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Hate Speech Regulation in Ethiopia: Lessons to Be Learned From Other Jurisdictions

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HATE SPEECH REGULATION IN ETHIOPIA: LESSONS TO BE LEARNED FROM OTHER JURISDICTIONS



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September, 2021

**HATE SPEECH REGULATION IN ETHIOPIA: LESSONS
TO BE LEARNED FROM OTHER JURISDICTIONS**

Thesis

**Submitted in Partial Fulfillment of the Requirements for the Degree
of Master of Laws (LLM) in Criminal Justice and Human Rights at
the School of Law, Bahir Dar University.**

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Thesis Approval

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Declaration

I hereby declare that, this paper prepared for the partial fulfillment of the requirements for LL.M Degree in Criminal Justice and Human Rights entitled ‘Hate Speech Regulation in Ethiopia: Lessons to be Learned from other Jurisdictions’ ’’ is my own work and that it has not previously been submitted for assessment to another University or another qualification. I also declare that any source used in the paper has been duly acknowledged.

Signature

Name of Student

University Id. Number

Date

Acknowledgement

First of all, let the name of my Almighty God be magnified and exalted. Secondly, I would like to express my sincere and profound gratitude to my advisor, Yohannes Eneyew Ayalew, without his supervision and guidance this work is unimaginable. Also, I'm deeply grateful to the many people who have contributed to the development of this study. I am indebted to the interviewees, who found time to speak with me, despite their many commitments. In particular, I'm thankful to Mr. Awel Sultan, Head of Press Secretariat, Federal Attorney General for his kind assistance.

Acronyms

ACHPR- African Charter on Human and Peoples' Rights

ACHR - American Convention on Human Rights

CDA - Communications Decency Act

COE - Council of Europe

CPPCG - Convention on the Prevention and Punishment of Crime of Genocide

ECHR - European Convention on Human Rights and Fundamental Freedoms

ECtHR - European Court of Human Rights

FDRE - Federal Democratic Republic of Ethiopia

HsDPSP - Hate Speech and Disinformation Prevention and Suppression Proclamation

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

ICCPR - International Covenant on Civil and Political Rights

ICTR - International Criminal Tribunal for Rwanda

PEPUDA - Prevention of Unfair Discrimination Act 4 of 2000

RPA - Rabat Plan of Action

SAHRC - South African Human Rights Commission

SMSPs - Social Media Service Providers

NetzDG - Network Enforcement Act

UDHR - Universal Declaration of Human Rights

UN - United Nations

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Abstract

No society is immune from the signs of hatred and hate speech. In Ethiopia too, there is a serious and growing problem of hate speech, offline and online. By exploring lessons learned from Germany, South Africa and Kenya, this research seeks to interrogate how 'hate speech' is regulated in Ethiopia. The government of Ethiopia passed a comprehensive law called Hate Speech and Disinformation Prevention and Suppression Proclamation (HsDPSP) No.1185/2020 to combat hate speech both online and offline. The study reveals that while the government's move to regulate hate speech is progressive, the hate speech legislation fails to strike a proper balance between freedom of expression and hate speech which may pose a risk of excessive regulation. This research examined how the definition of hate speech lacks clarity thereby will result in subjective interpretation, which could also infringe freedom of speech. Ethiopia is a country of diverse society in which the interpretation of history of nations, nationalities and peoples is contested and also the existence of wider social, economic or political problems or divisions in the society is a fertile ground for hateful messages. Using a doctrinal and comparative legal research methods, the research argues that a meaning full regulation of hate speech in Ethiopia requires in addition to legislative intervention among other things addressing the mutual mistrust, 'oppressor versus oppressed' narrative between various groups, through working on national reconciliation, meaningful grass-root dialogue, and efforts to build common destiny. Hence, multilayered approach is relevant for addressing the limitations of the use of legislation to regulate hate speech as well as the root causes, such as ethnic politics.

Key words

Hate Speech, Hatred, Freedom of Expression, Ethiopia, FDRE Constitution, Regulation

CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study

Freedom of expression constitutes one of the essential foundations of any democratic society—and basis for its progress and for each individual's self-fulfillment.¹ Freedom of expression forms a basis for the full enjoyment of a wide range of other human rights.² Also, it is an indispensable to the protection of all other human rights, as well as to a democratic society governed by the rule of law.³

The right to freedom of expression is protected by a number of international human rights instruments to which Ethiopia is a party. These include Article 19 of the Universal Declaration of Human Rights (UDHR)⁴ and Article 19 of the International Covenant on Civil and Political Rights (ICCPR)⁵, as well Article 9 of the African Charter on Human and Peoples' Rights (ACHPR's).⁶ Under international law, freedom of expression encompasses freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media, including the internet.⁷

At national level, freedom of expression is one of the fundamental rights guaranteed under the FDRE Constitution. The Constitution under article 29, provides a number of speech-related freedoms which among others includes 'everyone's right to freedom of expression without any

¹ Gündüz v. Turkey, European Court of Human Rights, Judgment of 4 December 2003, Para 37.

² UN Human Rights Committee (HRC) General Comment 34, art 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 Para 3, [herein after General Comment 34].

³ Andra Coliver (1998), Available in: http://muse.jhu.edu/journals/human_rights_quarterly/v020/20.1coliver.html, [last accessed January 3 2021].

⁴ Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III), adopted 10 December 1948, [herein after UDHR] available at: https://www.ohcr.org/en/udhr/documents/udhr_translation/eng.pdf, [last accessed on December 28, 2020]

⁵ International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A of 16 December 1966, [herein after ICCPR]. Ethiopia acceded to the ICCPR on 11 June 1993. available at: <https://www.ohcr.org/documents/professionalinterest/ccpre.pdf>. [last accessed on December 25, 2020]

⁶ African charter on Human and Peoples' rights, adopted 27 June 1981, OAU Doc, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), [herein after ACHPR]. Ethiopia acceded to the ACHPR on 15 June 1998. Available at: <https://au.int/en/treaties/african-charter-human-and-peoples-rights>, [accessed on December 10, 2020]

⁷ ICCPR (n 5), Article 19(2). See also Y Eneyew Ayalew, '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, 2020, pp. 315-345, at p.317. [Herein after Y Eneyew Ayalew, 'assessing the limitations to freedom of expression on the internet in Ethiopia'].

interference, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of one's choice.⁸ This right, however, is not an absolute one as it may be limited upon conditions.⁹

Under international human rights law, states can restrict the enjoyment of the right to freedom of expression subject to accepted standards. Broadly, any restriction to the right to freedom of expression on the basis of the prohibition of hate speech and offensive remarks must satisfy the three-part test laid down under international human rights law. The standard requires that the measure by which the human right is curtailed must be prescribed by law, directly satisfy a legitimate aim — and must satisfy the requirements of necessity and proportionality.¹⁰

The limitations on freedom of expression posit that not every category of speech is protected, especially speech that degrades, dehumanizes, and abuses others. Thus, the right to freedom of expression does not protect expression which seeks to incite violence, hatred or discrimination against others.¹¹ Consequently, the rise of hate speech is accompanied by increased adoption of restrictive legal frameworks as governments perceive they are justified to respond to these trends.¹² The prohibited forms of expression vary from country to country, during the past few decades; there has been an almost universal trend toward banning hate speech.¹³

When one thinking about limitations on freedom of expression in the context of hate speech, it can be argued that two interests are in conflict: the freedom to advocate distasteful opinions and the conflicting interest not to be a victim of discrimination and prejudice.¹⁴ It is a conflict

⁸ Article 29 (2) of the FDRE Constitution, adopted 8 December 1994, in force 21 August 1995 (Federal Negarit Gazeta, 1st Year No. 1) [herein after FDRE constitution].

⁹ Id. Art, 29 (6).

¹⁰ Para 23, General Comment 34 (n 2)

¹¹ *Vejdeland and others v Sweden*, European Court of Human Rights(ECHR) judgment of 2014, para15, Available at, < <https://globalfreedomofexpression.columbia.edu/cases/case-of-vejdeland-and-others-v-sweden/>> [last accessed December 25 2020]

¹² Téwodros W. Workneh, 'Ethiopia's Hate Speech Predicament: Seeking Antidotes beyond a Legislative Response', *African Journalism Studies*, 2019, pp. 123-139, at p.127, [herein after, Ethiopia's Hate Speech Predicament].

¹³ Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?', in M Herz and P Molnar(eds), *The content and context of hate speech: rethinking regulation and responses* , Cambridge University Press 2012,P.37. [Herein after Bhikhu Parekh, *Is There a Case for Banning Hate Speech?*]

¹⁴ Kevin Boyle , 'overview of a Dilemma: censorship versus racism, in Sandra Coliver (ed), *striking a balance: Hate Speech, Freedom of Expression and Non-discrimination* ,ARTICLE 19, London and Human Rights Centre,

between the right to freely advocate however distasteful the idea may be and the right to be free from prejudice and discrimination.

Moreover, the attempt to regulate hate speech has become more challenging in the digital ecosystem. The right to freedom of expression will not have a meaningful application without the media playing its key role.¹⁵ Tellingly it is well recognized that the protection of freedom of expression applies online in the same way as it applies offline¹⁶ and that any limitations on electronic forms of communications must be justified according to the same criteria as non-electronic communications.¹⁷ As one form of media that has a globalized, decentralized and interactive computer network, the Internet was heralded for its ability to cross borders, cast off distance and break down real world barriers.¹⁸ Internet plays a remarkable contribution for the promotion of human rights and democratization of a nation. The Internet has become one of the principal means for individuals to exercise their right to freedom of expression today since it offers essential tools for participation in activities and debates relating to questions of politics or public interest.¹⁹ At the same time, due to its global, immediate and participatory nature, the internet has become a space for both the expression and dissemination of intolerant ideas and beliefs.²⁰

In Ethiopia too, social media have become a medium for spreading of hate speech.²¹ This rise in hate speech online is compounded by difficulties in policing such activities which makes the Internet to remain largely unregulated. The greatest obstacles to enforcement of laws against online hate speech are the Internet's anonymity and its multi-jurisdictional nature.²²

University of Essex, 1992, p.1.[herein after Kevin Boyle, overview of a dilemma: censorship versus racism, in striking a balance]

¹⁵ Article 19, The Legal Frame Work of Freedom of Expression in Ethiopia, online at: <http://www.article19.org/data/files/pdfs/publications/Ethiopia-legal-framework-for-foe.pdf>, (visited December 20 2020)

¹⁶ HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012

¹⁷ Para 43, General Comment No. 34(n 2)

¹⁸ James Banks : Regulating hate speech online, International Review of Law, Computers & Technology, November 2010, Vol. 24, No. 3, 233–239

¹⁹ Ahmet Yildirim v. Turkey, European Court of Human Rights, 18 December 2012, Para. 54

²⁰ Assimakopoulos, Stavros(et al.), 'Introduction and Background', in Online Hate Speech in the European Union; A Discourse Analytic Perspective, p.12

²¹ P.129, at Ethiopia's Hate Speech Predicament (n 12)

²² Joseph Kizza, 'Civilizing the Internet: Global Concerns and Efforts Toward Regulation Paperback', McFarland Publishing,1998, at xi

The dangers of hate speech are real and have been experienced in places ranging from Western Europe to the former Yugoslavia, in Eastern Europe, and down to Rwanda.²³ Hence, in an attempt to regulate hate speech, societies take different measures to respond to this problem in accordance with their experiences. Recently, the Ethiopian government has adopted a piece of criminal legislation aimed at tackling the ever-increasing problem of hate speech and disinformation in the country. On the part of the government, the potential and actual impact of hate speech on violence is the main argument in favour of hate speech legislation.²⁴ It has been asserted that hateful speech and disinformation have contributed significantly to the unfolding polarized political climate, ethnic violence and displacement in Ethiopia.²⁵ One of the objectives of the Hate Speech and Disinformation Prevention and Suppression Proclamation is to curb speech that incites violence, which is likely to cause public disturbance or promotes hatred and discrimination against a person or an identifiable group or community based on ethnicity, religion, race, gender or disability.²⁶

Experiences at international level have highlighted the complexities of regulating hate speech on the Internet through legal frameworks. As noted by Perry and Olsson: 'The law is not the only - or perhaps even the most effective - weapon available to counter cyber hate'.²⁷ It has been argued that a broad coalition of citizens, industry and government, employing technological, educational and legal frameworks, may offer the most effective approach through which to limit the effects of hate speech.²⁸ Combining legal intervention with technological regulatory mechanisms are becoming more effective solutions to minimize online hate speech.

From a regulatory perspective in the Ethiopian context, the comprehensiveness of the legal and institutional frameworks and their readiness to new technological possibilities and how they will

²³ Roni Cohen, 'Regulating Hate Speech: Nothing Customary about It', 2014, Chicago Journal of International Law, Vol. 15 No. 1, p.255.

²⁴ P.123, at Ethiopia's Hate Speech Predicament (n 12)

²⁵ Halefom H. Abraha, The problems with Ethiopia's proposed hate speech and misinformation law, available at <https://blogs.lse.ac.uk/medialse/2019/06/04/the-problems-with-ethiopias-proposed-hate-speech-and-misinformation-law/>, accessed on January 20 2021.

²⁶ Hate Speech and Disinformation Prevention and Suppression Proclamation, Federal Negarit Gazzeta, Proclamation No. 1185 /2020, No. 26, March 23th 2020, article 3.[here in after, Hate Speech and Disinformation Proclamation]

²⁷ Perry and Olson, 'Cyber hate: the globalization of hate', journal of information and communications technology law, 2009, volume 18- issue 2, p. 196. Available at <https://doi.org/10.1080/13600830902814984>, (accessed on January 15 2021)

²⁸ James Banks, 'European regulation of cross-border hate speech in cyberspace: The limits of legislation', 2011, European Journal of Crime, Criminal Law and Criminal Justice, volume 19 issue 1, p. 1-13.

be exploited in practice present a number of pressing issues. Having these being said, this research seeks to illustrate the current status of hate speech regulation in Ethiopia in connection with the protection of human rights, in particular the right to freedom of expression.

1.2. Statement of the problem

The very existence of available legislation may give rise to hopes and expectations in terms of holding perpetrators accountable. In Ethiopia hate speech legislation is seen as one means to prevent harm emanating from speech. Enacting the hate speech and disinformation prevention and suppression proclamation can help control the threat hate speech and disinformation pose to social harmony, political stability, national unity, human dignity, diversity and equality²⁹ and punish those perpetrators who make dangerous statements.³⁰ However, having hate speech laws alone could not attain the intended objectives unless a meaningful prosecution and conviction of criminals resulted in accordance with the law. In Ethiopia, the deterrence effect of the Proclamation appears to be very unlikely, given that very few prosecutions takes place so far. Indeed, it has been almost a year since the Hate Speech and Disinformation Proclamation was enacted. However, as of yet, no prosecution has been made using the new proclamation for the crime of hate speech.³¹ More importantly, in pending cases of Oromo activists for furies occurred in parts of Oromia following musician Hachalu Hundessa shot dead, there are evidences showing the violence was supercharged by speech targeting particular groups which warrant cases of hate speech.³²

Previous experience also depicts similar problem. The 2004 Criminal Code of Ethiopia includes a provision that is of particular relevance to hate speech regulation. Article 486(b) provides that whosoever “by whatever accusation or any other means foments dissension, arouses hatred, or

²⁹ Preamble, hate speech and disinformation proclamation (n 26)

³⁰ Statement by Deputy Attorney-General at a parliamentary discussion, see YE Eneyew ‘Muting sectarianism or muzzling speech?’ Ethiopia Insight 31 January 2020, <https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-ormuzzling-speech/>, (accessed 4 January 2021).

³¹ However, a case pertaining to fake news was prosecuted under the proclamation. For instance, Journalist Yayesew Shimelis was on April 21, 2020 arrested for allegedly attempting to incite violence by spreading false information contrary to article 5 of the Proclamation and charged by the high court Lideta branch. See Mahlet Fasil, “News Update: Prosecutors Charge Journalist Yayesew with Newly Enacted Hate Speech Law,” Addis Standard, April 21, 2020, available at, <http://addisstandard.com/news-update-prosecutors-charge-journalist-yayesew-with-newly-enacted-hate-speech-law/>, see also Yohannes Eneyew Ayalew, available at <https://www.ethiopia-insight.com/2020/05/01/is-ethiopias-first-fake-news-case-in-line-with-human-rights-norms/>,

³² የኢትዮጵያ ሰብአዊ መብቶች ኮሚሽን (ኢሰመኮ), የአርቲስት ሃጫሉ ሁንዴሳ ግድያን ተከትሎ በተከሰተው የፀጥታ መደፍረስ ምክንያት የተፈጸሙ የሰብአዊ መብቶች ጥሰት ምርመራ ሪፖርት, 2013 ዓ.ም. 47

stirs up acts of violence or political, racial or religious disturbances” is guilty of a crime. Though it is currently repealed by the Hate Speech and Disinformation Prevention and Suppression Proclamation,³³ this provision has not been tested in court. However, there were instances in which the provision should have been used. For instance, 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 2005.³⁴ In the aforementioned case, a charge was instituted for attempted genocide, though the case clearly illustrates strong nexus with hate speech. The preceding instances reasonably cast doubt as to the exact orientation of the Ethiopian criminal justice machineries about hate speech cases, i.e., whether they stand as a crime or simply supplement other charges.

States are required to strictly define the terms in their laws that constitute prohibited content under human rights law. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression elaborated on the regulation of online speech in two reports in 2011.³⁵ In his elaboration the Special Rapporteur has specifically highlighted his concern that a large number of domestic provisions seeking to outlaw hate speech are “unduly vague, in breach of international standards for the protection of freedom of expression.” Under the proclamation, hate speech is defined as ‘speech that deliberately promotes hatred, discrimination or attack against a person or an identifiable group, based on ethnicity, religion, race, gender or disability’.³⁶ The definition is regarded as too broad and may fall short of the international human rights law standard.³⁷ Considering that the law is aimed to curtail one of the most fundamental human rights, one might expect to find clear definitions for the key terms couched in the Proclamation. However, it fails to define what constitutes ‘hatred’. In fact hate speech involves or is intimately connected with emotions, feelings, or attitudes of hate or hatred. Hence, attitudes of hate or hatred are part of the essential nature of hate speech.³⁸

³³ Article 9, Hate Speech and Disinformation Proclamation (n 26)

³⁴ Mesenbet A. Tadeg, ‘Making Space for Non-Liberal Constitutionalism in Free Speech: Lessons from a Comparative Study of the State of Free Speech in Ethiopia and Thailand’, *Journal of Ethiopian law*, 2018, p.36.[Mesenbet A. Tadeg, ‘Making Space for Non-Liberal Constitutionalism in Free Speech’]

³⁵ Report of the UN Special Rapporteur on Freedom of Expression, A17/27, 17 May 2011 and Report of the UN Special Rapporteur on Freedom of Expression, A/66/290, 10 August 2011.

³⁶ Art 2(2) at Hate Speech and disinformation Proclamation (n 26)

³⁷ P. 325, at Y Eneyew Ayalew ‘Assessing the limitations to freedom of expression on the internet in Ethiopia (n7)

³⁸ Alexander Brown, ‘what is hate speech? part 1: the myth of hate’, 2017, Available at, <https://link.springer.com/article/10.1007/s10982-017-9297-1>, accessed on February 4 2021

In recent years, there has been an increase in calls globally for greater regulation of social media platforms.³⁹ Currently, there is a need to find appropriate ways to deal with the power that a limited number of digital technology and social media companies have over the online flow of information and ideas.⁴⁰ As part of such effort, the Ethiopian hate speech proclamation also requires social media service providers to act within 24 hours to remove or take out of circulation disinformation or hate speech upon receiving notifications about such communication or post. However, several issues are left unaddressed which would without any doubt poses practical challenges and affects the implementation of the law. For instance, the punishment to be imposed on those ‘social media service providers’ who fail to comply with the law is left unregulated. Although the Council of Ministers is empowered to issue a Regulation to provide for the detail responsibilities of service providers, still no such regulation is enacted yet. In Germany, for instance, the 2017 Network Enforcement Act (NetzDG) provides a fine of up to 50 million EUR if social networks failed to remove “clearly illegal” content within 24 hours of a complaint or a week when it is not clear that the content is illegal.⁴¹ Moreover, Ethiopia does not have any agreement or commitments with digital technology companies aimed at Countering Illegal Hate Speech Online. Hence, it will be difficult to properly regulate online content produced within the country and disseminated via social media platforms. Ethiopia’s unilateral efforts to legislate against offensive material will be thwarted by its limited jurisdictional reach and serious limitations in relation to the application of national law to foreign entities. What makes Germany’s experience so important in this regard is the fact that, today, German laws against racial hatred apply to Internet material created outside of Germany but accessible to German users.⁴² In addition, in the recourse to technological regulation of online hate speech, the role played by “trusted reporters” of “illegal hate speech” is fundamental which is also lacking in the current Ethiopian hate speech regulatory framework. In this regard the NetzDG provides for the recognition of such agencies, with a role to determine whether a given piece of content is in violation of the law and should be removed from the platform.

³⁹ Article 19, ‘Self-regulation and ‘hate speech’ on social media platforms’, 2018, p.6, available at <https://www.article19.org/wp-content/uploads/2018/>, (accessed on January 5, 2021)

⁴⁰ Id, p.14

⁴¹ The Network Enforcement Act, 30 June 2017, in force of 1 October 2017, Federal Law Gazette 2017 I, Nr. 61, page 3352. available at, <https://germanlawarchive.iuscomp.org/?p=1245>, accessed on February 26, 2021.

⁴² P. 61, Hate Speech in Social Media (n 21)

Finally, effective implementation of a law and more generally genuine hate speech regulation would depend, by and large, on institutional capability and expertise with a clear and comprehensive mandate, among others. This demand becomes more important especially in cases of regulating problematic online content. It is clear that the legal framework regulating the mass media should take into account the differences between the print and broadcast media and the internet.⁴³ While the Ethiopian Human Rights Commission is mandated to promote on halting hate speech, this is however a promotion mandate than protection which gives the Commission to undertake some soft promotional works. Countries like South Africa who had entrenched hate speech under apartheid era went beyond in addressing the issue of hate speech by organizing robust institutions such as the Equality Courts. When it comes to Ethiopia, adjudication of hate speech is given to regular courts. Also Kenya, after experiencing the 1992 clashes and 2007/8 Post Elections Violence which were the result of propaganda through media, hate speech in public rallies, hate speech through text messages, and open speech turned into criminal offence against the security of individuals and ethnic groups, an institution with particular importance for hate speech regulation was established by National Cohesion and Integration Act No. 12 of 2008. Accordingly, National Cohesion and Integration Commission (NCIC) was created in 2009 as a body that would tame use of hate speech and promote national cohesion and integration. The mandate of the Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advice the government thereof. Therefore, this research also aims to interrogate whether the institutions identified under the Proclamation are adequate enough to tackle the problem of hate speech.

1.3. Research objectives

1.3.1. The General Objective

The overall aim of this research is to examine the experiences of selected jurisdictions with particular emphasis on efforts by Kenya, South Africa and Germany and gather possible lessons that the Ethiopian legal system could learn from such systems.

1.3.2. The Specific Objectives

⁴³ Para 39, General Comment No. 34 (n 2)

In the process of analyzing the relevant lessons, attempt is made to achieve the following interrelated specific objectives:

1. To provide an overview for understanding hate speech particularly in the context of the Ethiopian legal system.
2. To assess the institutional framework to combat hate speech in Ethiopia.
3. To examine whether the existing laws sufficiently regulate online hate speech contents.
4. To assess the challenges and possible solutions associated with online hate speech regulation in Ethiopia.

1.4. Research Questions

1.4.1. Main Question

What lessons could the Ethiopian hate speech regulatory legal and institutional framework learn from the experiences of selected jurisdictions on hate speech regulation in general?

1.4.2. Sub-Questions

With the general research question, the following interrelated research questions were posed.

1. What are the potential challenges that could be encountered in the effort of regulating problematic online contents?
2. How could Ethiopia best deal with online hate speech?
3. What are the shortcomings of Ethiopian hate speech legislative framework in relation to content moderation?
4. Is there institutional set up capable of adequately responding to illegal online content in Ethiopia?

1.5. Research methodology

To accomplish the aim of this research, the research is strongly dependent both on doctrinal and non-doctrinal types of research, i.e. mixed approach. Both primary and secondary sources were

employed as relevant methods of data collection. Under the primary sources, international instruments, regional conventions and bills, domestic laws, in particular the FDRE constitution and the hate speech and disinformation proclamation were consulted. Scholarly journals, articles, excerpts, periodicals, commentaries and reviews were employed as secondary sources. Both structured and non-structured interviews were conducted with officials from the Office of Attorney General,

1.5.1. Sampling Technique

The sampling technique employed to secure key informants is a non-probability sampling technique. Among various no-probability sampling techniques, purposive or expert sampling technique was exclusively used, i.e., a technique where respondents are chosen in a non-random manner based on their expertise on the phenomenon being studied.

1.5.2 Research Design

Concerning for the type of research design, which will be used in this study, it is more of a descriptive and analytical type. Here, a research design is a road map that guides how research is going to be conducted. It gives the methods, instruments for data collection and interpretation. The reason for choosing these research designs lays on their openness, flexibility; as they provide an opportunity for diverse perspectives into the research topic and are good for the open-ended data collection instruments. The exploratory and analytical research design were used to appraise the lessons that the Ethiopian hate speech regulation regime could learn from other jurisdictions experiences.

1.6. Scope of the study

The study tries to analyze lessons that could be learned from different jurisdictions experiences, and hence mainly covers lessons to be learned from Kenya, South Africa and Germany. It also tries to examine the current shape of the Ethiopian legal system on hate speech regulation. In doing so, emphasis is placed on the regulation of user-generated online content. Except for a case pertaining to disinformation, due to the absence and unavailability of cases on the issue, the practical analysis of the hate speech and disinformation proclamation impacts is not within the scope of this research.

1.7. Ethical Consideration

The major ethical issues that were considered by the researcher are:

- Permission was sought from participants before taking or recoding their views.
- The confidentiality of the research data and information has been ensured.
- The privacy and anonymity of the respondents were kept.

1.8 The Limitations of the Study

Throughout conducting this research, the researcher faced a dearth of relevant reference materials over the subject matter of the study. This study may be limited by certain challenges, which may include the sensitivity of the information that many respondents may not be willing to provide.

1.9. Organization of the study

The thesis is organized in to five chapters. The first chapter presents an introductory part that deals with the points as to why and how the research is conducted.

Chapter two deals with theoretical framework, as well as literature review and gives a brief explanation of conceptual and factual analysis of issues related with hate speech and its regulation that are relevant for issues to be explained in the subsequent chapters.

Chapter three is devoted to the comparative analysis of selected jurisdictions' regulatory responses to hate speech. The fourth chapter sketches hate speech regulation in Ethiopia in relation to the experience gathered under the previous chapters. Chapter five presents a summary of the research and recommendations.

CHAPTER TWO

2. THEORETICAL FRAMEWORK AND LITERATURE REVIEW

2.1. Introduction

The right to freedom of expression embraces a number of freedoms, and is applicable to various forms and modes of expression. Freedom of expression requires States to guarantee to all people the “freedom to seek, receive, or impart information or ideas of any kind, regardless of frontiers, through any media of a person’s choice.”⁴⁴ However, freedom of expression “carries with it special duties and responsibilities” and can be restricted if this is provided for by law and is necessary for respect of the rights or reputations of others or for the protection of national security, public order or of public health or morals.⁴⁵ Though many major international human rights instruments recognize free speech as an essential human right, but also limit the enjoyment of the right when it is hateful. More importantly, the advancement of technology has been accompanied by an incremental rise in the number of hate related activities taking place in the internet.⁴⁶ The internet is arguably a true marketplace of ideas but one of its downsides is that it provides a global forum for the advocates of intolerance and inequality.⁴⁷

In international law and in various States’ law except the United States, freedom of expression is a qualified right, in turn; states can lawfully limit this right in certain circumstances. States impose limitations for some forms of expression deemed to be hateful because of their content, and such approaches thereby restrict the freedoms of certain citizens so that the interests and wellbeing of others can be safeguarded. Obviously, one legal measure to combat hate speech is criminal laws governing hate speech. Additionally, States may restrict less severe forms of ‘hate speech’, through other types of legislation, i.e. civil and administrative laws.

This chapter discusses a general introduction to the protection for the right to freedom of expression under the international standard and the FDRE constitution. This section also looks at

⁴⁴ Article 19, ‘Responding to ‘hate speech’: Comparative overview of six EU countries’, 2018, p.8

⁴⁵ Article 19 ICCPR (n 5)

⁴⁶ B. Perry and P. Olsson, ‘Cyber hate: The Globalization of Hate’, *Information and Communications Technology and Law*, 18, no. 2 (2009), 185-199.p.4

⁴⁷ C. Harris, J. Rowbotham, & K. Stevenson, ‘Truth, Law and Hate in the Virtual Marketplace of Ideas: Perspectives on the Regulation of Internet Content’, *Information and Communications Technology and Law*, Vol. 18, No. 2, 2009.(herein after C. Harris et al. ‘Truth, Law and Hate’)

the tools available on an international level in relation to the legal regulation of hate speech. The subsequent section attempts to examine the various definitions of hate speech and addresses the approaches towards regulating hate speech on the internet through legal and beyond legislative measures.

2.2. The legal framework for the protection of freedom of expression

2.2.1. Freedom of expression under international law

Freedom of expression is a fundamental right recognized in international law and entrenched in most national constitutions.⁴⁸ International law protects freedom of expression in different instruments. For instance, the Universal Declaration of Human Rights (UDHR) affords “everyone the right to freedom of opinion and expression ... [which] includes freedom ... to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴⁹ The International Covenant on Civil and Political Rights (ICCPR) also indicates that the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.”⁵⁰ At regional level, similar provisions can also be found in the European Convention on Human Rights (Article 10), American Convention on Human Rights (Article 13), and African Charter on Human and Peoples' Rights (Article 9). Now a days, the scope of the right to freedom of expression under international human rights law includes expressions online. International standards have long asserted that the same human rights that apply offline must apply equally online.⁵¹

2.2.2. Freedom of expression under FDRE Constitution

The Constitution of the Federal Democratic Republic of Ethiopia is described as fundamental law of the country from which all other legal norms in the state are established, receive or lose their validity.⁵² The Constitution provides for both the protection of the right to freedom of

⁴⁸ Navanethem Pillay, Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance, journal of international law and comparative law, vol. 14 no. 2, 2008, pp. 203-210, at p.205.

⁴⁹ Article 19 of UDHR (n 4)

⁵⁰ Art. 19 of ICCPR (n 5)

⁵¹ UN Human Rights Council Resolution 38/7 on the Internet and Human Rights, A/HRC/Res/38/7, 5 July 2018; available at: <https://bit.ly/39RTzXU>, accessed on February 3, 2021.

⁵² Article 9, at FDRE constitution (n 8)

expression⁵³ and the right to equality⁵⁴. The Constitutions also provide the framework for permissible restrictions of the right to freedom of expression, usually along the lines of Article 29(6). In addition to stating limitations of freedom of expression can only be made through law, the first sentence of sub article 6 of article 29 provides that limitations on account of the content or effect of the view point expressed are not allowed. The prohibition on content based limitation is relevant to hate speech laws in Ethiopia, since one could ask if it is an absolute prohibition that would prohibits even limitations that are aimed at limiting the dissemination of materials with hateful contents. However, given that protecting the well-being of the youth, and the honor and reputation of individuals is provided as an acceptable ground for limiting freedom of expression in the next clause of the same sub-article,⁵⁵ one can assert that in relation to expression which contains hatred, an exception can be made to limit freedom of expression on account of its content. More importantly, the Constitution prohibits any propaganda of war and the public expression of opinion intended to injure human dignity. From these clauses one can conclude that certain types of speech could be or should be limited based on the effect they might have and also based on the intention of the speaker.⁵⁶

Moreover, the Constitution stipulates that the third chapter of the Constitution (i.e., bill of rights) should be interpreted in accordance with UDHR and international human rights instruments ratified by Ethiopia⁵⁷ and hence, the full picture of the legal regime that accord protection to freedom of expression in Ethiopia can only be captured if and only if the relevant provisions of the UDHR, the ICCPR, the ACHPR (African Charter on Human and Peoples' Rights) and other pertinent human rights instruments ratified by Ethiopia are read alongside the constitutional provision.⁵⁸

⁵³ Article 29 of the FDRE Constitution (n 8), sub article 2 provides that everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

⁵⁴ Id, Article 25, stipulates that all persons shall be equal before the law and shall be entitled to equal protection of the law without any discrimination whatsoever. All persons shall be entitled to equal and adequate guarantees without distinction of any kind such as race, nation, nationality, colour, sex, language, religion, political or social origin, property, birth or other status.

⁵⁵ Id, Article 29(6), Second sentence

⁵⁶ Gedion Timothewos 'freedom of expression in Ethiopia: the jurisprudential dearth', Mizan Law Review Vol. 4 No.2, 2010, p.219[herein after, 'freedom of expression in ethiopia']

⁵⁷ Article 13 (2) at FDRE Constitution (n 8)

⁵⁸ P.206, 'freedom of expression in ethiopia'(n 56)

2.3. Limitation of the right to freedom of expression and the prohibition of hate speech

2.3.1. Characterizing and defining hate speech

Hate speech is a contested concept with states, academics and private companies providing varying definitions.⁵⁹ Despite its frequent usage, no universally accepted definition of the term “hate speech” exists.⁶⁰ Despite the lack of a uniform definition, many international entities and governments have attempted to define hate speech, often in contradictory and incoherent terms.⁶¹ The absence of a standard definition of "hate speech" has challenged the uniformity of hate speech laws. It appears that at the heart of the problem in defining hate speech is the perceived tension between free speech and hate speech.⁶²

Bhikhu Parekh,⁶³ identified three essential features of hate speech. First, hate speech is directed against a specified or easily identifiable individual or, more commonly, a group of individuals based on an arbitrary and normatively irrelevant feature. Second, it stigmatizes the target group and lastly because of its implicitly or explicitly ascription towards the negative qualities of the target group, the group is viewed as an undesirable presence and a legitimate object of hostility.

While dealing with cases of hate speech, instead of defining hate speech as such, UN Human Rights Committee prefers to focus on the harm to the rights of others and whether or not the restriction was necessary to prevent that harm. The approach followed by the Committee tends to focus on the justifiability of any particular interference with freedom of expression.⁶⁴ In attempts to distinguish hate speech from merely offensive speech, which is undoubtedly protected, one line of reasoning, which is helpful at least conceptually, is to distinguish between expression

⁵⁹ P.3, at European regulation of cross-border hate speech in cyberspace (n 28)

⁶⁰ Anne Weber, Manual on Hate Speech, 3 (Council of Europe 2009), available at, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_SpeechEN.pdf. Last accessed February 3, 2021.

⁶¹ p.251, Regulating Hate Speech: Nothing Customary about It (n 23)

⁶² Alkiviadou, N., 'The Legal Regulation of Hate Speech: The International and European Frameworks', Croatian Political Science Review, Vol. 55, No. 4, 2018, pp. 203-229, at p.208

⁶³ P.4o, at Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' (n 13)

⁶⁴ Toby Mendel, 'Study on International Standards Relating to Incitement to Genocide or Racial hatred. For the UN Special Advisor on the Prevention of Genocide', 2006, P. 25, Available at, <http://www.law-democracy.org/wp-content/uploads/2010/07/hate-speech-study.pdf>, accessed on January 30, 2021 [Mendel, 'Study on International Standards']

targeting ideas, including offensive expression, which is protected, and abusive expression which targets human beings, which may not be protected.⁶⁵

Various Attempts have been made to define the term hate speech. For instance, C. R. Lawrence and et al defined it as speech that has a message of racial inferiority which is directed against a member of a historically oppressed group, and which is persecutory, hateful, and degrading.⁶⁶ Here they defined narrowly only from the perspective of race. UNESCO also defined hate speech as “expressions that advocate incitement to harm [...] based upon the targets being identified with a certain social or demographic group.”⁶⁷ The Council of Europe defines hate speech as “speech covering all forms of expression which spread, incite, promote or justify forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”⁶⁸ Here, UNESCO only recognizes expressions that advocate incitement to harm while Council of Europe recognizes all forms of expression which spread, promote or justify hatred in addition to incitement. On the other hand, the potential targets recognized by Council of Europe are minorities, migrants and immigrants while UNESCO recognizes social or demographic groups in general terms.

However, since the above definitions given by different scholars and other bodies had its foundation in the ICERD and ICCPR, for the purpose of this thesis it is better to look in to the definitions under those human rights instruments. As per Article 20(2) of the ICCPR, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is be prohibited by law. Likewise as per article 4 of ICERD all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin

⁶⁵ Gaudreault-DesBiens, J., ‘From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide’, 2000, 46 McGill Law Journal 121, p. 135.

⁶⁶ Lawrence, C Matsuda, J Delgado, R & Crenshaw, K ‘Introduction’ in Lawrence, C, Matsuda, J, Delgado, R & Crenshaw, K (eds.), Words that wound: Critical race theory, assaultive speech, and the First Amendment (1993), p.1.

⁶⁷ UNESCO, Countering online hate speech (2015) as cited in PRISM, Backgrounds, Experiences and Responses to Online Hate Speech: A Comparative Cross-Country Analysis (2015) p. 6.

⁶⁸ Council of Europe Committee of Ministers Recommendation No. R (97) 20 on "Hate Speech"(Adopted by the Committee of Ministers on 30 October 1997at the 607th meeting of the Ministers' Deputies, available at, https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20-of-the-committee-of-ministers-to-member, accessed on February 5, 2021

are prohibited. The UN's International Committee on the Elimination of Racial Discrimination understands 'hate speech' as "a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society."⁶⁹ Hence, international and regional human rights instruments imply varying standards for defining and limiting 'hate speech': this variation is also reflected in differences in domestic legislation.⁷⁰

2.3.2. The prohibition of hate speech under international law

The respect for freedom of expression does not, however, imply that restrictions on hate speech necessarily violate international law. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the right.⁷¹ Hence, the right to freedom of expression is not absolute and both international law and most national constitutions recognize that limited restrictions may be imposed on this right to safeguard overriding public and/or private interests. For instance, provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes. Article 19(3) of the ICCPR explicitly permits restrictions on the right to freedom of expression and sets the international standard for the scope of such restrictions. Thereby limitations on this right on accounts of hate speech must satisfy the required 'three-part test' of legality, legitimate aim and necessity/proportionality.⁷²

Regarding the restriction to freedom of expression in light of hate speech, four different instruments are relevant on the international level: the Convention on the Prevention and Punishment of the Crime of Genocide, the UDHR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the ICCPR.

A. The Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) made direct and public incitement to commit genocide a punishable act.⁷³ One of

⁶⁹ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 on combatting racist hate speech, 26 September 2013, CERD/C/GC/35, para 7

⁷⁰ Article 19, 'Hate Speech' Explained A Toolkit, 2015, p. 9

⁷¹ UN Human Rights Committee, General Comment 10, 3, UN Doc. HRI/GEN/1/Rev.1 at 11 (1994).

⁷² p.22, at Mendel, 'Study on International Standards' (n 64)

⁷³ Article 3 (c), at Genocide convention (n 79)

the rationale for including incitement to genocide among the punishable acts of genocide under the Genocide Convention lies on the fact that the perpetration of genocide could, “in all cases be traced back to the arousing of racial, national or religious hatred.”⁷⁴ Hence, inherent connection exists between ‘incitement to genocide’ in the Genocide Convention and the various provisions relating to hate speech under international human rights law. As a conclusion it could be said that although all incitement to genocide is hate speech, the reverse is not true as hate speech is a far wider concept.⁷⁵

Furthermore, the prohibition on hate speech has also been spelled as customary international law for the first time by the criminal tribunal for Rwanda. On December 3, 2003, the trial chamber of the International Criminal Tribunal for Rwanda ("ICTR") convicted three defendants of crimes against humanity based on speech it deemed incitement to racial hatred.⁷⁶ In *Prosecutor v. Nahimana* judgment, hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination.⁷⁷ The tribunal based its holding on international and domestic law which it believed established a customary international law ("CIL") prohibiting hate speech.⁷⁸ The court in its decision had diverged from the decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") that declared incitement to racial hatred did not constitute persecution as a crime against humanity, ruling that "the criminal prohibition of incitement to racial hatred has not attained the status of customary international law."⁷⁹ However, the sharp split over treaty law on the standard separating proscribed from protected speech is indicative that hate speech may not be regarded as a crime under customary international law.⁸⁰

B. UDHR

⁷⁴ P. 16, at Mendel, 'Study on International Standards' (n 64)

⁷⁵ Id. p.20

⁷⁶ *Prosecutor v. Nahimana*, ICTR 99-52-T, Trial Judgment and Sentence (Dec. 3, 2003), available at, <https://www.refworld.org/cases,ICTR,48b5271d2.html>, accessed on January 30, 2021.

⁷⁷ Id. Para. 1076.

⁷⁸ p.231, at *Regulating Hate Speech: Nothing Customary about It* (n 23)

⁷⁹ *Prosecutor v. Kordic*, International Criminal Tribunal for the former Yugoslavia, Trial Judgment, Feb. 26, 2001, Para.209 available at, <https://www.refworld.org/cases,ICTY,47fdb53d.html>, accessed on February 4, 2021.

⁸⁰ p.255, *Regulating Hate Speech: Nothing Customary about It* (n 23)

The Universal Declaration of Human Rights does not explicitly prohibit speech that advocates hatred based on race, religion, or other like categories.⁸¹ However, Article 7 of the UDHR states: “All are equal before the law and are entitled without any discrimination to equal protection of the law and are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”⁸² After proclaiming the right to equality before the law and to the equal protection of the law, in its second sentence, Article 7 stated that all are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination. Some scholars claimed that this clause was adopted with the understanding of the protection against propaganda of national, racial and religious hostility and hatred, as well as expression that incites discrimination.⁸³ Furthermore, the right to freedom of expression, as all rights contained within the document, is subject to a general limiting clause under Article 29(2) of the Declaration. Additionally, the prohibition of the use of rights to destroy others' rights is another argument raised by scholars to justify the place of hate speech as a limitation of freedom of expression under UDHR. Furthermore, the prohibition of the exercise of rights and freedoms listed under UDHR contrary to the purposes and principles of the United Nations which is stated under Article 19(3) of UDHR may also be raised as a justification for the limitation of freedom of expression based on hate speech. Because as per Article 1(3) of the UN Charter stipulates for promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion is one of the Purposes of the United Nations.⁸⁴ According to this, freedom of expression should not be exercised endangering other human rights. Accordingly, although there is nothing within the UDHR that prescribes hate speech restrictions, there would seem to be room within the UDHR for hate speech laws.⁸⁵

C. ICERD

⁸¹ Robin Edger, ‘are hate speech provisions antidemocratic? an international Perspective, American University International Law Review vol. 26 no. 1 , 2010, 119-154, p.126[Robin Edger, ‘are hate speech provisions antidemocratic?]

⁸² Art. 7, UDHR (n 4)

⁸³ Farrior, S ‘Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech’ 14 *BERKELEY J. INT’LL.* (1996), pp.16-19.

⁸⁴ UN Charter (1945), Art 1(3).

⁸⁵ P. 127, at Robin Edger, ‘are hate speech provisions antidemocratic?’(n 81)

The first international treaty to deal directly with the issue of hate speech was the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), - and was adopted by the UN General Assembly in 1965. The ICERD prohibits incitement to racial hatred.⁸⁶ A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by Article 4 of ICERD. The “CERD” requires state parties to criminalize "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all . . . incitement to or acts of violence against any race or group of persons of another colour or ethnic origin."⁸⁷ One major difference between ICCPR and ICERD is that Article 20(2) of the ICCPR prohibits incitement to discrimination, hostility or violence, while Article 4 of the ICERD requires legislation that not only prohibits such incitement but also makes “an offense punishable by law” the dissemination of ideas based on racial superiority or hatred, the creation or participation in organizations which promote racial discrimination, and the provision of any assistance, financial or otherwise, to racist activities.

D. ICCPR

Articles 19 and 20 of the ICCPR directly address the relationship between the opposing rights of freedom of expression and freedom from hate speech.⁸⁸ Here, the opposing rights are freedom of expression and freedom from hate against individual and community dignity, as embodied in ICCPR Articles 19 and 20, respectively.⁸⁹ Article 19, paragraph 2: reads “Everyone shall have the right to freedom of expression”⁹⁰ Whereas Article 20, paragraph 2: provides “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁹¹ In this regard Article 20 directly limits free speech in its prohibition of national, racial, and religious hate advocacy. Article 20(2) constitutes a clear restriction on hate speech. While Article 20(2) of the ICCPR addresses incitement as a

⁸⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [herein after CERD].

⁸⁷ Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. GAOR, Dec. 9, 1948. [hereinafter cited as Genocide Convention]

⁸⁸ Elizabeth F. Defeis, ‘Freedom of Speech and International Norms: A Response to Hate Speech’, *Stanford Journal of International Law*, Vol. 29, Issue 1, 1992, pp. 57-130.

⁸⁹ Scot J. Catlin, ‘Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights’, *Notre Dame Law Review*, Vol. 69, no. 4 1994, 771-813, p.796.

⁹⁰ Article 19(2) of ICCPR (n5)

⁹¹ Id. Article 20(2)

specific form of hate speech, States may also take action against other forms too, provided those laws comply with the conditions of Article 19(3) of the ICCPR.⁹²

2.4. The regulation of online hate speech

Regulating hate speech has been the major subject of wide debates across many jurisdictions. Moreover, recent technological advances, like the Internet, have made it more difficult for law enforcement agencies to prevent the dissemination of hate messages.⁹³ Furthermore due to the unique characteristics of the Internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the Internet.⁹⁴ Despite such difficulties, in general terms, laws dealing with hate speech apply equally to hate speech on the Internet, to the extent that the form or content of expression on a digital space contravenes these laws.⁹⁵

2.4.1. Legislative/ Unilateral regulation of hate speech

Legislative response to hate speech may encompass a legal framework consisting of civil, criminal and administrative law provisions on hate speech.⁹⁶ Advocates of hate-speech laws have suggested a criminal-law response.⁹⁷ Nevertheless, a criminal law response is arguably endorsed by international human rights treaty provisions, including Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and Article 20 of the International Covenant on Civil and Political Rights (ICCPR).⁹⁸

⁹² Article 19, 'tackling hate: action on UN standards to promote inclusion, diversity and pluralism', 3rd edition, 2020, p. 10. available at, <https://www.article19.org/resources/tackling-hate-action-un-standards-promote-inclusion-diversity-pluralism/>, accessed on 2 February 2021.

⁹³ Alexander, Tsesis, 'Hate in Cyberspace: Regulating Hate Speech on the Internet', vol. 38 no.817, San Diego L. Review, 2001, p.859.

⁹⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Report of the Special Rapporteur to the Human Rights Council on key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet, *UN Doc. A/HRC/17/27*, 16 May 2011, para.27.

⁹⁵ P. 156, at C. Harris et al. 'Truth, Law and Hate'(n 47)

⁹⁶ Recommendation R (97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Appendix, Principle 2. Available at, https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20,

Accessed on January 30, 2021

⁹⁷ Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story', Michigan law review, Vol. 87. No.2320, 1989, p. 2341-42.

⁹⁸ Simon Bronitt, 'Hate Speech, Sedition and the War on Terror,' in Katharine Gelber & Adrienne Stone eds., *Hate Speech and Freedom of Speech in Australia*, Federation Press 2007, P.135–6 [hereinafter *Hate Speech in Australia*]

It clear that the rising international concern about the problem of hate speech on the Internet has led to calls for greater regulation.⁹⁹ Despite the geographic indeterminacy of the internet and the jurisdictional challenges posed, several states have sought to impose virtual borders in cyberspace in an attempt to regulate online hate speech.¹⁰⁰ One of the major challenges faced by these states is the limited jurisdictional reach when such states seek to enforce laws extraterritorially into other jurisdictions. This is unsurprising given that countries have divergent views on freedom of expression owing to their different historical, philosophical and constitutional traditions.¹⁰¹

The case of Yahoo!, for example, clearly demonstrates the challenges encountered in an attempt of enforcing content laws of a state against material uploaded beyond national boundaries. In the landmark case of *Yahoo! Inc v. La Ligue Contre Le Racisme et L'Antisemitisme*, two French student organizations sought to prosecute Internet Service Provider (ISP) Yahoo! for contravening a French law forbidding the offering for sale of Nazi merchandise.¹⁰² Although the content originated in the USA, the French court ruled that Yahoo! was liable and should seek to eliminate French citizens' access to the sale of Nazi merchandise. However, Yahoo received, a judicial ruling from the United States District Court stating that the enforcement of the French authorities would breach the First Amendment of the Constitution.¹⁰³ The case exemplifies the problem that while nation states may be able to successfully prosecute hate crime that takes place within their own territorial boundaries, they have not been able to extend their reach beyond their borders.¹⁰⁴

In this regard significant steps have been taken by Germany to enforce its anti-hate speech laws in an Internet context. One among the high-profile cases is the case of Toben. Frederick Toben is an Australian immigrant from Germany¹⁰⁵, who runs the Adelaide Institute and its companion

⁹⁹ P.155, C. Harris et al. 'Truth, Law and Hate'(n 47)

¹⁰⁰ P. 234, Banks, Regulating hate speech online (n 18)

¹⁰¹ P.165, C. Harris et al. 'Truth, Law and Hate' (n 47)

¹⁰² *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L' Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001, 9th Cir. 2004. (two French student unions filed a civil complaint against Yahoo! alleging that Yahoo! violated French law)

¹⁰³ *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme and L'union Des Etudiants Juifs De France* united states court of appeals, ninth circuit, 2006, available at, <https://www.tjssl.edu/slomansonb/5.2%20Yahoo%20US.pdf>, accessed on March 5, 2021.

¹⁰⁴ P. 235, Banks, Regulating Hate Speech online (18)

¹⁰⁵ Robyn Weisman, Germany Bans Foreign Web Site for Nazi Content, News Factory Network, available at http://www.newsfactor.com/story.xhtml?story_id=6063, accessed on June 3, 2021.

website, while the site appears to be hosted on an American server.¹⁰⁶ Although the website is not maintained in Germany and is written in English, this site is accessible by German Internet users and contains content in violation of a German law.¹⁰⁷ The Germany's High Court, ruled that "German authorities may take legal action against foreigners who upload content that is illegal in Germany—even though the Websites may be located elsewhere."¹⁰⁸ It seems now clear that Germany will determine jurisdiction on contents published on foreign websites. In the 2000 Toben case, Germany's highest court ruled that German law applies to foreign users who post content on the web in other countries if the content can be accessed in Germany.¹⁰⁹ Similarly, in 2002 the Dusseldorf district government sought to block access to a number of websites hosted in the USA on grounds they contained material that was primarily racist, anti-Semitic and Nazi in content.¹¹⁰

In addition to criminalization, an alternative policy proposal is to call for a civil law response to hate speech. Despite the criminal law response is the major legal means to address hate speech; civil law remedies may also play a crucial role.¹¹¹ In the United States this has manifested, for example, in the form of a call for a tort cause of action for damages.¹¹² In Australia also the civil laws carry the practical regulatory burden against hate speech.¹¹³ The criminal laws are almost never used.¹¹⁴ This stands in contrast to the approach of those jurisdictions, such as Germany, which emphasize the use of criminal laws. The importance of civil laws has been recognized by international bodies. The Council of Europe Hate Speech Recommendation, for example, calls for greater attention to civil law remedies leading to compensation for hate speech.¹¹⁵

¹⁰⁶ Terry Lane, 'Censoring the Adelaide Institute's Web Site is Futile,' ONLINEOPINION, available at <http://www.onlineopinion.com.au/view.asp?article=1126>, accessed on July 23, 2021.

¹⁰⁷ Arrest Warrant for Dr. Frederick Toben, Institute for Historical Review, available at, <http://www.ihr.org/other/990409warrant.html>, accessed on July 20, 2021.

¹⁰⁸ See, Robyn Weisman, Germany Bans Foreign Web Site for Nazi Content (n 105)

¹⁰⁹ Pp. 168-69, C. Harris et al. 'Truth, Law and Hate'(n 47)

¹¹⁰ Ibid.

¹¹¹ Indeed, McGoldrick, D. and O'Donnell, T., "Hate-speech laws: consistency with national and international human rights law", 1998, 18 Legal Studies 453.p.457

¹¹² Katharine Gelber, 'Reconceptualizing Counter speech in Hate Speech Policy (with a Focus on Australia)', in M Herz and P Molnar (eds), The content and context of hate speech: rethinking regulation and responses, Cambridge University Press 2012,P.201. [Herein after Reconceptualizing Counter speech]

¹¹³ Katharine Gelber & Luke McNamara, 'Private Litigation to address a Public Wrong: A study of Australia's regulatory response to 'hate speech'', Vol. 33, Issue. 3, Civil Justice Quarterly, PP. 307-334.

¹¹⁴ P. 205, at Reconceptualizing Counter speech (n 112)

¹¹⁵ European Commission against Racism and Intolerance's General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.

2.4.2. Multilateral regulation of hate speech

As discussed above the unilateral effort which sought the application of national law to foreign entities is conquered with serious limitations. The first major multilateral compact aimed at Internet crimes was the Council of Europe's Convention on Cybercrime.¹¹⁶ Initially the plan was to add an Internet hate speech protocol to the Convention on Cybercrime; however, it was removed when it became apparent that the United States would not sign the Convention if the Internet hate speech provisions were attached.¹¹⁷ Instead, the Council of Europe made the Internet hate speech measure a separate protocol. Accordingly, On November 7, 2002, the Committee of Ministers of the Council of Europe adopted the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.¹¹⁸ The inability of states to overcome the obstacles posed by the internet's mobility and anonymity led to the Council of Europe's Convention on Cybercrime's introduction of a protocol aimed at harmonizing the national legal systems computer related offences in order to reach a common minimum standard in prosecuting online crimes including hate speech. Under the Additional Protocol to the Convention on Cybercrime, parties are required to criminalize acts of a racist and xenophobic nature committed through computer systems.¹¹⁹ The protocol has aimed at enhancing coordination and cooperation in combating hate crime in Europe.¹²⁰

The African Union also has adopted a Convention on Cyber Security and Personal Data Protection (hereinafter AU Convention)¹²¹ that is meant to address the issue of cybercrime, among other things. Under its relevant part to hate speech regulation, the convention requires State Parties to take the necessary legislative and/or regulatory measures to make certain content related offences a criminal act. Accordingly states are required to make a criminal offence, an

¹¹⁶ Council of Europe Convention on Cybercrime, 2001, European Treaty Series, No. 185, available at <http://conventions.coe.int/Treaty/en/Treaties/HtmIII85.htm>,

¹¹⁷ Christopher D. Van Blarcum, 'Internet Hate Speech: The European Framework and the Emerging American Haven', wash. & lee. rev. vol.62, issue.1, 2005, pp.781-829, p.792.

¹¹⁸ Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, 2003, Europe. T.S. No. 189

¹¹⁹ P.9, at Banks, 'European regulation of cross-border hate speech in cyberspace' (n 28)

¹²⁰ Explanatory Report, Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, 2003, Europ. T.S. No. 189

¹²¹ The convention still does not come in to force. As of Jan 2020, five years since its adoption, only 14 of 55 AU member states have signed it and seven have ratified it. In order for the convention to come in to force it must be signed and ratified by a minimum of 15 states.

Insult, through a computer system, persons for the reason that they belong to a group distinguished by race, colour, descent, national or ethnic origin, or religion or political opinion, if used as a pretext for any of these factors, or against a group of persons distinguished by any of these characteristics; and an act that deliberately deny, approve or justify acts constituting genocide or crimes against humanity through a computer system.¹²² The Convention calls for international cooperation through requiring State Parties to ensure that the legislative measures and/or regulations adopted to fight against cyber-crime will strengthen the possibility of regional harmonization of these measures and respect the principle of double criminal liability and also encourages Mutual legal assistance among state parties.¹²³ Also the 2019 African Declaration on Freedom of Expression and Access to Information in Africa clearly states that the right to freedom of expression must be secured both offline and online.¹²⁴ The Declaration requires states to prohibit any speech that advocates for national, racial, religious or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility or violence. Importantly, like the Rabat Plan of Action, the Declaration stipulates a six-part touchstone that guides states to tackle hate speech.¹²⁵

2.4.3. Technological regulation of hate speech

Recourse to technological regulation at both user and service providers may offer an alternative avenue through which the transmission and reception of online hate speech could be minimized.¹²⁶

A. Self-Regulation

Internet Service Providers can play a crucial role in reducing the level of online hate available to Internet users. In response to growing public concerns about hate speech, most social media platforms have adopted self-imposed definitions, guidelines, and policies for dealing with hate

¹²² African Union Convention Cyber Security and Personal Data Protection, EX.CL/846(XXV) [Hereinafter AU Convention on Cyber Security], article 29 (3) (1) (g) (h).

¹²³ *Id.*, Art 28(1)(2)

¹²⁴ ACHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa,(2019) ,<file:///C:/Users/yirga/Downloads/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_201, accessed on August 1, 2021.

¹²⁵ *Ibid*, Principle 23

¹²⁶ p.237, Banks, Regulating hate speech online (18)

speech and offensive languages.¹²⁷ Internet service providers can assist in regulation through their terms of service which permits them to remove and delete content that breaches their terms of service. Social media platforms routinely remove content from their platforms on the basis of these Terms of Service, either of their own initiative, or based on the complaints of their users.¹²⁸

In response to the rapid rise of social media, hate speech dissemination via social media providers and video-sharing platforms such as YouTube, Facebook, and Twitter have developed internal policies for Hate Speech regulation, and they also signed a Code of Conduct agreement with the European Commission.¹²⁹ Now a days, such decisions are taken at the corporate level, rather than the state level, which means that the companies concerned essentially regulate themselves.¹³⁰ Accordingly, such social media platforms use teams of moderators to determine whether potentially problematic posts should be removed or not in which the current systems rely on already-offended users complaining about offensive messages, and the content of these is then assessed by teams of people who determine whether or not they should be removed.¹³¹

B. Regulated self-regulation

The co-regulation model, also called “regulated self-regulation,” involves elements of a self-regulatory mechanism underpinned by legislation. For instance in Germany, the 2017 Network Enforcement Act (NetzDG) threatens social networks with a fine of up to 50 million EUR if they do not remove “clearly illegal” content within 24 hours of a complaint or a week when it is not clear that the content is illegal.¹³² The Act also provides for the recognition, by the Ministry of Justice, of “regulated self-regulatory agencies,” whose role will be to determine whether a given piece of content is in violation of the law and should be removed from the platform.

C. Commercial Solutions and Blocking

Several commercially available filtering devices block Internet sites based on their contents. There are arguments which claimed that the Internet should not be regulated because it is

¹²⁷ S. Ullmann, M. Tomalin, ‘Quarantining online hate speech: technical and ethical perspectives’, journal of Ethics and Information Technology, 2020, vol. 22 Issu. 1, pp. 69–80[herein after Quarantining online hate speech]

¹²⁸ P. 16, ‘Self-regulation and ‘hate speech’ on social media platforms’

¹²⁹ HM Government., ‘*Online Harms White Paper*’, 2019, available at, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf, accessed on February 12, 2021.

¹³⁰ P. 70, ‘Quarantining online hate speech’ (n 126)

¹³¹ Id. P.73.

¹³² The Network Enforcement Act, 30 June 2017, in force of 1 October 2017, Federal Law Gazette 2017 I, Nr. 61.

extraspacial and, therefore, should be unencumbered by government regulations¹³³, and hence the availability of these devices makes it unnecessary and undesirable for the government to become involved in censoring the Internet.¹³⁴ Accordingly, individuals can purchase and activate any of the available filtering software comporting with their individual moral or social perspectives.¹³⁵ Currently, various commercial Internet filtering software's are available for users. For instance, in 1998, ADL (Anti-Defamation League) introduced Hate filter, a filtering software product that educates users in addition to preventing access to websites that promote hate.¹³⁶ Alternatively, governments can also block extraterritorial websites that do not comply with their national laws. Remarkably, Spain has legislation which authorizes judges to shut down Spanish sites and block access to US based web pages that do not comply with national laws.¹³⁷

2.5. Conclusion

Even in a democracy rights and freedoms could be limited. It is not acceptable to say that freedom of expression must enjoy preferential treatment because it is necessary to a democracy. There are other freedoms and rights which are fundamental, such as the right not to be attacked by hate speech, to respect and recognition of the intrinsic value of all humanity. Equality and individual dignity are surely the two most fundamental values in a democratic society and the end to which all rights and freedoms are aimed. What is required is a deeper analysis of where the balance should lie. Legislation prohibiting hate speech is a necessary evil in a democratic society which aspires to the preservation and enhancement of the equality and individual dignity of its citizens. Under international law, freedom of expression is generally upheld as a fundamental human right; and restrictions are only advocated under very limited circumstances and must follow the rule of law in a democracy. The ICCPR opens the door for legislation on hate speech– but only if those restrictions satisfy the required ‘three-part test’ of legality, legitimate aim and necessity/proportionality. Article 4(a) of the ICERD offers the most far-reaching hate speech provision on the international level which requires contracting state parties,

¹³³ David R. Johnson & David Post, 'Law and Borders-The Rise of Law in Cyberspace', volume 48, no.5 Stanford Law Review, 1996, p. 1367

¹³⁴ Rachel Weintraub-Reiter, 'Note, Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?', pub. Int. law journal, vol. 8 issue.145, 1998.

¹³⁵ Id.

¹³⁶ p. 11, European regulation of cross-border hate speech in cyberspace (n 28)

¹³⁷ J. Scheeres, 'Europeans Outlaw Net Hate Speech', available at <http://www.wired.com/news/business/0,1367,56294,00html>, Accessed on February 2, 2021.

inter alia, to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred”. The Genocide Convention also declares “direct and public incitement to commit genocide” as a punishable act. At national level also the FDRE constitution provides for freedom of expression, freedom of the press, and access to information, while also prohibiting censorship. Freedom of expression can also be justifiably limited on account of protecting the well-being of the youth, and the honor and reputation of individuals. Since the right to freedom of expression is not absolute and it can be restricted for necessary grounds, such limitations are reinforced by subsequent legislations, including the hate speech and disinformation prevention and suppression proclamation.

An inevitable problem in any discussion of hate speech lies in the difficulty of defining what exactly the phrase refers to. Despite the various attempts, hate speech is an emotive concept, and there is no universally accepted definition of it in international human rights law. Definitions have also been adapted over time to address new situations, and to accommodate shifts in language, shifting understandings of equality, and the harms of discrimination, or developments in technology.

Due to the proliferation of technologies, now a days there is a shift of hate speech from mainstream media to the social media platforms. The Internet have made easier for extremists and hatemongers to promote hate. As new channels for hate speech are reaching wider audiences than ever at lightning speed, it is evident that no single entity can address and counter hate speech on its own. For instance, identifying and prosecuting all individuals posting hateful messages would be impractical for most states. Therefore, it appears that the fight against perceived online hate speech necessarily requires cooperation between a number of concerned parties, from governments to private companies and Internet Service Providers, as well as to a growing number of active organizations and affected individuals. Hence, in addition to laws, recourse to technological regulation and digital literacy activities may be deemed a more effective approach through which to minimize both the transmission and reception of online hate speech.

CHAPTER THREE

3. HATE SPEECH REGULATION IN SELECTED JURISDICTIONS

3.1. Introduction

Hate speech regulation refers to the protection of public good: a visible assurance offered by a society to all its members that they will not be subject to abuse, defamation, humiliation, discrimination and violence on grounds of race, ethnicity, religion, gender and other factors.¹³⁸ Thus, hate speech regulation is concerned with the application of legal framework aimed at punishing speech that abuses, humiliates, injures, debases or dehumanizes the person of the other on the basis of his race, religion, ethnicity, or gender, and by so doing promoting inclusive governance and national cohesion.¹³⁹

States address different concerns regarding hate speech through different types of regulations, which are generally subject to competing interests due to their possible effects on freedom of expression and information.¹⁴⁰ The purpose of considering other jurisdictions experience partly lies on the need to install human rights friendly response to the problem of hate speech by having a look at in to comparable experiences. One can cite various compelling reasons for taking guidance from other jurisdictions experience in relation to hate speech regulation as Ethiopian jurisprudence is patchy if not still non-existent. While the context in these countries is unique, their experiences could provide a useful insights to understanding the consequences of the laws and the limitations surrounding the Ethiopian hate speech legal and institutional regulatory frameworks.

This chapter is basically intended to discuss hate speech regulation in the Republic of South Africa, Kenya and Germany. In a first step, this chapter describes and analyzes the way that the above three states address hate speech in their respective regulatory projects. Then, the lesson drawing task will be undertaken under the next chapter besides the discussion on the Ethiopian

¹³⁸ Waldron, J. 'Dignity and defamation: The visibility of hate', *Harvard Law Review*, 2010, vol. 7 n. 123,1596–1657, p. 1599. Available at, <https://www.jstor.org/stable/40648494>, accessed on May 29, 2021.

¹³⁹ Nicholas Asogwa & Christian Ezeibe, 'The state, hate speech regulation and sustainable democracy in Africa: a study of Nigeria and Kenya', 2020, *African Identities*, DOI: 10.1080/14725843.2020.1813548, p. 3

¹⁴⁰ Tucker, Joshua A., Yannis Teocharis, Margaret E. Roberts, and Pablo Barberá. "From Liberation to Turmoil: Social Media and Democracy." *Journal of Democracy* 28, no. 4, 2017. P. 46–59. doi:10.1353/jod.2017.0064.

regulatory approach towards hate speech in general and its online aspects in particular. Such comparative studies are without a doubt very useful to promote scholarly exchange of ideas and achieve the higher level of information that allows informed choice of lessons.

3.2. Hate speech regulation in Germany

3.2.1. Background

Hate speech regulation in Germany stems primarily from experience under Nazi rule and extremist politics.¹⁴¹ However, the issue of hate speech regulation in the country became more prominent recently,¹⁴² in 2015, due to right-wing anti-migrant backlash following Angela Merkle’s acceptance of over 700,000 Syrian asylum seekers.¹⁴³ The German public’s attitude towards refugees and asylum seekers was accompanied with hatred and physical violence.

Although German Basic Law provides that “everyone has the right to freely express and disseminate his opinion in speech, writing and pictures and to inform himself from accessible sources,” these rights are subject to limitations in the provisions of general statutes.¹⁴⁴ The German Constitutional Court emphasized the primacy of human dignity and honor.¹⁴⁵ Germany’s desire to prioritize dignity and honor is an acknowledgement of the nation’s responsibility for sacrificing these values during the war, and serves to prevent those values from being compromised in the future.¹⁴⁶ It can be considered that the right to personal honor and dignity is the preeminent value and “spirit” of the Germany Constitution, and often takes priority when a conflict arises with free speech.¹⁴⁷

¹⁴¹ Article 19, ‘Germany: Responding to ‘hate speech’, 2018, p.8, available at, <https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf>, accessed on May 23 2021.

¹⁴² P. 8 at ‘Germany: Responding to ‘hate speech’ (n 140)

¹⁴³ Eurostat, Statistics Explained, available at, <https://bit.ly/1xHP3Yh>, accessed on May 3 2021.

¹⁴⁴ Art. 5, GUNDESEZ [German Constitution], translated in ‘Constitutions of the world’ 106 (Albert P. Blaustein & Gisbert H. Flants eds. 1994.

¹⁴⁵ Federal Constitutional Court (First Senate) 24 February 1971 BVerfGE 30, 173, 1971, available at, <http://www.hrcr.org/safrica/dignity/30bverfge173.html>, accessed on May 12 2021.

¹⁴⁶ Tessa McKeown “hate speech and holocaust denial: the prohibition of false historical discourse in modern society”, (LLM thesis), victoria university of well-being, 2014. P.53

¹⁴⁷ Steven W Becker “I Think, Therefore I Am Guilty”: Suppressing Speech and Hijacking History – The Case Against Criminalizing Hate Speech and Revisionism as Global Policy” in Guiliana Ziccardi Capaldo (ed) The Global Community: Yearbook of International Law and Jurisprudence (Oxford University Press, New York, 2009) vol. 17 at P. 17

3.2.1. The Act to improve enforcement of the law in Social Networks (NetzDG)

Passed in late 2017 by the Bundestag, the German federal parliament, the Network Enforcement Act was designed to combat hate speech, radicalization, and fake news online.¹⁴⁸ In January 2018, Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken¹⁴⁹ (herein after the Network Enforcement Act) came into effect. In fact the NetzDG does not establish new criminal offences; rather it merely enforces an existing legal obligation of social media service providers which is prescribed under sec. 10 of the Telemedia Act.¹⁵⁰ The law has been considered as the most comprehensive response to the problems of radicalization on social media yet enacted in a democratic country.¹⁵¹ The law requires social media companies to address complaints related to eighteen provisions of the criminal code.¹⁵² Several of these offenses are aimed at protecting public safety (such as incitement to hatred), while others are aimed at safeguarding individual rights (such as slander and defamation).¹⁵³ This fact differentiates the Network Enforcement Act from the European Code of Conduct against online hate speech, as in the latter the removal was based primarily on the companies' Terms of Service, rather than substantive criminal law.¹⁵⁴

3.2.1.1. Removal and blocking under the NetzDG

The Act requires Social Networks to adopt a particular approach to removal and blocking of unlawful content in response to user-generated complaints or complaints sent by other bodies.

¹⁴⁸ Stefan Engels, Network Enforcement Act in a Nutshell, DLA PIPER BLOG: IPT GERMANY, 2018, available at, <http://perma.cc/E6QT-VSEL>, accessed on June 3, 2021.

¹⁴⁹ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt, Teil I [BGBL I] at 3352 (Ger.). The English version available at; <http://perma.cc/72JK-3KNM>, accessed on July 31, 2021.

¹⁵⁰ Temelso Gashaw, 'countering online hate speech through legislative measure: The Ethiopian approach in a comparative perspective,' (LL.M Thesis), central European university, 2020. P.31

¹⁵¹ Germany Looks to Revise Social Media Law as Europe Watches, CNBC, 2018, <https://www.cnbc.com/2018/03/08/germany-looksto-revise-social-media-law-as-europe-watches.html>, accessed on June 3 2021.

¹⁵² S 1 (3), at Network Enforcement Act (n 41)

¹⁵³ Wolfgang Schulz, "Regulating Intermediaries to Protect Privacy Online: The Case of the German NetzDG," in Personality and Data Protection Rights on the Internet, ed. Marion Albers and Ingo Sarlet, New York: Springer.

¹⁵⁴ Danielle Keats Citron, Extremist Speech, Compelled Conformity, and Censorship Creep, 93 NOTRE DAME L. REV., 2018, p.1038.

NetzDG operates to oblige “social networks”¹⁵⁵ to remove within twenty-four hours, any content which is determined to be “manifestly unlawful,” because it violates one of the criminal provisions enumerated under section 1 (3) of the act. For borderline cases, companies have seven days to remove the content.¹⁵⁶ Removal means that the content is deleted worldwide, whereas blocked content is unavailable only for users with a German IP address.¹⁵⁷ This review period may exceed seven days in case more time is required to reduce “over blocking,” or when providers refer the decision to an independent co-regulatory body.¹⁵⁸

3.2.1.2. Handling complaints about unlawful content

Section 3 of the Act prescribes how Social Networks will handle complaints about unlawful contents. Section 3(1) of the Act requires that social networks maintain an effective and transparent procedure for handling complaints about unlawful content and the procedure must be easily recognizable, directly accessible and permanently available. In this regard, encouraging the institution of accessible, transparent and usable complaints procedures integrated to websites regarding unlawful content is a positive aim.¹⁵⁹ The procedure must ensure that complaints are immediately addressed and checks are carried out.¹⁶⁰ The report must be noted by someone who is authorized to delete and block content.¹⁶¹ The processes are generally spelled out more clearly in Section 3(2), they include: the requirement that Social Networks acknowledge without undue delay receipt of a complaint and also Social Networks are under obligation to inform both the complainant and the author of the content in issue of any decision reached, as well as the reasons for the decision made.¹⁶²

3.2.1.3. Reporting

¹⁵⁵ “Telemedia service providers” or “Social networks,” are defined as entities with over two million registered users in Germany “which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public.”

¹⁵⁶ S 3(2)(3), at Network Enforcement (n 41)

¹⁵⁷ Sandra Schmitz-Berndt & Christian M. Berndt, ‘The German Act on Improving Law Enforcement on Social Networks: A Blunt Sword?’, Pp. 30–31 (Working Paper, Dec. 14, 2018).

¹⁵⁸ Schulz, ‘Wolfgang, Regulating Intermediaries to Protect Privacy Online – The Case of the German NetzDG’ (n 153)

¹⁵⁹ Article 19 legal analysis, ‘Germany: The Act to Improve Enforcement of the Law in Social Networks’, August 2017, available at, <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>, accessed on May 21 201.

¹⁶⁰ S 3, Para 1, at Network Enforcement Act (n 41)

¹⁶¹ Id, S 3, Para 2, no. 1

¹⁶² Id, Section 3(2)(1) and (5)

The NetzDG imposes further obligations on large social media platforms, includes requiring publication of user complaint transparency reports. Companies which receive more than a hundred complaints per calendar year about unlawful content are mandated to produce biannual reports on how they handled said unlawful content.¹⁶³ Social networks must provide the public with other information, including complaints received, removals, and bans imposed. So far, social networks have published five transparency reports for the two halves of 2018 and 2019, respectively, and the first half of 2020.¹⁶⁴

3.2.1.4. Social networks liability

NetzDG provides for regulatory fines in cases of violations of its provisions and carries heavy penalties for failure to comply. Social network providers systematically breaching obligations contained in the NetzDG, such as the obligation to remove unlawful content, can be punished with a regulatory fine of 5 million Euros for such violations with potential application of the fine to be multiplied ten-fold, to 50 million Euros.¹⁶⁵

3.2.1.5. Recognition for Self-regulatory institutions

NetzDG creates a system for recognizing “self-regulation institutions” as secondary review bodies for “unlawful content”. Under this scheme the providers can form a self-regulatory body that takes on monitoring and sanctioning responsibilities. The act provides the federal office for justice¹⁶⁶ with powers to recognize self-regulatory institutions (section 3(5) (7)). While the Act does not require social networks to create, join or fund self-regulatory institutions, it establishes incentives for social Networks to so do, and to seek recognition for these institutions from the Federal Office for Justice. The seven-day time limit does not apply if the social network refers

¹⁶³ S 2(1), NetzDG (n 41)

¹⁶⁴ Patrick Zurth, ‘The German NetzDG as Role Model or Cautionary Tale? Implications for the Debate on Social Media Liability,’ 31 *Fordham Intell. Prop. Media & Ent. L.J.* 1084, P.115, 2021. [Herein after, ‘The German NetzDG as Role Model or Cautionary Tale?’]

¹⁶⁵ David Kaye (Special Rapporteur on Freedom of Opinion and Expression), Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Reference OL DEU 1/2017, at 1 (June 1, 2018), available at <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1>, 2017. See also Cf. the Regulatory Fining Guidelines under the NetzDG, https://www.bmjv.de/SharedDocs/Downloads/DE/Themen/Fokusthemen/NetzDG_Bu%C3%9Fgeldleitlinien_engl.pdf?__blob=publicationFile&v=2, accessed on June 4 2021.

¹⁶⁶ The Federal Office of Justice is the central service authority of the Federal German judiciary. [Federal Office of Justice](#) is also port of call for international legal transactions and performs other functions.

the decision to a recognized self-regulating institution within seven days of receiving the initial complaint.¹⁶⁷

3.3. Hate speech regulation in South Africa

3.3.1. Hate speech in South Africa

South Africa's constitution protects the freedom of expression; however, it places a limitation on speech that "propagates for war; incites imminent violence; or advocates hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".¹⁶⁸ Despite these constitutional provisions, racially prejudiced and other discriminatory speech are common in the country. Even after the end of the Apartheid era, South Africa has struggled with racial divisions, discrimination, and violence.¹⁶⁹ The Reconciliation Barometer survey findings noted that strong distrust between racial groups still persists in South Africa¹⁷⁰ showing the nation is still polarized along racial lines and supremacist beliefs – a legacy of the country's apartheid past.¹⁷¹ The South African Department of Justice and Constitutional Development also stated that among the discriminatory speech cases reported, hate speech cases have been the most prevalent matters over the last 15 years.¹⁷²

3.3.2. Legal framework for the regulation of hate speech in South Africa

3.3.2.1. The Constitution of South Africa

Under South Africa's constitutional system, freedom of expression is expected to be construed in the context of the constitutional values of freedom, equality, and in particular, dignity.¹⁷³ Section 16 of the Constitution provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or

¹⁶⁷ S 3, NetzDG (n 41)

¹⁶⁸ Section 16(1), Constitution of the Republic of South Africa [South Africa], 10 December 1996, available at: <https://www.refworld.org/docid/3ae6b5de4.html>, accessed 31 July 2021.

¹⁶⁹ Schweppe, Jennifer; Walters, Mark Austin, 'The Globalization of Hate: Internationalizing Hate Crime?' Oxford University Press, 26 May 2016.

¹⁷⁰ Hofmeyr, 'South African Reconciliation Barometer', briefing paper, 3 July, 2016, Available at: <http://ijr.org.za/home/wp-content/uploads/2016/11/IJR-SARB-3-2015-WEB-final.pdf>, accessed 7 May 2021.

¹⁷¹ Hofmeyr, Jan and Govender, Ranjen, 'National Reconciliation, Race Relations, and Social Inclusion', SA Reconciliation Barometer, Briefing Paper 1, 8 December 2015: Institute for Justice and Reconciliation, Available at: http://ijr.org.za/home/wp-content/uploads/2016/11/IJR_SARB_2015_WEB_002.pdf accessed 10 February 2021.

¹⁷² Rajuili, K., & Nyathi, N., 'South Africa and Kenya's legislative measures to prevent hate speech', 2017, available at, <https://www.accord.org.za/conflict-trends/south-africa-kenyaslegislative-measures-prevent-hate-speech/>, accessed on May 20 2021.

¹⁷³ Alexander Traum, 'Contextualising the hate speech debate: the United States and South Africa,' The Comparative and International Law Journal of Southern Africa Vol. 47, No. 1, (MARCH 2014), pp. 64-8

ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.¹⁷⁴ Most legislation relating to freedom of expression has an express limitation inserted that makes it clear what free expression cannot extend to. The internal limitation within the South African Constitution is unique in that it is the only right within the Bill of Rights that contains an internal limitation clause. This is indeed attributed to the South African history of apartheid which seemed to thrive on discrimination, hate speech and harassment. The writers of the Constitution were cognizant of that history and the need to take steps to highlight the responsibility that lies with the ever so important right to freedom of expression.¹⁷⁵

3.3.2.2. The promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Racial tension and hate speech occurs with alarming frequency in South Africa.¹⁷⁶ To redress this, South Africa introduced a statute which prohibits hate speech, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act). In fact the constitutional prohibition on hate speech has been given practical legislative effect by this Act. The Act was enacted following article 9(4) of the Constitution which provides, that national legislation must be enacted in order to prevent or prohibit unfair discrimination.¹⁷⁷ Popularly known as the “Equality Act” has one of its objectives “the prohibition of hate speech” and this objective is embodied in its section 10, which prohibits the publishing, propagating, advocating or communicating with ‘clear intention’ to be ‘hurtful’; be harmful or to incite harm; promote or propagate hatred”.¹⁷⁸ *Bona fide* artistic creativity, academic enquiry and accurate reporting in the public interest do not amount to hate speech.¹⁷⁹

3.3.3. Institutions to deal with hate speech in South Africa

¹⁷⁴ Section 16 (1) of the Constitution of the Republic of South Africa (n 166)

¹⁷⁵ Freedom of Expression Institute Module series, ‘Hate Speech and Freedom of Expression in South Africa’, 2017. available at, https://nanopdf.com/download/1-hate-speech-and-freedom-of-expression-in-south_pdf, accessed on June 4 2021.

¹⁷⁶ Tanya Calitz, “Is the prohibition and criminalization of hate speech in South Africa constitutional?” (OXHRH Blog, September 2020), <http://ohrh.law.ox.ac.uk/is-the-prohibition-and-criminalisation-of-hate-speech-in-south-africa-constitutional/>, accessed on March 19, 2021.

¹⁷⁷ South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services (EQ44/2009; EQ13/2012) [2017] ZAGPJHC 218; [2017] 4 All SA 234 (GJ); 2018 (2) SA 149 (GJ) (18 August 2017), available at, <http://www.saflii.org/za/cases/ZAGPJHC/2017/218.html>, accessed on June 7 2021.

¹⁷⁸ Section 10(1), ‘Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000’, Available at: <http://www.justice.gov.za/legislation/acts/2000-004.pdf>, accessed 21 April 2021.

¹⁷⁹ Id, Section 10, read with the proviso in Section 12.

The means of enforcement of the legislative framework that regards to hate speech are in the form of three institutions:

3.3.3.1. South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is an independent institution established in terms of the Constitution of the Republic of South Africa, to support constitutional Democracy.¹⁸⁰ The SAHRC is mandated to promote a culture of human rights, to promote the protection, development and attainment of human rights, and to monitor and assess the observance of human rights in the Republic.¹⁸¹ The SAHRC engages directly with members of the public to raise awareness of rights such as equality, dignity and freedom of expression through outreach interventions, the production and dissemination of educational material and research to enable the public to assert and enforce their rights.¹⁸²

The SAHRC serves as the first port of call for individuals who seek recourse for a grievance that pertains to a violation of any or all human rights as apparent in the Constitution. Among which is the right to Freedom of Expression on the one hand and the right to equality or dignity on the other.¹⁸³ Often people with a grievance that relates to hate speech will lay a complaint to the SAHRC, which then adjudicates on the matter. Matters adjudicated on by the SAHRC may result in further court action should the SAHRC determine that the violation of the said human right warrants court deliberation.¹⁸⁴

3.3.3.2. Equality Courts

The Equality Courts were created by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The Equality Courts are civil courts situated within designated Magistrate Courts and all High Courts. The Act opted for civil remedies as opposed to criminalizing discrimination, hate speech, and harassment because of the ongoing process of

¹⁸⁰ Hate Speech: information Sheet, South African human rights commission, 2017, p.10, available at, <https://www.sahrc.org.za/home/21/files/Hate%20Speech%20Information%20Sheet-%20print%20ready-.pdf>, accessed on May 29 2021.

¹⁸¹ Id.

¹⁸² Id.

¹⁸³ P.20 at 'Hate Speech And Freedom Of Expression In South Africa' (n 173)

¹⁸⁴ See, The complaints procedure, at <http://www.sahrc.org.za/home/21/files/Revised%20Complaints%20Handling%20Procedures%20of%20the%20SAHRC%20240212.pdf>, accessed on June 1 2021.

truth and reconciliation at the time it was being drafted.¹⁸⁵ Persons aggrieved by a violation of their right to equality, unfair discrimination and hate speech may proceed to make such a case at the Equality courts of South Africa. Equality Courts are central to the protection of the right to equality. Equality courts determine matters involving unfair discrimination, hate speech or harassment.¹⁸⁶ The purpose of Equality Courts is to adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech, with a view toward eradicating the ever present post-apartheid spectre which essentially has divided the country along racial, gender and monetary related lines.¹⁸⁷

3.3.3.3. High Courts of South Africa

The Equality Act designates all high courts in South Africa to be equality courts for their areas of jurisdiction.¹⁸⁸ Although South African High Courts are designated by the department of Justice as automatic Equality Courts; however the process of lodging an equality court process in the High Court is not an automated one.¹⁸⁹

3.3.4. The Role of Equality Courts in regulating hate speech

PEPUDA “positions the Equality Courts as a key mechanism in achieving the overall purposes and aims of the act.”¹⁹⁰ As stated above, equality courts hear only cases relating to unfair discrimination, harassment, and hate speech. In effect, the establishment of these courts has contributed to the regulation of hate speech in various ways.

3.3.4.1. Historical justification

¹⁸⁵ Emily N. Keehn, ‘The Equality Courts as a Tool for Gender Transformation,’ available at <https://escholarship.org/uc/item/1ms61553>, accessed on June 13 2021.

¹⁸⁶ P.9, at Hate Speech: information Sheet (n 178)

¹⁸⁷ The equality court Explained, 2011, accessible at <http://www.polity.org.za/article/the-equality-court-explained-2011-05-19>, accessed on June 1 2021.

¹⁸⁸ S 16(1)(a), at equality act (n 176)

¹⁸⁹ Matters that can be taken to the high court are matters only on condition:

1. An order is made by an Equality Court of the Magistrate’s Court which exceeds the normal civil jurisdictional limit of the Magistrate’s Court, or
2. Where such order pertains to unfair discrimination which does not fall within one of the prescribed grounds, such an order must be confirmed by the High Court having jurisdiction prior to such order being of force and effect.
3. In addition, an appeal to the High Court lies from decisions made by Magistrate’s Court Equality Courts.

¹⁹⁰ Bohler-Muller, Narnia, “The Promise of the Equality Courts,” South African Journal on Human Rights, Vol 22 (3), 2005, 380-404, at p. 383.

South Africa has a history of vast inequity along racial lines. In the past racism was institutionalized and legitimized.¹⁹¹ The South African Constitution guarantees a host of rights as part of an effort to design a post-apartheid social system based on equality. The establishment of equality courts has functional and historically embedded justification from the South Africans context. Among the reasons particularly relevant to the South African context for separating Equality Courts from other courts, the significant one is associated with the distrust by black South Africans towards Magistrate Courts because of the “perceived association of magistrates’ courts with apartheid justice.”¹⁹² This fact may prevent black South Africans particularly unlikely to bring cases of discrimination and hate speech before Magistrate Courts.

3.3.4.2. Speciality

A contravention of the Equality Act entitles a complainant to institute proceedings against the respondent in specially created equality courts.¹⁹³ The Equality Act stipulates that matters under the Equality Act may only be heard by presiding officers who have completed a training course equipping them to be equality court presiding officers.¹⁹⁴ The Equality Act also specifies that each equality court is to have its own specially trained clerk to assist the court in the performance of its functions.¹⁹⁵ Accordingly, Trainings are provided to the designated magistrates, judges, and court clerks acting as Equality Court officials.

3.3.4.3. Standing in Equality Courts

The standing provisions under the Equality Act are generous. The PEPUDA confers legal standing in respect of hate speech cases to a variety of persons. Proceedings may be instituted by: (i) a person acting in his or her own interest; (ii) a person acting on behalf of someone who cannot act in his or her own name; or (iii) a person acting on behalf of or in the interests of a group or association.¹⁹⁶ More importantly, NGOs and certain institutions created by the South

¹⁹¹ Rustenburg Platinum Mine v SAEWA obo Bester [2018 5 SA 78](#) (CC), para, 48.

¹⁹² Dana Kaersvang, ‘Equality Courts in South Africa: Legal Access for the Poor’, the journal of the international institute, Vol. 15, Issue 2, 2008, available at, <http://www.i1.umich.edu/UMICH/i1/Home/PUBLICATIONS/II%20Publications/3%20Kaersvang-web.pdf>. accessed on July 1 2021. [herein after ‘Equality Courts in South Africa: Legal Access for the Poor’]

¹⁹³ Rosaan Krüger, ‘Small Steps to Equal Dignity: The Work of the South African Equality Courts,’ the Equal Rights Review, Vol. Seven, 2011, P. 29.

¹⁹⁴ Section 16(2), at Equality act

¹⁹⁵ Ibid, Section 17(1).

¹⁹⁶ Ibid, section 20 (1).

African Constitution to protect human rights were empowered to litigate on behalf of others. The South African Human Rights Commission may also institute equality court proceedings.¹⁹⁷

3.3.4.4. Equality Courts and legal access, legal assistance and expeditious disposition of cases

Equal access to courts is recognized as a fundamental human right under numerous human rights treaties. Meaningful and unobstructed access to judicial mechanisms and systems is crucial for the realization and enjoyment of many civil, cultural, economic, political and social rights.¹⁹⁸ However, a recent study estimates that an access to justice gap exists for a majority of the people in the world, perhaps even as many as two thirds.¹⁹⁹ High legal costs and confusing, rigid procedures serve to keep poor litigants out of court and often result in loss when they attempt to represent themselves.²⁰⁰ Accordingly, the designers of the Equality Courts identified several major barriers to litigation that could be addressed through an alternative court system. Those barriers were costs, informational deficits related to navigating the legal system, the intimidating nature of the courts, and the long time needed for litigation.²⁰¹ In response to such and other barriers various steps has been taken in to account in the time of the introduction of the equality courts.

Equality Courts are meant to be very inexpensive for litigants to use. Litigants are required to pay witnesses a small fee, but the presiding officer can waive this fee Also, unlike many South African courts, no fees are required to place a case before Equality Court.²⁰² The Equality Court offers other important procedural advantages to complainants and was designed to be more flexible and informal in its proceedings. This can be seen in several aspects of their design that

¹⁹⁷ Ibid.

¹⁹⁸ Magdalena Sepúlveda Carmona and Kate Donald, 'Access to justice for persons living in poverty: a human rights approach', SSRN Electronic Journal, 2014. [herein after 'Access to justice for persons living in poverty: a human rights approach']

¹⁹⁹ Hague Institute for the Internationalization of Law (HiiL). Trend Report, Part 1: Towards Basic Justice Care for Everyone - Challenges and Promising Approaches. The Hague: HiiL, 2012.[herein after Hague Institute for the Internationalization of Law (HiiL), 2012]

²⁰⁰ At 'Equality Courts in South Africa: Legal Access for the Poor' n (190)

²⁰¹ Id.

²⁰² Regulation 12(1) of the Regulations Relating to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (the Regulations) as published under GN R 764 in Government Gazette 25065 of 13 June 2003 and amended by GN 563 in Government Gazette 26316 of 3 April 2004.

intend to enable cases to be processed without legal representation, with minimal cost, and within a quick time frame.²⁰³

The creators of the Equality Court system also took steps to ensure that even uneducated complainants would be able to access information necessary to navigate the courts without Attorneys. Lawyers are not needed in Equality Courts, although their use is not banned. Advice needed by litigants would be provided by an Equality clerk. Additionally, both the Equality clerk and the presiding officer would provide guidance on how to develop the case, and on the type of evidence to be presented.

To make the courts less intimidating, the legislation requires that cases be heard in an “expeditious and informal manner” which facilitates and promotes participation by the parties.²⁰⁴ Also, channeling discrimination cases into Magistrate Courts could result in insufficient resources and attention being allocated to these cases, in part because of the high case backlog in Magistrate Courts.²⁰⁵

As a conclusion one can safely summarize the introduction of equality courts in South Africa as a constructive step to remove barriers to judicial access and a suitable alternative to the country’s historical context.

3.4. Hate speech regulation in Kenya

3.4.1. The prevalence of hate speech

Kenya comprises of people from different ethnic groups with different cultural traditions that they affiliate themselves to. This is attributed to colonial injustice in Kenya. Politics in Kenya is to a great extent based on tribe which has caused division and animosity among Kenyans due to its ethnically motivated competitive nature.²⁰⁶ The political and tribal groups are vulnerable to hate speech. Hate speech is a significant part of political culture in Kenya. The government was prompted to put measures in place to correct a toxic political culture that is based on advocating

²⁰³ P. 4, at ‘The Equality Courts as a Tool for Gender Transformation’ n (183).

²⁰⁴ at ‘Equality Courts in South Africa: Legal Access for the Poor’ (n 190)

²⁰⁵ Id.

²⁰⁶ Doreen Nekesa Busolo and Samuel Ngigi, ‘Understanding Hate Speech in Kenya,’ *New Media and Mass Communication*, Vol.70, 2018, p.43.

for hatred within the country.²⁰⁷ The violence in 2007-2008 brought about the realization of the impact of hate speech to the nation, due to this, measures were put in place to curb the hate speech. The violence that erupted during the 2007 election period left nearly 1500 people dead and 600, 000 displaced and is, in part, attributed to hate speech.²⁰⁸ There was a shift of hate speech from mainstream media to the social media platforms. The technology boom in Kenya, which positions itself as an African tech hub, has surely contributed to an inconsiderate use of hate speech.²⁰⁹ The experience of Kenya reveals that controlled hate speech is a prerequisite for attainment of national cohesion and integration, particularly during the campaigning period.²¹⁰ Hate speech had polarized communities along ethnic lines leading to ethnic tensions and violence. The effect of ethnic violence resulting from hate speech has been devastating to the socio-economic stability of the country.²¹¹

3.4.2. Legal intervention to regulate hate speech in Kenya

There are series of measures to combat hate speech in Kenya, including hate speech regulation laws.²¹² In Kenya, like many countries, the right to freedom of expression is constitutionally protected, while placing limitations on speech that propagates war, violence, advocacy for hatred and incitement to cause harm. Since the adoption of the 2010 Constitution of Kenya, hate speech legislation have an express constitutional endorsement: article 33(2) (Constitution of Kenya 2010) literally restricts freedom of expression with regard to propaganda for war, incitement to violence, hate speech and advocacy of hatred.

²⁰⁷ Somerville, Keith, 'Hate Speech Raises its Ugly Voice as Kenya Drifts into Election Mode', The Conversation, 21 June 2016, Available at: <http://theconversation.com/hate-speech-raises-its-ugly-voice-as-kenya-drifts-into-election-mode-61305>, Accessed 3 April 2021.

²⁰⁸ Human Rights Watch (2013) 'High Stakes: Political Violence and the 2013 Elections in Kenya', Available at: <https://www.hrw.org/report/2013/02/07/high-stakes/political-violence-and-2013-elections-kenya>, Accessed 5 June 2021.

²⁰⁹ Andrea Scheffler, 'the Inherent Danger of Hate Speech Legislation: A Case Study from Rwanda and Kenya on the Failure of a Preventative Measure', Edited by Mareike Le Pelley, Friedrich-Ebert-Stiftung, 2015.

²¹⁰ The Kenya national dialogue and Reconciliation; building a progressive Kenya, available at: p. 37 <https://www.worldcat.org/title/report-of-the-commission-of-inquiry-into-post-election-violence-cipev/oclc/263606369>, accessed on June 5 2021.

²¹¹ The Kiliku report which investigated ethnic clashes in 1992 documented seven hundred and seventy nine deaths and six hundred and sixty four injuries. Between 27th December 2007 and 29th February 2008 a total of 1,133 deaths were recorded. This was in addition to massive destruction of property. Available at, <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/55807/IDL-55807.pdf>, accessed on June 5 2021.

²¹² Institute of Development Studies, 'using digital and social media to monitor and reduce violence in Kenya's elections', 2017, (Policy Briefing, Issue 44). Available at; www.ids.ac.uk, accessed on June 4 2021.

With regard to introducing a legal framework as one of the measures to regulate hate speech in Kenya, it is worth to note the Kenya's National Cohesion and Integration (NCI) Act, 2008 which prohibited hate speech. The NCI Act is supported by the Penal Code of 2009²¹³, which defines hate speech as a subversive activity, intended or calculated to promote feelings of hatred and enmity between different races or communities in Kenya. There are also other laws with a number of provisions relevant to the regulation of hate speech online. Specifically, article 4(c) of the Kenyan Information and Communication Regulations of 2012 mandates service providers to 'register users of its system, keep a record of all registrations of subscriptions made and provide a copy of this record to the regulator upon request by the commission'.²¹⁴

3.4.2.1. Kenya's National Cohesion and Integration (NCI) Act 2008

Today, the National Cohesion and Integration Act seem to be the most relevant law for the prosecution of hate speech in Kenya. The apparent purpose of the National Cohesion and Integration Act is to "encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes". Section 13 of the National Cohesion and Integration Act deals with "hate speech" in express terms. Accordingly, hate speech covers speech which "is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up."²¹⁵

3.4.2.1.1. National Cohesion and Integration Commission

The UN Special Rapporteur on minority issues has endorsed the establishment of specialized institutions as a good practice for effectively addressing and responding to hate speech and incitement to hatred.²¹⁶ Dedicated institutional attention to hatred is essential to prevent atrocities and reinforce unity and stability. In Kenya, the National Cohesion and Integration Commission

²¹³ Chapter 63, Revised Edition 2009 (2008) Published by the National Council for Law Reporting with the Authority of the Attorney General.

²¹⁴ National Council for Law Reporting, 'Kenya Information and Communications Act' Chapter 411A of 1998 revised edition in 2012. National Council for Law Reporting, Available at; https://www.unodc.org/res/cld/document/ken/1930/information-and-communicationsact_html/Kenya_Information_and_Communications_Act_2_of_1998.pdf, accessed on June 4 2021.

²¹⁵ Section 13, at National cohesion and integration act, 2008

²¹⁶ Izsák, R Report of the Special Rapporteur on minority issues (2015), A/HRC/28/64, para.80-86.

(NCIC), was established as a dedicated institution whose mandate is to tame the use of hate speech and promote national cohesion and integration, facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya and to advise the government thereof.²¹⁷ The idea to set up the Commission was borne out of the realization that long lasting peace, sustainable development and harmonious co-existence among Kenyans require a deliberate normative, institutional and attitudinal process of constructing nationhood. Kenya has institutionalized the management of diversity by the creation of the national cohesion and integration act, and eventually a Commission to implement it.²¹⁸

Kenya has over forty-two ethnic tribes. Almost all ethnic communities in Kenya have some kind of stereotypes about others, either positive or negative. Most negative statements depict feelings of contempt and general hate towards targeted communities resulting in heightened friction and animosity among various ethnic communities.²¹⁹ Hate speech is one of the catalysts of the ethnic violence that Kenya has witnessed since the first intense tribal clashes in 1992 during the advent of multi-party politics; and which is said to have fuelled the 2007/2008 post-elections violence. Hate speech potential to polarize the country, perpetuate fear and hate among Kenyans was highly observed in those days. The National Cohesion and Integration Act which created the Commission encourages national cohesion and integration by outlawing discrimination and hate speech on ethnic grounds.²²⁰ Under Sections 13 and 62 of the National Cohesion and Integration Act (NCI Act of 2008), the NCIC is mandated to halt hate speech, a role that strives towards national cohesion and integration.²²¹

Controlling hate speech requires extensive undertakings. In line with this understanding, the NCIC had undergone various tasks under its mandate of taming hate speech. The Commission

²¹⁷ Onyoyo, 'Criminality in "Hate Speech" Provision in the Laws of Kenya- Jurisprudential Challenges,' 2012. Available at www.erepository.uonbi.ac.ke, Accessed on 2 march 2021.

²¹⁸ Stephen omondi, 'the language factor in the search for national cohesion and integration in Kenya,' Open edition journal, 2013. P.

²¹⁹ Naituli, J.G. and King'oro, S.N., "An examination of ethnic stereotypes and coded language used in Kenya and its implication for national cohesion", International Journal of Development and Sustainability, Vol. 7 No. 11, 2018, pp. 2670-2693.

²²⁰ Article 19, 'Kenya: use of "hate speech laws and monitoring of politicians on social media platforms", 2020, available at, <https://www.article19.org/resources/kenya-use-of-hate-speech-laws/>, accessed on May 20 2021.

²²¹ Adhi, B. G., 'Open source intelligence gathering for hate speech in Kenya,' (Thesis), 2018, Strathmore University, P. 5.

works with various communities and stakeholders and it has made considerable success in preventing hate speech by identifying hate mongers and recommending their prosecution. The role of the media in propagating hate speech has been clearly manifested in the post-election violence.²²² As a result, control of hate speech involves monitoring of the political rallies and media. To achieve this, NCIC has entered into a partnership with the Media Council of Kenya and the Communications Commission of Kenya (CCK). The partnership with the two institutions will enhance investigations into the hate speech matters.²²³

Also, the Commission has rolled-out national training programs on hate speech for law enforcement officers across the country. Targeting the Kenya Police, Office of Director of Public Prosecutions (DPP), judicial officers, and experts, the training seeks to expand and enhance the investigations of hate speech under the NCI Act.²²⁴

Issues related to historical injustices are one of the reasons leading to hate speech. To address historical injustices and to promote healing and reconciliation, the Truth, Justice and Reconciliation Commission Act, 2008, was established to create a commission that would establish an accurate, complete and historical record of violations and abuses of human rights.²²⁵ As part of such effort, the NCIC has established a joint Taskforce with the Truth, Justice and Reconciliation Commission (TJRC) on Healing and Reconciliation in Kenya.²²⁶

Hate speech regulation has important relevancy for fostering public order, promoting national cohesion, enhancing inclusive governance, mitigating hate speech, promoting rule of law, protecting human rights and guaranteeing sustainable democracy, especially in multi-ethnic and multi-religious societies.²²⁷ In this regard, the establishment of a dedicated commission for taming hate speech and other associated measures adopted to reduce the proliferation of hate speech in Kenya was accompanied by successful achievements in promoting inter-ethnic cohesion, conflict resolution and peace building in Kenya.²²⁸

²²² The Commission of Inquiry into the Post Election Violence (CIPEV) – The Waki Report 2008. Available at,

²²³ P. 37, at building a progressive Kenya (n 209)

²²⁴ Id, P.38

²²⁵ Id, P.14

²²⁶ Id, p. 38

²²⁷ Nicholas Asogwa & Christian Ezeibe, ‘the state, hate speech regulation and sustainable democracy in Africa: a study of Nigeria and Kenya’, African Identities, 2020.

²²⁸ Id, p.10

3.5. Conclusion

As this chapter has demonstrated, attempts by legislators to regulate hate speech both on and offline is an extremely complex and subtle process. The chapter has explored how the regulation of hate speech is approached by the republic of Germany, South Africa and Kenya. Despite significant differences in their history and culture, all have experienced ‘hate speech’ incidents, motivated by various grounds.

Germany’s Internet hate speech laws are considered particularly stringent, which makes sense considering the country’s long and pernicious history with racial genocide.²²⁹ Moreover, hate speech was spread and possibly led to violence following the 2015 refugee and migration crisis, in which German Chancellor Angela Merkel decided to welcome upwards of one million asylum seekers.²³⁰ Motivated by perceived failures of self-regulatory attempts by internet platforms,²³¹ the German government adopted the NetzDG in 2017 and entered into effect on 1 January 2018. The German rule obliges social media platforms to establish a procedure to respond to notifications and remove or block certain illegal hate speech posts within 24 hours for manifestly unlawful content and 7 days for unlawful contents. It should be noted that the NetzDG guarantees pressure on these providers by imposing administrative fines which has an important complementary function.

As a result of the lesson learned in 1992 clashes and 2007/8 Post Elections Violence that left many victims, Kenya has also entrenched hate speech in its laws as a way of protecting individuals and groups from any organized or spontaneous criminal offence against them that may be provoked by hate speech. The National Cohesion and Integration Act No. 12 of 2008 is the most relevant law to regulate hate speech. In Kenya the response for hate speech is purported to address the underlying issues and the symptoms at the same time. As part of addressing the underlying causes of hate, the 2008 act created the National Cohesion and Integration Commission with the mandate to facilitate and promote equality of opportunity, good relations,

²²⁹ Yulia A. Timofeeva, Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany, 12 J. TRANSNAT’L L. & POL’Y 253, 2003, P.262

²³⁰ <https://www.theatlantic.com/international/archive/2018/09/facebook-violence-germany/569608/>, accessed on August 10, 2021.

²³¹ <https://www.dw.com/en/facebook-must-ban-abusive-content-says-german-justice-minister-maas/a-18676705>, accessed on July 30, 2021.

harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya.

South Africa has a history of vast inequity along racial lines. Intended to enact the right to equality guaranteed in the South African Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 was made possible by legislative routine. The hate speech provisions in the legislation have been expressly designed and interpreted to protect the hated from words that are “hurtful,” “harmful or to incite harm,” and “promote or propagate hatred.”²³² As for enforcement, special equality courts are used to enforce the provisions of the 2000 legislation. Selected officers of the equality courts, drawn from sitting magistrate and high court officers are under obligation to undergo special training to sit on hate speech cases. As the legislation reads, equality court officers are “designated, by reason of his or her training, experience, expertise, and suitability in the field of equality and human rights.”²³³ Training for court officers has proved to be a crucial part of the 2000 legislation. The success of the equality legislation largely depends on the success of the new equality courts. Overall, the Ethiopian legal system should emulate from the comparative lessons of Germany, Kenya and South Africa to fully and effectively regulate hate speech in Ethiopia.

²³² Paul Sniderman et al., “The New Racism,” *American Journal of Political Science* 35 (1991): 423–48;

²³³ Stuart Hall, “The Spectacle of the ‘Other,’ ” in *Representation: Cultural Representations and Signifying Practices*, ed. Stuart Hall et al., 257–59 (London: Sage Publications, 1997).

CHAPTER FOUR

4. HATE SPEECH REGULATION IN ETHIOPIA

4.1. Introduction

Ethiopia has been undergoing significant political, legal and institutional reforms that have profound and far-reaching implications for its future.²³⁴ Since 2018, the transition has, however, been challenged by heightened instability, violence and insecurity. The role of hate speech has been significant in its contribution to recent ethnic clashes that took place in different parts of the country.²³⁵ Hate speech has thrived in the Ethiopian media ecosystem and particularly online.²³⁶ Social media have grown in popularity, and it is awash with hate speech.²³⁷

Despite the presence of various scattered legislation relevant to hate speech regulation, with a view to enhance consistency and comprehensiveness which could help to adequately address the problem of hate speech,²³⁸ the government of Ethiopia enacted special legislation called the Hate Speech and Disinformation Prevention and Suppression Proclamation which came into force on 23 March 2020.²³⁹ The law prohibits dissemination of hate speech or disinformation through broadcasting, print, or social media using text, image, audio, or video. Although the proclamation criminalized the use of hate speech, the legal machineries responded reluctantly in terms of prosecuting offenders.

²³⁴UN provides trainings for representatives of government, CSOs and media on countering hate speech in Ethiopia,' 2021, available at, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E>, accessed on June 17, 2021.

²³⁵ Nicholas Asogwa & Christian Ezeibe, 'The state, hate speech regulation and sustainable democracy in Africa: a study of Nigeria and Kenya', 2020, African Identities, DOI: 10.1080/14725843.2020.1813548, p. 3.

²³⁶ European institute of peace, 'fake news misinformation and hate speech in ethiopia: a vulnerability assessment,' available at, <https://www.eip.org/new-publication-fake-news-misinformation-and-hate-speech-in-ethiopia-a-vulnerability-assessment/>, accessed on June 18 2021.

²³⁷ Felix Horne, 'Ethiopia's transition to democracy has hit a rough patch. It needs support from abroad,' los Angeles times, 2019. Available at, www.hrw.org/news/2019/04/08/ethiopia-transition-democracy-has-hit-rough-patch-it-needs-support-abroad, accessed on July 4, 2021.

²³⁸ Interview with Awel sultan mohammad- head, press secretariat, office of federal attorney, On Hate Speech Regulation in Ethiopia, June 12, 2021. [herein after, interview with Awel]

²³⁹ New Ethiopia law feared undermining free speech, Anadolu Agency, 2020, Available at, <https://www.aa.com.tr/en/africa/new-ethiopia-law-feared-undermining-free-speech/1733329>, accessed on June 3 2021.

This chapter analyses and sets out the legal and institutional frameworks available for the regulation of hate speech in Ethiopia. Besides, as a continuation of the previous chapter, important lessons will be drawn from the experience of states whose response to hate speech has been discussed. The vulnerability of Ethiopia to hate speech which underpins the importance of the regulation of hate speech and the challenges of the regulation is also the other issue which will be discussed under this chapter.

4.2. The prevalence of hate speech in Ethiopia

The 2015 report of Rita Izsák, the Special Rapporteur on minority issues, revealed that there is no country in this world, which is free from hatred and most often those belonging to national, ethnic, religious and linguistic diversities are the targets of hate.²⁴⁰ Throughout history, hate speech is the cause for gross violations of human rights by leading to the commission of international crimes such as genocide, crime against humanity or ‘ethnic cleansing’.²⁴¹ Ethiopia is not an exception. In Ethiopia, it has been noted by different writers that hateful speech has contributed significantly to the recent unfolding polarized political climate, ethnic violence and displacement.²⁴²

The Ethiopian People’s Revolutionary Democratic Front (EPRDF)—a coalition of four ethnically and regionally representative parties—came to power in Ethiopia in 1991 after ousting the *Derg*, the military junta that had ruled since 1974.²⁴³ After the coalition seized power, Ethiopia got its fourth written constitution, which entered into force on 21 August 1995. The FDRE Constitution establishes an ethnic based federal state consisting of regional states delineated on the basis of settlement patterns, language, identity, and consent of the people concerned.²⁴⁴ The 1991 constitution divides the country into nine ethnically-based regions and gives each virtual autonomy in legislative, executive, and judicial matters to the extent of self-determination at the risk of exposing the country to fragmentation and political turmoil.²⁴⁵

²⁴⁰ Izsák, R Report of the Special Rapporteur on minority issues (2015), A/HRC/28/64, para.29

²⁴¹ Schabas, ‘W’, ‘Hate Speech in Rwanda: The Road to Genocide,’ 46 MCGILL L.J. (2000), p.144

²⁴² Abraha, halefom. ‘The problems with Ethiopia’s proposed hate speech and misinformation law,’ media policy project blog, 2019, available at, <https://blogs.Ise.ac.medialse.2019/06/04/the-problems-with-ethiopias-proposed-hate-speech-and-misinformation-law>, accessed on May 14, 2020.

²⁴³ Human Rights Watch, Human Rights Watch World Report 1996 - Ethiopia, 1 January 1996, available at: <https://www.refworld.org/docid/3ae6a8af34.html>, accessed 20 June 2021.

²⁴⁴ Arts 1, 46 and 47, FDRE constitution (n 8)

²⁴⁵ At ‘Human Rights Watch World Report 1996 – Ethiopia.’ (n 242)

Moreover, the Constitution aims at “rectifying historically unjust relationships,”²⁴⁶ which would result in politicizing ethnic differences and created angers and suspicions between others and those who think as ‘marginalized societies’ in Ethiopia.²⁴⁷ This ethnic cleavage has been intensified and fuelled by hate speech through creating ‘us’ and ‘them’ narratives.²⁴⁸

Also the arrangements of political parties on ethnic lines have the potential to contribute to an increase in ethnic tension and hate speech.²⁴⁹ In this regard it has also been insisted that, hate speech had contributed to precipitating election violence in Ethiopia during the most contested election in the country.²⁵⁰ For instance, Yared L. Mengistu has asserted that Ethiopia experienced the harms of hate speech during May 2005 elections which resulted in the death of many citizens.²⁵¹ Accordingly

There is unsettled resemblance between the hate propaganda used during the Rwandan genocide and the hate campaign surrounding the May 2005 elections in Ethiopia. Fortunately, Ethiopia did not experience killings of genocidal proportions, although the election air was charged with hate, recrimination, and bloodshed.²⁵²

The rapidly increasing number of social media users in Ethiopia has contributed to the spread of hate message through such Media. To indicate the situation, the former PM Hailemariam Dessalegn, at 71th UN General Assembly conference said that “...social media has certainly empowered populists and other extremists to exploit people's genuine concerns and spread their message of hate and bigotry without any inhibition.”²⁵³ More recently, officials including Prime Minister Abiy have started to express alarm about the potential for social media, particularly

²⁴⁶ preamble Para 5, at FDRE Constitution (n 8)

²⁴⁷ Yohannes Eneyew Ayalew, ‘Defining ‘Hate Speech’ under the Hate Speech Suppression Proclamation in Ethiopia A Sisyphean exercise?’, 12 *Ethiopian Human Rights Law Series* (2020), 57-79.. [herein after, Yohannes ‘Defining ‘Hate Speech’]

²⁴⁸ Ibid.

²⁴⁹ Concluding Observation of ICERD on Ethiopia, Seventy-fifth session 3-28 August 2009, par.13.

²⁵⁰ Teshome W., ‘Electoral violence in Africa: Experience from Ethiopia’, *International Journal of Human and Social Sciences*, 4(6), 2009, p. 463–488.

²⁵¹ Mengistu, Y ‘Shielding Marginalized Groups from Verbal Assaults Without Abusing Hate Speech Laws’ in Herz,M and Peter Molnar,P (eds) in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, Cambridge University Press 2012, p.361.[herein after, ‘Mengistu, Y ‘Shielding Marginalized Groups in Ethiopia’]

²⁵² Ibid.

²⁵³ Prime Minister Hailemariam Desalegn Speaking on 71st UN General Assembly available at https://www.youtube.com/watch?v=8yjT-eB_YmY&t=519s, visited on April 3 2021.

Facebook, to exacerbate ongoing political tensions and ethnic violence.²⁵⁴ Thus, the specific understanding of online hatred has its own potential to trigger off-line violence.²⁵⁵

There are also various terms and codes used to disseminate hateful contents against targeted groups both in online and offline conversations. For instance, derogatory terms like ‘Neftegna’, ‘Galla’, ‘Tsila’ and ‘Wolamo’ are used to refer Amhara, Oromo, Tigre and wolayta peoples respectively.²⁵⁶ Though a comprehensive empirical research on the magnitude of the spread of hate speech in Ethiopia is not available, one cannot deny its existence.

4.3. The legal framework for hate speech regulation in Ethiopia

Laws pertinent to hate speech regulation in Ethiopia are scattered in many pieces of legislation, in particular under the Freedom of the Mass Media and Access to Information Proclamation, Broadcasting Service Proclamation, the FDRE Revised Criminal Code of 2004, the Telecom Fraud Proclamation, Advertisement Proclamation, Computer Crime Laws, Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting, the 1960 Civil Code and other relevant legislations. However, in February 2020, the Ethiopian government has adopted a new Proclamation aimed at countering hate speech.

4.3.1. FDRE Constitution

The Constitution devotes more than third of its content to provisions on fundamental human and people’s rights.²⁵⁷ The constitution further elevates the horizon of human rights through reference to international and regional human rights instruments as thresholds for the interpretation of its human rights provisions.²⁵⁸ Article 13(2) requires that the bill of rights “shall be interpreted in a manner conforming to the principles of the universal declaration of human rights, international covenants on human rights and international instruments adopted by Ethiopia”. The right to freedom of expression is among those rights recognized under article 29

²⁵⁴ Available at: <https://www.hrw.org/news/2018/12/03/tackling-hate-speech-ethiopia>, accessed on May 4, 2021.

²⁵⁵ Matt Pohjohe and Shana Udupa, ‘Extreme speech online, an anthological critique of hate speech debates’ ,international journal of communication, 11(2017), 1173–1191 page 11

²⁵⁶ Iginio Gagliardone and et al, ‘Mechachal: Online Debates and Election in Ethiopia: From Hate Speech to Engagement in Social Media’, (University of Oxford and Addis Ababa University, 2016) 40.

²⁵⁷ See Chapter 3, Arts. 13 – 44, at FDRE Constitution (n 8)

²⁵⁸ Id, Article 13(3)

of the constitution. However, the right to freedom of expression is not absolute under FDRE constitution. The constitutional guarantees for freedom of opinion and expression clearly specifies restriction on this right:

These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honor and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.²⁵⁹

In addition to stating that limitations of freedom of expression can only be made through law, the first clause of the provision clearly spells out the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. The first part of these prohibitions is a prohibition of “content based” limitation and acquired the inspiration from the US jurisprudence on “content based discrimination.”²⁶⁰ Content based restriction of freedom of expression is about the limitations of communication because of the message conveyed.²⁶¹ A question can be raised is whether or not an absolute prohibition that would proscribe even limitations that are aimed at limiting the dissemination of materials with hateful content. However, one can argue that since protecting the well-being of the youth and honor and reputation of individuals are provides as a ground for restriction, such content based limitation could be acceptable. Furthermore, the third clause of sub-Article 6 imposes an obligation on the legislature to enact laws that prohibit speech that is intended to injure human dignity and hate speech could be considered one among those expressions that injures human dignity. Despite the above statement, the constitution does not contain a clear limitation on the right to freedom of expression based on hate speech restrictions.

However, when we look in to South Africans constitution, it explicitly excludes hate speech from constitutional protection. Accordingly, Section 16(2) of the constitution expressly places “hate speech” that is based on race, ethnicity, gender, or religion, and that constitutes incitement to

²⁵⁹ Art 29(6), at FDRE Constitution (n 8)

²⁶⁰ Keith Werhan , ‘Freedom of Speech: A Reference Guide to the United States Constitution’, Praeger Publishers, 2004, pp. 73-74

²⁶¹ Stone, G., ‘Content Regulation and the First Amendment,’ 25 Wm. & Mary L. Rev.189, 1983, p.190.

cause harm outside freedom of expression, and removes it from the ambit of constitutional protection. Similarly Kenya included the term that prohibits hate speech in Constitution. Whereas Kenya and South Africa's constitution includes an express hate speech provision, Ethiopia has incorporated a general limitation clause in its Bill of Rights while hate speech provisions are enacted in various criminal and civil statutes.²⁶²

4.3.2. The Civil Code

A civil action is the other appropriate legal measures to regulate hate speech because civil remedy such as the payment of compensation, injunction or other measures are important to protect individuals against the harms of hate speech. In this regard, the civil code recognizes a civil cause of action for defamation, in which a successful plaintiff is entitled to obtain damages and/or an injunction.²⁶³ Although there are resemblance between defamation law and hate speech laws, they are quite different. Hate speech laws protect groups in addition to individuals, whereas defamation laws protect only individual's and also the protection defamation laws offer is only partial compared to anti-hate speech laws as truth can serve as a defense.²⁶⁴

4.3.3. Media Laws

Media laws such as the Broadcasting Service Proclamation No. 533/2007, Media Proclamation No. 1238/2021 and Advertisement Proclamation No. 759/2012 serves an important role in the regulation of hate speech. The Broadcasting Service Proclamation No. 533/2007 is one of the media laws which are pertinent to regulate hate speech. Important in this regard is Article 30(4) of the proclamation which sets prohibitions as the general guidelines for the transmissions of programs, that violate the dignity and personal liberty of mankind or the rules of good behavior or undermine the belief of others; maliciously accuse or defame individuals, nation/nationalities, peoples or organizations; cause dissension among nationalities or instigate dissension among peoples; or incite war.²⁶⁵

The Ethiopian parliament has also approved a new media law on February 2, 2021. The law has been regarded as a liberal one and a positive step to enhance media freedom in Ethiopia which

²⁶² P. 377, at Mengistu, Y 'Shielding Marginalized Groups in Ethiopia (n 251)

²⁶³ Art. 2047, Civil Code of Ethiopia 1960, the Federal Negarit Gazeta Year, No. 2, Proclamation No. 165/1960.

²⁶⁴ P. 365, at Mengistu, Y 'Shielding Marginalized Groups in Ethiopia (n 251)

²⁶⁵ Article 30 (4), Broadcasting Service Proclamation No.533 of 2007.

has been the subject of major setbacks due to assault and killings of journalist, imprisonment of editors and media owners and closure of regime critical media.²⁶⁶ This proclamation without stating the term ‘hate speech’, it prohibited some of the constitutive elements of hate speech. For instance, the law requires, among other obligations, online media to avoid language usage which are obscene and vulgar, and contribute to previously-exist and non-existing hostilities based on gender, ethnicity, and religion and incite violence in the content production, publishing and dissemination.²⁶⁷

Advertisements could be used to spread hate speech. Therefore, advertisement, if not regulated, may harm the rights and interest of the people.²⁶⁸ Accordingly Article 7 (1) and (5) of the advertisement proclamation prohibits advertisements that contains image, speech or comparisons that violates the dignity, liberty or equality of mankind in relation to language, gender, race, nation, nationality, profession, religion, belief, political or social status and advertisement that instigates chaos, violence, terror, conflict or fear among people.²⁶⁹

4.3.4. Criminal laws

The 2004 criminal code²⁷⁰ of Ethiopia contained a number of provisions that can potentially be applied against certain types of hate speech. Among the articles, article 486(b) is an important provision that is of particular relevance to hate speech regulation. As per Article 486(b) of the Criminal Code, “whoever by whatever accusation or any other means foments dissension, arouses hatred, or stirs up acts of violence or political, racial or religious disturbances”²⁷¹ is guilty of a crime. However, this provision is now repealed by the hate speech suppression proclamation without being applied in court of law for cases pertaining to hate speech.

The 2016 Computer Crime Proclamation also criminalized an array of online activities. For example, content that “incites fear, violence, chaos, or conflict among people” can be punished

²⁶⁶ ‘New liberal media law in Ethiopia,’ 4 February 2021, available at, <https://www.mediasupport.org/news/new-liberal-media-law-in-ethiopia/#:~:text=The%20Ethiopian%20parliament%20approved%20a,Minister%20Abiy%20Ahmed%20in%202018>, accessed on May 30 2021.

²⁶⁷ Article 61 (1), Media Proclamation No. 1238/2021, Federal Negarit Gazette No. 22, 5th April, 2021.

²⁶⁸ Preamble, Advertisement Proclamation No. 759 of 2012.

²⁶⁹ Art 7(1) and (2), Advertisement Proclamation No. 759 of 2012.

²⁷⁰ The Criminal Code of the Federal Democratic Republic of Ethiopia Proclamation No. 414 of 2004.

²⁷¹ Id, Art 486(b)

with up to three years in prison²⁷² and another provision ban the dissemination of defamatory content, which can be penalized with up to 10 years in prison.²⁷³ However, the law has failed to criminalize, among others, racist and xenophobic content.²⁷⁴

The Proclamation to establish the procedure for peaceful demonstration and public political meeting (proclamation no. 3/1991) also prohibits, under the pain of criminal liability, peaceful demonstrations or public political meetings held to further “discrimination based on race, color, region, sex or similar characteristics” or “racist promotion and provocation of ethnic mistrust and hatred among nations, nationalities and peoples.”²⁷⁵ Therefore, one cannot discuss an agenda which is discriminatory in public meetings and demonstrators cannot convey an idea of ethnic conflict and hatred.²⁷⁶

4.3.5. The Hate Speech and Disinformation Prevention and Suppression Proclamation No. 1185/2020

Ethiopia is experiencing a turbulent period of political change set off by the 2018 appointment of Prime Minister Abiy Ahmed, who came to power after Prime Minister Hailemariam Desalegn resigned in the face of mass protests.²⁷⁷ As part of such commitment, the Ethiopian government, in February 2020²⁷⁸, approved a new a hate speech law that makes the intentional publication, distribution, and possession of false information illegal with a view that its reform can be threatened by hate speech that incites violence. Hate speech and the deliberate spreading of misinformation on social media have been blamed for fanning the flames of violent conflict in regions of Ethiopia.²⁷⁹ The proclamation clearly stated in its preamble that it aims to prevent the spread of hate speech and fake news in Ethiopia, both online and offline. It is intended to

²⁷² Computer Crime Proclamation, 2016, Art.14, Proc. No. 958, Fed. Neg. Gaz. Year 22, No.83.

²⁷³ Id, Article 13.

²⁷⁴ Kinfe Micheal Yilma, Some Remarks on Ethiopia’s New Cybercrime Legislation, Mizan Law Review, Vol. 10, No.2,p.455.

²⁷⁵ Art. 8 (1), Proclamation No. 3/1991 for Peaceful Demonstration and Political Meeting.

²⁷⁶ P. 369, at Mengistu, Y ‘Shielding Marginalized Groups in ethiopia (n 251)

²⁷⁷ Ethiopia: Freedom in the World 2021 Country Report | Freedom House, available at, [/Ethiopia%20Freedom%20in%20the%20World%202021%20Country%20Report%20-%20Freedom%20House.html](#), accessed on June 24, 2021.

²⁷⁸ The Hate Speech and Disinformation Prevention and Suppression Proclamation law, which bans the production and dissemination of hate speech and fake news, such as creating or sharing social media posts that could result in violence or disturbance of public order, was passed into law by the House of People’s Representatives with a majority vote in the 547-seat parliament. Some 23 lawmakers voted against it while there were two abstentions .see, Addis Getachew, ‘New Ethiopia law feared undermining free speech (N 239)

²⁷⁹ Ibid, at Ethiopia: Freedom in the World 2021 Country Report | Freedom House (n 277)

minimize hate speech mainly by criminalizing individuals who disseminate hate speech by "broadcasting, printing, or social media using text, pictures, audio, or video." The law imposes fines up to 100,000 Ethiopia Birr and prison sentences on up to 3 years for any person who disseminates hate speech.²⁸⁰

4.3.5.1. Defining hate speech under the Proclamation

The problem of hate speech becomes as much about finding ways to mitigate the social and political tensions underlying such expressions of hatred as it is about determining what kinds of speech acts are acceptable and what is not- as it may mostly involves question of freedom of expression.²⁸¹ But how exactly do we define what hate speech is? Moreover, what does this contested term imply across a diverse range of nations and nationalities with often radically different sociopolitical contexts and contested histories in countries like Ethiopia?

The proclamation defines the term ‘hate speech’ as “any speech that deliberately promotes hatred, discrimination or attack against a person or a discernible group of identity, based on ethnicity, religion, race, gender or disability.”²⁸² The law defines ‘hate speech’ very broadly and susceptible to subjectivity.²⁸³ Subjectivity conquered the definition as it failed to define what constitutes hatred- which is part of the essential nature of hate speech.²⁸⁴ The proclamation attempt to be more specific by providing definitions for vague terms such as ‘discrimination’ and ‘attack’ has not been observed when it comes to the term ‘hatred’.²⁸⁵ In fact, emotions, feelings, or attitudes of hate or hatred are part of the essential nature of hate speech and it would be better had a clear definition been incorporate for what amounts to hatred for the seek of avoiding any excessive interpretation of the term. In the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, for instance, among the key terms “hatred” has been defined as... intense and irrational emotions of opprobrium, enmity and detestation towards the target group.²⁸⁶

²⁸⁰ Art 7, Hate Speech and Disinformation Proclamation (N 26)

²⁸¹ Matti Pohjonen, ‘A Comparative Approach to Social Media Extreme Speech: Online Hate Speech as Media Commentary’, *International Journal of Communication* 13(2019), 3088–3103, at 3099.

²⁸² Article 2 (2), Hate Speech and Disinformation Proclamation (n 26)

²⁸³ Interview with Awel (n 237), see also Yohannes “Defining ‘Hate Speech’” (n 246)

²⁸⁴ P. 2, at Alexander Brown, ‘what is hate speech? part 1(n 38)

²⁸⁵ P. 325, at Y Eneyew Ayalew ‘Assessing the limitations to freedom of expression on the internet in Ethiopia (n 7)

²⁸⁶ The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012,

Determining whether a given speech advocates hatred against the protected groups requires due consideration to the state of mind of the parties involved. In this regard the Supreme Court of Canada in *Canadian Human Rights Commission v. Taylor*²⁸⁷ stated that: with "hatred" the focus is a set of emotions and feelings which involve extreme ill will towards another person or group of persons. To say that one "hates" another means in effect that one finds no redeeming qualities in the latter.²⁸⁸ Hate is more than mere bias, and must be discriminatory. Hate is an indication of an emotional state or opinion, and therefore distinct from any manifested action.²⁸⁹ Accordingly, "hatred" relates to the state of mind of the speaker vis-à-vis the target group, and to the state of mind of the audience who s/he ultimately seeks to incite to the proscribed conducts.²⁹⁰ This is distinct from the feelings of insult or indignity that the target group may feel when confronted by 'hate speech.'

The lack of a clear definition for hatred under the proclamation inherently leaves room for the discretion of law enforcement authorities, such as prosecutors and courts to decide over what is to be viewed as "hatred" out of their own perceptions. In fact what is perceived to be hatred for some group of society may not necessarily be hatred to others as perception and interpretation may vary from one to the other. In the absence of specific guidelines on how to assess a speech that is deemed to be hate speech and clear definition for hatred, the chances of inconsistent application of the law remains high, as law enforcement officials – the police, prosecutors and judges – are all part of society and amenable to group sensitivities and narratives.²⁹¹ The concern with the definition lies on the fact that individuals – and law enforcement authorities – would not be sufficiently guided by this language as to what constitutes "hate speech," an offense subject to serious penalties, and that it would provide prosecutors with excessive discretion to apply the

accessed on June 20, 2021.[herein after Rabat plan of action], See also Article 19 The Camden Principles on Freedom of Expression and Equality (2009), Principle 12(1).

²⁸⁷ *Canada (human Rights Commission) v. Taylor*, 1990 SCC 26, [1990] 3 SCR 892 at para 92 , 75 DLR (4th), available at, <https://www.canlii.org/t/1fsp>, accessed on May 20 2021.

²⁸⁸ *Ibid*, at para 92

²⁸⁹ Article 19, "Hate Speech' Explained", 2015, p. 10. Available at, [https://www.article19.org/data/files/medialibrary/38231/Hate-Speech'-Explained---A-Toolkit-\(2015-Edition\).pdf](https://www.article19.org/data/files/medialibrary/38231/Hate-Speech'-Explained---A-Toolkit-(2015-Edition).pdf), accessed on March 5 2021.

²⁹⁰ *Id*, P. 75.

²⁹¹ Adem Kassie Abebe, 'Understanding Ethiopia's Hate Speech Law, Protecting Freedom of Expression,' available at, <https://defyhatenow.org/understanding-ethiopias-hate-speech-law-protecting-freedom-of-expression/>, accessed on May 21, 2021.

definition to various expressions.²⁹² This overbroad definition renders it subject to discretionary interpretation by law enforcers such as prosecutors and courts, which creates ground for abusing citizens' rights of freedom of expression.²⁹³

This problem has significantly contributed to the in-applicability of the one- years old hate speech law. According to an interview with Awel, the fact that the proclamation defines hate speech very broadly is among the reasons for rendering the bill out of function for more than a year since enacted. He also expressed his fear that law enforcement officials including judges might not be clearly oriented as to what amounts to hate speech among various expressions if one genuinely looks in to the wordings of the proclamation. Further, he suggested the judiciary to develop a set of guidelines or benchmarks to enable the proper identification of speech with hateful contents. If so, in addition to safeguarding the proper limits of individual's rights to freedom of expression, uniformity can be achieved in the application of the proclamation.

It is not an easy task to reach in to conclusive view on what constitutes hate speech. For instance in South Africa still no consensus has been reached about how the section dealing with hate speech in the equality act ought to be interpreted.²⁹⁴ In March 2019, almost two decades after the enactment of the PEPUDA, the South African Human Rights Commission (the SAHRC) in an official report²⁹⁵ commented that divergent views exist in the various Equality Courts as to what would constitute hate speech. In South Africa it seems to be a point of consensus hate speech provisions are still on the underdeveloped side. In Ethiopia, too and by far, hate speech regulation is in its infancy and development of it could be brought through case law and possibly any other interventions in future.

Given the complexity and risks of abuse of hate speech laws to restrict legitimate speech, efforts has been sought to create spaces for promoting a shared understanding of what hate speech is. In this regard the formulation of the Rabat Plan of Action on the prohibition of “national, racial or

²⁹² Report by special rapporteur David Kaye (n 163)

²⁹³ Analysis of Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation No.11 85 /2020, 2020, available at, https://cipesa.org/?wpfb_dl=398, accessed on May 3, 201.

²⁹⁴ Marais ME and Pretorius JL, 'The Constitutionality of the Prohibition of Hate Speech in terms of Section 10(1) of the Equality Act: A Reply to Botha and Govindjee,' PER / PELJ 2019(22) – DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5718>.

²⁹⁵ South African human rights commission, 2019, available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20&%20Other%20March%202019.pdf>, accessed on March 4, 2021.

religious hatred that constitutes incitement to discrimination, hostility or violence” was remarkable.²⁹⁶ It proposed a six part threshold test to identify hate messages, considering context,²⁹⁷ speaker,²⁹⁸ intent,²⁹⁹ content,³⁰⁰ extent of the speech³⁰¹ and likelihood the speech could incite actual harm.³⁰² The above six factors are helpful to assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred.³⁰³ Unfortunately, the proclamation failed to draw inspiration from the norms adopted in the action plan. Also the Legal Resource Centre of South Africa identified very important factors to be considered in deciding whether an expression constitutes hate speech while applying the hate speech protection in the equality courts.³⁰⁴ The factors are: historical associations and in relation thereto who the utterer is as against the victims; where and to whom the utterance is made; and the socio-political circumstances at the time of making the utterance. In South Africa some words that are used may bear cultural or historical associations that qualify them as hate speech. Examples include calling a black South African a "baboon" or likening him to a monkey³⁰⁵ and calling the members of a

²⁹⁶ Conclusions and recommendations emanating from the four regional expert workshop organized by the OHCHR in 2011 and adopted by experts in Rabat, Morocco on 5 October 2012, available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf, accessed on May 5, 2021.

²⁹⁷ Rabat Plan of Action (n 287), para 29(a) “Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.”

²⁹⁸ Rabat Plan of Action (n 287), para 29(b) “the speaker’s position or status in the society should be considered, specifically the individual’s or organization’s standing in the context of the audience to whom the speech is directed.”

²⁹⁹ Rabat Plan of Action (n 287), para 29(c) “Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for “advocacy” and “incitement” rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.”

³⁰⁰ Rabat Plan of Action (n 287), para 29(d) “Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.”

³⁰¹ Rabat Plan of Action (n 287), para 29(e) “Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the internet.”

³⁰² Rabat Plan of Action (n 287), para 29(f) “It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.”

³⁰³ Article 19, ‘Responding to ‘hate speech’: Comparative overview of six EU countries’, 2018, available at, https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf, accessed on July 30, 2021.

³⁰⁴ J Geldenhuys, M Kelly-Louw, ‘Demystifying Hate Speech under the PEPUDA’, PER vol.23 n.1, 2020, available at, <http://dx.doi.org/10.17159/1727-3781/2020/v23i0a7520>, accessed on May 2 2021.

³⁰⁵ *Lebowa Platinum Mines Ltd v Hill* 1998 19 ILJ 1112 (LAC) paras 12, 41, 58

population group "cockroaches."³⁰⁶ In assigning meaning to words, South African courts generally use dictionary definitions and refer to meanings assigned to words in previous court cases. However, in some cases even if the wording does not state what is meant, the true meaning of the utterance has been deduced. For instance, in *Dyonashe v Siyaya Skills Institute (Pty) Ltd*,³⁰⁷ even though the expression did not expressly refer to Whites but rather to "Boers", which could be viewed as a neutral race descriptor,³⁰⁸ the commissioner was satisfied that objectively viewed the reasonable person would read "Kill the Boer" to mean kill white people. Similarly, in *Afri-Forum v. Malema*,³⁰⁹ South African First Instance Equality Court ruled that Julius Malema, was found guilty of hate speech against white minorities after he, on several occasions, sang verses from a South African liberation song. The court had held that the struggle song "Kill the Boer" is understood by the reasonable person to mean kill white people.³¹⁰ Who the perpetrator is also plays a role in different ways. The more powerful the utterer is relative to the target group, the greater the threat of harm. How much value is attached to the expression is also linked to the perpetrator's identity. For instance, In *Dagane v SSBC*³¹¹ case it was noted that Dagane had been dismissed for posting racist statements. The Court held that dismissing him for doing so was fair because Dagane had made the racist utterances in his capacity as a police officer, and police officers are responsible for the safety of all citizens.³¹² The identity and status of the perpetrator can potentially increase the likelihood, and the extent of the harm suffered. Coming to the identity of the victims, the South African Equality courts appear to be more inclined to assist groups who are historically or currently oppressed. The Equality Court recently iterated that South African equality courts, in the fulfillment of the obligations under the Constitution and the PEPUDA, cannot allow hate speech against minority groups.³¹³ Therefore, it is incremental that the court must act in protection of minority groups, particularly those which historically have fallen victim to hate crimes.

³⁰⁶ Natasha Stop White Genocide 2016, available at, <https://stopwhitegenocideinsareports.blogspot.com/2016/06/black-unisa-lecturer-who-called-white.html>, accessed on August 20, 2021

³⁰⁷ *Dyonashe v Siyaya Skills Institute (Pty) Ltd* 2018 3 BALR 280 (CCMA).

³⁰⁸ *Duncanmec (Pty) Limited v Gaylard* 2018 6 SA 335 (CC), para 37

³⁰⁹ *Afri-Forum v. Malema*, The Equality Court of South Africa, Johannesburg, case No 20968/2010, September 2011.

³¹⁰ *Afri-Forum v. Malema* (n293), paras 108-109

³¹¹ *Dagane v SSSBC* 2018 7 BLLR 669 (LC)

³¹² *Dagane case* (n 296) para 49

³¹³ *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) para 54

Where and to whom the utterance is made may determine whether it constitutes hate speech or only rude or distasteful speech. In the Dagane case the fact that Dagane had posted the racially loaded utterance on Malema's Facebook page is significant. By posting the statement where many likeminded individuals were likely to read it, Dagane showed his intention to incite hatred and violence.³¹⁴ Moreover, the likelihood that the audience would share his ideology increased the likelihood that his utterance would incite hatred or harm.³¹⁵ Lastly, the socio-economic and political circumstances at the time of the making of the utterance are considered by South African institutions in assessing whether an utterance constitutes hate speech. The assessment into whether the intention of the utterer of alleged hate speech is to be hurtful, harmful and to propagate hatred requires a scrutiny of the content of the offending utterance in its social context.³¹⁶

Regrettably, the hate speech law in Ethiopia failed to set down requirements that should be followed to decide whether or not statements are deemed to be criminal offenses.³¹⁷ Had the hate speech proclamation of Ethiopia been guided by such factors as incorporated in the Rabat plan of action and envisaged by the South African Legal Resource Centre, the law enforcement authorities such as courts would easily determine expressions that are considered as hate speech and also ensure the consistent enforcement of the law.

4.3.5.2. Online hate speech regulation under the proclamation

According to HateBase, a web-based application that collects instances of hate speech online worldwide, the majority of cases of hate speech target individuals based on ethnicity and nationality, but incitements to hatred focusing on religion and class have also been on the rise.³¹⁸ While hate speech online is not intrinsically different from similar expressions found offline, there are peculiar challenges unique to online content and its regulation. The consequences of

³¹⁴ LRC Memorandum paras 44-46.

³¹⁵ LRC Memorandum (n 314) para 47.

³¹⁶ *Qwelane v South African Human Rights Commission* 2020 2 SA 124 (SCA), para 53

³¹⁷ Rahwa Weldeghebriel, 'Adequacy of the Prevailing Regulatory Framework Relating to Hate Speech on Social Media in Ethiopia,' (Addis Ababa university LL.M Thesis), 2020.

³¹⁸ HateBase – Hate speech statistics, <http://www.hatebase.org/popular>, accessed on June 3 2021.

ungoverned online hate can be tragic, as illuminated by Facebook's failure to address incitement against the Rohingya Muslim community in Myanmar.³¹⁹

Domestic usage of social media platforms, particularly Facebook, Twitter, and Instagram, has been expanding; the content often suffers hate speech. The growing problems of hate speech in the context of ethnic clashes have had a major negative effect on the credibility of legitimate online information. In this regard, the Proclamation can be regarded as a modern one as it introduced a provision on content moderation and social media responsibility.

4.3.5.2.1. Content Moderation and Social Media Responsibility

It is on the platforms of Internet companies where hateful content spreads online.³²⁰ The standard approaches to prevent online hate spreading include the removal of hate comments from the social media platforms.³²¹ Prohibitions of hate speech are allowed when rights of others are substantially implicated³²² and social network providers are allowed to prohibit, after a non-arbitrary internal process, certain statements that do not contribute to a forum where all users can enjoy their rights. The ECtHR's, in the landmark case of *Delfi v. Estonia*,³²³ expressed that:

Where third party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, the court considers that the rights and interests of individuals and of society as a whole may entitle contracting states to impose liability on internet news portals, without contravening article 10 of the convention, if they fails to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.³²⁴

³¹⁹ Naughton, J. (2018, April 29). Facebook's global monopoly poses a deadly threat in developing nations. The Guardian. Retrieved from <https://www.theguardian.com/commentisfree/2018/apr/29/facebook-global-monopoly-deadly-problem-myanmar-sri-lanka>, accessed on June 5, 2021.

³²⁰ Tim Wu, 'The Attention Merchants: The Epic Scramble to Get Inside Our Heads', New York, Vintage Books, 2016.

³²¹ Serra Sinem Tekiroglu et al., Generating Counter Narratives against Online Hate Speech: Data and Strategies, Proceedings of the 58th Annual Meeting of the Association for Computational Linguistics, pages 1177–1190, July 5 - 10, 2020, P. 1177.

³²² Matthias C. Kettemann, 'Follow-up to the comparative study on "blocking, filtering and takedown of illegal internet content"', 2019, p.12

³²³ *Delfi AS v. Estonia* App no 64669/09, European Court of Human Rights (ECtHR's 2015), available at, <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-155105&filename=001-155105.pdf>, accessed on June 4 2021.

³²⁴ *Ibid*, Para.153 and para 159

As Andre Oboler, the CEO of the Online Hate Prevention Institute, has noted, “The longer the content stays available, the more damage it can inflict on the victims and empower the perpetrators. If you remove the content at an early stage, you can limit the exposure.”³²⁵

It is with this assumption that Article 8(1) of the hate speech proclamation requires service providers to “endeavour to suppress and prevent the dissemination of disinformation and hate speech through its platform.” It further provides that providers “act within twenty-four hours” to remove infringing content “upon receiving notifications about such communication.” Though the introduction of content moderation can be seen as affirmative step, various legitimate concerns could be raised concerning the *modus operandi* of this law.

First, without a strong understanding of local contexts and languages, effective content moderation is a difficult undertaking.³²⁶ Specially, in Ethiopia, it is complex for Social Networks to determine speeches that are considered as illegal, which requires knowing more than 70 languages spoken across the country and the context surrounding the content. Alternative solution for such daunting task lies on establishing centers for content moderation staffed by persons with the required knowledge.

Second, the HsDPSP imposes no punishment against service providers at the event of non-compliance with the law requiring content removal when illegal. Article 8 (2) aimed at limiting content flow by imposing obligations on providers to not only limit dissemination of illegal contents but also obliges content removal within 24 hours without any penalty attached in cases of non-compliance. In this regard NetzDG carries heavy penalties for failure to comply and the fine can reach up to €5 million.³²⁷ Even some scholars speculate that resulting fines could be multiplied to up to even EU€57 million.³²⁸ Fear of fine are one means to have platforms compliance with the law. For instance, Germany government imposed its first fine under the new law, NetzDG, to Facebook in July 2019 and the company had to pay €2m for under-reporting of

³²⁵ Gagliardone, I., Gal, D., Alves, T., & Martinez, G. (2015). Countering online hate speech. UNESCO Series on Internet Freedoms. Paris, France: UNESCO Publishing. P. 13

³²⁶ Yohannes Eneyew Ayalew, ‘Uprooting Hate Speech: The Challenging Task of Content Moderation in Ethiopia,’ center for international media assistance, 2021, available at, <https://www.cima.ned.org/blog/uprooting-hate-speech-the-challenging-task-of-content-moderation-in-ethiopia/>, accessed on July 10, 2021.[herein after, ‘The Challenging Task of Content Moderation in Ethiopia’]

³²⁷ Art. 4, sec 2, NetzDG (n 41)

³²⁸ Danielle Keats Citron, ‘Extremist Speech, Compelled Conformity, and Censorship Creep’, Notre Dame L. Rev. 1035, 2018, p. 1049.

criminal activities on its platforms in Germany.³²⁹ Facebook has been removing approximately 14,000 posts per day since NetzDG went into enforcement and the company has confirmed that this number is a direct result of “paying attention to the German law.”³³⁰ It is reported that Facebook, Twitter, and Google removed an average of 92% of the reported illegal hate speech within 24 hours in compliance of the law.³³¹ Therefore, fines and criminal sanctions levied against a negligent intermediary may seem necessary to induce a speedy takedown of illegal content.³³²

When it comes to Ethiopia, there is no provision on the responsibility of a site on content posted on it, only individuals are targeted. In the absence of penalties placed on them for failure to meet that responsibility, social media service providers may be negligent in performing their obligations. More specifically, instruments absent of penalties are not sufficient if the goal is to force the targeted actor to actually perform. Only when regulation stipulates “sticks”—that is, financial disadvantages such as the high fines under NetzDG—will the provisions be implemented.³³³

It has been apparently observed that social media platforms failed to quickly take down harmful content that encourages inter-ethnic hatred and violence in Ethiopia. In June 2020, following the murder of famous singer Hachalu Hundesa, several extreme and ethnic based hate speeches were broadcasted through media.³³⁴ The effect of these narratives was widespread violence, property damage and the death of 166 individuals in Oromia region alone.³³⁵ The violence was triggered

³²⁹ Press Release, Federal Office of Justice, Federal Office of Justice Issues Fine Against Facebook (July 3, 2019), <https://perma.cc/SVC5-KFTN>. See also, BBC News: Social Media: How do other governments regulate it, available at, <https://www.bbc.com/news/technology-47135058>, Accessed on May 3, 2021.

³³⁰ Phillip Oltermann, Tough New German Law Puts Tech Firms and Free Speech in Spotlight, THE GUARDIAN (Jan. 5, 2018), <https://www.theguardian.com/world/2018/jan/05/tough-new-german-law-puts-tech-firms-and-free-speech-in-spotlight>, accessed on June 26, 2021.

³³¹ William Echikson and Olivia Knodt, ‘Germany’s NetzDG: A key test for combatting online hate’, Centre for European Policy Studies, 2018, p. 7

³³² McMillan, Imara, “Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights,” Chicago Journal of International Law: Vol. 20: No. 1, Article 7, 2019, p.284.

³³³ Amélie Heldt, ‘Let’s Meet Halfway: Sharing New Responsibilities in a Digital Age’, Journal of Information Policy, 2019, Vol. 9 (2019), pp. 336-369, at p. 363.

³³⁴ P. 16, ‘fake news misinformation and hate speech in ethiopia: a vulnerability assessment’(n 3)

³³⁵ ‘Hachalu Hundesa: Ethiopian singers death killed 166’BBC, 5TH July, 2020, available at, <https://www.bbc.com/news/world-africa-53298845#:~:text=ethnic%unrest%20in%20the%20aftermach,died%20in%20oromo%20region%20alone>, accessed on June 29, 2021.

by online hate speech inciting attacks on minorities living in Oromia regional state.³³⁶ However, the social media platforms on whose page the illegal contents were posted did not remove the contents as required by the law.³³⁷ Following the event, Minority Group International has urged “social media platforms including Facebook and Twitter to be on the alert for hate speech against minorities in Ethiopia and quickly take down harmful content that encourages inter-ethnic hatred and violence.”³³⁸ This study argues that heavy penalty is essential if compliance is needed. The law has no means of holding social media platforms (like Facebook and Twitter) accountable and the best it promises is to release a report on social media enterprises whether they discharge their duty properly.

4.3.5.2.2. Complaint handling procedure

An online reporting portal of hate-related speech is important step to achieve the objective of combating online hate. Social networking platforms should make advanced their responses to alleged hate speech online through careful interactions with user complaints and by increasingly making their regulation process more transparent. Complaints about unlawful content should be handled with predetermined procedures. The provider of a social network should maintain an effective and transparent procedure for handling complaints about unlawful content. Improving the moderation of illegal content online by platforms requires putting in place harmonized and transparent 'notice-and-action' processes.³³⁹ Recommended guidelines should be provided for tech companies to device user-friendly complaint mechanisms. Such procedural safeguards for complaints are lacking under the Ethiopian hate speech and disinformation proclamation and the law only sets forward a general provision that requires social media service providers to have policies and procedures in order to meet their responsibilities under it.³⁴⁰ At least legislating on the essential requirements of the process was important. This is because social network platforms

³³⁶ የኢትዮጵያ ሰብአዊ መብቶች ኮሚሽን (ኢሰመኮ) (n 32)

³³⁷Yohannes Eneyew Ayalew, ‘Why Ethiopia’s one-year-old hate speech law is off the mark,’ 2021, available at, <https://theconversation.com/why-ethiopias-one-year-old-hate-speech-law-is-off-the-mark-154860>, accessed on July 10 2021.

³³⁸ Minority rights group, recent violence in Ethiopia’s Oromia region shows hallmarks of ethnic cleansing, news, 2021, available at, <https://minorityrights.org/2020/07/22/ethnic-cleansing-oromia/>, accessed on June 30, 2021.

³³⁹ De Streef, A., Defreyne, E., Jacquemin, H., Ledger, M., & Michel, A. (2020). Online Platforms' Moderation of Illegal Content Online: Law, Practices and Options for Reform. European Parliament.p. 41[herein after, ‘Online Platforms' Moderation of Illegal Content Online’]

³⁴⁰ Art 8 (3), at hate speech and disinformation proclamation (n 47)

may come up with their own individual reporting formulas, making it difficult in some cases for users to flag illegal contents.

In this regard the German rule obliges social media platforms to establish a procedure to respond to notifications or take down requests. After requiring the procedure to be easily recognizable, directly accessible and permanently available,³⁴¹ NetzDG requires social media platforms to acknowledge without undue delay receipt of a complaint,³⁴² and inform both the person submitting the complaint and the author about any decision of the complaint, and the reasons for the decision must be provided.³⁴³

Online platforms should also allow users to appeal against their decisions on the moderation of illegal content online through a 'counter-notice' procedure.³⁴⁴ An appeal's process would allow users to express their disagreement with any of the measures taken by online platforms, giving them the chance to contest take down decisions. Although it is not explicitly stated, in cases of unjustified blockings based on NetzDG, German courts entertain such claims based on general principles of law.³⁴⁵ Therefore, it should be noted that German courts, generally speaking, grant a claim for remediation, which considerably reduces the incentive to delete content in case of doubt.

However, the hate speech Proclamation does not require social media platforms SMSP to provide users with the means to appeal towards the content-removal decisions when the author thinks that the decision is illegitimate and is contrary to his right to freedom of speech. Furthermore, it is not clear whether internet users have any recourse to court or administrative body in case of illegitimate or unjustified actions by social media service providers.

4.4. Institutional frameworks for hate speech regulation

4.4.1. The Ethiopian Human Rights Commission

Article 55(14) of the FDRE Constitution establishes Human Rights Commission. Pursuant to its responsibility under the Constitution, the HoPR established the Ethiopian Human Rights

³⁴¹ Section 3(1), Netz G

³⁴² section 3 (2) (1), NetzDG

³⁴³ Id, Section 3 (2) (5)

³⁴⁴ P. 6, at 'Online Platforms' Moderation of Illegal Content Online' (n 331)

³⁴⁵ p. 1125 & 26, at 'The German NetzDG as Role Model or Cautionary Tale? (n 162)

Commission by Proclamation No. 210/2000 which came into effect as of the 4th day of July, 2000, which was later amended by proclamation No. 1224/2020. The Establishment Proclamation of the Ethiopian Human Rights Commission (EHRC) states that the Commission is established primarily for the enforcement of human rights as are enshrined in the Constitution. The Commission is also entrusted with the task of investigating cases of violation of human rights enshrined in the Constitution, in its own initiative or upon a complaint submitted to it.

The role of the Ethiopian Human Rights Commission in addressing ‘hate speech’ is limited. Under the hate speech proclamation, the Ethiopian Human Rights Commission is mandated to conduct public awareness campaigns to combat hate speech.³⁴⁶ In fact, misconception by the public on what exactly constitutes hate speech remains a major concern and it is required from the commission to engage in increased public awareness campaigns. It is a commendable move that the law incorporates ‘awareness creation’ as one practical measure in countering hate speech.³⁴⁷ However, other institutions necessarily relevant for the regulation of social Medias and the internet, such as the Information Network Security Agency and the telecom regulatory authority are completely ignored under the law.

4.4.2. Regular courts

The FDRE Constitution recognizes the establishment of an independent judiciary that has a dual judicial system: the federal courts and the state courts with their own independent structures and administrations. Judicial powers, both at federal and state level, are vested in the courts.³⁴⁸ Some writers argued that hate speech cases are better adjudicated by specialized and freestanding tribunals.³⁴⁹ The researcher approached officials in the office of Attorney General and has been told that the issue of establishing distinct bench for hate speech cases was considered during the preparation of the proclamation but the proposal was dropped due to the unsatisfactory result obtained from benches assigned to entertain other specific matters.³⁵⁰

However, it is essential at least to provide law enforcement officials with a training that will allow them to understand various components of hate speech, namely identification,

³⁴⁶ Article 8 (6), at ‘Hate speech and disinformation Proclamation’ (n 26)

³⁴⁷ At ‘The problems with Ethiopia’s proposed hate speech and misinformation law’ (n 241)

³⁴⁸ Article 79(1) FDRE constitution (n 8)

³⁴⁹ At Yohannes, ‘Why Ethiopia’s one-year-old hate speech law is off the mark’(n 323)

³⁵⁰ Interview with Awel (n 237)

investigation, evidence preservation, preparation, prosecution and monitoring of hate speech. In this regard the government of Ethiopia in its reply to the allegations of the joint communications sent by the special rapporteur on the promotion and protection of the rights to freedom of opinion and expression; concerning the arrest and detention of Mr. Yayeew Shimelis and Ms. Elizabeth Kebede, has revealed that a series of trainings on the proclamation and how it should be applied in accordance with the constitution and international human rights are being prepared for federal and regional police as well as prosecutors.³⁵¹ However, despite the above statement by the government, as of yet trainings has not been provided for the concerned law enforcement officials and the outbreak of Covid-19 has been mentioned as a reason for ceasing the plan to give the trainings.

The issue of adjudication of hate speech cases in South Africa is approached differently under The Promotion of Equality and Prevention of Unfair Discrimination Act. The equality act is backed by remarkable institutional framework with equality courts being distributed all over the country and enjoying wider powers.³⁵² The act allows for cases of hate speech to be heard by the Equality Court. Equality courts, before which proceedings are instituted in terms of or under the equality act, hold an inquiry in the prescribed manner and determine whether hate speech, as the case may be, has taken place, and takes appropriate measure in the circumstance.³⁵³ It has been observed that the equality courts have contributed in a significant way to the affirmation of people's inherent equal dignity in South Africa.³⁵⁴

4.5. Some remarks on the poor application of the hate speech Proclamation

It has been more than one year since Ethiopia's hate speech and disinformation law was passed. The Proclamation entered into force on the date of its publication on the Federal Negarit Gazette, which was March 23rd, 2020. Cognizant of the threat hate speech and disinformation pose to social harmony, political stability, national unity, human dignity, diversity and equality in the

³⁵¹ The government of the federal democratic republic of Ethiopia; reply to the allegations of the joint communications sent by the special rapporteur on the promotion and protection of the rights to freedom of opinion and expression;,, 071/2020-A, 10 July 2020, available at; <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=35418>, accessed on June 5, 2021.

³⁵² Grete S. Vogt, 'Non-Discrimination on the Grounds of Race in South Africa: With Special Reference to the Promotion of Equality and Prevention of Unfair Discrimination Act', *Journal of African Law* , 2001, Vol. 45, No. 2 (2001), pp. 196-209, p.209.

³⁵³ Section 21 (1) and (2) Equality act (n 176)

³⁵⁴ Rosaan Krüger, 'Small Steps to Equal Dignity: The Work of the South African Equality Courts', *the Equal Rights Review*, Vol. 7, 2011.

country, the necessity to prevent and suppress by law the deliberate dissemination of hate speech and disinformation was felt by the government at the time of its promulgation. However, so far no one has been indicted for hate speech, although there is a single case still being adjudicated, according to the information obtained from General Attorney office. As an institution responsible for initiating, following and securing convictions against hate speech offenders, the organ was reluctant and restrained when the issue comes to prosecution. Having this fact in mind, the researcher approached, Ato Awel Sultan and got the following response,

“It is notable that the office of the attorney general has not managed to prosecute hate speech charges despite the occurrence of such kinds of expressions in considerable volume specially, in social media. Despite the presence of the law, its implementation is poor and court cases are almost non-existent. But, this does not mean the crime of hate speech is not being experienced in our country. However, our institution was conducting other tasks which we believe should come prior to pressing charges against offenders.”

In particular, public information and education campaigns were primarily planned to be undertaken before proceeding to the strict application of the law in court of law. As part of such commitment, the Training and legal awareness team at FDRE office of attorney general has been aggressively working on such campaigns. Creating awareness will enable the society to be fully aware of the nature and impact of hate speech and disinformation on different individuals and groups and build public trust towards law enforcement institutions which in turn make citizens to be fully committed to halt such behaviors. In this regard we are observing encouraging results.

As it is known hate speech cases are highly sensitive in terms of their political implications. For sure if individuals specially politically prominent ones are prosecuted, in the current context of our country what matters most would not be why a given individual is charged rather what matters is to which ethnic group he belonged. More importantly, it is challenging that some expressions and views could be regarded as hate speech for one society while for others it might be a legitimate one. Therefore, we believe there are a lot of works to be done before directly proceeding to implement the law at least in terms of creating awareness and consensus on the law to the extent that considerable portion of the society recognizes the law is devised to protect one's well-being.

The previous Ethiopian government was using different laws especially, the ‘Anti-Terrorism Proclamation’ to repress free speech and the opposition, to raise the cost of political dissent, and to penalize its political opponents. As a result there exists suspicion by the public towards the law that the same history is to happen. It is due to the above and other reasons education and media literacy campaign was favored.

However, for whatever reason the absence of prosecution could be attributed to, for the time being one cannot talk about the deterrence effect of the law, since successful prosecutions and convictions are not reported yet. The failure to prosecute means the crimes will continue. And in turn this will have a bearing on the legitimacy of the law since “restrictions on free speech which are not effective cannot be justified; they cannot be necessary to protect a legitimate aim since, by definition, they are not protecting it.”³⁵⁵

4.6. Possible challenges in regulating hate speech in Ethiopia

4.6.1. Issues of jurisdiction and prosecution

The greatest obstacles to enforcement of online illegal content laws are the issue of indeterminacy regarding jurisdiction and Internet's anonymity. Major social media platforms, such as Facebook, YouTube, and Twitter etc. are US-based transnational corporations and therefore are mainly governed by US law³⁵⁶ and they have striven to keep themselves in line with free speech laws in America, well known as the most liberal with such laws.³⁵⁷ The intention of the states to regulate hate propaganda on social media platforms is impeded by the issue of jurisdiction. Conflicts can and have occurred when states try to apply legislation extraterritorially into other jurisdictions. As discussed under Chapter Two, the case of Yahoo! in the early 2000s exemplifies the challenge.

Also the new media sector and Internet have made things more complicated as successful prosecution is dependent on sources of verifiable information. Prosecution of online hate speech is challenging as responsibility vanishes under the mantle of anonymity. Anonymity makes it hard for local prosecutors and victims to discover the identity of the party responsible for illegal

³⁵⁵ P.50 at Mendel, Toby, ‘Study on International Standards Relating to Incitement to Genocide or Racial hatred’(n 64)

³⁵⁶ Schieb, C., & Preuss, M., ‘Governing hate speech by means of counter speech on Facebook’. In 66th ICA Annual Conference, At Fukuoka, Japan, 2016, (pp. 1-23), p. 2.

³⁵⁷ Ashley Smith-Roberts, Facebook, Fake News, and the First Amendment, 95 DENV. L. REV. ONLINE 118, 123 (2018).

conduct.³⁵⁸ In this regard the role played by media in Kenya as a means for disseminating hateful speech can be taken as an example. During the 2007 election, mobile phones were the primary medium to spread hate speech and SMSs were even used for direct attacks.³⁵⁹ However, no arrests have been made and suspects have been acquitted because monitoring bodies failed to provide compelling evidence.³⁶⁰

Regulation of online speech for states might be difficult as individuals might post anonymous messages, be located outside their jurisdiction and they might even not be humans at all, but bots.³⁶¹ Cooperation between social media platform and criminal authorities could be an important asset to minimize the difficulties surrounding online hate speech prosecution as it will help to bring perpetrators of hatred towards law enforcement agencies. For instance, the 2020 amendment to the NetzDG introduced an obligation on social media platforms to report certain types of "criminal content" as well as IP addresses, last logins, user passwords and port numbers of the user having shared such content directly to the Federal Criminal Policy Office.³⁶² The government approved the amendment and was signed into law on March 30, 2021, by the German head of state.³⁶³ Under the law, the Federal Criminal Police Office is expected to transmit the information to the locally competent authority for criminal prosecution.³⁶⁴ Ethiopia is a consumer of foreign-based social media service providers and it remains clear that the country will face challenges in securing compliance in relation to prosecution of online hate speech offenders.

4.6.2. Politicization of hate speech prosecution

The worrying trend of impunity of political leaders who are main perpetrators of hate speech is a big challenge in fight against hate speech.³⁶⁵ Although the prosecution of politicians for hate speech may have the objective to protect democratic values, some may instead view hate speech

³⁵⁸ Jay Krasovec, 'Cyberspace: The Final Frontier, For Regulation?', 3 Akron L. REv. 101,1997, p. 109-10.

³⁵⁹ P. 79, at Andrea Scheffler, 'the Inherent Danger of Hate Speech Legislation' (n 152)

³⁶⁰ Id, p. 80

³⁶¹ Balkin, J. M. (2018). Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation. U.C. Davis Law Review, 51(3), 1187.

³⁶² Available at, <https://www.bundestag.de/dokumente/textarchiv/2020/kw25-de-rechtsextremismus-701104>, accessed on July 12, 2021.

³⁶³ Frank Jordans, 'Germany: Bill Requires Sites to Report Hate Speech to Police', ASSOCIATED PRESS (Feb. 19, 2020), Available at, <https://apnews.com/article/ef38dbeb3c0d026e65f5dde6edeb3837>, accessed on June 5 2021.

³⁶⁴ P.1115, at 'The German NetzDG as Role Model or Cautionary Tale?' (n162)

³⁶⁵ Doreen Nekesa Busolo and Samuel Ngigi, 'Understanding Hate Speech in Kenya,' New Media and Mass Communication, Vol.70, 2018, p. 47

trials as politically motivated assaults on democratic rights to free speech and representation.³⁶⁶ Such discontented citizens may for example include those who support the prosecuted politician, share similar ethnic or religious identity or sympathize with his or her statements. Part of the challenge for the government in enforcing the hate speech bill emanates from its commitment to hold offenders accountable indiscriminately, i.e., including prominent individuals and government officials.

Kenya's experience provides useful lessons on the difficulties of prosecuting people accused of hate speech as a criminal offence as cases either drag on without result or are dropped – often for political reasons.³⁶⁷ The high-profile names linked to hate speech have not been prosecuted despite the offensive utterance made in public against certain group(s). In Kenya the NCIC has noted that the tendency to politicize prosecution of hate speech is a real threat. This is experienced whenever prominent individuals are linked to incidents of hate crime there; supporter's claim that the cases are inspired more by political affiliation than by specific acts.³⁶⁸ In Kenya there is no successful prosecution that was made despite there being incriminating evidence on hate speech against various politicians. Although the majority of hate speech cases in Kenya involves politicians, some having been severally accused, none of them has ever been convicted.

In Ethiopia too a good number of the hate speech cases involve politicians and it is logical to fear that the politicization (and tendency to overreach) of police and prosecution offices would result in failing to prosecute politician offenders even when evidence is made available. So long as the institutions of democracy in Ethiopia are weakly developed, it might be difficult to regulate hate speech. We must ask whether the various institutions have the will to investigate and prosecute famous politicians for hate speech. Legal systems mostly fail to prosecute and punish offenders, who are largely politicians in government and opposition political parties.³⁶⁹

4.6.3. Ethnicity and hate speech

³⁶⁶ Roderik Rekke, Joost van Spanje, 'Hate Speech Prosecution of Politicians and its Effect on Support for the Legal System and Democracy', *British Journal of Political Science*, 2021, p.1

³⁶⁷ Rajuli, K., & Nyathi, N., 'South Africa and Kenya's legislative measures to prevent hate speech', 2017, available at, <https://www.accord.org.za/conflict-trends/south-africa-kenyaslegislative-measures-prevent-hate-speech/>, accessed on June 5 2021.

³⁶⁸ P. 47, at 'Understanding Hate Speech in Kenya' (n137)

³⁶⁹ Ibid.

Recent events show that the potential for widespread violence as a result of hate speech is much higher when it comes to ethnicity. The prevalence of ethnic diversity is not a challenge to democracy, rather the use of identity politics that promote narrow tribal interests is.³⁷⁰ The challenge posed by ethnic politics and the resulting ethnic rivalry on hate speech regulation has been observed in different nations.

In Kenya, it is a challenge to fight hate speech due to tribal connections. Ethnicity has taken central stage as a tool for political mobilization and organization. In Kenya tribal politics is the major cause of hate speech. It has been reported that the use of hate speech along ethnic lines and derogatory remarks about other tribes, races and communities has become the hallmark for Kenya's political rallies during the run-up to elections.³⁷¹ Moreover, perpetrators of hate speech especially politicians get support from the community they come from without looking at the impact of the words used.

In Ethiopia too the majority of hate speech tends to focus among others on ethnicity, federalism and ethnic nationalism.³⁷² Hate speech in Ethiopia has now become matter of politics and power. Having the Ethiopian context in background, where politics is largely aligned along ethnic lines within highly divided and heterogeneous society often with historically alleged controversial narratives, these will inevitably pose difficulty in demarcating the boundary between legitimate speech and political speech from the purview of hate speech. In this regard the very design of the Ethiopian structure that promotes ethnic organization as the most desirable form of political participation makes attempts to address hateful discourse across ethnic groups futile or, at best, facile.³⁷³ Tribal politics has been outlined as a zero-sum game, making it more prone to using hate speech and inciting violence.³⁷⁴ Moreover, the effectiveness of the law regulating hate speech in the country may remain poor due to extreme polarization of societies

³⁷⁰ Viewpoint: How tribalism stunts African democracy, available at, <https://www.bbc.com/news/world-africa-20465752>, accessed on June 25 2021.

³⁷¹ Kenya National Commission on Human Rights (KNCHR) 2017. KNCHR Alternative Report to the Committee on Elimination of All Forms of Racial Discrimination. Available at www.tbinternet.ohchr.org, accessed on May 13, 2021.

³⁷² P. 15 at 'fake news misinformation and hate speech in ethiopia' (n)

³⁷³ P. 137, at Téwodros W. Workneh, 'Ethiopia's Hate Speech Predicament' (n 12)

³⁷⁴ view point: how tribalism stunts African democracy, n (141)

with regard to matters relevant to common interest. Even some argued that Ethnic bias makes regulation of hate speech almost impossible.³⁷⁵

4.6.4. Silencing dissent

The use of legislation to combat hate speech and incitement has several limits. In Africa, the major problem of hate speech laws is the tendency for economic, social or political elite to use it to silence opposition.³⁷⁶ Governments especially in Africa often use hate speech laws to silence opposition, censor political discourse, undermine freedom of expression and limit press freedom. In Africa, the major problem of hate speech laws is the tendency for economic, social or political elite to use it to silence opposition.³⁷⁷ For example, Scheffler expressed that the Rwanda's hate speech legislation provided a tool for the government to suppress the opposition, media representatives, civil society actors, and the general public for legitimate speech and dissent.³⁷⁸ This problem is apparent in Kenya, where allegations were made that hate speech prosecution was only being used to silence opposition parties.³⁷⁹

Since 2018, the Ethiopian government embarked upon political, legal and economic reforms aimed at addressing its long history of suppressing human rights.³⁸⁰ As part of the reforms, the Proclamation was enacted with the aim of addressing the dissemination of hate speech. However, the regulation of speech, particularly in a transitioning democracy, creates the risk of curtailing public opinion. In this regard, Chuma posits that hate speech regulation has the potential to lead to either active or implicit censorship of political discourse, in the name of fostering “peace”.

³⁷⁵ CITAD. (2015). *Report of one-day stakeholders' forum on hate speech and the 2015 elections in Nigeria*. CITAD. Retrieved April 10, 2015, from <http://www.citad.org-report-of-one-day-stakeholdersforum-on-hate-speech-and-the-2015-elections-in-nigeria>, accessed on August 30, 2021.

³⁷⁶ De Vos, P., 'Hate speech Bill could be used to silence free speech', available at, <https://www.dailymaverick.co.za/opinionista/2019-02-26-hate-speech-bill-could-be-used-to-silence-free-speech/>, accessed on June 23, 2021.

³⁷⁷ Bowman, W. M., & Bowman, J. D. (2016). Censorship or self-control? Hate speech, the state and the voter in the Kenyan election of 2013". *Journal of Modern African Studies*, 54(3), 495–531. <https://doi.org/10.1017/S0022278X16000380>

³⁷⁸ P. 67, at Scheffler, A 'The Inherent Danger of Hate Speech Legislation n (152)

³⁷⁹ Makhoka, Timothy (2016) 'CORD Accuses Government of Using Hate Speech Charges to Muzzle Leaders', *The Standard*, 4 July, Available at: <http://www.standardmedia.co.ke/article/2000207443/cord-accuses-government-of-using-hate-speech-charges-to-muzzle-leaders>, accessed 12 March 2020.

³⁸⁰ Tefo Mohapi, "The Internet Shutdown In Ethiopia Costs The Country Approximately \$500,000 A Day In Lost GDP," CIPESA, October 28, 2016, available at <https://cipesa.org/2016/10/the-internet-shutdown-in-ethiopia-costs-the-country-approximately-500000-a-day-in-lost-gdp/>; accessed on June 4, 2021.

Thus, he observes, is significant, as it limits the opportunity for fair criticism of the government.³⁸¹

The impact of criminalizing speech on democratic participation and social dialogue should be considered. The effect this may have on shutting down necessary public debate or intergroup dialogue to reduce discrimination should be of concern. In Ethiopia too, genuine concerns were also raised by different writers that the law could have a chilling effect on free expression and be used to stifle legitimate public deliberation.³⁸² This fear is not unwarranted considering the Ethiopian government's track record of prosecuting and incarcerating individuals through highly misguided legal frameworks coupled with the absence of genuine judicial review and strong institutional frameworks sensitive to human rights. Ethiopia has been pointed as a state with discursive legal tools that make it impossible to demarcate the contours of political speech from speech that has serious and imminent threats to the national security and public order.³⁸³ Fears have also been expressed that the law could be used to silence critics and penalize robust political debates partly due to the ethnic definition of politics and governance at both layers of government.³⁸⁴

4.6.5. Healing the signs not the root cause

Dieng observes that “we must recognize the limits of legislation to combat hate speech and incitement. We need to develop a multi-layered approach to fight the root causes of hate speech, racism, and discrimination.”³⁸⁵ The Hate Speech and Disinformation Prevention and Suppression Proclamation No 1185/2020, emerged in the backdrop of a string of deadly inter-ethnic clashes across the country, which the government was quick to link to viral speech and disinformation disseminated through broadcasting, social and print media.³⁸⁶ The researcher, by contrast, argue that recent atrocities in Ethiopia can only be understood by comprehending the underlying

³⁸¹ Chuma, Wallace (2016) South Africa: Reflections on Hate Speech. In Elliott, Charlotte, Chuma, Wallace, El Gendi, Yosra, Marko, Davor and Patel, Alisha Hate Speech – Key Concept Paper: Media, Conflict and Democratisation (MeCoDEM), Available at: http://www.mecodem.eu/wp-content/uploads/2015/05/Elliott-Chuma-ElGendi-Marko-Patel-2016_Hate-Speech.pdf, accessed 10 May 2021.

³⁸² At ‘Understanding Ethiopia’s Hate Speech Law, Protecting Freedom of Expression’ (n 299)

³⁸³ P.30 at Mesenbet A. Tadeg, Making Space for Non-Liberal Constitutionalism in Free Speech (n 34)

³⁸⁴ P. 6, at David kaye (n 163)

³⁸⁵ Eberhard, Michelle (2013) ‘When Hateful Speech is Transformed into Hateful Deeds: Examining Freedom of Speech, Hate Speech, and Incitement to Genocide’, Available at: <http://www.auschwitzinstitute.org/blog/genprev-in-the-news-26-march-2013>, accessed 13 March 2021.

³⁸⁶ At ‘Understanding Ethiopia’s Hate Speech Law, Protecting Freedom of Expression’ (n 299)

historical, social, economic, political and other realities of the country, including the prevalence of endemic ethnic hatred.

What constitutes hate speech highly depends on historical relations and narratives between groups. In the presence of deep social fissures, mutual distrust and the absence of consensus on what constitutes the Ethiopian state, the attempt to regulate hate speech remains meaningless.³⁸⁷ A lack of meaningful inter-group communication, and the isolation and insularity of which this is a symptom, is often identified as a significant contributing factor to inter-group tensions, where ‘hate speech’ is more prevalent. Accordingly, hateful messages may fall on particularly fertile ground where there are wider social, economic or political problems or divisions in society.³⁸⁸

In addition to laws, addressing the potential of hatred requires working on national reconciliation and dialogue between various groups. Ethiopia currently has established a Reconciliation Commission by a proclamation as an institution to maintain peace, justice, national unity, consensus and reconciliation among Ethiopian peoples.³⁸⁹ This could be considered as a positive step in addressing the root causes of hate speech. However, wielding this institution with appropriate mandate to address the roots of hate speech would have much better importance. It is important to have an organ working towards identifying and eliminating structural discrimination in the public and private sectors, which would deal with underlying social causes of ‘hate speech’ and intolerance. Kenya, for instance has established the National Cohesion and Integration Commission under the national cohesion and integration act, with the purpose and objectives of facilitating and promoting equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial communities of Kenya. The Kenyan Commission is envisioned as a national institution with a mandate to rally Kenyans towards attaining a national identity and values; to mitigate ethno-political competition; to preclude ethnically motivated violence; to eliminate discrimination on ethnic, racial and religious bases; and to promote national healing and reconciliation.³⁹⁰ Since its establishment, the NCIC has been at the forefront in addressing the issue of hate speech in Kenya. The commission

³⁸⁷ At Yohannes ‘Why Ethiopia’s one-year-old hate speech law is off the mark’ (n 323)

³⁸⁸ Izsák, R Report of the Special Rapporteur on minority issues (2015), A/HRC/28/64, Para. 30.

³⁸⁹ Reconciliation commission establishment proclamation, Proclamation No. 1102/2018), *Federal Negarit Gazeta*, No. 27, Article 4

³⁹⁰ The foot prints of peace, consolidating National Cohesion in devolved Kenya : 2014-2018, National Cohesion and Integration Commission, 2018, available at, <https://www.cohesion.or.ke/images/docs/FOOTPRINTS-OF-NCIC.compressed.pdf>, accessed on May 7 2021.

provides the opportunity to rectify hatred relations among different groups and set a national goal through cohesion and integration.

4.7. Conclusion

This chapter has outlined a better approach to regulating hate speech in Ethiopia-an approach comporting with our unique realities, but it also drew inspiration from other jurisdictions. The approaches of Germany, South Africa and Kenya in countering hate speech are consulted to identify the lessons learned by these nations and the entities established for executing those policies. No society is immune from the signs of hatred. Similarly Ethiopia is also grappling with the serious and growing problem of hate speech which over the years has fanned inter-ethnic clashes. It has been argued that the prevalence of social media hate speech in Ethiopia is attributed to ethnic politics, and EPRDF government rhetoric.³⁹¹ Considering the bouncing of ethnic tension, in 2020, Ethiopia passed a law the” Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185/2020.”Although the Proclamation has good intentions of curbing hate speech in Ethiopia, it fundamentally restricts freedom of expression and has been criticized for being inherently intended to limit critics against the political reform.³⁹²

The Proclamation introduced a provision on content moderation and social media responsibility which can be taken as affirmative move. In terms of social media platforms, they are obliged to remove content that is considered fake or harmful within 24 hours of being notified. However, the Ethiopian law does not appear to introduce the detailed reporting system about the notifications and removals as the German does. Regulation on social media liability in Ethiopia should draw its lessons from NetzDG’s. Among others, for instance, in order to squash concerns about over-blocking, any content regulation should provide for a claim for remediation in case of unjustified bans. The law also does not require service providers to set a procedure that are transparent, sufficiently precise and adequately substantiated, which respect the rights of content providers with possibilities of 'counter-notices' and the rights to remediation in case when contents are removed or blocked unjustifiably. Dispute resolution is of fundamental importance as users need to be able to challenge decisions by platforms which may affect fundamental

³⁹¹ Muluken Asegidew Chekol, Mulatu Alemayehu Moges & Biset Ayalew Nigatu (2021): Social media hate speech in the walk of Ethiopian political reform: analysis of hate speech prevalence, severity, and natures, Information, Communication & Society, DOI: 10.1080/1369118X.2021.1942955.

³⁹² Solomon, D. (2019). Hate speech and freedom of expression in Ethiopia. The Ethiopian Herald, May 8/2019. At, <https://www.press.et/english/?p=5520#>, accessed on August 1, 2021.

rights. In addition, the law has no means of holding social media platforms (like Facebook and Twitter) accountable.

It is recommended to create a solid framework and institutional network to tackle hate speech. When we see the institutional framework on hate speech regulation, the Ethiopian Human Rights Commission is mandated to undertake awareness creation activities while adjudication is left for regular courts. Indeed, enforcing hate speech law requires strong institutions like the judiciary. In South Africa special courts named, equality courts are established to help people who have been unfairly discriminated against. Due to the detrimental effect hate speech legislations have on freedom of expression, any encroachment over the latter will be better addressed if the cases are approached by special courts. Moreover, multilayered approach is relevant for addressing the root causes of hate speech, in particular wielding pertinent institutions with issues of diversity and co-existence of citizens as core principle of nationhood is crucial. Therefore, it is important to look at the underlying cause of hate speech and address them through pertinent institutional arrangements.

There are numerous challenges that any attempt to regulate hate speech in Ethiopia may face. It is logical to fear that whenever an allegation of hate speech arises it may become a political issue and as result indicting so may create more damage to the security of the nation due to polarization of ethnic politics. It is also challenging for the prosecution to perform credible investigations on online hate speech since it is difficult to trace the sources of information sent and understand who places hate information to the website.³⁹³ The technicality involved in the use of digital media renders the prosecution of cybercrime related to hate speech more complicated. The track record of the Ethiopian government to use various laws to silence opposition, censor political discourse, and undermine freedom of expression and limit press freedom and the absence of a wide range of measures to tackle hate speech continues to be a challenge.

³⁹³ Russell G Smith, Peter Grabosky and Gregor Urbas, *Cyber Criminals on Trial* (Cambridge University Press 2004), available at, <http://ebooks.cambridge.org/ebook.jsf?bid=CBO9780511481604>, accessed on July 27, 2021.

CHAPTER FIVE

5. CONCLUSION AND RECOMMENDATION

5.1. Conclusion

Hate speech poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardizing peaceful coexistence. This study has examined hate speech regulation in Ethiopia in light of experiences that can be drawn from selected jurisdictions. The study has explored how the regulation of hate speech is approached by Germany, South Africa and Kenya. Though the response of each jurisdiction is linked to its unique circumstances, but all are informed about the devastating effects of hate speech and had experienced the same at different times. Currently hate speech is also a significant problem in Ethiopia and through hate remarks; the nation is broadly divided along ethnic lines. The major triggering factors of social media hate speech in Ethiopia includes historical narratives, associating religion with ethnicity, ethnic federalism, and land issues in particular over the national capital city.³⁹⁴

While discussing the existing hate speech legal framework, the HsDPSP, the study reaches the following conclusions. To maintain legitimacy in enforcing the legislative protection, an appropriate balance must be struck between the rights to equality and dignity on the one hand and freedom of speech on the other hand. In this regard the proclamation may result in compromising the exercise of freedom of expression due to various legitimate concerns which can be raised under it. The definition of hate speech lacks clarity; is not narrowly defined and there is a significant possibility that its implementation will result in subjective interpretation. In this respect the law does not clarify on what factors would be considered before one is accused of perpetrating hate speech. The presence of list of factors to be considered before deciding whether a given speech constitutes hate speech will help to avoid compromising the exercise of freedom of expression. Furthermore, law enforcement authorities will have the full power to determine a speech that could fall into the definition of hate speech which could even pose a serious threat to inconsistent law enforcement. It has been shown how the proclamation

³⁹⁴ P. 12-14, at Social media hate speech in the walk of Ethiopian political reform (n 393)

presented a potential threat to individuals' free expression right and may stifle critical public debate.

On the other hand, hate speech has undermined the dignity of the targeted persons, and damages social equality, cohesion and mutual trust among societies in Ethiopia. In this respect, the law governing hate speech in Ethiopia is weak since it does not send a strong message that hate speech is unacceptable, harmful, and dangerous and shall not be tolerated, which is mainly attributed to the absence of enforcement. Without the threat of prosecution, there is no adequate incentive for haters and trolls to discontinue their dangerous online behavior. As this study has suggested, however, focusing exclusively on repressive measures can miss the opportunity to look at the underlying cause of hate speech and address them.

Hate speech is becoming especially prevalent in the social media where both political actors and citizens express their thoughts without inhibition. And over the last few years, an inappropriate use of social media in Ethiopia has inflamed ethnic conflict in various parts of the country, leading millions of citizens to be displaced from their habitual residence. It appears that the fight against perceived online hate speech is beginning to reach a number of concerned parties, from governments to private companies and Internet Service Providers, as well as to a growing number of active organizations and affected individuals. The emergence and diffusion of hate speech online is an evolving phenomenon and developing effective responses is needed to minimize its consequences without affecting free speech.

5.2. Recommendation

The introduction of hate speech and disinformation is a step in right direction proclamation to primarily deal with the matter of hate speech both on and offline. However, there is still a lot that could and should be done in order to give better protection to the Ethiopian public from hate speech and ensure a safe environment that renders protection for individuals and groups against any discriminatory expressions defeating the rights to equality and human dignity.

Therefore, having this in mind, the study makes the following recommendations:

- The prosecution of cases under incitement to hatred legislations is one element of the state's responsibilities in this arena. The responsible prosecution organ should effectively

implement and enforce the proclamation so as to prevent the deliberate dissemination of hate speech and send a strong message for perpetrators of the offence.

- The government should review and amend some of the vaguely formulated hate Speech legislation provisions in order to formulate a definition of hate speech precisely and narrowly. Ethiopia should re-examine its legislation in light of strengthening judiciary independence and judicial effectiveness. It is crucially important that a clearer definition of hate speech be articulated, to lessen the arbitrary application of the law. Additionally, the proclamation should be re-drafted in order to take inspiration from the Rabat Plan of Action and other jurisdictions experience in particular for the purposes of defining key terms in the law that constitute prohibited content and factors that should be assessed to determine the severity necessary to criminalize hate speech.
- Concerning the responsibility of social media platforms, they should set a proper procedural safeguards, including notifying a user of any complaint against their content and takedown of the same, opportunity for judicial oversight or review by a similar independent adjudicatory authority or appeals mechanism should be provides for users whose content has been perceived as hate speech and subjected to removal.
- The government should better identify the root causes and drivers of hate speech in order to take relevant action to best address and/or mitigate its impact. Among others an institution should be considered that deals independently with generators of hate speech and issues of intolerance in the country with a wider view of achieving national cohesion and understanding while recognizing the internal diversity of groups.
- At the same time, while laws are certainly necessary and an important component in addressing hate speech, they should be complemented by a broad set of policy measures to bring about genuine changes in mindsets, perception and discourse. The government should consider other options to target hate speech, including in particular, nation-wide dialogue, education for diversity, equality and justice and in strengthening freedom of expression and promoting a culture of peace, and media literacy.
- The Ethiopian government should strengthen independent judicial mechanisms to ensure that individuals may have access to justice and remedies when their fundamental right to freedom of expression is limited unjustifiably and at the same time when become target of hate speech. Special courts or benches should be established and judges presiding over

hate speech cases shall be designated, by reason of his or her training, experience, expertise, and suitability in the field of equality and human rights.

- In addition to criminal sanction civil action (tort action) is the other legal measures to regulate hate speech in particular for less severe forms of speech. Therefore, like that of defamation which is stated as a ground of tort liability on article 2044 of civil code, hate speech should be stated as a source of civil liability.
- Finally, the governments should refrain from any attempt to abuse the hate speech law to silence opposition, censor political discourse, and undermine freedom of expression and limit press freedom.

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