

The Principle of Proportionality of Punishment in Criminal Law: An Appraisal of the Ethiopian Anti-Terrorism Law

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Abstract

This paper focuses on the calibration of punishments which is among the controversial issues, whereby this specific law is eloquently criticized and vehemently alleged from in and out of the country from its outset. Therefore, the paper concludes that the way punishments are prescribed are not in line with the principle of proportionality of punishment which is adhered to different criminal laws in different jurisdictions as well as the FDRE constitution so long as it fails to appropriately consider the social harm that the terrorist act caused and culpability of the offender though they are both basic parameters of gauging the proportionality of punishments. This is because of the basic reasons that in this specific law, inchoate crimes including pre-attempt terrorist offences (remote harms) are equally punishable with other completed offences irrespective of the seriousness of the social harm that they caused. Similarly, terrorist offences which are committed intentionally and other terrorist offences that are committed by the negligence of the offender are equally punishable in the law regardless of the mens rea element (culpability of the offender) that the offender has.

Keywords: proportionality of punishment, harm, culpability, preventive detention, inchoate offences

1. Introduction

Ethiopia, as one of the countries that are located in terrorist prone area (East Africa) and also as a country that suffers from terrorist acts in not less incidents, it has been obliged to adopt anti-terrorism legislation which is known as Anti-Terrorism Proclamation No.652/2009.

Despite its marvelous contributions in terms of foiling the threat of terrorism in Ethiopia, this specific law from its inception is prone for numerous criticisms and allegations from in and out of the country by different individuals and institutions.¹ Among others, the calibration of punishments is among the bones of contentions whereby the law is severely criticized by different bodies. According to these groups, though the principles of harm and culpability of the offender are the crucial parameters for the prescription of punishments, the law fails to appropriately consider these principles. Thus, the law calibrates equal punishments for inchoate and completed terrorist offences irrespective of the social harm that they caused. In a similar fashion, regardless of the principle of culpability the offender that committed a certain terrorist offence intentionally and the other individual who committed similar offence negligently is equally punishable. The law also punish sever violent terrorist offences similar with property offences. Hence, they argued the punishment in this specific law is against the principle of punishment and also it is against the Ethiopian constitution that prohibits inhuman cruel and degrading punishment.

Therefore, this paper elucidates how far the allegations of the law regarding the proportionality of punishment are sound and acceptable. Furthermore, the article tries to evaluate the compatibility of the extent of punishment with the Ethiopian constitution. With respect to contents, the paper has three parts excluding the introduction part. While the second part of the paper deals about the concept of proportionality of punishment, part three enumerates the underlying values of proportionality of punishment. Part four discusses the basic principles (harm and culpability) that are helpful to gauge punishments. The last part tries to explicate whether punishment under the Ethiopian anti-terrorism law are calibrated based on the principle proportionality and in line with the Ethiopian constitution.

2. Proportionality of punishment: conceptual overview

It was during the presence of the code of Hammurabi and the mosaic code that the concept of proportionality of punishment dates back. In the book of exodus, it was described as ‘thou shalt give life for life eye for eye tooth for tooth.’² Based on this line of understanding, punishment would be proportional and thus fair if it is identical with the magnitude of the nature of the crime or what is called mirror punishment. In other words, according to Balmer, proportionality of Punishment “rests on the intuitive moral notion that one fair means of punishing the

¹ Basically, Human rights watch and Amnesty international were the for front human right organizations in denouncing the Ethiopian anti-terrorism law by arguing that the law is against fundamental human rights of citizens. Similarly, the Ethiopian opposition parties like “Andenet”, “Mederek” and others were repeatedly opposing for the cancellation or Amendment of the law. Scholars also tried to show the shortcomings of the law. Wondwossen and Hiruy can be mentioned in this regard.

² Thomas A. Balmer, Some Thoughts on Proportionality, Oregon Law Review, Vol. 87, 783,2008, p.875

wrong doer is to inflict the same kind and degree of harm that was inflicted on the victim.”¹He further argues:

Although the traditional ‘eye for an eye’ formulation of proportionality, generally referred to as ‘lex talion’ often is associated with the retributive purpose of punishment –you inflicted harm on an innocent person, the state(or society) will now have retribution against you by inflicting the same harm on you- it also is consistent with other purpose of punishment.²

Lex talionis was also supported by prominent scholars of the 18th and 19th century. According to Kant, who was one of the proponents argued in his famous work that any punishment which is imposed on the criminal should not be used to promote the benefit of the criminal or other civil societies rather punishments must be levied on him based on the reason that he has committed /omitted/ a crime. Therefore, before considering other benefits and interests of the criminal and of course the public, he must be found to be deserving a specific punishment.³

Therefore, for Kant looking the punishment of the criminals not based on the measurement of *lex talionis* is against the principle of justice and equality. For him a punishment which is not based on *lex talionis* is not fair and certain. In other words, public courts can’t maintain proportionality of punishment that is to be manifested both in terms of quality and quantity of justices unless they seriously adopt *lex talion* as a standard for imposing punishments.⁴

However, as time goes on, the acceptability of the formulation of “eye for an eye” becomes simplistic and therefore considered as primitive and barbaric so far as its pillars are based on the sense of retaliation. There are different reasons for the unacceptability of eye for an eye. One of the reasons is the sole focus of the formulation of eye for an eye on the injury caused by the wrong doer. In other words, “the wrong doer’s mens rea and actus reus, as well as the resulting injury, are relevant in determining whether a punishment is appropriately proportional.”⁵ As per the principle of “eye for an eye”, “if the wrong doer did not intend to kill, for example, but was only reckless in engaging in the conduct that led to the victim’s death, the wrong doer may not deserve the death penalty.”⁶

Thus, different scholars basically Bentham and Beccaria tried to explicate the notion of principle of punishment in different perspectives. Beccaria was one of the scholars who tried to give better clarification for the proportionality of punishment and its relevance. According to him, “If an equal punishment is laid down for two crimes which damage society unequally, men will not have stronger deterrent against committing the greater crime if they find it more advantageous to do so.”⁷He further argued that, the evaluation of proportionality of punishment should not be based on the measure of the seriousness of the crimes as per the rank of the injured party by setting aside the significance for the public good. Thus, for him “If this were the true measure of criminality irreverence towards the Devine being out to be more harshly punished than the murder of a monarch, the superiority of his nature of setting infinitively the difference in the offence.”⁸

The utilitarian Bentham, also vehemently argued that the punishment must look forward to the consequence of punishment and not backward to the wrong done.⁹ For him, the purpose of punishment should not be recognized as retribution rather for the prevention of offences. Based on Bentham’s view punishment should be seen:

... as an incentive to reform: for convicted offenders, therapeutic reform, by inducing a consciousness of guilt that might motivate them to mend their ways; for potential offenders, punishment of the guilty provides an incentive to pre-emptive or prophylactic reform (the adjectives are mine), by inducing an awareness that crime is punished because it is wrong, causing those who might otherwise not do so to abandon their ‘mischievous inclinations’, to ‘rehabilitate’ themselves, as it were, even before they have committed a crime.¹⁰

H.L.A. Hart had tried to make reconciliation on to competing outlooks of retributive and utilitarian proportionality, suggesting that “while we can agree that the reason for having a penal system at all is the general betterment of society...we can at the same time maintain with consistency that punishment should only be

¹ Ibid

² Ibid ,p.876

³ Morris J. Fish, An eye for an eye: Proportionality as a moral principle of punishment, Oxford Journal of Legal Studies, Vol. 28, No. 1 (2008),p.63

⁴ Ibid

⁵ supra note 1,p.876

⁶Ibid

⁷ Rymond Guess(eds), Beccaria on crimes and punishments and other writings, Cambridge texts in the history of political thought ,p.21

⁸ Ibid,p.22

⁹ supra note 4,p.64

¹⁰ Ibid

handed out to those who deserve it, and only to the extent of their guilt.”¹

Despite these divergent understandings, it wouldn't be mistaken to say that the need of proportionality between the gravity of the crime and the punishment is recognized in both retributivists and utilitarian theories of punishments. According to the view of retributivists, to determine the appropriate degree of punishment, it is crucial to look at on two basic elements of the crime, namely the harm inflicted in the victim by the doer of the act and the moral blameworthiness of the actor. Utilitarian philosophy asserts that the punishment imposed must be proportional to the dangerousness of the inflicted harm.²

Accordingly, punishment is neither a ‘cost nor a benefit’; it is rather an appropriate behavior to ensure that behaviors as morally wrong. This response should be proportionate in the sense that punishment shouldn't be harsher than merited; punishment should express only the amount of reproach felt by the community.³

Irrespective of the increasing acceptability of the proportionality of punishment through time in different theories of punishments, there are yet different counter arguments from different scholars. The first counter argument after accepting necessity of proportionality of punishment, it asserted the intricacy of gauging proportionality of punishment. Professor Rothbard argues that “the root idea of proportionality in punishment is that the criminal loses his rights to the extent that he deprives another of his rights.”⁴ Thus, in not less situations, it is difficult to exactly know the extent of the violated rights particularly in monetary cases. For instance, “if one simply returns the sum stolen to the victim (plus, interest, cost, etc) the criminal has not really been punished. Therefore, this leads to the principle of “two teeth for a tooth.” The criminal must return, for example, any sum he had stolen and then pay the same sum to the victim, plus something for fear, anxiety, etc....”⁵

The second counter argument is related with the importance of excessive punishment other than its proportionality to the severity of the harm. Scholars argue that punishment should be excessive to the injuries occurred to the victim. It is possible to say that the stand of these scholars is even more than *lex talion* that requires mirror/identical punishments. For instance, the prominent scholars James Madison rejected the principle and favored the use of excessive punishment to give punishment maximum deterrent effect. As a result they supported the use of death penalty even for the crime of theft.

Despite these counter arguments against the proportionality of punishment, the current practice of the world garishly expresses that proportionality of punishment is adhered to different criminal laws in different jurisdictions across the world and also it is now supported by different eminent scholars in the area.

3. Underlying values of proportionality of punishment

Here it is imperative to ask a question why proportionality of punishment is so crucial? Why different scholars and also practitioners of different disciplines always eloquently shout for the observance of the proportionality of punishment whatever the nature of the criminal offence including terrorist offences? There are different justifications for the above raised questions. Thus, among other things proportionality of punishment has the following fundamental values.

3.1. The manifestation of fairness/justice.

When punishment is rendered based on proportionality that is laid down on the gravity of the offence, it reflects the reprehensibility of the conduct. Dworkin has expressed that the principle of proportionality “ is a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice, fairness or some other dimension of morality.”⁶ Burgh has described the relevance of proportionality of punishment as the manifestation of fairness/ justice as Follows:

It is important to notice that, in order to render punishment capability with justice, it is not enough that is deserved. The idea is that, in committing an offence, we don't think of the offender as deserving, but we must, in addition restricts the degree of punishment to the degree that is deserved. The idea is that, in committing an offence, we don't think of the offender as deserving unlimited punishment; rather we think of him as deserving a degree of punishment that is proportional to the gravity of the offence he committed. Hence, if we punish the offender to a degree that exceeds what he deserves, we treat him unjustly. In fact, if the offender can be said to deserve only so much punishment,, then any punishment in excess of this should be considered as objectionable as imposing an equivalent amount on an innocent.⁷

¹ Ibid, p.49-50

² Wondossen Demssie, Criminalization and Punishment of Inchoate Conducts and Criminal Participation: The case of Ethiopia, journal of Ethiopian law, vol.24, 2010, p.176

³ Perez Correa, Punishment and Proportionality: A Case Against Imprisonment, Proportionality as a principle, UNAM, p. 22

⁴ J. Charles King, A Rational for punishment, Journal of libertarian studies, IV, p.9

⁵ Ibid

⁶ supra note 14, p.4

⁷ Ibid, p.7.

Thus, if punishments are reflected otherwise, it caused more censure which is not compatible with the blameworthiness of the conduct that resulted disproportional punishment which is unfair and unjust.¹

According to Benjamin Franklin, a legal system “founded on Eternal principle of justice and Equality” must reasonably concur that the punishments should be proportioned to the offence.² In addition to disputing fairness, disproportionate punishments violate the human rights of offenders. Because, though an individual committed a certain crime, he still must be treated as a citizen and member of the community. Therefore, regarding punishing this offender, recognizing the fundamental human rights of the offender is not a matter of option but an obligation for any government so long as basic principles of justice and fairness entitles individuals not to be subjected to excessive punishments.³ It is only at this condition that the public can be satisfied and feel confidence on the justice system and the activities of the government as a whole.

3.2. Limiting the interference of the government

The other justification for the need of the proportionality principle is its role in limiting the interference of the state. The principle of proportionality was offered as a means for restricting the state’s authority to punish, particularly as a way of limiting the use of severe sanctions.⁴ In other words, the principle of proportionality safeguards offenders from excessive, disproportionate or arbitrary punishments.⁵ Concerning this issue, Ashworth argues that punishment and conviction are the basic mechanisms that the state used to respond wrongdoing. Therefore, punishment is the curtailment of the autonomy of individuals which has the consequence of invading the individual ability to choose and flourish. But, it is cautioned by Ashworth that such punishments must be proportional that doesn't give an opened room for the unlimited exercise of power by the government to disproportionately invade the personal autonomy of the alleged individual. Therefore, it would be an unacceptable use of state power and an invasion of autonomy for the sentence to be out of proportion to the degree of wrongdoing involved in the offense.⁶

Moreover, Prescribing punishment disproportionately is against the so-called social contract theory which vehemently demands the government to exercise its power and interference over the rights of its people restrictively based on the agreements.

Thus, based on this principle the interest of an individual including the one who committed a certain crime shouldn't be restricted except to the extent that is absolutely necessary and also rationally proportional to the harm committed.⁷ In doing so, any government can manifest its moral credibility to its people.

3.3. Preventing future crimes

When the punishments levied based on the gravity of the offence, citizens of any country defendants, in particular believe that the punishment is proportional and accept it as fair. Dejene has put the issue based on the following example. According to him:

...if a person who steal 20 birr is to be punished equally with a person who steal 20,000 birr, then the person who intends to steal 20 birr will change his plan and risk stealing the 20,000 birr. After all, human beings are hedonistic or self-interested if forced to choose between less serious and more serious crimes that are assigned equal punishment.⁸

Therefore, if punishments are prescribed disproportionately, the government is conversely encouraging individuals to engage in further criminal activities either by commission or omission.

4. Parameters to gauge proportionality of punishment

4.1. Principle of harm

The harm principle is firstly proposed by John Stewart Mill on his work on Liberty. He Provided that the fundamental and the only ground to justifiably contravene the autonomy of the civilized member of the community even without his willingness is basically to avert harm to others. He further articulated that the mere fact of having good character, physical or moral is not sufficient to safeguard him from harming others.⁹

To know more about the principle of harm, it is crucial to begin with the discussion of the concept of harm itself. According to prominent scholars of the field, understanding the concept of harm is not an easy task so far as it is a morally loaded concept.

¹ Andrew Von Hirsch, proportionality in the philosophy of punishment, university of Chicago, 1992, p.4

² supra note 17, p.150

³ Ruth Kannai, preserving proportionality in sentencing: constitutionality in sentencing constitutional or criminal issues, p.4

⁴ Andrew Von Hirsch, Censure and sanctions, oxford university press, p.89

⁵ supra note 14, p.4

⁶ Andrew Ashworth, conception over criminalization, Ohio state journal of criminal law, p.210

⁷ Andrew Ashworth, principle of criminal law, Oxford University press, fourth edition, 2003, p.527.

⁸ supra note 17, p.150

⁹ J.S. Mill, On Liberty in J. Gray (ed.) On Liberty and Other Essays, Oxford: OUP (1991),

A better definition of the term is given by Feinberg as “Those states of setback interests that are the consequences of wrongful act or omissions of others bypass these wider issues but itself depends on the concept of interests as matters in which a person has a legitimate stake.”¹ Ashworth cautioned that when harm is defined in terms of the violation of people’s legitimate interest, due care must be given regarding moral, cultural, and political nature of the interests in a given system.²

Therefore, harm principle has a central role in calibrating punishments proportionally. Based on the assertion of Feinberg, individual autonomy must not be restricted unless the restriction is justified and reasonably necessary to prevent them not to cause unreasonable harm to others. Put differently, the decisive issue to apply legal coercions is primarily with a view to prevent either public or private harm by the actor.

One of the imperative issues which is related with the proportionality of punishment is whether remote and minimal harms particularly inchoate crimes are to be equally punished with the completed crimes. To argue whether remote and minimal harms that basically include planning, preparation, conspiracy and attempt must be punished similar with completed offences, it is essential to see the aptness of the criminalization of these specific harms.

According to Wondwossen, because of temporal remoteness, non-consummated crimes don’t cause actual harm to the victim.³ If the argument that the criminalization of non-consummated crimes particularly pre-attempt activities that includes planning, preparation and conspiracy is not acceptable as long as there is neither actual nor potential harm, undoubtedly, the punishment of these pre-attempt activities is not acceptable and justifiable. Regarding attempt, so far as its criminalization is acceptable as it causes some social harm, there is no as such great difference on its punishment. However, yet, how attempt (one of the remote harms) is to be punished is the important point that invites certain discussion. Therefore, it is pertinent to have a discussion here whether the crime of attempt (one of non-consummated crimes) should be equally punished with consummated (completed) crimes.

Regarding the punishment of inchoate crimes particularly attempt, two basic computing theories (Subjectivism and objectivism) took sundry stands. The chief concern of theory of subjectivism is the mens rea of the offender. It is stated as Conduct of the actor (actus reus) which may or may not bring about an injury should not be a determinant factor for indicating whether or not the actor should be punished. It asserts that the act of execution is important only so far as it verifies the firmness of the actor’s intent. It follows that an act, irrespective of its innocuousness, that clearly shows the actor’s commitment to carry out a criminal plan is sufficient to justify punishment for an inchoate conduct.⁴

However, objectivists contend this theory because of the reason that the actor’s conduct is punishable whenever it is easily discernable at the time of the commission of the act. Therefore, based on this theory the offender is punishable only when the act itself manifests that the offender is subjected to punishments.⁵

Retributivists on their part particularly those who mainly support the culpability element of the attempter, argue that the one who attempt to commit a certain offence has a similar culpability with the one who succeed in committing a crime. Therefore, the punishment imposed on the attempter must be as severe as the punishment of the one who succeed in committing the crime. On the other hand, other retributivists argue that culpability by itself is not sufficient to judge the punishment. Thus, in addition to culpability, the harm occurred by the offence must be taken in to consideration. As long as the harm caused by the attempt is obviously less severe than the completed offences, the crime of attempt is lesser grave that deserves lesser punishment than the completed offences.

On the utilitarian point of view, there are who support the equal punishment of attempt and other consummated crimes. They argued in such a way based on the equal dangerousness of attempt and other completed offences. But most of utilitarian theorists are against this equal punishment of attempt and other completed offences based on two basic reasons. According to Ashworth, the first argument is that starting from the point at which the defendant crosses the threshold of the attempt of the offence until the completion of that specific crime, the prescribed punishments ideally graded and thus its severity would be increased.⁶ The second reason for the lesser punishment of attempt has significance in ceasing crimes before completion. Black stone phrased it as “an encouragement to repentance and remorse”.⁷

In nutshell, it would not be mistaken to argue that, almost all of the above theories of punishments support the lesser punishment of inchoate crimes from the completed crimes. This is because of the reason that when that conducts are not so proximate to the principal offence, the actor has a chance to renounce or desist his

¹ _____ Decisions to criminalize, p.34.

² supra note 26,p.528

³ supra note 14,p.166

⁴ Ibid,p,164

⁵ supra note 14,p.165

⁶ supra note 26,p.528

⁷ Ibid

intention from his criminal activity that makes him to be less culpable than the other actor who attempted/committed a crime whose mentality is so certain. Therefore, the proximate conduct to the actual commission of the crime, the severe punishment would be imposed.¹

The other disputing but worth mentioning concept here is the punishment of property crimes. One of the prominent criminal lawyers, Ashworth eloquently argues that the punishment of property crimes must be lesser so long as property crimes are less serious than violence crimes in terms of affecting the legitimate interests of the victim, their punishment must be lesser in a similar fashion.²

4.2. Principle of culpability

In addition to harm, Culpability/mens reu of the offender is the other parameter to gauge the proportionality of punishment in criminal laws including anti-terrorism laws. Thus, before showing how the culpability of an individual is important for the evaluation of proportionality of punishment, it is indispensable to see the conception of culpability (mens reu of the offender) itself. According to Ashworth:

Culpability refers to the factors of intent, motive and circumstance that determine how much the offender should be held accountable for his act. Culpability, in turn, affects the assessment of harm. The consequences that should be considered in gauging the harmfulness of an act should be those that can fairly be attributed to the actor's choice.³

The punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed. Certainly, the required mens reu elements for a certain crime are relevant in determining whether punishment is appropriately proportional. Regarding the importance of culpability of the offender for the evaluation of proportionality of punishment, there are two contending considerations.

For moderate constructivism, the crucial question is whether the defendant can be said to have changed his or her normative position by intentionally attacking another's protected interests. Once the defendant has passed over this moral threshold, there can be no objection to holding him or her liable for the consequences that ensue because morally the most crucial element is that initial, intentional attack. That is what changes the defendant's normative position in relation to consequences that might otherwise be ascribed to chance.

Those who adhere to the principle of correspondence would argue that this is indeed an excess of criminalization; in principle, the culpability requirement should be on the same level as the harm requirement so that the two correspond. For them, "If the harm required is death, the culpability requirement should relate to killing and not to some lesser harm (such as a felony, or serious bodily harm)."⁴ The argument in favor of correspondence is that, without it, the culpability requirement hangs in the air.

Therefore, Ashworth argues, irrespective of divergent theories, mens reu element of the offender is one of the crucial element in determining the seriousness of the offence. According to him, "culpability may create a difference in seriousness between the intentional killer and the negligent operator of a factory whose machine kill, or equally between the negligent killer and the factory owner who knowingly puts employees at risk of serious harm."⁵

By taking the mens reu element of the offender to put the issue in very plain language, the crimes committed by the offender with the negligent mental element are less serious than those crimes that are committed by the offender with the intentional offender. Put differently, taking the culpability of the offender, the one who committed a crime intentionally should be severely punished than the one who negligently committed the same crime. Punishing those who committed acts intentionally and negligently spread a wrong message to the public that both offences are similarly harmful and the offenders were in a similar culpability.

5. The place of proportionality of punishment under Ethiopian anti-terrorism law

In the following three indispensable ways, it is possible to argue that the kind and extent of punishments in the proclamation are not complied with the basic principle of proportionality of punishment as well as the basic principle which is stipulated under the FDRE constitution that prohibits inhuman, cruel and degrading punishment.⁶

5.1. The punishment of inchoate offences

The first allegation that comes from different directions against this specific law regarding the punishment is the

¹ Ibid

² Ibid, p.527

³ Andrew Ashworth, Sentencing and criminal justice, Cambridge university press, 4th ed, p.142

⁴ Ibid

⁵ Ibid

⁶ Dersolegn yeneabat, Assessing controversial issues of the Ethiopian Anti-terrorism Law: A special focus on substantive matters; journal of law, policy and globalization, vol.40, p.63

calibration of similar punishments for completed and inchoate terrorist offences. Most criminal lawyers argue that so far as the criminalization of most inchoate offences particularly plans, preparations and conspiracy of terrorist acts is not justified and acceptable because of the absence of the requirement of harm, fairness and also pragmatic concerns, the punishment of these inchoate offences in a similar fashion is not justified. Thus, among the inchoate offences, the punishment of attempt of terrorist offences is remaining crucial point that calls discussion. As per the theories and principles of criminal law, among inchoate crimes, the punishment of attempt is acceptable under the Ethiopian anti-terrorism law. But yet, talking about the extent and kind of punishment for attempt of terrorist acts under this specific law is very crucial. When we closely look at the provisions of the proclamation, the law prescribes equal punishments for attempt and other completed terrorist acts irrespective of the seriousness of the harm which is caused by terrorist acts and attempt of this crime. It is stipulated under article 4 as follows:

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

To plainly realize the extent of punishments under this particular provision, it is imperative to know article 3 of the proclamation. So far as acts provided under this specific article are consummated offences of terrorism, the punishment provided for these acts is ranged from 15 years rigorous imprisonments to life or with death. The amount of punishment provided under article 3 is also applicable for acts provided under article 4. Put differently, the law calibrates similar punishments for inchoate terrorist acts including pre-attempt acts which are provided under article 4 and completed terrorist offences provided under article 3 contrary to fairness. In this regard Dersolegn argues, "this proclamation fails to properly consider the equivocal and remote nature of the inchoate terrorist acts though they are pretty much important for the determination of the extent and types of punishment."² Because of this failure, the law put similar punishments for consummated and non-consummated terrorist crimes. This makes the stand of the law to be unfair and contrary to the principle of proportionality of punishment. In other words, "subjecting one who has planned, taken preparatory steps or conspired with others to commit a terrorist act to the same punishment as one who has committed a terrorist act makes the law unfair."³

Therefore, it is right to impose lesser punishments on inchoate offences than the completed ones so long as the former ones are less grave and sever than the latter in terms of causing social harms. If inchoate and complete terrorist acts are punished by the same kind and extent of punishments, it would have different adverse effects.

Because of this stand of the law the calibration of equal punishment of inchoate terrorist offences and other completed ones would transfer a wrong message to the public. The general public after looking such similar punishments will definitely accept that both inchoate offences and completed offences are equally harmful and the perpetrators of both offences are equally blameworthy. In other words, as Hart argues that this way of prescription of punishments brings "risk---of either confusing common morality or floating it and bringing the law in to contempt."⁴

Similarly, the equal punishment of both inchoate and completed terrorist offences under the Ethiopian anti-terrorism law has another negative effect on the offenders of the crime. If similar punishment is prescribed on both inchoate and complete offences, then once a person plans or takes preparatory steps, there is nothing that discourages him from proceeding to the actual criminal conduct. To the extent that the punishment system doesn't contribute in discouraging criminals from proceeding further in their criminal design, it is defective for it fails to serve its purported purpose-prevention of the commission of crime.⁵

Though the law is expected to prescribe the harm and culpability of the offender of the terrorist act, the law gives less/nominal recognition to the seriousness of the harm while it gives much recognition for the culpability of the offender. Wondwossen stated that by "subjecting instigators and accomplice to similar punishment irrespective of the fact that the principal crime (terrorist act) is attempted or committed, the proclamation deviates from the requirement that the extent of punishment should partly depends on the degree of harm."⁶ Accordingly, the punishment would fail to achieve its intended objectives.

Instead of punishing the inchoate crimes in such a sever manner, as scholars argue, adopting preventive detention is a best alternative. In other words, instead of severely punishing planning, preparation or conspiracy as the completed crimes, it would better if preventive detention were adhered to the Ethiopian anti-terrorism law. According to wondwossen adopting preventive detention in this specific law has the following basic benefits. First, those who want to commit terrorist offences would be prevented from continuing their plan, preparation or

¹ Anti-Terrorism proclamation, proc.No.652/2009, Federal Negarit Gazeta, 15th year No.57,(2009) article 3

² supra note 42,p.63

³ supra note 14,p.178

⁴ supra note 14,p.18

⁵ Ibid,p.18-19

⁶ Ibid

conspiracy as a result of preventive detention. Second, those who, even without the preventive detention, would have desisted from their criminal design would be rightly saved from punishment. Thirdly, even those who plan, prepare conspire prefer to continues to commit the terrorist offence even after the preventive detention, their dangerous disposition becomes clear which makes infliction of punishment to be most appropriate.¹

Further wondwossen argues:

Adopting preventive detention in place of punishment increases the legitimacy of the law by addressing the concerns raised in the preceding pages. The advantage of preventive detention over criminalization and punishment can also be seen from cost minimization viewpoint. The system suggested avoids a costly full-fledged investigation and trial.²

5.2. The recognition of culpability of the offender

The other allegation by many institutions and individuals against the Ethiopian anti-terrorism law regarding punishment is the calibration of similar punishments for intentionally and negligently committed crimes irrespective of the mens rea element of the offender of terrorist acts.³To bluntly understand the shortcomings of the law in this regard, it is important to closely read article 5 and 9 of this specific law. Article 5 of the proclamation underlines that any person who knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization, or a person who is negligently supporting to the commission of a terrorist act or organization. In a similar fashion, article 9 sets similar punishment to the one who knows that the property is the fruit of terrorist act possess, owns, deals, converts or conceals and another having reason to know about the source of the property but doesn't know the fact provisions those who committed . As per these provisions, those who intentionally committed offences are seen as dangerous as those who committed terrorist offences in a lesser mental guilt (negligently committed). Phrase differently, the imposition of similar punishment on two individuals one who commit terrorist act intentionally and on the other who commits terrorist acts negligently is not rational and also against the principle of fair labeling. Because, compared to intention, negligence constitutes a lower degree of criminal guilt. To provide similar punishment for negligently and deliberately committed offences conveys a wrong message to the public that both conducts are equally dangerous and both doers are equally culpable.⁴

Though the harm requirement is equally important with mental element of the offender to fix punishments, unlike the prescription of punishments of inchoate crimes, the Ethiopian legislator in calibrating punishments for negligently and intentionally committed terrorist acts focuses on the principle of harm than the culpability of the perpetrators of terrorist acts. However, the harm requirement in the maximum penalties attached to offences must be taken in to consideration to convey the relative seriousness of wrong doing. As far as the penalties specified misrepresent the exact mental elements of the offender, the punishment again fails to be compatible with the justice and fairness.

5.3. Punishment of property terrorist offences

The prescription of punishments for property terrorist offences is the other critical shortcoming of this specific law. Article 3 of the proclamation vividly shows the calibration of punishments are not based on the principle of proportionality and faire labeling so far as it prescribes identical punishments as violent crimes. The third manifestation for the shortcoming of the Ethiopian anti-terrorism law regarding the calibration of proportional punishment is the punishment of property crimes. As it is provided, under article 3 of the law property offences are equally punished with the violent crimes. However, in this regard the prominent scholar Ashworth argues that though measuring the seriousness of offences is not an easy task, usually property crimes are less dangerous than violent crimes. Thus, according to him violent crimes must be punished more severely than other property crimes.⁵Even to the worst scenario, in this similar provision the one who committed property crimes may be punished by death penalty. The prescription of death penalty of mere property crimes is not in line with what is provided under different international human right instruments so far these all instruments provided that, death penalty only be imposed for the most serious crimes.⁶This is also not compatible with the spirit of the Ethiopian constitution. As per article 18(1) "Everyone has the right to protection against cruel, inhuman or degrading treatment or punishment."⁷In other words, as most scholars agree punishing property crimes by death penalty is

¹ Supra note 14,p.175

² Ibid

³ supra note 42,p.64

⁴ supra note 14,p.177

⁵ supra note 25,p.211

⁶As cited by human rights watch, International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, article 6(2). Ethiopia ratified the ICCPR in 1993.

⁷ Federal Democratic Republic of Ethiopian Constitution, Proclamation No. 1/1995, 1'1Year No.1, 21sl August,

against the constitutional prohibition of cruel, inhuman or degrading treatment or punishment.

In nutshell, as it is observed from this analysis, the way that the law calibrates similar punishments for Imposing equal punishments to inchoate crimes similar with consummated crimes, imposing death penalty for property crimes and punishing negligently committed crimes as seriously as intentionally committed crimes contravenes the proportionality principle and violates the prohibition of cruel, inhuman and degrading punishments which are recognized under different the International human right instruments and article 18 of the Ethiopian constitution.

Concluding remarks

The Ethiopian anti-terrorism proclamation has served multiple controversies from its outset. Among the bones of contentions that many individuals and institutions vehemently invoke, the issue of failure of the law in prescribing punishments proportionally is the legitimate and acceptable allegation.

It is vividly revealed in different provisions of the law that the calibration of punishments is not based on different criminal law principles that basically encompass the principle of harm and culpability. In a similar fashion, the law contravenes the Ethiopian constitutional provision that clearly prohibits cruel, inhuman and degrading punishments.

As far as the law has criminalized pre- attempt inchoate offences, it entails punishment on terrorist offenders who committed these pre-attempt activities. However, the law inappropriately calibrated equal punishments for all inchoate activities including these pre-attempt activities with consummated terrorist activities irrespective of the seriousness of the harm that they caused on the public. This makes the law to be incompatible with the principle of faire and proportionality of punishment.

Likewise, the law fails to consider the appropriate level of culpability of the offender regarding the extent and type of punishments. Because of this, terrorist acts committed intentionally and other terrorist acts committed negligently by the offender are equally punished in the law. Apart from imposing equal punishments for violent terrorist offences and property terrorist offences, the law prescribed death penalties for property offences though different International human right instruments prohibit death penalty for property terrorist offence.

The way that the law prescribes punishments gives much opportunity to the government to punish those individuals unfairly and disproportionately. This in turn yields dangerous scenarios for the violation of human rights under the guise of prevention of terrorism.

Therefore, for this writer with a view to balance prevention of terrorism effectively on one side and protecting human rights by imposing proportional punishments based on the appropriate level of the social harm and the degree of the culpability of the offender on the other side, it is better to adopt preventive detention as option other than imposing sever punishments which are against proportionality of punishment which is adhered to different international human right standards and the FDRE constitution.

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