

PROSCRIPTION OF ENCOURAGEMENT OF TERRORISM IN ETHIOPIA: ANALYSIS OF ITS CONSISTENCY WITH FREEDOM OF EXPRESSION



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List of Acronyms

ATP	Ethiopia Anti Terrorism Proclamation No 57/2009
FDRE Constitution	Constitution of the Federal Democratic Republic of Ethiopia
CCPR	International Covenant on Civil and Political Rights

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Introduction

The Ethiopian Anti Terrorism Proclamation No. 57(herein after referred to as ATP) came into force in August 2009. The enactment of this law is partly to respond to the Security Council Resolution No 1456, which calls upon states to enact anti terrorism laws, which specifically criminalize terrorist acts and that also impose proportionate sanctions that take into account the seriousness of the crime of terrorist acts. The ATP criminalizes a number of acts including terrorist acts and encouragement of terrorism. Indeed a number of human rights issues arise if one considers almost each article of the proclamation. Nonetheless, the thesis is limited to the study of the implications of the stipulation of the proclamation, which proscribes encouragement of terrorism on the enjoyment of freedom of expression as envisaged in both the Constitution of the Federal Democratic Republic of Ethiopia (hereinafter referred to as FDRE Constitution) and the International Covenant on Civil and Political Rights (herein after referred to as CCPR), to which Ethiopia is a party.

Both the FDRE Constitution and the CCPR guarantee freedom of expression. They also provide for the permissible ways of limiting freedom of expression. The ATP proscribes speech that encourages terrorism. This rule clearly amounts to restriction on freedom of expression. Hence, the objective of the thesis is to analyze this rule which proscribes speech that encourages terrorism within the meaning of the proclamation in light of the permissible limitation standards as set out by both FDRE Constitution and CCPR. The three chapters of this thesis are, therefore destined to address this research question.

Accordingly, chapter one of the thesis deals with definition of terrorist acts in the ATP. The specific elements of the definition as provided therein are closely analyzed by referring to the pertinent provisions of the ATP, the Criminal Code of the Federal Democratic Republic of Ethiopia (hereinafter referred to as Criminal Code) and the FDRE Constitution. Where the need arises, definitions of terrorist acts in other jurisdictions are also consulted. This chapter lays

down the basic step for the analysis of the stipulation on encouragement of terrorism as the later specifically refers to the definition of terrorist acts.

The second chapter explores the specific substances (contents) of freedom of expression as guaranteed in both FDRE Constitution and CCPR. It further considers the permissibility standards or tests that should be met by any law that purports to limit freedom of expression under both instruments. Accordingly, what conditions should be met in order to lawfully restrict freedom of expression are dealt with in this chapter.

The last chapter, which is the main theme of the thesis addresses the issue whether the limitation regime introduced by the ATP in proscribing speech that encourages terrorism is compatible with the limitation tests in both FDRE Constitution and CCPR. It first explores the types of terrorism related speech, which gives emphasis to incitement to terrorism and proceeds to analyze which type of speech is proscribed in the ATP. The final section looks into whether the limitation on freedom of expression under the ATP is Constitutional and consistent with CCPR.

Methodology

The thesis employs the theoretical analysis of the pertinent laws of the FDRE Constitution, ATP, the Criminal Code and CCPR. These being the major sources of the study, United Nations Security Council and General Assembly Resolutions, Regional and International Conventions on human rights and terrorism, Declarations of Principles within both the United Nations, African Union and by other international non governmental organizations have been used. Moreover, concluding observations on state reports and decisions on individual communications of the Human Rights Committee have been used in the thesis.

Importantly, the provisions of FDRE Constitution and CCPR on freedom of expression have been joined in the discussion throughout the thesis. This is because Ethiopia is a party to CCPR, and the FDRE Constitution authorizes the interpretation of its provisions on human rights and

freedoms in line with CCPR and the Universal Declaration of Human Rights.¹ Moreover, international treaties, which are adopted by Ethiopia form law of the land.² Hence, the research question is approached from the harmonized interpretation of freedom of expression as guaranteed in both instruments.

¹ FDRE art 13(2)

² Ibid art 9(3)

Chapter One- Definition of ‘terrorist acts’ in the ATP

A study of the definition of ‘terrorism’ need to be the starting point of a study of an anti terrorism legislation as this part lays down the basis for the application of the whole contents of that law. Specifically, the provision that proscribes encouragement of terrorism in the ATP refers to definition of terrorism in the same law.³ Accordingly, the study of definition of terrorist acts in the ATP lays down the first and major step in understanding of what is proscribed by encouragement of terrorism, which constitutes the main theme of this thesis.

This chapter starts with brief introduction of the international and regional conventions, which define ‘terrorism’ or specific aspects of ‘terrorism’. It then proceeds to the discussion of possible elements of ‘terrorism’ and examines the definition of ‘terrorist acts’ under the ATP.

1.1 Definition of terrorism in general

Lawyers, academics, national legislatures, regional organizations and international bodies notably the United Nations have produced a bewildering array of definitions of ‘terrorism’.⁴ Today ‘terrorism’ is widely deployed in both political debate and legal discourse and particularly the legal meaning attributed to the concept is crucial in establishing and limiting the scope of serious criminal sanctions as well as the capacity of the government to infringe upon human rights.⁵

There are a number of international conventions on combating different forms of ‘terrorism’. Among others, the International Convention against the Taking of Hostages defines the crime of

³ ATP art 6

⁴ Golder (2004) p. 270

⁵ Ibid at 271

‘hostage taking’.⁶ Similarly, Article 2(1) of the International Convention for the Suppression of Terrorist Bombings defines the act of ‘terrorist bombings’.⁷ International Conventions on Suppression of Financing of Terrorism and Nuclear Terrorism also provide for their respective definitions of the specific acts of ‘terrorism’.⁸ Ethiopia acceded to the first two international conventions in 2003. There are also regional conventions in Americas, Africa and Europe which define terrorist acts. Specifically, the Organization of the African Union’s Convention on the Prevention and Combating of Terrorism provides for the definition of ‘Terrorist Acts’.⁹

Apart from these definitions in international and regional treaties, there are currently more than one hundred definitions of “terrorism”.¹⁰ These definitions vary and so far no objective universal definition of terrorism has been reached.¹¹ Nonetheless, it is argued that all definitions can be reduced to five basic structural elements namely: the perpetration of violence by whatever means; targeting of innocent civilians; with the intent to cause violence or with wanton disregard for its consequences; and for the purpose of causing fear, coercing or intimidating an enemy; in order to achieve some political, military, ethnic, ideological or religious goal.¹² These elements are more or less recognized in one of the United Nations Security Council Resolutions.¹³

Alternatively, definition of “terrorism” can be reduced to two elements: subjective element of a certain motivation or intention on the part of the perpetrators and an objective element of a crime of a certain scale.¹⁴ These elements are what are normally referred to as the mental and material

⁶ CATH art 1

⁷ CSTB art 2(1)

⁸ CSFT art 2 & CSNT art 2

⁹ CPCT art 1(3)

¹⁰ Golder (2004) p.271

¹¹ Ibid

¹² Tiefenbrun (2003) p.362

¹³ S/RES/1566(2004)

¹⁴ Walter (2003) p.27

elements of commission of crimes respectively. I have used the terms subjective/mental and objective/material elements interchangeably throughout this chapter. The subjective and objective elements roughly envisage the five basic structural elements of ‘terrorism’ listed out above. What distinguishes crimes of terrorism from other ordinary crimes is, of course the special nature of the intention of the perpetrators, and a crime of large scale, which affects or is at least intended to affect the general public and the government.¹⁵

Definitions of terrorism used to call for violence against persons to meet the material element of terrorism while the recent developments go in the direction of including violent and non violent but nevertheless destructive actions against public facilities.¹⁶ On the other hand, while the intention of creating terror and fear within the population is an uncontroversial subjective element of the definition of ‘terrorist acts’, the degree of the influence on government decision-making, which is necessary to speak of terrorism, varies from country to country.¹⁷ Some definitions use “coercing” while others use “influencing” the government.¹⁸ The first use refers to a restrictive approach in defining terrorism while the second one allows a broader application where otherwise accepted forms of public protest against government policies, such as large scale demonstrations, may too easily be labeled as terrorism.¹⁹

Generally, definitions of terrorism have both subjective/mental and objective/material elements that have to be met simultaneously if we are to talk about terrorist acts or crimes.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid at 29

¹⁸ Ibid at 30

¹⁹ Ibid

1.2 Definition of “terrorist acts” in the ATP

The ATP defines “terrorist acts” as:

“Anyone intending to coerce the government, to intimidate the public or section of the public or to destabilize or destroy fundamental political, constitutional, economic or social institutions of the country, for the purpose of advancing a political, religious or ideological cause, 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 these acts is punishable with rigorous imprisonment from 15 years to life or with death.”²⁰

The subjective and objective elements of this definition are considered in the coming sections of this chapter.

1.2.1. Subjective / mental element

The first phrase of the definition of “terrorist acts” in the ATP provides for the kinds of intention of the perpetrators of “terrorist acts”. The first subjective element is:

1 [...] *intending to coerce the government, to intimidate the public or section of the public or;*

The first consideration as regards the above phrase is the relation between the elements of “coercing the government” and “intimidation of the public or the section of the public”. While the conjunction “or” is used in between the other subjective elements of the definition of “terrorist acts”, there is none in the case of the above two. Hence, the language used in both the Amharic and English versions does not imply an alternative approach. Other national “terrorism” definitions use “the intention to create fear among the population” and “the purpose of

²⁰ ATP art 3

influencing or compelling the government or an international organization” alternatively.²¹ Although, the two issues are closely related in terrorist acts, because the intimidation of the population is intended to serve as a means of coercing the government, the modern approach separates the issues that if the intention of intimidating the population is present, the intention of coercing the government is not a necessary additional requirement.²²

Coming back to the ATP’s definition, there is no indication in the language used that the elements of “coercing the government” and “intimidation of the public” are alternative elements of the definition of “terrorist acts”. Hence, the intimidation of the public or parts thereof must be used as a means of coercing the government if we are to speak of terrorist act within the ATP’s framework, which makes the definition’s scope narrower on this regard. Secondly, the definition uses the word “coerce”, which calls for restrictive approach by making the threshold of the intention of the perpetrators higher. Finally, it is worth noting that for the purposes of the ATP “government” can mean the Ethiopian federal and regional governments, parts of these governments, a foreign government or an international organization.²³

2 [...] *intending to destabilize or destroy fundamental political, constitutional, economic or social institutions of the country,*

Alternatively to the element of intimidation of the public to coerce the government, the ATP’s definition of “terrorist acts” provides for the intention of destabilizing or destroying fundamental political, constitutional, economic or social institutions of the country. However, none of the ATP’s provisions provide for nor make reference to others laws as to what are the “constitutional”, “political”, “economic” or “social” institutions of the country. Moreover, what is the standard for determining one institution as “fundamental” or not is left unregulated. Reference to the FDRE Constitution and Regional Constitutions as the case may be may help in determining the “constitutional” institutions of the country. Among others, legislative, judicial

²¹ Walter (2003) p.28

²² Ibid

²³ ATP art 2(9)

and executive bodies at both federal and regional levels may constitute “constitutional” institutions of the country. Are they “fundamental” enough to fall under the scope of the above element is left to the discretion of the court or the House of People’s Representatives (herein after referred to as the House) in case of involvement of terrorist organization.

This approach tends to create an open ended element in defining terrorist acts by including ambiguous terms with no specific legal reference. This would further call for the arbitrary application of those elements to acts that might not otherwise be conceived as terrorist acts, which would further, undermine the freedoms and rights of individuals in the choices they make as members of a political party, in expressing their views and taking part in assembly and more others.

3 [...] *for the purpose of advancing a political, religious or ideological cause*

This is the last condition attached to both the first and second mental elements of the definition of terrorist acts discussed above. The question this last condition tries to address is whether it is necessary to speak of terrorism, that the perpetrators advance a political, religious or other ideological cause or not.²⁴ The definition in the ATP is clear that the presence of a political, religious or ideological cause on the part of the perpetrators is a detrimental condition of the definition of terrorism in the ATP. The definition, hence, excludes those forms of acts which have no political, ideological or religious motivations from its ambit.

1.2.2 Objective / material elements

Assuming that the necessary subjective/mental elements of the definition of “terrorist acts” are fulfilled, what are the material or objective elements of the “terrorist acts” is the consideration under this section. The classical and uncontroversial element of terrorism has been the use of serious violence against persons, which only refers to such violence as a sufficient criterion to

²⁴ Walter (2003) p.27

fulfill the objective element of terrorism.²⁵ However, there seems to be a development that broadens existing definition of terrorism into a direction of including violent and non violent but nevertheless destructive action against public facilities.²⁶

The ATP lists out material elements of “terrorist acts” some of which are defined in the “definitions” part of the ATP while the others are not. The relevant law in determining the exact limit and application of those undefined elements is hence, the Criminal Code.²⁷ The objective elements of the definition of terrorism together with the relevant reference in the ATP or the Criminal Code as the case may be are briefly discussed herein under.

Causing a person’s death or serious bodily injury: These acts are what are ordinarily referred to as crimes of “homicide” and “serious bodily injury”. The specific material elements of these crimes can be defined by referring to the Criminal Code.²⁸

Creating serious risk to the safety or health of the public or section of the public: Crimes against public safety and public health are provided in the Criminal Code.²⁹ Accordingly, the material elements of these crimes can be defined by referring to the Criminal Code while how “serious” should be the risk to call the application of the ATP would be decided by the court or the House as the case may be.

²⁵ Ibid

²⁶ Ibid

²⁷ ATP art 36 (2)

²⁸ CC arts 538 - 553

²⁹ Ibid arts494-504 & 514-534

Committing kidnapping or hostage taking: The act is defined in the ATP as seizing or detaining and threatening to kill, to injure or to continue to detain a person in order to compel the government to do something as a condition for the release of the hostage.³⁰

Causing serious damage to property: The ATP defines “Property” as any asset whether corporeal or incorporeal or movable or immovable, and includes deeds and instruments evidencing title to or interest in such asset such as bank accounts.³¹ The “seriousness” of such damage to property is to be determined by a court or the House as the case may be.

Causing damage to natural resource, environment, historical or cultural heritage: Neither the ATP nor the Criminal Code defines what constitutes crime of causing damage to natural resource, environment, historical or cultural heritage. As a result, specific regulations, or expertise definitions may be employed to define these terms.

Endangering, seizing or putting under control, causing serious interference or disruption of any public service: “Public service” is defined as electronic, information communication, transport, finance, public utility, infrastructure or other similar institutions or systems established to give public service.³² Like the other cases, the “seriousness” of the interference is to be determined by the concerned actors.

Two important points that are related with the definition of terrorist acts should be noted. Threatening, planning, preparation, conspiracy and attempt to commit one of the above acts are also punishable.³³ A person who has been found guilty of “terrorist acts” under the ATP is awaited with rigorous imprisonment from 15 years to life or capital punishment.³⁴

³⁰ ATP art 2(5)

³¹ Ibid art 2(1)

³² Ibid art 2(7)

³³ Ibid art 4

³⁴ Ibid art 3

The subjective and objective elements of terrorist acts under ATP have been discussed in this chapter. On the basis of the discussions, it can be concluded that the definition of ‘terrorist acts’ in the ATP indicates a restrictive application when it envisages the intention to ‘coerce’ instead of to ‘influence’ the government.

The inclusion of undefined and ambiguous or vague terms and phrases in the definition of ‘terrorist acts’ in the ATP, however lead to a conclusion that the definition is broad, which allows arbitrary application of the provisions of the ATP. The danger is that an overly vague or broad definition of ‘terrorism’ could lead to criminalization of conduct that does not constitute terrorism as such, which in turn poses a danger to the legitimate non violent and peaceful exercise of fundamental rights and freedoms.³⁵ Similarly, the Human Rights Committee (herein after referred to as the Committee) stressed that state party should adopt a more precise definition of terrorist acts so as to ensure that individuals will not be arbitrarily targeted on political, religious or ideological grounds.³⁶ It calls upon a state with vague definition of terrorist acts to address such vagueness in order to ensure that its application is limited to offenses that are indisputably terrorist offenses.³⁷

³⁵ A/63/337

³⁶ CCPR/C/CAN/CO/5

³⁷ CCPR/C/AUS/CO/5/CRP/1

Chapter Two: Freedom of Expression and its Limitation Clauses

The United Nations General Assembly in its very first session adopted Resolution 59(1), which asserts that freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.³⁸ Given the explicit recognition of freedom of expression by the United Nation, it is no surprise that freedom of expression is subsequently guaranteed in international and regional instruments in second half of the 20th century. Indeed international and regional bodies have recognized that freedom of expression is of vital importance in any democratic society.³⁹

Freedom of expression is guaranteed by international human rights instruments notably the Universal Declaration of Human Rights (hereinafter referred to as UDHR), the International Covenant on Civil and Political Rights and in regional human rights conventions of Africa, America and Europe. UDHR has arguably attained the status of customary international law while Ethiopia is a party to CCPR and the African Convention on Human and Peoples' Rights. All these instruments to which Ethiopia is internationally bound recognize the right to freedom of expression.⁴⁰ Moreover, the FDRE Constitution does not only guarantees freedom of expression but also gives explicit recognition to the applicability of these international norms at national level.⁴¹ Accordingly, discussion of freedom of expression within the Ethiopian Context will obviously call for the consideration of these constitutional and international undertakings of the country. However, considering all these instruments will be overambitious. Hence, the subsequent discussions on freedom of expression focus on the pertinent provisions of FDRE Constitution and CCPR. The next sections discuss substances and limitation clauses of freedom

³⁸ Callamard (2008) p. 2

³⁹ Ibid

⁴⁰ UDHR art 19, CCPR art 19, ACHPR art 9

⁴¹ FDRE art 9(4) & 13(2)

of expression as incorporated in FDRE Constitution and CCPR. Freedom of expression and information is provided alongside with freedom of opinion and freedom of press in both CCPR and FDRE Constitution. As the scope of the thesis is limited to freedom of expression and information, the other substances of Article 29 and 19 of FDRE Constitution and CCPR respectively are excluded. Hence, the discussion below is confined to freedom of expression and information under both instruments.

2.1 Freedom of Expression- What is protected in FDRE Constitution and CCPR?

Freedom of opinion and expression is frequently termed as the core of the CCPR and the touchstone for all other rights guaranteed therein primarily because it symbolizes more than any other right the interdependence of the two large categories of human rights of the first generation which led into the naming of the covenant.⁴² Freedom of expression is not only a fundamental human right, on its own and in its own right, but it is also a cornerstone right or an ‘empowerment right’, one that enables other rights to be protected and exercised.⁴³ Indeed, freedom of expression and opinion is linked to a number of other rights including freedom of association and assembly, right to property, minority rights, rights related to health and education matters and freedom of religion.⁴⁴ Importantly, freedom of expression forms a central pillar of a democratic framework through which all rights are promoted and protected, and the exercise of full citizenship is guaranteed.⁴⁵ The implication of such importance is that any violation of freedom of expression goes beyond what is protected by the freedom and can affect the enjoyment of other rights and freedoms.

⁴² Nowak (2005) p. 438

⁴³ Callamard (2008) p. 2

⁴⁴ Smith (2007) p. 267

⁴⁵ Callamard (2008) p. 3

Both FDRE Constitution and CCPR provide that a person has the right to freedom of expression without any interference and the right includes freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the forms of art, or through any media of one's choice.⁴⁶

Accordingly, Freedom of expression is protected with respect to "information and ideas of all kinds".⁴⁷ It can take many forms encompassing verbal, artistic and physical expression.⁴⁸ Hence, every communicable type of subjective idea and opinion, of value neutral news and information, of commercial advertising, art works, political commentary regardless of how critical, pornography, etc is protected by freedom of expression, of course subject to permissible restrictions.⁴⁹ In similar vein, anonymous publication of an opinion or information is protected.⁵⁰ Hence, freedom of expression extends beyond the mere verbalization of ideas.⁵¹ It further protects assemblies and demonstrations, all media of acoustic, visual, electronic and other communications i.e. in particular, radio and television, electronic media, film, photography, music, graphic and other arts.⁵²

An important point worth noting here is that the mere dissemination of information and ideas must be distinguished from actions going beyond this that have to do with the active implementation of these ideas.⁵³ In the case of latter, they are not protected by freedom of expression without a necessary resort to the permissible clauses of freedom of expression.⁵⁴

⁴⁶ FDRE art 29(2) & CCPR art 19(2)

⁴⁷ Nowak (2005) p. 443

⁴⁸ Smith (2007) p. 267

⁴⁹ Nowak (2005) p. 443

⁵⁰ Ibid

⁵¹ Smith (2007) p. 269

⁵² Nowak (2005) p. 445

⁵³ Ibid

⁵⁴ Ibid

As regards forms of communications, freedom of expression envisages exchange of information and ideas intra and internationally.⁵⁵ As the right is guaranteed “regardless of frontiers”, its enjoyment entails exchange of ideas and information of all kinds both intra and internationally.

The right to seek information is generally understood to relate to all generally accessible information.⁵⁶ What amounts to generally accessible information as regards different persons is an issue here. In the context of personal data and other specific information about a person, it is possible to assume that the individual concerned has a more extensive right to be informed of such data, in so far as this is not opposed by pressing interests of secrecy on the part of the state or a private data bank whereas it is debatable whether the public mandate of the press and electronic media to inform the public truthfully of all events of interests implies a privileged right of journalists to seek information beyond what is generally accessible.⁵⁷

Though political expression may arguably call for a better protection of freedom of expression, in both FDRE Constitution and CCPR the right protects information and ideas of all kinds invariably. Nonetheless, the Committee noted the importance of the right to seek and receive information on the conduct of political (parliamentary) affairs, which implies a privileged treatment of the media in the enjoyment of the right to information and stresses the positive obligation of states to protect against interference by private actors, in particular in relation to essentially public functions that have been delegated to private organizations.⁵⁸

Freedom of expression operates at both horizontal and vertical levels protecting an individual against arbitrary interference in the enjoyment of the right by both the state and other private individuals.⁵⁹ Accordingly, freedom of expression entails obligation to respect and protect. State parties, are therefore, subject to the duty to prevent excessive media concentration with positive measures, such as with state financial assistance for the press and as regards electronic media

⁵⁵ Smith (2007) p. 269

⁵⁶ Nowak (2005) p. 446

⁵⁷ Ibid

⁵⁸ Nowak (2005) p. 448

⁵⁹ Smith (2007)p. 268

states must above all provide for adequate public access.⁶⁰ The horizontal effects are additionally emphasized by the reference to the special duties and responsibilities accompanying the exercise of freedom of expression and information.⁶¹

2.2 Limitation clauses of freedom of expression

As the case is within the context of all human rights and freedoms, it is an interplay between the principle of freedom of expression and its limitation clauses, which determines the actual scope of the freedom.⁶² Accordingly, both international law and national constitutions provide for limitation of the right to freedom of expression to protect private and public interests.⁶³ Nonetheless, not every restriction on freedom of expression is lawful. International human rights conventions like CCPR provide for three part tests of “provided by law”, “in pursuance of legitimate aim” and “necessary” to assess the legitimacy of a restriction on freedom of expression.

Likewise, FDRE Constitution provides for limitation clauses on freedom of expression. It also provides for the requirements to be met while limiting freedom of expression. Unlike the substance of freedom of expression, FDRE Constitution’s limitation clause is different from CCPR’s limitation clauses, which calls for a different approach of discussion. Hence, I will first discuss the limitation clause on freedom of expression in CCPR and then FDRE Constitution.

2.2.1. Limitation clauses- CCPR

At the start of the limiting paragraph of freedom of expression, it is provided that enjoyment of freedom of expression carries with it special duties and responsibilities.⁶⁴ It further puts that freedom of expression can be subject to certain restrictions, which must be provided by law and are necessary for respect of the rights and reputations of others and for the protection of national

⁶⁰ Nowak (2005) p. 448

⁶¹ Ibid

⁶² Smith (2007) p. 271

⁶³ EAO (2004) p. 41

⁶⁴ CCPR art 19 (3)

security or of public order or of public health or morals.⁶⁵ A closer analysis at each element of the clause is made next.

The limitation clause of art 19(3) of CCPR emphasizes the special duties and responsibilities associated with the exercise of freedom of expression and information as the right to freedom of expression and freedom to seek information is capable of violating the rights of others⁶⁶ Moreover, as a consequence of the power associated with influencing public opinion, the exercise of freedom of expression tends towards concentration and monopolization, which leads to conflicts with the freedom of opinion and expression of others.⁶⁷ Alongside the general duty to disseminate information truthfully, accurately and impartially, these conflicts establish special responsibilities that impose upon the “opinion makers” an obligation not to abuse their power at the expense of others in addition to requiring state parties to take actions against excessive media concentration and to ensure diversity of opinion and general access to established opinions.⁶⁸

This being the special responsibilities and duties that enjoyment of freedom of expression entails, the different tests to be employed in assessing the legitimacy of any limitation on freedom of expression are discussed below.

It must be noted here that these tests are cumulative and the first two are largely formal although compliance with domestic law will not necessarily suffice for the lawfulness standard while the third requirement demands strict scrutiny on behalf of Human Rights Committee.⁶⁹ In addition to meeting the three tests, states should respect principle of equality and non discrimination while limiting freedom of expression.⁷⁰

⁶⁵ CCPR art 19 (3)

⁶⁶ Nowak (2005) p. 459

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Thorgeirsdottis (2005) p.29

⁷⁰ SPLDP pl. 9 &15

i)Restriction must be provided by law

Restrictions on freedom of expression and information must be set down in formal domestic legislation or an equivalent unwritten norm of common law and adequately specify the permissibility of a given interference by enforcement organs.⁷¹ A norm can be regarded as “law” for the purpose of restricting freedom of expression where it is formulated with sufficient precision to enable a person to foresee to a degree that is reasonable in the circumstances, the consequences, which a given action may entail.⁷² The level of precision required, of course depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover, and the number and status of those to whom it is addressed.⁷³ The degree of precision of the law is to be determined by pertinent bodies on case by case basis. Moreover, the “law” must adequately be accessible so that individuals have an adequate indication of how the law limits their rights.⁷⁴ Finally and importantly, any criminal law proscription must also comply with the principle of non retroactivity and non discrimination.⁷⁵

ii)Interference must be necessary

Second to the test of legality, the restriction on freedom of expression must be necessary to attain one of the legitimate purposes listed therein whose necessity requirement implies that the restriction must be proportional in severity and intensity to the purpose being sought and may not become the rule but an exception, which should be interpreted narrowly.⁷⁶ The restricting law must not be so severe and intense to jeopardize the exercise of the right to freedom of expression itself.⁷⁷ Limitations on freedom of expression must be necessary in the pursuit of a pressing

⁷¹ Nowak (2005) p. 460

⁷² Thorgeirsdottis (2005) p.29

⁷³ Sottiaux (2005) p. 42

⁷⁴ SPLDP pl. 17

⁷⁵ UNHCHR Fact Sheet p. 24

⁷⁶ Nowak (2005) p.460

⁷⁷ SPLDP pl. 2

objective, and its impact on the right strictly proportional to the nature of that objective.⁷⁸ A limitation that goes beyond what is necessary in the circumstances is not proportional and hence unlawful.

Since article 19(3) of CCPR does not provide for the criterion of necessity in a democratic society, the relevant criterion for evaluating the necessity of interference is not the principle of democracy but rather whether it was proportional in the given case.⁷⁹ Nevertheless, the Committee, when applying the proportionality test of art 19(3) in individual cases, regularly refers to freedom of expression and information as cornerstone in any free and democratic society and hence implies that “democracy” is one of the criterions.⁸⁰ Moreover, the Siracusa Principles on limitation and derogations of CCPR (herein after referred to as the Siracusa Principles) provide that the ‘in a democratic society’ criterion should be considered as an additional qualification of the limitation clauses.⁸¹ The Principles further recognize that though there is no single model of democratic necessity, a society which recognizes and respects the human rights set forth in the United Nations Charter and the UDHR may be viewed as meeting this definition.⁸² Regionally, the Declaration of Principles on Freedom of Expression in Africa provides for the additional condition of ‘necessary in a democratic society’.⁸³

Hence, if necessity in a democratic society is one of the conditions applied in determining the proportionality of a measure, a brief discussion of the standard as applied in the jurisprudence of the European Court of Human Rights (European Court) is necessary to understand how the condition is applied, what it means and what its application entails.

The European Court noted that the word “necessary” within the meaning of art 10(2) of European Convention of Human Rights is not synonymous with “indispensable”, neither has it

⁷⁸ SPLDP pl. 10

⁷⁹ Nowak (2005) p.460

⁸⁰ Ibid

⁸¹ SPLDP pl. 19

⁸² Ibid pl. 21

⁸³ DPFEA pl. II(2)

the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable” but it must imply a pressing social need.⁸⁴

Though the European Court does not employ all of them at once, the proportionality analysis usually consists of the following three sub principles, suitability (the limiting measure must be capable of achieving the legitimate) aim pursued, necessity (the limiting measure must be the least restrictive means to achieve the relevant purpose) and proportionality in the narrow sense (there must be a reasonable balance between the limiting measure and the aim pursued)⁸⁵

Hence, by the necessity test, the limiting measure is weighed whether it is the effective way of pursuing the legitimate aim in addition to requirement that it must be the least restrictive measure. Moreover, there must be a causal link between the limiting measure and the pursuance of the legitimate aim.

iii) Purposes of interference

In principle, limitation grounds of human rights and freedoms are listed exhaustively, hence additional limitation ground cannot be introduced to the list.⁸⁶ The purposes of interference in limiting freedom of expression are respect of the rights and reputations of others, national security, public order, public health or public morals.⁸⁷ Each permissible ground of interference is briefly discussed herein under.

a) Respect of the rights and reputations of others

This limitation ground raises the classic human rights conflict between freedom of expression and protection of privacy.⁸⁸ States parties, hence, are not only entitled to restrict freedom of expression, but also bound to provide statutory protection against intentional infringement on

⁸⁴ Thorgeirsdottis (2005) p.31

⁸⁵ Sottiaux (2005) p. 45

⁸⁶ SPLDP pl. 1

⁸⁷ CCPR art 19(3)

⁸⁸ Nowak (2005) p. 462

honor and reputation by untrue assertions.⁸⁹ The protection of the rights and reputation of others may be ensured by measures of criminal, civil and or administrative law of which the greatest importance, though, is possessed by those special measures provided for in the media laws of most states.⁹⁰

In protection of rights and reputations of others, the principle of proportionality must be strictly observed since there is otherwise the danger that freedom of expression could be undermined; particularly in the political arena, not every attack on the good reputation of others must be sanctioned, since freedom of expression and information especially freedom of the media would otherwise be stripped off their fundamental importance for the process of formation of political opinion.⁹¹ Hence, a limitation on freedom of expression, should not be used to protect the state and its officials from public criticism and opinion.⁹²

b) National security

It is argued that restrictions based on national security are permissible only in serious cases of political or military threat to the entire nation.⁹³ This ground should not be invoked to prevent merely local or relatively isolated threats to law and order.⁹⁴ Examples of limitations on freedom of expression on national security claims include situations of gathering of ‘intelligence’, the publication of ‘memoirs’ of former intelligence personnel and military information.⁹⁵ Publication and dissemination of a direct call to violent overthrow of the government in an atmosphere of political unrest or propaganda of war within the meaning of art 20(1) of CCPR as well falls within this ground of restriction.⁹⁶

⁸⁹ Ibid

⁹⁰ Ibid at 463

⁹¹ Ibid at 462

⁹² SPLDP pl. 37

⁹³ Nowak (2005) p. 463

⁹⁴ SPLDP pl. 30

⁹⁵ Smith (2007) p.273

⁹⁶ Nowak (2005) p. 464

Many governments have a tendency to invoke protection of national security to justify far reaching restrictions on freedom of expression of opposition groups, politicians and critical media.⁹⁷ It seems to overcome such tendency the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (hereinafter referred to as Johannesburg Principles) require that while resorting to the ground national security, governments should demonstrate that the expression is intended to incite imminent violence, it is likely to incite such violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.⁹⁸

c) Public order

Public order may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded where respect for human rights is part of it.⁹⁹ The term public order covers licensing of broadcasting cinema or television enterprises, procurement and dissemination of confidential information and endangering the impartiality of the judiciary, certain limitations on freedom of expression by members of security forces or by officials, as well as on the freedom of information of prisoners.¹⁰⁰

It is argued that since public order may otherwise lead to a complete undermining of the freedom of expression and information, strict requirements must be placed on the necessity of a given statutory restriction and that the minimum requirements flowing from a common international standard for this human right, which is so essential to the maintenance of democracy, may not be set too low.¹⁰¹

⁹⁷ Ibid

⁹⁸ JPFE pl. 6

⁹⁹ SPLDP pl. 22

¹⁰⁰ Nowak (2005) p. 465

¹⁰¹ Ibid

d) Public health or public morals

Public morals are in some ways ephemeral, evolving with changes in government and societal progress leading to no universal standard of public morality.¹⁰² The Committee stressed that there is no universally applicable standard of public moral consequently, in this respect; a certain margin of discretion must be accorded to the responsible national authorities.¹⁰³ However, the concerned state must demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.¹⁰⁴

On the other hand, the protection of public health as regards limitations on freedom of expression is of only minor practical relevance in the context of freedom of expression and information and examples on this ground include prohibition of misleading publication on health threatening materials or prohibition of advertising of tobacco, medicines and the like.¹⁰⁵ In applying this limitation ground, states are advised to give due regard to the regulations of the World Health Organization.¹⁰⁶

e) Prohibition of propaganda of war- additional legitimate ground?

Article 19(3) of CCPR provides the manner in which freedom of expression can legitimately be limited. This limitation paragraph and indeed the whole provision is followed by Article 20, which lays down for the prohibition of propaganda of war and advocacy of hatred. The ordinary case for rights and freedoms is that they first set the substances of what is protected by the right or freedom and then list out the manner in which that right can be restricted, which ultimately set the scope the right or freedom in question. However, the case for Article 20 is different, which calls for a further elaboration of what it is meant to govern, what called for its inclusion in the CCPR. In search of such elaboration resort to legislative background of Article

¹⁰² Ibid at 466

¹⁰³ Ibid

¹⁰⁴ SPLDP pl. 27

¹⁰⁵ Nowak (2005) p. 466

¹⁰⁶ SPLDP pl. 26

20, teachings of international human rights scholars and the case law of Human Rights Committee is necessary.

The historical background of Article 20 reveals that it was primarily intended to put an obligation upon states to employ preventive measures on the root causes like war that threaten rights of individuals notably the rights to life and equality.¹⁰⁷ The fact that the drafting of the two international human rights covenants, particularly CCPR was at the wake of the end of the Second World War, highlighted the importance of the inclusion of an article that imposes an obligation upon states to combat the root causes of acts that endanger fundamental human rights and freedoms.¹⁰⁸

The formulation of Article 20 is not to set out a right but put limitation to other human rights.¹⁰⁹ The fact that Article 20 follows Article 19 of CCPR seems to indicate that the prohibition of propaganda of war and advocacy of hatred is only targeted to restrict freedom of expression.¹¹⁰ Nonetheless, Manfred Nowak argues that it is a limitation to other rights such as freedoms of religion, association and assembly in addition to its particular relation with freedom of expression.¹¹¹ Hence, in case of conflict of human rights, the prohibition of discrimination and the right to life in CCPR are given certain priority by the operation of the rule that prohibits propaganda of war and advocacy of hatred if Article 20 is understood as a special, positive duty to guarantee the first two central provisions of the CCPR.¹¹² The provision is unique from other limitation clauses in CCPR in that it does not only authorize interference but also requires state parties to provide for corresponding restriction.¹¹³

¹⁰⁷ Nowak (2005) p. 468

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

The case law of the Human Rights Committee indicates two approaches towards treating actions that fall within the ambit of Article 20 of CCPR. It first gave a decision which implies the treatment of the provision not as a limitation provision but as an absolute prohibition of specified acts, which does not call for the observance of the different tests employed in determining the legitimacy of a given restriction.¹¹⁴ The Committee revised its approach in *Ross v Canada*, where it decides that restrictions that fall within scope of Article 20 must also be permissible under Article 19(3), which lays down requirements for determining whether restrictions on expression are permissible.¹¹⁵

Nowak argues that since legal prohibitions under Article 20 are to be interpreted in conformity with the restrictions tests under Article 19(3), the former merely sets forth additional specific purposes for interference, which might have easily been included under the latter.¹¹⁶ He further illustrates his position by examples where prohibition of propaganda of war can be necessary for the protection of national security, and prohibition of advocacy of hatred can be used for the respect of the rights of others and for the protection of public order.¹¹⁷

Hence, the relation between Article 19(3) and Article 20 as argued by Manfred Nowak and as suggested by the decision of the Committee clearly indicates that state parties need to show that the restriction on freedom of expression within the ambit of Article 20 is consistent with the limitation tests set out in Article 19(3) of the Covenant.

Having concluding that Article 20 forms an additional legitimate ground of restricting freedom of expression, what is actually meant by propaganda of war and advocacy of hatred will be discussed briefly.

Propaganda means only intentional, well aimed influencing of individuals by employing various channels of communication, which are capable of reaching a large circle of persons to

¹¹⁴ Ibid

¹¹⁵ *Ross v Canada*

¹¹⁶ Nowak (2005) p. 477

¹¹⁷ Ibid

disseminate, above all, incorrect or exaggerated allegations of fact in addition to negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation or incitement.¹¹⁸The object and purpose of prohibition of propaganda of war, hence is not to prohibit academic studies of questions of defense or security policy but rather to forbid propagandist incitement roughly comparable to that practiced in the Third Reich.¹¹⁹ State obligations here are to ensure, to fulfill and protect at the horizontal level primarily in addition to abstaining from engaging into official state propaganda.¹²⁰

The word ‘war’ relates to those forms of propaganda threatening or resulting in the act of aggression or breach of peace contrary to the United Nations Charter, which does not affect the right of individuals or collective self defense guaranteed in Article 51 of the Charter and other measures consistent with chapter seven or the right to self determination and independence.¹²¹ Moreover, internal civil wars are outside the scope of Article 20(1) unless they develop into an international conflict.¹²²However, states can limit expression that relates to propaganda of civil war on the legitimate ground of national security under Article 19(3) by meeting all the restriction requirements provided therein.¹²³ The offense of propaganda of war does not require that a war actually take place and it is only of minor importance as to when the armed aggression reaches the degree of intensity constituting war.¹²⁴

In prohibiting propaganda of war states may employ civil, public and criminal law restrictions, which should be consistent with the limitation clauses in Article 19(3).¹²⁵

¹¹⁸ Ibid

¹¹⁹ Ibid at 472

¹²⁰ Ibid at 473

¹²¹ Ibid

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid at 474

The second paragraph of Article 20 prohibits advocacy of hatred. This prohibition is related to ‘incitement to discrimination, hostility or violence’.¹²⁶ It does not require states to prohibit advocacy of hatred in private that instigates acts of racial or religious discrimination.¹²⁷

The limitation clauses of freedom of expression, which are primarily governed by Article 19(3) and in some particular cases by Article 20 of CCPR, which should be read in line with the former have been discussed above. The three tests of ascertaining the legitimacy of restrictions on freedom of expression has been elaborated. The next section considers the limitation clauses of freedom of expression as provided in the FDRE Constitution.

2.2.3 Limitation clauses- FDRE Constitution

A couple of important and inter related issues whose conclusion are premises for the discussion in this and chapter three of the thesis and indeed to the whole theme of the research need to be addressed at this point. The discussion of freedom of expression within the Ethiopian context is being made within the framework of both FDRE Constitution and CCPR. This is because Ethiopia is a party to CCPR and its Constitution provides that fundamental freedoms and rights therein are to be interpreted in line with CCPR¹²⁸ in addition to stipulating that international treaties signed by Ethiopia form laws of the country.¹²⁹

However, one need to address the related issues of interpretation that arise as a result of the above approach. The issues of interpretation are hence, whether interpretation of the FDRE Constitution in line with CCPR should be intended to create a narrower scope of the right to freedom of expression by including additional limitation grounds, which are not provided for in the first but in the second instrument or to create a wider scope of the right to freedom of expression by increasing the number of the tests that the government should observe while

¹²⁶ Ibid

¹²⁷ Ibid at 475

¹²⁸ FDRE Art 13(1)

¹²⁹ Ibid Art 9(3)

limiting freedom of expression though the additional test is not provided in FDRE Constitution but CCPR.

In addressing the first issue Article 5(2) of CCPR provides for the principle that the rights therein merely represent a minimum standard and that the combined effect of various human rights conventions, domestic norms and customary international law may not be interpreted to the detriment of the individual but ensure the greatest possible substantive and procedural rights.¹³⁰ Accordingly, it is not possible to interpret the FDRE Constitution in a way to give the individual a lesser right where the scope of the right provided therein is better than that of CCPR counter part. Additional grounds of limiting freedom of expression widen the pool of reasons where a government can legitimately limit freedom of expression, which in effect means lesser protection of the right. Hence, it is not permissible to include additional limitation grounds to the list of Article 29(6) of FDRE Constitution by invoking that they are found in CCPR.

FDRE Constitution only provides for the tests of ‘provided by law’ and ‘in pursuance of legitimate aims’ and not for the test of ‘necessity’. The second issue is hence, whether by way of interpretation we can include the ‘necessity’ test to the other two tests in FDRE Constitution. There is no specific stipulation as regards the treatment of the second issue in the CCPR. However, the *acontrario* reading of Article 5(2) of CCPR implies that where it recognizes a better scope of the right, state parties are unquestionably required to comply with their international human rights commitment despite their national law stipulation. Hence, though the test of ‘necessity’ is not provided in Article 29(6) of FDRE Constitution, it should be included by way of interpretation primarily because Ethiopia is a party to CCPR and is expected to guarantee a better scope of freedom of expression and because the Constitution clearly authorizes such interpretation.

On the basis of these premises a discussion of the three test of limiting freedom of expression in FDRE Constitution are discussed below.

¹³⁰ Nowak (2005) p. 112

i) Test of ‘provided by law’

Freedom of expression, according to FDRE Constitution, can only be limited through laws, which should be 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.¹³¹

The internationally accepted test of “provided by law” is, therefore provided in Article 29(6) of FDRE Constitution. What exactly is meant by this test has been discussed in the previous sub section where limitation clauses in CCPR as regards freedom of expression are thoroughly discussed. The discussion there holds true for the FDRE Constitution.

ii) The test of ‘in pursuance of legitimate aims’

The legitimate aims in limiting freedom of expression are protection of well-being of the youth, honor and reputation of individuals, prohibition of any propaganda of war and the public expression of opinion intended to injure human dignity.¹³² These legitimate aims for limiting right to freedom of expression are exhaustively listed.

Except for the ground of protection of honor and reputation of others the other limitation grounds in Article 29(6) of FDRE Constitution are not clearly found in CCPR Article 19(3). However, considering that Article 20 of CCPR provides for additional limitation grounds to Article 19(3) of the same, the grounds of prohibition of propaganda of war and public opinion intended to injure human dignity in Article 29(6) of FDRE Constitution can be equated with the limitation grounds in Article 20 of CCPR. Having stated this, the grounds of restricting freedom of expression in FDRE Constitution are discussed below.

¹³¹ FDRE art 29(6)

¹³² Ibid

a) Well being of the youth

The well being of the youth is unique ground of limiting freedom of expression, which is only found in the FDRE Constitution and not CCPR. This substantially hampers the discussion of this ground as there exists rare literature. What is worse is that the well being is attached to youth instead of the child. In the later case, reference to international and constitutional rules on rights of the child could help in understanding the ground. Age range of youth varies from one country to another. Nonetheless, being youth starts before one gets out of childhood, meaning before one turns eighteen. Hence, well being of the child can be part of well being of the youth.

Due to source constraints, I have decided to limit the scope of this ground to ‘well being of the child’. Though I fear that this will only address parts of ‘well being of the youth’, I am left with no other feasible alternative.

FDRE Constitution provide for the protection of children from exploitive practices, which may be hazardous to their education, health or wellbeing.¹³³ Moreover, the Convention on the Rights of the Child refers to the well being of the child.¹³⁴ Furthermore, it calls for the promotion of social, spiritual and moral well being of the child.¹³⁵ On the basis of these references, it may be concluded that well being of the child includes physical, social, spiritual or moral well being of the child.

Given the assumptions that children are dependent, innocent, incomplete, incompetent and above all vulnerable special child protection measures are necessary.¹³⁶ Hence, in the context of this discussion, an expression that jeopardize the physical, social, spiritual and moral well being of the child can be limited on the basis of this legitimate ground. Examples of expression that may endanger the well being of the child include pornography, indoctrination and brain washing.

¹³³ Ibid art 36(1)(d)

¹³⁴ CRC art 3(2)

¹³⁵ Ibid art 36

¹³⁶ Anglin (2002) p. 235

b) Honor and reputations of others

The objective of this limitation ground is to protect the right to human dignity, honor and reputation of individuals.¹³⁷ An individual has the right to the free development of her person in a manner compatible with the rights of the rights of other in addition to be recognized everywhere as a person.¹³⁸

Honor and reputation of others as recognized in FDRE Constitution is hence, another ground of limiting freedom of expression.

c) Prohibition of propaganda of war

Prohibition of propaganda of war was argued as a specific additional limitation ground of limiting freedom of expression in addition to all those provided in Article 19(3) of CCPR. In similar vein, FDRE Constitution provides it as one of the legitimate grounds for limiting freedom of expression.

In the previous sub section what is meant by the prohibition of propaganda of war has been discussed. It was argued that the prohibition of propaganda of war is necessary for the protection of national security. In other words, though the FDRE Constitution fails to provide for the ground of national security in clear manner, it has implicitly included this ground when it prohibits propaganda of war.

d) Public opinion intended to injure human dignity

Despite the frequent use of the concept in human rights discourse, human dignity has remained fluid without a single agreeable definition.¹³⁹ Nonetheless, it is argued it connotes an intrinsic worth of human being.¹⁴⁰ Hence, human dignity within the context of exercise of freedom of

¹³⁷ FDRE art 24

¹³⁸ Ibid

¹³⁹ Schachter (1983) p. 849

¹⁴⁰ Ibid

expression can be used to restrict those speech that target the inherent worth of human beings.¹⁴¹ Statements that demean and humiliate individuals or groups and dissemination of negative stereotypes of groups and teachings that particular races, ethnic groups or religions hold ‘ridiculous’ or dangerous views are some examples of statements that may injure human dignity.¹⁴²

On the other hand, FDRE Constitution provides for the prohibition of public opinion intended to injure human dignity alongside with prohibition of propaganda of war.¹⁴³The prohibition covers only public statements. It seems that this ground is replica of Article 20 of CCPR. It follows, prohibition of public opinion intended to injure human dignity is in effect prohibiting advocacy of hatred. On the basis of arguments of Nowak, such prohibition is necessary for the protection of public order and honor and reputation of others.¹⁴⁴The fact that human dignity has been recognized as part of right to honor and reputation in the FDRE Constitution supports this interpretation.

Hence, prohibition of public opinion intended to injure human dignity in Article 29(6) of FDRE Constitution is in effect protecting honor and reputation of others and public order. Importantly, the ground of public order is included to the legitimate grounds of limiting freedom of expression in FDRE Constitution, though the Constitution does not clearly provide for it. As it has been noted in the previous discussion, public order comprises of fundamental principles upon which a democratic society committed to equality and non discrimination is founded. Given the above interpretation, rights of equality and non discrimination are implicitly envisaged by the ground of public order.

¹⁴¹ Ibid at 852

¹⁴² Ibid

¹⁴³ FDRE art 29(6)

¹⁴⁴ Nowak (2005) p. 477

iii) The test of ‘necessity’

The test of necessity, which should be met alongside with the first and second tests, is not found in the limitation clause of FDRE Constitution. However, it was argued and concluded that the test of ‘necessity’ must be met while limiting freedom of expression when FDRE Constitution is interpreted in line with CCPR. The discussion on the test within the context of CCPR is pertinent for the understanding of the test to be employed in weighing limitation of freedom of expression in the FDRE Constitution. In order to avoid repetition, readers are advised to refer to the previous discussions on the test in the preceding section.

Generally, the substances of freedom of expression as recognized in FDRE Constitution and CCPR have been discussed in this chapter. The limitation tests that need to be fulfilled when states limit freedom of expression in both instruments have also been dealt with. The next chapter will analyze the ATP proscription of encouragement of terrorism in light of these tests.

Chapter Three: Proscription of Encouragement of terrorism in the ATP- Permissible Limitation on Freedom of Expression?

*“Propaganda has long been the hand maiden of violence: inciting, justifying and naturalizing it; ploughing the ground for violence by softening our psychological defenses to it and desensitizing us to its brutalizing effects of and much of the power of propaganda stems from what is left unspoken: the vast possibilities of imagination triggered by clever, subtle and insidious emotional provocation.”*¹⁴⁵

The need to put restrictions on speech that incites terrorist acts is justified on a couple of reasons. The first is criminalization of incitement is an early measure against the materialization of the target conduct when it is particularly harmful, in this case terrorist acts.¹⁴⁶ The second reason for criminalizing incitement to terrorist acts may be that it has a particular qualitative contribution to the materialization of the terrorist acts, namely that incitement is a *sine qua non* for the materialization of the target conduct.¹⁴⁷

Given the prominence of terrorist acts in the 21st century and due to the fact that incitement to terrorism is a strategy commonly used by terrorist organizations to further support their cause and call for violent action, the United Nations Security Council Resolution 1624 (herein after referred to as the Resolution) identified it as a conduct which is contrary to the purposes of the United Nations and called on states to adopt specific measures to prohibit and prevent it.¹⁴⁸ In the words of the Resolution, “incitement acts motivated by extremism and intolerance poses a

¹⁴⁵ Saul (2005) p. 869

¹⁴⁶ Ronen (2009) p 13

¹⁴⁷ Ibid at 14

¹⁴⁸ UNHCHR Fact Sheet p. 42

serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all states, undermines global stability and prosperity”.¹⁴⁹

Ethiopia is one of the most recent states to criminalize encouragement of terrorism. This chapter would first explore the types of terrorism related speech and proceed to identify what is proscribed in the anti terrorism proclamation. The last section would analyze if this proscription is consistent with the permissible limitation clauses of freedom of expression under both the FDRE Constitution and CCPR.

3.1 Types of terrorism related speech

3.1.1 Terrorist threats

Not all terrorist threats call for legal regulation but only those “true threats”, which encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals where the speaker need not actually intend to carry out the threat.¹⁵⁰ A prohibition on true threats, hence, protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.¹⁵¹

Many states around the world proscribe terrorist threats though there is a discrepancy as regards the adjective “true” in qualifying terrorist threats.¹⁵²

3.1.2. Incitement to terrorism

The Resolution points out incitement to terrorism as the most dangerous act that goes against the purposes of the United Nations and called upon states to criminalize incitement to terrorism in their respective domestic laws but only repudiates acts of glorification of terrorism.¹⁵³ Incitement

¹⁴⁹ S/RES/1642(2005)

¹⁵⁰ Sottiaux (2005) p. 102

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ S/RES/1642(2005)

to terrorism is a commonly used strategy of terrorist organizations in furthering their cause and call for violent actions.¹⁵⁴ The call for the prohibition of incitement to terrorist acts by the Security Council does not differentiate what types of sanctions should be applicable. Nor does it provide for the definition of incitement to terrorism.

Apart from the Resolution, none of the universal terrorism related conventions explicitly requires the prohibition of incitement to terrorism.¹⁵⁵ Nevertheless, the United Nations Special Rapporteur on the promotion and protection of human rights and freedoms while countering terrorism has expressed the view that the Council of Europe's Convention on the Prevention of Terrorism (hereinafter referred to as CECPT) provision on provocation of terrorist acts represents the best practice in defining the proscription of incitement to terrorism.¹⁵⁶ Accordingly, in determining the definition of incitement or provocation to terrorism a resort is made to the this European instrument.

The CECPT defines provocation to commit a terrorist offence as the distribution, or otherwise making available, of a message to the public, with intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more of such offences may be committed.¹⁵⁷ This provision has a number of elements, which are discussed below.

a) Terrorist acts

The prohibition of incitement to terrorism is related to terrorist acts, which are defined in either national or international instruments, in this case the European Framework Decision on Combating Terrorism.¹⁵⁸ Accordingly, the definition of terrorist acts in the relevant instrument to

¹⁵⁴ UNHCHR Fact Sheet p. 42

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ CECPT art 5(1)

¹⁵⁸ EFDCT art 1(1)

which the prohibition of incitement refers to is one of the main elements of the definition of incitement to terrorism.

b) Content of the speech

No doubt that incitement includes a direct call to engage in a terrorist act while it is not clear whether it should include other speech such as glorification of terrorism.¹⁵⁹ It is argued that the weight exerted by the inciters on the incites lies not on the issuance of direct orders but in sowing and nurturing in their audience the ideological foundations from which the willingness to act emerges.¹⁶⁰ That is should incitement include speech which is thought to have some potential to incite criminal action, but which may be less targeted in message or audience and less obviously a proximate cause of actual criminal acts.¹⁶¹

The Resolution clearly does not encompass glorification of terrorism. Moreover, the report of the Secretary General of the United Nations on the protection of human rights and fundamental freedoms while countering terrorism (hereinafter referred to as the Report) expressly reject the prohibition of glorification.¹⁶² Hence, though these instruments are not legally binding it can be concluded within the United Nation framework, only incitement not glorification is called to be prohibited.

On the contrary, the European definition above envisages glorification of terrorism, that includes indirect incitement and incitement to terrorism.¹⁶³ Glorification of terrorism or which is otherwise referred to as indirect incitement includes presentation of a terrorist offence as necessary and justified and dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding of terrorist organizations or other similar behavior.¹⁶⁴

¹⁵⁹ Ronen (2009) p. 22

¹⁶⁰ Ibid

¹⁶¹ Pokempner (2007) p. 6

¹⁶² A/63/337

¹⁶³ Saul (2005) p. 869

¹⁶⁴ Ibid

c) An act of communication

The provocation to terrorism must constitute an act of communication.¹⁶⁵ Incitement to terrorism is only proscribed only as regards public communication of the provocation , which targets a non specific audience within both the Resolution and the CECPT context.¹⁶⁶Hence, the incitement should be directed at a non specific audience rather than a private communication to an individual or a specifically defined group.¹⁶⁷However, the determination of whether a specific speech was public or private must take into account the totality of the circumstances, such as the number of members of the public involved, and the openness and accessibility of the place or the speech.¹⁶⁸

d) Objective probability of harm

The other element of the definition of provocation of terrorism in CECPT is the requirement of an additional objective danger that the author's conduct will incite terrorism.¹⁶⁹ There must be some risk of resulting harm as a consequence of the inciting statement.¹⁷⁰ The scope of the speech that may be prohibited and the gravity of the offense or the social interest which it protects are the two parameters in determining the threshold of the probability of harm.¹⁷¹ Moreover, the objective probability of harm need to be assessed by reference to the nature of the author of the addressee as well as the context in which the statement was made.¹⁷² Indeed there need to exist a causal link between the public expression of support for terrorist offenses or

¹⁶⁵ UNHCHR Fact Sheet p. 42

¹⁶⁶ Ronen (2009) p. 26

¹⁶⁷ Ibid

¹⁶⁸ Ibid at 27

¹⁶⁹ UNHCHR Fact Sheet p. 42

¹⁷⁰ Ronen (2009) p. 27

¹⁷¹ Ibid

¹⁷² Cram (2009) p. 93

terrorist groups and the commission of terrorist offenses so a person could be liable of provocation of terrorism.¹⁷³

e) The requirement of intention

Intention to bring about the commission of a terrorist act is a condition for prohibiting speech that incites terrorism.¹⁷⁴ Accordingly, an act of incitement to terrorism without an accompanying intention on the part of the perpetrator does not entail liability under anti terrorism laws. In assessing the context the European Court of Human Rights takes into account the ‘the problems linked to prevention of terrorism’ and the decision of the court once suggested that the above may imply that statements, which at first sight, do not incite violence, can nevertheless be held to do so in the context of a serious terrorist campaign.¹⁷⁵

Given the proportionality risk that limitation of rights involves the last two conditions of the existence of objective probability of harm and the intention on the part of the perpetrator attached as regards incitement to terrorism operate as proportionality check.¹⁷⁶ Accordingly, states are expected to comply with these two conditions while framing their national laws proscribing incitement to terrorism.¹⁷⁷ They also should take due care in setting boundary between the indirect incitement to commit acts of terrorism on the one hand whilst safeguarding the ‘legitimate voicing of criticism’ on the other.¹⁷⁸

3.1.3 Glorification of terrorism

Martin Scheinin, a special rapporteur on the promotion and protection of human rights and fundamental freedom while countering terrorism expressed his concern over the trend to move beyond actual incitement, in order to criminalize the glorification or apology of terrorism or the

¹⁷³ Ibid

¹⁷⁴ Ronen (2009) p. 29

¹⁷⁵ Sottiaux (2005) p. 105

¹⁷⁶ Cram (2009) p 93

¹⁷⁷ Ibid

¹⁷⁸ Ibid

publication of information that may be useful in the commission of acts of terrorism.¹⁷⁹ Recall that the Resolution only repudiates glorification of terrorism while the subsequent Report clearly prohibits its proscription.

As noted above, glorifying statements are those statements which praise, support, or justify terrorism as opposed to inciting terrorism.¹⁸⁰ These statements may not go as far as inciting or promoting the commission of terrorism but only justify or praise past terrorist acts.¹⁸¹ Statements that glorify or promote terrorist acts might offend sensibilities of individual persons and society, particularly victims of terrorists' acts; it is however argued that laws should not be imposed to restrict such kind of statements.¹⁸² The joint declaration of experts of freedom of expression explains that incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly casually responsible for increasing the actual likelihood of a terrorist act occurring.¹⁸³ The same position is taken in the Report of the Secretary General.¹⁸⁴

All the above arguments and approaches reveal that proscribing apology or glorification of terrorism is not or at least should not be permissible as such restriction would be not be proportional restriction of freedom of expression.

3.2 Types of speech proscribed in the ATP

Above the different categories of terrorism related speeches have been explained. It has been pointed out that arguably almost all forms of terrorism related speech do not enjoy legal protection. As far as the Resolution and the Report are concerned only incitement not glorification of terrorism are called to be sanctioned. Whereas the CECPT definition of

¹⁷⁹ Schenin (2005)

¹⁸⁰ Sottiaux (2005) p. 107

¹⁸¹ UNHCHR Fact Sheet p. 43

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ A/63/337

provocation of terrorism envisages an indirect provocation of terrorist acts that may include glorification of terrorism. However, it may be concluded that there exists a consensus as regards limitation of freedom of expression and political dissent by proscribing those statements that incite others to commit terrorist acts.

Be this as it may, the Ethiopian government introduced the first anti terrorism law of the country partly to respond to the international call for enactment of domestic anti terrorism law. The same holds true for the proscription of encouragement of terrorism and other terrorism related speech under the ATP. The relevant sections as regards terrorism related speech are Articles 3(7) and 6 of the ATP that proscribe threats of terrorist acts and encouragement of terrorism respectively. On the other hand, whether glorification or apology of terrorism is actually criminalized in the ATP or not would be identified after the analysis of the provision on encouragement of terrorism.

3.2.1 Threats of terrorist acts

As regards terrorist threats, it has been argued above that only true threats should be proscribed. National courts at first instance and international organs like the Committee have the authority in determination of the truthfulness of terrorist threats that should call for lawful restriction on such speech.

Coming back to the ATP, terrorist threats are proscribed. After defining what terrorist acts are, the ATP proscribes terrorist threats.¹⁸⁵ This stipulation fails to put the adjective “true” making it broad as regards its application. Therefore on the basis of this provision any terrorist threat, which can be true or false that is communicated by anyone under any circumstances would entail liability. So far no cases have been brought before the Ethiopian courts as regards terrorist threats leaving us with no practical guidance as to the application of this provision. However, it can be concluded that given the limited power of courts in interpretation of criminal laws, the chance where courts apply the adjective “true” where the law does not explicitly provide for it is very low. This leaves the provision on terrorist threats broad that can be applied to anyone

¹⁸⁵ ATP art 3(7)

irrespective of the personal characters and the circumstances under which the communication was made.

3.2.2 Encouragement of terrorism

The stipulation on encouragement of terrorism defines the act as:

“[...] publishing or causing the publication of a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission or preparation or instigation of an act of terrorism[...]¹⁸⁶”

The stipulation can be reduced into a number of elements, which are closely analyzed below.

- The first is an act of communication whereby a statement is published or caused to be published.

What exactly is meant by ‘statement’ and what is the scope of the term ‘publication’ as used in this stipulation need some clarification. The ATP does not define both terms. Hence, resort to other definitions of other countries is necessary. Accordingly, a statement includes any communication of any description, including a comment without words constituting of sounds or images or both.¹⁸⁷ On the other hand, publication includes providing electronically any service by means of which the public have access to the statement, which extends to internet service providers and those who run websites where people can post statements.¹⁸⁸ As regards the personal liability, the wording of the above stipulation indicates both the publisher and the author of the communication who caused the publication of the encouraging statement are liable.

- The second element of the proscription of its reference to “acts of terrorism”.

¹⁸⁶ Ibid art 6

¹⁸⁷ Extreme Speech and Democracy (2009) p. 467

¹⁸⁸ Ibid

Acts of terrorism are defined in Article 3 of the ATP, which has been the theme of the first chapter of this thesis. According to the definition in the ATP, acts of terrorism are committed where an individual or a group with the intention of advancing a political, ideological or religious cause coerces the government, intimidates the public or section of the public or destabilizes or destroys the fundamental political, constitutional or economic or social institutions of the country by committing acts that range from those targeting against life of persons to property and other interests of the country, foreign state or international organization.¹⁸⁹ Recall the conclusion in the first chapter that this definition is broad, which does not only cover a number of acts that can be regulated by criminal or other laws but also contains vague, ambiguous and undefined terms. Hence, a statement that relates to the vaguely and ambiguously defined terrorist acts in the ATP and which meets the other requirements of the definition of encouragement of terrorism in the ATP is proscribed.

- The third element is that the statement should be communicated to the public.

The stipulation above provides that the publication of the statement should be targeted to some or all of members of the public. Hence, private communication of statements that may otherwise constitute encouragement of terrorism fall outside the scope of the stipulation.

- The fourth element is that the published statement is likely to be understood as a direct or indirect encouragement or other inducement of terrorism.

The objective probability of harm requirement calls for causal link between the encouraging statement and the danger of commission, preparation or instigation of terrorist acts. It considers the nature of the author and of the addressee, as well as the context in which the offense is committed.¹⁹⁰ The above stipulation, however only covers the probable understanding of the addressees in relation to the communication, which is one aspect of the “objective” requirement. Accordingly, an “objective” assessment of the danger that the communication entails in

¹⁸⁹ ATP art 3

¹⁹⁰ Cram (2009) p. 93

encouraging or inducing commission, or preparation or instigation of an act of terrorism fails to be the element of the above stipulation.

A related point, which is worth noting here is that the stipulation covers encouraging statements to the commission, preparation and instigation of terrorist acts. This coupled with the absence of an “objective” assessment of the danger that the encouraging statement entails allows a broad application of the stipulation on encouragement of terrorism.

- The fifth element of the definition of encouragement of terrorism in the ATP is the content of the speech proscribed.

The stipulation reads that directly or indirectly encouraging or in other way inducing the public to the commission or preparation or instigation of an act terrorism is proscribed. In the previous section, it was concluded that indirect incitement to terrorism may include glorification of terrorism, which present terrorist acts as necessary and justified.¹⁹¹

Though, the ATP is silent on what constitutes direct and indirect encouragement or other inducement, it is apparent that direct encouragement forms direct incitement of terrorist acts while indirect encouragement implies glorification of terrorism. On the other hand, what constitutes other inducement is left with no feasible standard in determining which acts fall within its scope. Generally it can be concluded that as far as the content of speech proscribed is concerned, the scope of the proscription covers direct encouragement, glorification and in any other way inducement to terrorist acts, leaving it as the broadest in terms of its application.

- The last consideration is if the requirement of *mens rea* on the part of the person liable of encouragement of terrorism is necessary.

Intent to bring about the commission of a terrorist act or offense has been treated as a condition for prohibiting the speech.¹⁹² However, the ATP’s stipulation on encouragement of terrorism lacks the element of the subjective intention on the part of the perpetrator of the act.

¹⁹¹ Saul (2005) p. 869

¹⁹² Ronen (2009) p. 29

On the other hand, the Criminal Code provides that a crime is completed when the legal, material and mental elements are present.¹⁹³ It further provides that a crime is only committed where a person acts intentionally or negligently.¹⁹⁴ In the case of encouragement of terrorism in the ATP, the mental element of the crime is not provided for, hence, can be argued no crime. To what extent such argument is acceptable by Ethiopian Courts is another issue but the law is clear, no mental element hence no criminal responsibility.

Generally, when the ATP's provision on encouragement of terrorism is weighed in light of the CECPT definition of provocation of terrorism and the Report it comes short of a number of the elements contained in the latter. That is the ATP's stipulation that proscribes encouragement of terrorism strictly meets only the first element of the existence of an act of communication whereas it partly covers one aspect of the "objective" requirement in assessing the existence of a danger of commission of terrorist act while it totally fails to address the subjective intention of the person who communicates the encouraging statement. As noted above, the last two elements on which the proclamation fails partly and totally are generally accepted as parameters of "proportionality" test.¹⁹⁵ Hence, the stipulation can be ruled as not proportional on the basis of these tests.

Finally, it is worth noting that the punishment for encouraging terrorism is rigorous imprisonment from 10 to 20 years.¹⁹⁶ Note here that committing acts of terrorism in the ATP is punishable with rigorous imprisonment from 15 years to life or with death.¹⁹⁷ Moreover, grave crimes of homicide are punishable with rigorous imprisonment from 5 years 20 years to life or death in case of aggravated homicide.¹⁹⁸ In my opinion, the gravity of the punishment applicable

¹⁹³ CC art 23(2) & ATP art 36(2)

¹⁹⁴ CC art 57(1) & ATP art 36(2)

¹⁹⁵ Cram (2009) p.93

¹⁹⁶ ATP art 6

¹⁹⁷ Ibid

¹⁹⁸ CC art 539& 540

on encouragement of terrorism can be used as one of the parameters to determine the proportionality of the restriction on freedom of expression, which takes us to the next section.

3.3 Consistency of the stipulation on encouragement of terrorism with FDRE Constitution and CCPR

A couple of interrelated issues were addressed in the last section of chapter two. The first is FDRE Constitution only provides for the tests of legality and in pursuance of the listed legitimate aims leaving the indispensable test of necessity or proportionality aside. On the other hand FDRE Constitution provides for the permissible grounds of limitation, which are honor and reputations of others, wellbeing of the youth, prohibition of propaganda of war and the public expression of an opinion that affects human dignity.

The conclusions made there are the premises for the discussion in the next sections. The first premise is the “legitimate aims” as far as limitation laws on freedom of expression in Ethiopia are concerned are the grounds of honor and reputations of others, well being of the youth and prohibition of propaganda of war (which includes national security interests) and public expression of opinion intended to injure human dignity (which includes interests of reputation of others and public order) as contained in FDRE Constitution and interpreted in line with CCPR. Secondly, though the test of necessity is not provided in the FDRE Constitution, it has been argued and concluded that this test is applicable in restricting freedom of expression.

The three tier tests are discussed herein under followed by a concluding remark whether the anti terrorism proclamation’s provision on encouragement of terrorism is compatible with the pertinent provisions of FDRE Constitution and CCPR.

3.3.1 The test of “provided by law”

Both FDRE Constitution and CCPR provide that restriction on freedom of expression should be provided by law.¹⁹⁹ The provision on encouragement of terrorism is contained in the anti terrorism proclamation, which has statutory status. Moreover, the proclamation has been published in the country’s law gazette which can be accessed by anyone in the stores by paying a small amount of money. This roughly meets the requirement of accessibility.²⁰⁰ However, when one considers the fact that almost eighty percent of the Ethiopian population lives in rural areas where access to education and other basic infrastructure including the shops that sell proclamation is considerably limited, the accessibility of the ATP is put in question. Hence, it is hardly possible to consider a law that is only accessible to twenty percent of a given population meets the accessibility test.

The stipulation that proscribes encouragement of terrorism tries to address the objective test of probability of causation between the act of encouragement and the commission or preparation or instigation of an act of terrorism.²⁰¹ Accordingly, the likelihood of the understanding of the addressee of the encouragement statement is the only parameter for the determination of the causal link, which does not enable the author or the one who causes the publication of an encouraging statement to foresee what is the level of the understanding.

Moreover, the the proscription on free speech in ATP covers direct and indirect encouragement of terrorism or other inducement to terrorism. As pointed out above the stipulation fails to define each of these. Especially, the last act of “other inducement” leaves the scope of the stipulation very broad allowing for the arbitrary inclusion of any act within its ambit. Hence, as regards what type of speech is proscribed, the ATP stipulation on encouragement of terrorism is not clear. Furthermore, the proscription of encouragement of terrorism does not provide for the *mens rea* of the perpetrator of the communication. Thus, a person cannot foresee what is the mental requirement for criminal responsibility of encouragement of terrorism. On the other hand, the

¹⁹⁹ FDRE art 29(6) & CCPR art 19(3)

²⁰⁰ JPFE pl 1(1)(a)

²⁰¹ JPFE pl 6& DPFEA pl 13(2)

fact that the proscription gives reference to terrorist acts, which are vaguely and inadequately defined in the ATP, precludes an individual from precisely foreseeing the consequences of her acts.

The provision on encouragement of terrorism can generally be ruled as imprecise, which is vague and in some cases silent on very crucial points. It also makes reference to broad and vague definition of terrorist acts. Accordingly, a reasonable person cannot foresee with sufficient precision what is punishable under the proclamation on the basis of encouragement of terrorism where he publishes or causes the publication of a statement.

The provision of the ATP that proscribes encouragement of terrorism, hence only meets the test that the prohibition must be provided in formal law while it fails short of being accessible to most Ethiopians and precisely provide for the acts that are proscribed therein. Therefore, the prohibition fails to meet the test of “provided by law”. The Committee noted that the broad and vague definition of ‘encouragement of terrorism’ is inconsistent with CCPR as its application may lead to disproportionate interference with freedom of expression.²⁰²

3.3.2 The test of “in pursuance of one of legitimate aims”

The legitimate aims on the basis of which freedom of expression can be limited are honor and reputations of others, wellbeing of the youth, prohibition of propaganda of war, which may include protection of national security and prohibition of public expression intended to injure human dignity that may similarly be used to protect public order and honor and reputations of others.²⁰³

It is generally agreed that protection of national security and public order which are also recognized in the preamble of the ATP are the pertinent legitimate grounds for counter terrorism

²⁰² CCPR/C/GBR/CO/6

²⁰³ FDRE art 29(6)

laws including proscription of encouragement of terrorism.²⁰⁴ Similarly, the Committee in A.K and A.R V Uzbekistan noted that threats to national security interests, which relate to violently overthrowing a government and rights of others are pertinent grounds to limit expression in countering terrorism.²⁰⁵ If one sticks to this assertion, only the grounds of prohibition of propaganda of war and public opinion intended to injure human dignity, which may include national security and public order interests respectively are the pertinently applicable grounds of limiting freedom of expression as far as encouragement of terrorism is concerned. I however, decided to analyze each ground and find out if there is any pertinent aspect of these grounds that legitimize the proscription of encouragement of terrorism.

i) Well being of the youth

In chapter two of this thesis, the possible cases of expression that endanger the well being of the child, which is one aspect of well being of the youth were pointed as pornography, indoctrination and brainwashing. The fact that terrorism is led by intolerant extremist ideologies, the chance whereby children who are naturally innocent can be victims of indoctrination and brainwashing of terrorist ideologies is high. This poses a danger to the physical wellbeing of children, who may be used as tool of terrorists especially as suicide bombers. Moreover, indoctrination of children to extremism endangers their moral wellbeing, which should be built upon awareness of human rights and tolerance to differences. Hence, wellbeing of the youth within the above scope and meaning can be used to restrict speech that encourages terrorism so as to protect the psychological and physical wellbeing of the youth.

ii) Honor and reputation of others

States are not only entitled but also required to put statutory protection against intentional infringement on honor and reputation by untrue assertions.²⁰⁶ The protection of the honor and reputation of others is best served by special measures provided for in the media laws of most

²⁰⁴ A/63/337

²⁰⁵ A.K. and A.R. v Uzbekistan

²⁰⁶ Nowak (2005) p. 462

states.²⁰⁷Hence, the provisions in the Media Law not proscription of encouragement of terrorism in the ATP can rightly do the job of protecting the honor and reputations of others.²⁰⁸

iii) Public opinion intended to injure human dignity

In chapter two it was asserted that human dignity within the context of exercise of freedom of expression can be used to restrict speech that target the inherent worth of human beings.²⁰⁹ It was further argued that this ground can be equated with the ground of prohibition of advocacy of hatred in article 20(2) of CCPR, which according to Nowak is necessary for the protection of honor and reputations of others and public order.²¹⁰ Since, honor and reputation of others are best served by Media Laws, the pertinent aspect of this ground for the purpose of proscribing encouragement of terrorism will be its appeal to public order, which calls for equality and non discrimination on the basis of which a democratic society should be founded.

iv) Prohibition of propaganda of war

FDRE Constitution provides for the prohibition of propaganda of war as one of the permissible grounds for limiting freedom of expression.²¹¹ In chapter two of this thesis, it has been concluded that prohibition of propaganda of war is a specific additional limitation ground to those which are already provided in Article 19(3) of CCPR. Manfred Nowak further argues that prohibition of propaganda of war is necessary for the protection of national security.²¹² Hence, prohibition of propaganda of war in the FDRE Constitution can roughly be equated with the permissible ground of protecting national security. Hence, the ground of national security, which is impliedly covered by the prohibition of propaganda of war in the FDRE Constitution can be the legitimate ground for limiting an expression, which encourages terrorist acts within the meaning of the ATP.

²⁰⁷ Ibid at 463

²⁰⁸ ML art 40

²⁰⁹ Schachter (1983) p. 852

²¹⁰ Nowak (2005) p. 477

²¹¹ FDRE art 29(6)

²¹² Nowak (2005) p. 477

On the other hand, it is imperative to briefly look at the existing legal provisions relating to prohibition of propaganda of war in the Criminal Code. Publicly provoking others by word of mouth, images or writings, or launching or disseminating, systematically and with premeditation by word of mouth, images or writings, inaccurate, hateful, or subversive information or insinuations calculated to demoralize the public and to undermine its confidence is criminalized entailing simple imprisonment or where the foreseeable consequences of the provocation are particularly grave with rigorous imprisonment not exceeding ten years.²¹³ Provocation of others to commit crimes against the Constitution or the State and against the external security and defensive power of the state is hence, punishable in the Criminal Code.²¹⁴ The special criminal liability of the author, originator or publisher (the mass media) of a statement relating to the above crimes is also provided in the Criminal Code.²¹⁵ In such cases, the author, originator or the publisher of a given statement that relates to one of the crimes above will assume a special criminal responsibility as a principal criminal or an instigator or an accomplice.²¹⁶

The aforementioned stipulations of the Criminal Code are destined to limit those speeches that are thought to be propaganda of war. Hence, prohibition of propaganda of war as one of the legitimate grounds for limiting freedom of expression has well been served by the provisions of the Criminal Code. The question then arises what part of the prohibition of propaganda of war has not been covered by the above mentioned articles that would necessarily call for the protection of the interest by introducing new law that proscribes encouragement of terrorism. This issue will rightly be addressed in the test of proportionality.

In concluding the discussion, it has been pointed out the prohibition of propaganda of war, which may include interests of national security and protection of human dignity from demeaning and humiliating statements, which implicitly covers the ground of public order and wellbeing of the youth are pertinent legitimate ground in proscribing encouragement of terrorism.

²¹³ CC art 257

²¹⁴ Ibid

²¹⁵ Ibid art 44(1)

²¹⁶ Ibid

3.3.3 The test of “necessity”

Though FDRE Constitution does not provide for the test of proportionality or necessity while limiting freedom of expression, it was argued and concluded, that the test should be included by interpreting the Constitution in line with CCPR. In principle any limitation on the free enjoyment of rights and freedoms must be necessary in the pursuit of a pressing objective, and its impact on rights and freedoms strictly proportional to the nature of that objective.²¹⁷ To be necessary, a rational link must exist between the limiting measure and the pursuit of the particular objective, which will normally be accepted if the measure logically furthers the objective, although more evidence of this connection might be necessary if such a link is not plainly evident.²¹⁸ For the purposes of determining the importance of a particular measure’s objective, it will be instructive to determine: how the measure is linked with the countering of an actual or potential threat of terrorism against the state; the measure’s contribution to international and regional frameworks on counter terrorism as well as, subsidiarily, its contribution to other national interests of the state.²¹⁹

The pressing objectives to be protected by proscribing encouragement of terrorism in the ATP are prohibiting propaganda of war (interests of national security) and statements intending to injure human dignity (interests of public order) and protection of the wellbeing of the youth. It can be concluded, therefore, there are pressing objectives. The question proceeds as, is the proscription of encouragement of terrorism capable of achieving these legitimate aims.²²⁰ The provision on encouragement of terrorism as it stands there is capable of furthering the legitimate aims. Given the fact that freedom of expression especially the media are exploited by terrorists to communicate their deeds, to incite others to commit terrorist acts and create a hub for recruiting new members and to indoctrinate others to extremism the danger that such communication poses to these legitimate aims is considerable. Accordingly, limiting freedom of expression as regards

²¹⁷ SPLDP pl 10

²¹⁸ UNHCHR Fact Sheet p. 25

²¹⁹ Ibid

²²⁰ Sottiaux (2005) p. 45

those statements that encourage terrorist acts has a logical link in promoting the protection of national security , public order and wellbeing of the youth . Moreover, the proscription of encouragement of terrorism in Ethiopia promotes the counter terrorism efforts within the horn of Africa, which further gives an input to the international counter terrorism endeavors given the location of Somalia in the horn of Africa. Hence, proscription of encouragement of terrorism in Ethiopia does not only protect the national interests of the country but also support the regional and international counter terrorism efforts.

The second element of the test of necessity is that the limiting measure must be the least restrictive means to achieve the relevant purpose.²²¹ Accordingly, is the proscription of encouragement of terrorism in the ATP the least restrictive measure in limiting freedom of expression in order to protect public order, national security and well being of the youth. A number of parameters can be used to arrive an answer to this question.

First comes the consideration of those rules in the Criminal Code of Ethiopia, which prohibit provocation to commit crimes against the Constitution or the State and against the external security and defensive power of the state²²² and those which provide for a special criminal responsibility of an author, originator or publisher of a provoking and inciting and misleading statements.²²³ I argue that these rules cover acts that encourage terrorist acts by criminalizing acts that provoke and incite others to commit crimes including crimes against humanity and armed uprising though they do not provide for the act specifically. Hence, the introduction of ATP which specifically provide for encouragement of terrorist acts is partly redundant as the acts are already governed by the provisions in the Criminal Code. If a need arises to specifically address the issue of encouragement of terrorist acts so as to respond to the calls of the Resolution, amendment of the existing laws to specifically include the act would have sufficed. This conclusion seems more appropriate where one considers the intensity and severity of the ATP's stipulation on encouragement of terrorism vis a vis those applicable for general acts of

²²¹ Ibid

²²² CC art 257

²²³ Ibid art 44(1)

provocation and incitement. I similarly argue that public order can be protected by the general rules on provocation and incitement in the Criminal Code, which particularly cover crimes against humanity, armed uprising and crimes that target the security and integrity of the state.

Secondly, the ATP stipulation on encouragement of terrorism covers wide range of acts. These are directly or indirectly encouraging or in any other way inducing not only for commission of terrorist acts but also instigation or preparation for an act of terrorism. Hence, the stipulation is intensive as it covers a wide range of acts. Moreover, the punishment imposed for encouraging terrorism under the ATP is severely huge, which is ten to twenty years of imprisonment.²²⁴ Note that even committing an act of terrorism is punishable with rigorous imprisonment from fifteen years to life or with death.²²⁵ I strongly argue that a lesser punishment could have served the purpose of deterring individuals from publishing or causing the publication of statements that encourage terrorism. Accordingly, the intensive nature of the application of the stipulation as regards encouragement of terrorism coupled with the severe punishment that the act entails leads to the conclusion that the limitation on freedom of expression by proscribing encouragement of terrorism does not meet the test of being the least restrictive measure to achieve the legitimate purposes.

Restricting rights and freedoms calls for a reasonable balance between the rights and interests at hand. Hence, freedom of expression should not be limited so considerably leading to the jeopardy of the right itself at the expense of disproportionate protection of other rights and interests.²²⁶ Indeed, freedom of expression plays a crucial and indispensable role in democracy and in the exercise and enjoyment of other rights and freedoms. So are human dignity (public order), national security (prohibition of propaganda of war) and wellbeing of the youth. Hence, all interests and rights are in their own way important. Hence, restriction of a given right in order to promote another right or interest is not a matter of priority but balancing of these interests and rights depending on the circumstances.

²²⁴ ATP art 6

²²⁵ Ibid art 3

²²⁶ SPLDP pl 2

The ability and willingness of an author or a publisher to exercise their freedom of expression is substantially limited with the existence of such severe and intense law that proscribes encouragement of terrorism. Therefore, the right to freedom of expression is considerably and disproportionately limited by the ATP rule on encouragement of terrorism, which leads to substantial jeopardy of the right at the expense of disproportionate protection of public order, national security and wellbeing of the youth among which the two are already protected by less restrictive rules in the Criminal Code. Hence, the proscription of encouragement of terrorism does not meet the test that there must be a reasonable balance between the limiting measure and the aim pursued.

On the other hand, it is generally acceptable practice that there must be a subjective intention on the part of the author of the provoking statement and an objective danger that her statement will create a danger that a terrorist act would be committed. These two criteria are widely accepted as proportionality steps whereby any stipulation on incitement of terrorism should be tested against.²²⁷ The ATP stipulation on encouragement of terrorism, fails to provide for the subjective intention of the person responsible for encouragement of terrorism while its objective requirement only addresses one aspect of the requirement, which is the understanding of the addressee. Failure in observing these two steps obviously means that the stipulation is not proportional.

In concluding the discussion in this chapter, the following findings are worth noting. Except for being promulgated in the law gazette of Ethiopia, the stipulation on encouragement of terrorism fails to be accessible and precise. The pertinent pressing social needs, which call for the criminalization of encouragement of terrorism are prohibition of propaganda of war and public opinion intended to injure human dignity and protection of the well being of the youth. It was further pointed out that there is a rational link between the pursuance of these legitimate aims and proscription of encouragement of terrorism. On the other hand the stipulation was ruled as intense and severe that substantially undermine freedom of expression by appealing for an excessive and disproportionate protection of the pressing objectives. Furthermore, it fails to

²²⁷ Cram (2009) p. 93

provide for the mental requirement for the criminal responsibility of encouragement of terrorism nor does it provide for the internationally accepted requirement of objective probability of harm. Hence, the stipulation on encouragement of terrorism can be ruled as disproportional and hence does not meet the necessity test.

Conclusion and recommendations

The thesis examined the consistency of the ATP stipulation that proscribes encouragement of terrorism in light of the limitation clauses of freedom of expression under both FDRE Constitution and CCPR.

The first step in such examination was identifying the scope of the definition of ‘terrorist acts’ in the ATP. It was found out in the first chapter of the thesis that the definition of ‘terrorist acts’ in the ATP is vague and broad, which creates a wide possibility of arbitrary application of the definition on a variety of acts. Moreover, the definition of ‘terrorist acts’ not only covers those crimes that target the lives and bodily integrity of individuals but also property crimes and crimes against the historical and cultural heritages of the country, which are not ordinarily conceived as terrorist acts. Broad definition of terrorist acts results in the arbitrary application of all provisions of ATP particularly proscription of encouragement of terrorism to the detriment of rights and freedoms of individuals.

As the criminalization of encouragement of terrorism or any terrorism related speech is destined to limit freedom of expression, the contents of the right and the applicable legitimate limitations thereof have been discussed in chapter two of the thesis. Both FDRE Constitution and CCPR have been harmonized in ascertaining the exact content of freedom of expression. Due emphasis have been made to the three tests of ‘provided by law’, ‘in pursuance of legitimate aims’ and ‘necessity’ that are applicable in analyzing the legitimacy of any restricting law on freedom of expression.

The ATP proscribes terrorist threats and encouragement of terrorism, which covers direct incitement or encouragement to terrorism, indirect encouragement and other forms of inducement that may amount to glorification of terrorism. Hence, the forms of speech that are proscribed in the ATP are terrorist threats, direct encouragement or incitement to terrorism and indirect encouragement or glorification of terrorism. Accordingly, almost all recognized forms of terrorism related speech are criminalized under the ATP.

Finally, the stipulation on encouragement of terrorism in the ATP has been analyzed in light of the three tests against which limitation laws should be weighed. The conclusion is, the stipulation fails to meet the test ‘provided by law’ as it contains imprecise and vague terms and references, particularly its reference to the definition of ‘terrorist acts’, which disable a reasonable person from foreseeing what is actually sanctioned and the consequences of one acts. Moreover, it has been argued that the law fails to be accessible to most Ethiopians. Accordingly, except for the fact that the law has been enacted as a formal legislation, it comes short of the other elements of the test of ‘provided by law’.

The proscription of encouragement of terrorism in the ATP meets the test of ‘in pursuance of legitimate aims’ as it can be used for protecting well being of the youth, human dignity and prohibiting propaganda of war. It was pointed out the last two grounds appeal for the protection of public order and national security. It was further argued that these grounds are already protected by the provisions in the Criminal Code.

The test of ‘proportionality’ or ‘necessity’ was the last test considered to ascertain the legitimacy of the limitation on freedom of expression by the ATP. It was concluded that the stipulation that proscribes encouragement to terrorism is too intense and severe that jeopardizes the right to freedom of expression at the expense of disproportionate protection of other rights and interests. It was further concluded that the proscription of encouragement of terrorism is not the least restrictive measure to attain the legitimate purposes. A lesser punishment or the application of the less grave provisions on general subversive advocacy in the Criminal Code could have served the purposes of protection human dignity and the prohibition propaganda of war. Moreover, the stipulation fails to provide for the mental element of commission of crime, which may lead to a conclusion that there exists no crime where no mental element is provided. On the other hand, it also comes short of providing for the objective probability of harm that the encouraging statement entails. All these shortcomings of the stipulation lead us to a conclusion that it fails to meet the test of ‘proportionality’.

As the three tests are cumulative, it would have sufficed to show that the stipulation on encouragement of terrorism in the ATP fails short of only one of them. However, it is clear that the stipulation does not meet the two tests of ‘provided by law’ and ‘proportionality’ while it meets the test of ‘in pursuance of legitimate aims’. Hence, it can safely be concluded that the limitation regime on freedom of expression in the ATP is not permissible under both FDRE Constitution and CCPR. Therefore, the finding of the research is the rule that sanctions encouragement of terrorism is not only unconstitutional but also inconsistent with the international human rights commitment of Ethiopia under CCPR. FDRE Constitution provides that any stipulation that is not consistent with it is void from the outset.²²⁸

Given the fact that freedom of expression is a right whereby other rights and freedoms are exercised, the implication of the conclusion that the proscription of encouragement of terrorism in the ATP is neither constitutional nor consistent with CCPR is far reaching. Importantly, the democratic process of Ethiopia will severely be hampered where freedom of expression is excessively limited. Moreover, as the freedom is related with freedom of association and freedom of assembly, which are equally important in democracy, the violation of the freedom by the ATP in a way violates these freedoms. Hence, these indispensable elements of democracy are jeopardized by a single provision that proscribes encouragement of terrorism. The fact that Ethiopia introduced new laws on civil and non governmental organizations, on media freedom and terrorism within the past two years ahead of the country wide election in May 2010 made the government susceptible of intending to suppress the political dissent in the country through these laws. The cumulative effects of all these laws on the democratization process of the country is an interesting area for future studies.

On the basis of the finding of the research, which is the stipulation on encouragement of terrorism is not a legitimate restriction on freedom of expression, it is imperative to make some recommendations. One way of approaching the legitimacy of the law can be amending the rules

²²⁸ FDRE art 9(1)

in the Criminal Code so that they clearly include terrorist acts and repealing the provision in the ATP that proscribes encouragement of terrorism.

On the other hand, if it is argued that the proscription of encouragement of terrorism should specifically be addressed in the ATP, it should be amended to be constitutional and consistent with CCPR. Since proscription of encouragement of terrorism gives reference to definition of terrorist acts in ATP, amendment of the following aspects of the provisions on ‘terrorist acts‘ and ‘encouragement of terrorism‘ are recommended.

The first general step is to clearly provide for the acts of terrorism and encouragement of terrorism in the ATP. Hence, all vague and ambiguous terms in both rules as are identified in this research should be replaced by precise terms to enable individuals to reasonably foresee the consequences of their actions.

Terrorist acts should only include those acts which are ordinarily conceived as such i.e property crimes and crimes against the historical and cultural heritage, environment and natural resources should be excluded from the definition.

The rule on encouragement of terrorism should provide for the objective requirement of risk of harm that results from the published encouraging statement.

It should provide for the mental element of commission of an act of encouragement of terrorism.

The scope of encouragement of terrorism should be limited to direct encouragement and not indirect encouragement and other inducement of terrorism. Moreover, the encouragement should only relate to commission of and not preparation or instigation of terrorist acts.

The punishment applicable on encouraging terrorism should be lesser than that is already provided. The punishment should give reasonable weight for the importance of freedom of

expression in a democratic society and the danger a terrorism encouraging statement poses to the pertinent legitimate interests protected.

The proclamation should be made accessible to all Ethiopians by ensuring the ways they can get it easily. Moreover, the public should be educated about the contents of the law and its application.

SPLDP United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex 1985

ATP Anti Terrorism Proclamation, Addis Ababa June 2009

CC Criminal Code of the Federal Democratic Republic of Ethiopia, Addis Ababa 2005

FDRE Constitution of the Federal Democratic Republic of Ethiopia, Addis Ababa 1995

ML Proclamation on Freedom of the Mass Media and Access to Information, Addis Ababa, December 2008

CECPT Council of Europe Convention on Prevention of Terrorism, Warsaw 16 May 2005

CPTC Organization of African Unity Convention on Prevention and Combating of Terrorism, Algiers 14 July 1999

DPFEA Declaration of Principles on Freedom of Expression in Africa, Banjul 17-23 October 2002

JPFE The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Johannesburg November 1996

EFDCT European Frame Work Decision on Combating Terrorism, Strasbourg 13 June 2003

CCPR /C/ ETH/1 Human Rights Committee, Consideration of First Periodic Reports Submitted by State Parties under Article 40 of CCPR-Ethiopia, 22 October, 2009

CCPR/C/GBR/CO/6 Human Rights Committee, Concluding Observations on United Kingdom Terrorism Act 2006, 21 July 2008

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