Criminalization and Punishment of Inchoate Conducts and Criminal Participation: The Case of Ethiopian Anti-Terrorism Law

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Introduction

Ethiopia has been a victim of terrorist acts for over a decade. These acts include attempted assassinations on the Egyptian President and the Minster of Transportation and Communication of the Federal Democratic Republic of Ethiopia, and bombings in hotels and public transportation. Convinced that the ordinary penal legislation and procedural laws in place are not adequate to effectively deal with cases of terrorism[390], the House of Peoples' Representatives adopted a special law[391] in August 2009.

The law deals with substantive and procedural matters. The substantive part, *inter alia*, criminalizes different conducts (steps) in a criminal process towards the commission of a terrorist act. Other than actual perpetration of a terrorist act, the law prohibits planning, preparation, conspiracy and attempt to commit a terrorist act. Similar punishment is prescribed for all these conducts. Furthermore, the law proscribes participation in a secondary capacity in the commission of a terrorist act. Participations in the form of incitement, assistance before, during or after the commission of the terrorist act are prohibited.

This article treats selected issues relating to the substantive part of the Ethiopian Anti- Terrorism Law.[392] Its first part, after a brief discussion on relevant provisions of the law that criminalize the above referred conducts, assesses the aptness of their criminalization in light of different criminal law theories. It explores different concerns arising from innocuousness, equivocality and remoteness of the conducts. The second part evaluates the

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[390] 3rd and 4th paragraphs of the preamble part of the Proclamation on Anti-Terrorism (Proc. No. 652/2009)

[391] For a survey of other governments which have passed special laws on terrorism refer to C. Lumina, "Counter-terrorism legislation and the protection of human rights: A Survey of Selected International Practice, Afr. Hum. Rts. L.J. Vol. 7 (2007), pp.35—68.

[392] On the procedural and evidentiary aspects of the law refer to: Wondwossen Demissie, 'Reflective Analysis of Procedural and Evidentiary Aspects of the Ethiopian Anti-Terrorism Law' in Wondwossen Demissie (ed.), Human Rights in Criminal Proceedings: Normative and Practical Aspects: Ethiopian Human Rights Law Series Vol. III (2009), pp. 42-111.

equitability of the punishments prescribed for these conducts in light of different criminal law theories focusing on the doctrine of proportionality.

The article concludes that it is neither appropriate nor supported by major criminal law theories for the Ethiopian Anti-Terrorism Law to criminalize inchoate conducts (other than attempt) and unsuccessful instigation and assistance. Subjecting these conducts to punishment as severe as applicable to completed crime is found to be another problematic area of the law. If, in view of the special nature of terrorism, criminal law has to intervene before attempt stage is reached, the paper recommends a system of preventive detention in place of punishment. This system, if properly regulated, by allowing the government to step in at the earliest possible time, can ensure prevention of commission of a terrorist act without unjustifiably subjecting the 'suspects' of inchoate conducts to punishment.

I. Criminalization

1. Inchoate Conducts

Carrara's definition of 'crime' has influenced the Ethiopian criminal law.[393] Carrara defines crime as "the violation of legal prescription, resulting from human behavior, whether positive or negative, which is prohibited under the pain of a criminal sanction."[394] This definition has three elements, viz., legal, material and moral ingredients.[395]

Many activities may be carried out before an offence is fully consummated. Joshua Dressler succinctly describes the criminal process as follows.[396]

> When a person intentionally commits a crime, it is the result of a six stage process. First, the actor conceives the idea of committing a crime. Second she evaluates the idea, in order to determine whether she should proceed. Third, she fully forms the intention to go forward. Fourth, she prepares to commit the crime, for example, by obtaining any instruments

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[393] P. Graven, An Introduction to Ethiopian Penal Law, (1965), p.57. Graven is referring to Article 23 of the 1957 Penal Code which defined a crime and listed down its elements. This is valid for the definition of crime under Article 23 of the 2004 Criminal Code as well for this provision does not have a significant difference from its predecessor.

[394] Ibid.

[395] Id. pp.57-59

[396] J. Dressler, Understanding Criminal Law (3rd ed., 2001), P.373

> necessary for its commission. Fifth, she commences commission of the offence. Sixth, she completes her actions, thereby achieving her immediate criminal goal.

These six steps in the criminal process can be grouped into two categories: internal and external phases. The first three, which fall under the internal phase, are merely intellectual activities. The actor starts to think about the commission of a crime, evaluates the idea of committing the crime and decides to go forward and commit the crime. In the other three steps, which are in the external phase, the doer progressively manifests his thought by overt acts.[397] It is at the third stage that the actor forms the necessary *mens rea* to commit a crime. Activities that come after the formation of the *mens rea,* which are intended to facilitate the commission of the targeted offence, but short of attainment of the criminal goal are referred as inchoate conducts.[398] They include preparation, attempt, and conspiracy.[399]

There is no consensus at what stage in the criminal process should the police intervene.[400] On the one hand, there is a need for prevention of consummation of a crime which calls for early intervention in the criminal process. On the other hand, there is a risk that such license to the police would be detrimental to the interest of innocent persons. Joshua Dressler indicated the conflicting interests at stake as follows.[401]

> The earlier the police intervene to arrest for inchoate conduct, the greater the risk that suspicious looking, but innocent, conduct will be punished, or that a person with a less than fully formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist. On

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[397] Normally, the first three steps are not seen as criminal conducts and hence not punishable for the person's thoughts are not yet externally manifested. Also, punishing the 4th stage is not common. There is more or less a consensus on criminalization and punishment of the fifth stage. Ibid.

[398] These are also known as imperfect or incomplete conducts. (Ibid). The proximity of one inchoate conduct to the commission of the actual crime differs from that of the other. As will be explained below, the more remote the conduct from the actual crime the less it is within the ambit/realm of criminal law.

[399] Solicitation is also treated as one of the inchoate conducts. But for the purpose of this material it is treated as a form of participation in an offence.

[400] Remoteness and equivocality of preparatory acts made most Criminal Codes not to declare preparatory acts as being unlawful and punishable. P. Graven, cited above at note 4, p.69.

[401] Dressler, cited above at note 7, p. 374.

> the other hand, the longer the law requires police officers to abstain from intervention, the greater the risk that an actor will successfully complete an offence.

The Ethiopian Anti-terrorism Proclamation[402] (hereinafter the Proclamation or the Anti-terrorism law), authorizes arrest of persons who have reached at the third stage in the process of committing a terrorist act (planning stage). [403] Article 4 of the Anti-terrorism law criminalizes incomplete conducts as follows:

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

A definition for what constitutes planning is provided nowhere in the Proclamation. Ordinarily, to plan to commit a crime is to decide to commit a crime and to devise how to proceed so as to achieve a criminal goal. It is merely a mental exercise not manifested by external conducts. It refers to the third step in the criminal process where the person merely forms a *mens rea*.[404]

Once a person decides to commit a crime and designs how to go about it, the next step is to make the necessary preparations to realize the plan. Preparatory acts signify the transition from the internal to the external phase in carrying out a crime. Preparations are said to be made where the perpetrator takes "such steps as are, objectively or according to his estimation, necessary to ensure the offence can be committed ..."[405]

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[402] The Proclamation can be cited as the "Anti-Terrorism Proclamation No. 652/2009"

[403] Article 27 of both the 2004 Criminal Code and the 1957 Penal Code criminalizes one's intentional conduct when he reaches at the fifth stage (attempt) in the criminal path. Article 26 of both Codes provides: "Acts which are committed to prepare or make possible a crime, —, are not usually punishable—." Preparatory acts are punishable only in exceptionally specified cases. See for example Article 254 of the Penal Code and Article 256(b) of the Criminal Code. Though the caption of Article 274 of the Criminal Code seems to criminalize preparatory acts, its content does not. Articles 257(b) and 274(b) of the Criminal Code criminalizes planning stage of crimes against the State and the law of nations respectively. So do Articles 254 and 269(b) of the 1957 Penal Code.

[404] That 'planning' refers to a distinct conduct that comes before preparation in the criminal process can be inferred from the fact that the law puts the two (planning and preparation) distinctly as separate punishable conducts.

[405] Graven, cited above at note 4, p.67.

A criminal attempt—the fifth stage in the criminal process—refers to an act that constitutes a substantial step towards the commission of the targeted offence. A person is said to have attempted to commit a crime where he begins to commit the crime. As there is an overt act in both attempt and preparation (as opposed to planning) and as the two are steps in a continuum, it may be difficult to draw a clear line between preparation and attempt. By reasoning *acontrario* from the *Expose des Motifs* ,[406] Philippe Graven derived the following principles to make distinction between the two steps in the process of commission of crime:[407]

> There is no attempt unless an offence is in the course of being executed; an offence is not in the course of being executed unless the act done reveals not only the doer has a criminal intent, but also that he is determined to carry it out; the doer may not be deemed to have a criminal intent which he is determined to carry out unless he does something which is neither equivocal nor remote.

Conspiracy, another criminalized inchoate conduct, refers to an agreement between two or more persons to commit a crime.[408] It exists where there is unity of mind between or among the persons involved. Conspiracy, being merely an intellectual activity as is planning, falls in a criminal process, under the third stage where there is no overt act. However, some scholars argue that conspiracy is different from planning for there is more determination to commit the crime in the former.[409] Moreover,

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[406] Article 26 of the 1957 Penal Code provides that preparatory acts are, in principle, not punishable.

[407] Graven, cited above at note 4, p.70.

[408] Article 38 of the Criminal Code. By virtue of Article 36 of the Anti terror law, the Criminal Code provisions are applicable to the extent that they do not contravene with the proclamation.

[409] Archbold indicates that where several persons enter into agreement to commit a crime, their individual intention passes from being secrete intention to the overt act of mutual consultation and agreement. He is of the opinion that an engagement by two or more persons is conspiracy even if the conspirators do nothing in furtherance of the engagement. For him, "where two agree to carry it (the crime) into effect the very plot is an act itself." Archbold, quoted in Graven, cited above at note 4, p.108. For Graven, too, where there is conspiracy, the agreement of the persons involved is to be treated as an advancement of the intention of each. He described conspiracy as "a collective preparation for an offence." By so describing, he equates conspiracy with preparation

involvement of more than one person may for several reasons make conspiracy more dangerous than individual determination (planning) to commit a crime.[410] When seen from a different angle, the involvement of several persons in the planning of a crime can be a factor that militates against the successful execution of the plan. As noted by Goldstein: [411]

> it is as likely that conspiracies will frustrate as that they will promote crime: with more people involved, there is an enhanced risk that someone will leak information about the offense, turn against others, or try to convince colleagues to desist from their criminal endeavor.

Article 4 of the Proclamation criminalizes conspiracy to commit a terrorist act. The Proclamation does not say anything as to the effect of conspiracy where the conspirators succeeded in committing a terrorist act. Will they be charged for the conspiracy and for the terrorist act concurrently or will the conspiracy be subsumed under the substantive crime? In the Criminal Code, unless conspiracy is an ingredient element of the committed crime, the conspirators will be charged concurrently for two crimes: conspiracy and the committed substantive crime.[412] The Proclamation does not

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stage of an offence which is closer than planning to the commission of the offence. Graven, cited above at note 4, p.109

[410] First "out of fear of co-conspirators, loyalty to them, or enhanced morale arising from the collective effort, a party to a conspiracy is less likely to abandon her criminal plans than if she were acting alone." Second "collectivism promotes efficiency through division of labor; group criminality makes the attainment of more elaborate crimes possible." Dressler, cited above at note 7, p.425, note 17. As is indicated in one U.S. Supreme Court case, "the strength, opportunities, and resources of many are obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." Dressler, cited above at note 7, p.425, note15.

[411] Abraham S. Goldstein, "Conspiracy to Defraud the United States," Yale L. J. Vol. 68 (1959), P.414 quoted in Dressler cited above at note 7, P. 425, note 18.

[412] Graven, cited above at note 4, p.110. Conspiracy, under the Criminal Code, is relevant in two ways. Firstly, By virtue of Article 84(1) (d) of the Code, it serves as a ground to aggravate punishment, which is so where the targeted offence is committed. In such cases, the offenders are basically to be punished for the offence committed. That the crime is a result of conspiracy would be considered as an aggravating circumstance while the punishment is calculated. Secondly, it is treated as a crime in and by itself, which is the case where the targeted offence is not committed. Legal provisions that punish conspiracy can be categorized into two: those laws that punish conspiracy to commit specifically listed offences and that which punish conspiracy in general. To the first belong Articles 257, 274 and 300 of the 2004 Criminal Code. It is only under Article 300 that mere conspiracy –agreement to commit a crime (without

expressly indicate that conspiracy is an element of the crime of a terrorist act. But for an act to be a terrorist act, as can be understood from the definition under Article 3 of the Proclamation, *inter alia*, it is required that the actor does any of the acts listed there under, with an intention to advance *" political, religious or ideological cause."* It is not common for an individual, without being a supporter or member of a certain group, to have a desire to advance the aforementioned causes. In view of the fact that conspiracy is normally a permanent, though tacit, element of a terrorist act, it would not be right to punish the doer for both the conspiracy and the substantive terrorist act.

2. Participation

Crime can be committed by one or several persons. Where several persons are involved in the commission of a crime, they may be primary or secondary participants depending on their degree of participation.[413] This section is concerned with secondary participation in the commission of a terrorist act: incitement[414] and complicity and a related but different type of involvement in the commission of the crime, namely accessory after the fact.

2.1 Incitement

The Proclamation criminalizes and punishes incitement to commit a terrorist act. The way crime of incitement is treated in the Proclamation is different from that of the Criminal Code. The cumulative reading of Article 2(6)[415] and Article 4 of the Proclamation indicates that, unlike in the

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more) is punishable. In the other two, there should be something more– formation of a band or group with the object of committing the crimes referred there under. The second category constitutes Article 478 of the Criminal Code which criminalizes conspiracy for the purpose of preparing or committing crimes against public safety or his health, the person or property, or persuades another to join such conspiracy provided that the offences are punishable with rigorous imprisonment for five years or more.

[413] See in general Graven, cited above at note 4, pp. 93-108.

[414] It is also referred as solicitation or instigation. Generally it refers to an intentional invitation, request, command, or encouragement of another to engage in a crime. The invitation, request, command or encouragement is considered as an *actus reus* of the crime of incitement and the specific intent that the other party consummate the solicited crime is the *mens rea*. Dressler, cited above at note 7, p.415-416

[415] Article 2(6) provides: " "incitement" means to induce another person by persuasion, promises, money, gifts, threats or otherwise to commit an act of terrorism even if the incited offence is not attempted"

Criminal Code[416], inciting another to commit a terrorist act is punishable even where the terrorist act is not attempted. Whether incitement, as defined under the Proclamation, requires the incited person (at least) to have agree and decide to commit the crime or that mere inducement on the part of the instigator suffices is not clear.[417]

Article 2(6) of the Proclamation, unlike the corresponding provision in the Criminal Code, does not expressly require that incitement be intentional. Though unclear, this should not be construed as criminalizing incitement committed by negligence. [418]

2.2.. Complicity

In criminal law, any sort of assistance provided to the perpetrator before or during the commission of a crime is treated as complicity. An assistance, to be considered as complicity in the commission of a crime must have been

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[416] As can be inferred from the reading of Article 36(1) and (2) of the 2004 Criminal Code it is one thing to be guilty of crime of instigation and it is another to be liable to punishment for having instigated the commission of crime. Same is true under Article 35(1) of the 1957 Penal Code. In both Codes, to say that incitement takes place, there is no need to establish the fact that the incited person has attempted to or committed the intended offence. (The Amharic version of Article 35 of the 1957 Penal Code, however, requires that the instigated person is made to have committed the incited offence.) Without prejudice to the exceptions where an instigator is subject to punishment without the principal offence being attempted or committed, it is only where the targeted offence is at least attempted that punishment would be due to the instigator. Articles 274 and 480 of the Criminal Code criminalize mere public provocation of others to do wrongs. Moreover, soliciting individuals to engage in criminal activities is criminalized under Articles 301, 332 and 350 of the Criminal Code.

[417] As all inducements constituting incitement are punishable under the Proclamation, as opposed to in the Criminal Code, whether mere inducement, without successfully convincing the instigated person to agree and decide to commit the crime, constitutes incitement or not has a practical significance. Philippe Graven interpreted 'incitement,' as defined under Article 35 of the 1957 Penal Code, as requiring a causal relation between the inducement and what the instigated person decides to do. For him, "there is no instigation unless one causes another to take the decision to commit an offence." Graven emphasizes on the fact that the instigated person being induced or persuaded by the instigator and determined/decided to commit the crime than the actual attempt or commission of the crime. For Graven, making the instigated person to be committed to carry out the crime is critical to determine whether or not instigation exists. Graven, cited above at note 4, p.100

[418] By virtue of Article 59(2) of the Criminal Code, which is applicable to terrorism cases pursuant to Article 36 (2) of the Proclamation, crimes committed by negligence are punishable only where there is an express provision to that effect.

given knowingly.[419] In the words of Philippe Graven, a person is an accomplice only in so far as he is aware that he is assisting the principal actor in the commission of the crime and he does it with an intention to assist; if assistance is provided by negligence there is no complicity.[420] For the accomplice to be punished, the crime for the commission of which he extended assistance should be committed or at least attempted.[421]

The Proclamation criminalizes assistance provided before the commission of a terrorist act as an independent principal offence.[422] This approach has resulted in three interrelated consequences which would not have ensued had these acts been treated as assistance. First, he who does any of the acts listed under Article 5 of the Proclamation, which are meant to facilitate the commission of a terrorist act, is subjected to a criminal proceeding and punishment even where the principal terrorist act is not committed or attempted. Second, engaging in such acts negligently is treated as a criminal conduct. Third, the punishment prescribed for these acts, as opposed to normal case of principal-accomplice relation, is different from the punishment for a principal terrorist act. Treating assistance to commission of a terrorist act leniently, though a departure from a commonly accepted treatment accorded to accomplices and principal offenders, rightly responds to the criticism made in connection with the equal treatment of unequals in the criminal process. According to critics, making one whose participation in an offence is substantial (the principal actor) and one whose involvement is not equally significant (the assistance provider) subject to

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[419] An intention to aid the primary party to commit the offence charged is broken down into "dual intents' (1) the intent to assist the primary party; and (2) the intent that the primary party commit the offence charged. People v. Burns, 242 Cal. Rptr. 573,577 (Ct. App.1987) .

[420] Graven, cited above at note 4, p.105.

[421] These features of complicity are incorporated under Article 37 of the Criminal Code and Article 36 of the 1957 Penal Code.

[422] Article 5 (1) of the Proclamation provides: " Whosoever knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization:

a) Provides, prepares or gives forged or falsified document;
b) Provides a skill, expertise or moral support or gives advice;
c) Provides, collects or makes available any property in any manner
d) Provides or makes available monetary, financial or other related services;
e) Provides or makes available any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or
f) Provides any training or instruction or directive;

is punishable with rigorous imprisonment from 10 to 15 years."

the same punishment is inconsistent with the retributive principle of just deserts.[423]

The Proclamation is silent about assistances, other than those listed under Article 5, which may be given before or during the commission of the crime. By virtue of Article 36(2) of the Proclamation, these cases are treated in accordance with Article 37 of the Criminal Code where none of the above three consequences would ensue.

2.3. Accessory after the fact

Ordinarily, an accessory after the fact is one who, with knowledge of another's guilt, intentionally assists the perpetrator of a crime to avoid arrest, trial, or conviction.[424] As opposed to instigation and assistance where a secondary offender participates before or during the commission of a crime, in the case of accessory after the fact, the 'assistance', where there is any, to the perpetrator comes after the offence is committed or attempted. Strictly speaking an accessory after the fact does not participate in the commission of the main offence for he comes in to the picture after the crime has been committed. He commits a separate offence.

The Proclamation devotes couple of provisions to accessory after the fact in the context of crimes of terrorism.[425] Article 5(2) of the Proclamation[426] prohibits harboring, helping to escape or concealing someone who has committed a terrorist act. Article 9 of the Proclamation[427] prohibits possessing and dealing with proceeds of a terrorist act.[428]

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[423] Dressler, cited above at note 7, p.471.

[424] State v.Ward,396 A.2d at 1047 ibid, p.465.

[425] Under the Criminal Code there are three cases where one may be treated as an accessory after the fact and face punishment. The first is harboring and aiding an offender in order to save him from prosecution as provided under Article 445. The second one is hiding a convicted person to save him from serving the sentence as provided under Article 460. The third one, as provided under Article 682, is receiving property which has been obtained by a crime committed by another.

[426] Article 5(2) provides: "whosoever harbors or helps to escape or conceals someone whom he knows to have committed terrorist act mentioned under this Proclamation is punishable with rigorous imprisonment from 10 years to life.

[427] Article 9 provides: "whosoever knowingly or having reason to know that a property is a proceed of terrorist act acquires or possesses or owns or deals or converts or conceals or disguises the property is punishable, subject to the property being forfeited, with rigorous imprisonment from 5 to 15 years.

[428] As provided under Article 2(2) of the Proclamation "proceeds of terrorism" refers to "any property, including cash, derived or obtained from property traceable to a

3. Aptness of Criminalizing Inchoate Conducts and Participation

Many would agree that prevention of commission of crime is better than punishing the offender afterwards. Prevention is possible where the law allows the Police to step in at some stage in the criminal process but before the commission of a crime.[429] Apparently, Article 4 of the Proclamation, which criminalizes plans, preparations, conspiracies and attempts to commit a terrorist act, is aimed at prevention of crime. As rightly stated by Philippe Graven, "the need to prevent the commission of offences makes it impossible to wait until this behavior has borne fruit before the law can run its course".[430]

True, the law that criminalizes inchoate acts, by allowing the government to act before the offence is fully consummated, increases the chance of preventing terrorist acts from being committed. However, giving such mandate to the police is risky for it may result in an unintended effect of violating the rights of those who have never thought about a terrorist act or those who may have thought about it but would, nonetheless, have dropped their thoughts.

Because planning is not manifested by external acts, it is not difficult to imagine the possibility of persons who have never thought of committing a terrorist act being wrongly apprehended and subjected to criminal proceedings. Similarly, the facts on the basis of which the Police suspect one of preparing to commit a terrorist act may be so equivocal that there is a chance of a wrong person being apprehended. [431] Moreover, because

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terrorist act, irrespective of a person in whose name such proceeds are standing or in whose possession or control they are found".

[429] In this connection Joshua Dressler indicated that "criminalizing inchoate offences would provide a basis for official police intervention in order to prevent the consummation of an offence." Dressler, cited above at note 7, P. 381.

[430] Graven, cited above at note 4, p.67.

[431] That is so because activities which are preparatory to commit a crime can as well be done for a perfectly lawful purpose. If, for instance, someone, having decided to commit a terrorist act, resolves to use a gun and buys the same to use for his purpose he is at the stage of preparation. However, gun may be bought for several purposes including lawful ones. It is the concerned person alone who knows exactly for what purpose he bought the gun. Buying a gun is therefore an equivocal activity. In so far as the only purpose of buying a gun is not a preparation for committing a terrorist act, there is a risk that he who buys a gun for a purpose unrelated to commission of a terrorist act may be apprehended and subjected to a criminal proceeding.

instigation, planning, preparation and conspiracy[432] to commit a terrorist act are remote from the commission of the substantive crime, there is a possibility of one who may have dropped the idea of committing the crime being apprehended.

Basically, the above mentioned difficulties are attributed to the fact that inchoate acts are remote and equivocal.[433] Remoteness and equivocality make proving the conducts and relating them with the substantive offence and the required degree of certainty difficult. Moreover, their remoteness makes inchoate acts innocuous. A brief discussion on how remoteness and equivocality of inchoate conducts militate against their criminalization follows.

3.1. Lack of social harm

Different authorities[434] agree on the central place of harm in criminal law. Social harm is so vital that Joshua Dressler described it to be the body—the linchpin—of the crime.[435] As inchoate acts do not normally hurt anyone, the harm requirement implies that such acts, being harmless[436], are beyond the

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[432] The agreement among conspirators to commit a crime which is treated as the "concrete" and "unambiguous" evidence of their dangerousness and culpability is said to be proved only inferentially. Even if the agreement is conclusively proved to exist, "the potential temporal remoteness of the agreement to the target offence increases the likelihood that some conspirators who would later renounce their intentions, for whose intentions were not strongly held when the agreement was formed, will be punished." Dressler, cited above at note 7, p.425.

[433] There is difference among inchoate conducts in terms of their proximity to the substantive crime and equivocality. For there is no overt act in cases of planning and conspiracy, the issue of equivocality, which is necessarily of acts, is not relevant for them. It is their remoteness from the substantive crime that is relevant. As will be explained below, the more remote and equivocal a conduct is the less within the realm of criminal law it will be.

[434] Albin Eser indicated social harm being an ingredient of the *actus reus* element of an offence. A. Eser, "The Principle of harm in the concept of crime: A comparative Analysis of the criminally protected Legal Interests," 4 Duq.L.Rev.345 (1965) p. 386. Joel Feinberg's 'harm principle' advocates that "the only good reason to subject persons to criminal punishment is to prevent them from wrongfully causing harm to others." J. Feinberg, "Harm to others, the moral limits of the Criminal law," in D. N. Husak, "The Nature and Justifiability of non consummate offences" 37 Ariz. L.Rev. (1995), p.156. According to Feinberg, "acts of harming are the direct objects of the criminal law." J. Feinberg, Harm to Others (1984).

[435] Dressler, cited above at note 7, p.109.

[436] Because it is a common knowledge that criminal laws punish attempt, one of the inchoate offences, some preferred to describe the aforementioned objection as 'absurd.'

reach of criminal law. The issue is not as simple as that, though. Opinions on the requirement of harm for criminalization in general and its relevance to inchoate conducts in particular are diverse.[437]

Proponents of the theory of retributivism [438] contend that punishment in the absence of social injury[439] is unjustified. It is where a person causes harm that he takes something from the society. Only then is a debt owed which gives rise to the society's entitlement to take something from him by means of punishment.[440] An opposing view comes from Utilitarianism[441] which contests the requirement of actual social harm for criminalizing a given conduct. So long as the actor's conduct threatens the society with injury, there is enough reason for punishment. For a utilitarian, harm should not be waited for to punish a conduct. It has to be avoided through deterring dangerous conducts by detaining dangerous people before they cause harm.[442] In support of this assertion, Douglas Husak stated that legislators

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Husak, cited above at note 45, p.159. Moreover, this 'no harm no crime' position seems to be objectionable in the light of the fact that some consummated criminal conducts may cause no injury in the ordinary sense of the term. Though driving while intoxicated, irrespective of its consequences, is a crime, it is hardly possible to see the injury arising from such conduct, if nobody is hurt and no property is damaged.

[437] For example John Austin stated: "generally attempts are perfectly innocuous, and the party is punished— in respect of what he intended to do." This is to say two things. First, there is no social harm when a crime is merely attempted. Second, because attempts, without causing social harm are punishable, infliction of punishment is not conditioned on social harm. J. Austin, "Lectures on Jurisprudence 523" in Dressler, cited above at note 7, P.378.

[438] For more on retributivism theory refer to Dressler, cited above at note 7, pp. 13-23 and pp.52-54.

[439] Some who are of the view that social harm is significant to condemn and punish a conduct construe 'social harm' broadly. In their view, society is wronged when an actor invades any socially recognized interest and diminishes its value. For instance, Albin Eser defines social harm as "the negation, endangering, or destruction of an individual, group or state interest which was deemed socially valuable." Eser, cited above at note 45, p. 217.This definition is said to be broad enough to meet the concern raised in connection with criminal conducts that do not cause actual injury but only jeopardizes a socially valued interest, like the case of drunk driving. Dressler, cited above at note 7, p.110.

[440] Dressler, cited above at note 7, p.109.

[441] For more on utilitarianism theory refer to Dressler, cited above at note 7, pp. 13-23 and 50-52

[442] Id., p.109.

pass criminal laws "not only to prevent conduct that causes actual harm, but also to prevent conduct that creates risk of harm."[443]

There are other competing theories[444] on the relevance of social harm to criminalization: subjectivism and objectivism. Subjectivism, in determining guilt, focuses on an actor's subjective state of mind (*mens rea*) to assess his dangerousness and bad character. According to this theory, conduct of the actor (*actus reus*) which may or may not bring about an injury should not be a determinant factor indicating whether or not the actor should be punished. It asserts that "the act of execution is important only so far as it verifies the firmness of the actor's intent."[445] It follows that an act, irrespective of its innocuousness, that clearly shows the actor's commitment to carry out a criminal plan is sufficient to justify punishment for an inchoate conduct. [446] As opposed to subjectivists, objectivists believe that an actor's conduct is punishable where its criminality is "objectively discernable at the time that it occurs."[447] In other words, "acts performed, without any reliance on the accompanying *mens rea* of the actor, must mark her --- conduct as criminal in nature."[448] It is where the conduct speaks for itself that the actor should be subject to punishment. The conduct's criminality would be so certain, for an objectivist, when the unconsummated offence causes social harm.[449]

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[443] He believes that the requirement of social harm for criminalizing a given conduct was developed with consummate offences in mind. Hence, he suggests a reformulation of the harm principle of criminal law so as to make it relevant to non consummate offences. He suggests the harm principle to be reformulated as "criminal liability is unjustified unless conduct harms or risks harm to others." Husak, cited above at note 45, pp.165, 159.

[444] These theories are developed in connection with criminalization of attempt, one of the inchoate offences. For the details on the theories see P. H. Robinson & J. M. Darley, "Objectivist versus Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory", 18 Oxford J. Legal Studies 409 (1998).

[445] Fletcher at 138, in Dressler, cited above at note 7, p.379.

[446] Dressler, cited above at note 7, p.379. This theory seems to require an overt act without which it is hardly possible to verify the firmness of the actor to pursue his plan to commit a crime.

[447] Fletcher, cited above at note 56, p.116, in Dressler, cited above at note 7 , p.379.

[448] United States v. Oviedo, 525 F.2d 881, 885(5th cir.1976).

[449] Harm may have different forms such as "disturbing social repose," Clark v. State, 8 S.W. 145, 147 (Tenn. 1888); "unnerving---the community," Fletcher at 144, in Dressler, cited above at note 7, p.379; or by causing apprehension, fear or alarm in the society because the actor has patently "set out to do serious damage --- and to break the accepted rules of social life." Thomas Weigend, "Why Lady Eldon Should be acquitted: The Social Harm in Attempting the Impossible", 27 DePaul L.Rev. 231 (1977).

Though for different reasons, all the foregoing theories support criminalizing criminal attempt, one of the inchoate conducts. Attempts are punishable, for subjectivists, on the basis of defendant's *mens rea*. Where an actor reaches at a stage which is beyond the point of no return (which signifies the attempt stage) he must have performed conducts that can reasonably show his intention to commit the crime and hence sufficient to justify punishment irrespective of occurrence of a harm. From an objectivist perspective, if the actor takes critical steps towards the commission of crime, which signifies attempt, there would be appreciable fear or alarm in the society that its rules are about to be violated (social harm) and the criminality of such conducts is objectively discernable in which case infliction of punishment is appropriate.

Similarly, proponents of utilitarianism and retributivism agree that punishing attempt is justified. For one group of retributivists (culpability-retributivists) one who reaches at the point of no return to commit a crime but failes to attain his goal is morally as culpable as another who succeeds in his endeavor. It would not be acceptable for the law to "allow the lucky attempter off, while it punishes the successful wrong doer."[450] For the other group of retributivists (Harm-retributivists) the attempter, by his actions, "disturbs the order of things ordained by law,"[451] thereby causing social harm, the restoration of which requires that he be punished. For utilitarians, even if the attempter does not succeed in his criminal endeavor, he represents an ongoing threat to the community. Punishment would incapacitate and thereby deter him from committing crime. Punishing him deters other potential criminals as well.[452]

It is hardly possible to justify punishment of plan, preparation, and conspiracy to commit terrorist act by the above theories[453]. At these stages,

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[450] The American Law Institute, comment to Article 5, at 294 in Dressler, cited above at note 7, p.382

[451] A. Ashworth, "Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law," 19 Rutgers L.J. (1988), pp. 724-725.

[452] A person, who thinks that he will avoid detection, apprehension and punishment if he successfully commits a crime but would be apprehended while attempting the crime for poor execution, may be deterred by punishment of attempts.

[453] For retributivists and objectivists social harm is a necessary element which does not exist in cases of inchoate acts. At the time one plans or more than one persons conspire to commit a terrorist act, their intention is not yet manifested by overt acts without which there cannot be a reasonable threat for the community that its rules are about to

unlike attempt, there is neither actual nor threat of harm. There is no actual harm for the crime is not consummated. There is no threat of harm for reasons related to temporal remoteness. George Fletcher's view on the matter is in order. For him, where a conduct is criminalized "the assumption is that a neutral third party observer could recognize the activity as criminal even if she had no special knowledge about the offender's intention."[454] As the fact that a terrorist act is to be committed cannot be objectively discerned from plans, preparations and conspiracy, the social harm that is said to be existent in attempts does not exist in such cases making them unsuitable for criminalization and punishment.

Douglas N. Husak, in an attempt to draw a distinction between justifiable and non justifiable non consummate offences, developed five requirements that should be met for the proscription of a conduct as non consummate offence to be justified.[455] According to one of the requirements– the *causal* requirement – a non consummate conduct, to be justifiably proscribed, should reasonably be appreciated as having created the risk of actual

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be breached. In the absence of externally manifested conduct, there is nothing from which criminality of the one who planned or those who agreed to commit a terrorist act is to be discerned. By the same token, when one prepares to commit a terrorist act, though he is closer to the anticipated offence as compared to the aforementioned two inchoate acts, his preparatory acts are not proximate enough to the offence so as to create alarm or fear in the community. Those inchoate acts do not make the society to feel that the concerned persons are moving towards the commission of a terrorist act. Even for utilitarians and subjectivists, who do not require actual social harm, infliction of punishment on he who plans, conspires or prepares for the commission of a terrorist act cannot be justified. Though, under both theories, social harm is not required for punishment, there should be dangerous conduct which threatens the society which is missing at the stages of planning, conspiracy and preparation. Short of such conduct, utilitarian theory does not support infliction of punishment. What is important, for subjectivists, is the actor's intention. In so far as the actor's intention to commit a terrorist act is verifiable, punishing the actor is justifiable even without existence of actual or risk of social harm. But, punishing the aforementioned unconsummated acts cannot be justified even under subjectivist theory for there is no overt act from which the intention and the firmness of the actor's intent can be verified.

[454] Fletcher, cited above at note 56, p.116, in Dressler, cited above at note 7, p.379.

[455] The five principles are: 1) consummate criminal harm requirement, 2) high culpability requirement, 3) causal requirement, 4) proximity requirement, and 5) persistence requirement. If a conduct is proscribed as a nonconsummate offence in the absence of any of these requirements, the proscription is unjustifiable in which case the state is said to have used its law making power illegitimately. Douglas N. Husak, "The Nature and Justifiability of Nonconsummate Offences," 37 Ariz. L. Rev.(1995), pp. 169-178

harm.[456] Though planning, conspiracy and preparation increase the likelihood that a terrorist act may be committed, it does not necessarily mean that there is a genuine risk[457] of commission of a terrorist act that calls for their proscription.[458]

Criminalizing and punishing unsuccessful[459] assistance and incitement is equally worrisome. As the Proclamation criminalizes and punishes mere incitement and assistance to the commission of a terrorist act, even where the principal offence is not committed or at least attempted, the punishment imposed in such cases is inflicted in the absence of social harm, making its fairness questionable. Inflicting as severe a punishment on such futile exercises as that where the terrorist act is fully consummated, as will be discussed in Section II below, in particular does not make sense.

3.2. Pragmatic Concerns

Criminalization of planning to commit a terrorist act is objectionable for two practical reasons. First, it is not practically possible to accurately know what is in a person's mind. As correctly pointed out by Goldstein the requirement of an act as a constituent element of an offence is "deeply rooted in skepticism about the ability---to know what passes through the minds of men."[460] Philippe Graven, in the following paragraph, expresses the possible risk of abuse if one were to be punished for his thoughts:[461]

> With a view to or generally under the guise of, safeguarding the alleged general interests, political, religious or others, action is taken against persons whose only mistake is or may be that they do not think along official lines, on the ground that they create a social danger and a menace to the

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[456] As actual harm occurs where the crime is consummated, there can only be risk of actual harm where there is risk of the offence being consummated.

[457] No genuine risk in the sense that there is wide chance for that plan not to be pursued

[458] Criminalizing attempt, where there is incontrovertible risk of actual harm, satisfies this requirement.

[459] Instigation or assistance is futile where, despite everything is done on the part of the instigator or provider of assistance, the substantive crime—terrorist act—is not even attempted.

[460] A. S. Goldstein, "Conspiracy to Defraud the United States", Yale L. J. vol.68 (1959), p. 405.

[461] Graven, cited above at note 4, p.67

community, and punishments are imposed only on the basis of suspicion.

On the other hand, for there is no way to show that a person has thought of committing a crime of terrorism except on those rare occasions where the offender declares his intention, it would be as good as providing a law which may be impossible to enforce. And it is difficult to see the good of providing for a law which undermines the enforcement capacity of the law enforcing agencies and which would ultimately become obsolete.

Second, even under the assumption that we could read a person's mind, there is still another practical reason that would make punishing thoughts objectionable. If thoughts were punishable, virtually all people, most of whom are law abiding, would have been subject to criminal law for they think of committing a crime at one time or another.[462] Criminal law is not to be used "to purify thoughts and perfect character." [463] As asserted by the U.S. Supreme Court, "the aim of the law (criminal) is not to punish sins, but is to prevent certain external results."[464] It is only those thoughts that would end up with the commission of the intended crime that are harmful and hence to be prevented ahead of time. Unfortunately, there is no way to distinguish "between desires of the day dream variety and fixed intentions that may pose a real threat to society."[465] In view of this difficulty, criminalization of planning would result in a high probability of punishing those who would not have pursued their thoughts to the end. Where, because of the difficulty in differentiating the injurious thoughts from desires of the day dream, there is a risk of apprehending and punishing wrong persons, the law should not criminalize such thoughts. As rightly stated by Blackstone, it is better that ten offenders escape than to make an innocent suffer.[466]

3.3. Lack of Logic/Fairness

Renouncing one's pursuit of criminal activity is a mitigating factor while assessing punishment. Depending on circumstances, there is a possibility

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[462] R. G. Singer and J. Q. La Fond, Criminal Law; Examples and Explanations, (2004), p.35

[463] United States v. Hollingsworth, 27 F.3d 1196, 1203 (7th Cir. 1994) (*en banc*) .

[464] Commonwealth v. Kennedy, 48 N.E. 770,770 (Mass.1897).

[465] Powell v. Texas, 392 U.S. 514, 543 (1968) (Black and Harlan, JJ. ,concurring).

[466] 4 William Blackstone, Commentaries on the Laws of England 358 (1765) in J. Dressler, Understanding Criminal Procedure, (3rd ed., 2002), p.30.

for he who renounces his criminal conduct to be free from punishment.[467] This is a clear recognition that there is a possibility of desisting from a criminal activity at any stage in the criminal process – planning, preparation, conspiracy or attempt. This is an approach consistent with the requirement that society must give each person some breathing space, i.e., the opportunity to choose to desist from wrongful activity.[468]

If one is apprehended at the stage of planning, preparation or conspiracy, he is being denied the opportunity to renounce his plan or decision and get acquittal or at least benefits from mitigation of punishment. As pointed out by Joshua Dressler "the earlier the police intervene to arrest for inchoate conduct, a person with a less than fully formed criminal intent will be arrested before she has had the opportunity to reconsider and voluntarily desist."[469] To the extent the law recognizes and rewards renunciation of criminal design, which can be done at any point in the criminal process, but at times it punishes, with no chance of mitigation, those who plan, prepare or conspire, without more, suffers from illogicality.[470]

3.4. Punishment not serving its purpose

There are two major theories on the purpose of punishment: utilitarian and retributivist. Utilitarianism is a consequentiality theory which advocates that "actions are morally right if, but only if, they result in desirable consequences."[471] This theory justifies punishment on the ground that its threat or actual infliction results in reduction of crime—deterrence function

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[467] Article 28 (1) of the Criminal Code of the Federal Democratic Republic of Ethiopia

[468] Dressler, cited above at note 7, p.83.

[469] Id. p.374.

[470] One who committed the crime intentionally might get a mitigated punishment than the one who is apprehended before the commission of the crime. That is so for Article 82(e) of the 2004 Criminal Code allows the court to reduce punishment where the one who commits the crime delivers himself to the authorities or when, on being charged, he pleads guilty. Ultimately, it would be a matter of chance that one is apprehended at earlier stage in the criminal process than the other which does not justify the harsh treatment of the former.

[471] There are two types of moral reasoning. The first one emphasizes on actions as means to good ends which is known as "teleological" or "consequentialist" view. Another form of moral reasoning which focuses on actions as ends in themselves is known as 'deontological" view which is essentially nonconsequentialist. To this approach belongs the other theory of punishment. Dressler, cited above at note 7, pp.13-14.

of punishment.[472] For a utilitarian, a person contemplating criminal activity will balance the expected benefits of his contemplation against its risks such as likelihood of successful completion of the crime, the risk of apprehension and conviction, and the severity of the possible punishment. Then he will avoid criminal activity if the perceived potential pain (punishment) outweighs the expected potential pleasure (criminal rewards).

Retributivist theory of punishment looks at actions as ends in themselves. This theory evaluates the action itself irrespective of its ultimate effects on others. For the retributivist, punishment is legitimately inflicted when it is deserved. In so far as, the criminal has committed a crime by his own free will, retributivists advocate, he has to be punished whether or not his punishment results in a reduction of crime.[473]

In view of the remoteness and equivocality of plans, preparations, and conspiracy, it is hardly possible to see how the deterrent or retributive purposes of punishment may be served by punishing such conducts. As has been shown earlier, their criminalization creates a room for apprehending and punishing the wrong persons[474]. Where wrong persons are punished neither retributive nor deterrent purpose of punishment would be served. To the contrary, punishment in such cases might be counterproductive. First, those who are wrongly subjected to punishment may develop a sense of revenge against the public. Second, if potential offenders know that the

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[472] Punishment is believed to serve its deterrence function in two ways, namely general deterrence and specific/individual deterrence. The first one, as its name implies, refers to cases where punishing a criminal passes a message to the general community to forego criminal conduct in the future. The idea is one's punishment teaches the community what conduct is impermissible; it instills fear of punishment in would be violator's of law. The specific deterrence function of punishment, the second way, refers to the fact that the criminal himself who is subjected to punishment and felt its pain will get lesson not to engage in criminal activities in the future.

[473] Dressler, cited above at note , p.13-14 and p.16.

[474] 'Wrong persons' here refer to those who have never thought of committing a terrorist act or those who might have thought but would have desisted from pursuing their thoughts. Had there been a means which would allow us to identify those who planned and prepared to commit a terrorist act that would pursue their plan to its end if not apprehended timely from those who would not, then having a law that allows the police to arrest the former category of persons would have been perfect to prevent commission of the intended crime and to deter others. But that is not humanely possible. It is only where the actor's conducts are closer to the commission of the crime that one can reasonably be certain about the actor's determination. This makes punishing inchoate conducts problematic.

system does not screen wrong doers from non wrongdoers, they will be encouraged to try their criminal thoughts. Such system may even tempt some innocent members of the community to think about committing a crime for they may feel that if one's innocence does not guarantee his freedom from arrest and perhaps from punishment, it is better to be punished after committing a crime. Also, the system may make people to be frightened away even from some of their legitimate endeavors to avoid the indiscriminate treatment of the system which is equally undesirable.

Punishment of plans in particular, is not likely to produce effect on the society as thoughts, unlike conduct, almost certainly cannot be deterred.[475] Even if the law that criminalizes inchoate conducts were to have a contribution in shaping citizens' attitude on terrorism by preventing them from planning or thinking about terrorism, it will still be criticized for going outside of its legitimate purpose. As has been said, the purpose of punishment is not to punish *sins and purify thoughts* but to prevent certain external results.[476]

3.5. Downsides of Criminalizing Inchoate Conducts

As argued earlier criminalization of planning to commit a terrorist act (in so far as not manifested by conduct) amounts to prohibition of pure thought about commission of a terrorist act. Hence, its constitutionality can be challenged for being an infringement of freedom of thought guaranteed by Article 27 of the FDRE Constitution and other provisions of international[477] and regional[478] human rights instruments. The Human Rights Committee, in its General Comment No.22, indicated that Article 18 of the International Covenant on Civil and Political Rights, which provides for the right to freedom of thought, does not permit any limitations whatsoever on the right.[479] In the case of *Stanley v. Georgia*[480] the U.S. Supreme Court, in relation to the First Amendment to the U.S. Constitution which is understood to guarantee freedom of thought, concluded that "the state --- cannot constitutionally premise legislation on the desirability of controlling

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[475] Dressler, cited above at note 7, p.82.

[476] Commonwealth v. Kennedy, 48 N.E. 770,770 (Mass. 1897).

[477] Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

[478] Article 18 of the African Charter on Human and Peoples' Rights

[479] General Comment No.22: The Right to freedom of thought, conscience and religion (Art.18), ccpr/c/21/Rev.1/Add4,, 07/30/1993

[480] Stanley v. Georgia, 394 U.S. 557,566 (1969).

a person's private thoughts."[481] In another case[482], Judge Williams noted that First Amendment protection of freedom of thought extend protection even to ideas that are immoral or contemplate criminal conduct[483].

In the event that the law passes constitutional scrutiny, because punishment itself is evil, "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[484] Bentham argues that punishment ought not to be inflicted, *inter alia*, where it is unprofitable or too expensive.[485]

Following are some of the negative impacts of criminalizing inchoate conducts that should be balanced against the possible benefits of their criminalization. First, criminalizing plans, preparations and conspiracy, is likely to result in apprehension of wrong persons which, as argued earlier, is counterproductive in the struggle against terrorism. The drawback of arresting the wrong persons is that the acquittal rate would be high as a consequence of the difficulty of proving their guilt to the necessary degree.[486] As the deterrent effect of punishment is very much related with the likelihood of actual infliction of the punishment[487], high rate of acquittal may become detrimental to the criminal justice administration in general and to preventing terrorist acts in particular.

The second negative consequence of such laws is what Bentham calls the "evil of coercion or restraint"[488] of the laws on those who respect it. As applied to the issue at hand, it refers to the burden the law imposes on the

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[481] Constitutional Law—Freedom of Thought—Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks,— *Doe v. City of Lafayette*, 377 F. 3d 757 (7th Cir. 2004), Harv. L. Rev., vol. 118, note 42, p.1057

[482] Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004)

[483] Constitutional Law—Freedom of Thought—Seventh Circuit Upholds City's Order Banning Former Sex Offender from Public Parks, cited above at note 92.

[484] J. Bentham, An Introduction to The Principles of Morals and Legislation, (4th ed., 1965) p.170.

[485] Id., p.171

[486] Even where the arrested persons have in fact planned or prepared to commit a terrorist act, remoteness and equivocality would still make it difficult to prove their involvement by a necessary degree of proof.

[487] Steven Klepper and Daniel Nagin argued "an increase in the *likelihood* of punishment will deter more effectively than an increase in the *severity* of punishment." S. Klepper and D. Nagin, The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited, 27 Criminology (1989), p. 721.

[488] Bentham, cited above at note 95, p.175.

society by prohibiting engaging in lawful activities which could, at times, be construed as preparation for committing a terrorist act. Because of the equivocality and remoteness of the conducts from the actual crime, activities which are performed for a purely lawful purpose might be perceived as preparatory acts for the commission of a terrorist act. Also, Article 5 of the Proclamation punishes he who, *having reason to know* that these activities would have the effect of supporting the commission of a terrorist act or a terrorist organization, engages in activities listed there under. It is not difficult to imagine possibilities where one might engage in any of those acts for a purpose not related to terrorism. This law exposes such person to the risk of being held criminally responsible. The punishment for a negligently provided assistance being as harsh as for that provided intentionally makes the law's absurdity vivid.

In Bentham's view, "punishment is warranted only to the extent that its beneficial effects in discouraging criminal behavior outweigh the harm it produces."[489] Considering the harms that may result from criminalizing and punishing these inchoate conducts, it seems that these conducts should not be punishable. By criminalizing these pre attempt activities, the Ethiopian legislature has joined the club of those who are criticized for not giving sufficient attention to Bentham's restraining principle--that against the preventive benefits of punishing must be weighed the pain of those punished.[490]

3.6. Preventive Detention—alternative to punishment

Waiting till a crime is fully consummated or attempted for the criminal law to be applied may not be advisable in some cases. Precluding earlier stages in the criminal process (inchoate conducts) from falling within the ambit of criminal law may cause some potential offenders to believe that in so far as their plan is not aborted ahead of time, they can avoid detection and apprehension after the commission of the crime. Others may not be worried about apprehension and subsequent punishment after the commission of crime. They may even perceive the punishment as a reward. What is important for them is successful execution of the crime no matter what it takes. This is true for terrorists who employ suicide bombing as a means of committing the terrorist act even at the expense of their lives.

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[489] Bentham, quoted in A. V. Hirsch, "proportionality in the Philosophy of Punishment", Crime and Justice, vol.16 (1992), p.58.

[490] Ibid.

If criminals perceive punishment following the commission of a terrorist act as a reward, it would not serve its deterrent purpose. That is, such offenders are so committed for the perpetration of the offence (at any cost) that possible punishment that follows commission of terrorist act would not discourage them from committing the crime. This is a case where Bentham's assumption[491] that potential offenders will avoid commission of crime if they believe that they will be apprehended and punished does not work.

There is another problem, unique to terrorism, that makes Bentham's assumption irrelevant. Where a terrorist act is intended to be committed by suicide bombing or other means that endangers the life of the doer, the society will not have an opportunity to try and punish the criminal. It might be too late to try the offender after the commission of the crime.

Given these attributes of terrorism, having criminal laws that deal with inchoate conducts seems necessary. However, it need not be by criminalizing and punishing inchoate conducts. As shown above criminalizing and punishing inchoate conducts have several disadvantages. Punishment should be confined to the minimum possible for it is an evil in itself. As the justification for early intervention is to get a reasonable assurance that the intended crime be not realized, any means that can serve this purpose at a lower cost would make infliction of punishment unnecessary.

The idea of preventive detention[492] is in order. Applying preventive detention instead of punishment, where one is suspected of inchoate conducts, if not abused, would have the following benefits. First, those,

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[491] Jeremy Bentham, Principles of Penal Law, in Dressler, cited above at note 7, p.14.

[492] For the purpose of this article 'preventive detention' refers to detention of a person upon a reasonable threat that he is planning, preparing or conspiring towards commission of a terrorist act. There is no consensus on the aptness of preventive detention. For arguments against and for preventive detention see generally: M. Corrado, "Punishment, Quarantine and Preventive Detention," Cr. Justice Ethics 15 (1996) pp. 3-13 and P. Montague, "Justifying Preventive Detention," Law and Philosophy Vol.18 No.2 (1999), pp.173-185. The idea of preventive detention was incorporated under Article 145 of the 1957 Penal Code. Graven indicated that in Ethiopia prevention of crime, which is the goal of criminalizing preparatory acts, can be attained by applying this provision. Article 141 of the 2004 Criminal Code, which corresponds to Article 145 of the 1957 Penal Code, is drafted in such a manner that it is only one who is suspected to have committed a crime (not one who is suspected to have planned or is preparing) who may be subjected to detention.

who would have gone to the extent of committing the crime, will, as a result of the detention, be prevented from pursuing their plan, preparation or conspiracy. As far as this category is concerned, the law serves the main goal of prevention of a terrorist act without the avoidable evil – punishment. As suggested by Jeremy Bentham, using punishment is unnecessary where the purpose of punishment can be achieved at a cheaper rate.[493] Second, those who, even without the preventive detention, would have desisted from their criminal design would be rightly saved from punishment.[494] Third, as regards those who prefer to continue in their pursuit of criminal thought of committing a terrorist act, even after release from detention, their dangerous disposition becomes clear which makes infliction of punishment to be most appropriate. The fact that they were detained in connection with suspicion that they were involved in conducts related with terrorism can be considered as aggravating factor.

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

II. Proportionality of Punishment

The Ethiopian Anti-terrorism law authorizes the law enforcement agencies to intervene at the earliest possible time in the process of the commission of a terrorist act. The law punishes plans, preparations, conspiracy and attempts to commit terrorist acts. It provides for similar punishment for all these non-consummated acts and the fully consummated terrorist act. The aptness of subjecting inchoate conducts to punishment be as it may, the issue to be dealt hereunder relates to the propriety of subjecting these conducts to the punishment as that of the completed crime. Also, participants in a terrorist act are subject to punishment. Whether the punishment prescribed to the participants meets the requirement of equitability is another subject of discussion in this section. Basically, this section evaluates the extent to which the doctrine of proportionality is incorporated in the Proclamation.

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[493] Bentham, cited above at note 95, p.177.

[494] Though subjecting them to preventive detention in itself is not appropriate, it is better than subjecting them to punishment.

The principle of proportionality—that the severity of punishment be proportionate to the gravity of the actor's criminal act—is a basic requirement of fairness.[495] As Feinberg has put it "justice requires that the punishment fit the crime."[496] Furthermore, "safeguarding offenders against excessive, disproportionate or arbitrary punishment" is acknowledged to be one of the purposes of modern criminal laws.[497]

The need for proportionality between the gravity of the crime and the punishment is recognized under both theories of punishment. For retributivists, the appropriate level of punishment is to be determined by taking the crime's two basic components, namely the harm inflicted by the actor and the actor's moral blameworthiness. Utilitarian philosophy is said to direct that "punishment be neither too little nor too much, but rather that it be proportional"[498] to the dangerousness of the crime committed.[499]

It has been shown earlier that punishing plans, preparations and conspiracy is not justified under both theories. As the theories do not accept criminalization of these conducts, they do not deal with the extent of punishment for the conducts. For both theories support criminalization of attempts, they deal with the appropriate punishment to be attached to them. After briefly looking at the factors they take into account to calibrate the appropriate level of punishment for attempts vis-à-vis completed offence, we will try to extend the arguments for the other inchoate offences.

Both schools of thought split into two on whether attempt should be punished as severely as the completed offence. Culpability-retributivists, who emphasize more the blameworthiness of the actor than the harm, believe that a failed attempt should be punished as severely as a completed crime. For this group, a person deserves punishment proportional to her

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[495] Hirsch, cited above at note 100, p.55.

[496] J. Feinberg, the Expressive Function of Punishment, in B. E. Harcourt, "Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal law and The Expressive Function of Punishment", 5 Buff. Crim. L. Rev. 2001-2002, p.161.

[497] To mention few, Model Penal Code, Paragraph 1.02 (2) (c), the 1991 English Criminal Justice Act, the 1988 Swedish sentencing law, and sentencing guidelines of Minnesota, Washington State, and Oregon.

[498] Dressler, cited above at note 7, p.50.

[499] The dangerousness of the crime is to be measured by predicting the overall harm that may arise from the commission of the offence in the future by the offender at hand and by others. Dressler, cited above at note 7, p.50.

culpability whether or not the intended harm results. The one who attempted but failed to commit the crime and the one who succeeded in committing the crime are equally culpable which calls for equal punishment.[500]

Harm-retributivists argue that punishment should be determined on the basis not only of culpability but also of harm. They admit that both the successful and the unsuccessful ones are equally blameworthy which makes both of them eligible for penal sanction. Regarding the appropriate degree of punishment, the extent of the resulting harm should be taken into consideration. Since the harm caused by an attempt is necessarily less than that caused by the successful commission of a crime, a criminal attempt is always a lesser offence which deserves a less severe punishment than the consummated crime.[501]

In the utilitarian school of thought, too, there are supporters of equal punishment as there are advocators for lenient punishment of attempts. Those who advocate equal punishment believe that both the attempter and the one who succeeds in committing the crime are equally dangerous and in need of rehabilitation. Because their intention and criminal resolve is the same, they are equally dangerous calling for similar punishment.[502]

Those utilitarians who object to similar punishment for attempt and completed offence advance two reasons in support of their position. First is the difference in the degree of obstinacy and wickedness in an attempt and a completed offence. In this regard, Ashworth noted that "from the moment the defendant's conduct crosses the threshold of an attempt, up until the completion of the crime, the punishments should ideally be graded with increasing severity."[503] Second reason is that making the punishment for attempts less severe serves as an incentive for one who is at the stage of attempt to desist before completing the crime. Mitigated punishment is said to provide "an encouragement to repentance and remorse."[504]

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[500] Id. pp.383-384.
[501] Id., p.384.
[502] Id., p.383.
[503] Ashworth, cited above at note 62, p.739.
[504] 4 Blackstone at *14 in Dressler, cited above at note 7, p.383. As stated by Jermey Bentham the reduced punishment serves as an incentive to the actor to desist before completing the crime. Jermey Bentham, Theories of Legislation 427 (1931) in Dressler, cited above at note 7, p.383.

It is clear from the preceding paragraphs that both retributivists and utilitarians determine punishment on the basis of certain criteria. Determinant factors for the severity of punishment in the cases of consummated offences and attempt--blameworthiness of the doer and harmfulness of the conduct-- are not present in the case of other inchoate conducts.[505] That is, the inchoate conducts under discussion are so remote and equivocal that neither culpability of the actor can reasonably be verified nor can harm be felt by the public. In such a case, both harm and culpability retributivists would not be in a position to calibrate the punishment proportional to the conducts. For the same reasons of remoteness and equivocality, the dangerousness of the actor cannot be measured as a result of which a utilitarian could not opine on the appropriate degree of punishment.

Once inchoate conducts are criminalized, perhaps by a political decision, punishment would follow where the doctrine of proportionality becomes relevant[506]. Because the conducts are remote from the principal offence, there is a chance that the actors would desist from their criminal activity which makes them less culpable/blameworthy than those who have attempted or committed a crime whose determination to commit the crime is certain. It follows that the closer the conduct to actual commission of the crime, the more the severe the punishment should be. As stated by Blackstone "for evil, the nearer we approach it, is the more disagreeable and shocking, so that it requires more obstinacy and wickedness to perpetrate an unlawful action, than barely to entertain the thought of it."[507] Moreover, these conducts are innocuous. It is, then, a simple logic that the punishment (if there should be one) to those conducts be less severe than the punishment for an attempt or commission of a crime. [508]

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[505] Absence of factors on the basis of which punishment is to be calculated is a clear indication that their criminalization is not supported by criminal law theories.

[506] If punishment is to be determined by disregarding the proportionality requirement, it would simply be decided randomly which would become another reason for objecting the law.

[507] 4 Blackstone at *14 in Dressler, cited above at note 7, p.383

[508] For harm-retributivists, to whom punishment should be decided on the basis of harm resulting from the wrongful conduct, the punishment for planning or preparing to commit a crime should necessarily be of a lesser severity than that for attempt and consummated offence since the harm arising from such conducts (if there is any) is obviously lesser than that arising from attempt or consummated offence. Also, it would be only logical to assume that culpability-retributivists, whose judgment on the extent of punishment depends on blameworthiness of the actor, would support a less severe punishment to those who are at the stage of planning, preparation or

As stated by Feinberg:[509]

> Justice does require that in some sense the punishment fit the crime. The degree of the disapproval expressed by the punishment should fit the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes.

No reasonable mind would argue that planning to commit a terrorist act is equally dangerous as actually committing the terrorist act. Where their resemblance in terms of resulting harm or blameworthiness of the persons concerned cannot be established, there cannot be a valid and convincing reason for similar punishment. To provide similar punishment for both inchoate and consummate offences conveys a wrong message to the public that both conducts are equally harmful and both doers equally culpable. This is an approach inconsistent with the expressive function of punishment. In this connection, Hart indicates that disproportionate sanctions pose the "risk --- of either confusing common morality or flouting it and bringing the law into contempt."[510]

These ideas are well reflected in the Criminal Code. In cases where the Code criminalizes plans, preparations and conspiracy the punishment is significantly lower than the punishment for attempt or consummated

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conspiracy as compared to those who went as far as committing or attempting to commit an offence. The implication of Blackstone's statement on the same is pertinent. According to Blackstone, "for evil, the nearer we approach it, is the more disagreeable and shocking, so that it requires more obstinacy and wickedness to perpetrate an unlawful action, than barely to entertain the thought of it."

4 Blackstone at * 14 in Dressler, cited above at note 7, p.383. Hence the argument against punishment or for mitigated punishment of inchoate offences gains its strength as the conducts become far from the crime. In the path of crime, remoteness and equivocality - reasons advanced for abolition and/or mitigation of punishment for inchoate offences— progressively vanishes as actors advance and approach to the actual commission of the crime. Hence, in the path of a crime, the punishment should be graded with increasing severity as one is approaching to the actual crime.

[509] Feinberg, cited above at note 107, p.161

[510] H.L.A.Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1970), p.25

offence.[511] Unlike the Criminal Code, the Proclamation, disregards the effects of remoteness and equivocal nature of the inchoate conducts as factors that determine the extent of punishment and prescribes for similar punishment to all criminalized inchoate conducts and consummated terrorist act. Subjecting one who has planned, taken preparatory steps or conspired with others to commit a terrorist act to the same punishment as one who has committed a terrorist act makes the law unfair.[512]

The preamble of the 2004 Criminal Code[513] made it clear that deterrence is the primary purpose of punishment under the Ethiopian criminal law indicating that it is influenced by utilitarian principles.[514] Hence, a reference to utilitarian principles and rules relating to proportionality would be in order.

Punishment for a utilitarian is justified by its use to prevent commission of all offences. Where it is not possible to prevent commission of all offences, the next object of punishment is to prevent the worst offence. From this develops one of the rules of calibrating punishment which is: "the punishment system should be designed in such a way that it induces the actor to choose the less mischievous of the two wrongful acts."[515] It follows from this rule that plans, preparations, and conspiracy to commit an offence, being less mischievous than committing or attempting to commit the crime, the punishment for the former conducts should be less severe than the punishment for the latter ones. Such system of punishment would make the actor who has already planned or made preparatory acts to think

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[511] Compare the punishment provided under Article 256 (b) (for preparation) with the punishments provided under Articles 238, 240 and 246 (principal crimes); the punishment under Article 257 (b) (for conspiracy and planning) with the punishments under Articles 238, 240 and 246 (principal crimes); the punishment provided under Article 274 (planning and conspiracy) and punishment provided under Articles 269 and 270 (principal crimes).

[512] It is stated in the preamble part of the 2004 Criminal Code that one of the factors that necessitated the revision of the 1957 Penal Code is recognition that applying double standard (regular Penal Code and the Revised Special penal Code) for similar matters disregards equality among citizens. The problem of applying double standard would surface where inchoate conducts in the 2004 Criminal Code and the Anti-Terrorism Proclamation are treated differently.

[513] The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, p.III-IV.

[514] Though the anti-terror law does not make an explicit reference to utilitarian rules and principles the relevance of these rules and principles can be inferred from Article 36(2) of the law.

[515] Bentham, cited above at note 95, p.181

twice before proceeding to the actual commission of the crime. This approach is consistent with Blackstone's idea that the punishment for inchoate offences and complete offence should be different so that the actor would be encouraged to repent.[516] If similar punishment is prescribed to both inchoate and complete offences, then once a person plans or takes preparatory steps, there is nothing that discourages him from proceeding to the actual criminal conduct. To the extent that the punishment system does not contribute in discouraging criminals from proceeding further in their criminal design, it is defective for it fails to serve its purported purpose – prevention of the commission of crime.[517] If planning, preparing, attempting and committing an offence would subject an actor to similar punishment, he might think "since I'll be punished (same punishment) any way, I might as well go and do what I decided to do."[518]

Among Bentham's rules of determination of punishment, the rule that runs " when a man has resolved upon a particular offence, the next object is, to induce him to do no more mischief than what is necessary for his purpose" is pertinent to calibration of punishment of participants in the commission of a given offence. [519] The application of this rule requires that the punishment for mere incitement to commit a terrorist act should be less severe than that for inciting another and continuing to coordinate the commission of the crime. Instigating one to commit a crime is one mischief and continuing to coordinate the commission of the crime is another mischief. In such cases "the punishment should be adjusted in such manner to each particular offence that for every part of the mischief there may be a motive to restrain the offender from giving birth to it."[520] If one knows that instigation is punishable as severe as committing the crime, once he starts to induce another, then he will proceed and commit the crime by himself or continue to provide the necessary support to the instigated person as there is no (additional) punishment for all activities that come after instigating

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[516] 4 Blackstone at *14, in Dressler, cited above at note 7, p.383.

[517] It would not be wrong to argue that the system that punishes consummated and non consummated offences similarly tempts those who have already started the criminal process to come to the end pursuing on their plan as doing so does not have any additional negative consequence. Perhaps, one may believe that if to be punished, it is better to be punished for the complete offence than for mere plan, preparation or attempt

[518] Graven, cited above at note 4, p.68

[519] Bentham, cited above at note 95, p.181

[520] Ibid.

the other person. The same is true with accomplice.[521] If one who provides assistance before the commission of a crime knows that he will be subject to the same punishment whether or not he continues his involvement in the commission of the crime, he will be encouraged to do his best to ensure the perpetration or completion of the crime.

Moreover, by subjecting instigators and accomplices to similar punishment irrespective of the fact that the principal crime (terrorist act) is attempted or committed, the Proclamation deviates from the requirement that the extent of punishment should partly depend on the degree of harm.[522]

Another strange position of the Proclamation relating to extent of punishment is that it prescribes equal punishment irrespective of the type of *mens rea*. As stated under Article 5 of the Proclamation, assistance, be it provided intentionally or negligently, would subject the provider to the same punishment. Likewise, Article 9 of the Proclamation prescribes similar punishment for one who *knowing* that a property is a fruit of terrorist act possesses, owns, deals, converts or conceals and another *having a reason to know* about the source of the property (but as a matter of fact does not know) does the same act.[523]

Subjecting a person who engages in a criminal act intentionally and another who does the same act negligently to similar punishment is not sound. Compared to intention, negligence constitutes a lower degree of criminal guilt.[524] To provide similar punishment for negligently and deliberately

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[521] Even if, in principle, the punishment for instigation, accomplice and actual perpetration of a crime is subject to the same punishment, Articles 36 and 37 of the 2004 Criminal Code authorizes the court, where circumstances justify, reducing the punishment to be imposed on an accomplice and instigator. That is not the case under the Anti-terrorism Proclamation.

[522] The Criminal Code, in principle, punishes instigation and accomplice only where the principal offence is at least attempted. The amount of punishment where such participations are punishable without the principal offence being attempted is significantly lower than the punishment where the principal crime is committed. See Articles 255, 301, 332, and 355 of the Criminal Code.

[523] Article 682 of the Criminal Code treats receiving made intentionally and deliberately differently. Also, Article 683 (3) of the Code makes clear that knowledge aggravates punishment on an accessory after the fact.

[524] Graven, cited above at not 4, p.159. The punishment prescribed under sub articles 1, 2 and 3 of Article 682 and Article 683(3) of the Criminal Code reflects the difference in culpability depending on whether the crime of receiving is committed intentionally or negligently.

committed offences conveys a wrong message to the public that both conducts are equally dangerous and both doers equally culpable. This is a disservice to the expressive function of punishment. Hart's observation in connection with disproportionate punishment is once more pertinent. For him, disproportionate sanctions pose the "risk --- of either confusing common morality or flouting it and bringing the law into contempt."[525]

The application of the Proclamation results in unwarranted differential treatment of providers of assistance in the commission of a terrorist act. Assistance, given before the commission of a terrorist act, which is in the form of those listed under Article 5 of the Proclamation, is treated as separate offence.[526] The Proclamation is silent as to other forms of accessory before the fact and any assistance provided during the commission of a terrorist act. In such cases, the relevant provisions of the Criminal Code apply.[527] Hence, any sort of assistance not envisaged under Article 5 of the Proclamation (be it provided before or during the commission of the crime) is to be treated in accordance with the principle provided under Article 37 of the Criminal Code. This gives rise to the following consequences. First, a person whose assistance to the commission of a terrorist act does not fall under Article 5 of the Proclamation is treated as an accomplice only where he provided the assistance intentionally. Second, he will be subject to punishment only where the principal terrorist act is at least attempted. Third, where he is to be punished, he will be subject to the same punishment as the perpetrator of the terrorist act which is more severe than that provided under Article 5 of the Proclamation.

The punishment prescribed for conducts that come after the terrorist act is committed or attempted are manifestly disproportional with both the culpability of the doer and the harm that may possibly arise from these conducts. A comparison with the approach taken by the Criminal Code makes the point clear. The punishment to be imposed on a person who harbors or helps to escape or conceals someone who has committed

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[525] Hart, cited above at note 121, p.25.

[526] It follows that the provider of any of the assistances envisaged under Article 5 of the Proclamation is treated as principal offender but not as a secondary participant.

[527] That is authorized under Article 36(2) of the Proclamation. Theoretically one may argue that where the Proclamation lists down specific types of assistances the implication is that it excludes other types of assistance from being criminalized. In my opinion, this opinion makes Article 36 of the Proclamation useless.

crimes[528] which are as grave or even graver than a terrorist act is by far less severe than the punishment on one who harbors or helps to escape or conceals one who has committed a terrorist act.

Conclusion

The desire to prevent commission of crime necessitates early intervention in the criminal process. However, at what stage in the process should the intervention be made has to be carefully decided. There is a consensus that it is appropriate to step in when one reaches the point of no return in the criminal process. However, criminalization of inchoate conducts other than attempt is not supported by major criminal law theories. Equivocality and remoteness of these conducts give rise to different concerns that militate against their criminalization. For one or another reason, the criminalization of planning, preparation, and conspiracy by the anti-terror Proclamation is not justified. Criminalizing and punishing instigation and participation where the terrorist act is not attempted is unreasonable. Far from serving the intended purpose of prevention of a terrorist act, their criminalization may rather become counterproductive in the struggle against terrorism.

Once criminalized, normally the punishment to be attached to these conducts should be determined by taking the degree of harm caused on the public and the culpability of the doer into consideration. Assessment of the punishment prescribed for these conducts in the anti-terrorism law in light of the factors that influence determination of punishment and a comparison with relevant provisions of the Criminal Code clearly show that the law does not take into account these factors. The punishment set by disregarding these factors is simply arbitrary.

If, in view of the special nature of terrorism, criminal law has to intervene before attempt stage in the criminal process is reached, a system of preventive detention is recommended in place of punishment. This system, by allowing the government to step in at the earliest possible time, would ensure prevention of commission of a terrorist act without unjustifiably subjecting the 'suspect' to punishment.

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[528] Crimes against the constitution and constitutional order, and crimes against humanity can be mentioned as examples. As provided under Article 445 of the Criminal Code provides "whoever knowingly saves from prosecution a person who has fallen under a provision of criminal law, whether by warning him or hiding him, by concealing or destroying the traces or instruments of his crime, by misleading investigation, or in any other way, is punishable with simple imprisonment or fine."