

The Disparity of Ethiopia's Hate Speech and Disinformation Prevention and Suppression Proclamation in Light of International Human Rights Standards

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Abstract

The right to freedom of expression protects information regardless of the medium employed for dissemination. It has recognized under the FDRE constitution and various human right instruments, as a qualified right. While states are required to enact laws restricting freedom of expression in the interest of prohibiting advocacy to hatred, the law must be clear, certain and published in accessible manner. Nowadays, it is apparent that technologically advanced means of communications given rise to the speedy dissemination of hate speech and disinformation that threatens the political and social fabric of the society in Ethiopia and many other countries. To curb the imminent risk of violence, hostility and discrimination that arises from hate speech, Ethiopia has adopted hate speech and disinformation laws. However, certain parts of this newly enacted proclamation do not meet international standards in restricting the right to freedom of expression. The proclamation-exhibited ambiguity in the definitional part and contain provisions lacking adequate clarity and specificity as well as overly broadened stipulations.

laws.

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1. Introduction

The right to freedom of expression protects information regardless of the medium employed for dissemination including internet based communications.¹ Under the FDRE Constitution and various human right instruments, the right to freedom of expression is a qualified right with the fulfillment of the three part tests: legality, legitimate purpose as well as necessity and proportionality requirements.² Among others, the right to freedom of expression may be restricted in the prevention of advocacy to hatred, which is strictly prohibited in the human rights law themselves.³ Hate speech or incitement to hatred is strictly prohibited under the international covenant on civil and political rights (ICCPR) article 20(2) and other international laws.⁴ Such prohibition is based on the fact that advocacy to hatred will pose a real risk of discrimination, hostility and violence as well as other grave crimes such as genocide and crime against humanity especially whenever they are made against a national, racial or religious groups.⁵

While the imposition of limitation on the exercise of freedom of expression to curb advocacy to hatred has no doubt, laws limiting the right to freedom of

¹ *Autronic AG v. Switzerland*, 22 May 1990; *Gaskin v. the United Kingdom*, 7 July 1989; *Leander v. Sweden*, 26 March 1987; *Társaság a Szabadságjogokért v. Hungary*, 14 April 2009, paragraph 35.

² *Article 19, Freedom of Expression Unfiltered: How blocking and filtering affect free speech* (2016) < <https://www.article19.org/resources/freedom-of-expression-unfiltered-how-blocking-and-filtering-affect-freespeech/> > accessed on 12 December 2019; *Konaté v Burkina Faso*, application no. 004/2013 (African court of human rights, 2013) para 35; *Media Rights Agenda v Nigeria*, Communication no. 105/93, 128/94, 130/94 and 152/9 (African Commission, 1998) para 68; *Understanding the right to freedom of expression* (2015) an international law primer for journalists, international human right program, pp 30.

³ *Handyside v. the United Kingdom*, 7 December 1976, paragraph 49; 5 Dominic McGoldrick and Thérèse O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', (1998) 18 *Legal Studies*, p. 454.

⁴ "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

⁵ General Comment 11, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (29 July 1983) (General Comment 11); Stephanie Farrior, 'Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech', (1996) 14.1, *Berkeley Journal of International Law* pp 4; Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing; Religion and Human Rights* 5 (2010) 171–190, pp. 8.

expression must comply the strict requirements of article 19 paragraph 3⁶ of the ICCPR and be in light of the aims and objectives of the Covenant.⁷ States are required to draft laws entailing restriction clearly, precisely and publish them in an accessible manner. Having this in mind it is necessary to reiterate the FDRE constitution requiring human rights and fundamental freedoms to be interpreted pursuant to international human right instruments such as the ICCPR. Nowadays, it is apparent that technological advanced means of communication given rise to the speedy dissemination of hate speech and disinformation that threatens the political and social fabric of communities in Ethiopia and many other countries. To curb such imminent risk of violence, hostility and discrimination that is arising from hate speech, Ethiopia has come up with hate speech and disinformation laws.

However, there are concerns that certain parts of the newly enacted law do not meet international standards. So far, in Ethiopia one official case has been brought to the federal courts based on the newly enacted law.⁸

Thus this article converses Ethiopia's newly enacted hate speech and disinformation proclamation no. 1185/2020 in light of the standards adopted under international laws concerning limitations that may be imposed in the exercise of the right to freedom of expression. In addressing these points the study will have two sections. The first section rely on discussing various international human right laws on freedom of expression to appreciate the standard that are required to meet

⁶ The FDRE constitution under art 13(2) dictates interpretation of chapter three of the constitution in light of human right conventions Ethiopia is a state party. Among others Ethiopia is a state party to the ICCPR. So while interpreting the right to freedom of expression and restriction by law we need to attract the attention of international human right laws and jurisprudence.

⁷ See *Toonen v. Australia*, communication no. 488/1992, (HRC GC. 30 March 1994); *General Comment 34* (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34'), para. 26.

⁸ *Public prosecutor vs. Yaysew Shimles*, (federal first instance court, 2020), criminal file no. file 213101. This case is the first allegation that has submitted to the court of law based on the newly enacted hate speech and disinformation proclamation no. 1185/2020.

before restricting the right. The second section devotes in analyzing the hate speech and disinformation proclamation in light of international standards and jurisprudences discussed in section one.

2. Hate speech and a limitation by law

The freedom of expression under Article 19 of the ICCPR is not absolute,⁹ and can cedeto a state's duty to protect society from speech that incites discrimination, hostility or violence.¹⁰ Thus states are required to denounce the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence through its domestic laws.¹¹ The rationale is clear under article 5 of the covenant itself. No one may engage in an activity aimed at limiting or destroying the right of others contrary to what is provided on the covenant.¹²

⁹ See Art 19(3) ICCPR; *Shchetko v Belarus*, UN Doc CCPR/C/87/D/1009/2001 (HRC, 8 August 2006) para 7.3; UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*', UN Doc A/66/290, (10 August 2011) (hereinafter, '*UNHRC August 2011 Freedom of Expression Report*') para 15; UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*' (11 May 2016) UN Doc A/HRC/32/38 para 7; HRC, '*Views adopted by the Committee under Article 5 (4) of the Optional Protocol*' (29 November 2018) UN Doc CCPR/C/124/D/2441/2014 para 13.3; HRC, '*Views adopted by the Committee under Article 5 (4) of the Optional Protocol*', UN Doc CCPR/C/124/D/2260/2013 (13 December 2018), para 6.3.

¹⁰ Art 20(2) ICCPR; UN Economic and Social Council, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*', UN Doc E/CN4/2002/75, (30 January 2002), para 64; UNHRC, '*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*', UN Doc A/HRC/17/27, (16 May 2011), (hereinafter, '*Special Rapporteur May 2011 Freedom of Expression Report*') para 25; UNHRC August 2011 Freedom of Expression Report, para 26; UNHRC, '*Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*', UN Doc A/HRC/22/17/Add 4, (11 January 2013), (hereinafter, '*UNHRC Rabat Plan of Action*') para 14; UNGA, '*Promotion and Protection of the Right to Freedom of Opinion and Expression*', UN Doc A/74/486, (9 October 2019), para 8; IACHR, '*Freedom of Expression and the Internet*' CIDH/RELE/IN F11/13, (2013), para 135.

¹¹ UNGA, *Report of the Special Rapporteur on freedom of religion or belief*, (23 December 2015), p. 15; UN OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, UNGA Human Rights Council, 14th Sess, A/HRC/14/23, (20 April 2010), para 79(h); UN OHCHR, towards an interpretation of article 20 of the ICCPR: thresholds for the prohibition of incitement to hatred (February 8-9, 2010).

¹² Stephanie Farrior, '*Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech*', (1996) 14.1 Berkeley Journal of International Law pp 4; Nazila Ghanea, *Expression and Hate Speech in the ICCPR: Compatible or Clashing; Religion and Human Rights* 5 (2010) 171–190, p. 8.

Therefore, if freedom of expression serves as a tool to offend or restrict the right of others, it should be liable to restrictions.¹³ The ICCPR under article 20(2) imposes the state party the obligation to prohibit any kind of advocacy to hatred based on a certain status that constitutes incitement to discrimination, hostility or violence. According to the Human Rights Committee (HRC) article 20(2) is compatible with Article 19.¹⁴ While this freedom is not absolute,¹⁵ its significance for society's progress mandates that any interference with this freedom should only be imposed in exceptional circumstances and must be convincingly established.¹⁶ Consequently, interference may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary and proportional.¹⁷ These three requirements have been applied so many times by the United Nation Human Right Committee (UNHRC),¹⁸ African human right commission,¹⁹ the European Court of Human Rights (ECtHR)²⁰ and the Inter-American Court of Human Rights (IACtHR).²¹

¹³ Stephene Farrior, *Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech*, supra note 6, p. 5.

¹⁴ HRC, *General Comment 11*, Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (29 July 1983) (General Comment 11).

¹⁵ See article 29 of the FDRE constitution, art 19(3) UDHR; art 10(2) ECHR; art 13(2) ACHR; art 10(2) ACHPR.

¹⁶ UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'* (28 February 2008) UN Doc A/HRC/7/14 ('UNHRC February 2008 Report') para 49; *'General Comment 34'* supra note 10, para 21

¹⁷ ICCPR art 19(3); Art 10(2) ECHR; *Vörður Ólafsson v Iceland*, App no 20161/06, (ECtHR, 27 April 2010) ('*Vörður*') para 51; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection*

of the Right to Freedom of Opinion and Expression', UN Doc A/HRC/23/40 ('UNHRC April 2013 Report'), (17 April 2013), paras 28–29.

¹⁸ *Womah Mukong v Cameroon*, UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; *Sohn v Republic of Korea*, UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; *Malcolm Ross v Canada*, UN Doc CCPR/C/70/D/736/1997 (HRC, 26 October 2000) ('*Malcolm Ross*') para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC, *'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression'*, UN Doc A/66/290, (10 August 2011), 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and

2.1. Existence of the law

Human right laws are inviting a room to enact laws restricting the right to freedom of expression. Most of these laws are arising out of criminal laws in due course of safeguarding the right of others. Criminal law is not only created by legislations but also prohibitions must be drafted in 'clear, certain and unambiguous language'.²² Within the wisdom of human right laws, a person should not be charged with or convicted of a criminal offence and his right restricted to an act that he did not and could not have known existed at the time when he allegedly committed it. This is construed as the "certainty principle".²³ There may be various indications to uncertainty of the criminal law. For instance, where an offence has been created (or altered) retrospectively the criminal law is considered to be uncertain.²⁴ Where a law has not been publicized, when it refers to irrelevant laws, or when it is difficult to ascertain with certainty what are/is the elements of a particular offence, then the criminal law is uncertain.²⁵ In international conventions containing a legality

Expression', UN Doc A/HRC/23/40 ('UNHRC April 2013 Report'), (17 April 2013), para 15; General Comment 34 para 35.

¹⁹ ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa', ACHPR/Res 62(XXXII)02, (2002), principle II; *Interights v Mauritania*, AHRLR 87 Comm no 242/2001 (ACommHPR, 2004), paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in wAfrica v Zimbabwe*, AHRLR 268 Comm no 294/04 (ACommHPR, 2009), para 80.

²⁰ *Handyside v UK*, App no 5393/72 (ECtHR, 7 December 1976) ('Handyside') para 49; *Sunday Times v UK*, (No 1) App no 6538/74 (ECtHR, 26 April 1979), para 45; *Ceylan v Turkey*, App no 23556/94 (ECtHR, 8 July 1999) ('Ceylan') para 24; *Murat Vural v Turkey*, App no 9540/07 (ECtHR, 21 January 2015), para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) ('Perinçek') para 124.

²¹ *Francisco Martorell v Chile*, (IACtHR, 3 May 1996), para 55; *Herrera-Ulloa v Costa Rica*, Preliminary

Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120; IACHR, 'Inter-American Legal Framework Regarding the Right to Freedom of Expression' OEA/SER L/V/II CIDH/RELE/INF 2/09 ('Inter-American Legal Framework') 24; IACHR, 'Freedom of Expression and the Internet', OEA/SER L/II CIDH/RELE/INF 11/13 ('IACHR December 2013 Report') 26–29.

²² Glory Nirmala K. Ato Serkaddis Zegeyem criminal law I teaching material 2009, pp 60.

²³ Fran Wright, *certainty and ascertianity of criminal law after the Pitcairn trail*, 39 Victoria U. Wellington l. rev. 659 2008-2009.

²⁴ *Ibid.*

²⁵ *Ibid.*

provision, certainty is generally considered as a natural component of the legality principle.²⁶ Certainty principle is inherent in article 15 of the ICCPR.²⁷

The law should specify in detail the precise circumstances in which any interference may be permitted²⁸, This foreseeability allows citizens to know when their actions will constitute an offence and enables them ‘to regulate [their] conduct’.²⁹ Law prescribes a prosecution under a statute if the relevant statute is sufficiently precise.³⁰ Laws drafted in imprecise terms are vulnerable to arbitrary application by state authorities,³¹ thereby impeding individuals from being able to reasonably foresee liability.³² A restriction of the right to freedom of expression

²⁶ *kokkinakis v. greece*, application no. 14307/88, ECtHR 25 May 1993, para. 52; *Cantoni v France [judgment]* ECtHR app 43522/98 reports 1996-v Para. 35.

²⁷ Article 15(1) provides: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed... see also Fran Wright, certainty and ascertainment of the criminal law after pitcairn trail, (2008) pp. 661).

²⁸ HRC, ‘General Comment 16’, UN Doc CCPR/C/21/Rev 1 (‘General Comment 16’), (19 May 1989), para10.

²⁹ *The Sunday Times v United Kingdom*, app no 6538/74 (ECtHR, 26 April 1979), Para 49.

³⁰ *Sunday Times*, para 49; *Muller v Switzerland*, App no 10737/84 (ECtHR, 24 May 1988), para 29; *Kokkinakis v Greece*, App no 14307/88 (ECtHR, 25 May 1993), para 40; *Wingrove v UK*, App no 17419/90 (ECtHR, 25 November 1996), para 40; *Lindon, Otchakovsky-Laurens and July v France*, App no 21275/02 (ECtHR, 22 October 2007), para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine*, App no 33014/05 (ECtHR, 5 August 2011), para 52; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘*Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR*’, UN Doc E/CN 4/1984/4, (1984) (hereinafter, ‘Siracusa Principles’) principle 17; HRC, ‘General Comment 16’ (19 May 1989) UN Doc CCPR/C/21/Rev 1 (‘General Comment 16’) para 3; *General Comment 34*, paras 24–25.

³¹ ‘UNHRC, ‘*Rabat Plan of Action*’; UNHRC, ‘*Report of the Special Rapporteur on Freedom of Religion or Belief*’, UN Doc A/HRC/28/66/Add.1, (23 December 2014), para 49; UNHRC, ‘*Report on Best Practices and Lessons Learned on How Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism*’, UN Doc A/HRC/33/29, (21 July 2016), para 21; UNHRC, ‘*Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*’, UN Doc A/71/373 (‘UNHRC September 2016 Report’), para 13.

³² *Altuğ Taner Akçam v Turkey*, App no 27520/07 (ECtHR, 25 October 2011) para 95; European Commission for Democracy Through Law of the Council of Europe, ‘*Opinion on the Federal Law*

through the criminal law which is vague, ambiguous, overly broad, open ended or difficult to understand by the subjects tantamount to an arbitrary intrusion of the right susceptible to violation. Hence, certainty, preciseness/clarity of the criminal law is an essential ingredient of the principle of legality.

2.2.The existence of pressing need

State imposing restriction on freedom of expression is contrary to article 19(3) if it fails to reveal the existence of pressing need and is not otherwise averted less costly.³³ State party to the covenant invoking a legitimate ground for restriction of freedom of expression, requires demonstrating in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, specifically by establishing a direct and immediate connection between the expression and the threat it triggers.³⁴ It requires the national authorities to give convincing reason for their decision to restrict freedom of expression.³⁵ The list of purposes to restrict freedom of expression is the same under various international treaties including article 19 (3) of the ICCPR and are exhaustive.³⁶ According to the ECtHR, restriction must be narrowly interpreted and the necessity for any restrictions must be convincingly established.³⁷ The UN Special Rapporteur (UNSR) notes the principle that “restriction on expression via

on Combating Extremist Activity of the Russian Federation’ (Council of Europe, 20 June 2012) <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e)> accessed 21 January 2020, paras 70, 74; UNHRC, ‘Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’, UN Doc A/HRC/28/28, (19 December 2014), para 48.

³³ *Zana v Turkey*, Application No. 18954/91 (ECHR, 25 November 1997) para 51; *Lingens v Austria*, application No 9815/82 (ECHR, 8 July 1986) para 39-40.

³⁴ *Shin v. Republic of Korea*, communication no. 926/2000 (HRC GC, 2000); *Thorgeirson v Iceland*, application No. 13778/88, (ECHR, 1992) para 63.

³⁵ *Fatullayev v. Azerbaijan*, application no. 40984/07 (ECHR, 22 April 2010).

³⁶ *Prohibiting incitement to discrimination, hostility or violence*, policy brief, (December 2012), pp 26.

³⁷ *Thorgeirson v Iceland*, No. 13778/88, (ECHR 1992) para 63.

the internet must be exceptional and in a limited circumstance for the protection of others right justified under international law.³⁸

Expressions via internet can be limited exceptionally and in accordance with the procedure set under international law for the protection of others rights.³⁹ Online platforms such as instant messaging and broadcasting applications have enabled the instantaneous and widespread dissemination of harmful content, rendering this duty increasingly onerous.⁴⁰ It has been even applying publications that “offend, shock or disturb” in the interest of freedom of expression.⁴¹ HRC emphasize prohibitions enacted in the name of article 20 (2) against advocacy to hatred must comply “with the strict requirements of “purpose” under article 19 paragraph 3.⁴² In the nonexistence of a direct and immediate threat against a group, even extreme views on a matter of serious public interest including the practice Church or mosque do not constitute incitement under article 20 of ICCPR.⁴³

A state invoking a restriction on freedom of expression on the basis of advocacy to hatred through article 20 (2) of the ICCPR must demonstrate the expression is intended to incite violence and the degree as well as its level of intensity against a

³⁸ UNGA ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ supra note 5.

³⁹ *Ibid.*

⁴⁰ UNHRC Rabat Plan of Action’; Kurt Wagner, ‘WhatsApp Is At Risk in India So Are Free Speech and Encryption’ (19 February 2019) <<https://www.vox.com/2019/2/19/18224084/india-intermediary-guidelineslaws-free-speech-encryption-whatsapp>> accessed 6 November 2019; Zachary Laub, ‘Hate Speech On Social Media: Global Comparisons’ Council on Foreign Relations (7 June 2019) <<https://www.cfr.org/background/hate-speech-social-media-global-comparisons>> accessed 6 November 2019; Bloomberg, ‘Mob Lynchings: WhatsApp At Risk of Being Labelled Abettor’ (19 June 2018) <<https://www.bloombergquint.com/law-and-policy/mob-lynchings-whatsapp-at-risk-of-being-labelledabettor#gs.0mf5kq>> accessed 6 November 2019.

⁴¹ See UNHRC, ‘Rabat Plan of Action, supra note 4, para. 17.

⁴² *General Comment 34* supra 1, para 48.

⁴³ UN Office of the High Commissioner for Human Rights, *Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred*, (Vienna, February 8-9, 2010).

certain group.⁴⁴ 'Advocacy' is to be understood as intentional act of promoting hatred publicly towards the target group while 'incitement' is a statement about national, racial or religious groups, which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁴⁵ Article 19 rejects the approach of negligent incitement/advocacy because it does not meet article 20's wording or its principles.⁴⁶ Advocacy requires the advocator to specify the target group and did the victim group suffered from any recent violence as a result.⁴⁷ Advocacy is present when there is a direct call for the audience to act in a certain way (violence, hostility or discrimination).⁴⁸

The jurisprudence of ECtHR is likely to grant the State a wide margin of appreciation in determining the legitimacy of restrictions of expression relating to religious nature.⁴⁹ Similarly article 20 of the ICCPR gives the national court the power to draw between freedom of expression and possible triggering of advocacy to violence, discrimination and hatred.⁵⁰ Within the jurisprudence of an advocacy for hatred, analysis of 'the content of the opinions expressed' its impact on the audience and the public nature of the expression as well as the extent and repetition of the communication are paramount to determine hatred in the expression.⁵¹ The original intention of the statement including whether it was intended to spread

⁴⁴ See *Karatas v Turkey*, App no 23168/94 (ECtHR, 8 July 1999) [53]; See *Athukoral v AG*, 5 May 1997, SD nos 1-15/97, (Supreme Court of Sri Lanka); *Secretary of State for the Home Department v Rehman*, UKHL 47 (United Kingdom House of Lords), (2001); Council of Europe Convention on the Prevention of Terrorism (entered into force 1 June 2007) ETS no 196 art 5(1); Council Framework Decision 2008/919/JHA' (COE, 2008); IACtHR 'Annual Report of the Inter-American Commission on Human Rights 1994' (17 February 1995).

⁴⁵ ARTICLE 19, *Camden principle on freedom of expression and equality*, (April 2009), para 12.

⁴⁶ *Towards an interpretation of article 20 of the ICCPR*, supra note 37.

⁴⁷ See Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, (2006).

⁴⁸ Prohibiting incitement to discrimination, hostility or violence, supra note 30.

⁴⁹ *Gündüz v Turkey*, application no. 35071 (ECtHR, 1997), para 37.

⁵⁰ Prohibiting incitement to discrimination, hostility or violence, supra 30, p 28.

⁵¹ *Jersild v Denmark* application no 15890/89 (ECtHR, 22 August 1994); Stephanie Farrior, 'Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech', (1996) 14.1 *Berkeley Journal of International Law*, p. 66.

racist or intolerant ideas with hate speech are also paramount,⁵² though not expressly envisaged under article 20 of the ICCPR. The tone of the speech and circumstances in which it was disseminated are also relevant.⁵³ Moreover, a statement made during live programming carry greater evidence of advocacy to hatred.⁵⁴ In addition, the scale and repetition of the communication plays a decisive role to determine the existence of intent. Likewise the existence of historical pattern of violence among the competing group may also be taken as a manifestation to show promotion of hatred within the speech.⁵⁵ The level of the speaker's authority or influence over the audience is relevant as is the degree to which the audience is already primed or conditioned, to take their lead from the inciter.⁵⁶ In addition, the content and context of the expression including the style and degree of provocation likelihood of its imminence are necessary parameters to determine the existence of advocacy to religious hatred.⁵⁷

2.3.Proportionality

Proportionality element requires states to make a fair balance between the aim and measure to be taken and the right to be violated and adopt the least restrictive one.⁵⁸ Imprisonment is inappropriate for the expression of opinion unless such

⁵² ARTICLE 19, prohibiting Incitement to Discrimination, Hostility or Violence, policy brief, (December 2012), p. 22; UN OHCHR, *towards an interpretation of article 20*, supra note 37.

⁵³ Ibid.

⁵⁴ *Gündüz v Turkey*, supra note 43, para 49.

⁵⁵ *Nazila Ghanea*, supra note 6.

⁵⁶ *Rabat plan*, supra note 4; UN OHCHR, *Towards an interpretation of article 20 of the ICCPR*, supra 37.

⁵⁷ ARTICLE 19. Supra note 39.

⁵⁸ UNHRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, UN Doc A/HRC/13/37, (28 December 2009), para 17.

expression amount to an incitement to discrimination, hostility, or violence.⁵⁹ Even then, criminal imprisonment is still only reserved for the most severe cases of incitement.⁶⁰ Nevertheless, when a statement incite to violence against an individual or a sector of the population, the State authorities enjoy a wider margin of appreciation of interference with freedom of expression including the imposition of criminal responsibility.⁶¹ The state as it has the obligation to respect freedom of expression, equally imposed to protect others rights and remedied whenever the right is violated.⁶² The ECtHR stressed the fact that the amount of imprisonment is sever does not make it disproportionate with the aim pursued when freedom of expression is incompatible with the notion of tolerance and the fundamental values of justice and peace set forth in the preamble of the Convention.⁶³ A restriction is proportionate if it goes no further than necessary to achieve the legitimate aim.⁶⁴ In assessing proportionality, the nature and severity of the punishment must be considered with the aim achieved.

Hence, it is concluded that the validity of restriction imposed based on a national law in the enjoyment of freedom of expression would be assessed based on the

⁵⁹ *Marques de Morais v Angola*, UN Doc CCPR/C/83/D/1128/2002, (HRC, 18 April 2005), para 6.8; *Adonis v Philippines*, UN Doc CCPR/C/103/D/1815/2008/Rev 1, (HRC, 26 April 2012), para 7.7; UNESCO, *World Trends in Freedom of Expression and Media Development: Special Digital Focus* (UNESCO Publishing, 2015) 164; David Kaye, 'Jailing Teen Blogger in Singapore Sends Wrong Message on Free Expression' (UN News Centre, 4 October 2016) <www.un.org/apps/news/story.asp?NewsID=55207#.WF1KaVN97IU> accessed 21 November 2019; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 September 2011) paras 58– 60; *Belpietro v Italy* App no 43612/10 (ECtHR, 24 September 2013) paras 61–62. See also *Lohé Issa Konaté v The Republic of Burkina Faso* application no 004/2013 (ACHPR, 5 December 2014), para 167.

⁶⁰ *Lehideux and Isorni v France* application no. 24662/94, (ECtHR, 23 September 1998) para 57; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 ('UNHRC May 2011 Report') para 36; Law Commission of Canada, *What is a Crime? Defining Criminal Conduct in Contemporary Society* (UBC Press, 2014).

⁶¹ *Sürek v. Turkey*, application no. 26682/95 (ECtHR, 1999) § 62, ECHR 1999-IV.

⁶² See ICCPR article 2(3), 5 and 18 (2).

⁶³ *Gündüz v. Turkey*, supra note 43.

⁶⁴ *Siracusa Principles on the Limitation and Derogation*, para 11; *General Comment 34*, supra note 1, para 34.

above standards; existence of the law, existence of pressing need as well as necessity and proportionality.

3. Proc. No. 1185/2020 eroding international human rights standards

As it is clearly provided under article 13(2) of the FDRE constitution, its stipulations concerning human rights and fundamental freedom shall be interpreted in light of relevant international standards. Among others Ethiopia is a state party to the international covenant on civil and political rights as well as the African charter on human and people's rights. Accordingly, in imposing restriction against the right to freedom of expression it requires to give due attention to the jurisprudence of interpretations adopted by a treaty monitoring bodies such as the human right committee. As we can note from the preamble of the proclamation the very essence of enacting the proclamation is "...to prevent and suppress by law the deliberate dissemination of hate speech and disinformation". Besides this, the proclamation under its preamble is also cognizant of the fact that limitation of right must be duly tailored with legality, legitimacy and proportionality principles. Again it has also emphasized the need to have the essence of democratic society in mind. Hence, as the proclamation itself announces, the analysis on its legal provision is subject to the jurisprudence of limitation of freedom of expression by law.

3.1.Lack of adequate definition

The proclamation under article 2 (3) states "*Disinformation* means speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict".

Although the proclamation tries to restrict the term such as “knew or should reasonably have known” the definition adopted for disinformation under article 2(3) raises a number of doubts owing from the nature and standard of the criminal law principles. Firstly, although studying whether the proclamation is in line with article 19 and 20 of the ICCPR in terms of the scope of restriction is beyond the reach of this paper it is important to note that Article 19 does not, by its terms, limit the freedom of expression to “truthful” information. Instead, it applies to “information and ideas of all kinds”. Second, the definition under the proclamation assumes as if “falsity” has objective definitions. Emanating from this, one can say the proclamation adopt overly broad approach towards defining disinformation. This overbroad definition will embrace law enforcer the liberty to incorporate even issue not anticipated in the proclamation itself. Third, it is unclear whether the knowledge standard applies not only to falsity but also to the likeliness of causing a public disturbance. Fourthly, as we will discuss later in depth, the proclamation ignore the intent requirement to a promotion to hatred contrary to international standards. In such a case, even if a person were to share false information, knowing it was false, but intended to imply disagreement with the content, or to raise an alarm that such false information was circulating, the definition may yet cause that person's action to be deemed a criminal offense.⁶⁵ As it is noted by the joint declaration of 2017⁶⁶ *“General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on*

⁶⁵ United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, 2-9 December 2019 End of mission statement, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E> visited May 3, 2020.

⁶⁶Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. *Joint declaration on freedom of expression and “fake news”, disinformation and propaganda* , fom.gal/3/17 3 March 2017 <https://www.osce.org/fom/302796?download=true>

freedom of expression ... and should be abolished. Fifth, articulating as “speech that is false, is disseminated by a person who knew or should reasonably have known the falsity of the information and is highly likely to cause a public disturbance, riot, violence or conflict” lacks specificity and entrusted a broad discretion to law enforcers to determine a number of elements stipulated there by themselves. Knew or should reasonably know, likely to cause public disturbance... which is to be decided in case by case basis is left to the discretion of the law enforcers and the courts. This kind of articulation on to top of violating the right of the accused brings non-standard application of the law before various tribunals.

In addition to this, though the Proclamation offered some guidance on how to define disinformation, the boundary between fake news and free speech remains unclear in Ethiopia. Not only this in the context of social media, it is not precisely provided whether the law targets all those involved in the distribution and redistribution of hate speech and disinformation.

The proclamation defines “*Hate speech*” as speech promoting hatred, discrimination or attack against a person or an identifiable group, based on ethnicity, religion, race, gender or disability. The first thing the law encounters is that, it employs “promote instead of advocacy to hatred unlike article 20(1) of the ICCPR. It would not be as such arguable in the change of the word had it not been the meaning the word themselves carrying. Given the fact that Ethiopia is organized in ethnic line and the prevailing widespread, antagonistic here and there between ethnic backgrounds unmanaged definitions of this law would offer the law enforcers to pick somebody they intend to detain. The definition adopted above is quite imprecise and overbroad. It fails to define what constitutes “hatred” nor “discrimination” or “attack.” Even the “promotion” part of the definition is too

vague and does not necessarily require a direct link between the speech and the consequences.⁶⁷ Moreover, the basis for the “identifiable groups” are designed as exhaustive, while in reality there are more bases for groups, such as political opinion.⁶⁸

3.2. Certain parts of the proclamation lacks sufficient precision

As stated in the firsts section for a restriction to be prescribed by law, a statute must be sufficiently precise as to the rule's constraints, limitations, and penalties. This foreseeability allows citizens to know when their actions will constitute an offence and enables them ‘to regulate [their] conduct’.⁶⁹ Further, vague and overly-broad laws are often found to be impermissible since they provide officials with discretionary power to make arbitrary decisions.⁷⁰ The UNHRC expressed ‘repeated concerns’ about Russia's on the general use of extremism lacking specification.⁷¹ According to the committee the general use of “extremism” is ‘increasingly used to curtail freedom of expression, including political dissent’.⁷² In addition, the Kyrgyz Law on Extremism Activity⁷³ was criticized for using ‘extremism’ as an umbrella term to describe a list of activities,⁷⁴ which could lead

⁶⁷ Girmachew Alemu, ‘Narrow hate speech law will not broaden minds’, January 24, 2020.

⁶⁸ *Ibid.*

⁶⁹ *The Sunday Times v United Kingdom*, App no 6538/74 (ECtHR, 26 April 1979), Para. 49.

⁷⁰ UNGA ‘Communications report of Special Procedures’, A/HRC/31/79, case no CHN 7/2015, (30 November 2015); (hereinafter, Article 19) www.article19.org/pages/en/limitations.html accessed 25 March 2020.

⁷¹ Russian Model Law 2009 No 32-9; Yarovaya Law 2016.

⁷² UNHRC ‘Concluding observations on the seventh periodic report of the Russian Federation’, UN Doc CCPR/C/RUS/CO/7, (28 April 2105), Para. 19-20. See also Tanya Lokshina, ‘Draconian Law Rammed through Russian Parliament’ (Human Rights Watch, 7 July 2016) www.hrw.org/news/2016/06/23/draconian-law-rammed-through-russianparliament accessed 1 December 2019; Evgeniya Melnikova, ‘Yarovaya Law. The Death of the Russian Constitution’ Huffington Post (11 July 2016) www.huffingtonpost.com/evgeniya-melnikova/yarovaya-law-the-deathof_b_10864882.html accessed 1 December 2019.

⁷³ Kyrgyz Law on Extremism Activity 2005 No 150 (amended 2016).

⁷⁴ Article 19, ‘Kyrgyzstan: Law on Countering Extremist Activity’ (2015) www.article19.org/data/files/medialibrary/38221/Kyrgyzstan-Extremism-LA-Final.pdf accessed 27 November 2019. See also Paul Daudin Clavard and others, ‘Freedom of Expression and Public Order Training Manual’ (UN Educational, Scientific and Cultural Organisation, 2015) <http://unesdoc.unesco.org/images/0023/002313/231305e.pdf> accessed 25 November 2019.

to abuse against ‘religious minorities, civil society, human rights defenders, peaceful separatists . . . and political opposition parties’.⁷⁵ Of course, statutes need not be absolutely precise, as laws must keep pace with changing circumstances somehow through flexible interpretation.⁷⁶ The degree of precision required depends on the content and area that the law is designed to cover.⁷⁷ States cannot be faulted for every element of uncertainty surrounding a new law.⁷⁸ However, laws especially whenever it is a criminal issue must as far as possible embrace “reasonable clarity” so as not to give discretion to law enforcers to violate the human right and fundamental freedom of a person in the whim of prosecution.

The proclamation is managing to provide what is prohibited as “hate speech and disinformation” in only two articles. That is too rushing and short. It is also imprecise and overly broad. For instance, the prohibition of "disseminating hate speech" under article 5 is problematic to exactly figure out what is typically governing given the breadth of the term "dissemination". International human rights law such as article 20 of the ICCPR obligates states to prohibit "*advocacy* of

⁷⁵ See UNHRC ‘*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*’, A/HRC/16/53/Add.1, (22 February 2016), p. 99-106. See also UNHRC ‘*Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin’, A/HRC/10/3, (4 February 2009); ‘Russia: amendments to extremist legislation further restricts freedom of expression’ *Article 19* (19 July 2007) <www.article19.org/data/files/pdfs/press/russia-foeviolations-pr.pdf> accessed 4 December 2019.

⁷⁶ *Tolstoy Miloslavsky v UK*, App no 18139/91 (ECtHR, 13 July 1995) para 41; *Kudrevičius v Lithuania*, App no 37553/05 (ECtHR, 15 October 2015); *Sekmadienis Ltd v Lithuania*, App no 69317/14 (ECtHR, 30 January 2018) para 66.

⁷⁷ *Centro Europa 7 SRL and Di Stefano v Italy*, App no 38433 (ECtHR, 7 June 2012) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 72; *Delfi v Estonia*, para 122; *Karascony v Hungary*, App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016) para 125; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, para 144

⁷⁸ *Savva Terentyev v Russia*, App no 10692/09 (ECtHR, 28 August 2018), para 58.

national, racial or religious hatred," but it does not address mere "dissemination,"⁷⁹ given the endless reasons why a person might share hateful speech. Even if the proclamation adopts exempting approach under article 6 it does not cover all kinds of sharing that might not only be perfectly legitimate but also desirable for purposes of awareness-raising, criticism, and other reasons.⁸⁰ Since the proclamation does not reveal clear and precise parameters or standards to say "hate speech" it is inevitably difficult to figure out the gravity required to characterize expression as hate speech against a certain group. The Ethiopian Human Right Commission commissioner raised this concern during the laws approval⁸¹ although it has been remained unsolved in the laws draft-ship. This problem could have been simplifying if the proclamation incorporate the parameters being employing by the Rabat plan of action⁸² and international human right instruments. Within the jurisprudence of an advocacy for hatred, analysis of 'the content of the opinions expressed' its impact on the audience and the public nature of the expression as well as the extent and repetition of the communication are paramount to determine hatred in the expression.⁸³ The original intention of the statement including whether it was intended to spread racist or intolerant ideas with hate speech is also paramount.⁸⁴ In addition to this, the tone of the speech and circumstances in which it was disseminated are also relevant.⁸⁵ Moreover, a statement made during live

⁷⁹ Article 20(2) of the ICCPR states 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

⁸⁰ United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, 2-9 December 2019 End of mission statement, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25402&LangID=E> visited May 3, 2020.

⁸¹ Watch at <https://www.youtube.com/watch?v=LDsSfXv787M&t=244s> accessed May 27 2020.

⁸² See UNHRC, 'Rabat Plan of Action, supra note 10.

⁸³ *Jersild v Denmark*, application no 15890/89 (ECtHR, 22 August 1994); Stephanie Farrior, 'Molding Te Matrix: the Historical and Theoretical Foundations of International Law Concerning Hate Speech', 1996, 14.1 *Berkeley Journal of International Law*, pp. 66.

⁸⁴ ARTICLE 19, prohibiting Incitement to Discrimination, Hostility or Violence, policy brief, (December 2012), pp. 22; UN OHCHR, towards an interpretation of article 20 of the ICCPR, supra note 37.

⁸⁵ *Ibid.*

programming carry greater evidence.⁸⁶ While a state is required to denounce the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence through its domestic laws,⁸⁷ applying vague criminal law and penalties would generally be inappropriate. In the context of being vague and excessively broad law there is a fear that the officials would have practically unbridled discretion to determine whom to investigate and prosecute, leading to an almost certain inconsistency in approach and a potential wave of arbitrary arrests and prosecutions.⁸⁸

Unfortunately, the marriage with un-clarity and imprecise terms does not end in the articulation of disseminating of disinformation. Under article 7(4), it is provided that if the offense of disinformation was committed through a social media account with more than 5,000 followers, the person responsible for the act shall be punished with simple imprisonment not exceeding three years, or a fine not exceeding 100,000 birr. In this sub article, in the first place there is a clear controversy between the Amharic and the English versions where the English version employs “or” the Amharic employ “and” which means both imprisonment and fine may be imposed.⁸⁹

⁸⁶ Gündüz v Turkey, supra note 43, para 49.

⁸⁷ UNGA, *Report of the Special Rapporteur on freedom of religion or belief*, (23 December 2015), pp. 15; UN OHCHR, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Frank La Rue, UNGA Human Rights Council, 14th Sess, A/HRC/14/23, (20 April 2010), para 79(h); UN OHCHR, towards an interpretation of article 20 of the ICCPR, supra note 37; United Nations human rights office of the high commissioner, Beirut declaration, 18 commitments on faith for rights (UN OHCHR, March 2011).

⁸⁸ United Nations Special Rapporteur on the right to freedom of opinion and expression David Kaye Visit to Ethiopia, supra note 74.

⁸⁸ Watch at <https://www.youtube.com/watch?v=LDbSfXv787M&t=244s> accessed May 7 2020.

⁸⁹Of course, we need to resort to article 2(4) of the federal Negarit gazette establishment proclamation No. 3/1995 to reconcile since this one make the Amharic version to prevail. Nevertheless, this easy solution may trigger the principle that interpretation in favor of the accused.

The proclamation also does not specify and differentiate the responsibility of the creator of the hate speech and disinformation and the people involved in disseminating the hate speech and disinformation through share or likes. Under article 7 (4), it is stipulated that dissemination of hate speech and disinformation by a social media user with more than 5, 000 followers is an offense punishable with a maximum of three years imprisonment and fine not exceeding 100,000 birr. The use of this term i.e. social media user more than... is too vague and broad which is difficult to anticipate who is liable under this law. It is not clear if a person having more than 5000 followers likes or shares someone's post would be considered as disseminating hate speech within the meaning of the proclamation. If the proclamation is also meant to address individuals inter alia who likes others post, that would rise issue of over-criminalization and will not be managed to address all this kinds of issues.

Besides, while the proclamation repeals article 486 of the criminal code it is not clear why it does not consider other similar stipulation of the code like article 813. Article 486 is a stipulation intended to protect government and public officials from false rumors and charges that would distort public opinion, or incite hatred or public disturbance including religious, ethnic and political acts of violence. Whereas, article 813 states that “whoever...announces, spreads, publishes or reports to the authorities false, exaggerated or biased news intended to or capable of perturbing public order or tranquility is punishable with fine or arrest.” Article 813 governs acts apart from article 486. The only difference between article 813 and article 486 of the code is the gravity of the acts; while serious acts goes to the later simple cases fall within the ambit of article 813. They are built up in the three laws i.e. the hate speech and disinformation proclamation, article 486 and 813 rely

In fact article 2 (4) of the criminal code invites interpretation within the spirit of the law [the hate speech proclamation]. However, it is still open that whether one may consider simply article 2 (4) of proclamation No. 3/1995 or adhere strong human right based laws to interpret such ambiguous criminal laws in favor of the accused.

on “false information”. However, such degree of classification is not expressly revealed in the proclamation at least in the manner the code has approached. This will cast doubt on the prosecutor and the judge on how to handle an allegation, which is likely fall to both the proclamation and the criminal code given the fact that both laws carry different penalty.

Indeed, the above problem on the parts of the law has been envisaged in Yayeew Shemlis⁹⁰ case which has been known as the first case brought to the courts attention through the hate speech and disinformation proclamation. The cases factual scenario was as follows... On March 27, federal police arrested Yayeew at a relative’s home in the town of Legetafo.⁹¹ On 28 April 2020, the Federal Attorney General charged⁹² him under Ethiopia’s newly enacted Hate Speech and Disinformation Prevention and Suppression Proclamation No.1185/2020. In its tweets, *Addis Maleda* cited an official who said that Yayeew would be tried under the criminal code, but the official did not indicate the specific sections of the law

⁹⁰ *Public prosecutor vs. Yayeew Shimles*, criminal file no. file 213101. Before March 26/2020 (before he has been caught by the police), Yayeew was used to work as a [columnist](#) for Fetea magazine and hosts a weekly political program on Tigray TV, a regional government broadcaster. He also posts reports on Facebook and the [Ethio Forum](#) YouTube channel. Yayeew is vocal and has [criticised](#) the current administration for issues including the process to create Prosperity Party, unrealistic regional diplomacy, and its Nile policy.

⁹¹ <https://twitter.com/addismaleda/status/1243547593898106884?s=20> accessed June 1, 2020. See also <https://twitter.com/addismaleda/status/1243547593898106884?s=20> accessed June 1, 2020.

⁹² In April 21 E.C, the attorney General office announced that it has instituted a criminal charge against Yayeew based on Hate Speech and Disinformation Prevention and Suppression Proclamation 1185/2012 Article 5 and 7/4. According to the charge, he was accused on account of distributing false information in 17/07/2012 E.C (March 26/2020) that the government has ordered the readying of 200,000 burial places amid corona virus pandemic spreading. The attorney general further depict the said proclamation has published in *negarit gazette* and put in place before the alleged act has been committed. <https://www.facebook.com/photo?fbid=2938152326278832&set=a.671951436232277> visited May 13, 2020.

under which he would be charged.⁹³ As discussed above, the proclamation fails to concretely provide its relationship to article 486 and 813 of the criminal code. This creates difficulty to exactly figure out the alleged acts of Yayesew in one of those laws in the investigation process and drafting of charges. Initially there was apparent vagueness in framing the charge such as incorrect filing and framing of charges. First the prosecutor indicted him under the criminal code Article 485 for alarming a provision explicitly repealed by the hate speech and disinformation suppression proclamation. Then, this was dropped and altered to terrorism charges.⁹⁴ In the end, Yayesew was charged for article 5 and 7(4) of the Hate Speech and Disinformation Suppression Proclamation no. 1185/2012.

Although, one can stipulate various reasons for such irregularities this article clarifies some of them specially those related to the clarity of the hate speech and disinformation proclamation as well as the date of its publishing (raising concern of non-retroactivity; not in the scope of this study). First of all as stipulated above since the proclamation does not make clear its stand toward approaching similar provision in the criminal code ambiguity towards framing Yayesew's case is expected. Even though, such alterations are not illegal, owing from such clarity issue initially prevented Yayesew from accessing bail as well as the right to speedy trial. The Ethiopian Human Rights Commission has cautioned the government that the prosecutors' alterations of charge violated the accused's rights to bail. Normally when police arrests a person as well as avail him before the court the he is expected to show the type of offense the arrestee is being caught. Specifying the type of the offense inevitably invites the police to stipulate the types of criminal

⁹³ Yohannes Eneyew Ayalew, *Is Ethiopia's first fake news case in line with human rights norms?* May 1, 2020.

⁹⁴ Ethiopian police hold journalist Yayesew Shimelis pending terrorism investigation April 16, 2020 3:10 PM EDT <https://cpj.org/2020/04/ethiopian-police-hold-journalist-yayesew-shimelis/> accessed June 1, 2020.

law that has been violated in the suspected act of the individual. The specification in terms of the type of offense and law violated helps the court to determine on the bail issue. In addition to this, logically in situations where no possibility of bail exists, the suspect will have a keen interest in knowing whether the prosecution's evidence warrants his arrest and continued detention. In such way it is essential to clearly show in the summon as well as during arrestees appearance before the court as to which law the case falls and the offense the accused is being suspected of. In the case at hand, since the police and the prosecutor were not clearly envisaged as to which law the case might falls with, compelled him to wait in arrest, until they finish their prosecution in three laws.

3.3.Intent requirement missed

The intent of a speech as opposed to mere negligence is the central theme to determine advocacy to hatred.⁹⁵ Article 19 of the ICCPR rejects the approach of negligent incitement/advocacy because it does not meet article 20's wording or its principles, particularly in relation to "advocacy," which must be understood as intentional action.⁹⁶

Article 5 of the Proclamation forbids any dissemination of disinformation by means of broadcasting, print or social media using text, image, audio or video." This provision embraces broad stipulation. For instance, the term 'disseminating' is difficult to interpret since it is too broad and may incorporate a number of subtle dissemination of information. This could have been simplified had it incorporate

⁹⁵ UNHRC, 'Rabat Plan of action, supra note 5, para 29; ARTICLE 19, supra note 39, p 27.

⁹⁶UN Office of the High Commissioner for Human Rights, towards an interpretation of article 20 of the ICCPR, supra 37. UNHRC, 'Rabat Plan of action, supra note 5, para 29; ARTICLE 19, supra note 39, p 27.

the intent requirement within it. This issue was raised in the parliamentary hearing⁹⁷ on the proclamation and subsequent consultations.⁹⁸

The then deputy Attorney General Gedyion Temoteos explained the law has targeting to hold criminally responsible to those who intentionally promote hatred. However, the law does not clearly contemplate such element in defining hate speech. Probably we may employ article 59(2) of the criminal code which excludes criminal liability for negligence crime. In addition, the definition failed to clearly define the fate of dissemination such as through tag, share, like or retweet. Moreover, the proclamation has also failed to define what “dissemination”. So that we cannot exactly say this or that regarding subsidiary manipulation of messages. It would have been embracing clarity if the law was employed advocacy than promoting since promote’ does not set out the intention to encourage hatred, discrimination or an attack against the target group.⁹⁹ Regardless of the aim and purpose of advocacy suppressing laws, various human right defenders has begun to criticize the government stating it is employing the law to silent expression which are not necessarily incite hatred or concrete cases of disinformation.¹⁰⁰

Conclusion

The recently enacted Ethiopia's Hate Speech and Disinformation Proclamation endorse certain concrete problems in its definition and provision of crime. It lacks adequate definition, clarity and specificity of crimes unlike international human right law standards. In particular, lack of clarity in its approach with similar stipulation of the criminal code as well as general stipulation of words such as hate speech, dissemination, encompass unfriendly with the principle of legality.

⁹⁷ Watch <https://www.youtube.com/watch?v=LDbSfXv787M&t=244s> visited 7 May 2020.

⁹⁸Yohannes Eneyew Ayalew, ‘*Muting sectarianism or muzzling speech?*’ January 31, 2020. <https://www.ethiopia-insight.com/2020/01/31/muting-sectarianism-or-muzzling-speech/> visited 3 May 2020.

⁹⁹ Yohannes, *Muting sectarianism or muzzling speech?*’ supra note 86.

¹⁰⁰ <https://www.article19.org/resources/ethiopia-hate-speech-and-disinformation-law-must-not-be-used-to-suppress-the-criticism-of-the-government/>. Visited July 17/2022.

Moreover, it also employs vague and open ended terms. These kinds of articulation on to top of violating the right of the accused bring non-standard application of the law before various tribunals. As a way forward, some points could be remarked. The principle of legality is pivotal instrument to ensure restriction and derogation of the right to freedom of expression is undertaken according to accepted law and process. Under the constitution article 13 (1) the executive, legislative and courts are imposed to respect and enforce human right and fundamental freedoms to safeguard the interest of the accused. Therefore, the parliament, executive and courts need to develop the habit of abiding with human right laws. Based on this: the legislature is advised to revisit the aforementioned problems in order to make them human rights friendly. Besides, legislature shall comply with its constitutional duty and act as protectorates of human rights and fundamental freedom of the people. Moreover, courts need to seriously advocate judicial activism regarding human rights and exploit all tools of interpretation at their disposal. For instance, when they approach criminal statutes, which does not satisfy accessibility requirement judges are required to check whether they comply with the legality requirement of adequate accessibility. Regarding accessibility, the criminal code itself has a very good stipulation that may be a basis for interpreting various special laws and regulation that has the problem of effective accessibility. In such case, the criminal code would be a good lesson for courts to refer and develop their cases based on it.

Furthermore, this study recommends the courts to refer international human right laws and the constitution to interpret vague, ambiguous or imprecise terms of the law. For instance, under the hate speech proclamation the law does not sufficiently define various issues including failing to explicitly provide intent requirement. In such case, courts should refer human right instruments to give adequate safeguard

to the right of the accused. For instance while interpreting “promoting to hatred”; the court may draw inspiration on accepted parameters such as content and context of expression, the status of the speaker, motive and the modality of expression. Perhaps the court may consult the Rabat Plan of Action that recommends a six-part threshold test in determining whether the severity of incitement to hatred rises to the level of criminalization under article 20 of the ICCPR. These factors include: (a) context, (b) speaker, (c) intent, (d) content and form, (e) extent of the speech act, and (f) likelihood, including imminence, of incitement leading to violence. This approach helps the court to effectively enforce the rights of the accused and bring standard application of the statute itself.