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## AN EVALUATION OF THE CONTROVERSIAL ETHIOPIAN ANTI-TERRORISM LAW

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### ABSTRACT

This paper strives to assess whether the critiques/ fears against the Ethiopian anti-terrorism law particularly on its substantive part are legitimate and acceptable in light of the FDRE constitution and different criminal law principles and policies. Therefore, the paper concludes that the criticisms/fears on substantive part of the law by different bodies are legitimate and acceptable. More specifically, the paper argues that, (1) the definition of terrorism in this specific law is antithetical to the principle of legality, (2) the law excessively stifles both freedom of expression and peaceful political dissents, (3) the criminalization of inchoate crimes other than attempt is not justifiable and acceptable, (4) The extents and the kinds of punishments are not proportional that are not complied with the constitutional prohibition of cruel, inhuman and degrading punishments. Accordingly, the paper urges the Ethiopian legislative body to amend the law in a way that avoids these shortcomings thereby to respect human rights while preventing terrorism.

*Keywords:* Terrorism, Social Rights, Inchoate Offences, Proportionality Of Punishment, Principle Of Criminal Law.

### 1. INTRODUCTION

Currently, terrorism is one of the prime threats to the international community. Many are killed and wounded, and tremendous amount of property is destructed in different angles of the world due to terrorism. Particularly, after September 11 attack, United Nation adopted multiple resolutions to urge member states to criminalize terrorism in their domestic criminal laws.

Ethiopia has also suffered a lot from the acts of terrorism. The assassination attempt on the Egyptian president and the minister of transportation and communication of Ethiopia, the explosion on the minibus in Addis Ababa caused the loss of life in may 2008, October 2009 in Hargessa (Somali land) it also incurred loss of life on Ethiopian trade mission are some manifestations of the lethal incidences that are caused by terrorists.<sup>1</sup> Thus, to enforce the International obligations required by UN Resolutions on the one hand and to effectively foil such threat of terrorism on the other hand, the Ethiopian government adopted Anti-terrorism Proclamation, proc.No.652/2009. However, since its inception this specific law is prone for several bones of contentions. Though the contentious issues encompass both substantive and procedural part of the law, the focus of this paper is limited to the controversial issues on substantive parts of the law that are particularly related with the issue of criminalization. This law

<sup>1</sup> Human rights watch, An Analysis of Ethiopia's Draft Anti-Terrorism Law Updated, 2009,p.6

is criticized by different bodies because of the reason that the definition of terrorism is not in line with the principle of legality. So far as the terms and phrases are vague and broad they are not easily determinable. The criminalization of inchoate crimes particularly pre attempt activities is also another issue by which the law is alleged by different scholars, human right activists and opposition political parties as it stifles different human rights. Furthermore, the law is alleged that the extents and kinds of punishments are not proportional. Thus, according to the allegations by different bodies, the law easily stifles freedom of expression and excessively restricts peaceful political dissents. Therefore, the basic theme of this paper is evaluating whether these allegations against the law are legitimate and acceptable in light with the FDRE constitution and different accepted policies and principles of criminal law. Regarding content, the paper has four parts excluding the introduction. The first part focuses on the conceptual overview of terrorism. The second part focuses on the criminalization of terrorism including basic principles and policies of criminalization. The third one briefly evaluates the legitimacy and acceptability of the critiques against the law based on different principles and policies of criminal law and the Ethiopian constitution. Lastly the paper will end up by concluding remarks.

### 1.1 TERRORISM: CONCEPTUAL OVERVIEW

Despite extensive efforts to come up with a comprehensive definition, the international Community is not yet able to reach on the agreed definition of terrorism.<sup>2</sup> Even the United Nation anti- terrorism strategies and its numerous resolutions are not able to provide a comprehensive and precise definition. Acharya described as: “For some, terrorism is an offense, and for others, it is an activity assigned by God; for some, it is a distinctive act of maintaining power pride, and for others, it is a justified action against oppression; for some, it is an attack on the peace and security and for others, it is a quest for identity.”<sup>3</sup> These far-reaching differences are emanated from the reason that while some scholars and states want to define terrorism subjectively others are interested to define terrorism objectively. Arab, African and Asian countries and scholars want to define terrorism subjectively by considering the purpose of the act.<sup>4</sup> These countries don’t want to criminalize acts that are committed for the purpose of self-determination, secession and for other movements to gain liberty. For them, one man’s terrorist is another man’s freedom fighter.<sup>5</sup> Supporting this position, scholars like Professor Ben Saul vehemently condemn the criminalization of liberation movements as terrorists by asserting that legitimate liberation movements must be considered as lawful combatants.<sup>6</sup>

On the contrary, other scholars and politicians like Benjamin Netanyahu want to define terrorism objectively. They argued, regardless of its purpose terrorism in its nature is the cause of destruction of human rights, peace and security, and of course human beings themselves. For them “one man’s terrorist is every one’s terrorist.”<sup>7</sup> This lack of universal definition of terrorism gives a wide room for different governments in the world to evade human rights. UN Human Rights Council asserted the issue as:

Without a universal definition of terrorism, States may create broad, overreaching definitions and intentionally or inadvertently criminalize

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<sup>2</sup>Eric Manic, *Terrorism: Its past, Present and Future Prospects*, p.152.

<sup>3</sup> Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, Boston College International and Comparative Law Review Volume 29, 2006, p.655.

<sup>4</sup> Christian Walter, *Defining Terrorism in National and International law*, 2003, p.6.

<sup>5</sup> Ibid, p.36

<sup>6</sup> Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal to combat Terrorism*, Michigan State International Law Review Vol. 20:2, p .232.

<sup>7</sup> Ibid, p.5.

activity outside the realm of terrorism. States may also intentionally create a broad definition and use this broad power to suppress oppositional movements or unpopular groups under the guise of combating terrorism.<sup>8</sup>

Additionally, lack of universal definition may have its own negative impact on effective prevention of terrorism in terms of having coordination among the international community with a view to extradite those criminals who commit serious crimes like terrorism.<sup>9</sup> Though the perpetrator of that act may be a terrorist in the home country, they may not be a terrorist as per the definition of the host country.<sup>10</sup> However, the exploration of counter terrorism legislations in different jurisdictions show that the objective approach to define terrorism which does not take in to account the 'motives' of the conduct of terrorism is becoming acceptable. UN anti- terrorism strategies and its different resolutions adopt this approach to define terrorism though none of them provide a definite and comprehensive definition of terrorism. For instance the UN resolution 1269/1999 states that:

Unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whoever committed, in particular those which would threaten international peace and security.<sup>11</sup>

Among the definitions of terrorism given by numerous international legislations, the definition given by the United Nation Convention on Suppression and Financing Terrorism has a better stand in terms of acceptance by the international community.<sup>12</sup> After the attack of September 11 about 160 countries in the world ratified this Convention.<sup>13</sup> Article 2(1) (b) of the Convention provided the acts that shouldn't be supported financially as follows:

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>14</sup>

From this definition one can infer the following crucial elements. Terrorism and related acts are not committed for personal benefits like in ordinary crimes but the main purpose of the terrorist is to bring about change or to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>15</sup> The actus reus element in this definition is any act intended to cause death or serious bodily injury.<sup>16</sup> The targets of the terrorist are civilians or persons not taking part in hostilities. This Convention also does not specifically provide the means by which terrorism is to be committed. This makes the definition of terrorism

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<sup>8</sup> See A paper presented by Human Rights Advocates on Counter-terrorism and the Protection of Human Rights at 13<sup>th</sup> session of human right council on page 4.

<sup>9</sup> Ibid, p.2.

<sup>10</sup> Eric Luna, The Over criminalization Phenomenon, American University Law Review, Vol. 54:703,2005,p.350

<sup>11</sup> \_\_\_\_\_, The Nature and Definition of Terrorism, p.20.

<sup>12</sup> Aviv Cohen, supra note 7, p.233.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, p. 235.

<sup>16</sup> See International Convention for the Suppression of Financing Terrorism, adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999.

to be comfortable in the future to include new methods of terrorism that can come with the technological advancement like cyber-terrorism.

Despite its better stands, the definition of terrorism in the convention fails to clearly indicate the identity of terrorists. But according to Aviv Cohen, though article 2(1) (b) does not explicitly expressed the identity of perpetrators, it may not be wrong to presume that the perpetrators are both state and non-state entities and individuals as perpetrators of terrorism.<sup>17</sup> In nutshell, though the International community has not reached on an unequivocal consensus on the clear and definite meaning of terrorism, according to Dr. Muzaffer Yasin, there are at least five common elements of the definition of terrorism that are addressed in many anti- terrorism legislations of across the world. These are the perpetration of violence by whatever means; the targeting of innocent civilians; with the intent to cause violence or with wanton disregard for its consequences; for the purpose of causing fear; coercing, or intimidating an enemy; and in order to achieve some political, military, ethnic, ideological, or religious goals.<sup>18</sup>

## 2. CRIMINALIZATION OF TERRORISM

### 2.1 *Terrorism as an offence*

Despite its divergent definitions, starting from 1960's terrorist acts is criminalized as an offence in different international anti-terrorist treaties.<sup>19</sup> Particularly, after 1970's the international community disapproves terrorist acts because of different reasons that include "terrorism is a serious human rights violation; that terrorism undermines democratic governance, or at a minimum undermines the State and peaceful political processes; and that terrorism threatens international peace and security."<sup>20</sup> Different international treaties and organizations including UN Anti-terrorism Special Rapporteur argue that there is no even single human right which is exempted from the attack of terrorism.<sup>21</sup> Therefore, the criminalization of terrorist acts that caused serious harm to physical integrity, material support and amenity, freedom from humiliation or degrading treatment, and privacy and autonomy<sup>22</sup> is undoubtedly acceptable. Undoubtedly, terrorism is also a serious offence since it causes the destruction of democracy and instills terror on legitimate established governments. Ben Saul provided as follows:

A plausible basis for criminalizing terrorism is that it directly undermines democratic values and institutions, especially the human rights underlying democracy such as political participation and voting, freedom of speech, opinion, expression and association. Terrorists violate the ground rules of democracy, by coercing electors and candidates, wielding disproportionate and unfair power through violence, and subverting the rule of law.<sup>23</sup>

Accordingly, the International Community has reached on the consensus that every act, method and practice of terrorism in its form and manifestations regardless of the place of commission and the identity of the actor must be criminalized.<sup>24</sup> However, any Counter terrorism

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<sup>17</sup>Aviv Cohen, *Supra* note 7, p.236.

<sup>18</sup> Muzaffer Yasin, *The Role of International Criminal Law in the Global War on Terrorism*, Ankara Law Review Vol.2 No. 1,2005, p.5

<sup>19</sup> Ben Saul, *Three Reasons for Defining and Criminalizing Terrorism*, p.2

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, p.5.

<sup>23</sup> *Ibid.*, p.6

<sup>24</sup> *Ibid.*

legislations adopted by the government is required to be human rights friendly.<sup>25</sup>Violating human rights for the purpose of preventing terrorism doesn't make sense. In other words, "Effective counter- terrorism measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of states duty to protect individuals within their jurisdiction."<sup>26</sup> Therefore, when any government criminalizes terrorism and other related acts, it is required to be based on the basic principles of criminal law and human right instruments.

## 2.2 Principles and policies of Criminalization

### (a) Harm

The principle is firstly proposed by John Stewart Mill on his prominent work of *on Liberty*.<sup>27</sup> He provided that: "The only purpose for which power can be rightfully exercised over any member of a civilized community against his will/autonomy is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear. . . because in the opinion of others to do so would be wise or even right."<sup>28</sup> In a similar fashion Feinberg put the relevance of the principle of harm for criminalizing acts as follows: "State interference with a citizen's behavior tends to be morally justified when it is reasonably necessary. . . . to prevent harm or the unreasonable risk of harm to parties other than the person interfered with. More concisely, the need to prevent harm (private or public) to parties other than the actor is always an appropriate reason for legal coercion."<sup>29</sup> However, both of these prominent scholars don't attempt to argue that any harm should be criminalized. Thus, based on the minimalist approach criminalization of an act is limited to serious acts which cause direct social harm and victimize individuals and the community at large.<sup>30</sup>Less serious acts (minor harms) are dealt in different mechanisms like civil law, administrative regulations and the like. The instrument of criminal law must be used if it serves to effectively to control the serious harmful conducts which justify criminalization and/or if it is most efficient and cost effective.<sup>31</sup>As Joel Feinberg puts it:

The harm principle must be made sufficiently precise to permit the formulation of a criterion of 'seriousness', and also, if possible, some way of grading types of harms in terms of their seriousness. Without these further specifications, the harm principle may be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others for better and worse to some degree, and thus would properly be the state's business.<sup>32</sup>

The other crucial matter in criminalization is about the issue of remote harms that basically constitutes possession and inchoate offences. These acts are not harmful by themselves but they may generate other subsequent harmful acts.<sup>33</sup> Though there is no a common stand on the criminalization of remoter harms including inchoate crimes, it is revealed in different criminal legislations that these offences are criminalized. However, scholars like Ashworth stated that,

<sup>25</sup> Ibid.

<sup>26</sup> Aviv Cohen, *supra* note 7, p.233

<sup>27</sup> J.S. Mill, *On Liberty* in J. Gray (ed.) *On Liberty and Other Essays*, Oxford: OUP (1991).

<sup>28</sup> Ibid.

<sup>29</sup> \_\_\_\_\_ *Decisions to criminalize*, p.34.

<sup>30</sup> Ibid, p.37-42.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

there are different objections regarding the criminalization of remote harms.<sup>34</sup> According to him, these remote harms are mere possession or preparatory acts that don't amount to harm unless further harms are committed. Particularly, regarding inchoate crimes scholars argue that, except attempts, other inchoate offences are out of the reach of criminal law so long as these acts cause no harm to the individual or community.<sup>35</sup> Though planning, conspiracy and preparation have an opportunity to the likely hood of the commission of the crime, it doesn't mean that a harmful act is committed. Thus, these acts are not harmful by themselves that attracts criminal liability.<sup>36</sup> Similarly, there are two pragmatic concerns regarding the criminalization of inchoate crimes specifically planning. In the first place, it is hardly possible to exactly know whether a person is planning to commit a crime or not. Philip Graven provided his concern regarding the criminalization of planning as follows:

With a view to or generally under the guise of, safeguarding the alleged general interests, political, religious or others, action is taken against persons whose only mistake is or may be that they don't think along official lines, on the ground that they create a social danger and a menace to the community, and punishment are imposed only on the basis of suspicious.<sup>37</sup>

Even taking an assumption that person's mind is readable, criminalizing thoughts is not acceptable. Criminal laws should not serve as an instrument 'to purify thoughts and prefer character.'<sup>38</sup> Many criminal law scholars agree that among the inchoate crimes, criminalizing attempt is acceptable based on the mens rea and the act of the defendant. Where an actor reaches at a stage which is beyond the point of no return (which signifies the attempt stage) he must have performed conducts that can reasonably show his intention to commit the crime and hence sufficient to justify punishment irrespective of occurrence of the occurrence the harm.<sup>39</sup>

In terms of culpability, though the attempt of the attempter is failed, he has similar culpability with the one who achieved his goal. Similarly, though the attempt is not fully consummated it caused social harms, threats and fears in the community. Thus, though the criminalization of attempt is acceptable, the criminalization of other inchoate crimes is debatable and mostly not acceptable because of the reason that these offences cause neither actual harm nor threat of harm.<sup>40</sup>

#### (b) Maximum Certainty

This is among the basic constitutive elements of the principle of legality that contains the notions of fair warning and void for vagueness which are crucial standards of the quality of law.<sup>41</sup> In other words, this principle obligates the legislature of the law to clearly define the elements of the offence and to set the sanction in a parliamentary statute thereby it guarantees the individual that only those acts stipulated in the statute may be punishable. In any criminal law, unless the words, phrases and all other terminologies are provided in a qualified manner, the fundamental rights of the community may be easily overridden by the government agencies. Additionally the

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<sup>34</sup> Ibid.

<sup>35</sup> Wondossen Demssie, Criminalization and Punishment of Inchoate Conducts and Criminal Participation: The case of Ethiopia, journal of Ethiopian law, vol.24, 2010, p.163

<sup>36</sup> Andrew Ashworth, principle of criminal law, Oxford University press, fourth edition,2003, p.37-42

<sup>37</sup> Philip Graven, An Introduction to the Ethiopian Law, the faculty of Hail Selassie I university,1965,p.67

<sup>38</sup> Wondwossen, supra note 37, p.168.

<sup>39</sup> Ibid, p.165.

<sup>40</sup> Ibid, p.166.

<sup>41</sup> Andrew Ashworth, supra note 38, p.76

law itself fails to guide the public by giving faire warning about the prohibited conducts.<sup>42</sup> The Strasbourg court stated in Sunday times case:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able- if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>43</sup>

Thus, the criminal law to meet the quality of law standard, in addition to providing the clear definition of the crime, it must also give other relevant issues like the level of the harm, the culpability of the offender, about responsibility for the conduct of others and for inchoate crimes and the extent and types of penalties imposed.<sup>44</sup> Though this principle should be mandatorily adhered to different criminal legislations, in many situations, Criminal legislations like anti-terrorism laws in different jurisdictions may be crafted in uncertain and vague manner. The most obvious situation in which uncertainty exist is in a situation where an offence has been created or altered retrospectively. Similarly, uncertainty may occur when the law has not been publicized, and where it is impossible to ascertain with certainty what the elements of a particular offence are criminalized.<sup>45</sup> Many scholars argued that if the terms and rules of any law are vaguely drafted and formulated it will result different negative consequences. The ambiguous law creates undue difficulty to the public in ascertaining the law and hence to achieve fair labeling and fair warning. Similarly, unless this principle is properly applied in any criminal legislation, it would give more discretion to the government agencies and at the same time it failed to give fair warning to the public.<sup>46</sup> In this regard particularly utilitarian argue that uncertain laws do not achieve their objective as they cannot guide human behavior. Some writers link certainty with the very nature of law. According to summers:

A rule that is quite unclear in its meaning, for example, is not really law-like. A secret law that is not made public is not really law-like... In all such instances, not only is the efficacy of law sacrificed; the very conceptual claim that this use of first order law is a fully law-like use of law is also at risk and may even have to be forfeited.<sup>47</sup>

Given that laws are formulated in a vague and uncertain manner, they must be elaborated by other definitional elements, guidelines or illustrative examples which limit the broad discretion of courts.<sup>48</sup>

### (c) Proportionality of punishment

Trough time due to the weaknesses of the conception of "eye for an eye"<sup>49</sup> scholars encouraged to see proportionality of punishment focusing on the gravity of crime, mental state

<sup>42</sup> Barry Mitchell, *Multiple Wrong Doing and Offences Structure; A plea for Consistency and Fair labeling*, 2002, p.393.

<sup>43</sup> Andrew Ashworth, *supra* note 38, p.76.

<sup>44</sup> Edward M.Wise, *General Principle of Criminal Law*, Denv.J.Int.law 1996-97, p.315.

<sup>45</sup> Fran Wright, *Certainty and Ascertain of criminal law*, VUWLR, 2008, p.661.

<sup>46</sup> *Ibid*, pp.76-78.

<sup>47</sup> Fran Wright , *Supra* note. 47, p.662.

<sup>48</sup> Andrew Ashworth, *supra* note 38, p.76.

<sup>49</sup> The principle of "eye for an eye" doesn't consider the perpetrator's mens rea and actus reus, as well as the resulting injury while these are crucial for the assessment of the proportionality of the punishment.

of the wrongdoer, the victim's injury, other circumstances of the crime and the degree of punishment.<sup>50</sup> Thus, prominent scholars like Beccaria and others started to advocate the punishment imposed must fit with the wrong done. There are different justifications for the proportionality of punishment. Burgh has described the relevance of proportionality as follows:

It is important to notice that, in order to render punishment capability with justice, it is not enough that is deserved. The idea is that, in committing an offence, we don't think of the offender as deserving, but we must, in addition restricts the degree of punishment to the degree that is deserved. The idea is that, in committing an offence, we don't think of the offender as deserving unlimited punishment; rather we think of him as deserving a degree of punishment that is proportional to the gravity of the offence he committed. Hence, if we punish the offender to a degree that exceeds what he deserves, we treat him unjustly. In fact, if the offender can be said to deserve only so much punishment, then any punishment in excess of this should be considered as objectionable as imposing an equivalent amount on an innocent.<sup>51</sup>

Thus, proportionality of punishment is the matter of fairness/justice. When punishment is imposed based on the gravity of the offence, it reflects the reprehensibility of the conduct. Dworkin has expressed that the principle of proportionality "is a standard that is to be observed, not because it will be advanced or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice fairness or some other dimension of morality."<sup>52</sup> If punishments are reflected otherwise, it caused more censure which is not compatible with the blameworthiness of the conduct.<sup>53</sup> The notion of proportionality principle has a crucial role in limiting the interference of the state. In other words, the principle of proportionality safeguards offenders from excessive, disproportionate or arbitrary punishments.<sup>54</sup> Consequently, based on this principle "no individual, even offender, should have his or her interests sacrificed except to the extent that is absolutely necessary and reasonably proportionate to the harm committed or threatened."<sup>55</sup> In doing so, any government can manifest its moral credibility to its people.

It also has an importance in preventing future crimes. When the punishments levied based on the gravity of the punishment, citizens of any country particularly defendants believe that the punishment is proportional and accept it as fair. Therefore, currently the principle of proportionality is a global principle of law which is applicable both the common law and civil law before national and transnational courts alike.<sup>56</sup>

Proportionality of punishment is recognized in both retributivists and utilitarian theories of punishments. Wondewossen provided that:

For retributivists, the appropriate level of punishment is to be determined by taking the crime's two basic components, namely the harm inflicted by the actor and the actor's moral blameworthiness.

<sup>50</sup> <sup>50</sup> Thomas A. Balmer, Some Thoughts on Proportionality, Oregon Law Review, Vol. 87, 2008, p.784.

<sup>51</sup> Pereze Correa, Punishment and Proportionality: A Case Against Imprisonment, Proportionality as a principle, UNAM, p.7.

<sup>52</sup> Ibid, p.4.

<sup>53</sup> Andrew Von Hirsch, Proportionality in the Philosophy of Punishment, University of Chicago, 1992.

<sup>54</sup> Pereze Correa, supra note 54, p.4.

<sup>55</sup> Andrew Ashworth supra note 38, p.69.

<sup>56</sup> Eric Engle, The History of the General Principle of Proportionality: An Overview, the Dartmouth Law journal Vol. X:1, p.3.



Utilitarian philosophy is said to direct that punishment be neither too little nor too much, but rather that is to be proportional to the dangerousness of the crime committed.<sup>57</sup>

One of the important issues which are related with the proportionality of punishment is whether remote harms particularly inchoate crimes are to be equally punished with the completed crimes. In both of the above theories, the criminalization of other inchoate crimes except attempt is not justifiable. Thus, dealing about the proportionality of punishment about such offences is not as such relevant. The relevant matter that needs discussion here is whether the crime of attempt should be equally punished with consummated crimes since the criminalization of attempt is supported by both theories of punishments.

Regarding the punishment of attempt, the above theories took different stands. Retributivists that mainly support the culpability element of the attempter, argue that the one who attempt to commit a certain offence has a similar culpability with the one who succeed in committing a crime. Therefore, the punishment imposed on the attempter must be as severe as the punishment of the one who succeed in committing the crime. However, other retributivists argue that culpability by itself is not sufficient to judge the punishment. Thus, in addition to culpability, the harm occurred by the offence must be taken in to consideration. So long as the harm caused by the attempt is obviously less severe than the completed offences, the crime of attempt is lesser grave that deserves lesser punishment than the completed offences.

On the utilitarian point of view, though there are who support the equal punishment of attempt and other consummated crimes, most of utilitarian theorists are against this equal punishment of attempt and other completed offences based on two basic reasons. According to Ashworth the first argument is “from the moment the defendant’s conduct crosses the threshold of an attempt, up until the completion of the crime, the punishments should ideally be graded with increasing severity.”<sup>58</sup>The second reason for the lesser punishment of attempt has significance in ceasing crimes before completion. Black stone phrased it as “an encouragement to repentance and remorse”<sup>59</sup>

Generally, it would not be mistaken to argue that, both the above two theories of punishments support the lesser punishment of inchoate crimes from the completed crimes. Because:

Conducts are remote from the principal offence, there is a chance that the actors would desist from their criminal activity which makes them less culpable/blameworthy than those who have attempted or committed a crime whose determination to commit the crime is certain. It follows the closer the conduct to actual commission of the crime, the more the sever the punishment should be.<sup>60</sup>

The punishment of intentionally and negligently committed crimes is the other crucial matter that calls discussion. Taking the culpability of the offender, the one who committed a crime intentionally should be severely punished than the one who negligently committed the same crime.<sup>61</sup> Imposing equal punishment on those who committed crimes intentionally and negligently spread a wrong message to the public that both offences are similarly harmful and the offenders were in a similar culpability.<sup>62</sup>Similarly, as Ashworth well argue, calibrating equal punishments for property and violent crimes is also unfair.<sup>63</sup> According to him, since violent

<sup>57</sup> Wondwossen, supra note 37, p.176.

<sup>58</sup> Andrew Ashworth, supra note 38, p.739.

<sup>59</sup> Wondwossen , supra note 37, p.177.

<sup>60</sup> Ibid, p.178.

<sup>61</sup> ibid

<sup>62</sup> Wondwossen, supra note 37, p.183

<sup>63</sup> Andrew Ashworth, supra note 38, pp.37-42.

crimes are more serious in terms of infringing the victims interest than property crimes, the punishment for the first one must be sever than the latter.

### 3. EVALUATION OF THE CONTROVERSIAL ISSUES UNDER ANTI-TERRORISM LAW

#### 3.1 Uncertain Definition Of Terrorism

The definition of terrorism in the proclamation is both vague that lacks clarity and broad that includes acts which are not inherently terrorism acts. This makes the law to be non-compatible with the principle of legality. Some of the vague and broad terms and phrases of the definition of terrorism are elaborated as follows. One of the controversial provisions in this regard is article 3 of the proclamation. It is provided as follows:

Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:

- Causes a person's death or serious bodily injury;
- Creates serious risk to the safety or health of the public or section of the public;
- Commits kidnapping or hostage taking;
- Causes serious damage to property;
- Causes damage to natural resource, environment, historical or cultural heritages;
- Endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
- Threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death.

The phrase “*coercing the government*” which is incorporated in the definition of terrorism under this provision lacks certainty regarding its magnitude to be easily determinable by the public at large. It is possible to raise different questions based on this particular phrase of the law. For instance, does it mean that all acts to express the dissatisfactions against the government considered as terrorist acts? To show the vagueness of terms in the definition, let us consider it base on the following hypothetical case. Assume that one of the universities in Ethiopia failed to fulfill the demands of its students like food, sanitation, etc. Students dissatisfied by the deeds of the administration of the university took a measure that destroys different vehicles and buildings to force the university administration to take corrective measures to the problems occurred. The question is, do the acts of students amount to terrorist acts? Though the wrongness of the act is not questionable, it doesn't seem justifiable to consider these acts as acts of terrorism that substantially coerce the government. Rather these are mere acts for the manifestation of their dissatisfactions.

Thus, the term lacks clarity as to what level of coercion of the government is considered as a terrorist act and what coercions are not under the definition of terrorism. It fails to put a clear demarcation between terrorism and other forms of violence either politically or religious. This may lead judges to interpret that the phrase that includes all act of coercion of the government as terrorism so long as the law is silent in terms of showing the magnitude of the coercion of the government and also not included any exceptions. The phrase ‘----- *destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country*’ is

also another uncertain phrase that is not easily determinable by people. What are the fundamental *political, constitutional or, economic or social institutions of the country*? For instance, based on this stipulation destroying a certain school or other social institutions to advance political, religious or ideological may be considered as terrorism. Though destroying a school which is undoubtedly among social institutions is a criminal act, it wouldn't be sound that this criminal act amounts to terrorism.

In addition to vagueness, the law defines terrorism in a broader fashion that includes property crimes. In this regard United Nations Special Rapporteur on counterterrorism and human rights has stated that the notion of terrorism doesn't encompass property crimes rather it should be limited to acts committed with the intention of causing death or serious bodily injury, or the taking of hostages.<sup>64</sup> Thus, criminalizing and punishing property crimes as a terrorist act under the proclamation is against the principle of faire labeling and certainty.

The definition is also broad that makes an act a terrorist act if one "*causes damage to natural resource, environment, historical or cultural heritages.*" These terms are too broad that are not easily identifiable. What kinds of acts that causes damage to natural resource, environment, historical or cultural heritages justifies the labeling of terrorist conducts even fulfilling other elements of the definition? Undoubtedly, this broad definition of terrorism may lead to a wrong perception by the public. Based on this wording, even causing damage on a single church or mosque may be considered as an act of terrorism provided that other elements are fulfilled. Though this act is a criminal act, it is again difficult to argue that it is terrorism. The law failed to put the acts that causes damage to natural resource, environment, historical or cultural heritage in qualified manner with a view to easily communicate the people about the acts prohibited as terrorist acts and other crimes against natural resource, environment, historical or cultural heritages but are not considered as terrorist acts. Many jurisdictions if not all, provided these matters are in a qualified manner. For instance, the Common Wealth definition of terrorism limits that "the means of damage requiring that the damage has to expose the public or a part thereof to dangerous, hazardous, radioactive or harmful substance, a toxic chemical, a microbial or other biological agent or toxin."<sup>65</sup>

The other manifestation for the broadness of the definition under sub-article 6 of this specific provision stated that anyone who "*endangers, seizes or puts under control, causes serious interference or disruption of any public service*" is punishable with rigorous imprisonment from 15 years to life or with death. To know the broadness of this phrase it would be important to see how the phrase '*public service*' is defined under article 2 of the proclamation. It is described as '*as a means electronic, information communication, transport, finance, public utility, infrastructure or other similar institutions or systems established to give public service.*'<sup>66</sup>This broad definition is against the principle of certainty that may lead any one to understand that even the mere fact of blocking of roads may considered as terrorist acts. Regarding this issue there are different jurisdictions that identify and limit the acts which would be considered as terrorist acts and other acts. Common Wealth Draft Model Legislation in this regard is a good example. It expressly provides that disruption of any services which is committed in pursuance of a protest, demonstration, or stoppage of work, shall be deemed not to be a terrorist act unless the act is intended to resulting endangering a person's life, causing serious bodily harm serious damage to property or serious risk to the health of safety of the public or a part thereof.<sup>67</sup> In a Similar fashion, the UN resolution 1556 has also qualified the magnitude of interferences that are to be considered as terrorist acts. However, unlike to these anti-terrorism legislations the Ethiopian anti-terrorism law had not qualified the types of serious interferences or disruptions of

<sup>64</sup>Human rights watch, supra note 1, p.5.

<sup>65</sup> Hiruy wube, Some points on the Ethiopian Anti-terrorism law from Human Rights Perspective, journal of Ethiopian law vol. XXV,2012, p.59.

<sup>66</sup> Anti-terrorism Proclamation ,proc.No.652/2009,Federal Negarit Gazeta,15<sup>th</sup> year N.57

<sup>67</sup> Hiruy, supra note 67,p.62

public service that might be labeled as terrorist acts. Therefore, this broad and vague nature of the definition of terrorism may be simply used by the government to easily stifle any human and democratic rights in the country.

### 3.2 The Downsides of the Criminalization of Inchoate Offences

Criminalization of inchoate crimes (incomplete offences) is one of the substantive issues by which the weakness of the law is manifested. The first shortcoming of the law regarding the criminalization of inchoate offences is based on the harm principle. Because of the remoteness of the inchoate crimes from the substantive crimes, it is difficult to argue that these inchoate crimes in the proclamation have either actual or potential harms. In a broader way, though inchoate crimes particularly pre-attempt activities that include planning, conspiracy and preparation may cause the likelihood of the danger of terrorist acts, it doesn't mean that there is a real risk for the commission of a terrorist act that invites for the criminalization of these acts.<sup>68</sup>Hence, criminalizing such incomplete crimes with the absence of harm/injury to the community is absurd and illogical.

However, among the inchoate crimes the criminalization of attempt of committing terrorist act is justifiable by the harm principle. Attempt has more proximity to the commission of terrorist act than other inchoate crimes. Hence, attempting to commit a terrorist act is not similar with other non-consummated crimes which have no injury on the community. Though, the harm that it may cause may not be as equal as the consummated crimes, *attempt* injures different legitimate interests of the community. Similarly, in terms of culpability, though the attempter failed to accomplish his target of committing terrorist acts, he had a similar blameworthiness with the one who is successful in committing terrorist acts.<sup>69</sup>

The other weakness of the law regarding the criminalization of inchoate crimes is associated with the non-compatibility of principle of individual autonomy.<sup>70</sup> The criminalization of those non-consummated crimes gives the government agencies to interfere on the individual rights even with the absence of any harm. It is clear that any individual who plan, prepare, conspire or even attempt may renounce his criminal activity after considering different matters. Therefore, it is not fair to restrict the individual freedoms at the earliest stage in a way that gives much power to the government agencies under the guise of preventing terrorist acts. Hence, it is illogical and unfair to interfere the individual rights at the earliest stage and punish them without giving an opportunity to reconsider and choose to desist from their wrongful activity under the guise of the welfare of the public.<sup>71</sup>

Pragmatically, the criminalization of inchoate offences specifically planning to commit a terrorist act in this law is not justifiable based on two reasons. Firstly, it is difficult to know what is inculcated in the persons mind unless it is manifested in external activities. Secondly, Even if it is possible to assume that the assertion of things in the persons mind is possible, criminalizing planning to commit a terrorist act is objectionable. The criminalization of planning in this specific law under the guise of protecting the welfare of the public infringe the individual autonomy specifically rights of thought which is guaranteed in different international human rights instruments<sup>72</sup> and article 27(1) of the Ethiopian constitution.<sup>73</sup> Additionally, the

<sup>68</sup> Wondwossen, *supra* note 37, p.167.

<sup>69</sup> *Ibid*, p.165.

<sup>70</sup> According to Dawrkin, individual autonomy (liberties and the rights of individuals) should be protected from undue interference by the state through the instrument of criminal law unless they committed an act which is officially prohibited as a crime.

<sup>71</sup> Wondwossen, *supra* note 37, p.169.

<sup>72</sup> Article 18 of the Universal Declaration of Human rights and Article 18 of International Covenant on Civil and Political Rights protects the freedom of thought, conscience and religion.

<sup>73</sup> This provision provides that "Everyone has the right to freedom of thought, conscience and religion. This right shall include the freedom to hold or to adopt a religion or belief of his choice, and the freedom,

criminalization of inchoate crimes in the proclamation would serve as a challenge for the prevention of terrorism itself. The criminalization of inchoate crimes may create an opportunity for the apprehension of wrong person because of the remoteness of inchoate offences from the main terrorist act. This is because of the reason that:

Arresting the wrong person is that the acquittal rate would be high as a consequence of the difficulty of proving their guilt to the necessary degree. As deterrent effect of punishment is very much related with the likelihood of actual infliction of the punishment, high rate of acquittal may become detrimental to the criminal justice administration in general and to preventing terrorists acts in particular.<sup>74</sup>

Hence, the criminalization of pre-attempt activities which causes neither actual harm nor potential social harm, without considering practical matters would make the law unjustifiable and unfair to the public.<sup>75</sup>

### 3.3 Punishments are not proportional

There are about three manifestations for the non-compliance of the kind and extent of punishments in the proclamation with the basic principle of proportionality of punishment. The first manifestation for the disproportional of punishments in the proclamation is the imposition of similar punishments for consummated and non-consummated offences. It is stipulated under article 4 of the proclamation as follows:

Whosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article.

This specific provision vividly manifests that these all inchoate crimes are equally punishable with other consummated offences of terrorism. However, due to the requirement of harm, fairness and pragmatic concerns the criminalization of plans, preparations and conspiracy of terrorism is not justified and acceptable, the punishment of these acts of terrorism would be unacceptable too. Thus, the remaining crucial point that needs discussion is about the punishment of attempt. Since, the criminalization of attempt of terrorism among the inchoate crimes is acceptable, talking about the extent and kind of punishment of attempt of terrorism would be justifiable in the Ethiopian anti-terrorism proclamation. But still punishing attempts of terrorism equal with the fully consummated terrorist offences is not acceptable as it is provided under the above provision. Imposing similar punishment for inchoate and complete terrorist offences in the proclamation depicts its unfairness. It is stated that:

The proclamation disregards the effects of remoteness and equivocal nature of the inchoate conducts as factors that determine the extent of punishment and prescribes for similar punishment to all criminalized inchoate conducts and consummated terrorist act. Subjecting one who

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either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

<sup>74</sup> Wondwossen, supra note 37, p.172.

<sup>75</sup> However, there are groups particularly who advocate the principle of public welfare which look this stand as the manifestation of the reluctance of governments to their people by waiting for the commission of the terrorist acts. For them terrorists shouldn't be given any room though their acts are not realized and hurt any part of the community.

has planned, taken preparatory steps or conspired with others to commit a terrorist act to the same punishment as one who has committed a terrorist act makes the law unfair.<sup>76</sup>

The imposition of similar punishments for inchoate terrorist offences and completed offences in this proclamation would transfer a negative message to the public that these offences are equally harmful and the perpetrators of both offences are equally blameworthy.<sup>77</sup> In other words, these similar punishments cause the confusion of the public and bring the contempt of the law itself.<sup>78</sup> Similarly, the equally punishment of both inchoate crimes and completed crimes has another negative effect on the offenders of the crime. If individuals or groups understand that the punishments of inchoate offences of terrorism are punishable equal with the consummated terrorist offences, they will not renounce from the commission of grave crimes of terrorism.<sup>79</sup>

The equal punishment of inchoate crimes with the consummated crimes in this law is based on the culpability of the offender. Though the requirement of harm has equal relevance with the culpability of the offender for prescribing punishments, the law gives much emphasis for the latter requirement while it gives almost nominal place for the first one. Thus, punishing inchoate crimes equal with completed crimes irrespective of the harm caused shows that the law fails to consider the relevant parameters to prescribe punishments. This would make the law to fail to achieve its objective expected from punishments.<sup>80</sup>

The second manifestation for the disproportional punishments in this specific law is the calibration of equal punishment to intentionally and negligently committed acts as provided under article 5 and 9. Article 5 underlines that “*any person who knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization, or a person who is negligently supporting to the commission of a terrorist act or organization*” are punishable equally punishable with those who committed intentional terrorist acts. In a similar fashion article 9 sets equal punishment to the one who knowing that the property is the fruit of terrorist act possess, owns, deals, converts or conceals and another having reason to know about the source of the property but doesn’t know the fact. The imposition of similar punishment on two individuals one who commit terrorist act intentionally and on the other who commits terrorist acts negligently is not justifiable and also against the principle of faire labeling. In other words:

Subjecting a person who engages in a criminal act intentionally and another who does the same act negligently to similar punishment is not sound. Compared to intention, negligence constitutes a lower degree of criminal guilt. To provide similar punishment for negligently and deliberately committed offences conveys a wrong message to the public that both conducts are equally dangerous and both doers are equally culpable.<sup>81</sup>

Unlike the prescription of punishments of inchoate crimes, the Ethiopian legislator in calibrating punishments for negligently and intentionally committed terrorist acts focus on the principle of harm than the culpability of the perpetrators of terrorist acts. The third manifestation for the shortcoming of the Ethiopian anti-terrorism law regarding the imposition of disproportional punishment is the punishment of property crimes. As it is provided under article 3 of the law property offences are equally punishable with violent acts of terrorism. Even property

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<sup>76</sup> Wondwossen, supra note 37, p.180

<sup>77</sup> Ibid, p.179.

<sup>78</sup> H.L.A. Hart, punishment and responsibility: Essays in the philosophy of law, 1970, p. 25

<sup>79</sup> Wondwossen, supra note 37, p.181

<sup>81</sup> Wondwossen, supra note 37, p.182

crimes may be punished by death penalty in the proclamation that is undoubtedly against the principle of faire labeling and proportionality. Apart from that, permitting the death penalty for property crimes would violate the requirement under international law that the death penalty only be imposed for the most serious crimes.<sup>82</sup> Therefore, the kinds and extents of punishments prescribed in the proclamation are not complied with the so called principle of proportionality and the constitutional prohibition of cruel, inhuman and degrading treatment which is provided under article 18(1) of the Ethiopian Constitution.

### 3.4 Unwarranted Restriction of Freedom of Expression

This law negatively affects the freedom of expression because of two basic reasons that are provided under article 2(6), 4, 6, 22 of the proclamation.<sup>83</sup> Coming to the first reason, under article 4 the proclamation criminalizes inchoate offences particularly unsuccessful incitement and assistance stifles freedom of expression. Wondwossen argues:

As the proclamation criminalizes and punishes mere incitements and assistance to the commission of a terrorist act, even where the principal is not committed or at least attempted, the punishment imposed in such cases is inflicted in the absence of social harm, making its fairness questionable.<sup>84</sup>

This is because of the absence of the requirement of fault of the suspect and there is a remote connection between the statement and the expected offense specifically terrorist acts.<sup>85</sup> Given that incitement is criminalized, it is required to be limited to intentional incitements. Report on the impact of Ethiopian anti-terrorism law on freedom of expression provided that:

The criminalization of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of terrorist act occurring, or to actual participation in terrorist acts.<sup>86</sup>

Therefore, the criminalization of incitement in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>87</sup> However, in this proclamation incitement is criminalized ambiguously in a broad manner that includes not direct incitements to violence. The law criminalizes incitement of another to commit a terrorist act despite the terrorist act is not even attempted. The very broad

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<sup>82</sup> Human rights watch, *supra* note 66, p. 4

<sup>83</sup> See a documentary film hosted by Aljazeera on Ethiopian anti-terrorism law. The documentary film affirmed that the Ethiopian government is using the anti-terrorism law as weapon to stifle freedom of expression. It presented different allegation against journalists in Ethiopia as a manifestation. It is available at <http://www.youtube.com/watch?v=sABjG94eT3E> assessed on January 23,2015

<sup>84</sup>Wondwossen, *supra* note 37, p.167.

<sup>85</sup> Andrew Ashworth, *supra* note 38, p.415.

<sup>86</sup> See IPI/WAN-IFRA, press freedom mission report, press freedom in Ethiopia, International press institute, p.11.

<sup>87</sup> See Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted October 1995. See, for example, UN Doc E/CN.4/1996/39, 22 March 1996. Also available at <http://www.article19.org/pdfs/standards/joburgprinciples.pdf> assessed on December 6,2014.

nature of criminalization of incitement gives more discretion to law enforcement organizations to easily suppress the freedom of expression under the guise of prevention of terrorism.

The second reason for the negative implication of the law on freedom of expression is its non-compliance with the principle of legality regarding the criminalization of encouragement. The proclamation used subjective way of criminalization that encompasses not only clear cases of encouragement but also *'anything that is likely to be understood by the public or a part thereof for whose consumption the publication is made.'* Phrases *'likely to be understood'* and *'other inducements'* are not so certain that are precisely defined to allow citizens to foresee to a degree that is reasonable to identify the kind of result of publication that might induce persons to commission or preparation or instigation of the an act of terrorism. This gives much discretion to the law enforcement organs to abuse the freedom of expression. It is stated as:

In so far as there is a possibility for the expression to be understood by members of the public as a direct or indirect encouragement of terrorism, it is legally possible to punish the expression without enquiry in to the objective plausibility that the expression is a clear case of encouragement of terrorism. The subjectivity makes the domain of the offence indeterminate. The more indeterminate the criminal offence is the more likely for it to be abused.<sup>88</sup>

The other vague phrase which causes unpredictable understanding of audience thereby creates an atmosphere of increasing ambiguity with respect how communications are to be interpreted and understood is *'Public or the part thereof'*. This gives a great role to the perceiver's or recipient's own goals assumption and mindset. In explicit contradiction with article 29(6) of the Ethiopian constitution, the proclamation used subjective criteria to easily control the media outlets. Hence, this subjective consideration gives great opportunities for the violation of freedom of expression.<sup>89</sup> The obligation that required everyone to give information is the other broad aspect of the proclamation that erodes the freedom of expression. Obviously, this obligation which is provided under article 22 is also applicable to journalists and media organizations to disclose their sources. However, for the purpose of having free flow of information to media institutions and the public, journalists and media organizations have a right:

Not to disclose the identities of their confidential sources; to not provide information gathered in the course of journalism; to not be forced to testify; and to not be subject to surveillance and searches to undermine these rights. The rights can only be overridden in extraordinary circumstances.<sup>90</sup>

Though, freedom of expression is not an absolute right, the mere claims of officials to have information to prevent terrorism are not acceptable. The UN Special Rapporteur on Human Rights and Counter-Terrorism argues that:

The legitimate interest in the disclosure of confidential materials of journalists outweighs the public interest in the non-disclosure only where an overriding need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature and the

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<sup>88</sup> Hiruy, supra note 67, p.59.

<sup>89</sup> Ibid, p.60.

<sup>90</sup> See Article 19, Global campaign for free expression, comment on Anti-Terrorism Proclamation, 2009, of Ethiopia, p.6.



necessity of the disclosure is identified as responding to a pressing social need.<sup>91</sup>

Thus, the provisions of the law regarding freedom expression are not complied article 29 of the Ethiopian constitution and the African charter on Human and People's Right and UDHR, which Ethiopia has ratified which makes it to excessively infringe freedom of expression.<sup>92</sup>

### 3.5 Excessive Restrictions on Political Dissents

The law restricts of peaceful political dissents because of two basic reasons. While the first reason is related with the proscription process of terrorist organizations by the House of Peoples Representative the second one is associated with lack of certainty of terms and phrases particularly related with definition of terrorism.

In Ethiopia, freedom of association is recognized as a fundamental right under article 31 constitution.<sup>93</sup> Though it is easy to infer from this article that forming an association for terrorist purpose or for any purpose prohibited is forbidden, the determination of whether the association is for legitimate or for terrorist mission should not be determined by the legislature rather this must be determined by the independent judiciary.<sup>94</sup> In other words, the civilian courts have a jurisdiction to determine and give decisions on terrorism cases without any interference from other organs of the government including the legislature.<sup>95</sup> Therefore, the denial of the judiciary from the involvement of the proscription of terrorist organizations would have different negative implications on political dissents in Ethiopia.<sup>96</sup> The implication is both on political organizations and on the individual members to the proscribed organization.

It is crystal clear that currently 100% of the parliamentary seats are taken by the leading party.<sup>97</sup> As it stands, the proclamation can be used as weapon by the leading party to quash political parties by proscribing them whenever it thinks that the party would be dangerous for its existence though that the opposition party is exercising its duties in a peaceful manner.<sup>98</sup>

As provided above the proclamation not only discouraged political organizations but also the individual members of the proscribed political organizations because of their participation. The criminalization of membership and participation in political organizations is a debatable which needs the saying and consideration of the judiciary particularly in determining the intent of those charged for being a member of a proscribed organization.<sup>99</sup> The law doesn't clearly put the intent of the individual who join the proscribed organization. For instance an individual joins an organization believing that the institution undertakes its duties in a peaceful manner. However, after a while if the organization to which the innocent individual is a member is proscribed as a

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<sup>91</sup> Mr. Martin Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Doc. A/HRC/13/37, 28 December 2009.

<sup>92</sup> Ibid.

<sup>93</sup> As per this article "Every person has the right to freedom of association for any cause or purpose. Organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited."

<sup>94</sup> Hiruy, supra note 67, p. 69

<sup>95</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, pp.43-44.

<sup>96</sup> The Ethiopian Radio and Television has hosted a debate between the ruling party and some opposition parties on the Anti-terrorism proclamation. During the debate, the Ethiopian opposition Political parties repeatedly and aggressively echoed that the law has high negative implication on political dissents. They argued that the proclamation is intentionally designed with a view to narrow the political sphere. Therefore, according to the opposition members this law is serving as a weapon to criminalize even legitimate and lawful political movements under the pretext of prevention of terrorism.

<sup>97</sup> Political parties debate on the Anti-terrorism Proclamation hosted by ETV available at <http://www.youtube.com/watch?v=Dmk7kW-30mI> assessed on December 6,2014

<sup>98</sup> Ibid.

<sup>99</sup> Hiruy Wube, supra note, 67, p.52.

terrorist organization, that innocent individual is liable to a minimum of 5 years punishment by the mere fact that he is a member and participated in a proscribed organization. This would be a good ground for any individual not to participate in any opposition political parties by fearing subsequent proscriptions. It is stated that:

This has deterrence effects on peaceful political protests as there is a possibility for protests to result in the public service interruption or disruption sought by the law and the whole activity be regarded as a 'terrorist act' making the organizing party susceptible to proscription. Any undue limitation on the right to protest, the functional party of the right to political participation, is of far-reaching harmful consequences on human rights protection.<sup>100</sup>

The second main reason for the restriction of peaceful political movements is related with uncertainty of terms and phrases in the proclamation. As stated above, the definition of terrorist acts under the Ethiopian anti-terrorism law is both broad and vague which is not in line with the principle of legality. The point here is how broad and vague definition of terrorism jeopardize the peaceful political dissents? The following are indicators for that. The law criminalizes '*serious interference or disruption of public services*' as a terrorist act. Based on this phrase if demonstrations which are undoubtedly among the main ways to undertake political protests cause loss of human life, serious damage of bodily integrity or grave loss or destructions, the participants to the demonstration and the political party that organized the demonstration are considered as a terrorist. Needless to say, this curtails the peaceful political movements so far as political organizations fear to undertake peaceful demonstrations against the government. Human rights watch put the matter as follows:

A non-violent march that blocked traffic could qualify as a terrorist act, subjecting protestors to 15 years to life in prison, or possibly even the death penalty. The law might also permit prosecutions on terrorism charges for minor acts of violence committed in the context of political activism: thus a political protestor who damages a police car or breaks the window of a government building could conceivably be prosecuted as a terrorist.<sup>101</sup>

Terrorism organization is defined in this law is '*a group or association composed of not less than two members.....*'. This definition of terrorism organizations coupled with the vague and broad definition of terrorism make a certain group of two or more individuals who engaged in a peaceful political movements as a terrorist organization which is punishable 5 to 20 years.<sup>102</sup>

Criminalizing '*support of terrorism*' as provided under article 5 ambiguously is also another instrument to jeopardize peaceful political movements. The nature and type of support and the identity of those who give support is not stipulated in a qualified manner. For instance the mere fact of giving advice, food, water or other similar things to the political protester even by their families may result the charge of themselves with terrorism under this provision.<sup>103</sup>

#### 4. CONCLUSION

Though many of the issues related with the definition, concept and nature of terrorism are controversial across the world, there is a global consensus that it is a prime challenge that

<sup>100</sup> Ibid, p.56.

<sup>101</sup> Human rights watch, supra note 1, p.4.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid, p.5.

undoubtedly affects fundamental human rights, undermines democratic governance and the peaceful political processes and similarly terrorism threatens international peace and security. Because of this UN adopted different resolutions and also encouraged the international community to criminalize terrorism provided that the criminalization must be in line with the fundamental human rights.

Since, Ethiopia as a country suffers a lot from the terrorist acts, it adopted anti-terrorism proclamation 652/2009 with a view to effectively foil the danger of terrorism. However, assessing this law with respect to substantive criminal law principles and policies, international human right instruments and FDRE constitution, it has different shortcomings.

The proclamation defines terrorism in a problematic manner that deviates from the principle of legality. Terms and phrases that are used in the definition of terrorism are broad that unjustifiably include acts which are inherently not terrorist acts and also vague that are not easily determinable not only by the public at large but also to the experts.

The law has also a negative impact on freedom of expression. These weaknesses of the law are basically emanated from two basic things. The first one is the criminalization of mere incitements where the principal act is not committed or even attempted. This way of criminalization makes the law unjustifiable because of the absence of harm. Criminalizing incitements which are not committed intentionally is not fair and not in line with the international standards. The second thing is the failure of the law to be in line with the principle of legality as to the criminalization of 'encouragement.' The law used subjective expressions to criminalize 'encouragement.' Because of the subjectivity of criminalization, it is hardly possible to easily determine what is the intention of the legislature is regarding this issue. Because of the criminalization of mere incitements including which are not committed intentionally and the failures of the law to be compatible with the principle of legality and the international human right instruments and the FDRE constitution gives a wide room for the government agencies to easily manipulate the law as a weapon to jeopardize freedom of expression under the guise of averting terrorism.

Similarly, the law unduly restricts the political dissents because of two reasons. The first factor is linked with the proscription of terrorist organizations. The proclamation has vested the authority of proscribing terrorist organizations to the House of People Representatives. In the current Ethiopian parliament more than 100% of the seats are occupied by the ruling party (EPRDF). Thus, this law give a wide opportunity to the government to easily proscribe any political organization whenever it thinks that the party becomes a danger in the political sphere though it never engaged in terrorist activities. The other way that the law used as a weapon for the government to excessively restrict the peaceful political movements is related with the non-compliance of the definition of terrorism with the principle of legality.

The other shortcoming of the law is the criminalization of inchoate crimes particularly pre-attempt activities under article 4. The criminalization of these inchoate crimes served the government to interfere on the individual autonomy at the earlier stage without the social harm. Similarly, for practical reasons, it is also not acceptable to criminalize planning so long as it is difficult to determine planning unless they are manifested by external practice. Even it is possible to determine what is inculcated in a person's mind, the criminalization planning is not justifiable and even it is against different international human right instruments and article 27 of the FDRE constitution so long as it affects the freedom of thought. Thus, because of the absence of harm (cause neither potential nor actual harm) and pragmatic concerns the criminalization of inchoate crimes in the proclamation except attempt, is not acceptable and justifiable.

The extents and kinds of punishments prescribed in the law are not proportional. The proclamation imposes similar punishment for consummated and non-consummated offences; and intentionally and negligently committed of terrorist offences. Similarly, it is not also complied with the international human rights standards that property crimes should not be punished to death. Thus, the prescription of the extents and kinds of punishments in the proclamation deviate

from the constitutional prohibition of cruel, inhuman and degrading punishments as it is provided under article 18 of the FDRE constitution.

Therefore, the allegations and critiques against this specific law are legitimate and acceptable in light of the FDRE constitution and substantive criminal law principles. The author of this paper recommends the Ethiopian legislature must reconsider and amend the law in a way that provides the definition of terrorism in a certain way and respects freedom of expression and political dissents. Similarly, the legislature should exclude pre-attempt activities from criminalization and also make the extent and types of punishments proportional based on the social harm of the offence and culpability of the offender.

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