

Jimma University



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TITLE: PRETRIAL PUBLICITY VIS-À-VIS FAIR TRIALRIGHT OF ACCUSED IN CRIMINAL JUSTICE SYSTEM OF ETHIOPIA: CASE ORIENTED STUDY

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Abbreviation

UN- United Nation

FDRE- Federal Democratic Republic of Ethiopia

ICCPR- International Convention on Civil and Political Rights

UK- United Kingdom

ACHPR- African Charter on Human and Peoples Rights

ABSTRACT

It is almost more than 27 years since freedom of expression and the right to fair trial of the accused has been proclaimed as one of the fundamental rights and freedoms recognized in the FDRE Constitution. Both freedom of the press and the right to fair trial of the accused are imperative to democracy in that the former maintains an informed public and the latter protects the rights of the accused. Therefore, when Courts enforce fair trial right of the accused, it is expected to enforce this right in the way that does not endanger the enjoyment of freedom of expression. Although numerous cases (that clearly gave rise to issues implicating freedom of expression and fair trial right of the accused) have been entertained in our courts, we have yet to develop a body of standards, tests and doctrines pertaining to balancing of freedom of expression and the right to fair trial. This void of constitutional jurisprudence of enforcing of fair trial right of the accused can indeed undermine freedom of expression.

Criminal trials of high profile accused persons such as Juwar Mohammad Siraj and Getacho Asefa easily show Courts void approach in enforcing or balancing of freedom of expression and fair trial right of the accused. Courts have shown a tendency to protect the right to “fair trial of the accused” despite the negative effect of such decision on freedom of expression.

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CHAPTER ONE

1.1. BACKGROUND

In Ethiopia, the media coverage of the criminal matters of Getacho Asefa and other 26 person and Juwar Mohammed Siraj and other 21 person .An events leading to the arrest and trial of Getacho Asefa¹, the former head of National Intelligence and security service, and other 26 persons captured the attention of the Ethiopian people. The official status of the defendant and the disturbing nature of the crime contributed to get media and public attention². The FDRE Attorney General prosecutor charged these defendants on July 2020. While this case was on pending on court proceeding, Walta Tv aired advertisement of documentary film that would be released in future to the public at large .This documentary contained an interview of a person who going to be state witness and various animation /moving image/ that show the while the defendants a carry out a torture in various detention center. Such type reports affects defendants' public image significantly and led to their guilt prior to the actual trial. On the next day, the defendant petitioned against Walta TV to the trial or Bench where their case with public prosecutor was pending. The petitioners requested an order of prior restraint that demand Walta TV to halt dissemination this documentary film. The Federal high Court issued order that ban the dissemination this documentary before it reaches a targeted audience. But the approach in which the order was issued was unconstitutional under FDRE constitution.

The criminal matters of Juwar Mohammad Siraj and other 21 person also attracted extensive media coverage. Juwar and other 21 person charged by FDRE General Attorney for instigating of public unrest which resulted in death of many people and destruction properties in various town of Oromia National Regional State. After one week from this charge, General attorney released a press conference for the foreign diplomats in collaboration of office of prime minister. Following to this press conference, these defendants requested an order banning of a further dissemination of this press conference media by arguing that the conference could affect the right presumed innocent and the independency of the court. Moreover, the defendants also requested

¹ .Criminal litigation continued on his ex-parte

² .These defendants were charged for inflicting of torture in various detention centers.

the court to pass the order that ban the General Attorney from making press conference in relation to their criminal matter might be released in future. The court rejected the application of the defendants by arguing that the press conference was not held as the allegation of the defendant. Still the court's approach in justifying the press conference was not clear or not mentioned out.

FDRE constitution protects media coverage of criminal matters and of the judicial system because press coverage is a blood for our democratic form of government³. This is a justification for the freedom of expression being under the subject of the protection of the FDRE constitution. If citizen are well informed about the problem of crime through means of freedom of press, this condition enable them effectively to participate in crime prevention process. This to mean that better informed public through the means of press can contribute to more to the implementation of solutions to the problem of crime.

Foredoom press which prescribed under Art.29 of FDRE constitution also important in actualizing one of the fundamental principles of FDRE constitution which is enshrined under chapter two of this constitution⁴. This to mean that freedom of press also helps make government institutions become more accountable. If the public is going to perform its self-governing function, it must be able to receive information about how the government works. Yet, given modern social and governmental structures, it is doubtful that the average citizen has the ability or the time to perform this task alone. It is the press that has taken on the role of surrogates to the public. It is through the press that citizens can participate in self-governance. The FDRE's Constitution protection of freedom of the press, therefore, serves the media as well as the individuals, who depend on it to fulfill the values of freedom of expression, participation in democratic government, and self-realization.⁵ This is why speech that comments on governmental entities or that provides more knowledge of the government and the way it works is at the core of the FDRE's Constitution protection of freedom of the press. In the case of speech about the judicial process, the fact that the media has access to criminal trials also helps protect the defendant's right to a fair trial⁶. This because public scrutiny of criminal matter on

³ . Alexander Meiklejohn (2004), *Free speech and its relation to Selfgovernment*

⁴ . Constitution of the Federal Democratic Republic of Ethiopia/hereinafter FDRE/, Art.12 of FDRE constitution.

⁵ .Ibid

trial or under police investigation is one means of effective restraints against possible abuses of judicial power which enhances the quality and integrity of the process, with benefits to both the defendant and society as a whole.

On the other hand, the right to a fair trial for criminal defendants is one of fundamental rights prescribed under the FDRE constitution. For instance, the right to be presumed innocent until proved guilty by court⁷. The right to a fair trial includes the defendant's right to have his guilt determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial. Courts are under constitutional obligation to protect this right⁸.

To balance these competing interests, courts sometimes issue orders banning publication of pretrial criminal case information. Although the FDRE constitution does not specifically refer to orders of this type, it has been interpreted to protect the press from them⁹. Since, such prior restraints have a negative effect against freedom of expression, courts must determine with due care. Therefore, when an order banning publication is requested, courts must determine whether such an order would constitute an unconstitutional prior restraint.

In cases *Getacho Asefa Vs Walta media communication* and *FDRE General Attorney Vs. Juwar Mohammad Siraj* involved, in an attempt to solve the conflict between the right to a fair trial for the defendants and freedom of the press, the Federal courts ordered banning of broadcasting which is constitutionally invalid. The procedure and approach of the courts in enforcing prior restraint is not clear and confusing.

⁶. FDRE Constitution, Art. 20 of the FDRE constitution clearly prescribes public trial as one component of the right to a fair trial of the accused. The US Supreme Court has recognized that the guarantee of a public trial was created for the benefit of the defendant. In *In re Oliver*, for example, the Court held that a secret contempt trial violated the defendant's right to a public trial under the Fourteenth Amendment. 333 U.S. 257, 272-73 (1948).

⁷. See FDRE Constitution, Supra note 6, Art. 20/3/.

⁸. See FDRE Constitution, Supra note 6, art. 13.

⁹. *Ato Dinku Dayas vs Walta Tv.* Case no. 284552, 2020, *Getacho Asefa vs Walta media communication*, case no. 208040, 2020, Federal High Court Lideta Branch and the like issued orders of banning broadcasting of documentary. Again, there is a similar trend in foreign jurisdiction. For instance in US See *Near v. Minnesota*, 283 U.S. 697 (1931).

1.2. PROBLEM STATEMENT

FDRE constitution protects media coverage of criminal matters because press coverage is a valuable component of our democratic form of government¹⁰. This is part of the reasoning behind protection by the FDRE Constitution of the right to freedom of expression in general and freedom the press in particular. As I discussed before, better informed public can contribute more to the implementation of solutions to the problem of crime. Also, the information helps make government institutions more accountable. If the public is going to perform its self-governing function, it must be able to receive information about how the government works. It is through the press that citizens can participate in self-governance. The constitutional protection of freedom of the press, therefore, serves the media as well as the individuals who depend on it to fulfill the values of freedom of expression, participation in democratic government, and self-realization¹¹. This is why speech that comments on governmental entities or that provides more knowledge of the government and the way it works is at the core of the FDRE's constitution protection of freedom of the press. In the case of speech about the judicial process, the fact that the media has access to criminal trials also helps protect the defendant's right to a fair trial.

On the other hand, FDRE constitution grant a right to a fair trial for a criminal defendant¹² is recognized as one of the "most fundamental of all freedoms,¹³ essential "to the preservation and enjoyment of all other rights."¹⁴ The right to a fair trial includes the defendant's right to have his guilt determined solely on the basis of the evidence introduced at trial, and not on the grounds of "official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial."¹⁵ It is the duty of trial court to protect this right.

Irresponsible, inaccurate and biased pre-trial publicity presents or may present a problem for accused persons in Ethiopia. In such case courts have a duty to protect both rights without affecting one right for the other. To balance all of the interests at stake, courts sometimes issue orders banning publication of pretrial information.

¹⁰ . See FDRE Constitution,Supranote 6,Art.29(4),See Alexander MikleJohn,Free Speech and Its Relation(1948).

¹¹ . Alexander MikleJohn,Free Speech and Its Relation(1948)

¹² . See FDRE Constitution,Supranote 6, art.19,20,79.

¹³ .See FDRE Constitution,Supranote 6, chapter three ,Estes v. Texas, 381 U.S. 532, 540 (1965).

¹⁴ . Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976).

¹⁵ . Holbrook v. Flynn, 475 U.S. 560, 567 (1986)

The case of Getacho Asefa vs Walta media communication is key example of the pre-trial publicity in which an order of prior restraint is issued. The remedy was requested by applicant by alleging the publicity had the potential to undermine the administration of justice and the rights of an accused. The cases of Getacho Asefa and other 26 person vs Walta , the Federal High court issued an order of prior restraint banning the dissemination of the documentary film. Again in case of FDRE General Attorney Vs. Juwar Mohammad siraj and other 20 persons involved, was the other key example in which order of prior restraint was requested. The Federal High court rejected petition of the defendants. But an attempt by court to solve the conflicting between the right to freedom of expression and fair trial was confusing and without the standard. The courts arbitrarily entertained the issue of prior restraint.

1.3. OBJECTIVE OF THE RESEARCH

1.3.1. General Objective

The basic objective of this research is to examine Ethiopian courts approach in balancing of right of fair trial right of accused and freedom of press when these two right come to conflict. The research also examines the standard, the yardstick courts employed in balancing of freedom of expression with the right of fair trial when one of these right threaten the other. The research suggest possible solutions if the approach of the court in balancing of fair trial and freedom press is without the standard.

1.3.2. Specific Objectives

- Critically examining the right and the obligation of media when reporting on pending criminal cases.
- It also examines the prime interest of media in pretrial reporting.
- It analyze the effect of adverse pretrial report of criminal cases on court proceeding.
- Assess whether there are clear guidelines of law on how to freedom of press and fair trial right of the accused.
- Critically examine whether the practice regarding balancing of freedom of press and fair trial right of the accused is going in line with the FDRE Constitution.

- Suggest possible recommendations for the problems which could be revealed as research findings.

1.4. LITERATURE REVIEW

There is vast number of international academic writing that deal with the limitation of the right to freedom of expression in order to protect fair trial rights. Here the focal argument is that freedom of speech is not an absolute right, and should be limited when it threatens the right of an accused to a fair trial or when it threatens the administration of justice. Some of these writings will be referred to later

There is little academic writing in Ethiopia which deals with the limitation of the right to freedom of expression in order to protect fair trial rights. For example, Gideon Timotiyos argue that under FDRE constitution freedom of expression can be limited for the sake of safeguarding of fair trial of the individual and judicial integrity.

Tsaga's academic writing is the other academic essay that assesses practice of state owned media coverage of high criminal profile cases. This article come up with finding that as Ethiopia's State media reporting highly publicized criminal cases adversely affects the fair trial right of the accused through the dissemination of inherently prejudicial information such as confession of the accused, comments on the merit of the case, interview of the witness and display of the photograph under the pretext of the right of freedom of expression. The writer further raised that the present remedies i.e./criminal liability /of the media available under newly revised criminal law and freedom of media and access to information proc.590/2008 is adequate so as to reduce or eliminate the negative effect adverse pretrial publicity against the fair trial of the accused person . Hence ,the writer argue that fair trial right of the defendant is not safeguarded as result of practical problem of implementation of those preventive and protective remedial provided by the law by judiciary and law enforcing organ .

At national level, even if there is a gap by judicial bodies at domestic level in implicating of the existing protective remedial rules available for protecting of both freedom of expression and the right to fair trial without affecting one the other, still there is an attempt by domestic courts in enforcing these rules so as to preserve the fair trial right of

the accused and preserving of the judicial integrity of the courts. The Federal court were witnessed in issuing of prior injunction or gag against media that halt the dissemination of adverse news coverage and documentary film before it reach the target audience so as to preserve the fair trial right of the accused and judicial integrity of the court. But at domestic level, including the above writing, no writing that examine the approach followed by the domestic courts in relation to the enforcement of the right fair trial without affecting freedom of expression. Moreover, there is little/no writing that examine the extent of the duty of the media in broadcasting of high profile criminal case in forms of documentary film or in forms of news.

1.5. RESEARCH QUESTION

- What is the approach of Ethiopian Courts in balancing of freedom of expression with the right to fair trial of the accused?
- Do the media exploit the right to freedom of expression when media produce adverse pretrial publicity and conduct trial by media?

These questions will be assessed by considering firstly, the obligations of the news media under FDRE constitution; secondly, the effects of adverse pretrial publicity against fair trial and finally, the approach enforcement of prior restraint by court against media when media is with adverse pre-trial publicity which could threatens the right to a fair trial of the accused.

1.6. SIGNIFICANT

By pinpointing gaps in law as well as in practice, and putting the ways forward to deal with problems identified in the subject area, this work will serve some important purposes.

A. Law enforcement agency behavior; particularly courts approach in enforcing fair trial right of the accused and freedom of press.

B. Significant to lawmaking body/legislature/.

It serves as a springboard in raising the awareness of lawmaking body concerning the existing legal lacuna in relation to balancing fair trial and freedom press.

C .Significance to literature

So far, it can be used for other similar study to be conducted on the subject matter. Again the study shall to contribute and fill gaps in the literature on the subject matter.

1.7. RESEARCH METHODOLOGY

As a practice oriented work, the writers contemplate to employ dates, which include studies of court jurisprudence.

1. **Research Method:** Case study method is in-depth focus on the study in this research. The data obtained from the research is in the form of words which the majority of the data contain verbatim quotes from case of court's decision. In dealing with case study, the main purpose should center on the identification of the relevant themes contained in two Court's case in which Juwar Mohammad Siraj and Getacho Asefa involved.
2. **Data Collection:** The main sources of data for this study consisted of primary and secondary sources. Primary sources of data are those in which the originator of the document is recounting first-hand experience with the phenomenon of interest. These data were collected from Federal High court's decision on criminal cases of Getacho Asefa vs Walta media communication and FDRE General Attorney vs Juwar Mohammad Siraj. Although there might be other similar court's decisions with the relevant to research question, only these two cases were selected. This because, court decisions used in this research were selected based on the aim of this study which was to examine the approaches of the court in balancing the right to fair trial and freedom of press or freedom of expression. Again these cases were considered comprehensive and necessary in providing answers to the research questions. The other justification for selecting of only these two cases that these two cases are the recent case that the shows or represent the contemporary approach of the Federal courts in balancing of fair trial right of the accused and freedom of expression or freedom of press. Again only these two cases were selected in order to have a researchable or manageable topic.

Data of secondary source were derived from relevant literature to the study, including books, journals, and internet sources.

3. **Data Analysis Method:** This would be the glaring methodology the writers heavily rely on. The available limited number of Cases relating to balancing of fair trial of the accused and freedom of press in which an order of injunction sought by the accused will be examined. In examining the approach of the court in balancing of freedom of press and fair trial right of the accused, certain questions would need to be addressed. It will be relevant to find answers to such questions as: what are the right and the obligation of media when they report criminal cases pending under police investigation or pending on court proceeding? Does adverse pretrial publicity negatively affect the criminal proceeding or outcome of the litigation? What are the standards, tests and doctrines of the Courts in limiting of freedom of press for the reason of protecting fair trial right of the accused? To answer these question, analysis of pending or/and decided cases on the subject matter, an appraisal of the FDRE constitution and other relevant laws and various literatures to the study are utilized.
4. **Ethical Issues:** During the course of this study, ethics were given due consideration.

1.8. STRUCTURE OF THE RESEARCH.

The First Chapter is devoted to the description of the research proposal.

Chapter Two will discuss the rights and obligations of the media Under FDRE Constitution. The chapter will assess whether adverse pre-trial publicity/trial by media/ can be deemed information in the public interest. It shall consider also whether the media are failing in their constitutional obligations when they resort to publicity purely in their own interests/i.e.in relation to public interest/. This will be done with reference to the pecuniary interest of the media in pre-trial publicity.

Chapter Three will discuss the right of an accused to a fair trial and will highlight specific rights in the Constitution which may be affected by adverse pre-trial publicity. It will examine the effect of pre-trial publicity on the integrity of an accused and on his ability to defend himself. It will examine also whether the negative impact of pre-trial publicity may affect the accused's trust in the fairness of the trial.

Chapters Four will examine the approach followed by Domestic courts when accused person complain for order of prior restraint against adverse pretrial publicity.

Chapter Five will conclude the study and suggest the recommendation.

CHAPTER TWO

FRDEDOOM OF EXPRESION IN ETHIOPIA

INTRODUCTION

This chapter deals with the right of freedom of expression in Ethiopia. The focus of this chapter is on the right and the obligation of the media when they report on pending criminal cases/i.e. Criminal cases under investigation or under prosecution or pending on court proceeding/,as this this case often bring to conflict the right to fair trial. In this chapter we are going to discuss the prime interest of the Medias expected to be observed in pretrial reporting.

2.1. THE RIGHT TO FREDOOM OF EXPRESIO IN ETHIOPIA: JUSTIFICATION.

2.1.1. Mill's Argument for Truth

Argument for discovering of true is the predominant and the most durable underling of justification for protection of freedom of expression. John staurt mill is one of the evolutionary of this thought. Freedom of expression as being a necessary precondition in the search for truth has been further developed by the utilitarian J.S Mill in his famous essay on 'Liberty'. Mill argued that without freedom of expression we might be deprived of the opportunity to learn the truth if we have not discovered it yet and we cannot perfect our partial knowledge of the truth we have learnt, or will not have the opportunity to have a clearer understanding of received truths¹⁶.

Mill further contends that whether opinions are true, false or partially true and partially false, their uninhibited expression is always a contribution to the advancement of truth and mankind is always the loser by their suppression and only complete freedom of expression can maintain those conditions in which opinions will be constantly refined by criticism, men's mental powers will be developed by controversy, the grains of truth will gradually be sifted out from the chaff of error, and true beliefs will be held, not as dead dogmas but as living convictions¹⁷.Therefore accordance Mill's argument for protection of freedom of expression is so as to discovering truth . In addition to this philosophical foundation, the concept of free expression has been successfully translated in legal terms and incorporated in various jurisdictions across the world. Thus, for

¹⁶ . John Stuart Mill (1869), *On Liberty*, Chapter II: Of the Liberty of Thought and Discussion, in Gedion Timothewos, *Freedom expression in Ethiopia: The jurisprudential dearth*, available at < <http://www.ajol.info>. last accessed on 1/3/2010 E.C.

¹⁷ .Francis canavan, *J. S. Mill on Freedom of Expression*, available at < <http://www.isistatic.org>. last accessed on 10/3/2010 E.C.

example, in the case of *Abrams v United States*, in the US Supreme Court, Justice Holmes stated¹⁸:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out

In Ethiopia, in principle, there is a legal framework freedom of expression that promotes open and free discussion and debate. Under Art.29 (2) of the FDRE constitution, it provided to the citizen the right to impart information and ideas of all kinds...regardless frontier... through any media of their choice. Hence, accordance this article, whether the information is in offensive or offensive, the information is protected by constitution. Again content or effect based limitation is impermissible ground for limiting freedom of expression¹⁹. It is possible to argue that the current protection afforded to freedom of press by our constitution is so robust that it anticipated the importance free flow of information in searching the truth. Due to this reason, the Ethiopian Court expected to incline favoring of freedom of expression over the right to fair trial.

In criminal proceeding, trial is a venue where searching of the truth is carried out. This could be possible when fair environment is created for the court that enables it to investigate impartially upon only facts produced by parties. But adverse pretrial publicity contaminates the environment of impartiality; particularly by decreasing the standard beyond reasonable doubt supposed to be used by judge at court proceeding²⁰. This in return result in an increased margin of error conviction which could not represent 'truth'. So innocent people would go to be convicted for a crime what did not committed²¹. Therefore, adverse pretrial publicity has no role in searching of

¹⁸ . *Abrams v. United States*, 250 U.S. 616 (1919)

¹⁹ . See FDRE Constitution, supranote 6, Art.29(6)

²⁰ . Matthew Mastromauro, *Pretrial Prejudice 2.0: How YouTube Generated News Coverage Is Set to Complicate the Concepts of Pretrial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights*, 10 J. HIGH TECH. L. 289, 289 (2010) Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 1011, *In re Winship*, 397 U.S. 358, 364 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)); *DNA Exonerations Nationwide*, Innocence Project (Feb. 19, 2016, 4:46 PM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerationsnationwide>[<https://perma.cc/D24E-DL33>]: Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 1011,

²¹ . *Ibid.*

the truth; rather it has the potentiality of hiding the truth by negatively affecting the mind of judge.

2.1.2. Democratic Self Governance

Another justification for protection of freedom is expression what expounded by A. Meiklejohn. This scholar argue that the protection of free speech is justified by being of prerequisite for self-governance²². This to mean that once the citizen are well informed about the public interest through means of freedom of expression, this condition enable them effectively to participate in Democratic process. Therefore, accordance Meiklejohn, freedom expression paves the way or create a conducive environment for promotion and advancement of Democracy. While basically subscribing to this rationale of free speech, some believe that this rationale of free speech limits the scope of the freedom to political speech and communication only²³ while others are of the view that expressions that might not directly be characterized as being political such as art could be very influential in forming our political views and hence merit protection²⁴. Although, proponents of both views, they might differ on the scope of protection, the function of the freedom expression as foundation of Democratic states is not disputed by various Global human right documents and also reaffirmed its very importance by various regional human right Court. For example, the Inter American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a Democratic society rests²⁵

The European Court of Human Rights has noted:

F] Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man²⁶.

²² . Alexander Meiklejohn (2004), *Free speech and its relation to Selfgovernment*,.

²³ . Robert H Bork(1971-1972), ‘Neutral Principles and Some First Amendment Problems’, 47 *Ind. L.J.* 1, pp.6-28. in Gedion Timothewos, Freedom expression in Ethiopia: The jurisprudential dearth, available at < <http://www.ajol.info>. last accessed on 1/3/2010 E.C

²⁴ . Alexander Meiklejohn(1961), ‘The First Amendment Is an Absolute’, *The Supreme Court Review*, Vol. 1961, pp. 245-266. in Gedion Timothewos, Freedom expression in Ethiopia: The jurisprudential dearth, available at < <http://www.ajol.info>. last accessed on 1/3/2010 E.C

²⁵ . *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

And the African Commission on Human and Peoples' Rights has indicated, in respect of Article 9 of the African Convention:

“This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country”²⁷.

At national level, in case of South African National Defense Union v Minister of Defense the the court held that:

*Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy*²⁸.

Under Article 29(4) of the FDRE Constitution, it is provided that “the free flow of information, ideas and opinions... are essential to the functioning of a democratic order”.

Under FDRE constitution, press or media are one means of exercising freedom of expression²⁹. Therefore, one main question expected to be raised here is that, since freedom of press is one of the means of freedom of expression, in what way the role of media or press expected to be shaped? The interpretation of constitutional rights must be generous and purposive and must give expression to the underlying principles of the Constitution³⁰. The underlying core values of the FDRE constitution are human and democratic right, transparency, accountability, openness for all Ethiopian³¹. Therefore the interpretation of freedom of expression and other right must be purposive and should actualize these constitutional values. The expressions which do not promote these values should not be protected. In democratic states, governments are accountable to the electorate. Democratic governments do not operate behind closed doors. Their actions are transparent and are subject to public scrutiny and debate. The judiciary is called to account in the same manner. The principle of open justice is entrenched firmly in our law³² and the media, by

²⁶ . *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

²⁷ . *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52

²⁸ . *South African National Defence Union v Minister of Defence*⁴⁷⁷.

²⁹ . See FDRE Constitution, supranote 6, art.29/1/ .

³⁰ . Currie & De Waal (2005: 360). See also *S v Makwanyane* 1995 (3) SA 391 (CC) 403.

³¹ . See FDRE Constitution supranote, art.10,12 .

³² . FDRE Constitution supranote, art.20/1/ .

virtue of the values of transparency and accountability, have a right to report on court matters, whether before, during or after the trial, thereby monitoring the exercise of judicial power. The media, in this context, become the watchdog of the people; to ensure that governments are held accountable for their actions and that they make good their undertakings.

In Ethiopia, Courts legitimacy and credibility depend on the function they grant to the public at large .But this possible if courts' role is seen to the public at large by media in the forms of discussion, report or comments. That is why Van der Westhuizen in his writing accorded that the legitimacy of the courts is dependent on reports, comments and discussion in the media³³ Again, within the discussion of connection between freedom of expression and legitimacy, James Weinstein in his writing reinforced that, “if an individual is excluded from participating in public discourse ... any decision taken as a result of that discussion would, as to such an excluded citizen, lack legitimacy.”³⁴ Judicial service communicated to the public at large by media in the forms of report or comment, Legitimacy of the court will be high and this in return creates public confidence to the service of court. This in return creates constitutional order.³⁵ This is interest of a democratic society. Therefore, it is crucial that the media act responsibly when covering matters before courts. If they act irresponsibly, the very legitimacy of our courts are at risk, because the people may call into question the credibility of the judiciary and hence of the administration of justice.

2.1.3. Self-Fulfillment

This theory, it enlarges the prospect for individual self-fulfillment or allow personal growth and self-realization, without such freedom, human beings cannot fully develop their personality and be autonomous moral agents with self-respect³⁶.Self-fulfillment is achieved when individuals decide for themselves what is good or bad, without intrusion. This encourages the free development of opinions and thoughts on a wide array of matters which, in turn, enables self-development and growth. Freedom, then, as the exercise and expression of individuality, is not

³³ . Van der Westhuizen J ,A Few Reflections on the Role of Courts, Government, the Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy, *African Human Rights Law Journal* 268.

³⁴ . Weinstein – Participatory Democracy and Free Speech, p. 498.

³⁵ . See Van der Westhuizen J ,supranote 41,pp.268.

³⁶ . See Thomas Scanlon (Winter, 1972), ‘A Theory of Freedom of Expression’,*Philosophy and Public Affairs*, Vol. 1, No. 2, pp. 2015-226 and David A. J.Richards(Nov., 1974), ‘Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment’, *University of Pennsylvania Law Review*, Vol. 123, No. 1, pp.45-91

only the means to obtaining advanced democratic value, self-governance and discovering of the truth but also the condition and substance of the development of the human race. In words of justice, the European court of human right between *Handyside v. United Kingdom* incorporated within its decision as freedom expression necessary and foundational for the development of everyman³⁷.

2.2. THE RIGHT TO FREEDOM OF EXPRESION UNDER THE RATIFIED INTERNATIONAL HUMAN RIGHT INSTRUMENTS

Freedom of expression is granted protection under various Global and Regional human right documents. For example, common Article 19 of both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to freedom of opinion and expression. African Charter on Human and People's Rights (ACHPR), also protected Freedom of expression is under Article 9

Art.9(4) and 13(2) of the FDRE constitution provides: "all international agreements ratified by Ethiopia are an integral parts of the law of the land" and that "the fundamental right and freedom specified in chapter three shall be interpreted in a manner conforming to principles of Universal Declaration Human Right, International Covenants on Human Right and International Instrument adopted by Ethiopia"³⁸. Since Ethiopia has ratified International Covenants on Civil and Political Right (ICCPR) on 11 June 1983 and African Charter on Human and People's Rights (ACHPR)³⁹ on June 19 1985, Art.19 of ICCPR and Art.9 of ACHPR which talks about freedom of expression also the parts of Art.29 of FDRE constitution and therefore, Ethiopia, as state members to these documents, has the obligation of enforcing this right.

Art.19 of Universal Declaration of Human Right (UDHR) has recognized freedom of Expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

³⁷ . *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

³⁸ .See FDRE Constitution,supranote 6,art.9/4/ and 13/2/ .

³⁹ .Adopted 17 June 1981, in force 21 October 1986

Even if UDHR is not legally binding documents, many of its provision, including art.19 constitute a general principle of law and widely held as legally having acquired legally as customary international law since its adoption in 1948⁴⁰. More over UDHR is taken as authoritative guide to human right by General Assembly and it is regarded by Assembly and by some jurists as parts of the ‘law of the United Nation’⁴¹.

Art.19 of International Convention on Civil and Political Right (ICCPR), which Ethiopia ratified, guarantee freedom of expression in the following terms:

(1) Everyone shall have the right to freedom of opinion.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Again, Art.9 of African Charter on Human and Peoples Right recognized the right of freedom expression as follow:

(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law.

When we analyze International Human Right Instrument which Ethiopia ratified, adverse pre-trial publicity and trial by media fall within the forms of expression which enjoy protection under international law.

However, under international human right Instrument which Ethiopia ratified, freedom of expression is not absolute right that it may be limited under exceptional circumstance. Article 19(3) of the ICCPR lay down a condition which the restrictions of freedom of expression must meet:

⁴⁰ . M. Akehurst, “Custom as a Source of International Law,” 48 BYBIL, 1974-1975, pp.1-53

⁴¹ . I. Brownlie and GS Goodwin-Gill, Basic Documents on Human Rights, 4 th Edition (Oxford: Oxford University Press, 2002).

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (order public), or of public health or morals.

Also, article 9(2) of the ACHPR requires that the right to express and disseminate opinions be exercised within the law. Again, the Jurisprudence of Human right Committee on art.19 (3) and African Commission on Art.9 (2) demonstrate that “any restriction on freedom of expression must meet a strict three –part test⁴². These tests require any restriction on freedom of expression: 1.shall be required by the law, 2. Shall be serve a legitimate aim, 3.shall be necessary in democratic society to secure a legitimate aim. What is more, the meaning and extent of the right to freedom of expression in international law should be comprehended with reference to the Madrid Principles on the Relationship between the Media and Judicial Independence.

2.2.1. Madrid Principles.

From January 18 – 20 1994,with the arrangement ICJ’s Centre for the Independence of Judges and Lawyers, a group of legal experts and media representatives, Committee of UNICEF came together to lay down a guiding principles for medias and legal practitioners that regulate the relationship between freedom of expression and Judicial Independency. The meeting was held there in Spain, at town of Madrid.

The preamble of this Principles recognized the vary importance freedom of the media in a democratic society and the responsibility of judges to recognize this and to put in to effect. The preamble obligates the judiciary that any restrictions on that freedom should be permitted only if they are authorized by the ICCPR and are specified in precise law. However, the principle also describe that, in exercising this freedom, the media have an obligation to respect the rights of individuals and the independence of the judiciary.

⁴² .Mukong v.Cameron,communication No.458/1991,view adopted 21 July 1994(UN Human Right Committee)

Accordingly the Madrid formulated the following basic minimum thresh hold to govern the relationship between freedom of expression and Judicial Independence. This basic principle here is that:⁴³

1. Freedom of expression, including freedom of the media, is one of the essential foundations of a democratic society. It is the function and right of the media to gather and bring information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. This principle can be departed from only in the circumstances envisaged in the ICCPR, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR.
3. The right to comment on the administration of justice shall not be subject to any special restrictions.

This basic principle is not only preoccupied in recognizing of the right of Medias in enjoying of the right to freedom of expression. But also the principle has taken in to consideration the problem that the administration of the justice system may face. As the result, this basic principle may be limited for (a) the prevention of serious prejudice to a defendant; (b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim⁴⁴

2.3. THE RIGHT OF FREDOOM OF EXPRESION UNDER DOMESTIC LAWS OF ETHIOPIA

2.3.1. The Right to Freedom of Expression under FDRE Constitution

⁴³ . Centre for Independence of Judge and Lawyer, Section 1 and two of Madrid Principle (March 1994).

⁴⁴ . Madrid Principle, Section 10, March 1994(Centre for Independence of Judge and Lawyer).

In Ethiopia, freedom of expression is the fundamental right guaranteed by Article 29 of the FDRE Constitution⁴⁵. The article provides for the ‘Right of Thought, Opinion and Expression’ in the following terms:

- 1) Everyone has the right to hold opinions without interference.
- 2) Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.
- 3) Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements: (a) Prohibition of any form of censorship; (b) Access to information of public interest.
- 4) In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.
- 5) Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.
- 6) These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honor and reputation of individuals.
- 7) Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.

Pre-trial publicity is the coverage by the media of pending criminal trials. Coverage starts within hours of the arrest of suspects and will continue throughout the investigation until the accused appears and pleads in a court of law

⁴⁵ . See FDRE Constitution, supranote 6, art.29

As evidenced from the above article, the first five sub-articles of Article 29 provide the rights associated with freedom of opinion and expression that are protected by the Constitution. Sub-Articles 6 and 7 deal with the limitation of the rights enumerated in the preceding sub articles. While sub Article 6 lays down the grounds and conditions for limiting freedom of expression, sub-Article 7 stipulates that “Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law”. Hence, these sub-articles tell us what is protected. Therefore, pursuant to article 29(1-5) of the FDRE constitution, pretrial publicity of media of pending criminal investigation or criminal matter under prosecution or pending criminal trial covered under the scope of this provision. Therefore media are not only the holder of the right in terms to article 29 but also free to disseminate criminal matter under pending trial.

But the question expected to be raised here is that whether adverse pretrial publicity and trial by media are the speech protected by article 29 of the FDRE constitution.

Adverse pretrial publicity, in addition to being an obstacle to the integrity of judicial system⁴⁶, negatively affects the right of the accused. The dignity of an accused could be harmed also, in that the consequences of adverse pre-trial publicity for its victims often include the disreputable lives and destruction of innocence⁴⁷. Greer, C and Mc Laughlin in their work marked the effects of adverse pretrial publicity or trial by media against the accused as follow:

“...evidence obtained from a variety of sources is combined with hearsay, conjecture, and insinuation that sensitizes consumers to the transgresses actions and disreputable lives of those who stand accused in the news-media spotlight. The default inferential structure is ‘guilty until proven innocent’. When crystallized, this inferential structure ensures that the ‘wrongdoer’ will be subject to merciless, humiliating ‘naming and shaming’ followed by carnivalesque condemnation and ridicule...”⁴⁸

⁴⁶ . Stephen, R.S. (1992). Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a “Media Circus”. *Suffolk University Law Review*, 26, 1063-1106.

⁴⁷ . Greer C & McLaughlin E (2012) ‘Media justice: Madeleine McCann, Intermediatisation and "Trial by Media" in the British Press’ 16(4) *Theoretical Criminology* 398-399

⁴⁸ .Ibid

Abusive expressions that degrade the dignity, reputation do not serve any value underlying the protection of freedom expression. Rather it creates a speculation of ‘individual guilty ‘within the mind of the public at large before the individual appear to court of justice.

When we come back to FRDE constitution, it is better to read the limitation clause of art.29/6/ of FDRE constitution. Accordingly, sub articles of art 29/6/ is with limitations clauses. The first one requires limitations on freedom of expression carried out through principle that limitation is of freedom of expression cannot limited based on account of the effect or content of the expression. This principle is supposed to guide all limitations on freedom of expression. The second clause permits limitations on freedom of expression for the sake of protecting the wellbeing of the youth and the honor and reputation of individuals while the third clause requires limitations to proscribe propaganda of war and protect human dignity. Therefore one can bear in mind from 2nd and 3rd limitation clause that that pretrial publicity adversely affects the dignity, reputation and honor of the accused do not deserve constitutional protection under Art.29(6) of FDRE constitution.

In case of Dinku Dayas Vs Walta Tv, the same position held by Federal Frist Instance Court, Lideta Bench. Initially the arrest warrant against the applicant issued against Dinku Dayas as the result of he was suspected by crime of drawing check without cover⁴⁹. Following this, On June 10, 2020 E.C.Walta Information Center disseminated a documentary film through its investigative program against business man named Dinku Dayas⁵⁰. This documentary film composed of two parts. The narrators of this documentary film describe the tax evasion activities of this business man and various evil deeds that implicate his involvement in cheating activities. This documentary film interviewed several of government employees of from several governmental bodies who aware the case at hand. Therefore any person saw this documentary film could conclude that this business man was the wrong doer. The detailed described circumstance of the offence in such manner inevitably causes the public to conclude that this business man is guilty and as the consequence of his dignity could be harmed. Therefore, should be such types of freedom of expression be considered as the role or interest of media under article 29/6/ of the FDRE constitution?

⁴⁹ . walta tube, ባኔታብሱ ጸንባዎች የጸከቡ ኪሶች - የዋኔታ ምርመራ ዘገባ (ክፍል ሁከት-ከ),

⁵⁰ . Ibid

The legal representative of Dinku Dayas lodged a formal complaint to Federal 1st Instance Court by alleging that the Walta had disseminated the documentary film that degraded his dignity and reputation which was contrary to article 24 of the FDRE constitution⁵¹. Following allegation of complaint, court temporarily ordered injunction that halts a further dissemination of this documentary film⁵². Such type of freedom expressions specifically excluded under article 29(6) of FDRE constitution. Abusive expressions that degrade the dignity, reputation do not serve any value underlying the protection of freedom expression. Rather it creates speculation of guilty. Therefore, freedom expression is not absolute right and that might be limited by article 29(6) of FDRE constitution and law of general application such article 24 of FDRE constitution.

There is question whether the assertion of restriction of certain freedom of expression for the need to protect the honor and reputation is always valid or whether there exist a situation when this expression is tolerated even at the expense of individual whose honor and reputation might be tarnished. On this matter there is a comparative and international experience. In *New York Times Co. v. Sullivan*⁵³, US Supreme Court reversed that a libel damages judgment against the *New York Times*. The Supreme Court held that:

*“ the First Amendment guarantees of freedom of speech and press may protect libelous words about a public official in order to foster vigorous debate about government and public affairs. ”*⁵⁴

Again in case of *Khumalo and others v Bantubonke Harrington Holomisa*, Constitutional Court of South Africa held that:

“...it is inconsistent with section 16 of the Constitution to permit a plaintiff to recover damages for the publication of a statement relating to matters of public

⁵¹ . *Atto Dinku Dayas vs Walta Tv. ,no.284552,2020(Ethiopian Federal 1st Instance court Case).*

⁵² .*Ibid*, Walta’s Documentary is composed of two parts. Dinku brought an application to Federal 1st Instance Court after the dissemination of the part I of the documentary and requested an order of gag against further dissemination of part II of the Documentary.

⁵³ . *See New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964)* ,In this case Sullivan began as a lawsuit against the newspaper for mistakes in a full-page civil rights fundraising editorial advertisement in 1960 entitled “Heed Their Rising Voices.” The advertisement, protesting the treatment of the Rev. Martin Luther King Jr. by Alabama law enforcement, carried the names of prominent civil rights activists, including actors, writers, ministers, and other prominent Americans. The lawsuit was filed by L. B. Sullivan, an elected city commissioner in Montgomery, Alabama, whose duties included supervision of the local police. Under Alabama law, Sullivan only needed to prove that there were mistakes and that they likely harmed his reputation. A jury awarded him \$500,000 in damages, an enormous sum at the time.

⁵⁴ . *New York Times Co. v. Sullivan, Supreme Court (United States).376 U.S. 254 (1964).*

interest, alternatively to matters of political importance, alternatively to the fitness of a public official for public office, alternatively to the fitness of a politician for public office, in circumstances where that plaintiff does not allege and prove the falsity of the statement in question... ”⁵⁵

In relation to our legal system limitation clauses of Article 29(6) of FDRE constitution seems to be inspired by these experiences. This clause requires primarily limitations on freedom of expression through laws that are not based on account of the effect or content of the law. This principle also supposed to guide all limitations on freedom of expression.

For instance a defamatory content of the speech is one of permissible ground of limiting of freedom of expression on account of Art. 29 (6) of the FDRE constitution. But this limitation of freedom of expression supposed to be guided by principle that requires the limitation of freedom of expression should not base on account of the effect or contents of the law⁵⁶. Therefore, even if these defamatory contents is a ground for the limitation of freedom expression as the result of the adverse effect it creates on an individual reputation, a accordance this principle, the expression will be tolerated at the expense of the individual reputation if the expression is with matter of public interest. Hence, defamatory content of a given expression does not always subject to limitation. Therefore, under FDRE constitution, abusive expression that offend the honor and reputation of an individual is a valid ground for the limiting freedom of expression, there is a situation these abusive expression be protected ,at the expenses of honor and reputation, provided that this expression is with public interest.

By taking in to consideration the negative consequence the absolute right to freedom of expression, the FDRE constitution stipulated the legal limitation that could be imposed on freedom of press to protect the well-being of youth, propaganda of war, statement capable of damaging human dignity or reputation⁵⁷.But there is no an express prescription stated under FDRE constitution that lay down ‘fair trial’ and ‘judicial integrity’ as legitimate ground for

⁵⁵ . Khumalo v Holomisa 417.

⁵⁶ . This prescription is designed to make sure that the exception will not swallow the rule and to make room for securing or not losing the interest that greater than the interest protected under art.29/6/ of FDRE constitution, see, Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992); to see the applicability of the rule that limitations of human rights should be construed narrowly

⁵⁷ .See FDRE Constitution,Supra note 6,art.29/6/.

restricting of the right of freedom of expression by anticipating the negative consequence of the absolute use of freedom of press that may result in violation of the right of fair trial of the defendant. As the result of this, there is question whether restriction of adverse pretrial publicity or trail by media for the need to protect the fair trial right of the accused a valid ground or whether medias' right in reporting criminal matter is extended to the expression that endanger fair trial right of the accused and judicial integrity.

The pretrial right, the hearing right/or the trail right and post trail right are the constituting elements of the fair trial right⁵⁸. These rights are designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. Again, making available the criminal matter to the public through the broadcasted media coverage promotes public education, deterrence, and freedom of the press⁵⁹. Therefore both freedom of the press and the right to fair trail are the basic essence for democracy that the former maintains an informed public and the latter protects the rights of the accused⁶⁰. But the extensive use of the freedom of press may result in the violation of the right of fair trial of the defendant⁶¹. In these case the legal system must take an action that rebalance these two interest. But as already discussed above, to ensure the fair trail right, the FDRE constitution is not expressly stated 'fair trail' or/and/ judicial integrity as legitimate ground restricting freedom of expression in general, freedom of press in specific.

In relation to the above issue, there is an international and comparative experience. In case of *Gannett Co.v. Depasqual*, Supreme Court of US held that:

*“the sixth amendment the right to ‘public trail’ belong to the defendant in criminal trail and does not guarantee the public or access of press to pre trail hearing or even to trail”*⁶²

⁵⁸ . Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993).

⁵⁹ . Susanna R. Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, 10 JUST. SYST. J. 279, 280-81 (1985).

⁶⁰ .Judy, *The First Amendment Watchdog Has a Flea Problem*, at 542,cited in Ariana Tanoos,shielding the presumption of innocent from pretrial media coverage, at 997.

⁶¹ . Ariana Tanoos,shielding the presumption of innocent from pretrial media coverage, at 1021.

⁶² . *Gannett Co.v.Depasqual* 443 U.S.368/1979/.

Again in Republic of South Africa, in case of Midi Television vs. Director of public prosecutor, *Supreme Court held that:*

*“Freedom of expression, which includes freedom of the press and other media, is protected by s 16 of the Bill of Rights.yet the constitutional promise of a free press, like other constitutional promises, is not absolute. ... Protected freedom may be abridged in favor of preserving the integrity of the administration of justice.”*⁶³

The above experience shows that where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa –it is the task of a court to reconcile them-that is possible to protect both right.

In line with the above foreign experience ,the closer examination of the FDRE constitution shows as there exist an intention of creating harmony between two sets of the right by setting a reasonable limitations. These intention could be inferred from Art.19 (2),19(5),20(3),29(3),29(4), 29/6/ and 78 of the constitution. This to mean that the constitution anticipated to underscores the Medias’ role if its activities are a threat to these constitutional provisions.

Art.9 of FDRE constitution provides that international agreements ratified by Ethiopia are an integral part of the law of the land. Again, Art.13 of FDRE constitution provides that chapter three of the FDRE constitution, which prescribes fundamental rights and freedoms, shall be interpreted in a manner conforming to the principles of the International Covenants on Human Rights adopted by Ethiopia. Since Ethiopia ratified International Covenants on Civil and Political Right (ICCPR) on June 11 193, Art.19 of ICCPR which talks about freedom of expression also the parts of Art.29 of FDRE constitution. Therefore, under FDRE constitution freedom of expression is a fundamental right and the restriction imposed upon it must be interpreted in line with international human right instrument ratified by Ethiopia. For instance, International Convention on civil and political right/ICCPR/, besides listing the national security, public order, public health or morals, also incorporated the need to protect other right person’s right as justification for restraining freedom of expression⁶⁴. The phrase “other person’s” would

⁶³ . Midi Television v. Director of public prosecutor, south Africa case no.100/06.

by definition include the right to fair trial. Thus, promoting fair trial and judicial integrity could be regarded as one legitimate ground for limiting freedom of expression. Even if FRDE constitution⁶⁵ appears as it leaves out some reasonable Ground of limiting freedom of expression, list of ground that expressly mention in the constitution⁶⁶ cannot be taken as an exhaustive list. As the result of this, the need to uphold the integrity to judicial process and fair trail right of the individual can be considered a legitimate reasonable ground for limiting of speech. But to do so, judges are with prime responsibility in evaluating of limitation of freedom expression within the context of fair trial⁶⁷. A judge is expected to recognize a limitation upon the exercise of freedom of press according to what is required by the particular circumstances and within the constraints that are imposed by Art.19(2),19(5),20(3),29(3),29(4), 29(6) and 78 of the FDRE constitution.

Prior restraint is one way of courts limiting of freedom of expression in general and freedom of press in particular in advance before it reaches a targeted audience for the reason of protecting fair trial or judicial integrity⁶⁸. Art.29 (3) of FDRE constitution prohibits censorship of press. The primary purpose of this provision to protect the press against the imposition of prior restraint. But this prohibition is not absolute that the prior restraint may be imposed against the press in exceptional circumstance as prescribed under Art.29 (6) of the FDRE constitution⁶⁹. But this prior restraint or censorship guided by the principle that freedom of expression and information cannot be limited on account of contents or the effect of point of view it expressed. This rule is essentially inspired or founded on an American jurisprudence⁷⁰. These stringent requirements by FDRE constitution seem to protect easy exposure of press to censor comes from various sources⁷¹. This is because under FDRE constitution, there is public interest or public

⁶⁴ . International Convention on civil and political right, adopted on December 1966.

⁶⁵ . 'Fair trail' and 'judicial integrity' is not listed under art.29/6/ of FDRE constitution as legitimate ground for limiting of freedom of expression.

⁶⁶ . See FDRE Constitution, Supranote 6 ,art.29/6/.

⁶⁷ .Eva Brems,Conflicting human right :Exploration in the context of the right to fair trail in Eropcan convention for protection of human right and fundamental fredom at.304-305,the John Hopkins University press.

⁶⁸ . Thomas I.Emerson,The Doctrine of prior Restriant,at.648

⁶⁹ .See Freederick Schauer/1978/,fear,risk and the first amendment: 'Unraveling the chilling effect',Boston University law review.

⁷⁰ . Keith Werhan (2004), Freedom of Speech: A Reference Guide to the United States Constitution, (Praeger Publishers), pp. 73-74 for a concise introduction of the US free speech doctrine regarding content based restrictions. See also The Oxford Companion to the Supreme Court of the United States, Editors, Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman, (2005), Second Edition, (Oxford University Press), R. A. V. v. City of St. Paul, 505 U.S. 377 (1992) in which the US Supreme Court held that a restriction of speech based on the view point expressed as opposed to being based exclusively on the proscribe-able nature of the speech is not valid.

concern in freedom of expression; as it is vital for a process of building democracy⁷². Hence, the limitation of freedom of expression in the forms of prior restraint is possible through strict judicial screening if the competing interest with greater public interest. It is mandatory to examine this competing interest involved and how important aspects for the protection of human right as such. This requires the court to test whether the competing public interest aspect with greater interest than freedom of expression or press⁷³ One of the most common tests used to determine whether a limitation on the freedom of expression is justified has come to be known as the ‘proportionality test’. A typical proportionality test assesses whether a limitation on a right can be ‘justified by reference to gains on some other interest or value⁷⁴. The limitation on the freedom of expression is justified only if the countervailing interests outweigh the interests in the freedom of expression⁷⁵.

But the main question expected to be raised here is that weather it possible to impose prior restraint against adverse pretrial publicity or not.

As I already discussed above, media coverage of pending high profile criminal investigation or criminal proceeding is in public interest. This because it informs the public at large about the court proceeding and this in return educate the public. Again this situation actualizes the right to fair trial of the accused by bolstering the principle of open justice. But, in contrary, a publication by media on high criminal profile may contain information, such as interview of witness, confession of the accused, activities of police that adversely affects a fair trial right of the accused or affect judicial integrity. This because it speculates the guilty of the defendant by influencing the independency and impartiality of the court. In this case the court must differentiate the one with more weighted public interest that arise from the two conflicting human right i.e. public interest from freedom of expression and judicial administration.

⁷¹ . See Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992); to see the applicability of the rule that limitations of human rights should be construed narrowly Cited in Gedion Timothewos, Freedom of Expression in Ethiopia: The Jurisprudential Dearth, at 217.

⁷² . See FDRE Constitution Supranote 6, Art.29/4, Alexander Meiklejohn (2004), *Free speech and its relation to Selfgovernment*, (Law Book Exchange Limited).

⁷³ . Donna J.Sullivan, Gender Equality and Religious Freedom :to wards a framework for conflict Resolution, 24 N.Y.U.J.IN’L L. and POL. 795, 821-23/1992

⁷⁴ . Urbina 2014, proportionality test generally involves a justificatory burden of a particular form: the limitation on the freedom of expression is justified only if the countervailing interests outweigh the interests in the freedom of expression.

⁷⁵ .Ibid

The existence of an independent and effective justice system essential for safeguarding of human right⁷⁶. Freedom of expression is one the fundamental human right under FDRE constitution⁷⁷. If Judicial integrity eroded through adverse pretrial publicity, then all constitutional human right enshrined under chapter three of FDRE constitution including freedoms expression are also compromised. Therefore, ‘judicial integrity’ is with a greater public interest than ‘freedom of expression’ which carry information that is adverse to judicial integrity; as adverse pretrial publicity is not only affects judicial integrity but also, there are numerous human right going to be violated⁷⁸. Hence, such type of adverse pretrial publicity must be banned before it reaches to the targeted audience.

But the other issue expected to be raised here is that the requirement as to proximity and remoteness of a threat of adverse pretrial publicity to fair trial of the individual and/or judicial integrity under FDRE constitution. FDRE constitution is silent in relation to this issue. But US courts employ ‘imminence’; not ‘merely a likely’ standard to safeguard the interest of fair trial and/or/judicial integrity⁷⁹. This standard is used to impose prior restraint against a press so as to limit the dissemination of criminal news or documentary if it adversely affects fair trial and /or judicial integrity. This standard best suit for Ethiopian judicial system. This is due two facts. One, under FDRE constitution, the right to freedom of expression in general and freedom of press in particular under robust protection⁸⁰. Effect based limitation of freedom of expression is also impermissible ground for limiting of freedom of expression. But exceptionally, as already discussed above, freedom of expression can be limited for the sake of preserving fair trial or judicial integrity. Since such effect based limitation is carried out under exceptional circumstance, a due care should be taken in the way that do not open a gate way for the abuse of power by state official through this exception⁸¹. To do so this, the court expected to employ this

⁷⁶ . UN, Judicial integrity (unodc.org)

⁷⁷ .See FDRE Constitution ,supranote 6, Art.29 of FDRE constitution.

⁷⁸ . On similar issue, in case of *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC) 325*, the Appellate Court of South Africa ruled that “...the integrity of the judicial process is an essential component of the rule of law; and if the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms including the freedom of the press are also compromised...”

⁷⁹ . *U.S. v. CBS, Inc.*, 497 F. 2d 102 (5th Cir. 1974), quoting from *Craig v. Harney*, 331 U. S. 367 (1947, [Before] a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be “an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately ‘imperil.’”

⁸⁰ See FDRE Constitution ,supranote 6, art.29/1/ recognized the right to disseminate information without interference, art.29/3/ also prohibit sensor of information by 3rd party before dissemination, again art.29/4/ attached high value to freedom of expression and art 29/6/ also prohibit effect-contents based limitation. All these prescription suggest as freedom of expression cannot be susceptible to limitation with lenient standard rather with high standard .

high standard. Secondly, the reality of state officials including the court do not permit to employ other less stringent standard .The reality of history of Ethiopia state official including courts in implementation of freedom of expression in general and freedom of press in particular is turbid⁸² .Like western country, even if Ethiopia is with a constitution that recognize free speech and free press, factually Ethiopia's press and speech rights are deemed restrictive in their implementation⁸³.Again, according to the 2013 annual Press Freedom Index by *Reporters Without Borders*, Ethiopia was ranked 137th out of 179 countries⁸⁴.

Therefore, prior restraints must be a remedy least tolerable and therefore it is expected to be justified by inquiry whether adverse pretrial publicity create imminent and present danger to a fair trial of the accused and/or/ judicial integrity.

The legal frame work existed for the protection of freedom of expression in regional state constitution is similar with FDRE constitution. For example, art.30 Oromiya regional State constitution and 29 of Amahar Regional State Constitution talks about protection of freedom of expression. These prescriptions are a carbon copy of art.29 of FDRE constitution.

To sum up adverse pre-trial publicity or trial by media constitutes a form of expression that prima facie is protected by section 29(1), (2), (3),(4) and (5) of FDRE, however, subject to limitation in terms of article 29(6) of the Constitution.

2.3.2. The Right to Freedom of Expression under Media Proclamation No.1238/2021.

⁸¹ . such technique is important for limitation of human right in general and freedom of expression in particular in particular so as to make sure that the exception will not swallow the rule, See *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992); to see the applicability of the rule that limitations of human rights should be construed narrowly.

⁸².Brandon Sams, *Free Speech and Free Press Around the World*, available at <https://freespeechfreepress.wordpress.com/africa/ethiopia/>,accessed sept.20/2021.

⁸³ .Ibid,see also Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*,pp.222-228.

⁸⁴ .Report out Border available at, <https://templatelab.com/press-freedom-index-2013/>,accessed on June 2021.

Art.13 of FDRE Constitution provides that, legislative organ is duty bounded to enforce fundamental right prescribed under chapter three of FDRE constitution. Freedom of media or freedom of expression is the category of fundamental right in which is essential for democratic development. Therefore subsequent legislation going to be enacted by legislative organ expected to be in the way the enforcement of this fundamental right make effective. This is the the task of Legislative organ under FDRE constitution. Accordingly, in line art.29 (1-5) of the FDRE constitution, aticle.48 of media proclamation no.1238/2012 recognized the right of media to seek, obtain and communicate any information. Again in line art.29 (6) of the FDRE constitution, art.50 of media proclamation no.1238/2021 obliged the media to respect the dignity and reputation of an individual. Moreover art. art.68 (2) of this proclamation obliged media respect the right to privacy of everyone, human dignity and to refrain from an act encourage behavior which is harmful to health or safety; to refrain from an act an act incite crime or disturbance of peace and security; and to refrain from an act incite hatred or contempt on grounds of race, language, national or ethnic origin, color, religion, gender, age or mental or physical disability.

The media have a right to report, therefore accordance media procl.no1238/2021, on pending criminal matters and the public has a right to receive such information to be able to appreciate and understand the rule of law in society. This includes coverage by the media of cases before, during and after trial. However, this media proclamation fails to obligate the media to refrain from providing criminal news coverage which threatens judicial independence or violates the presumption of innocence.

2.4. THE RIGHT AND OBLIGATION OF THE MEDIA

In Ethiopia, Medias are the agent of the public at large. This to mean that under FDRE constitution, media or press is one means of exercising freedom of expression⁸⁵. So, by taking in consideration the vitality of press in democratic society, the constitution also bestowed the legal personality to media or press⁸⁶. This legal personality is to ensure its operational independency and to promote media being of a platform of diversified expression of opinion⁸⁷. Therefore

⁸⁵ .FDRE Constitution,Supranote 6,art.29/2/ .

⁸⁶ .FDRE Constitution, Supranote 6,art.29/4/

⁸⁷ .Ibid

Medias are at the service of the people and represent them; as people speak through the media.

Under FDRE constitution, media are with right to gather or to receive information⁸⁸. This right is not as the result of the special privilege; rather the existence of corresponding obligation to impart news to the people. Therefore Medias' right is protected by FDRE constitution, not because of any special status accorded to the news media, but because in seeking out news and reporting it; as far as media act as an agent of the public.

There is a question as to the category of information expected to be disseminated to the public at large. As already raise in above discussion, press or media do have the right to receive information so as to carry out its constitutional obligation. But the scope of their duty is limited to disseminating of information that can be considered as 'public interest'⁸⁹. But it is not defined FDRE constitution what constitute 'public interest'. However, it is defined under art.2(36) of Ethiopian Media Proclamation No. 1238/2021 as "the need of the wider public – whether of a security, economic, cultural, political or other nature – as opposed to a private or a limited group's interest;" Therefore, under FDRE constitution, those media whose activities/role/ confined to satisfying the interest of individual or a limited group's interest completely become unconstitutional.

Adverse pre-trial publicity and trial by media is not with public interest; it does not suggest media duty, reliability and integrity, as envisaged by Art. 29 of the Constitution. When the media act unscrupulously, carelessly and without honesty, they merely are asserting the right to freedom of expression, and are no longer fulfilling their obligations to the broader society.

2.5. TRAIL BY MEDIA

⁸⁸ . FDRE Constitution, Supranote 6,art.29/2/ .

⁸⁹ . FDRE Constitution, Supranote 6,art.29/3/ .

Agenda-setting theory sees the media as means of shaping public behavior by setting the agenda in public discourse. The theory states that when issues are covered by the media as often as possible, the public would take them to be important.⁹⁰ The theory was derived from the work of Walter Lippman in 1922, who argued that “the public responds not to actual events in the environment but to the pictures in our heads”.⁹¹, that the “news media construct our view of the world”⁹². Public opinion is “shaped and influenced” as the media choose and sift certain elements of news, which makes the audience of the media think along a certain pattern. Hence the media’s choice of topics and how the topics are presented are elements of the theory ⁹³.Therefore from the cumulative reading of the above social science work one can understand Medias’ a dominant role in constructing mental setup of the society at large. Medias are a power full agent of making public thinking along certain pattern. Therefore ”committed journalism” should carefully informs the public at large in which priority is placed on values such as democracy, free choice, openness, morality, and serving the common good“, e.g. It is the role of investigative journalists to search and uncover the truth, the exposure of the truth is in harmony with human right and with the public interest. But in contrary, the media can serve as powerful instruments for violence⁹⁴, and if not controlled, could induce large-scale human rights violations.

Trial by media is the logical extension of the above discussion. This because it constructs the perception of guilty of an individual within the mind of the public at large by disseminating prejudicial materials through media out let⁹⁵.In instances of trial by media, the inflammatory details of the accused would be available to the public at large so as to create perception of guilty. It reiterated by Greer & McLaughlin that:

“...evidence obtained from a variety of sources is combined with hearsay, conjecture, and insinuation that sensitizes consumers to the transgresses actions and disreputable lives of those who stand accused in the news-media spotlight.

⁹⁰ . Wanta, W. (1997) How people learn about important issues: The public and the national agenda, New Jersey: Lawrence Earlbaum Associates Inc.

⁹¹ . LittleJohn, S. Foss, K. (2008) Theories of human communication, Belmont: Thomas Wandsworth

⁹² . Coleman et al (2009) „Agenda Setting“, in Wahl-Jorgensen, K. and T. Hanitzsch, (Eds) The handbook of journalism studies New York: Routledge Cohen-Almagor, R. (2001) Speech, media and ethics: the limits of free expression,

⁹³ . Fourie, P. (2001) Media studies: Institutions, theories and issues, volume one. Lansdowne: Juta Education

⁹⁴ . Frohardt, M. and T. Temin (2007) „The use and abuse of media in vulnerable societies“, in A. Thompson, (ed) The media and the Rwandan Genocide [e-book] London: Pluto Press Available at: <http://hdl-bnc.idrc.ca/dspace/bitstream/10625/30283/9/123840.pdf>

⁹⁵ .Katie Sambrooks,Guilty or innocent.

The default inferential structure is 'guilty until proven innocent'. When crystallized, this inferential structure ensures that the 'wrongdoer' will be subject to merciless, humiliating 'naming and shaming' followed by carnivalesque condemnation and ridicule...the outcomes may vary from a chilling of public sentiment towards to the accused through irreversible spoiled identity to criminal prosecution''⁹⁶

Courts are the only forum to determine guilty or innocent an individual. But, to run this correctly, full facts expected to be considered in court room other than media out. However, if a full of facts of the accused publicized through media out let, there is the possibility of the judges being exposed to these prejudiced information which will take the them to speculate the defendant guilty. These would render trial unfair. When the media disrupts a criminal trial in a such way, it is not only dislocate a forum of pronouncing of guilty, but also this in return threaten the judicial process and administration of justice.

Every publication of fact the accused by media are not equally threaten fair trial right of the accused. This to mean that the dissemination of all types of facts about the defendant by media do not consider automatically the individual trailed on courts of public opinion. But there are certain publications which have identified as that inherently harmful all times: such publications are recognized by jurisprudence European Court of Human Right and UK.

Accordingly, broadcasting of confession is one commonly accepted forms of trial by media. Even if confession is not conclusive evidence or not admissible evidence in criminal court proceeding; but it is regarded as detrimental to fair trial of the accused if the information is disclosed by media prior to the criminal trial⁹⁷. Such types of publication remain for the long period of time within the mind of the judges as long as the moment we are in the year in which the society described media saturated with accessibility of internet and 24 hours news channels. The media gets this information by using the right to receive information from public bodies⁹⁸..

⁹⁶ . Greer C & McLaughlin E (2012) 'Media justice: Madeleine McCann, Intermediatisation and "Trial by Media" in the British Press' 16(4) Theoretical Criminology 398-399

⁹⁷ . In Canad,Enland,France,SouthWale ,publication of confessions is a crime of court contempt if the publication carried out before or while the case is under trail investigation,see on Law commission of India, 2006, 2ooth Report on trail by media, free speech and fair trail under criminal procedure code 1973,pp.199-201,

⁹⁸ .American Bar Association/1966/,Standard Relating toFair Trail and Press,pp.47.

Publication of the character of the accused or prior criminal records is the other types of trial on media. These types of publication by media create hostility towards the accused. The media destruct the innocent of the accused by characterizing the accused or suspect as “corruptor” or “Assassinator” and the with the like power full words.

The other category of information inherently damages the right the accused is the statement released is associated with display of evidence or interview of prospect witness against the accused or the suspect. The evidence released by such manner perilous that there is mechanism of cross checking whether or not the contents of the evidence are correct⁹⁹.

Therefore the activities of the above Medias suggests as they engaged on trial on media. Of course the public at large have an interest from publicity of the above high profile criminal matter. But the dissemination of information are with detail facts of the accused; as these information/news/documentary/ consisted of interview of the prospective witness, display of demonstrative evidence, confessions of the suspect and character of the accused or the suspect which establish ‘speculation of guilty ‘within mind of the judges. The disclosure of such information goes against fair trial safeguards of presumption of innocent recognized by FDRE constitution as well as international and regional human right instruments.

As I it already discussed before, freedom of expression in general and coverage of high profile criminal cases in specific will perform to attain the objective of democracy. Accordingly, Public has the right to get information about the function of judicial bodies including of Investigative police and prosecuting Agency which, in return, will strength their understanding of and the confidence in the judicial system. The media keep check on the exercise of public power by the judiciary and such media scrutiny will increase the accountability of the judicial process. However irresponsible Media’s reports on pending matter on pretrial or on trial invariably speculate on guilty or administration of justice. Therefore such types of pretrial publicity little merit as it serves none values of underlying freedom of expression. Instead it threatens the legitimacy of the judiciary and challenges the administration of justice.

⁹⁹ .ABA/1966/,Standard Relating to Fair Trail and Free Press, 35

2.6. CONCLUSION

Freedom of Expression in general and Pretrial publicity in particular is essential for building of Democracy, searching truth and self-fulfillment. Therefore, while media report on criminal matter, it must be in the way it promotes searching of truth; as far as courts are a place of

searching of the truth, building of democracy and educating the public at large. This in relation creates the legitimacy of judicial bodies including of Investigative police and prosecuting Agency

Adverse pre-trial publicity or trial by media is simply irresponsible behavior on the part of the media, and therefore it cannot be said to enhance any of the values emanates freedom of expression, rather, destruct the legitimacy of the judiciary and challenges the administration of justice and also affect private lives of innocence.

CHAPTER TREE

FAIR TRAIL RIGHT OF THE ACCUSED UNDER ETHIOPIAN LEGAL SYSTEM

INTRODUCTION

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. This chapter deals with the right to a fair trial, in particular the right to be presumed innocent and the right to an ordinary court which is independent and impartial. In criminal proceeding, right to presumed is a foundation for other procedural right of the accused¹⁰⁰. The obligation arises from this procedural right rests on the state that it oblige to prove beyond reasonable doubt against the accused. Again while the court entertains the criminal case between the accused and the state, the court expected to be impartial and independent. These two components, but not limited to two, of fair trail is a foundation for legitimacy of criminal justice system. But the right to a fair trial is vulnerable danger if the administration of justice independent, is partial to the case of either party before it, and does not function free from interference. Therefore, under this chapter we are going to investigate whether adverse pretrial publicity or trail by media renders the trail unfair or not. In doing so, this chapter discuss the effect of the adverse pretrial publicity on the proceeding and the outcome of the criminal litigation.

3.1. THE RIGHT TO FAIR TRIAL UNDER RATIFIED INTERNATIONAL HUMAN RIGHT INSTRUMENTS

The Bill of Rights is an integral part of Ethiopia's law. Article 9 (4) of FDRE constitution articulates that all international agreements ratified by Ethiopia are an integral parts of the law of the land. Again, Art. 13 (2) of FDRE constitution provided that the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia. As I already raised in chapter two, Since Ethiopia has ratified International Covenants on Civil and Political Right (ICCPR) on 11 June 1983 and African Charter on Human and People's Rights (ACHPR)¹⁰¹,has the obligation of enforcing the legal prescription of the 'right to fair' which enshrined under these documents.

¹⁰⁰ .Gabriela C.Nicoleta et al./2011/,Short Essay on presumption of innocent ,ECHR precedent,Legal Practice and International Law,p.193.

¹⁰¹ .Adopted 17 June 1981, in force 21 October 1986

The right to a fair trial is recognized in these international laws as a fundamental right. These international law highlights four components of the right to a fair trial, namely, equality before the law, the presumption of innocence, the right to a public hearing and the right to be heard by an independent, impartial and competent tribunal. For instance, The UDHR enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal established by law. Accordingly, Article 10 states that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

And Article 11(1) of the UDHR provides that:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense

The right to a fair trial is protected similarly by Article 14 of the ICCPR. This provision stipulates that:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

In Art.7 of ACHPR protect the right to a fair trial as “every individual shall have the right to have his cause heard” which includes:

“ the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence, including the right to be defended by counsel of his

choice; the right to be tried within a reasonable time by an impartial court or tribunal.”

Moreover, with the objective elaborating Article 7(1) of the ACHPR, in 2003, the African Commission on Human and Peoples’ Rights adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Principles and Guidelines)¹⁰². The right to a fair and public hearing is set out in Section A(1), which provides that:

“In the determination of any criminal charge against a person, or of a person’s rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.”

The right to be presumed innocent until proved guilty is contained in Section N(6), which states that:

“ Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

These components of the international right to a fair trial are strengthened by minimum “guarantees” which represent procedural safeguards to which all courts must adhere. The words “all the guarantees necessary” in Article 11(1) of the UDHR, “minimum guarantees” in Article 14(3) of the ICCPR and “essential elements” and “include” in the African Principles and Guidelines indicate that the list of guarantees, safeguards or elements of a fair trial is not exhaustive. Thus, Paragraph 5 of General Comment 13 of the ICCPR states that the requirements of Article 14(3) of the ICCPR are minimum guarantees, the fulfillment of which is not always sufficient to ensure the fairness of a trial¹⁰³.

Even if the International human right instrument which Ethiopia ratified considered fair trial right as a minimum guarantee, presumption of innocence and the right to a public hearing by an independent and impartial court stand is considered fundamental to the protection of human rights¹⁰⁴, the right to a public trial in criminal proceedings serves the general interest in the open

¹⁰² . African Commission on Human and Peoples' Rights (2003). <http://etd.uwc.ac>.

¹⁰³ . Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994).

administration of justice¹⁰⁵. The right to an impartial and independent judiciary is considered essential to any fair and just legal system¹⁰⁶. These rights are substantive in nature and are essential elements of a fair trial. The minimum guarantees or safeguards which follow these fundamental rights are procedural in nature. Thus, minimum guarantees or safeguards which follow these fundamental rights are not only procedural in nature but also its violation also amount substantive matter.

3.2. THE RIGHT TO FAIR TRIAL UNDER ETHIOPIAN DOMESTIC LAW

3.2.1. The Right to Fair Trial Of The Accused Under FDRE Constitution

The notion of “fair trial” embodied a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime¹⁰⁷. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person¹⁰⁸. This is due to the fact that since, in criminal matters, the investigation is carried out by state, the accused right is susceptible to the coercive power of the state machinery.

The formality of prescription and recognition of the components of fair trial are varying in different jurisdiction. Even if countries are vary in approaches of recognizing of fair trial, normative content of the right to fair trial in every jurisdiction entails the protection of key rights enjoyed by the accused and guaranteed in the legal framework¹⁰⁹. FDRE constitution, like other jurisdiction, does not expressly list out the elements /components/ of fair trial in court proceeding¹¹⁰. As the result of this, in criminal proceeding, there is a question whether fair trial of

¹⁰⁴ . Udombana N (2006) ‘The African Commission on Human and Peoples’ Rights and the development of fair trial norms in Africa’ African Human Rights Law Journal 312.

¹⁰⁵ Ibid ,at 319

¹⁰⁶ . Kelly (1996: 1). Kelly F ‘An Independent Judiciary: The Core of the Rule of Law’ (1996) Vancouver: International Centre for Criminal Justice Reform and Criminal Justice Policy, available at <http://icclr.law.ubc.ca/publications/independent-judiciary-core-rule-law> (visited 22 Dec 2021).

¹⁰⁷ . WiseGeek, What is a Fair Trial?’ accessed 2 February 2020.

¹⁰⁸ . Lawyers Committee of Human Rights, What is a Fair Trial?: A Basic Guide to Legal Standards and Practice (Lawyers Committee of Human Rights 2000).

¹⁰⁹ .e.g. the right to be presumed innocent until proven guilty, right to a fair hearing before an independent and impartial court of law or tribunal and the like all jurisdiction commonly recognized as fair trial right of the accused.

¹¹⁰ .E.g. constitution of South Africa under section 35 listed out constituting elements of fair trial.

the accused confined in trail/only after the institution of charge against the defendant/ or extended to inception of the criminal investigation.

The main objective of criminal process is to recognizing fair trial. The notion of the right to fair trial, require the court first being impartial and independent and next applying legal principles through law of evidence¹¹¹. Therefore, Fair trial as the right presupposes the conduct of court proceeding accordance existing rules and principles in the procedure which the law requires. The rational of the notion of fair trail requiring the court being a compliant to the existence principles here is that to balance various competing interests involved in criminal litigation; i.e. the interests of the accused, the victim and the public .To explain more it is fundamental that the criminal trial produce a factually accurate verdict. However, it ‘does not involve the pursuit of truth by any means¹¹². The criminal trial must also protect the rights of the defendant¹¹³.

The function of fair trail right, in criminal proceeding, go throughout the whole legal process. This importance derived from its position as regulating the exercise of power by the executive¹¹⁴. Protections which restrain the exercise of power to protect rights are desirable because they promote the recognition and legitimacy of the verdict¹¹⁵. Therefore, if the trial is seen as regulating the exercise of coercive power by the executive, a breach of fair trial standards ‘is in itself a wrong’¹¹⁶. It is a wrong because the state has exercised its power without proper validation or justification¹¹⁷. The relation of the state with the defendants with the government commences at early inception of the investigation of the criminal matter and, as the result of this, the opportunity of the being the defendant under the coercive of the executive start from this moments. Hence, the protections which restrain the exercise the power of the government shall commence automatically. Therefore any pretrial activities by executive during the investigative stage that can cause the whole trial deviating from formality, rules, principles to which our law requires can be considered unfair trail. This is because such proceeding leads to wrongful conviction.

¹¹¹ . See Don Mathias, ‘The Accused Right to a Fair Trial: Absolute or Limitable?’ [2005] New Zealand Law Review 217,218-9.

¹¹² . R v Apostilides (1984) 154 CLR 563, 576 cited in Lee v New South Wales Crime Commission (2013) 302 ALR 363, 456 [324] (Gageler and Keane JJ).

¹¹³ . Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3rd ed, 2005) , 22-4.

¹¹⁴ . Ho Hock Lai, *Liberalism and the Criminal Trial* (2010) 32 Sydney Law Review 243, 244

¹¹⁵ . Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 3rd ed, 2005) 25 who caution against theories which focus on legitimacy as ‘[l]egitimacy is a rather elusive concept’.

¹¹⁶ . Ho Hoch Lai,Supranote at 121 ; Allan, *Constitutional Justice*, , 271-2.

¹¹⁷ . Ho Hoch Lai,Supranote at 254

The notion of the extension of the right to fair trial overall the criminal proceeding witnessed in Australian Court. In case of R v Jama, the court ruled out that;

“Unfair and inappropriate practices during the investigative stage can infect the whole trial and lead to wrongful convictions¹¹⁸.”

Again, In case of Antoun v The Queen the held the similar position that;

“Public confidence in the administration of justice requires that authorities observe the requirement of fairness in all stages of the criminal process¹¹⁹.”

Therefore, the court has a broad power to observe a trial for an abuse of its processes to preserve the integrity of the trial and safety of the verdict

Lawyer’s Committee on Human implicated fair trial guarantees’ scope from the investigation stage until the accused commences the criminal proceedings, including any appeal, have been completed by classifying the right to fair trial into three categories: the pre-trial procedures; the actual trial; and the post-trial procedures¹²⁰. This distinction can suggest the violations of human rights during one stage can have diverse effects on another stage.

The pre-trial proceeding encompasses different rights enjoyed by the accused keeping in mind that an accused has to be presumed innocent until proven guilty by a court of law. Pre-trial rights include: prohibition of arbitrary arrest and detention;¹²¹ right to know the reasons of arrest;¹²² right to legal counsel; right to prompt appearance before a judge to challenge the lawfulness of arrest and detention;¹²³ the prohibition of torture and the right to humane conditions during pretrial detention; and prohibition of incommunicado detention. These rights are usually referred to as the rights of arrested persons. The FDRE constitution, under Article 19, recognizes rights of an

¹¹⁸ . R v Jama [2009] VSCA (7 December 2009) Mr Jama was wrongfully convicted of rape on the basis of a matching DNA profile; See generally Victoria, Inquiry into the circumstances that led to conviction of Mr Farah Abdulkadir Jama, Report (2010); Jeremy Gans, ‘Ozymandias On Trial: Wrongs and Rights in DNA Cases’ in Paul Roberts and Jill Hunter (eds), Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions (Oxford and Portland, 2012) 195, 208-13.

¹¹⁹ . Antoun v The Queen (2006) 159 A Crim R 513, 521-22 [28] (Kirby J); X7 v Australian Crime Commission (2013) 298 ALR 570, 612-3 Justice Kiefel has noted that ‘[t]he accusatorial nature of the system of criminal justice involves not only the trial itself, but also pretrial inquiries and investigations’: at [160]

¹²⁰ Lawyers Committee on Human Rights

¹²¹ . ICCPR, Article 9 (1)

¹²² . ICCPR, Article 9(2), The reasons for arrest and explanation of other rights such as the right to counsel must be given in a language the accused understands

¹²³ . An arrested person has to be brought promptly before the court. In most cases it is within 48 hrs from the time of arrest.

arrested person which fall under this category¹²⁴. Thus, under the FDRE constitution the right to fair trial not be confined to the trial that its operation is throughout the whole legal process.

The issue to be determined here is whether adverse pre-trial publicity or trial by media causes procedural “irregularity” which results or could result in a failure of justice. This determination needs to be made taking into account the effects of adverse pretrial publicity create on both the proceeding and the outcome of the proceeding.

Adverse Pre-trial publicity or trial by media occurs primarily at the inception of the criminal process, from the time of arrest until the suspect is charged formally and subsequently appears in court. During this period the media discuss evidence to be heard by the courts and speculate on the outcome of cases. They may publicize, as already discussed chapter two, the confession of the accused, previous character of the suspect, real evidence which may/may not admissible evidence as the truth, thereby convincing the people of the guilt of the accused. Such situation ‘in return’ causes the court to depart from formal to irregular criminal proceeding by influencing the judge to speculate the accused guilty before the commencement of the trial. This is because the formal criminal proceeding requires the mental set up of judge to stay on the status of presuming the accused as innocent until proven guilty¹²⁵.

In the case of Getacho Asefa and other 26 persons Walta TV prepared a documentary to be publicized to the public. The documentary involves interview of persons who listed on prosecutor charge and involve showing of animation/moving image/ while the various person brutally tortured¹²⁶. So wouldn’t this documentary force the court to depart from the formalities, rule and principles of criminal procedure in which the criminal trial to be conducted? The Federal High Court Lideta bench later ruled out that:

“ ...the court can understand the effect it has on court proceeding and outcome of court proceeding if the criminal case pending on bench going to be disseminated in the forms of documentary film.. ”¹²⁷

¹²⁴ . Rights of an arrested person under Article 19 of FDRE constitution include the right to be informed promptly the reasons for the arrest, the right to remain silent, right not to be compelled to make any confession or admission that could be used in evidence against them, right to be brought before a court within 48 hours of arrest, right to be released on bail or bond and etc

¹²⁵ .FDRE Constitution,Suprannote 6,art.20/3/ of FDRE constitution.

¹²⁶ . Getacho Asefa vs Walta media communication,case no.208040,2020(Federal High Court).

¹²⁷ .Ibid.

The court banned the dissemination of the documentary by taking in to consideration the inherent effect it pose on the conduct of court proceeding and safety of the verdict. The influence of the media on court proceeding is a powerful that it has potential of distorting the court conduct.

3.3. PURPOSE OF FAIR TRIAL

Dignity, Liberty and Equality are cross cutting human right and values both international human right instruments¹²⁸ and in national human right document¹²⁹. This because, provision providing general principles and provisions providing for specific substantive and procedural human rights are, in one way or another, directed towards or concerned with ensuring these cross-cutting human rights and values. The right to a fair trial thus should be interpreted with a view to operationalizing these core constitutional values of human rights for all Ethiopians. For instance, the right to a public hearing, the right to access to full evidence, the right to be presumed innocent, the right to be tried by an impartial and independent court and the like are the Procedural safeguards articulated in Art.20 of the FDRE constitution. The impartiality and judicial independency ensures equality between the state and the defendants in criminal litigation by avoiding the external influences: those specially caused from other branches of the government. This situation enables the courts to deprive the liberty of a defendant only upon a ground and in a procedure as established by the law and this ‘in return’ lay a ground for the judiciary to ‘convict’ the guilty only and ‘acquit’ the innocent only. This, in turn, entails practical conception of human dignity by courts. In relation to this it better to raise the ruling of south Supreme Court. In cases of S vs Jaipal, the court raised the importance fair trail that

“essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness.”¹³⁰

¹²⁸ . See UNC, ICCPR, ICESCR, Thematic Treaties, Regional Hum. Rights. Treaties (general and thematic), Various Declarations (e.g., VDPA 1993), Jurisprudence and Reports.

For instance UN charter..stipulate that “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”, again UDHR,..stipulate that All human beings are born free and equal in dignity and rights .

¹²⁹ .See FDRE constitution.

¹³⁰ .S Vs Jaipal 592.

The right of fair trial is not limited in safeguarding of the right of the accused in criminal proceeding. This right also the function of brings fairness to the victim or public represented by the state. It also builds the confidence of the public at large against functioning of criminal justice system. That why De Villiers argued that his writing that “the right of an accused to a fair trial requires fairness to the accused as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of the crime.”¹³¹

There for while the court conduct criminal trial, the court should bear in mind the dignity, liberty and equality of the defendant or the accused. This is because it is possible to think the adverse effect of wrongful conviction on the interests of the accused. The non-observance of the above values with far reach consequences that it extended by affecting the administration of justice by eroding the confidence of public.

As the result of adverse pretrial publicity, an individual under criminal investigation or charged with a criminal offence faces grave social and personal consequences, including possible loss of physical liberty, subjection to social humiliation and ostracisation from the community, as well as other social, psychological and economic harms¹³². This in return will diminish the right to a fair trial; particularly by affecting the dignity, liberty and equality rights of both accused.

3.4. THE RIGHT TO PRESUMPTION OF INNOCENCE

The conception of presumption of innocent focuses on three categorization. The following categories of main rationales of the principle along the lines of three wide-ranging normative characterizations, which are broadly recognized in both the literature and the international case law: its portrayal as a safeguard against wrongful convictions, as a shield against intrusive state powers, and as a norm of treatment and mind-set¹³³. Three categories demonstrate the presumption of innocent interims of the qualification, implication and function¹³⁴.

¹³¹ De Villiers W (2002) ‘The Operation of the Presumption of Innocence and Its Role in Bail Proceedings under Canadian and South African Law (Part 2)’ 35 De Jure 195. page.40.

¹³² .Ibid,at 96

¹³³ . Ferry de Jong & Leonie van Lent, The Presumption of Innocence as a Counterfactual Principle,Utrech Law Review,at page.,34

¹³⁴ . Ferry de Jong & Leonie van Lent,Ibid.

Accordingly the first categorizations demonstrate that presumption of innocent has the function of safeguarding the innocent from wrongful conviction. This conception focuses on the dangers inherent in conviction as such. It is the very nature of the consequences of being found guilty of a criminal offence that is believed to necessitate the safeguarding of the defendant wrongful convictions by, firstly, adhering to the *in dubio pro reo* principle and, secondly, by burdening the prosecution with proving guilt and thereby defeating the presumption of innocence¹³⁵. Ashworth takes this rationale to be the first and foremost reason for recognizing the principle¹³⁶. To Van Sliedregt, the prohibition of wrongful convictions constitutes the core of the presumption of innocence; the rule of *in dubio pro reo* is a direct deduction of this¹³⁷. Keijzer speaks of the *right to be acquitted* if the charge has not been legally and convincingly proved¹³⁸.

Again, in the common law legal doctrine the presumption of innocence is taken to be primarily a *rule of evidence*, setting standards for the decision on guilt¹³⁹. Taken in this sense, the notion dictates that the *burden of proof* is on the prosecution authorities¹⁴⁰, and it sets a standard with regard to the threshold of required proof: the presumption of innocence must be defeated by

¹³⁵ .Ibid

¹³⁶ . Ashworth 2006, To name but a few: A. Stumer, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (2010); V. Tadros, 'The Ideal of the Presumption of Innocence', (2014) 8 *Criminal Law and Philosophy*, pp. 449-467; V. Tadros, 'Rethinking the Presumption of Innocence', (2007) 1 *Criminal Law and Philosophy*, no. 2, pp. 193-213; V. Tadros & S. Tierney, 'The Presumption of Innocence and the Human Rights Act', (2004) 67 *The Modern Law Review*, pp. 402-434; A. Ashworth, 'Four Threats to the Presumption of Innocence', (2006) 10 *International Journal of Evidence and Proof*, no. 4, pp. 241-278; E. van Sliedregt, *Tien tegen één. Een hedendaagse bezinning op de onschuldpresumptie* (inaugural lecture, Free University Amsterdam) (2009); L. Stevens, 'Pre-trial Detention: The Presumption of Innocence and Article 5 of the European Convention cannot and do not Limit its Increasing Use', (2009) 17 *European Journal of Crime, Criminal Law, and Criminal Justice*, no. 2, pp. 165-180; A. Galetta, 'The Changing Nature of the Presumption of Innocence in Today's Surveillance Societies: Rewrite Human Rights or Regulate the Use of Surveillance Technologies?', (2013) 4 *European Journal of Law and Technology* no. 2; (the contributions to the) (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, Special Issue on the Presumption of Innocence, cite in Ferry de Jong & Leonie van Lent, *The Presumption of Innocence as a Counterfactual Principle*, *Utrecht Law Review*, at page, 34

¹³⁷ .Ibid page.35

¹³⁸ .Ibid.

¹³⁹ . Campbell 2013, Stumer 2010, supra note 2, pp. 52-87; cf. R. Glover, Review of A. Stumer, 'The Presumption of Innocence: Evidential and Human Rights Perspectives', (2011) 15 *The International Journal of Evidence and Proof*, no. 1, pp. 89-92; L. Campbell, 'Criminal labels, the European Convention on Human Rights and the Presumption of Innocence', (2013) 76 *The Modern Law Review*, no. 4, pp. 681-691; T. Weigend, 'There is Only One Presumption of Innocence', (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, pp. 683, Du2009, We will pay no specific attention to the so-called 'proportionality inquiry' in connection with the justification of *limitations* on the presumption of innocence; for this, see Stumer 2010, supra note 2, pp. 119-151, Tadros 2007, supra note 2 and Tadros & Tierney 2004, supra note 2. Nor will we address the implications of the presumption of innocence for substantive criminal law, for instance with regard to the statutory design of criminal offences; see for this Tadros 2014, supra note 2 and R.A. Duff, *Answering for Crime* (2009), pp. 19-22, 195-228, cited in Ferry de Jong & Leonie van Lent, *The Presumption of Innocence as a Counterfactual Principle*, *Utrecht Law Review*, at page, 35

¹⁴⁰ . For which it is often cited from *Woolmington v DPP*, in which Viscount Sankey stated that this principle is part of the common law of England, labelling it as 'one golden thread' in the web of English criminal law, [1935] AC 462. See Stumer 2010, supra note 2, pp. 152-189, cited in Ferry de Jong & Leonie van Lent, cited in *The Presumption of Innocence as a Counterfactual Principle*, *Utrecht Law Review*, at page, 35

proof of guilt *beyond a reasonable doubt* before guilt can be regarded as established and a conviction can take place¹⁴¹.

A similar position also held by Ethiopian legal system. Article 20(3) of the Ethiopian Constitution stipulates that, “[d]uring proceedings, accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves”.¹⁴² The accused on his part is not thus required to submit proof before the public prosecutor produces evidence.¹⁴³

The second categorizations demonstrate that presumption of innocent as a shield against intrusive state powers. Accordingly, **Weigend** demonstrate that the presumption of innocence as a ‘counterweight’ against all the real risks involved in an individualized suspicion from the state agents¹⁴⁴. The line of this notion of the presumption of innocent aimed imposing duty to the state to recognize the defendants’ legal status of innocent before conviction¹⁴⁵. That why Ferry de Jong & Leonie van Lent argued that presumption of innocent is the rule of procedure that applies from the initiation of criminal procedure to its final conclusion¹⁴⁶. Therefore presumption of innocent has the function of prohibiting state agents including Medias from taking activities that potentially speculate the suspect in fact is “guilty”.

But in relation to the above concept, the way art.20/3/ of the FDRE constitution articulated raises question whether presumption of innocence operates outside the trial context or not; as this prescription only mentions the accused only. Some writer such as Schwikkard argues that the

¹⁴¹ . Campbell 2013, supra note 3, p. 681. The standard ‘beyond reasonable doubt’ is also reflected in the case law of the ECtHR. Ashworth argues, however, that this particular standard is not dictated by the presumption of innocence; not setting the standard lower than this is an implication of the values underpinning the presumption of innocence; see Ashworth 2006, supra note 2, p. 250; see also Weigend 2014, supra note 10. See also the proposed EU Directive, Art. 5; it should be noted that this proposed Art. 5(2), which summarizes the relevant ECtHR case law, is heavily disputed behind the scenes: see <<http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0407%28COD%29>> for pro-posed amendments (last visited October 2015), cited in cited in Ferry de Jong & Leonie van Lent, cited in The Presumption of Innocence as a Counterfactual Principle, *Utrecht Law Review*, at page, 35

¹⁴² . FDRE Const. Art 20(3)

¹⁴³ . Defendant is not required to participate in the proof process against himself; that is what is referred to as privilege against self-incrimination. J. D. Jackson (2005) "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" 68 *Modern L. Rev. No. 5*, at 758 cited in Simeneh Assefa, The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal P

¹⁴⁴ . Weigend 2013, There is Only One Presumption of Innocence’, (2013) 42 *Netherlands Journal of Legal Philosophy*, no. 3, pp. 193-204. Stumer 2010, The Presumption of Innocence. Evidential and Human Rights Perspectives (2010); we will come back to the notion of a ‘counterweight’ Stumer 2010, *The Presumption of Innocence. Evidential and Human Rights Perspectives* (2010);

¹⁴⁵ . Ashworth 2006, Four Threats to the Presumption of Innocence’, (2006) 10 *International Journal of Evidence and Proof*, no. 4, pp. 244

¹⁴⁶ . Ferry de Jong & Leonie van Lent, The Presumption of Innocence as a Counterfactual Principle, *Utrecht Law Review*, at page, 35

presumption of innocence does not operate outside the trial context and that it is a rule of evidence and procedure in the trial context only¹⁴⁷. If this argument is taken as sound then it does not matter whether the media speculate on the guilt of the accused, no matter how irresponsible and prejudicial such speculation. Thus, trial by media is acceptable expression even in a situation where such publicity infringes the presumption of innocence, and the trial would not be unfair since the right to be presumed innocent operates only as a rule of evidence and procedure during the trial where the object is to determine the guilt or innocence of an accused. This approach result in an absurd consequence as the result of narrow interpretation of the right to 'presumed innocent'. This because it relieve the Government from the obligation of proving guilty beyond reasonable doubt as the result of perception it may be created by irresponsible media before the commencement of the trail.

However, as already noted or chapter two, constitutional rights ought to be interpreted generously and purposively to give expression to the values underlying the Constitution. The purpose of the presumption of innocence is described cogently in the Canadian case of Oakes, where the court held that the enactment of the presumption as a Charter right does not diminish its broader purpose as a fundamental right, which dictates that the starting point of any proposed criminal prosecution is that the person charged with or suspected of committing an offence is innocent¹⁴⁸. This approach was followed in the South African cases of Sebejan, Orrie and Melani¹⁴⁹. The presumption of innocence protects and preserves other fundamental rights and to restrict its operation to the criminal trial context will confound its fundamental purpose.

The right to a fair trial requires, therefore, that an accused be treated fairly throughout the criminal process. The right to be presumed innocent under section 20(3) of the Constitution ought to apply across the criminal process and thereby become a principle of fundamental justice, as applied in international law. The presumption of innocence as a principle of fundamental justice requires that any person facing possible criminal prosecution be treated as innocent throughout the criminal process.

¹⁴⁷ .Ibid.

¹⁴⁸ .R v Oakes

¹⁴⁹ .S vs Melani 188;S vs Sejan 1095;Sv Orrrie 218.

Adverse pre-trial publicity or trial by media speaks to the guilt or innocence of an accused. Evidence to be used at trial is going to be publicized widely in the way inviting the public to speculate on the merits of the criminal prosecution and decision. This in relation result in Public criticism against criminal suspects or arrested or detained and accused persons is exacerbated by such reporting, resulting often in the public calling for convictions or acquittals.

The third categorizations demonstrate that presumption of innocent as rational of the presumption additionally implies a *mental* requirement, *viz.* the requirement that criminal law officials have and keep an ‘open mind’ with regard to the guilt or innocence of the suspect or defendant. The fact that the presumption of innocence is a rule of procedure means that it applies ‘from the initiation of a criminal process to its final conclusion’ and only addresses the judicial authorities in their dealings with the suspect/defendant¹⁵⁰ Likewise, Ashworth finds that the principle’s aim – due respect for the legal status of innocence, necessitated by the harm done by a conviction and the proper relationship between State and individual¹⁵¹ – also prevents public officials from making statements on the guilt of the defendant¹⁵².

3.5. THE RIGHT TO FAIR TRIAL BEFORE AN IMPARTIAL AND INDIPENDANT COURT

Among the three branches of the government, judiciary is the basic institution enabling the enjoyment of the right to a fair trial while the criminal proceeding takes place. Hence, this institution expected to be competent, independent and impartial tribunal established by law¹⁵³. Paragraph 19 of General Comment 32 of the ICCPR declares the right to a competent, independent and impartial tribunal an absolute right that is not subject to any exception. The principles of judicial independence and impartiality are entrenched also in African fair trial rights jurisprudence. Section A (4) (f) and Section A (5) (a) of the African Principles and Guidelines, firstly, prohibit any inappropriate or unwarranted interference with the judicial process and,

¹⁵⁰ . Weigend 2014, T. Weigend, ‘Assuming that the Defendant is not Guilty: The Presumption of Innocence in the German System of Criminal Justice’, (2014) 8 *Criminal Law and Philosophy*, pp. 289.

¹⁵¹ . R.A. Duff, ‘Who must Presume whom to be Innocent of What?’, (2013), 42 *Netherlands Journal of Legal Philosophy*, no. 3, p. 170;

¹⁵² . A. Ashworth, ‘Four Threats to the Presumption of Innocence’, (2006) 10 *International Journal of Evidence and Proof*, no. 4, pp. 241-244

¹⁵³ . ICCPR, art.14/1/ of, See also European Convention, Article 6(1); American Convention, Articles 8(1) and 27(2); and African Charter, Articles 7(1) and 26.

secondly, require that a judicial body base its decision only on objective evidence, arguments and facts presented before it and to decide matters without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason. The rationale of these provisions is to avoid the arbitrariness and/or bias that would potentially arise if criminal charges were to be decided on by a political body or an administrative agency.

Moreover, in 1985 the United Nations adopted Basic Principles on the Independence of the Judiciary .Accordingly; it set out requisite of independence of the judiciary on the first of its Basic principles that;

“A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”

Therefore this principle speak out that independency is the autonomy given to judge and tribunal to decide the case applying the law to the facts. This is because the judges are the agent of courts that the judicial function of the court as institution manifested by the activities of the judges on the bench. Therefore without securing the autonomy the judges, it is impossible to secure the independency of the courts.

The FDRE constitution seems to be inspired by above principal. This is due to the fact that Art.79 (1) of FDRE constitution vests judicial authority in the courts. Therefore, Courts are the fora for pronouncing on a person's guilt or innocence on a criminal charge in a public hearing. But so as to convict guilty only and acquit innocent only through consideration of fair trail, establishment of constitutionally independent court is inevitable. As the result of this, art. 78/1/ of FDRE constitution declares courts to be independent and only established by constitution. In the execution of this independency, the constitution obliged judicial judges to exercise their function in full independence and only be directed solely by law/Art.79 (3) of the FDRE constitution. Again, Art.79 (2) of FDRE constitution also prohibits any interference of influence of any governmental body, governmental official or from any other source.

Independence judiciary presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch. This is because Art.79 (1) of FDRE constitution vested judicial power only to courts. Therefore courts are only competent to pronounce guilty or innocent.

Trial by media utterly usurps the functions of the courts by pronouncing on the guilt of an accused prior to a court of law, in which judicial authority is vested, doing so. Evidence to be used at the trial is published in all tabloids and is discussed widely on all fora. In the Documentary of Jihadawi Haraket, Dinku Dayase Documentary, matter, discussions were held on every trial day and televised worldwide. Where the media publish reports on matters still to be decided by courts, including evidence to be presented, they are interfering with the functions of the judiciary. Such discussion and debate do not circumvent judges and may exert pressure on them to decide a matter in a certain way. This disrupts the functions and duties of the judiciary in which only granted only to courts as per Art.79 (1) of FDRE Constitution.

3.6. CONCLUSION

The notion of right of fair trial in criminal procedure is preoccupied in safeguarding important cross cutting human right and value while the accused or the suspected become under the criminal investigation of the state. Dignity, equality and liberty are the underlying value that the notion of the right to fair trial is founded. Therefore, the principles, the rules of the criminal procedure and criminal evidence that aimed to actualize these value expected be observed by state from the moment of an individual become under subject of criminal investigation. Any activities by state including media that cause the court to deviate from formal principles ,rules of criminal procedural or criminal evidence cause the trail unfair and this, return, infringes the value of fair trial by convicting innocent and acquitting the guilty.

Adverse pretrial publicity or trails by media discuss the evidence to be presented against the accused or the suspect or facts about the accused or the suspect before this individual presented to the court. This affects the right to be presumed of innocent of an individual and interfere in to the function of the court. This in relation undermine the core value of fair trail .Therefore adverse pretrial publicity or fair trial violate the dignity, liberty and equality of the accused or the suspect by disturbing the court proceeding.

CHAPTER FOUR

JUDICIAL BALANCING OF THE RIGHT TO FREEDOM OF EXPRESION VIS -A-VIS THE RIGHT TO FAIR TRIAL OF THE ACCUSED: CASE ANALYSIS

4.1. INTRODUCTION

Some of conceptual issues or questions raised or discussed in the chapter two and three are not simply for academic purpose. The experience of the various jurisdictions that have been cited show that the questions are practical and require judicial answers. These important questions do not have authoritative answers within our legal system. But the present writer of this research or thesis has proposed some tentative answers as to how these questions should be addressed in future within our constitutional system. But these are tentative answers and there is hardly a body of case law or authoritative doctrinal writing that could be used to confirm or repudiate the answers provided above¹⁵⁴. Even if ordinary courts were seen in settling the issue of balancing freedom of expression and fair trial, it had not yet developed specific standards, tests and principles that could be used in resolving issues arising in relation to balancing of freedom of expression and the fair trial.

As I already discussed in chapter two, Art.29 of FDRE Constitution protects media coverage of criminal matters. Because press coverage criminal case is a valuable component of our democratic form of government. Again, making available the criminal matter to the public through the broadcasted media coverage promotes public education, deterrence, and freedom of the press¹⁵⁵. This is the rationale behind the FDRE's Constitution protection of freedom of the press¹⁵⁶. A better informed public can contribute more to the implementation of solutions to the problem of crime. Also, the information helps make government institutions more accountable. If the public is going to perform its self-governing function, it must be able to receive information about how the government works. It is through the press that citizens can participate

¹⁵⁴ .In Ethiopia, of course, there was an prescription of body of legislation that talks about limitation of freedom of expression for the reason of protecting other interests (before a reform ,See the “Freedom of the Mass Media and Access to Information Proclamation No. 590/2008” and the “Broadcasting Service Proclamation No.533/2007”,after reform, see media proclamation no. 1238/2021. Hence, one could argue that this corpus of legislation should be taken as part of an Ethiopian jurisprudence. However, such argument with all its merit is not convincing since the questions that arose in the previous chapters cannot be answered by referring only to the legislations in question.

¹⁵⁵ . Susanna R. Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, 10 JUST. SYST. J. 279, 280-81 (1985).

¹⁵⁶ .Alexander MeikleJohn, *Free Speech and Its Relation to Self-government* (1948).

in self-governance. The FDRE constitution protection of freedom of the press, therefore, serves the media as well as the individual also who depend on it to fulfill the values of freedom of expression, participation in democratic government, and self-realization. This is why speech that comments on governmental entities or that provides more knowledge of the government and the way it works is at the core of the FDRE Constitution protection of freedom of the press.

On the other hand, as I discussed in chapter three, the FDRE Constitution's right to a fair trial for a criminal defendant is recognized as one of the most fundamental of all freedoms, essential to the preservation and enjoyment of all other rights. The component of the right to "fair trial" is extending from date which the state activities affect substantially the situation of the defendant to the formal criminal charge lodged to the defendant¹⁵⁷. For instance, presumption of innocent is which is enshrined under Article 20(3) of the FDRE constitution is one of the basic components of the right to fair trial. This right to a fair trial includes the defendant's right to have his guilt determined solely on the basis of the evidence introduced at trial, and not on the grounds of "official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial. These rights are designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. Therefore both freedom of the press and the right to fair trial are the basic essence for democracy that the former maintains an informed public and the latter protects the rights of the accused¹⁵⁸. As I raised in chapter two of this writing, the extensive use of the freedom of press may result in the violation of the right of fair trial of the defendant¹⁵⁹. If the media, under the pretext of freedom of press, going to disseminate a documentary film which show the interview of the prospect witness or confession of the accused or other facts which implicate the guilty of the accused, this will automatically amount to violation the right to fair trial of the accused (specifically to mention it violates the right to be presumed innocent). In this case trial courts have a duty to protect this right¹⁶⁰. This because Art.13 (1) FDRE constitution provide that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter three of the FDRE constitution¹⁶¹. Since "the right to fair trial" is one of the constitutive parts of

¹⁵⁷ . Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington:1993

¹⁵⁸ .Judy, *The First Amendment Watchdog Has a Flea Problem*, at 542, cited in Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 997.

¹⁵⁹ . Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 1021.

¹⁶⁰ .See FDRE Constitution, supranote 6, Art13/1/.

the fundamental right and freedoms, the courts are duty bounded to enforce this right. It is the inherent task of the court. This task includes balancing of two conflicting constitutional rights where the enforcement of one constitutional right itself has the potential threat to the other. This to mean that if the full enjoyment of freedom of expression necessarily curtails the full enjoyment of the right of fair trial and vice versa –it is the task of a court to reconcile them-that is possible to protect both right.

To balance all of the interests at stake, courts sometimes issue orders banning dissemination of pretrial information. Although the FDRE Constitution does not specifically refer to orders of this type, it has been interpreted to protect the press from them¹⁶².

This chapter will deal with prior restraint orders rule as remedy to safeguard the fair trial of the accused or administration of justice in pending court proceedings. In this chapter, the author will examine some selected Court cases to illustrate how Courts in practice balance the right to freedom of expression and the right to fair trial.

Prior restraint orders will allow courts to ban the publication of adverse pre-trial information before it is disseminated to the public domain; where such information is found to prejudice or interfere with fair trial of the accused or the administration of justice in pending criminal court proceedings. While these types of orders could be effective measures against adverse pre-trial publicity or trial by media, there is no denying that they amount to censorship which, by its nature imposes limitation upon free speech. The approach of the Federal High Court Lideta Bench in Getacho Asefa and other 26 persons and Juwar Mohammad Siraj and other 21 persons will be analyzed critically in this regard.

4.2. APPROACH FOR PRIOR RESTRIANT

¹⁶¹ .Ibid

¹⁶².For instance, AtoDinku Dayas Vs Walta Tv. Case no.284552, 2020(Federal 1st Instance court Lideta Bench), ,Getacho Asefa vs Walta media communication, case no.208040,2020 (Federal High court Lideta Branch,) and the like issued order of banning broadcasting of documentary. Again there is a similar trend in foreign jurisdiction. For instance in US See Near v. Minnesota, 283 U.S. 697 (1931).

The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication¹⁶³. A prior restraint is an order which seeks to prohibit speech in advance of publication. For the present discussion it may be defined as an interdict to prohibit the media from publishing information which will prejudice and interfere with pending court proceedings and the fair trial rights of an accused. These interdicts are obtained before the information is in the public domain and could be effective measures to protect the judicial process and, consequently, the right to a fair trial, as they will prevent prejudice at its inception. Prior restraint amounts to censorship as courts have to determine whether or not a publication should be released and whether it amounts to a violation of the dignity, privacy or fair trial rights of a person. These types of orders effectively “gag” the media and are an impose limitation upon free speech. This because the order prior restraint has a serious effects that it hinder free enjoyment freedom of expression either temporarily or permanently

In Ethiopian legal system there is no a procedural laws that prescribe the procedure in which order of prior restraint is granted against media for the reason of protecting the right to fair trail of the accused. But as I raised in above paragraph, even if there is no authoritative legal regime that provides the procedure of granting’ order prior restraint’ ,ordinary courts were seen in issuing order of prior restraint against media.

In the case of Getacho Asefa vs Walta Television, Getacho Asefa and the following other 25 person applied for prior restraint that would preventing Walta Television from broad casting. This documentary film contains information that shows while the accused persons commit a crime of torture. The advertisement of these this documentary released after the trial of the accused commenced. The criminal case involving Getacho Asefa which attracted enormous media attention clearly indicated how Courts deal with cases that relate pre-trial publicity and the right to fair trial. The Television program included an interview with a person who was likely to be 113th state witness. The defendants requested to ban the Walta Tv from broadcasting the documentary. The applicants, in their application, argued that:

“The documentary involves interview of person who is listed on criminal charge witness...and other persons who had been under police investigation with us for similar

¹⁶³ .Thomas I.Emerson,The Doctrine of prior Restriant,at.648

criminal case for what we had been suspected. The documentary also involved highly showing animation/moving image/ while the various people brutally tortured”¹⁶⁴ .

Walta Television did not challenge the factual and the legal argument of the applicant; but requested the court to compare the allegation of the applicant with the contents of the documentary films. After considering the application, the Court ordered the banning of the broadcasting of the documentary film. It reasoned that broadcasting the film will run counter to the accused’ right to be presumed innocent until proved guilty¹⁶⁵.

Court did not set out within its decision the approach for limiting freedom of press. It arbitrarily ruled the case at hand. This because in the above case, one cannot find the courts inquiring whether or not the interest being advanced by the statute that were invoked applicant are interests that could be taken as legitimate grounds for limiting freedom of expression in accordance Article 29(6) of the Constitution. In the absence of such inquiry, it is no surprise that the courts have not proceeded to raise questions regarding the proportionality. This is so because, reasonably, the judicial analysis of proportionality of limitations is always comes after an inquiry as to the existence of legitimate grounds for limiting a right. The court seems to be ignorant to the need to inquire into the legitimacy of” fair trial right of the accused” to justify a limitation on freedom of expression.

As I discussed under chapter two, fair trial is a legitimate ground for limiting of freedom of expression in general and freedom of press in particular. Freedom of the press as a vehicle for comment on public issues is basic to any democratic system. The assurance of a fair trial by an impartial court is essential for the preservation of an effective system of justice. The public are interested from both value. Both values have been affirmed by FDRE constitution and the Bill of Rights recognized by Ethiopia. Therefore, it requires the balancing of public interest factors. But, the public interest in the functioning of the courts invokes both these values. It calls for free expression of information and opinions as to the performance of these public responsibilities. It also calls for determination of disputes by courts which are free from bias and which make their decisions safely on the evidence judiciously brought before them.

¹⁶⁴ . Getacho Asefa vs Walta media communication, case no.208040,(2020) (Federal High Court Lideta Bench) the translation is by writer of this thesis.

¹⁶⁵ . Ibid

Dissemination of criminal case involves Getacho Asefa is with a public interest since formerly they were higher public official and for serious crime they were indicted. This information was in public domain. But event surround the criminal charge was not in in a public domain. This is because the documentary communicates the event surrounding the offence by interviewing witness who was listed on criminal charge as a state witness. But, in contrary, dissemination by media on high criminal profile may contain information, such as interview of witness, confession of the accused, activities of police, that negatively affects a fair trial right of the accused or affect judicial integrity. This because, as it already discussed under chapter two, it speculates the guilty of the defendant, influencing the independency and impartiality of the court. In such a case the court must differentiate the one with more weighted public interest that arise from the two conflicting human right, i.e. public interest from freedom of expression and judicial administration. Thus, as I discussed in chapter two, the establishment of an independent and effective justice system essential for safeguarding of human rights. Freedom of expression is one the fundamental human right under FDRE constitution. If Judicial integrity eroded through adverse pretrial publicity, then all constitutional human right enshrined under chapter three of FDRE constitution including freedoms expression are also compromised. Therefore, ‘judicial integrity’ is with a greater public interest than ‘freedom of expression’ which carry information that is adverse to judicial integrity; as adverse pretrial publicity is not only affects judicial integrity but also, there are numerous human right going to be violated. Therefore, in the case Getacho Asefa involved, the inquiry should have to be considered by court was that simply whether the greater public interest justifies the publication or comment when freedom of press comes counter to judicial integrity.

The court also failed to mention the proximity of the contents of the documentary film being of a threat to judicial integrity before order of limitation/ prior restraint/ imposed. The court was expected to shade light the circumstances that justify the limitation of Walta’s Documentary film. The court also didn’t talk about the enquiry used to limit the freedom of press. The approach did not correspond with” clear and present danger” test.

When we turn to cases of Juwar Mohammad Siraj vs FDRE Generala Attorney¹⁶⁶; a similar approach is adopted by Federal High Court Lideta Bench. Juwar Mohammad Siraj and Bakale

¹⁶⁶ . FDRE General Attorney Vs. Juwar Mohammad siraj and other 20 persons,case no.260215,,(2020) (*Federal High Court Lideta Bench*), the translation is mine.

Garba brought an action against FDRE General Attorney for what he had granted a press conference for foreign diplomats issues related to investigation of crime committed following the death of famous artist Hacalu Hundesa. On Press conference ¹⁶⁷, Gedion Timothewos Hessebon had said: “.....i would reiterate that there were hundreds of people who have been directly affected by the violence these individuals have instigated and incited. We have to distinguish between peaceful lawful political mobilization and the kind of rhetoric, the kind of ultranationalist militant violent political activism that results in death and injury of citizens...” Immediately to this press conference, Juwar Siraj and Bakale Garba brought an application against the FDRE General Attorney requesting a banning of further dissemination this press conference that:

“.....Courts are the only competent body for reaching criminal guilty....but the General Attorney violated fair trials rights under Article 14(1) of the International Convention on Civil and Political Right, which Ethiopia has ratified, as well as Article 20 of the Ethiopian Constitution regarding the right to be presumed innocent..... The statement endangers the defendants’ presumption of innocence and hinders the fairness and neutrality of decisions this court will render ...and the statement of the Attorney General seem like our guilt is already decided. He called us ‘ultra-nationalist and militant... he has committed a crime against the justice system...’”¹⁶⁸

In its written response, the Federal Attorney General argued that there had been no violation of the principles of presumption of innocence or judicial independence, claiming instead that the statement merely presented information to the public¹⁶⁹.

The second argument raised by Attorney General’s office called the defendants’ claim “unacceptable”— arguing that “the claim that the prosecution cannot reach a conclusion arises from misunderstanding the prosecution’s authority.” It said the prosecution proceeds with charges when it “reaches the conclusion that the crime has been committed has been committed by the accused person.”¹⁷⁰ After considering the application, the Court rejected the application of

¹⁶⁷ .<https://www.youtube.com/watch?>

¹⁶⁸ . FDRE General Attorney Vs. Juwar Siraj, Supra note 173,Para.5.

¹⁶⁹ .Ibid,at para.8

¹⁷⁰ .Ibid,at Para.9

the defendants. It reasoned that “no statements from the conference that implicate guilty of the defendants....”¹⁷¹

As it inferred from the above court’s decision, the court had not proceeded in balancing the interest in press and the interests of the defendants. This procedure by court is invalid. This is because, as I discussed in chapter two, the judicial analysis of proportionality of limitations is always preceded by an inquiry as to the existence of legitimate grounds for limiting freedom of press. But, the court did not witness explaining the way in which a press conference of Attorney General justified in light Art.29 of FDRE constitution. Again the court also failed to mention the remoteness of the contents of the press conference from being of a threat to judicial integrity.

One the other problem of the court in the case Getacho Asefa and Juwar Mohammad Sayid involved here was the order to produce the information or copy of recorded CD for review by a court. The Court, on receiving the application, ordered Walta TV to produce CD/film/ for the purpose of considering the content of the film. Similarly, in Case of Juwar Mohammad Vs FDRE Attorney General¹⁷², the court ordered the General Attorney to produce the copy of press conference record¹⁷³. The order to produce the copy of the record had been an invalid order against the press. The orders the courts issued were unconstitutional because they shifted the burden of proof onto the press to prove that the information would not affect the defendant. The courts should have inquire, should the press bear the heavy burden of justifying the legality dissemination of the documentary for the only reason the petition brought by defendants against the press?

Freedom of expression seriously involves acknowledging it both as a ‘liberty’ and a ‘claim right’. A ‘liberty’, conceptually speaking, refers to the absence of any competing duty to do or refrain from doing something¹⁷⁴. The freedom of expression is a liberty, as it involves absence of

¹⁷¹ .Ibid,at para. 11.

¹⁷² . FDRE General Attorney Vs. Juwar Siraj, Supra note 173,Para.2 .Following the murder of Hachalu Hundesa, one of famous Oromic musician, public uprising was occurred and as the result of this many people died and injured. In September 2020, the General Attorney charged JuwarSiraj and other 20 persons with crime of terror on Federal High Court Lideta Branch anti-terrorism bench. One week after a charge, while the case was pending on trial, the FDRE General Attorney disseminated a press conference to foreign diplomats. Following this press conference,JuwarSiraj and other 20 persons complained to the bench where their criminal case being entertained requiring a court for order that ban a further dissemination General Attorney’s press conference. But the application was not substantiated with evidence.

¹⁷³ .JuwarSirajvs FDRE Attorney General case no.260215/2021

constraints on what an individual is free to express. A 'claim right' meanwhile corresponds to another's duty to do or refrain from doing something¹⁷⁵. Claim rights correspond to duties; the freedom of expression imposes duties on others to refrain from interfering with the expression in question. The reason we recognize certain claimable right is often linked to the underlying interests these rights set out to protect¹⁷⁶. Recalling such value is important, as the process through which we justify limitations on the freedom of expression is contingent on the value we attach to it¹⁷⁷. When the conduct in question relates to the freedom of expression, this justificatory burden falls on those who wish to restrict the conduct. Therefore, in the case of the freedom of expression, the starting point in the process of reasoning is clear: an individual is ordinarily entitled to engage in the conduct associated with the freedom of expression, unless a restriction on the conduct is carefully and convincingly justified.

In line the above theoretical framework, art. 29 of FDRE constitution prescribe that everyone has the right to freedom of expression without any interference. This right enjoyed without any precondition. This is to mean that this right can be exercised without cross bonding obligation. When the conduct in question relates to the freedom of expression, this justificatory burden falls on those who wish to restrict the conduct. If a given person is with an application that request prior restraint against the publication of press, then his/her request presumed unconstitutional; the burden of proof rests on the petitioner to show that the order is needed to protect the rights of the defendant. Thus burden of proof required to justify a prior restraint cannot be based on mere allegations, or on speculation.

In the case Getacho Asefa and Juwar Mohammad Siraj involved, the Federal courts had also acted as a pre dissemination censor and therefore interfered with the constitutional rights of the press. This because media's broadcast subjected under court's permission. The court should have inquired as to the compatibility of the order in light of Art. 29 (3) (a) of the FDRE constitution. Accordance Art.29(3) (a) of the FDRE constitution, the press may not be required to justify or defend what broadcast until after the expression has taken place. This means that any person

¹⁷⁴ . Hohfeld WN ,Fundamental Legal Conceptions as Applied in Judicial Reasonin,at 36-39, Cook WW (ed). Yale University Press, New Haven(1919)

¹⁷⁵ .Ibid at.39.

¹⁷⁶ . Raz J The Morality of Freedom. Clarendon Press, Oxford(1986)

¹⁷⁷ . Alexander Meiklejohn (2004), *Free speech and its relation to Selfgovernment*, See Thomas Scanlon (Winter, 1972), 'A Theory of Freedom of Expression', *Philosophy and Public Affairs*, Vol. 1, No. 2, pp. 2015-226 and John Stuart Mill (1869), *On Liberty*, Chapter II: *Of the Liberty of Thought and Discussion*

including the Government has been prohibited from interfering with the editorial process giving directives as to the content of expression the media's program. Thus it is possible to say Federal courts were involved in the editorial process that inherently threat to freedom of expression of the press.

The other problem in case of Getacho Asefa vs Walta is the procedure the court arrived on temporary restraining orders. The court, upon the request of Getacho Asefa and other applicants¹⁷⁸, immediately issued a temporary restraining order that hinder Walta from broadcasting of a this documentary film for indefinite period¹⁷⁹. But this temporary order is not substantiated by evidence that it is granted by mere speculation of the contents of petition.¹⁸⁰ These can be also evidenced from the passage of the order of the court that:

*“...these accused persons like any person have the constitutional right to be presumed innocent before the judgmenthence, their right is expected to be respected by this bench and any citizen ...therefore, if the above mentioned documentary film has relation with the case of the defendants, the court temporarily ordered Walta not to air this documentary”*¹⁸¹

The procedure in which this this order issued is not correct. The burden to justify by evidence the need prior restraint falls on the applicant. This because System of prior restraint has the serious effects of preventing a communication in advance from being occurred at all¹⁸². That is why Alberto Bernabe argued that “temporary order has an immediate suppression effect on the dissemination of information and thus operate as a prior restraint”¹⁸³. Therefore a temporary prior restraint carry a heavy presumption of against constitutional validity and the burden of proof of the constitutionality of prior restraint rests on the petitioner. Before any types of order

¹⁷⁸ . Getacho Asefa vs Walta, supranot 171, at para.3 Getacho Asefa and other 24 applicant together requested the Federal High Court order of injunction against Walta Television's Documentary by arguing that” .. *documentary involves interview of person who listed on prosecutor charge to be 131th state witness...and other persons who had been detain with us for similar case for what we suspected... , and also this documentary involves highly showing animation/moving image/ while the various person brutally tortured...therefor in addition to prejudicing justice organ, this documentary film against our constitutionally guaranteed right of the right to presumed innocent and threat to our dignity, security and security of our family.”But this complain is not substantiated by evidence.*

¹⁷⁹ .ibid

¹⁸⁰ .ibid

¹⁸¹ . Getacho Asefa vs Walta media, case, supra note 171, para.3

¹⁸² .Thomas I.Emerson, the doctrine of prior restraint, 1955

¹⁸³ .Alberto Bernabe, Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard, 84 Ky. L.J. 259 (1996), at.297.

whether it is permanent or temporary, the applicant expected to prove by evidence the constitutionality of the temporary order¹⁸⁴.

The other problem in case of *Getacho Asefa Vs Walta* is the way of the temporary restraining orders used by court to decide the validity of the requested orders. As already mentioned before, the court also ordered *Walta Tv* to produce a documentary CD to decide whether a permanent injunction should be issued. The judge had felt that it was needed to examine the content of a documentary film to determine the constitutionality of permanent prior restraint. Accordingly the Federal High Court Lideta Bench, by examining the content, entered a permanent order after the publication was prevented temporarily for one month¹⁸⁵. Even if it was a victory for the applicant in getting an order of prior restraint, it took several days for a court to make a ruling. This is because the permanent order of prior restraint issued after one month delay of the issuance of temporary prior restraint. Any delay of publication, for even periods of time, unquestionably constitutes irreparable injury to the news media. This is because after a delay, as the result of temporary prior restraint, if the press is going to be allowed to disseminate the documentary, at this moment the press may decide it is not worth to broadcast. Again if the press decides to disseminate, information might be published after it has lost its value. This is because the public will not receive the information at the time when it is entitled. As the result of this, the media becomes without followers. This result, in the long run, is a dangerous chilling effect on the press. Such a forced delay of broadcasting amounts to a direct violation of freedom of the press by court. Therefore, the press must be allowed to publish the news quickly enough.

Most of the time, as already discussed in chapter two, the documentary film or news on high criminal profile is made to the public at large while the case is pending on trial or while it is under police investigation. But it is possible to challenge the dissemination of this documentary before it reaches the targeted audience through rule of prior restraint. But, in relation to this, there is

¹⁸⁴. On this matter there is an international experience. In case of *Near vs Minnesota*, the Supreme Court of U.S. decided that before any type of order of prior restraint was made, the court must examine the effects of the order not its title or character, *Near vs Minnesota*, 283 U.S. 697, 708-09/1931/. Again in case of *Chicago Council of Lawyer vs Bauer*, the Supreme Court of US reflected in its decision the equal footing of, in terms of its effect, temporary order with permanent order that temporary order meets four characteristics of defining prior restraint that: the order restrains the specified expression, it must be obeyed until reversed, the violation of the order may be punished as contempt, the proceeding conducted for its violation do not include all safeguards of a criminal trial, including the fact that the violator cannot argue the constitutionality of the order as a defense for its violation, *Chicago Council of Lawyers vs Bauer*, 522 F.2d 242, 248/1975/.

¹⁸⁵ . *Getacho Asefa vs Walta media*, case, supra note 171, para. 10.

a question whether the application for order of prior restraint is possible to the bench where the case is pending.

Within the context of fair trial, the objective of granting order of restraint by judiciary here is to protect the right of defendant from prejudicial effects of the media. This because some study have shown that the greatest risk of pretrial news coverage is depriving a accused/defendant/ of his constitutional rights by allowing a prejudiced jury to proceed, thereby denying his right to due process and a fair trial¹⁸⁶. A 1997 study polling potential jurors in areas where a large trial was expected revealed that a majority of the jury pool knew the facts of the case prior to a large trial and sided with the prosecution as a result¹⁸⁷. Despite the fact that higher standard of proof(beyond reasonable doubt requirement) in criminal cases is supposed to decrease the margin of error in erroneous convictions, innocent people are convicted for crimes that they did not commit¹⁸⁸. From above empirical research one can conclude that the margin of impartiality of the judge decrease as the judge is exposed to pretrial publicity. This scenario suggest us not to bring the facts of accused that adversely affects due process and fair trail of the accused to the trail/judge where his/her case running under investigation. Therefore, the application for the order of prior restraint should not occur at least to the bench where the main case of the defendant/if the defendant charged or the case commenced/ being entertained. Unfortunately, after the commencement of the charge, if the application of an order of prior restraint carried out to the bench where the main case of the defendant being entertained, in this case, after the case of prior restraint dissolved, the judge expected to with draw herself or himself from the bench so as to avoid prejudicial effect against the defendant.

On this point the approach of federal of high court lideta bench seems to run counter to the objective of prior restraint. In the case of Getacho Asefa noted above, Getacho Asefa and the rest of the defendants applied for prior restraint to the bench where their case was pending¹⁸⁹.

¹⁸⁶ . Matthew Mastromauro, *Pretrial Prejudice 2.0: How YouTube Generated News Coverage Is Set to Complicate the Concepts of Pretrial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights*, 10 J. HIGH TECH. L. 289, 289 (2010) Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 1011.

¹⁸⁷ . Id.

¹⁸⁸ . *In re Winship*, 397 U.S. 358, 364 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)); *DNA Exonerations Nationwide*, INNOCENCE PROJECT (Feb. 19, 2016, 4:46 PM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerationsnationwide> [<https://perma.cc/D24E-DL33>], Ariana Tanoos, shielding the presumption of innocent from pretrial media coverage, at 1011

¹⁸⁹ . *FDRE General Attorney Vs. Juwar Siraj*, *Supra* note 173. Initially, FDRE General Attorney charged Getacho Asefa, the former head of National Intelligence and security service, and other 26 persons with crime of torture and other in human

Following to these application, the court issued temporary restraint¹⁹⁰. These order was given by the same criminal bench and by the same judges at trial who had been responsible for entertaining defendants' pending criminal case who were accused by FDRE General Attorney with crime of torture¹⁹¹. The court did not referred the application of the defendants to other bench so as to safeguard their constitutional right "the right to fair trail". This can be also evidenced from the passage of courts order that:

*"..at this moment while this bench had been entertaining the case of accused by case no. 208040, these defendants as any citizen had a constitutional right to presumed innocent before judgment and this court also obliged to protect these right... and therefore the above mentioned documentary film was highly prejudicial to the case at hand, and this court ordered Walta Tv not to disseminate the documentary"*¹⁹².

A similar trend also witnessed the criminal case Juwar Siraj Mohammed involved. The court did not refer the application of the defendants to other bench so as to safeguard the constitutional right of the defendant "the right to presumed innocent." This evident from the following court's passage:

*"...in addition to the a preliminary objection to the charge of public prosecutor, defendants on this bench complained by written application against FDRE General attorney press conference held in sept.2020 that the statement would endangers the defendants' presumption of innocence and they asked the court to take legal measurement...based upon the application of the defendants ,the bench investigated copy of record of the press conference and the court found that claim was 'unacceptable'— arguing that "the press conference was not accordance of the defendants claim."*¹⁹³

treatment committed against various persons who detained in various detention center. The prosecutor charged these defendants on July 2020. While this case was on pending, Walta aired advertisment of documentary film that would be released in future to the public at large .Following this, on the date the eye witness of the public prosecutor heard against these by High court, these defendants submitted application of order of prior restraint that demand Walta Tv to halt a dissemination these documentary film.

¹⁹⁰ . Ibid.

¹⁹¹ . Ibid, the contents of file no.208040

¹⁹² . Getacho Asefa vs Walta media, case, supra note 171, para. 11.

¹⁹³ . FDRE General Attorney Vs. Juwar Siraj, Supra note 173, Para.13

Accordance the order, as to dissolve the defendants' application, the court had to access the contents to the press conference. The contents of the press conference may with information that might implicate guiltiness of the defendants. As the result of this, right of the defendants might be at stake. Based upon Art.106 of the criminal procedure code¹⁹⁴, both courts should have to refer to the other bench by anticipating the negative consequence might be resulted. But this situation was not occurred on both benches. The court, rather, simultaneously adjudicated the issue of fair trial and the main criminal case on a single bench¹⁹⁵.

As it discussed before, prohibition against sensor is not absolute that it can be imposed exceptionally against press. When the prior restraint is selected by a court as remedy for preserving of the fair trail right of the individual, an order of prior restraint going to be given by court must be clear enough and possible in the way that can effectively protect fair trail of the individual. The prior restraint order that is over broad and vague become unconstitutional and may have chilling effect on both freedom of press and the right to fair trial¹⁹⁶.

Such type of problem was also witnessed in Federal High Court Lideta Branch 1st criminal bench in case of Getacho Asefa and other 26 persons Vs Walta Tv. Following the petition of the accused, this court granted an order of prior restraint which lack clarity to implement it. This vagueness of an order can be evidenced from the following passage of the order that:

“...these accused persons like any person have the constitutional right to presumed innocent before the judgmenthence, their right is expected to be respected by this bench and by any citizen ...therefore, if the above mentioned documentary film has relation with this defendants' case, the court has temporarily ordered Walta not to air this documentary, but if the above

¹⁹⁴ . Criminal procedure of the empire Ethiopia,negarit gazeta,extra ordinary issue no.1.of 1991,at art.1o6.

¹⁹⁵ . In case of FDRE General Attorney Vs. Juwar siraj and other 21 persons,case no.260215,the presiding judge continued ruling of preliminary objection raised by defendants on the charge of the prosecutor after the requiste for prior restraint by defendants is rejected by judge.Similarl, in case of Getacho Asefa vs Walta media communication,case no.208040,the presiding judge continued hearing of the witness the public prosecutor against the defendants after the ruling of order of prior restraint against the documentary granted.

¹⁹⁶ . Kemner v. Monsanto Co., 112 Ill.2d 223 (1986). restraining order prohibiting Monsanto, manufacturer of the chemical dioxin, from any media contact in connection with a case it was defending, was found to be both overbroad and vague, and thus unconstitutional, Cooper v. Rockford Newspapers, Inc., 34 Ill.App.3d 645 (2nd Dist. 1975), An order restraining a newspaper from publishing any editorial regarding a libel suit it was defending was declared invalid on the ground of overbroad.

mentioned documentary has no relation with this defendants' cases, this order doesn't concern the Walt..."¹⁹⁷

The order is not clear cut that its enforcement depends on the personal understanding of the media. If the Walta think that the documentary has relation with the applicants, it may halt the dissemination of the documentary. Again Walta may not respect the order provide that it think the documentary has no relation with the applicants.

¹⁹⁷ . Getacho Asefa vs Walta supranote 171.

CONCLUSION

Prior restraint orders is a remedy sought by the accused when he or she think that her or her right of fair trial going to be threaten by broadcasting of press. Even if such types of remedy is not available in FDRE constitution and in other legislation, in cases of Getacho Asefa involved, courts are witnessed granting this remedy. But, the approach expounded by court so lenient that the accused can obtain this remedy easily. But, court should have been considered that simply whether the greater public interest justifies the broadcasting Walta Tv despite the corresponding prejudice. That enquiry was expected preceded by the determination of whether or not the broadcasting create clear and present danger to outcome of pending court proceedings.

Any publication or comment which undermines the legitimacy of the courts and threatens the constitutional order cannot be in the public interest.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

The major rationale for granting a robust protection for “freedom of expression” is discovering of the ‘truth’ through free discussion, bringing ‘democratic self-governance’ and ‘self-fulfillment’. These are the major underlying values or importance or interest of freedom of expression. In line with the above theoretical justification, the 1995 FDRE Constitution recognized freedom of expression as one of fundamental rights. According to Art.29 (1-5) of the FDRE Constitution any person including media has the right to freedom of expression without any interference. This right includes freedom to receive information, including public interest and impart this information and ideas of all kinds, regardless of frontiers. But sub.Art.6 of the same provision provides that legal limitations can be imposed against freedom of expression in order to protect the well-being of the youth, and the honor and reputation of individuals. Thus, media’s duty is examined from these perspectives.

Interest in crime news or Documentary is usually high and attracts public interest, especially if it concerns famous persons or the crime is of a particularly shocking nature. At the heart of freedom of expression lies the right of every citizen to receive and impart information and to debate openly and frankly matters which are of public concern, including matters before the courts. The legitimacy of the courts also depends on media reportage and public scrutiny of judicial matters which such reportage stimulates. Again media coverage of pending criminal matters enables the public at large to engage in criminal prevention activities. From this perspective such type media coverage of pending criminal news falls under the scope of freedom of expression which is enshrined under Art.29 of FDRE Constitution.

Trial by media constructs the perception of guilt of an individual within the mind of the public by disseminating prejudicial materials. Such types of pretrial publicity have little merit as they serve none of the underlying values of freedom of expression. Instead they threaten the honor and reputation of an individual. Therefore, such types of criminal reports by media are out of the scope of Freedom of expression as prescribed under Art. 29 (6) of FDRE Constitution.

The” right to a fair trial” is one of the essential and fundamental rights which prescribed under chapter three of FDRE Constitution. The values underlying these are dignity, liberty and equality. The right to a fair trial of the accused extends from the commencement or inception of criminal investigation up to final decision rendered by Court. Along this proceeding, any action which infringes the underlying values of the right to fair trial renders a trial unfair.

Under FDRE Constitution it obvious that trial by media will prejudice the fair trial rights of accused persons and the administration of justice. Broadcasting high criminal profile which contain information, such as interview of witness, confessions of the accused, and police finding obtained as the result of criminal investigation adversely affects a fair trial right of the accused or affect judicial integrity. This because, such media coverage infringes the presumption of innocence, frustrates the right to be tried in open court, and interferes with the independence and the impartiality of presiding judge. Here, therefore, there might be a real possibility that an accused may be convicted despite the existence of reasonable doubt. Hence, Publicity which contain interview of witness, confessions of the accused not meant to educate or inform the public on matters before court. Instead, it is publicity that negligently publicized or motivated by a other interests, irrespective of the way it affects the dignity and liberty of an individual.

Under FDRE constitution, trial by media is not under the ambit of the right of freedom of expression and the right to fair trial. But, the fair trial right or/and judicial integrity is not expressly stated as legitimate ground restricting freedom of press. Both freedom of the press and the right to fair trial are the basic essence for democracy that the former maintains an informed public and the latter protects the rights of the accused. The extensive use of the freedom of press may result in the violation of the right of fair trial of the defendant and judicial integrity. In this case it is the task of a court to reconcile when one constitutional right themselves have the potentially limiting enjoyment of another and vice versa. Such types of courts obligation inferred from Art.19 (2),19(5),20(3),29(3),29(4), 29/6/ and 78 of the constitution. This to mean that constitution anticipated to underscores the Medias’ role if its activities are a threat to these constitutional provisions.

Ethiopia ratified International Covenants on Civil and Political Right (ICCPR) on June 11 193, Art.19 of ICCPR which talks about freedom of expression also the parts of Art.29 of FDRE constitution. Therefore, under FDRE constitution freedom of expression is a fundamental right

and the restriction imposed upon it must be interpreted in line with international human right instrument ratified by Ethiopia (Art.13 and Art.9 of FDRE constitution). Again, the meaning and extent of the right to freedom of expression in international law which Ethiopia ratified should be comprehended with reference to the Madrid Principles on the Relationship between the Media and Judicial Independence. Section one and two of the Madrid Principles provides that” comment on the administration of justice shall not be subject to any special restrictions.” But exceptionally, this document prohibit the comment of that seriously prejudice defendant right.

Prior restraint is one way of courts limiting of freedom of expression in general and freedom of press in particular in advance before it reaches a targeted audience for the reason of protecting fair trial or judicial integrity. Art.29 (3) of FDRE constitution prohibits censorship of press. The primary purpose of this provision to protect the press against the imposition of prior restraint. But this prohibition is not absolute that the prior restraint may be imposed against the press in exceptional circumstance as prescribed under Art.29 (6) of the FDRE constitution. This limitation can be imposed against freedom of press if the dissemination of a documentary affects the right of the accused or affects judicial integrity. But the approach of justifying of limitation of freedom of expression for the reason of protecting fair trial right of defendant is not prescribed under FDRE constitution and under subsequent legislation.

Despite the none availability procedure for granting prior restraint remedies, the court in Ethiopia usually held liable Medias for their adverse, biased and irresponsible criminal pre-trial reporting. The courts have shown a tendency to protect the judicial process, the administration of justice and the fair trial rights of accused persons despite the such ruling was given arbitrarily.

In cases involved Getacho Asefa,Federal High Court witnessed ordering prior restraint arbitrarily. In the case of Getacho Asefa vs Walta Television, Getacho Asefa and the following 25 accused applied for prior restraint preventing Walta Television from broad casting documentary dealing with gross human right violation committed by these accused persons after the trial commenced. The Court ordered temporary injunction against Walt TV. But, the approach of justifying limitation the dissemination of Walt’s documentary film is not mentioned out. The court did not mentioned out the approach of balancing of right of Fair trail the defendant and freedom of press. Again the court did not compare the interest of fair trial right of the accused with the interest raised from broad casting of the documentary film by Walta. Again court did

not inquired whether the documentary film could cause a real danger to the fair trial of the defendants. This to mean that proximity and the remoteness of the documentary film were not inquired.

Again, in cases involved Getacho Asefa and Juwar Mohammad Siraj, even if Court was with a tendency to protect judicial process, the end result of the prior restraint analysis in were to leave the door open for abuse of the system by allowing courts to tell the media that it cannot publish information about events of public concern. This because court were witnessed issuing a quick temporary. These injection or temporary prior restraint ordered relaying a mere allegation or petitions of the defendants. The petitions were not substantiated by evidence. The court should have protected the freedom of expression enshrined under art.29 of FDRE constitution until the party seeking the injunction could meet the heavy burden to defeat the presumption of invalidity of the injunction. What was expected by court that to avoid the petition by creating the standard in the first place. This because, allowing litigation by courts to issue prior restraints with lenient standard could create the possibility of restraint proceedings collateral to every criminal case before the courts, which would create a significant financial drain on the media involuntarily made parties to these proceedings.¹⁹⁸ Ultimately, there would be a chilling effect because media organizations would begin to fear the risks of broadcasting¹⁹⁹. Again, this, lenient standard could have the potential of increasing the number of litigation for prior restraint orders.

Furthermore, the approach employed in cases of Getacho Asefa and other 26 persons and Juwar Mohammad Siraj and other 21 persons by Federal High Court Lideta branch, could lead to judges becoming prepublication censor roles. For instance, Federal High court banned publication of the documentary and ordered the Walta Tv. and the General Attorney to produce CD thinking that it was necessary to examine the contents of the CD so as to issue permanent order.

Again, in cases of Getacho and Juwar involved, applicants or the defendants witnessed instituting their application for order of prior restraint to the bench where their criminal case is pending. The courts did not refer the case to other bench so as to save fair trial right of the accused. This approach seems to run counter to the objective of prior restraint. The objective of granting order

¹⁹⁸ . Nebraska Press, 427 U.S. at 600-02 (Brennan, J., concurring), page 284.

¹⁹⁹ .Ibid.

of restraint by judiciary here is to protect the right of defendant from prejudicial effects of the media. Prior restraint is issued by court to avoid the exposure the judge to prejudicial information.

Adverse trial publicity or trial by media is prejudicial to the administration of justice and to the fair trial rights of accused persons²⁰⁰. Any publication or comment which undermines the legitimacy of the courts and threatens the constitutional order cannot be in the public interest. Prior restraint orders can stop such prejudice at its inception.

5.2. RECCOMNDATION

As it witnessed from practical cases where Getacho Asefa and Juwar Mohamad Siraj involved, there is no real need balancing freedom of press with fair trial right by Federal Courts. The approach which leads the court to order prior restraint is not mentioned out. The decisions were rendered arbitrarily. Therefore, to alleviate this problem;

1. An absolute rule that justify the use of prior restraints against media must be formulated. The contents of the rule that allow prior restraints must be with a ‘clear inquiry or ‘yardstick’ that enables courts to justify limitation of broadcasting of information by media. Accordingly, this rule must be the rule halt the dissemination of information by media if the information is with a ‘clear and ‘imminent danger’ to the right to fair trial of the accused and administration of justice. But this rule must take in to consideration a condition in which publication or dissemination of information going to be justified if the information is with greater public interest despite the corresponding prejudice. But in any case the rule is not expected justify any publication or dissemination of information which undermines the legitimacy of the courts and threatens the FDRE constitutional order. This because judicial integrity is essential for proper implementation of other fundamental constitutional right.

Again as I discussed under chapter four of this writing, in the case Juwar involved, the Court witnessed in ordering a quick temporary prior restraint against Walt Tv by only reason of defendant’s petition. The defendant’s petition was not substantiated by evidence. This may cause

²⁰⁰ . See Chapters Two and Three

the increasing trend of a high number of groundless cases of prior restraint to the court. Therefore, to alleviate this problem;

2. Having of an absolute rule that obliges the petitioner to substantiate his or her claim by evidence is very important. This because this rule has the function of, first, rule would eliminate much groundless litigation. Second, rule would also eliminate the risk of a chilling effect and delays in the publication of the information.

The other problem in case Getacho Asefa involved was that court witnessed issuing unconstitutional temporary restraining orders to examine the petition of the defendants. But, the temporary order has an immediate suppression effect on the dissemination of ideas and thus operates as a prior restraint. This temporary order prevents all speech until the court determines whether or not the information should be banned. The temporary orders also issued for indefinite period until the final order granted by courts. Moreover, the news value of the information may be lost while the restraining order is in place, as it may take several days for a court to make a ruling and for the appeals process. This situation may result in chilling effect on freedom of expression. Therefore, to solve this problem;

3. An absolute rule that hinder the courts from using temporary prior restraint must be formulated. The creation of an absolute rule is also valid because. It reduces delays in, or loss of, the publication or dissemination of information of public interest.

The other problem I discussed in the cases of Juwar Mohammad Siraj and Getach Asefa Involved was that there is a tendency by courts ordering to produce information or copy of the CD the examine or review the contents of the information. But such types of measure taken by court amount to allowing the courts to the role of making editorial decisions or amount to close to an institutionalized system of censorship, which is, at the very least, contrary to art 29 of the FDRE constitution. Therefore to solve this problem the writer suggests having:

4. The rule that demand the court not involving in reviewing the contents of the information unless exceptional circumstance exist. The exceptional circumstance may allow the court to review the contents of the information if the petitioner or the defendant proved his or her petition beyond reasonable doubt.

Apart to the above recommendation, as I discussed in chapter two, in various jurisdiction like US, and South Africa, there is similar a legal rules gap in relation issues to balancing freedom of press and fair trial. But this legal gap covered by courts jurisprudence. Therefore, I also suggest our judicial courts to follow a similar trend so as to fill the existing gap.

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