

## **State Media Coverage of Highly Publicized Criminal Cases in Ethiopia and the Fair Trial Rights of the Accused**

**Tsega Andualem Gelaye**

### ***Abstract***

*The precise role of Ethiopian state media in the administration of justice, particularly their coverage of highly publicized criminal cases, raises serious concerns on the fair trial rights of the accused. Under the guise of freedom of expression and informing the public, the media is at times taking over the sole responsibility of courts of determining the guilt or innocence of persons accused of committing crime, by releasing publications of highly prejudicial nature in violation of the fair trial guarantees of presumption of innocence, privilege against self-incrimination and the right to be tried by an impartial court. Here the important question would be how the media could exercise its freedom without infringing the fair trial rights of the accused. In other words, what the media can and cannot do in reporting criminal cases. The answer to this question is not simple and it requires trading a delicate balance between freedom of expression and the right to fair trial both of which are guaranteed under the FDRE constitution.*

*Yet, the FDRE constitution does not clearly indicate how the two sets of rights could co-exist without one threatening the existence of the other. Thus, this article tries to elaborate or point out the bounds of media freedom in covering criminal cases under FDRE constitution by examining standards developed by other countries and international jurisprudence on the matter. It also assesses the current practice of Ethiopian state media coverage of highly publicized criminal cases in light of these standards by taking some (in)famous broadcasts of the Ethiopian National Television (ETV) currently renamed as Ethiopian Broadcast Corporation (EBC) as an example. Finally, the mechanisms of controlling and remedying irresponsible media reportage of criminal cases under Ethiopian law as well as their adequacy is also dealt in this article.*

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· LL.B, LL.M in Human Rights Law (Addis Ababa University), Lecturer at College of Law, Debre Berhan University. I would like to thank the anonymous reviewers of the journal for enriching the article with their critical and constructive comments. Contact Address: tsega.andualem@yahoo.com

## I. Introduction

Media is capable of playing both constructive and destructive roles in the administration of criminal justice anywhere and the Ethiopian state media is no exception in this regard. Concerning Media's positive role in the adjudication of criminal cases, the US Supreme Court in its decision on *Sheppard vs. Maxwell*, succulently noted that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in criminal field".<sup>415</sup> Here the term 'responsible' media should be underscored since it is the only kind of media that aids the course of justice instead of the irresponsible ones. Although there is no clear cut definition of what a responsible media constitutes, authorities have attempted to provide certain key attributes. For instance, the Indian High Court identified 'accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people'<sup>416</sup> as cardinal virtues which responsible media must uphold and live up to.

Such media assists the administration of criminal justice by performing various functions at different stages of the criminal proceedings. Prior to arrest, media could assist the capture of a crime suspect who is not apprehended yet and it serves to notify the public of the possible dangers posed by him/her so that they could take the necessary precautions.<sup>417</sup> Following the arrest and until the commencement of trial, media reporting of proceedings gives the public the confidence that the law enforcement officials are properly carrying out their responsibility of safeguarding the public.<sup>418</sup> Additionally, media scrutiny during this period also helps the accused to appear in court within the prescribed time instead of languishing in police detention.<sup>419</sup>

Once trial gets going, coverage of the trial proceedings by the media helps to ensure the accountability of judges, prosecutors, lawyers and other parties involved in the trial.<sup>420</sup> Thus, attention by the media reminds these

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<sup>415</sup> *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir.1965), rev'd, 384 U.S. 333 (1966).

<sup>416</sup> *Mother Dairy Foods & Processing Ltd v. Zee Telefilms (IA 8185/2003 in Suit No. 1543/2003)*

<sup>417</sup> AMERICAN BAR ASSOCIATION (hereinafter ABA), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 47(1966).

<sup>418</sup>*Id.*, at 48

<sup>419</sup>*Id.*, at 49

<sup>420</sup> Giorgio Resta, *Trying Cases In The Media: A Comparative Overview*, 71 LAW AND CONTEMPORARY PROBLEMS, 35-36(2008).

participants that they are being closely watched by the eyes of the public which motivates them to perform their duties to the highest level. Further, fair criticisms of court decisions after the completion of the trial contributes for the improvement of the criminal justice administration system<sup>421</sup> by indicating the weakness, errors or irregularities committed in the process. Hence, these are the benefits derived from responsible media's coverage of criminal cases.

In contrast, irresponsible media's reporting in criminal cases is an obstacle to the effective administration of justice. Rather than being accurate, objective and fair in their reporting, irresponsible media are biased and lopsided to one of the parties. They are often known for distorting facts and taking allegations as facts.<sup>422</sup> Without due consideration of the impacts of their reporting in the administration of justice in general and the possible influence they might create in judicial proceedings, they tend to disclose carelessly whatever information they have at their disposal without regard to its prejudicial nature to the undertaking of independent judicial function. Hence, the only concern of such kind of media reporting is not revealing what is 'in the interest of the public rather what the public is interested in'.<sup>423</sup>

Such unhealthy media reporting of criminal cases will have the effect of undermining the fair trial rights of the accused intended to safeguard the individual from arbitrary and unlawful deprivation of his other fundamental rights and freedoms.<sup>424</sup> Some of these fair trial rights include:

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<sup>421</sup>*Ibid*

<sup>422</sup> Regional Workshop on 'Reporting of Court proceedings by media and administration of justice' At the High Court of Maharashtra and Goa, Mumbai (October 19, 2008).

<sup>423</sup>LAW COMMISSION OF INDIA, 200<sup>TH</sup> REPORT ON TRIAL BY MEDIA FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE 1973,(hereinafter LAW COMMISSION OF INDIA) 14 (2006). The public might be interested or curious to hear certain stories even if the information has no relevance to whatsoever to it day to day life as such. On the other hand, the dissemination of some information might be beneficial to the public or society to a large extent and contribute for the common good. For a detail discussion of the difference between 'what the public is interested 'and 'what is in the interest of the public' See Information Commissioner's Office, *The Public Interest Test* , [http://www.ico.org.uk/media/for-organizations/documents/1183/the\\_public\\_interest\\_test.pdf](http://www.ico.org.uk/media/for-organizations/documents/1183/the_public_interest_test.pdf), (last visited on May 26, 2015).

<sup>424</sup>LAWYERS COMMITTEE FOR HUMAN RIGHTS,WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 1 (2000).

the defendants' right to a presumption of innocence, prohibition on self incrimination and the right to independent and impartial tribunal.<sup>425</sup> In this section, only a general account of these rights is made. The status of these rights in the FDRE constitution and other human right treaties ratified by Ethiopia vis-à-vis the right to freedom of expression will be explored in depth in subsequent sections.

Accordingly, to begin with the right to be presumed innocent; it stipulates that "a person is considered innocent as long as there is no final judgment proving him /her guilty"<sup>426</sup>. Hence, *anyone* including the *media* is expected to respect this right by refraining from proclaiming the guilt of a person suspected of committing a crime before his/her guilt is determined by final judgment of a court.<sup>427</sup> Further, this right is believed to have laid the foundation for all other procedural rights belonging to the accused.<sup>428</sup>

Historically, the right to presumption of innocence began to get recognition at the end of 18<sup>th</sup> century together with the 'beyond reasonable doubt standard of proof'.<sup>429</sup> Consequently, the accused is not expected to prove his innocence. Rather, the prosecution is required to prove the guilt of the accused beyond reasonable doubt by adducing sufficient evidence. If there is a doubt regarding the innocence of the accused after the production of evidence by the prosecution, that doubt would be interpreted in favor of the accused pursuant to the principle in *dubio pro reo*.<sup>430</sup>

Another fair trial right of the accused potentially affected by irresponsible media reporting is the right not to incriminate one self. This right guarantees that no person "shall be compelled in any criminal case to be a witness against himself"<sup>431</sup>. As such, the accused has the right to remain silent in pre-trial criminal investigation and the right not to give evidence at trial. Until late 18<sup>th</sup> century, the fundamental safeguard for an accused person was not the right to remain silent rather the opportunity to speak.<sup>432</sup> During this period, the prime objective of criminal trials was to give a

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<sup>425</sup>*Id* at 13,15 &19

<sup>426</sup>*Id*, at 15

<sup>427</sup>*Ibid*

<sup>428</sup> Gabriela C. Nicoleta et al., *Short essay on Presumption of innocence. ECHR precedent*, LEGAL PRACTICE AND INTERNATIONAL LAW 193 (Christinel L. Murzea ed..2011).

<sup>429</sup>John H. Langbein, *The Historical Origins of the Privilege against Self-incrimination at Common Law*, 92 MICHIGAN LAW REVIEW 1047, 1070, (2002).

<sup>430</sup> See, Nicoleta *supra* note 14, at 195

<sup>431</sup> See Langbein, *supra* note 15, at 1047

<sup>432</sup>*Ibid*

defendant the chance to respond to the accusations brought against him/her.

But in late 18<sup>th</sup> century the role of defense counsels in criminal trials increased dramatically and prosecutions burden of proving allegations beyond reasonable doubt standard emerged at the same time.<sup>433</sup> These developments changed the objective of criminal trial in to testing the case of prosecution by the defense counsel and the criminal defendant acquired the right to decline to speak against charges against him. Accordingly, confessions of the accused will be accepted as evidence only when it was free, voluntary and not compelled.<sup>434</sup> Here, voluntariness impliedly incorporates the right not to answer or confess at all and the right to remain silent. The rationale behind the privilege against self incrimination is the assumption that confessions obtained by compulsion are not reliable as evidence.<sup>435</sup> Nonetheless, some media reports of criminal cases could endanger this privilege of defendants by releasing highly incriminating information obtained from them without making sure whether they are obtained voluntarily or not.

Apart from the two fair trial rights discussed above, irresponsible media coverage of criminal cases by the media could also infringe the defendant right to be tried by impartial court. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. However, the negative influence of irresponsible media coverage on judges' ability to adjudicate cases before them impartially is a bone of contention among scholars. With respect to this, some scholars argue that unlike lay men, professional judges that have taken rigorous legal training and sworn to perform their duties impartially should be assumed to have the stamina to withstand the negative effects of prejudicial media publicity.<sup>436</sup> In their view it is very unlikely for judges to be influenced by information released by irresponsible media. On the other hand, others contend that we must not forget that judges are also human beings and they are susceptible to influence as their fellow human beings. Hence, even if a judge endeavors to ignore prejudicial media publicity of a pending case and rule impartially,

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<sup>433</sup>*Id.* at 18

<sup>434</sup>Pat McNerney, *The Privilege against Self-incrimination from early origins to Judges' Rules: Challenging the 'orthodox view'*, 18 THE INTERNATIONAL JOURNAL OF EVIDENCE & PROOF 112,130 (2014).

<sup>435</sup>*Ibid*

<sup>436</sup> Pascale DuparcPortier, *Media Reporting of Trials in France and in Ireland*, 6 JUDICIAL STUDIES INSTITUTE JOURNAL 1, at 208 (2006)

his/her judgment could be affected by such information without the judge knowing it or sub-consciously.<sup>437</sup>

Furthermore, despite the actual or objective impartiality of the judge in the adjudication of the case, exposure of judges to biased information by irresponsible media may create the impression among the public that judges are already biased as a result of the publication. This is an important consideration since 'justice must not only be done but it must be seen done'.<sup>438</sup> Accordingly, the exposure of judges to prejudicial information by the media erodes subjective impartiality and the confidence of the public in fair and impartial adjudication of cases. Thus, it would be naïve to ignore the negative pressure irresponsible media could exert upon the administration of justice. All in all, as responsible media are allies to fair administration of justice, irresponsible media undermine the fair trial rights of the accused. Because of this, any measure that seeks to minimize the prejudicial effects of media on fair trial must only target irresponsible media and must leave the responsible ones operating space so that they could keep on delivering their beneficial functions for ensuring efficient administration of criminal justice.

## **II. Balancing Freedom of Expression and the Right to Fair Trial Under the Federal Democratic Republic of Ethiopia(FDRE) Constitution**

The FDRE constitution has given recognition to two important fundamental human rights constituting the pillars of a democratic system i.e. Right to Freedom of Expression and the Right to Fair trial.<sup>439</sup> Often the two sets of rights go hand in hand one safeguarding the proper exercise of the other. For instance, as noted in the preceding section media scrutiny of criminal proceedings ensure the accountability of actors operating in it. Likewise, courts are supposed to stand against unjustified interferences in the exercise of freedom of expression. Nonetheless, there are times where the two sets of rights may come in to conflict with each other. Such conflict arises when one right is exercised in absolute manner without consideration or even at the expense of the other. To illustrate, if the freedom of the press is considered as an absolute right giving the media the green light to publish any information that damages the fair trial right of the accused ,

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<sup>437</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 39-54

<sup>438</sup> *Ibid*

<sup>439</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (hereinafter FDRE CONSTITUTION), art.19, 20 and 29 (1995).

recognition of the right to fair trial will become a hallow promise. Similarly, if the right to fair trial bans any kind of media coverage of criminal cases, freedom of the press and the freedom of expression will not be ensured.

However, a closer examination of the FDRE constitution shows that the intention is to create a harmony between the two sets of rights by setting reasonable limitations. These could be inferred from articles 19(2), 19(5), 20(3), 29(2), 29(3), 29(4), and 29(6) of the Constitution. On one hand, the Constitution underscores the indispensable role of the media in a democratic society by serving as a channel for the dissemination of different ideas and viewpoints.<sup>440</sup> As such, it guarantees freedom of the press from interference and censorship. On the other hand, the Constitution also notes the dangers of an absolute right to freedom of expression. Hence, the Constitution states that legal limitation could be imposed on the freedom of the press to protect the well-being of the youth, public moral, propagation of war and statements capable of damaging human dignity or reputation.<sup>441</sup>

Here it should be noted that ensuring fair trial is not expressly stated as one of the legitimate grounds for restricting the right to freedom of expression. Yet, freedom of expression being a fundamental human right, the limitations placed upon it or the grounds for limiting it must be interpreted in conformity with international human right instruments ratified by Ethiopia.<sup>442</sup> Accordingly, the International Covenant on Civil and Political Rights (ICCPR), besides listing national security, public order, public health or morals also incorporate the need to protect the *other person's right* as a justification for restraining freedom of expression.<sup>443</sup> The phrase other persons right would include the right to fair trial. Thus, promoting fair trial is one of the legitimate grounds of limiting free expression.

Notably, the right to fair trial incorporates a number of guarantees ranging from the right to be informed of the charge one is accused of up to the right to appeal against the final judgment of a court.<sup>444</sup> However, not every guarantee of the right to fair trial is equally threatened by unrestrained coverage of media. Rather, certain key guarantees of the right to fair trial are particularly endangered by irresponsible reporting of the media.

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<sup>440</sup>*Id.*, at 29(4)

<sup>441</sup>*Id.*, at 29(6)

<sup>442</sup>*Id.*, at 13(2)

<sup>443</sup> International Covenant on Civil and Political Rights (hereinafter ICCPR ), Adopted on 19 December 1966 (entered into Force on 23 March 1976)., art.19(3), a

<sup>444</sup> See FDRE Constitution, *supra* note 25, at 20

Among these guarantees, the first is a person's right to be tried by an independent and impartial court.

This entitlement emanating from the right to fair trial is recognized in the FDRE constitution as well as the ICCPR and the Principles and Guidelines on the Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and People's Rights.<sup>445</sup> The FDRE Constitution under article 78 provides for the establishment of an independent judiciary. This provision is located outside chapter three of the Constitution which talks about Fundamental Rights and Freedoms. Nonetheless, it has relevance and strong connection with the fair trial right of the accused. The Constitution also elaborates the meaning of independent judiciary as freedom from "any interference of influence of any government body, government, officials or from any other source"<sup>446</sup>. The term 'any other source' indicates that the framers of the FDRE constitution have anticipated in advance that irresponsible media reporting could also come from non-state actors and unduly influence the judiciary or threaten judicial independence. Thus, the Constitution affords protection to the independence of the judiciary not only from the threat posed to it by state media but also from private media as well.

Likewise, the ICCPR speaks with the same tone by stipulating that 'in the determination of any criminal charge against him...everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law'.<sup>447</sup> The Covenant also stresses that media could be excluded from reporting the whole or part of the proceeding if the court is of the opinion that such publicity obstructs the administration of justice. Similarly, the Fair Trial Guidelines of the African Commission on Human and People's Rights (the Guidelines) also restate the stipulation of the ICCPR.<sup>448</sup> The Commission adopted the guideline with the objective of strengthening the fair trial provisions of the African

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<sup>445</sup> Constitution of the Federal Democratic Republic of Ethiopia (1995)., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976)., AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).

<sup>446</sup>*Id.*, at 79(2)

<sup>447</sup> See ICCPR, *supra* note 29, at 14(1)

<sup>448</sup> AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).art. 1



Charter on Human and Peoples Rights and to make it consistent with international standards of fair trial.

Accordingly, the Guidelines note that one of the guarantees of fair hearing is ensuring the determination of a person's rights and obligations based on solely on evidence presented to the judicial body'<sup>449</sup>. It also defines an impartial tribunal as one that 'bases its decisions only on objective evidence, arguments and facts before it'.<sup>450</sup> The Guidelines further stress the need to secure independence of the judiciary from restrictions, improper influence, inducement, threats or interference, direct or indirect from any quarter or for any reason'<sup>451</sup>. Since the guideline prohibits possible interferences from all directions, media would also fall under its ambit.

The other facet of the right to fair trial threatened by irresponsible media reporting is a person's right to be presumed innocent until proven guilty. Underlying this guarantee, the assumption is that, human beings are good naturally and they do not intend to commit crime or harm each other.<sup>452</sup> To rebut such presumption whosoever alleges the commission of crime must prove beyond reasonable doubt that the accused has committed the crime.

The FDRE Constitution and the international and regional human rights instruments ratified by Ethiopia have incorporated this guarantee.<sup>453</sup> To illustrate, article 20 of the FDRE Constitution states that 'accused persons have the right to be presumed innocent until proved guilty'.<sup>454</sup> In a similar manner, ICCPR echoes the Constitution's statement by saying that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'<sup>455</sup>. Thus, any information received by the media that determines the guilt or innocence of the accused violates his/her right to be presumed innocent before the final decision of the court.

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<sup>449</sup>*Id.*, at 2(h)

<sup>450</sup>*Id.*, at 5(a)

<sup>451</sup>*Ibid*

<sup>452</sup> Joseph C. Cascareli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AMERICAN JOURNAL OF JURISPRUDENCE 4 (1996).

<sup>453</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (1995), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976).

<sup>454</sup> See FDRE CONSTITUTION, *supra* note 25, at 20(3)

<sup>455</sup> See ICCPR, *supra* note 29, at 14(2)

Another component of the right to fair trial endangered by irresponsible media reporting is the protection afforded to the accused of not incriminating or testifying against oneself. With respect to this, the FDRE Constitution provides that 'persons arrested have the right to remain silent'<sup>456</sup> and they shall 'not to be compelled to testify against themselves'.<sup>457</sup> A similar guarantee is enshrined in the ICCPR which states a person charged with the commission of an offence is entitled 'not to be compelled to testify against himself or confess guilt'<sup>458</sup>. The fear here is that confession transmitted by the media might be a coerced one resulting from police interrogation conducted by disregarding the accused right to remain silent and the privilege against self- incrimination.<sup>459</sup> Thus, if an irresponsible media discloses the alleged confession of the accused or his/her admission of guilt, it would indirectly violate the privilege against self-incrimination.

To sum up, the discussion held in this section demonstrates that freedom of the press or expression is not an absolute right devoid of any limitation. Instead it could be restricted to protect other competing interests such as the right to fair trial. Clearly, unlimited freedom of expression/ press could infringe the fair trial rights of the accused to be tried by impartial court, his/her presumption of innocence and his/her right to protection against self-incrimination. Thus, limitation on freedom of expression is necessary to ensure the integrity as well as trustworthiness of the criminal justice administration system.

### **III. When is Limitation on Freedom of Expression Justified on Account of Defendants Right to Fair Trial?**

As noted above, arguably a combined reading of the FDRE Constitution and different human rights treaties ratified by Ethiopia will lead to the conclusion that protecting the fair trial rights of the accused is one of the grounds for putting a limitation on freedom of expression. But, how do we determine whether a certain broadcast or publication violates fair trial rights of the accused or not? What are the parameters for saying so? The FDRE Constitution and human right treaties adopted by Ethiopia are silent on this issue. Thus, it is necessary to examine the experience of other legal

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<sup>456</sup>See FDRE CONSTITUTION, *supra* note 25, at 19(2)

<sup>457</sup>*Id.*, at 20(3)

<sup>458</sup> See ICCPR, *supra* note 29, at 14(3) g

<sup>459</sup> Carl Minzer, *China's latest tactic: Confessions on state TV*, <http://www.law.fordham.edu/faculty/21264.htm> Carl November 6, 2013, (last visited on May 22, 2015).

systems on the matter. Accordingly, the approach followed by common law legal systems particularly the United Kingdom (UK) and the approach by the European Court on Human Rights are often cited in the literature as two main models on the area.<sup>460</sup>

To begin with the jurisprudence of the common law legal system, not every type of media coverage of criminal cases is susceptible to restriction. It is only where the publication of the media creates *substantial risk of prejudice* to the administration of criminal justice which is so serious that it is not possible to conduct the proceeding free from bias.<sup>461</sup> Here the tests are two. First, the publication of the media in its nature must be capable of affecting the fair handling of the proceeding. Second, the degree of its effect on the proceeding must not be minimal or unsubstantial. Rather, the consequence of the released prejudicial information must have substantial or serious negative impact on the fair undertaking of the criminal proceeding.<sup>462</sup>

If a publication disclosed by the media does not meet these criteria, it will not be subjected to restriction and falls within the ambit of freedom of expression. Nonetheless, it is important to admit the imprecision of the term 'substantial risk of prejudice' since it may vary from case to case. However, there is a consensus on some types of media coverage's of criminal proceedings as inherently and substantially prejudicial to the fair trial rights of the accused which would be dealt in detail in the subsequent paragraphs of this section.

Apart from the common law legal system, the European Court on Human Rights (ECHR) has also developed three level cumulative tests for restraining freedom of expression on account of safeguarding the right to fair trial, based on the stipulations of the European Convention on Human Rights.<sup>463</sup> Besides recognizing the need to maintain the impartiality of the judiciary as one of the legitimate grounds for limiting media coverage of criminal cases, the European Convention also provides the preconditions

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<sup>460</sup> See Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, NEW YORK UNIVERSITY LAW REVIEW,(2010)., Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, (2010).

<sup>461</sup> UNITED KINGDOM CONTEMPT OF COURT ACT, 1981 § 2(2)

<sup>462</sup>*Ibid*

<sup>463</sup> THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (herein after EUROPEAN CONVENTION, (1950)., art, 10 & *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

that must be met in advance for restriction to take place. These prerequisites for limitation are, it 'must be prescribed by law', it must be 'based on legitimate grounds' and it must be 'necessary in a democratic society'.<sup>464</sup> The ECHR has elaborated these tests in a number of cases.<sup>465</sup> Regarding the requirement of the limitation to be 'prescribed by law', it meant that the government cannot restrict medias exercise of freedom of expression unless there is a law that backs its action. In other words, no law means no restriction.

What if a government enacts a law that restrains freedom of expression without citing any justification or legitimate grounds for doing so? Would it be acceptable? The answer would be an obvious no since the second precondition of the European Convention provides that the law that restricts freedom of expression must pursue legitimate aims such as "interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of judiciary*"<sup>466</sup>. Thus, if the government wanted to impose limitation on media coverage of criminal cases it must aspire to achieve the aforementioned solemn objectives particularly the need to ensure the impartiality of the judiciary.

Yet, the limitation must also fulfill the third important requirement which is 'it must be necessary in a democratic society'. This means, restriction on media reporting of criminal cases cannot be imposed unless there exists a pressing social need to do so which is proportionate to the legitimate aim pursued.<sup>467</sup> To put it simply, the government cannot restrict freedom of expression because it thinks it would be useful or convenient to do so. Rather, it must be sure that limitation of the right to freedom of expression is the only viable option available to safeguard the pressing social need in danger. This test is very crucial to determine which kind of media publications pose the greatest danger to defendants right to fair trial. Further, the proportionality of the measure taken by the government will also be scrutinized in light to the legitimate aim pursued.<sup>468</sup> Hence, the limitation itself must be limited to extent necessary for safeguarding the

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<sup>464</sup>*Ibid*

<sup>465</sup> *Sunday Times v. United Kingdom* (1979) (2) EHRR 245

<sup>466</sup> See EUROPEAN CONVENTION, *supra* note 49, at 10(2)

<sup>467</sup> See *Sunday Times v. United Kingdom*, *supra* note 51

<sup>468</sup>*Ibid*

legitimate aim. If it goes beyond meeting a legitimate aim it will not fulfill the criterion of necessity in a democratic society.

The two approaches on restriction of freedom of expression have more of similarity than a difference since both of them require serious risk of harm to result from the media coverage of the criminal proceeding on the defendant's right to fair trial, which absolutely necessitates restriction. Nonetheless, the determination of whether a publication has a serious prejudicial effect or not may vary from case to case. Yet certain categories of publications were identified to be inherently hazardous at all times. These kinds of publications also meet the standards set by countries following the common law legal system particularly UK as well as by the jurisprudence of the European Court on Human Rights. Among them, publications concerning the character of the accused or previous convictions, disclosures of confession, publications which comment upon the merit of the case, photographs and publication of interview with witnesses are the primary ones.<sup>469</sup> Further, such publications are mostly released during the period of criminal process that goes from the arrest or formal charge to the beginning of trial and the police is the primary source of prejudicial information for the media at this stage.<sup>470</sup>

#### **i. Publication of Confession**

Despite the possible inadmissibility of the alleged confession of the accused given to the police in a court of law, disclosures of such information by the media prior to trial is regarded as one of the most detrimental information threatening the fair trial right of the defendant.<sup>471</sup> The rationale for this is that confession is the most incriminating kind of information that can be adduced against the accused. Further, there is no means for verifying whether such confession is obtained through coercion or other inappropriate methods which makes the confession as unreliable as evidence.<sup>472</sup> Furthermore, such kind of publications will be retained in the mind of the judge for a longer period impairing his/her capacity to adjudicate impartially.

Although the primary source of confession is the police, the media could also get confession directly from the accused through recording or televised

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<sup>469</sup> See ABA, *supra* note 3, at 17 & see LAW COMMISSION OF INDIA, *supra* note 9, at 195-220

<sup>470</sup> See ABA, *supra* note 3, at 17

<sup>471</sup> *Ibid*

<sup>472</sup> *Ibid*

interview under the supervision or approval of the police while the accused is in custody.<sup>473</sup> Thus, whenever the media releases confession of the accused, it would seriously violate his/her fair trial right.

**ii. Publications Concerning the Character of the Accused or Prior Criminal Record**

At times the media goes to the extent of determining the guilt of the accused by snatching the proper province or function of courts. Such kinds of publications by the media have the tendency to trigger the feeling of hostility towards the accused.<sup>474</sup> The media do so primarily by labeling the accused as a “criminal”, “terrorist” or “corrupt” etc. Characterizing the accused as such goes beyond reporting facts to the public. It also does more harm than good to the public since it challenges the court’s decision on the matter free of bias. Similarly, media also disclose information pertaining to the prior convictions of the accused. Such statements are released by the media with the belief that ‘it is more likely that an accused person committed the offence charged if he has a criminal record and less likely if he has no record’.<sup>475</sup>

Nevertheless, such kind of information is irrelevant to determine the issue whether the accused committed the alleged crime at the moment. Their use is rather confined for the purpose of sentencing. Regarding this, the American Bar Association rightly noted that the issue is not how many crimes the defendant has committed but whether he/she has committed this crime.<sup>476</sup> To sum up, above publication of information regarding the merit of the case or the prior conviction of the accused constitute inherently prejudicial information and grossly endanger the undertaking fair trial. As such, the media should refrain from publishing such kind of information to the public in violation of the fair trial rights of the accused.

**iii. Pre-trial Reports of Evidence and Interview of Witnesses**

The other category of seriously damaging statements released by the media which is often a cause for concern involves the display of evidences or oral statements made against the accused. Such kind of information is usually gathered mainly during the search and seizure conducted on the accused. What makes the evidences released by the media hazardous is that there is

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<sup>473</sup>*Id.*, at 30

<sup>474</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 195-199

<sup>475</sup> AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150)

<sup>476</sup> See ABA, *supra* note 3, at 31

no mechanism for checking whether the prescribed safeguards set by the law for conducting search and seizure are met or not.<sup>477</sup> If the evidence is obtained through improper ways it would eventually lose its admissibility in a court of law. Nevertheless, exposure of judges to such inadmissible information may seriously affect their impartiality.

Likewise, the media's dissemination of interviews of witnesses against the accused is also troublesome for a number of reasons. First, since the accused is not in a position to defend himself / herself and cross examine the witness, such release by the media only shows one side of the picture which is highly prejudicial to the accused.<sup>478</sup> Second, the witness may have given such testimony to the media against his will since there is no mechanism for the audience to check the presence of consent on the part of the witness.<sup>479</sup> Third, the chance of correcting testimony given to the media in a court of law later is very less; since the witness is under pressure to ensure the consistency of his statements at all times.<sup>480</sup> For all these reasons, the publication of interview of witness tampers with the fair trial right of the accused and requires restriction.

#### iv. Photographs

In addition to those kinds of publications of the media discussed above, the display of photographs of the accused is also regarded as a serious threat to fair trial of the accused. Particularly, if there is an issue regarding the identity of the accused, the likelihood of prejudice is high. This is because, following the display of the picture of the accused over the media, 'witnesses who have not seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw'<sup>481</sup> and identify him as the suspect. Thus, the witness recognizes not the person who had been seen by him/her, committing the crime but the person he/she saw in the photograph. Further, the display of photographs of the accused by the media may also influence the audience to develop feeling of hostility towards the accused and the presumption of guilt which could create an atmosphere not suited for conducting fair trial of the defendant.<sup>482</sup>

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<sup>477</sup>*Id.*, at 35

<sup>478</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 215

<sup>479</sup>*Ibid*

<sup>480</sup>*Ibid*

<sup>481</sup>*Id.*, at 203-204

<sup>482</sup>*Ibid*

#### IV. State Media Coverage of Highly Publicized Criminal Cases in Ethiopia: The practice vs. the Fair trial Rights of the Accused

Although media are supposed to be handmaiden for effective administration of justice, the role played by some state media in Ethiopia stands in a stark contrast against this objective being highly irresponsible. These media not only release highly prejudicial information against the accused before or during trial in courts but also often determine the guilt or innocence of the accused punching way beyond their weights. This may force one to question whether the rights of accused recognized in the FDRE constitution such as the presumption of innocence, the right to be tried by impartial court and the privilege against self-incrimination are hallow promises or enforceable rights.

In this section an attempt is made to show the problem of irresponsible media coverage of highly publicized criminal cases in Ethiopia in light of the defendant's fair trial rights. Accordingly, the author has chosen four broadcasts of the Ethiopian National Television (ETV) with the belief that they adequately demonstrate the magnitude of the problem. The first three are documentaries entitled "Akeldama"<sup>483</sup> (Land of Blood), "Jihadawi Harakat"<sup>484</sup> (Jihad Movement) and "Hazen Lemdres...Guzo Wede Dessie" (To Mourn...trip to Dessie).<sup>485</sup> The final is news broadcast of the ETV that reports the undertaking of search and seizure in the residence of government officials suspected of corruption. Each of them will be discussed in detail subsequently.<sup>486</sup> But it is essential to point out some of the commonalties between them.

The first similarity among the four broadcasts is that the type of information released by them largely constitute confessions of the accused, pre-trial release of evidences, display of photographs, comments on the merits of the case as well as interview of witness which are regarded as

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<sup>483</sup>Akeldama, [http://diretube.com/ethiopian-documentary/akeldama-part-1-video\\_25cf45af1.htm](http://diretube.com/ethiopian-documentary/akeldama-part-1-video_25cf45af1.htm), [http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video\\_30d42597c.html](http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video_30d42597c.html), [http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video\\_086c05142.html](http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video_086c05142.html) (last visited November 1, 2013).

<sup>484</sup>JihadawiHarakat, <http://www.youtube.com/watch?v=g4SxGOS5y88>, (last visited on august 9, 2013).

<sup>485</sup>Ethiopia-Terrorist attack on sheik NuruYimam, [http://www.youtube.com/watch?v=x\\_8Ypxiz4y8](http://www.youtube.com/watch?v=x_8Ypxiz4y8), (last visited on July 7, 2014).

<sup>486</sup> Police Recovered Millions, [http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebrewahed-house-video\\_16585f1c0.html](http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebrewahed-house-video_16585f1c0.html) (last visited December 4, 2013).



inherently prejudicial to the defendants right to fair trial both by the standards developed by country's following the common law legal system and the European Court on Human Rights discussed in the previous section. Apart from this, the four documentaries also tamper with various rights of accused persons recognized by the FDRE constitution and human right treaties ratified by Ethiopia. Further, all broadcasts were published following the arrest of the accused and before the beginning of trial. This conforms to the theory that most prejudicial information's against the accused are disclosed in the period between the arrest and the starting of trial which increases the likelihood of prejudice.<sup>487</sup>

Furthermore, with the exception of the documentary "To mourn...trip to Dessie", the media principal source of information were the police. In the two broadcasts i.e. "Akeldama" and "Jihadawi Harakat", the documentaries were made by the collaboration of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU). The news covering search and seizure of persons arrested on suspicion of corruption was broadcasted with the information obtained from the Federal Police. This practice also proves the theory that Police is themajor source of prejudicial information's between the time of arrest and trial.<sup>488</sup> This being said regarding the common features of the broadcasts detail examination of each broadcast is conducted as follows.

#### **i. Aceldama " Land of Blood"**

This documentary was broadcasted by the Ethiopian National Television on November 2012 in cooperation with National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU).<sup>489</sup> It starts with a warning that the program is not suited for persons below the age of thirteen followed by a title 'Akeldama' in Amharic with blood dropping from each of the letters. Then, very disturbing and shocking pictures of slaughtered children, dismembered dead bodies, droplets of blood across the street, pictures of persons mourning the loss of their loved ones etc are displayed. After these scenes, all of a sudden a narrator appears on a screen with a facial expression and tone that seeks sympathy from the audience. Then, he tells the viewers that the documentary is a three part

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<sup>487</sup> See ABA, *supra* note 3, at 30

<sup>488</sup> *Id.*, at 28

<sup>489</sup> See *Akeldama*, *supra* note 69

series showing terrorist networks planning to make Ethiopia land of blood.<sup>490</sup>

Part one of the documentary claims that as a result of terrorist attacks committed in Ethiopia 339 people were killed, 363 sustained bodily injury and 25 people were kidnapped in the past years.<sup>491</sup> The documentary also blames the Eritrean government for sponsoring terrorism through training and infiltration of terrorists to Ethiopia. Additionally, it praises the adoption of the Anti-Terrorism Proclamation by the Ethiopian parliament for playing a key role in combating terrorism in Ethiopia. The documentary also tries to convince that the country would have been a land of blood had it not been for the anti-terrorism proclamation.<sup>492</sup>

In part two, the documentary mainly shows the organizations declared by the Ethiopian parliament to be terrorist organizations and the justification for this measure. With respect to this, the documentary recalls the decision of the House of people Representatives to declare Ginbot 7, The Oromo Liberation Front(OLF), The Ogaden National Liberation Front(ONLF), Al-shabab and Alqaeda as terrorist organizations after due considerations of evidences presented against them.<sup>493</sup> With this as a background, the documentary goes on to display the confessions of individuals arrested on the suspicion of terrorism which is highly incriminating and prejudicial to them. The individuals giving their confessions were alleged to be members of Ginbot 7. Their confessions mainly state that they have taken terrorist training in Eritrea regarding the use of Kalashnikovs, bombs and explosives.<sup>494</sup> Further, they confessed that 'the purpose of taking those training is to assassinate Ethiopian government officials and bombard different development projects in Ethiopia under the instruction of Ginbot 7 with the belief that peaceful struggle in Ethiopia is hopeless'.<sup>495</sup>

The documentary has also shown interview of witnesses against the accused which is considered as highly prejudicial to the defendant's right to fair trial. Several persons giving confession in the documentary have identified a number of individuals by their name stated their involvement

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<sup>490</sup>*Ibid*

<sup>491</sup>*Ibid*

<sup>492</sup>*Ibid*

<sup>493</sup>*Ibid*

<sup>494</sup>*Ibid*

<sup>495</sup>*Ibid*

in the planned terrorist attack.<sup>496</sup> Such activity by the media would infringe defendant's right to receive fair trial by depriving them the opportunity to cross examine those witnesses. The third part of the documentary was also dedicated for showing confessions and testimonies of the accused against themselves and others. The manner of presentation of the documentary was in itself interesting. Most of the talking is done by the narrator and the statements of confessions of the accused are presented for a very short time only to corroborate what the narrator has said. No statement was made in the documentary regarding how the interrogation was conducted and whether the accused persons confessed voluntarily. Nonetheless, one of the accused i.e. Debebe Eshetu noted that the police treated him very well and he was teasing with officers who presumably conducted the interrogation.<sup>497</sup> He was later released without any charge.<sup>498</sup>

However, international human right organizations such as Human Right Watch reported that the accused suffered maltreatment in the hand of the police and their confession could be a coerced one.<sup>499</sup> In any case, the media practice of broadcasting confessions of the accused and inferring their guilt from those confessions violates the defendant's right against self-incrimination, the right to be presumed innocent and the right to trial by impartial court recognized not only by the FDRE constitution but also by the international and regional human rights instruments in which Ethiopia is a state party. Here, it is noteworthy that the documentary was aired while the case of defendant was being entertained by the court. Their trial was completed in June/July 2012 eight months after the broadcast of the documentary.

## ii. "Jihadwi Harakat" (Jihad Movement)

The documentary was aired by the Ethiopian National Television (ETV) in February 2013. It was made with the assistance of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU) as usual.<sup>500</sup> In the beginning of the documentary, pictures of suspected terrorists under arrest appear one after the other in a stylish

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<sup>496</sup>*Ibid*

<sup>497</sup>*Ibid*

<sup>498</sup>Amnesty International, *EskinderNega*, <http://www.amnesty.org/nz/eskinder-nega>, (last visited on May 23, 2015).

<sup>499</sup> Human Rights Watch, "They Want a Confession", 17 October 2013, <http://www.m.hrw.org/ru/node/119814/section/9> (last visited on May 23, 2015).

<sup>500</sup> See *JihadawiHarakat*, *supra* note 70

manner, together with background sound truck music capable of terrifying the audience. Then, the narrator tells the audience that Somalia being failed state for the past 20 years had become a fertile ground for the operation of terrorists like *Alshabab*. He further notes that after the defeat of *Alshabab* by Ethiopian and Somalia transitional government forces in 2010, the group has adopted the view of *Saleh Nebha* that calls for the establishment of decentralized terrorist network in east Africa.<sup>501</sup>It also accuses an association called '*Daru Bilal*' that operates in Kenya with the plan of accomplishing the above objective.<sup>502</sup>

Stating these as a background the documentary proceeds to show the confession of suspected terrorists in custody which is highly incriminating. In the documentary, some of the suspected terrorists noted that, they went to Somalia to take basic terrorist training including how to operate and shoot Kalashnikov, military training on choosing and using locations for war, distribution of weapons and man power and digging of fortress.<sup>503</sup>The suspects also confessed that 'the aim of the training is to conduct a Jihad War in Ethiopia with the objective of taking over the governments control on the people and ultimately establish Islamic state'.<sup>504</sup>

The documentary also televised the confession of other suspected terrorists on the issue of using the questions of Ethiopian Muslims for their own ends. In this regard, the suspects stated that 'they had attended training offered by Dr. Jasim Mustefa on inciting riot with the intent to create conducive environment for conducting Jihad war in Ethiopia'.<sup>505</sup> With this mission the suspects also confessed that they have established a group called '*Harekatul Shibabel Mujahidin Fi Bidel Hijrateyen*' literally means 'youth Mujahidin'.<sup>506</sup> Like that of the Akeldama documentary, the publication of ETV on Jihadwi Harakat grossly infringe the defendants right to fair trial since it amount to constitute gravely prejudicial information's pursuant to the standard developed by the UK and European Court of Human Right. Thus, the media should have refrained from broadcasting such kind of documentaries to the public.

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<sup>501</sup>*Ibid*

<sup>502</sup>*Ibid*

<sup>503</sup>*Ibid*

<sup>504</sup>*Ibid*

<sup>505</sup>*Ibid*

<sup>506</sup>*Ibid*

In connection with the documentary Jihadawi Harakat it is important to underscore two points. First, the documentary was broadcasted by the Ethiopian National Television before the completion of trial which is still going at the time of writing up this article. Second, the documentary was transmitted despite an injunction order of the Federal high court fourth criminal bench banning the airing of the documentary.<sup>507</sup>

**iii. “Hazen Lemderes... Guzo Wede Dessie” (To Mourn.... Trip to Dessie)**

Unlike the documentaries discussed above, this documentary was produced by the website called *Ethiopia First* that purports to carry out its own investigation of the case.<sup>508</sup> However, the documentary was broadcasted by the Ethiopian National Television (ETV). It was aired following the assassination of Sheikh Nuru Yimamin Dessie Ethiopia and just after the arrest of suspects. The author has chosen it for discussion in this article since it is relevant to show how Ethiopian state media are broadcasting other kinds of extremely prejudicial information in highly publicized cases i.e. the publication of photographs of the accused and comments on the merit of the case. Accordingly, the documentary repeatedly showed the photographs of two individuals arrested on suspicion with a tag under their picture saying “*Hired Assassins*”.<sup>509</sup> Such kinds of disclosures are very hazardous since they pre-judge the guilt of suspects before trial by a court of law and establish presumption of guilt than innocence. A documentary of similar content was broadcasted by the Ethiopian National Television on August 15, 2014 entitled ‘*Sheikeh Nuru Lemen Motu?*’ or why Sheikh Nuru Yimam die?<sup>510</sup> The documentary shows the confession of individuals suspected of killing Sheikh Nuru Yimam and whose photographs was displayed earlier in the documentary ‘To mourn.... trip to Dessie’.

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<sup>507</sup>Ayten Girma, *Trial by Media and its Constitutional Implications*, THE REPORTER, Feb. 09, 2013, at 15, Merga Yonas, *Muslim Defendants to Sue Government, ETV on Documentary*, THE REPORTER, Feb. 09, 2013, at 1 & Human Rights Watch, *Ethiopia: Muslim protesters face Unfair Trial*, <http://www.m.hrw.org/news/2013/04/02/ethiopia-muslim-protestors-face-unfair-trial> (last visited on March 25, 2015).

<sup>508</sup>*Ethiopia-Terrorist attack on sheik Nuru Yimam*, supra note 71

<sup>509</sup>*Ibid*

<sup>510</sup>[Must Watch] ETV Jihadawi Harakat2- Why did Sheikh Nuru Yimam die\_ \_August 15, 2014. Available at <http://www.ethiotube.net/flvideo/27325.flv> (last visited on March 25, 2015).

#### iv. News Report of Search Conducted in the Residence of Government officials Suspected of Corruption

Following the arrest of the officials of the Ethiopian Revenue and Customs authority in May 2013 on suspicion of engaging in corruption, their arrest was the talk of the country for many days. This is partly due to the overwhelming media coverage given to the case at times in very prejudicial manner to the defendant right to fair trial. A good example of such publications is the news broadcast of the Ethiopian National Television (ETV) concerning the search conducted in the house of suspected official's i.e. Geberewahid Woldegiorgis and Asmamaw Woldemariam.<sup>511</sup> In the news a member of the police shows a search warrant to the camera and list the items recovered from the houses of the two individuals. In the house of Geberewahid Woldegiorgis, the police stated that, 200,000 Ethiopian birr, 26,000 Euro, 560 pound in cash and eight laptops, one iPod and several title deeds in Legedadi and Legetafo area were found.<sup>512</sup> Likewise, in the residence of Asamenew Woldemariam the police noted the recovery of cash 1,947, 675 Ethiopian birr.<sup>513</sup>

As discussed in the section dealing with the standards for restricting freedom of expression above, pre-trial publication of evidences by the media is considered as one of the most serious threats to the defendants right to fair trial by demonstrating an evidence which might not be admissible in court of law with ongoing prejudicial effect though. In the case at hand, the recovered items were shown to the public as evidence pending trial proceeding. Some writers criticized this practice by saying that the media went to determine the guilt of the defendants before their first appearance in a court of law.<sup>514</sup> In the assessment of the author, the reaction of the public who saw that news was also very hostile towards defendants. Some individuals where even calling for those individuals to be executed on the mere sight of the TV news. Here also, the news broadcasts was aired before the completion of trial which is still going at the time of writing this paper

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<sup>511</sup> See Police Recovered Millions, *supra* note 72

<sup>512</sup> *Ibid*

<sup>513</sup> *Ibid*

<sup>514</sup> SebeleTeweldebirhan, *Latest Arrest: Fighting Corruption or Political Side Show* (May 17, 2013) <http://www.ezega.com/NewsDetails.aspx?page=news&NewsID=3452> (last visited on July 29, 2014).

The defendants in this case were also very concerned with the media coverage of their case. For instance, the lawyer of the Gebrewhaid Woldegiorgis informed the court that media reports are infringing his client's right to be presumed innocent and could create undue influence in conducting fair proceeding.<sup>515</sup>The lawyer even demanded the court to impose injunction on the media with the intention to prevent the release of prejudicial information. However, the court just advised the media to be impartial, be balanced in their reporting and avoid bias.

## V. The Legal Regime for Combating Pre-judicial Media Coverage of Criminal Cases in Ethiopia

Before discussing the legal regimes for combating prejudicial media publicity of criminal cases in Ethiopia, it will be ideal to see the experience of other countries in the area for comparison. Accordingly, the approach followed by the United States and United Kingdom is often discussed in many literatures on the issue. To begin with the US, there is a less tendency for imposing on the media prior restraint on account of safeguarding the fair trial rights of the accused. Prior restraint in the media is only allowed where it is proved that the publication creates a '*clear and present danger*' to the defendant's right to fair trial which is capable of causing presumed or actual harm.<sup>516</sup> Since the standard of proof is high the US courts rarely order restraint on medias to avoid prejudicial publicity. To avoid the release of prejudicial information by the media the US courts use remedial measure such as *voir dire*, instruction to the jurors, gag or injunction order and change of venue.<sup>517</sup>

Since the US follows trial by jury *voir dire* involves asking jurors questions to identify whether they are biased or not by the media release of prejudicial information. Following the questioning of jurors those biased would be removed from the case. In addition to *Voir Dire*, US judges also try to minimize the effect of prejudicial media publicity by instructing jurors to ignore what they have heard or seen in the media and decide the case based on the evidence presented to them. Further, US courts also give

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<sup>515</sup>Mikias Sebsibe, *Court Report: Melaku Fenta etal 2<sup>nd</sup> Day In Court-Horn Affairs* <http://hornaffairs.com/en/2013/05/court-report-melaku-fenta-et-al-2nd-day/> (last visited July 29, 2014).

<sup>516</sup> Elliot W. Atkinson Jr., *Free Press v. Fair Trial: Insulation Against Injustice*, 43 LOUISIANA LAW REVIEW 3, 556 (1973).

<sup>517</sup> Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, 766-767 (2010).

gag or injunction orders against trial participants such as police and prosecution with the objective of preventing them from disseminating information detrimental to the fair trial rights of the accused. Such orders are found to be very effective in most cases since the media's sources of most prejudicial publications are law enforcement bodies.<sup>518</sup> Furthermore, change of venue is also used in the US to curb the effects of prejudicial media coverage. Change of venue involves the transfer of the defendant's case to another jurisdiction in which the exposure to hazardous information against the accused is very less.

The United Kingdom has a different approach for addressing the problem of prejudicial media publicity interfering with fair trial rights of the accused from that of the US. In UK if a media engages in "an act or omission calculated to interfere with the due administration of justice"<sup>519</sup> the media will be held liable for contempt of court which is a criminal offence and receive adequate penalty. The offence includes direct contempt which deals with contempt in the face of the court or indirect contempt committed outside court. Its purpose is to balance accused persons right to fair trial and the competing freedom of expression.

However, it is important to note that not every publication of the media that could affect fair trial in insignificant way is subjected for contempt. Instead, only those publications "which create substantial risk that the course of justice in the proceeding in question will be seriously impeded or prejudiced"<sup>520</sup>. Such publications include confession of defendants, photographs of the accused, comments on the merit of the case and interview of witnesses. Further, the Media could escape liability for contempt if it proves that the publication is "fair and accurate report of legal proceedings held in the public, published contemporaneously and in good faith"<sup>521</sup>. Having said this as a spring board, the legal regimes for addressing prejudicial media publicity in Ethiopia will be tackled subsequently.

As discussed in section two of this article fair trial guarantees of presumption of innocence, privilege against self-incrimination, right to

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<sup>518</sup> Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, 75 NEW YORK UNIVERSITY LAW REVIEW, (2010).

<sup>519</sup> *Ibid*

<sup>520</sup> *Ibid*

<sup>521</sup> *Ibid*



cross examine and trial by an impartial court incorporated in the FDRE Constitution as well as international human right instruments ratified by Ethiopia. But these guarantees are too general and require the adoption of detail implementation laws if media and responsible authorities are to easily identify publications detrimental to the defendant's right to fair trial and refrain from disclosing them. Besides, when such disclosure happen it will enable the law enforcement officers and court take appropriate measure. Accordingly, the FDRE government has adopted the Broadcast Service Proclamation<sup>522</sup>, Freedom of Mass Media and Access to Information Proclamation<sup>523</sup> and FDRE Criminal Code.<sup>524</sup> These laws seem to have incorporated similar measures for regulating prejudicial media publicity like those in the US and the UK.

To start with the Broadcast Service Proclamation, it recognizes that transmitting programs with diverse and balanced perspectives of is beneficial to the public.<sup>525</sup> A corollary of this recognition is the stipulation that "every news shall be impartial, accurate and balanced"<sup>526</sup>. Accordingly, any person who violates this prescription is liable to punishment with a fine not less than Birr10, 000 and not exceeding Birr 50,000. Likewise, the Mass Media and Access to Information Proclamation underscores in its preamble the crucial role of media in building democratic order in Ethiopia.<sup>527</sup> It also provides that, restrictions on freedom of expression and of mass media must be prescribed by law and must be justified on account of "preserving the wellbeing of the youth, honor and reputation of persons, national security, public order and *other overriding rights*"<sup>528</sup>. The phrase *other overriding rights* could include the accused right to fair trial as stipulated in different international and regional human rights instruments. Further, the Proclamation provides for all persons right including the media to seek, obtain and disseminate information so long as it is not precluded by the exceptions stipulated by the proclamation.<sup>529</sup>

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<sup>522</sup>A PROCLAMATION ON BROADCASTING SERVICE(hereinafter BROADCASTING SERVICE PROCLAMATION), Proclamation No. 533/2007,Fed.Neg.Gaz Year 13, No. 39

<sup>523</sup> FREEDOM OF MASS MEDIA AND ACCESS TO INFORMATION PROCLAMATION (hereinafter MASS MEDIA PROCLAMATION), Proclamation No.590/2008, Fed.Neg.Gaz Year 14, No. 64

<sup>524</sup> THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA(hereinafter FDRE CRIMINAL CODE,2004, Proc.no.414, Fed.Neg.Gaz

<sup>525</sup> See BROADCASTING SERVICE PROCLAMATION, *supra* note 103, art. 30(3)

<sup>526</sup>*Id*, at 45(2)

<sup>527</sup> See MASS MEDIA PROCLAMATION, *supra* note 109, at preamble

<sup>528</sup>*Ibid*

<sup>529</sup>*Id*, at 12(1)

One of the exceptions stipulated in the Proclamation is protection afforded to proceedings of law enforcement and legal investigation. Accordingly, it states that “a public relation officer may refuse a request for information relating to an alleged offender whose prosecution is under preparation or even though completed the prosecution is not yet instituted or whose prosecution is pending the disclosure or assuring the existence or non-existence of the requested information would likely....to prejudice or impair the fairness or impartiality of the trial”<sup>530</sup>. Yet, it does not indicate or give illustration of the kind of information capable of tampering with the defendant’s right to fair trial. Had the proclamation gave an illustrative list of inherently prejudicial information it would have made the job of public relation officers a lot easier. Nonetheless, the limitations of the proclamation resembles the gag or injunction order common in the US which imposes restriction on law enforcement bodies from giving information prejudicial to the right to fair trial.

Notably, the Ethiopian Mass Media and Access to information proclamation does not precisely says trial participants, law enforcement bodies or prosecution, it rather uses the generic term *public relation officer* who is supposed to undertake public relation of the public body including police and prosecution institutions. Further, the Criminal Code imposes a penalty on the officer who is responsible for disclosing such kind of information by stating that “whoever, not being entitled or expressly authorized so to do, publishes in whole or in part deeds, reports, instructions, deliberations or decisions of a public authority, the content of which is required to be kept secret by law or by virtue of an express decision of the competent authority, is punishable with simple imprisonment not exceeding three years or fine”<sup>531</sup>.

Such limitations are very crucial to safeguard the violation of the defendant’s right to fair trial from irresponsible media coverage. To illustrate, in the prejudicial documentaries and News broadcasted by the Ethiopia National Television (ETV) discussed in section four of the article, the media source for confessions of the accused, comments on merits of the case, pre-trial release of evidence and interview of witnesses were the police and law enforcement bodies. Had the police and law enforcement bodies respected the prescriptions of the Mass Media and Access to information proclamation which prevents them from making accessible those kinds of information, the harmful effects of the media publication on

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<sup>530</sup> *Id*, at 21(2)

<sup>531</sup> See FDRE CRIMINAL CODE, *supra* note 110, art. 441

the defendants' fair trial would have been avoided. Here it could be argued that the media could still publish prejudicial information without citing its sources but the credibility of its publications would be proportionally reduced.<sup>532</sup>

Despite the importance of restricting law enforcement authorities from giving substantially prejudicial information to the media, this measure alone would not eliminate the risk of harmful media publicity. This is because the media could engage in such irresponsible conduct without identifying its sources. Thus, there should be an additional mechanism for holding the media accountable when it publishes hazardous information's hampering the undertaking of fair trial proceeding. To this effect the FDRE Criminal Code has incorporated an offence of contempt of court like in the one in the UK. Accordingly, it provides that "Whoever, in the course of a judicial inquiry, proceeding or hearing, (a) in any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge in the discharge of his duty; or (b) *in any other manner disturbs the activities of the Court*, is punishable with simple imprisonment not exceeding one year, or fine not exceeding three thousand Birr"<sup>533</sup>.

Like that of the Mass media proclamation, the FDRE Criminal Code did not make an attempt to indicate the type of information's which could disturb the function of the courts. Had there been explicit indication of inherently prejudicial publications, it would have facilitated continence on the part of the media and imposition of penalty on the judge's part. Nonetheless, disclosure substantially hazardous information's such as confession, evidence, witness interviews and comment on merits by the media would satisfy the requirements of article 449(b) and the media could be punished for contempt since amount to interference in the function of the court. Hence, ETV which broadcasted those documentaries and news discussed in section four could be held for contempt as it disturbs the proper function of the court in impartial manner.

### Conclusion

In conclusion, this article has demonstrated that in practice Ethiopian state media reporting of highly publicized criminal cases is endangering the fair trial rights of the accused through the dissemination of inherently prejudicial information such as the confessions of the accused, comments

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<sup>532</sup> See Brandwood, *supra* note 104, at 1449

<sup>533</sup> See FDRE CRIMINAL CODE, *supra* note 110, art. 449

on the merit of the case, interview of witnesses and display of photographs of suspects under the pretext of exercising freedom of expression. The disclosure of such kinds of hazardous information goes against the fair trial safeguards of presumption of innocence, privilege against self-incrimination, trial by impartial tribunal recognized not only by the FDRE Constitution but also by international and regional human rights instruments to which Ethiopia is a state party. Thus, media in Ethiopia must be accurate and fair in their reporting of criminal cases upholding their professional, moral and legal obligations of non-disclosure of substantially prejudicial information against the accused.

With respect to the Ethiopian legal regime for regulating irresponsible media coverage of criminal cases, it is fair to conclude that there is no significant problem with the adequacy of protective and remedial measures. Yet, the failure of existing laws to explicitly indicate the types of highly prejudicial information was noted as a glitch. A more serious problem, however, is practical implementation of those preventive and remedial measures provided by law. As noted in this article, time and again, the police with the collaboration of some state media have released highly prejudicial information in utter disregard of the negative effects on the fair trial rights of the accused. And yet neither the media nor the police were held accountable for their irresponsible conduct and a culture of impunity has prevailed. Thus, unless this culture of impunity is replaced with a culture of accountability where the police and media are held responsible for their misconduct, the fair trial guarantees of presumption of innocence, the right not to incriminate oneself and right to be tried by impartial court will be hollow promises.

To sum up, if the prevailing culture of impunity is to change the following measures are important. First, being the major source of prejudicial information for the media, the police must obey their legal duty of keeping the secrecy of highly prejudicial records in their hands from the reach of irresponsible media as provided under the Mass Media and Access to Information Proclamation. They must also show their unwavering commitment to investigate and ensure the prosecution of members of the police force breaching their legal duty of secrecy to safeguard a defendant's right to receive impartial trial. Second, the judiciary and law enforcement officials must uphold their constitutional duty of not only respecting fundamental fair trial rights of the accused but also ensuring the respect of these rights by the media.

## **State Media Coverage of Highly Publicized Criminal Cases in Ethiopia and the Fair Trial Rights of the Accused**

**Tsega Andualem Gelaye**

### ***Abstract***

*The precise role of Ethiopian state media in the administration of justice, particularly their coverage of highly publicized criminal cases, raises serious concerns on the fair trial rights of the accused. Under the guise of freedom of expression and informing the public, the media is at times taking over the sole responsibility of courts of determining the guilt or innocence of persons accused of committing crime, by releasing publications of highly prejudicial nature in violation of the fair trial guarantees of presumption of innocence, privilege against self-incrimination and the right to be tried by an impartial court. Here the important question would be how the media could exercise its freedom without infringing the fair trial rights of the accused. In other words, what the media can and cannot do in reporting criminal cases. The answer to this question is not simple and it requires trading a delicate balance between freedom of expression and the right to fair trial both of which are guaranteed under the FDRE constitution.*

*Yet, the FDRE constitution does not clearly indicate how the two sets of rights could co-exist without one threatening the existence of the other. Thus, this article tries to elaborate or point out the bounds of media freedom in covering criminal cases under FDRE constitution by examining standards developed by other countries and international jurisprudence on the matter. It also assesses the current practice of Ethiopian state media coverage of highly publicized criminal cases in light of these standards by taking some (in)famous broadcasts of the Ethiopian National Television (ETV) currently renamed as Ethiopian Broadcast Corporation (EBC) as an example. Finally, the mechanisms of controlling and remedying*

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· LL.B, LL.M in Human Rights Law (Addis Ababa University), Lecturer at College of Law, Debre Berhan University. I would like to thank the anonymous reviewers of the journal for enriching the article with their critical and constructive comments. Contact Address: tsega.andualem@yahoo.com

*irresponsible media reportage of criminal cases under Ethiopian law as well as their adequacy is also dealt in this article.*

## **II. Introduction**

Media is capable of playing both constructive and destructive roles in the administration of criminal justice anywhere and the Ethiopian state media is no exception in this regard. Concerning Media's positive role in the adjudication of criminal cases, the US Supreme Court in its decision on *Sheppard vs. Maxwell*, succulently noted that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in criminal field".<sup>534</sup> Here the term 'responsible' media should be underscored since it is the only kind of media that aids the course of justice instead of the irresponsible ones. Although there is no clear cut definition of what a responsible media constitutes, authorities have attempted to provide certain key attributes. For instance, the Indian High Court identified 'accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people'<sup>535</sup> as cardinal virtues which responsible media must uphold and live up to.

Such media assists the administration of criminal justice by performing various functions at different stages of the criminal proceedings. Prior to arrest, media could assist the capture of a crime suspect who is not apprehended yet and it serves to notify the public of the possible dangers posed by him/her so that they could take the necessary precautions.<sup>536</sup> Following the arrest and until the commencement of trial, media reporting of proceedings gives the public the confidence that the law enforcement officials are properly carrying out their responsibility of safeguarding the public.<sup>537</sup> Additionally, media scrutiny during this period also helps the accused to appear in court within the prescribed time instead of languishing in police detention.<sup>538</sup>

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<sup>534</sup> *Sheppard v. Maxwell*, 231 F. Supp. 37, 39 (S.D. Ohio 1964), rev'd, 346 F.2d 707 (6th Cir.1965), rev'd, 384 U.S. 333 (1966).

<sup>535</sup> *Mother Dairy Foods & Processing Ltd v. Zee Telefilms (IA 8185/2003 in Suit No. 1543/2003)*

<sup>536</sup> AMERICAN BAR ASSOCIATION (hereinafter ABA), STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS, 47(1966).

<sup>537</sup>*Id.*, at 48

<sup>538</sup>*Id.*, at 49

Once trial gets going, coverage of the trial proceedings by the media helps to ensure the accountability of judges, prosecutors, lawyers and other parties involved in the trial.<sup>539</sup> Thus, attention by the media reminds these participants that they are being closely watched by the eyes of the public which motivates them to perform their duties to the highest level. Further, fair criticisms of court decisions after the completion of the trial contributes for the improvement of the criminal justice administration system<sup>540</sup> by indicating the weakness, errors or irregularities committed in the process. Hence, these are the benefits derived from responsible media's coverage of criminal cases.

In contrast, irresponsible media's reporting in criminal cases is an obstacle to the effective administration of justice. Rather than being accurate, objective and fair in their reporting, irresponsible media are biased and lopsided to one of the parties. They are often known for distorting facts and taking allegations as facts.<sup>541</sup> Without due consideration of the impacts of their reporting in the administration of justice in general and the possible influence they might create in judicial proceedings, they tend to disclose carelessly whatever information they have at their disposal without regard to its prejudicial nature to the undertaking of independent judicial function. Hence, the only concern of such kind of media reporting is not revealing what is 'in the interest of the public rather what the public is interested in'.<sup>542</sup>

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<sup>539</sup> Giorgio Resta, *Trying Cases In The Media: A Comparative Overview* , 71 LAW AND CONTEMPORARY PROBLEMS, 35-36(2008).

<sup>540</sup>*Ibid*

<sup>541</sup> Regional Workshop on 'Reporting of Court proceedings by media and administration of justice' At the High Court of Maharashtra and Goa, Mumbai (October 19, 2008).

<sup>542</sup>LAW COMMISSION OF INDIA, 200<sup>TH</sup> REPORT ON TRIAL BY MEDIA FREE SPEECH AND FAIR TRIAL UNDER CRIMINAL PROCEDURE CODE 1973,(hereinafter LAW COMMISSION OF INDIA) 14 (2006). The public might be interested or curious to hear certain stories even if the information has no relevance to whatsoever to it day to day life as such. On the other hand, the dissemination of some information might be beneficial to the public or society to a large extent and contribute for the common good. For a detail discussion of the difference between 'what the public is interested 'and 'what is in the interest of the public' See Information Commissioner's Office, *The Public Interest Test* , [http://www.ico.org.uk/media/for-organizations/documents/1183/the\\_public\\_interest\\_test.pdf](http://www.ico.org.uk/media/for-organizations/documents/1183/the_public_interest_test.pdf), (last visited on May 26, 2015).

Such unhealthy media reporting of criminal cases will have the effect of undermining the fair trial rights of the accused intended to safeguard the individual from arbitrary and unlawful deprivation of his other fundamental rights and freedoms.<sup>543</sup> Some of these fair trial rights include: the defendants' right to a presumption of innocence, prohibition on self incrimination and the right to independent and impartial tribunal.<sup>544</sup> In this section, only a general account of these rights is made. The status of these rights in the FDRE constitution and other human right treaties ratified by Ethiopia vis-à-vis the right to freedom of expression will be explored in depth in subsequent sections.

Accordingly, to begin with the right to be presumed innocent; it stipulates that "a person is considered innocent as long as there is no final judgment proving him /her guilty"<sup>545</sup>. Hence, *anyone* including the *media* is expected to respect this right by refraining from proclaiming the guilt of a person suspected of committing a crime before his/her guilt is determined by final judgment of a court.<sup>546</sup> Further, this right is believed to have laid the foundation for all other procedural rights belonging to the accused.<sup>547</sup>

Historically, the right to presumption of innocence began to get recognition at the end of 18<sup>th</sup> century together with the 'beyond reasonable doubt standard of proof'.<sup>548</sup> Consequently, the accused is not expected to prove his innocence. Rather, the prosecution is required to prove the guilt of the accused beyond reasonable doubt by adducing sufficient evidence. If there is a doubt regarding the innocence of the accused after the production of evidence by the prosecution, that doubt would be interpreted in favor of the accused pursuant to the principle in *dubio pro reo*.<sup>549</sup>

Another fair trial right of the accused potentially affected by irresponsible media reporting is the right not to incriminate one self. This right guarantees that no person "shall be compelled in any criminal case to be a

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<sup>543</sup>LAWYERS COMMITTEE FOR HUMAN RIGHTS,WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE 1 (2000).

<sup>544</sup>*Id* at 13,15 &19

<sup>545</sup>*Id*, at 15

<sup>546</sup>*Ibid*

<sup>547</sup> Gabriela C. Nicoleta et al., *Short essay on Presumption of innocence. ECHR precedent*, LEGAL PRACTICE AND INTERNATIONAL LAW 193 (Christinel L. Murzea ed..2011).

<sup>548</sup>John H. Langbein, *The Historical Origins of the Privilege against Self-incrimination at Common Law*, 92 MICHIGAN LAW REVIEW 1047, 1070, (2002).

<sup>549</sup> See,Nicoletasupra note 14, at 195



witness against himself”<sup>550</sup>. As such, the accused has the right to remain silent in pre-trial criminal investigation and the right not to give evidence at trial. Until late 18<sup>th</sup> century, the fundamental safeguard for an accused person was not the right to remain silent rather the opportunity to speak.<sup>551</sup> During this period, the prime objective of criminal trials was to give a defendant the chance to respond to the accusations brought against him/her.

But in late 18<sup>th</sup> century the role of defense counsels in criminal trials increased dramatically and prosecutions burden of proving allegations beyond reasonable doubt standard emerged at the same time.<sup>552</sup> These developments changed the objective of criminal trial in to testing the case of prosecution by the defense counsel and the criminal defendant acquired the right to decline to speak against charges against him. Accordingly, confessions of the accused will be accepted as evidence only when it was free, voluntary and not compelled.<sup>553</sup> Here, voluntariness impliedly incorporates the right not to answer or confess at all and the right to remain silent. The rationale behind the privilege against self incrimination is the assumption that confessions obtained by compulsion are not reliable as evidence.<sup>554</sup> Nonetheless, some media reports of criminal cases could endanger this privilege of defendants by releasing highly incriminating information obtained from them without making sure whether they are obtained voluntarily or not.

Apart from the two fair trial rights discussed above, irresponsible media coverage of criminal cases by the media could also infringe the defendant right to be tried by impartial court. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. However, the negative influence of irresponsible media coverage on judges’ ability to adjudicate cases before them impartially is a bone of contention among scholars. With respect to this, some scholars argue that unlike lay men, professional judges that have taken rigorous legal training and sworn to perform their duties impartially should be assumed to have the stamina to withstand the

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<sup>550</sup> See Langbein, *supra* note 15, at 1047

<sup>551</sup> *Ibid*

<sup>552</sup> *Id.* at 18

<sup>553</sup> Pat McInerney, *The Privilege against Self-incrimination from early origins to Judges’ Rules: Challenging the ‘orthodox view’*, 18 THE INTERNATIONAL JOURNAL OF EVIDENCE & PROOF 112,130 (2014).

<sup>554</sup> *Ibid*

negative effects of prejudicial media publicity.<sup>555</sup> In their view it is very unlikely for judges to be influenced by information released by irresponsible media. On the other hand, others contend that we must not forget that judges are also human beings and they are susceptible to influence as their fellow human beings. Hence, even if a judge endeavors to ignore prejudicial media publicity of a pending case and rule impartially, his/her judgment could be affected by such information without the judge knowing it or sub-consciously.<sup>556</sup>

Furthermore, despite the actual or objective impartiality of the judge in the adjudication of the case, exposure of judges to biased information by irresponsible media may create the impression among the public that judges are already biased as a result of the publication. This is an important consideration since 'justice must not only be done but it must be seen done'.<sup>557</sup> Accordingly, the exposure of judges to prejudicial information by the media erodes subjective impartiality and the confidence of the public in fair and impartial adjudication of cases. Thus, it would be naïve to ignore the negative pressure irresponsible media could exert upon the administration of justice. All in all, as responsible media are allies to fair administration of justice, irresponsible media undermine the fair trial rights of the accused. Because of this, any measure that seeks to minimize the prejudicial effects of media on fair trial must only target irresponsible media and must leave the responsible ones operating space so that they could keep on delivering their beneficial functions for ensuring efficient administration of criminal justice.

## **VI. Balancing Freedom of Expression and the Right to Fair Trial Under the Federal Democratic Republic of Ethiopia(FDRE) Constitution**

The FDRE constitution has given recognition to two important fundamental human rights constituting the pillars of a democratic system i.e. Right to Freedom of Expression and the Right to Fair trial.<sup>558</sup> Often the two sets of rights go hand in hand one safeguarding the proper exercise of the other. For instance, as noted in the preceding section media scrutiny of criminal

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<sup>555</sup> Pascale DuparcPortier, *Media Reporting of Trials in France and in Ireland*, 6 JUDICIAL STUDIES INSTITUTE JOURNAL 1, at 208 (2006)

<sup>556</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 39-54

<sup>557</sup> *Ibid*

<sup>558</sup> CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (hereinafter FDRE CONSTITUTION), art.19, 20 and 29 (1995).

proceedings ensure the accountability of actors operating in it. Likewise, courts are supposed to stand against unjustified interferences in the exercise of freedom of expression. Nonetheless, there are times where the two sets of rights may come in to conflict with each other. Such conflict arises when one right is exercised in absolute manner without consideration or even at the expense of the other. To illustrate, if the freedom of the press is considered as an absolute right giving the media the green light to publish any information that damages the fair trial right of the accused, recognition of the right to fair trial will become a hallow promise. Similarly, if the right to fair trial bans any kind of media coverage of criminal cases, freedom of the press and the freedom of expression will not be ensured.

However, a closer examination of the FDRE constitution shows that the intention is to create a harmony between the two sets of rights by setting reasonable limitations. These could be inferred from articles 19(2), 19(5), 20(3), 29(2), 29(3), 29(4), and 29(6) of the Constitution. On one hand, the Constitution underscores the indispensable role of the media in a democratic society by serving as a channel for the dissemination of different ideas and viewpoints.<sup>559</sup> As such, it guarantees freedom of the press from interference and censorship. On the other hand, the Constitution also notes the dangers of an absolute right to freedom of expression. Hence, the Constitution states that legal limitation could be imposed on the freedom of the press to protect the well-being of the youth, public moral, propagation of war and statements capable of damaging human dignity or reputation.<sup>560</sup>

Here it should be noted that ensuring fair trial is not expressly stated as one of the legitimate grounds for restricting the right to freedom of expression. Yet, freedom of expression being a fundamental human right, the limitations placed upon it or the grounds for limiting it must be interpreted in conformity with international human right instruments ratified by Ethiopia.<sup>561</sup> Accordingly, the International Covenant on Civil and Political Rights (ICCPR), besides listing national security, public order, public health or morals also incorporate the need to protect the *other person's right* as a justification for restraining freedom of expression.<sup>562</sup> The phrase other persons right would include the right to fair trial. Thus, promoting fair trial is one of the legitimate grounds of limiting free expression.

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<sup>559</sup>*Id.*, at 29(4)

<sup>560</sup>*Id.*, at 29(6)

<sup>561</sup>*Id.*, at 13(2)

<sup>562</sup> International Covenant on Civil and Political Rights (hereinafter ICCPR), Adopted on 19 December 1966 (entered into Force on 23 March 1976)., art.19(3), a

Notably, the right to fair trial incorporates a number of guarantees ranging from the right to be informed of the charge one is accused of up to the right to appeal against the final judgment of a court.<sup>563</sup> However, not every guarantee of the right to fair trial is equally threatened by unrestrained coverage of media. Rather, certain key guarantees of the right to fair trial are particularly endangered by irresponsible reporting of the media. Among these guarantees, the first is a person's right to be tried by an independent and impartial court.

This entitlement emanating from the right to fair trial is recognized in the FDRE constitution as well as the ICCPR and the Principles and Guidelines on the Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and People's Rights.<sup>564</sup> The FDRE Constitution under article 78 provides for the establishment of an independent judiciary. This provision is located outside chapter three of the Constitution which talks about Fundamental Rights and Freedoms. Nonetheless, it has relevance and strong connection with the fair trial right of the accused. The Constitution also elaborates the meaning of independent judiciary as freedom from "any interference of influence of any government body, government, officials or from any other source"<sup>565</sup>. The term 'any other source' indicates that the framers of the FDRE constitution have anticipated in advance that irresponsible media reporting could also come from non-state actors and unduly influence the judiciary or threaten judicial independence. Thus, the Constitution affords protection to the independence of the judiciary not only from the threat posed to it by state media but also from private media as well.

Likewise, the ICCPR speaks with the same tone by stipulating that 'in the determination of any criminal charge against him...everyone shall be entitled to a fair trial and public hearing by a competent, independent and impartial tribunal established by law'.<sup>566</sup> The Covenant also stresses that media could be excluded from reporting the whole or part of the proceeding if the court is of the opinion that such publicity obstructs the

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<sup>563</sup> See FDRE Constitution, *supra* note 25, at 20

<sup>564</sup> Constitution of the Federal Democratic Republic of Ethiopia (1995), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976), AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).

<sup>565</sup>*Id.*, at 79(2)

<sup>566</sup> See ICCPR, *supra* note 29, at 14(1)

administration of justice. Similarly, the Fair Trial Guidelines of the African Commission on Human and People's Rights (the Guidelines) also restate the stipulation of the ICCPR.<sup>567</sup> The Commission adopted the guideline with the objective of strengthening the fair trial provisions of the African Charter on Human and Peoples Rights and to make it consistent with international standards of fair trial.

Accordingly, the Guidelines note that one of the guarantees of fair hearing is ensuring the determination of a person's rights and obligations based on solely on evidence presented to the judicial body<sup>568</sup>. It also defines an impartial tribunal as one that 'bases its decisions only on objective evidence, arguments and facts before it'.<sup>569</sup> The Guidelines further stress the need to secure independence of the judiciary from restrictions, improper influence, inducement, threats or interference, direct or indirect from any quarter or for any reason<sup>570</sup>. Since the guideline prohibits possible interferences from all directions, media would also fall under its ambit.

The other facet of the right to fair trial threatened by irresponsible media reporting is a person's right to be presumed innocent until proven guilty. Underlying this guarantee, the assumption is that, human beings are good naturally and they do not intend to commit crime or harm each other.<sup>571</sup> To rebut such presumption whosoever alleges the commission of crime must prove beyond reasonable doubt that the accused has committed the crime.

The FDRE Constitution and the international and regional human rights instruments ratified by Ethiopia have incorporated this guarantee.<sup>572</sup> To illustrate, article 20 of the FDRE Constitution states that 'accused persons have the right to be presumed innocent until proved guilty'.<sup>573</sup> In a similar manner, ICCPR echoes the Constitution's statement by saying that 'everyone charged with a criminal offence shall have the right to be

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<sup>567</sup>AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHT, PRINCIPLES AND GUIDELINES ON THE RIGHT TO FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA (2001).art. 1

<sup>568</sup>*Id.*, at 2(h)

<sup>569</sup>*Id.*, at 5(a)

<sup>570</sup>*Ibid*

<sup>571</sup> Joseph C. Cascareli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AMERICAN JOURNAL OF JURISPRUDENCE 4 (1996).

<sup>572</sup>CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (1995)., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Adopted on 19 December 1966 (entered into Force on 23 March 1976).

<sup>573</sup> See FDRE CONSTITUTION, *supra* note 25, at 20(3)

presumed innocent until proved guilty according to law<sup>574</sup>. Thus, any information received by the media that determines the guilt or innocence of the accused violates his/her right to be presumed innocent before the final decision of the court.

Another component of the right to fair trial endangered by irresponsible media reporting is the protection afforded to the accused of not incriminating or testifying against oneself. With respect to this, the FDRE Constitution provides that 'persons arrested have the right to remain silent'<sup>575</sup> and they shall 'not to be compelled to testify against themselves'.<sup>576</sup> A similar guarantee is enshrined in the ICCPR which states a person charged with the commission of an offence is entitled 'not to be compelled to testify against himself or confess guilt'<sup>577</sup>. The fear here is that confession transmitted by the media might be a coerced one resulting from police interrogation conducted by disregarding the accused right to remain silent and the privilege against self- incrimination.<sup>578</sup> Thus, if an irresponsible media discloses the alleged confession of the accused or his/her admission of guilt, it would indirectly violate the privilege against self-incrimination.

To sum up, the discussion held in this section demonstrates that freedom of the press or expression is not an absolute right devoid of any limitation. Instead it could be restricted to protect other competing interests such as the right to fair trial. Clearly, unlimited freedom of expression/ press could infringe the fair trial rights of the accused to be tried by impartial court, his/her presumption of innocence and his/her right to protection against self-incrimination. Thus, limitation on freedom of expression is necessary to ensure the integrity as well as trustworthiness of the criminal justice administration system.

## **VII. When is Limitation on Freedom of Expression Justified on Account of Defendants Right to Fair Trial?**

As noted above, arguably a combined reading of the FDRE Constitution and different human rights treaties ratified by Ethiopia will lead to the conclusion that protecting the fair trial rights of the accused is one of the

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<sup>574</sup> See ICCPR, *supra* note 29, at 14(2)

<sup>575</sup> See FDRE CONSTITUTION, *supra* note 25, at 19(2)

<sup>576</sup> *Id.*, at 20(3)

<sup>577</sup> See ICCPR, *supra* note 29, at 14(3) g

<sup>578</sup> Carl Minzer, *China's latest tactic: Confessions on state TV*, <http://www.law.fordham.edu/faculty/21264.htm> Carl November 6, 2013, (last visited on May 22, 2015).

grounds for putting a limitation on freedom of expression. But, how do we determine whether a certain broadcast or publication violates fair trial rights of the accused or not? What are the parameters for saying so? The FDRE Constitution and human right treaties adopted by Ethiopia are silent on this issue. Thus, it is necessary to examine the experience of other legal systems on the matter. Accordingly, the approach followed by common law legal systems particularly the United Kingdom (UK) and the approach by the European Court on Human Rights are often cited in the literature as two main models on the area.<sup>579</sup>

To begin with the jurisprudence of the common law legal system, not every type of media coverage of criminal cases is susceptible to restriction. It is only where the publication of the media creates *substantial risk of prejudice* to the administration of criminal justice which is so serious that it is not possible to conduct the proceeding free from bias.<sup>580</sup> Here the tests are two. First, the publication of the media in its nature must be capable of affecting the fair handling of the proceeding. Second, the degree of its effect on the proceeding must not be minimal or unsubstantial. Rather, the consequence of the released prejudicial information must have substantial or serious negative impact on the fair undertaking of the criminal proceeding.<sup>581</sup>

If a publication disclosed by the media does not meet these criteria, it will not be subjected to restriction and falls within the ambit of freedom of expression. Nonetheless, it is important to admit the imprecision of the term 'substantial risk of prejudice' since it may vary from case to case. However, there is a consensus on some types of media coverage's of criminal proceedings as inherently and substantially prejudicial to the fair trial rights of the accused which would be dealt in detail in the subsequent paragraphs of this section.

Apart from the common law legal system, the European Court on Human Rights (ECHR) has also developed three level cumulative tests for restraining freedom of expression on account of safeguarding the right to fair trial, based on the stipulations of the European Convention on Human

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<sup>579</sup> See Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, NEW YORK UNIVERSITY LAW REVIEW,(2010)., Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, (2010).

<sup>580</sup> UNITED KINGDOM CONTEMPT OF COURT ACT, 1981 § 2(2)

<sup>581</sup>*Ibid*

Rights.<sup>582</sup> Besides recognizing the need to maintain the impartiality of the judiciary as one of the legitimate grounds for limiting media coverage of criminal cases, the European Convention also provides the preconditions that must be met in advance for restriction to take place. These prerequisites for limitation are, it 'must be prescribed by law', it must be 'based on legitimate grounds' and it must be 'necessary in a democratic society'.<sup>583</sup> The ECHR has elaborated these tests in a number of cases.<sup>584</sup> Regarding the requirement of the limitation to be 'prescribed by law', it meant that the government cannot restrict medias exercise of freedom of expression unless there is a law that backs its action. In other words, no law means no restriction.

What if a government enacts a law that restrains freedom of expression without citing any justification or legitimate grounds for doing so? Would it be acceptable? The answer would be an obvious no since the second precondition of the European Convention provides that the law that restricts freedom of expression must pursue legitimate aims such as "interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or *for maintaining the authority and impartiality of judiciary*"<sup>585</sup>. Thus, if the government wanted to impose limitation on media coverage of criminal cases it must aspire to achieve the aforementioned solemn objectives particularly the need to ensure the impartiality of the judiciary.

Yet, the limitation must also fulfill the third important requirement which is 'it must be necessary in a democratic society'. This means, restriction on media reporting of criminal cases cannot be imposed unless there exists a pressing social need to do so which is proportionate to the legitimate aim pursued.<sup>586</sup> To put it simply, the government cannot restrict freedom of expression because it thinks it would be useful or convenient to do so. Rather, it must be sure that limitation of the right to freedom of expression is the only viable option available to safeguard the pressing social need in

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<sup>582</sup> THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (herein after EUROPEAN CONVENTION, (1950)., art, 10 & Sunday Times v. United Kingdom (1979) (2) EHRR 245

<sup>583</sup>*Ibid*

<sup>584</sup> Sunday Times v. United Kingdom (1979) (2) EHRR 245

<sup>585</sup> See EUROPEAN CONVENTION, *supra* note 49, at 10(2)

<sup>586</sup> See Sunday Times v. United Kingdom, *supra* note 51



danger. This test is very crucial to determine which kind of media publications pause the greatest danger to defendants right to fair trial. Further, the proportionality of the measure taken by the government will also be scrutinized in light to the legitimate aim pursued.<sup>587</sup> Hence, the limitation itself must be limited to extent necessary for safeguarding the legitimate aim. If it goes beyond meeting a legitimate aim it will not fulfill the criterion of necessity in a democratic society.

The two approaches on restriction of freedom of expression have more of similarity than a difference since both of them require serious risk of harm to result from the media coverage of the criminal proceeding on the defendant's right to fair trial, which absolutely necessitates restriction. Nonetheless, the determination of whether a publication has a serious prejudicial effect or not may vary from case to case. Yet certain categories of publications were identified to be inherently hazardous at all times. These kinds of publications also meet the standards set by countries following the common law legal system particularly UK as well as by the jurisprudence of the European Court on Human Rights. Among them, publications concerning the character of the accused or previous convictions, disclosures of confession, publications which comment upon the merit of the case, photographs and publication of interview with witnesses are the primary ones.<sup>588</sup> Further, such publications are mostly released during the period of criminal process that goes from the arrest or formal charge to the beginning of trial and the police is the primary source of prejudicial information for the media at this stage.<sup>589</sup>

#### **i. Publication of Confession**

Despite the possible inadmissibility of the alleged confession of the accused given to the police in a court of law, disclosures of such information by the media prior to trial is regarded as one of the most detrimental information threatening the fair trial right of the defendant.<sup>590</sup> The rationale for this is that confession is the most incriminating kind of information that can be adduced against the accused. Further, there is no means for verifying whether such confession is obtained through coercion or other inappropriate methods which makes the confession as unreliable as

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<sup>587</sup>*Ibid*

<sup>588</sup> See ABA, *supra* note 3, at 17 & see LAW COMMISSION OF INDIA, *supra* note 9, at 195-220

<sup>589</sup> See ABA, *supra* note 3, at 17

<sup>590</sup> *Ibid*

evidence.<sup>591</sup> Furthermore, such kind of publications will be retained in the mind of the judge for a longer period impairing his/her capacity to adjudicate impartially.

Although the primary source of confession is the police, the media could also get confession directly from the accused through recording or televised interview under the supervision or approval of the police while the accused is in custody.<sup>592</sup> Thus, whenever the media releases confession of the accused, it would seriously violate his/her fair trial right.

**ii. Publications Concerning the Character of the Accused or Prior Criminal Record**

At times the media goes to the extent of determining the guilt of the accused by snatching the proper province or function of courts. Such kinds of publications by the media have the tendency to trigger the feeling of hostility towards the accused.<sup>593</sup> The media do so primarily by labeling the accused as a “criminal”, “terrorist” or “corrupt” etc. Characterizing the accused as such goes beyond reporting facts to the public. It also does more harm than good to the public since it challenges the court’s decision on the matter free of bias. Similarly, media also disclose information pertaining to the prior convictions of the accused. Such statements are released by the media with the belief that ‘it is more likely that an accused person committed the offence charged if he has a criminal record and less likely if he has no record’.<sup>594</sup>

Nevertheless, such kind of information is irrelevant to determine the issue whether the accused committed the alleged crime at the moment. Their use is rather confined for the purpose of sentencing. Regarding this, the American Bar Association rightly noted that the issue is not how many crimes the defendant has committed but whether he/she has committed this crime.<sup>595</sup> To sum up, above publication of information regarding the merit of the case or the prior conviction of the accused constitute inherently prejudicial information and grossly endanger the undertaking fair trial. As such, the media should refrain from publishing such kind of information to the public in violation of the fair trial rights of the accused.

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<sup>591</sup>*Ibid*

<sup>592</sup>*Id*, at 30

<sup>593</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 195-199

<sup>594</sup> AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150)

<sup>595</sup> See ABA, *supra* note 3, at 31

### iii. Pre-trial Reports of Evidence and Interview of Witnesses

The other category of seriously damaging statements released by the media which is often a cause for concern involves the display of evidences or oral statements made against the accused. Such kind of information is usually gathered mainly during the search and seizure conducted on the accused. What makes the evidences released by the media hazardous is that there is no mechanism for checking whether the prescribed safeguards set by the law for conducting search and seizure are met or not.<sup>596</sup> If the evidence is obtained through improper ways it would eventually lose its admissibility in a court of law. Nevertheless, exposure of judges to such inadmissible information may seriously affect their impartiality.

Likewise, the media's dissemination of interviews of witnesses against the accused is also troublesome for a number of reasons. First, since the accused is not in a position to defend himself / herself and cross examine the witness, such release by the media only shows one side of the picture which is highly prejudicial to the accused.<sup>597</sup> Second, the witness may have given such testimony to the media against his will since there is no mechanism for the audience to check the presence of consent on the part of the witness.<sup>598</sup> Third, the chance of correcting testimony given to the media in a court of law later is very less; since the witness is under pressure to ensure the consistency of his statements at all times.<sup>599</sup> For all these reasons, the publication of interview of witness tampers with the fair trial right of the accused and requires restriction.

### iv. Photographs

In addition to those kinds of publications of the media discussed above, the display of photographs of the accused is also regarded as a serious threat to fair trial of the accused. Particularly, if there is an issue regarding the identity of the accused, the likelihood of prejudice is high. This is because, following the display of the picture of the accused over the media, 'witnesses who have not seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw'<sup>600</sup> and identify him as the suspect. Thus, the witness recognizes not the person

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<sup>596</sup>*Id.*, at 35

<sup>597</sup> See LAW COMMISSION OF INDIA, *supra* note 9, at 215

<sup>598</sup>*Ibid*

<sup>599</sup>*Ibid*

<sup>600</sup>*Id.*, at 203-204

who had been seen by him/her, committing the crime but the person he/she saw in the photograph. Further, the display of photographs of the accused by the media may also influence the audience to develop feeling of hostility towards the accused and the presumption of guilt which could create an atmosphere not suited for conducting fair trial of the defendant.<sup>601</sup>

### VIII. State Media Coverage of Highly Publicized Criminal Cases in Ethiopia: The practice vs. the Fair trial Rights of the Accused

Although media are supposed to be handmaiden for effective administration of justice, the role played by some state media in Ethiopia stands in a stark contrast against this objective being highly irresponsible. These media not only release highly prejudicial information against the accused before or during trial in courts but also often determine the guilt or innocence of the accused punching way beyond their weights. This may force one to question whether the rights of accused recognized in the FDRE constitution such as the presumption of innocence, the right to be tried by impartial court and the privilege against self-incrimination are hallow promises or enforceable rights.

In this section an attempt is made to show the problem of irresponsible media coverage of highly publicized criminal cases in Ethiopia in light of the defendant's fair trial rights. Accordingly, the author has chosen four broadcasts of the Ethiopian National Television (ETV) with the belief that they adequately demonstrate the magnitude of the problem. The first three are documentaries entitled "Akeldama"<sup>602</sup> (Land of Blood), "Jihadawi Harakat"<sup>603</sup> (Jihad Movement) and "Hazen Lemdres...Guzo Wede Dessie" (To Mourn....trip to Dessie).<sup>604</sup> The final is news broadcast of the ETV that reports the undertaking of search and seizure in the residence of government officials suspected of corruption. Each of them will be

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<sup>601</sup>*Ibid*

<sup>602</sup>*Akeldama*, [http://diretube.com/ethiopian-documentary/akeldama-part-1-video\\_25cf45af1.htm](http://diretube.com/ethiopian-documentary/akeldama-part-1-video_25cf45af1.htm), [http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video\\_30d42597c.html](http://www.diretube.com/ethiopian-documentary/akeldama-part-2-video_30d42597c.html), [http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video\\_086c05142.html](http://www.diretube.com/ethiopian-documentary/akeldama-part-3-video_086c05142.html) (last visited November 1, 2013).

<sup>603</sup>*JihadawiHarakat*, <http://www.youtube.com/watch?v=g4SxGOS5y88>, (last visited on august 9, 2013).

<sup>604</sup>*Ethiopia-Terrorist attack on sheik NuruYimam*, [http://www.youtube.com/watch?v=x\\_8Ypxiz4v8](http://www.youtube.com/watch?v=x_8Ypxiz4v8), (last visited on July 7, 2014).

discussed in detail subsequently.<sup>605</sup> But it is essential to point out some of the commonalities between them.

The first similarity among the four broadcasts is that the type of information released by them largely constitute confessions of the accused, pre-trial release of evidences, display of photographs, comments on the merits of the case as well as interview of witness which are regarded as inherently prejudicial to the defendants right to fair trial both by the standards developed by country's following the common law legal system and the European Court on Human Rights discussed in the previous section. Apart from this, the four documentaries also tamper with various rights of accused persons recognized by the FDRE constitution and human right treaties ratified by Ethiopia. Further, all broadcasts were published following the arrest of the accused and before the beginning of trial. This conforms to the theory that most prejudicial information's against the accused are disclosed in the period between the arrest and the starting of trial which increases the likelihood of prejudice.<sup>606</sup>

Furthermore, with the exception of the documentary "To mourn...trip to Dessie", the media principal source of information were the police. In the two broadcasts i.e. "Akeldama" and "Jihadawi Harakat", the documentaries were made by the collaboration of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU). The news covering search and seizure of persons arrested on suspicion of corruption was broadcasted with the information obtained from the Federal Police. This practice also proves the theory that Police is themajor source of prejudicial information's between the time of arrest and trial.<sup>607</sup> This being said regarding the common features of the broadcasts detail examination of each broadcast is conducted as follows.

#### **i. Aceldama " Land of Blood"**

This documentary was broadcasted by the Ethiopian National Television on November 2012 in cooperation with National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU).<sup>608</sup> It starts with a warning that the program is not suited for persons below the

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<sup>605</sup> *Police Recovered Millions*, [http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebawahed-house-video\\_16585f1c0.html](http://www.diretube.com/ethiopian-news/police-recovered-stolen-money-at-ato-gebawahed-house-video_16585f1c0.html) (last visited December 4, 2013).

<sup>606</sup> See ABA, *supra* note 3, at 30

<sup>607</sup> *Id.*, at 28

<sup>608</sup> See *Akeldama*, *supra* note 69

age of thirteen followed by a title 'Akeldama' in Amharic with blood dropping from each of the letters. Then, very disturbing and shocking pictures of slaughtered children, dismembered dead bodies, droplets of blood across the street, pictures of persons mourning the loss of their loved ones etc are displayed. After these scenes, all of a sudden a narrator appears on a screen with a facial expression and tone that seeks sympathy from the audience. Then, he tells the viewers that the documentary is a three part series showing terrorist networks planning to make Ethiopia land of blood.<sup>609</sup>

Part one of the documentary claims that as a result of terrorist attacks committed in Ethiopia 339 people were killed, 363 sustained bodily injury and 25 people were kidnapped in the past years.<sup>610</sup> The documentary also blames the Eritrean government for sponsoring terrorism through training and infiltration of terrorists to Ethiopia. Additionally, it praises the adoption of the Anti-Terrorism Proclamation by the Ethiopian parliament for playing a key role in combating terrorism in Ethiopia. The documentary also tries to convince that the country would have been a land of blood had it not been for the anti-terrorism proclamation.<sup>611</sup>

In part two, the documentary mainly shows the organizations declared by the Ethiopian parliament to be terrorist organizations and the justification for this measure. With respect to this, the documentary recalls the decision of the House of people Representatives to declare Ginbot 7, The Oromo Liberation Front(OLF), The Ogaden National Liberation Front(ONLF), Al-shabab and Alqaeda as terrorist organizations after due considerations of evidences presented against them.<sup>612</sup> With this as a background, the documentary goes on to display the confessions of individuals arrested on the suspicion of terrorism which is highly incriminating and prejudicial to them. The individuals giving their confessions were alleged to be members of Ginbot 7. Their confessions mainly state that they have taken terrorist training in Eritrea regarding the use of Kalashnikovs, bombs and explosives.<sup>613</sup> Further, they confessed that 'the purpose of taking those training is to assassinate Ethiopian government officials and bombard

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<sup>609</sup>*Ibid*

<sup>610</sup>*Ibid*

<sup>611</sup>*Ibid*

<sup>612</sup>*Ibid*

<sup>613</sup>*Ibid*

different development projects in Ethiopia under the instruction of Ginbot 7 with the belief that peaceful struggle in Ethiopia is hopeless'.<sup>614</sup>

The documentary has also shown interview of witnesses against the accused which is considered as highly prejudicial to the defendant's right to fair trial. Several persons giving confession in the documentary have identified a number of individuals by their name stated their involvement in the planned terrorist attack.<sup>615</sup> Such activity by the media would infringe defendant's right to receive fair trial by depriving them the opportunity to cross examine those witnesses. The third part of the documentary was also dedicated for showing confessions and testimonies of the accused against themselves and others. The manner of presentation of the documentary was in itself interesting. Most of the talking is done by the narrator and the statements of confessions of the accused are presented for a very short time only to corroborate what the narrator has said. No statement was made in the documentary regarding how the interrogation was conducted and whether the accused persons confessed voluntarily. Nonetheless, one of the accused i.e. Debebe Eshetu noted that the police treated him very well and he was teasing with officers who presumably conducted the interrogation.<sup>616</sup> He was later released without any charge.<sup>617</sup>

However, international human right organizations such as Human Right Watch reported that the accused suffered maltreatment in the hand of the police and their confession could be a coerced one.<sup>618</sup> In any case, the media practice of broadcasting confessions of the accused and inferring their guilt from those confessions violates the defendant's right against self-incrimination, the right to be presumed innocent and the right to trial by impartial court recognized not only by the FDRE constitution but also by the international and regional human rights instruments in which Ethiopia is a state party. Here, it is noteworthy that the documentary was aired while the case of defendant was being entertained by the court. Their trial was completed in June/July 2012 eight months after the broadcast of the documentary.

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<sup>614</sup>*Ibid*

<sup>615</sup>*Ibid*

<sup>616</sup>*Ibid*

<sup>617</sup>Amnesty International, *EskinderNega*, <http://www.amnesty.org.nz/eskinder-nega>, (last visited on May 23, 2015).

<sup>618</sup> Human Rights Watch, *"They Want a Confession"*, 17 October 2013, <http://www.m.hrw.org/ru/node/119814/section/9> (last visited on May 23, 2015).

## ii. “Jihadwi Harakat” (Jihad Movement)

The documentary was aired by the Ethiopian National Television (ETV) in February 2013. It was made with the assistance of the National Information and Security Services (NISS) and Federal Police Counter Terrorism Unit (FPCTU) as usual.<sup>619</sup> In the beginning of the documentary, pictures of suspected terrorists under arrest appear one after the other in a stylish manner, together with background sound truck music capable of terrifying the audience. Then, the narrator tells the audience that Somalia being failed state for the past 20 years had become a fertile ground for the operation of terrorists like *Alshabab*. He further notes that after the defeat of *Alshabab* by Ethiopian and Somalia transitional government forces in 2010, the group has adopted the view of *Saleh Nebha* that calls for the establishment of decentralized terrorist network in east Africa.<sup>620</sup> It also accuses an association called ‘*Daru Bilal*’ that operates in Kenya with the plan of accomplishing the above objective.<sup>621</sup>

Stating these as a background the documentary proceeds to show the confession of suspected terrorists in custody which is highly incriminating. In the documentary, some of the suspected terrorists noted that, they went to Somalia to take basic terrorist training including how to operate and shoot Kalashnikov, military training on choosing and using locations for war, distribution of weapons and man power and digging of fortress.<sup>622</sup> The suspects also confessed that ‘the aim of the training is to conduct a Jihad War in Ethiopia with the objective of taking over the governments control on the people and ultimately establish Islamic state’.<sup>623</sup>

The documentary also televised the confession of other suspected terrorists on the issue of using the questions of Ethiopian Muslims for their own ends. In this regard, the suspects stated that ‘they had attended training offered by Dr. Jasim Mustefa on inciting riot with the intent to create conducive environment for conducting Jihad war in Ethiopia’.<sup>624</sup> With this mission the suspects also confessed that they have established a group called ‘*Harekatul Shibabel Mujahidin Fi Bidel Hijrateyen*’ literally means ‘youth

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<sup>619</sup> See *JihadaawiHarakat*, *supra* note 70

<sup>620</sup> *Ibid*

<sup>621</sup> *Ibid*

<sup>622</sup> *Ibid*

<sup>623</sup> *Ibid*

<sup>624</sup> *Ibid*



Mujahidin'.<sup>625</sup> Like that of the Akeldama documentary, the publication of ETV on Jihadwi Harakat grossly infringe the defendants right to fair trial since it amount to constitute gravely prejudicial information's pursuant to the standard developed by the UK and European Court of Human Right. Thus, the media should have refrained from broadcasting such kind of documentaries to the public.

In connection with the documentary Jihadawi Harakat it is important to underscore two points. First, the documentary was broadcasted by the Ethiopian National Television before the completion of trial which is still going at the time of writing up this article. Second, the documentary was transmitted despite an injunction order of the Federal high court fourth criminal bench banning the airing of the documentary.<sup>626</sup>

**iii. "Hazen Lemderes... Guzo Wede Dessie" (To Mourn....Trip to Dessie)**

Unlike the documentaries discussed above, this documentary was produced by the website called *Ethiopia First* that purports to carry out its own investigation of the case.<sup>627</sup> However, the documentary was broadcasted by the Ethiopian National Television (ETV). It was aired following the assassination of Sheikh Nuru Yimamin Dessie Ethiopia and just after the arrest of suspects. The author has chosen it for discussion in this article since it is relevant to show how Ethiopian state media are broadcasting other kinds of extremely prejudicial information in highly publicized cases i.e. the publication of photographs of the accused and comments on the merit of the case. Accordingly, the documentary repeatedly showed the photographs of two individuals arrested on suspicion with a tag under their picture saying "*Hired Assassins*".<sup>628</sup> Such kinds of disclosures are very hazardous since they pre-judge the guilt of suspects before trial by a court of law and establish presumption of guilt than innocence. A documentary of similar content was broadcasted by the

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<sup>625</sup>*Ibid*

<sup>626</sup>Ayten Girma, *Trial by Media and its Constitutional Implications*, THE REPORTER, Feb. 09, 2013, at 15, Merga Yonas, *Muslim Defendants to Sue Government, ETV on Documentary*, THE REPORTER, Feb. 09, 2013, at 1 & Human Rights Watch, *Ethiopia: Muslim protesters face Unfair Trial*, <http://www.m.hrw.org/news/2013/04/02/ethiopia-muslim-protestors-face-unfair-trial> (last visited on march 25, 2015).

<sup>627</sup>*Ethiopia-Terrorist attack on sheik Nuru Yimam*, *supra* note 71

<sup>628</sup>*Ibid*

Ethiopian National Television on August 15, 2014 entitled '*Sheikeh Nuru Lemen Motu?*' or why Sheikh Nuru Yimam die?<sup>629</sup> The documentary shows the confession of individuals suspected of killing Sheikh Nuru Yimam and whose photographs was displayed earlier in the documentary 'To mourn.... trip to Dessie'.

#### **iv. News Report of Search Conducted in the Residence of Government officials Suspected of Corruption**

Following the arrest of the officials of the Ethiopian Revenue and Customs authority in May 2013 on suspicion of engaging in corruption, their arrest was the talk of the country for many days. This is partly due to the overwhelming media coverage given to the case at times in very prejudicial manner to the defendant right to fair trial. A good example of such publications is the news broadcast of the Ethiopian National Television (ETV) concerning the search conducted in the house of suspected official's i.e. Geberewahid Woldegiorgis and Asmamaw Woldemariam.<sup>630</sup> In the news a member of the police shows a search warrant to the camera and list the items recovered from the houses of the two individuals. In the house of Geberewahid Woldegiorgis, the police stated that, 200,000 Ethiopian birr, 26,000 Euro, 560 pound in cash and eight laptops, one iPod and several title deeds in Legedadi and Legetafo area were found.<sup>631</sup> Likewise, in the residence of Asamenew Woldemariam the police noted the recovery of cash 1,947, 675 Ethiopian birr.<sup>632</sup>

As discussed in the section dealing with the standards for restricting freedom of expression above, pre-trial publication of evidences by the media is considered as one of the most serious threats to the defendants right to fair trial by demonstrating an evidence which might not be admissible in court of law with ongoing prejudicial effect though. In the case at hand, the recovered items were shown to the public as evidence pending trial proceeding. Some writers criticized this practice by saying that the media went to determine the guilt of the defendants before their

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<sup>629</sup>[Must Watch] ETV Jihadawi Harakat2- Why did Sheikh Nuru Yimam die\_ \_August 15, 2014. Available at <http://www.ethiotube.net/flvideo/27325.flv> (last visited on March 25, 2015).

<sup>630</sup> See Police Recovered Millions, *supra* note 72

<sup>631</sup>*Ibid*

<sup>632</sup>*Ibid*

first appearance in a court of law.<sup>633</sup>In the assessment of the author, the reaction of the public who saw that news was also very hostile towards defendants. Some individuals were even calling for those individuals to be executed on the mere sight of the TV news. Here also, the news broadcasts were aired before the completion of trial which is still going at the time of writing this paper

The defendants in this case were also very concerned with the media coverage of their case. For instance, the lawyer of the Gebrewhaid Woldegiorgis informed the court that media reports are infringing his client's right to be presumed innocent and could create undue influence in conducting fair proceeding.<sup>634</sup>The lawyer even demanded the court to impose injunction on the media with the intention to prevent the release of prejudicial information. However, the court just advised the media to be impartial, be balanced in their reporting and avoid bias.

#### **IX. The Legal Regime for Combating Pre-judicial Media Coverage of Criminal Cases in Ethiopia**

Before discussing the legal regimes for combating prejudicial media publicity of criminal cases in Ethiopia, it will be ideal to see the experience of other countries in the area for comparison. Accordingly, the approach followed by the United States and United Kingdom is often discussed in many literatures on the issue. To begin with the US, there is a less tendency for imposing on the media prior restraint on account of safeguarding the fair trial rights of the accused. Prior restraint in the media is only allowed where it is proved that the publication creates a 'clear and present danger' to the defendant's right to fair trial which is capable of causing presumed or actual harm.<sup>635</sup> Since the standard of proof is high the US courts rarely order restraint on medias to avoid prejudicial publicity. To avoid the release of prejudicial information by the media the US courts use remedial

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<sup>633</sup>SebeleTeweldebirhan, *Latest Arrest: Fighting Corruption or Political Side Show* (May 17, 2013) <http://www.ezega.com/NewsDetails.aspx?page=news&NewsID=3452> (last visited on July 29, 2014).

<sup>634</sup>Mikias Sebsibe, *Court Report: Melaku Fenta etal 2<sup>nd</sup> Day In Court-Horn Affairs* <http://hornaffairs.com/en/2013/05/court-report-melaku-fenta-et-al-2nd-day/> (last visited July 29, 2014).

<sup>635</sup> Elliot W. Atkinson Jr., *Free Press v. Fair Trial: Insulation Against Injustice*, 43 LOUISIANA LAW REVIEW 3, 556 (1973).

measure such as *voir dire*, instruction to the jurors, gag or injunction order and change of venue.<sup>636</sup>

Since the US follows trial by jury *voir dire* involves asking jurors questions to identify whether they are biased or not by the media release of prejudicial information. Following the questioning of jurors those biased would be removed from the case. In addition to *Voir Dire*, US judges also try to minimize the effect of prejudicial media publicity by instructing jurors to ignore what they have heard or seen in the media and decide the case based on the evidence presented to them. Further, US courts also give gag or injunction orders against trial participants such as police and prosecution with the objective of preventing them from disseminating information detrimental to the fair trial rights of the accused. Such orders are found to be very effective in most cases since the media's sources of most prejudicial publications are law enforcement bodies.<sup>637</sup> Furthermore, change of venue is also used in the US to curb the effects of prejudicial media coverage. Change of venue involves the transfer of the defendant's case to another jurisdiction in which the exposure to hazardous information against the accused is very less.

The United Kingdom has a different approach for addressing the problem of prejudicial media publicity interfering with fair trial rights of the accused from that of the US. In UK if a media engages in "an act or omission calculated to interfere with the due administration of justice"<sup>638</sup> the media will be held liable for contempt of court which is a criminal offence and receive adequate penalty. The offence includes direct contempt which deals with contempt in the face of the court or indirect contempt committed outside court. Its purpose is to balance accused persons right to fair trial and the competing freedom of expression.

However, it is important to note that not every publication of the media that could affect fair trial in insignificant way is subjected for contempt. Instead, only those publications "which create substantial risk that the course of justice in the proceeding in question will be seriously impeded or

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<sup>636</sup> Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 43 OHIO NORTHERN UNIVERSITY LAW REVIEW, 766-767 (2010).

<sup>637</sup> Joanne A. Brandwood, *You Say "Fair Trial" and I Say "Free Press": British And American Approaches To Protecting Defendants' Rights In High Profile Trials*, 75 NEW YORK UNIVERSITY LAW REVIEW, (2010).

<sup>638</sup>*Ibid*

prejudiced”<sup>639</sup>. Such publications include confession of defendants, photographs of the accused, comments on the merit of the case and interview of witnesses. Further, the Media could escape liability for contempt if it proves that the publication is “fair and accurate report of legal proceedings held in the public, published contemporaneously and in good faith”<sup>640</sup>. Having said this as a spring board, the legal regimes for addressing prejudicial media publicity in Ethiopia will be tackled subsequently.

As discussed in section two of this article fair trial guarantees of presumption of innocence, privilege against self-incrimination, right to cross examine and trial by an impartial court incorporated in the FDRE Constitution as well as international human right instruments ratified by Ethiopia. But these guarantees are too general and require the adoption of detail implementation laws if media and responsible authorities are to easily identify publications detrimental to the defendant’s right to fair trial and refrain from disclosing them. Besides, when such disclosure happen it will enable the law enforcement officers and court take appropriate measure. Accordingly, the FDRE government has adopted the Broadcast Service Proclamation<sup>641</sup>, Freedom of Mass Media and Access to Information Proclamation<sup>642</sup> and FDRE Criminal Code.<sup>643</sup> These laws seem to have incorporated similar measures for regulating prejudicial media publicity like those in the US and the UK.

To start with the Broadcast Service Proclamation, it recognizes that transmitting programs with diverse and balanced perspectives of is beneficial to the public.<sup>644</sup> A corollary of this recognition is the stipulation that “every news shall be impartial, accurate and balanced”<sup>645</sup>. Accordingly, any person who violates this prescription is liable to punishment with a fine not less than Birr10, 000 and not exceeding Birr 50,000. Likewise, the Mass Media and Access to Information Proclamation underscores in its preamble

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<sup>639</sup>*Ibid*

<sup>640</sup>*Ibid*

<sup>641</sup>A PROCLAMATION ON BROADCASTING SERVICE(hereinafter BROADCASTING SERVICE PROCLAMATION), Proclamation No. 533/2007,Fed.Neg.Gaz Year 13, No. 39

<sup>642</sup> FREEDOM OF MASS MEDIA AND ACCESS TO INFORMATION PROCLAMATION (hereinafter MASS MEDIA PROCLAMATION), Proclamation No.590/2008, Fed.Neg.Gaz Year 14, No. 64

<sup>643</sup> THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA(hereinafter FDRE CRIMINAL CODE,2004, Proc.no.414, Fed.Neg.Gaz

<sup>644</sup> See BROADCASTING SERVICE PROCLAMATION, *supra* note 103, art. 30(3)

<sup>645</sup>*Id*, at 45(2)

the crucial role of media in building democratic order in Ethiopia.<sup>646</sup> It also provides that, restrictions on freedom of expression and of mass media must be prescribed by law and must be justified on account of “preserving the wellbeing of the youth, honor and reputation of persons, national security, public order and *other overriding rights*”<sup>647</sup>. The phrase *other overriding rights* could include the accused right to fair trial as stipulated in different international and regional human rights instruments. Further, the Proclamation provides for all persons right including the media to seek, obtain and disseminate information so long as it is not precluded by the exceptions stipulated by the proclamation.<sup>648</sup>

One of the exceptions stipulated in the Proclamation is protection afforded to proceedings of law enforcement and legal investigation. Accordingly, it states that “a public relation officer may refuse a request for information relating to an alleged offender whose prosecution is under preparation or even though completed the prosecution is not yet instituted or whose prosecution is pending the disclosure or assuring the existence or non-existence of the requested information would likely....to prejudice or impair the fairness or impartiality of the trial”<sup>649</sup>. Yet, it does not indicate or give illustration of the kind of information capable of tampering with the defendant’s right to fair trial. Had the proclamation gave an illustrative list of inherently prejudicial information it would have made the job of public relation officers a lot easier. Nonetheless, the limitations of the proclamation resembles the gag or injunction order common in the US which imposes restriction on law enforcement bodies from giving information prejudicial to the right to fair trial.

Notably, the Ethiopian Mass Media and Access to information proclamation does not precisely says trial participants, law enforcement bodies or prosecution, it rather uses the generic term *public relation officer* who is supposed to undertake public relation of the public body including police and prosecution institutions. Further, the Criminal Code imposes a penalty on the officer who is responsible for disclosing such kind of information by stating that “whoever, not being entitled or expressly authorized so to do, publishes in whole or in part deeds, reports, instructions, deliberations or decisions of a public authority, the content of which is required to be kept secret by law or by virtue of an express

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<sup>646</sup> See MASS MEDIA PROCLAMATION, *supra* note 109, at preamble

<sup>647</sup> *Ibid*

<sup>648</sup> *Id*, at 12(1)

<sup>649</sup> *Id*, at 21(2)

decision of the competent authority, is punishable with simple imprisonment not exceeding three years or fine"<sup>650</sup>.

Such limitations are very crucial to safeguard the violation of the defendant's right to fair trial from irresponsible media coverage. To illustrate, in the prejudicial documentaries and News broadcasted by the Ethiopia National Television (ETV) discussed in section four of the article, the media source for confessions of the accused, comments on merits of the case, pre-trial release of evidence and interview of witnesses were the police and law enforcement bodies. Had the police and law enforcement bodies respected the prescriptions of the Mass Media and Access to information proclamation which prevents them from making accessible those kinds of information, the harmful effects of the media publication on the defendants' fair trial would have been avoided. Here it could be argued that the media could still publish prejudicial information without citing its sources but the credibility of its publications would be proportionally reduced.<sup>651</sup>

Despite the importance of restricting law enforcement authorities from giving substantially prejudicial information to the media, this measure alone would not eliminate the risk of harmful media publicity. This is because the media could engage in such irresponsible conduct without identifying its sources. Thus, there should be an additional mechanism for holding the media accountable when it publishes hazardous information's hampering the undertaking of fair trial proceeding. To this effect the FDRE Criminal Code has incorporated an offence of contempt of court like in the one in the UK. Accordingly, it provides that "Whoever, in the course of a judicial inquiry, proceeding or hearing, (a) in any manner insults, holds up to ridicule, threatens or disturbs the Court or a judge in the discharge of his duty; or (b) *in any other manner disturbs the activities of the Court*, is punishable with simple imprisonment not exceeding one year, or fine not exceeding three thousand Birr"<sup>652</sup>.

Like that of the Mass media proclamation, the FDRE Criminal Code did not make an attempt to indicate the type of information's which could disturb the function of the courts. Had there been explicit indication of inherently prejudicial publications, it would have facilitated continence on the part of the media and imposition of penalty on the judge's part. Nonetheless,

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<sup>650</sup> See FDRE CRIMINAL CODE, *supra* note 110, art. 441

<sup>651</sup> See Brandwood, *supra* note 104, at 1449

<sup>652</sup> See FDRE CRIMINAL CODE, *supra* note 110, art. 449

disclosure substantially hazardous information's such as confession, evidence, witness interviews and comment on merits by the media would satisfy the requirements of article 449(b) and the media could be punished for contempt since amount to interference in the function of the court. Hence, ETV which broadcasted those documentaries and news discussed in section four could be held for contempt as it disturbs the proper function of the court in impartial manner.

### **Conclusion**

In conclusion, this article has demonstrated that in practice Ethiopian state media reporting of highly publicized criminal cases is endangering the fair trial rights of the accused through the dissemination of inherently prejudicial information such as the confessions of the accused, comments on the merit of the case, interview of witnesses and display of photographs of suspects under the pretext of exercising freedom of expression. The disclosure of such kinds of hazardous information goes against the fair trial safeguards of presumption of innocence, privilege against self-incrimination, trial by impartial tribunal recognized not only by the FDRE Constitution but also by international and regional human rights instruments to which Ethiopia is a state party. Thus, media in Ethiopia must be accurate and fair in their reporting of criminal cases upholding their professional, moral and legal obligations of non-disclosure of substantially prejudicial information against the accused.

With respect to the Ethiopian legal regime for regulating irresponsible media coverage of criminal cases, it is fair to conclude that there is no significant problem with the adequacy of protective and remedial measures. Yet, the failure of existing laws to explicitly indicate the types of highly prejudicial information was noted as a glitch. A more serious problem, however, is practical implementation of those preventive and remedial measures provided by law. As noted in this article, time and again, the police with the collaboration of some state media have released highly prejudicial information in utter disregard of the negative effects on the fair trial rights of the accused. And yet neither the media nor the police were held accountable for their irresponsible conduct and a culture of impunity has prevailed. Thus, unless this culture of impunity is replaced with a culture of accountability where the police and media are held responsible for their misconduct, the fair trial guarantees of presumption of innocence, the right not to incriminate oneself and right to be tried by impartial court will be hollow promises.



To sum up, if the prevailing culture of impunity is to change the following measures are important. First, being the major source of prejudicial information for the media, the police must obey their legal duty of keeping the secrecy of highly prejudicial records in their hands from the reach of irresponsible media as provided under the Mass Media and Access to Information Proclamation. They must also show their unwavering commitment to investigate and ensure the prosecution of members of the police force breaching their legal duty of secrecy to safeguard a defendant's right to receive impartial trial. Second, the judiciary and law enforcement officials must uphold their constitutional duty of not only respecting fundamental fair trial rights of the accused but also ensuring the respect of these rights by the media.