated in section two of this article, political expression has been given higher status by the ECtHR than other interests that the government seeks to defend.⁹¹ In other words, the issue is not how to strike a balance between the two types of interests, but how to prioritize expression over the other. As a result, the interference should be given a specific meaning. Contrary to this widely accepted approach, political expression is not afforded such a privilege in the decisions of courts in Ethiopia.

Elias Kifle and others v. Federal Public Prosecutor was yet another case that shows the problem created by a lack of helpful methodological approach to weigh competing constitutionally protected interests. In *Elias Kifle and others*,⁹² the Federal High Court of Ethiopia followed a similar pattern of interpretation as in the earlier case of *Federal Public Prosecutor v. Andualem Arage and others*. The prosecution accused all five defendants of conspiring to commit a terrorist act; among them, two were opposition politicians and three were journalists. Expressions that the defendants either wrote or spoke themselves or had others write or speak them made up the majority of the prosecution's evidence.⁹³ To establish the defendants' involvement and demonstrate that they had done an act in preparation for a terrorist act, the Court admitted oral, documentary, and audiovisual evidence.⁹⁴ The defendants' participation

⁹¹ See Andargachew, *supra* note 28, p. 55.

⁹² *Federal Public Prosecutor v Elias Kifle and others*, Criminal File No 112199, Federal High Court of Ethiopia, Lideta District, Judgment, (2012).

⁹³ Several e-mail exchanges and intercepted phone conversations between the defendants were produced as evidence for their participation in planning and preparing for a terrorist activity. It was stated that the defendants were distributing illegal and provocative writings.

⁹⁴ *FPP v. Elias Kifle and others*, Ministry of Justice, 5 January (2012), P. 9.

in the creation and posting of slogans demanding the resignation of the ruling party and the then prime minister was taken as the crucial pieces of evidence in the prosecution's case.⁹⁵ The prosecution relied entirely on written or spoken statements made by the defendants.

As noted above, requirements under the FDRE Constitution and international human rights treaties must be met for a restriction on freedom of expression to be legitimate. However, the Court accepted into evidence statements made by the defendants like slogans demanding the resignation of the ruling party and correspondence made between them that show these statements go beyond the bounds of their right to freedom of expression.⁹⁶ The Court made its decision without considering the validity of the law that forbids these expressions or if other requirements for restricting one's freedom of expression are met. Thus, in the same way as the previously discussed cases were decided, the Court failed to engage in properly weighing the two competing interests based on the factual and legal circumstances of the case.

It is unlawful to restrict freedom of expression in the absence of a compelling reason to do so.⁹⁷ According to the Special Rapporteur on the promotion and preservation of the right to freedom of opinion and expression, a restriction should be designed to meet a "pressing social necessity".⁹⁸ The Special Rapporteur on freedom of opinion and expression has backed the Johannesburg Principles, which state that a serious threat to national security may justify restricting freedom of expression, since there can be a direct and immediate link between the

⁹⁵ *Id.*

⁹⁶ See *Federal Public Prosecutor v Elias Kifle and others*, *supra* note 89.

⁹⁷ See Wondwossen, *supra* note 4, p. 240.

⁹⁸ Frank Rue La, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (2010), A/HRC/14/23, Para. 79.

expression and the potential and occurrence of such violence. Principle 6 states that the right to freedom of expression may only be restricted under the pretense of national security if it is intended and is likely to inspire immediate violence.⁹⁹ Furthermore, the Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression states that:

The protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹⁰⁰

This implies that national security should not be invoked as a cover-up to suppress the exercise of the right to freedom of expression. All human rights treaties allow restrictions on freedom of expression when necessary to safeguard national security. Even when states are given a lot of leeway in this regard, the security interest should only be brought up when a threat is being posed to the territorial or national integrity of a state, not only to a particular government.¹⁰¹ As stated in the handbook for article 19, the Supreme Court of the United States observed that

criticism of public measures or comment on government action, however, strongly worded, is within reasonable limits and is consistent with the fundamental right of freedom of speech and

⁹⁹ Article XIX, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, International Standard Series (1996) Principle 11.

¹⁰⁰ Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (2011), A/HRC/17/27, Para. 36.

¹⁰¹ The Article 19 Freedom of Expression Handbook International and Comparative Law, Standards and Procedures, (1993), p. 114.

expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet standards of common acceptability.¹⁰²

As the ECtHR puts it in *Weber v. Switzerland*,¹⁰³ it is the responsibility of the state to first disclose its justifications for limiting freedom of expression and then to show that those justifications are pertinent and sufficient, or that intervention is necessary. The necessity requirement is pretty important as it imposes the duty on the government whether the means chosen is least restrictive of the right. However, the necessity requirement is not implicated in the Court decisions of Ethiopia but its incorporation can be argued through the interpretation of the Constitution.

Article 29(4) of the FDRE Constitution should be interpreted to mean that the restriction must be required in a democratic society, as opposed to authoritarian regimes that have employed restrictions on freedom of expression to silence dissent and encroach on press freedom. According to the Constitution, freedom of expression must be exercised in a democratic Ethiopia. A relevant part of article 29(4) of the Constitution reads as follows: “the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions in the interest of free flow of information, ideas, and opinions which are essential to the functioning of a democratic order.” Additionally, it is possible to construe article 29(6) of the Constitution to demand that a state demonstrates that its act of restriction is required to

¹⁰² *Organization for a Better Austin v. Keefe*, 402 US, 415, 419 (1971) cited in The Article 19 Freedom of Expression Handbook International and Comparative Law, Standards and Procedures, August 1993, p. 140.

¹⁰³ *Weber v. Switzerland*, Judgment of 22 May 1990, series A, no. 177.

protect a specified interest and that the said interest cannot be achieved other than by restricting a right to freedom of expression.¹⁰⁴ This view is supported by the provision that states that interference cannot be made because of the substance of the speech, only to defend one or more constitutionally protected interests. Hence, it can be argued that the necessity requirement is mirrored under the FDRE Constitution through interpretation, even though it was not shown in Court rulings of Ethiopia.

A proper weighing of the competing constitutionally protected interests by using proportionality analysis methodology could have helped the Ethiopian courts to engage in a step-by-step analysis of the factual and legal circumstances of the cases they had to deal with. In *Elias Kifle and others*, as in others discussed above, assuming that the accusation made against the defendants were accurate (as some even claim the accusations to be factually unfounded¹⁰⁵), if the Court utilized proportionality analysis methodology, it would have been in a better position to properly weigh the factual basis on which the prosecution relied and to find that it is lacking when assessed vis-a-vis the limitation clause under article 29(6) of the Ethiopian Constitution.

FPP v. Temesgen Desalegn case also offers another pertinent example of judicial decisions devoid of any discernable methodological approach.¹⁰⁶ Like many cases noted above, the prosecution's case against Temesgen relied on his writings. Temesgen was found guilty of crimes against the

¹⁰⁴ See Andargachew, *supra* note 28, p. 57.

¹⁰⁵ Asmelash, *supra* note 30, p. 109.

¹⁰⁶ *Federal Public Prosecutor v. Temesgen Desalegn*, Criminal File No.123875, Federal High Court of Ethiopia, Judgment (17 October, 2007), See the full comment by Mesenbet Assefa, Freedom of Expression and the Contours of Political Speech in Ethiopia: Lessons from a Comparative Study, PhD Dissertation, Irish Centre for Human Rights, College of Business, Public Policy and Law, National University of Ireland Galway (2017), p. 223.

state, including encouraging rioting to overthrow the government through his published pieces in *Feteh* magazine.¹⁰⁷ In his article, he discussed the 2005 national election and the accompanying political events, as unmistakably revealing a golden period in Ethiopian politics and as an example of how “the current generation does not fear death.” The second basis for the accusation was an article by Temesgen that appeared in *Feteh* publication in 2012 which stated that the current political climate in Ethiopia pushes people to be angry rather than afraid and that “if the young stands up for its rights, no force can stop it”. The prosecutor made the case that the defendant incited violence and the destruction of the State’s constitutional order through these writings. The defense asserted that content-based restrictions are unlawful under article 29(6) of the Constitution, and as a result, the crimes of incitement to which the accused is charged are invalid.¹⁰⁸

The Federal High Court of Ethiopia stated in its decision that “the defendant had incited the people through his writings by reminding them that the current state of affairs and the current government may be changed by overthrowing it.”¹⁰⁹ In the reasoning of the Court, if what the defendant ideas of the possibility of overthrowing the government through public protest and public disobedience, severe consequences would have happened to the people of Ethiopia.¹¹⁰ In this case, as in all previous cases discussed, the Court again failed, among others, to examine the standards of incitement to terrorism. When establishing whether there has been incitement to terrorism, it is essential to consider whether the speech in question may potentially engender the possibility

¹⁰⁷ *Id.*, pp. 1-2. It was further stated in the charge that, to replicate Arab Spring to Ethiopia, the accused pushed and motivated the Ethiopian people to overthrow the government through public protest and public disobedience.

¹⁰⁸ *Id.*, P. 8.

¹⁰⁹ *Id.*, P. 11-12.

¹¹⁰ *Id.*, P. 25.

of the commission of a terrorist act.¹¹¹ According to Eric Barendt, the prosecution must prove four interrelated legal criteria to prove the crime of inciting terrorism and bring charges against alleged offenders. These include specifying the speaker's intention, the speech's content, the setting in which it was delivered, and the danger's imminence and possibility of materialization.¹¹²

Mesenbet Assefa has also argued that without taking into account the essential components of the crime of incitement developed in international and comparative law such as the speaker's intent, and the likelihood and proximity of the harm, there is a high possibility that several forms of acceptable political speech that are essential to lively public discourse will be characterized as incitement to terrorism.¹¹³ He continues by saying that Temesgen's speech hardly qualifies as an inducement to commit a crime under the law.¹¹⁴ As consistently argued in this article, courts should adopt a standard of review when dealing with restrictions on freedom of expression. This can, for example, be done by proportionality analysis as it accords a framework of analysis in dealing with the limits to freedom of expression and the standards of incitement to terrorism. In this case, the restriction did not pass the pressing need test which is one of the requirements of proportionality reasoning since the restriction was used negatively to silence dissent and encroach on press freedom. Had the Court used proportionality analysis together with the standards of incitement to terrorism which are necessary for

¹¹¹ See Eric, *supra* note 75, pp. 221-240.

¹¹² Eric Barendt, *Incitement to, and Glorification of, Terrorism*, in Ivan Hare & James Weinstein (eds.), *Extreme Speech and Democracy*, (2009), pp. 455-58.

¹¹³ Mesenbet, *supra* note, p. 228.

¹¹⁴ *Id.*

principle-based examination of cases, there could have been a better outcome.

Another case we would like to present here is *Public Prosecutor v Ibrahim Mohamed*¹¹⁵ This case is interesting because the accused, Mr. Ibrahim, sought referral of his case to the Council of Constitutional Inquiry (CCI) for constitutional interpretation which the Court denied. The charge was brought by the prosecutor under Press Proclamation No. 34/1992, which was then in force. The chief editor of the *Islama* News Paper was found guilty by the judge for claiming that the Minister of Education harbored animosity for Ethiopian Muslims and purposefully denied them their constitutionally protected rights. The accused contended that his right to freedom of expression might be violated if he was found guilty under Proclamation No. 34/1992 and claimed that the issue should be referred to the CCI. Asserting that freedom of expression under the Ethiopian Constitution is not unrestricted, the Court “declined to send the matter to the CCI because it did not think there was a legitimate constitutional issue at stake.”¹¹⁶ The failure of the editor-in-chief to carry out his responsibilities to verify that there was no legal liability regarding the press content (which was imposed on chief-editors by proclamation No. 34/1992) was the basis for the conviction.¹¹⁷

According to the Court’s reasoning, freedom of expression is not unrestricted, and the Constitution allows for laws to be passed that restrict it based on the ideas people express and the consequences of those ideas. In this connection, article 10 of Proclamation No. 34/1992 stipulates that any press content that produces accountability is not

¹¹⁵ *Federal Public Prosecutor v. Ibrahim Mehamed*, Criminal File No.71562, Federal High Court of Ethiopia, (2001), p. 1.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

permitted. The judge, in this case, implemented the proclamation mechanically without carefully reading it or making any references to the Constitution's freedom of expression protections.¹¹⁸ Almost no attempt was made to evaluate the facts alleged by the prosecution in the light of the limitation clauses in article 29(6) of the Constitution. Again, it seems to us almost self-evident that the deployment of proportionality reasoning could have enabled the Court to interpret the right to freedom of expression at issue in line with the constitutional requirements.

Commenting on the instant case, Gedion Timithewos questioned the ruling for neglecting to assess if there were any legal justifications for restricting freedom of expression in that particular circumstance. In his view, the restriction on the right to freedom of expression in the case was based on the ideas or opinions being conveyed. The judge should have submitted the case to the CCI since article 29 (3) (a) of the Constitution prohibits restrictions on freedom of expression based on the content and consequences of the viewpoints being expressed.¹¹⁹ This content-based restriction is incompatible with the spirit of the Ethiopian Constitution, which aims to promote democratic dialogue or the free exchange of ideas.

Other recent decisions based on the new laws that show the trend of the misuse of constitutional limitation are the *Tadesse Yohanes* and *Yayeseew Shimelis* cases. These are the two relevant cases after the enactment of the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020 and Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020. In *FPP v. Tadesse Yohanes*,

¹¹⁸ *Federal Public Prosecutor v. Ibrahim Mehamed*, Criminal File No.71562, Federal High Court of Ethiopia, Lideta District, (2001), p. 4.

¹¹⁹ Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*, 4 Mizan Law Review 2, (2010), p. 127.

the defendant was charged with violating Proclamation No. 1176/2020.¹²⁰ The defendant has admitted that he is a civil member of the Tigray People's Liberation Front (TPLF), which the Ethiopian parliament has proscribed as a terrorist organization. He also stated his opinion that the TPLF is fighting for its dignity and religion and will soon arrive in Addis Ababa and that those who supported the federal armed force in its conflict with the TPLF are morons.¹²¹ When asked if he had committed the offense or not, the defendant said that he had never done so and that he was not at fault. Based only on oral testimony, the Court found the defendant guilty of speaking as a terrorist in contravention of the article 30(1) and (2) of the Proclamation.¹²²

The Court stated that Tadesse Yohannes accepted the terrorist organization's purpose and mission by disclosing his status as a civil member of TPLF.¹²³ The political motivation behind this indictment chills the expression of political thought. Since the defendant's political beliefs are not grounds for justification of limitation under article 29(6) of the FDRE Constitution, they are not grounds for justification per se. It does not, therefore, meet the criteria of the justifiable limitation on freedom of expression. The defendant claimed to have made certain verbal statements on which the prosecution based all of its evidence. The Court considered these pieces of evidence or oral testimony as sufficient to convict the defendant of terrorism-related charges.

¹²⁰ *Federal Public Prosecutor v. Ato Tadesse Yohanes*, Criminal File No.279938, Federal High Court of Ethiopia, Judgment and decision, December 5/4/(2014), P. 9.

¹²¹ *Id.*

¹²² Prevention and Suppression of Terrorism Crimes Proclamation No. 1176/2020, *Federal Negarit Gazeta*, 2020, art. 30 (1) & (2).

¹²³ *Id.*, pp. 10-16.

Some contend that the practice both under the repealed Ethiopian anti-terrorism Proclamation¹²⁴ and the current one has been used negatively to prosecute those who join political opposition groups that do not support violence of any kind.¹²⁵ The prosecution made an effort to connect the case with a terrorist act. The Court seems unwilling to clarify or outline how the crime of promoting terrorism is to be viewed or what exactly qualifies as such. Particularly, in the instant case, the Court relied solely on oral testimony to convict the defendant, which raises the issue of how judges assess a defendant's membership and political view of a person to a group that the parliament designated as a terrorist organization in the absence of sufficient evidence being offered at the time of the trial. Again, if the Court had examined this case using proportionality reasoning and the standards of incitement to terrorism, the defendant would have gone free. However, the Court failed to use such tests and as a result, the defendant was convicted.

Yayesew Shimelis was charged with violating Proclamation No. 1185/2020 for the Prevention and Suppression of Hate Speech and False Information Dissemination, in *FPP v. Yayewsew Shimelis* case.¹²⁶ According to the Court's reasoning, the defendant intentionally or negligently circulated on social media false information about the spread of the Covid-19 disease in Ethiopia. It was alleged that the defendant posted a picture of the then Minister of Health, Dr. Liya Tadesse, on his social media account to give the impression that he had received information about an order from the Ministry of Health to prepare 200,000 graveyards for fatalities from COVID-19.¹²⁷ The prosecution's

¹²⁴ Anti-terrorism Proclamation No. 625/2009, *Federal Negarit Gazeta*, 2009, art. 3.

¹²⁵ Asmelash, *supra* note 105, p. 137.

¹²⁶ *Federal Public Prosecutor v. Yayesew Shimelis*, Criminal File No.284141, Federal First Instant Court of Ethiopia, Judgment, (15 May 2014), p. 1.

¹²⁷ *Id.*

main points center on issues of freedom of expression. When asked if he committed the crime or not, the defendant pleaded that he did not and that he was not guilty. He continued to defend himself by claiming that the alleged spread of false information was carried out through a fictitious account opened in his name, which he had never used.

Yayesew was first released on bail as Addis Ababa police failed to provide evidence of its ‘false news’ accusation. Then the federal police appealed the court’s decision and accused Yayesew of violating the revised anti-terrorism law. As the federal police lacked enough evidence, the court, for the second time, granted Yayesew bail. The case was reviewed by the court for the third time under the new Preventing Hate Speech and Disinformation Proclamation. The prosecution and conviction of the defendant in this case were based on the content of expression, the setting in which the message was disseminated, the imminent danger to public health, and the potential for the message to create social disorder. It was said that, due to the defendant’s inability to refute the public prosecutor’s evidence, the Court found him guilty.¹²⁸ Yayesew was given a term of three months of forced labor for disseminating false information in contravention of article 5 and 7(4) of the Proclamation.¹²⁹

From the prosecution’s case, one can see its shortfalls with respect to the constitutionality of the requirements to limit freedom of expression, namely, a legitimate aim and necessity in a democratic society. The supposed legitimate aim is to prevent intentional dissemination of false information as stated in the preamble of the Proclamation. However, it is not just enough to state the imminent danger to public health and the potential for the message to create social disorder as an excuse for a

¹²⁸ *Id.*, pp. 3-11.

¹²⁹ Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185 /2020, *Federal Negarit Gazette*, 2020, arts. 5 & 7(4).

restriction unless it can be shown that the restriction is genuinely proportionate to the legitimate aim sought to be achieved. In this case, public health and social disorder were used as a cover to suppress the freedom of expression of the defendant. There was not enough proof at the trial to convict the defendant. The Court's ability to reach a decision is called into question by the lack of specific justifications, since restriction on the right to freedom of expression requires strong justification.¹³⁰ Without sufficient proof establishing that the social media account is his own, the defendant was found guilty.

Conclusion

This article has attempted to show the problem with the existing interpretative approach adopted by Ethiopian courts. The article has revealed that there is no established method of interpretation of constitutional rights adopted by Ethiopian courts. In particular, we have shown that the courts do not employ any discernable methodology in the interpretation of the constitutional right to freedom of expression. The judicial analysis of the acceptability of limitations of a constitutional right is always preceded by an inquiry as to the existence of legitimate grounds for limiting that right. The Ethiopian courts seem to be oblivious to the need to inquire into the legitimacy of an objective meant to justify a limitation on freedom of expression. This article, therefore, urges for the adoption and application of the principle of proportionality in cases of limitation of the right to freedom of expression guaranteed under the FDRE Constitution.

The article has shown that Ethiopian courts do not position their interpretation of sub-constitutional laws within the framework of the

¹³⁰ Frederik Shauer, *Free Speech: A Philosophical Enquiry* (1982), pp. 167-201.

constitution and applicable international human rights laws. The court cases analyzed show that the principal role of Ethiopian courts and judges is mechanically enforcing sub-constitutional laws regardless of their implications on freedom of expression. In this case, the article has shown that the Federal High Court has not been guided by the limitation clause of article 29 of the Ethiopian Constitution in making its decisions on the cases that came before it. It is plausible to say that this is the case with all levels of federal and regional courts of the country. As one of the measures that need to be taken to improve the enforcement of constitutional rights in general and freedom of expression in particular, we suggest that proportionality analysis methodology of constitutional interpretation should be embraced by the Ethiopian courts. In order to accomplish this, necessary trainings need to be given to members of the judiciary as well to the public prosecutors and the legal practitioners.
