

Human Rights in Times of State of Emergency in Ethiopia

Association for Human Rights in Ethiopia

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Association for Human Rights in Ethiopia (AHRE)

Bole Road | Addis Ababa | Ethiopia

Phone: +251910-92-12-94

Email: executive@ahrethio.org | edenjossy2005@gmail.com

Web: <https://ahrethio.org/>

Researcher: Brightman Gebremichael Ganta (Dr.) (LLB,LLM,PhD)

Editor: Wondemagegn Tadesse Goshu (Dr.) (LLB, LLM, PhD)

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List of Acronyms

AHRE	-	Association for Human Rights in Ethiopia
Com.	-	Council of Ministers
CSO	-	Civil Society Organization
ECtHR	-	European Commission on Human Rights
EPRDF	-	Ethiopian People Revolutionary Democratic Front
FDRE	-	Federal Democratic Republic of Ethiopia
GC	-	General Comment
HPR	-	House of Peoples Representatives
ICCPR	-	International Covenant on Civil and Political Rights
No.	-	Number
Proc.	-	Proclamation
SEIB	-	State of Emergency Inquiry Board
TPLF	-	Tigray People Liberation Front
UNHRC	-	United Nations Human Rights Committee

About Association for Human Rights in Ethiopia

The **Association for Human Rights in Ethiopia** (AHRE) is a non-governmental, non-partisan, and not-for-profit organization dedicated to the advancement of human rights in Ethiopia. The organization was initially registered and based in Geneva, Switzerland. It was established through an initiative of an Ethiopian human rights activist that fled the country and other members of the Ethiopian diaspora, as an overseas human rights organization that carries out activities that are difficult to undertake by organizations based in Ethiopia due to financial and administrative restrictions.

Taking advantage of the opening up of the civic space as a result of the revision of the restrictive CSO proclamation (proclamation no. 621/2009) AHRE decided to base its office in Ethiopia, and got registered with the Agency as of November 12/2020.

The organization is engaged in contributing for the improvement of the human rights situation in Ethiopia, mainly through its advocacy and research works. It is also engaged in Training Local Actors, Publishing press statements monthly and a Bi-monthly magazine online and Trial monitoring. All the above activities are the tools used to work for creating awareness, strengthening the capacity of local actors in Ethiopia and call upon concerned parties to give it due concern.

Recommendations

To the Government of Ethiopia

- Abstain from the use of State of Emergency laws to restrict non-derogable rights and to derogate the derogable rights in ways that are contrary to criteria for derogability.
- Interpret the FDRE Constitution to be in line with the international human rights instruments regarding non-derogable rights.
- Make sure emergency measures are context-specific and compatible with the nature of the exigencies. Certain exigencies like COVID-19 are better controlled and countered by Human Rights-Based approach than ‘command-and-control’.
- Observe the basic principles of proportionality, necessity, non-discrimination, legislative oversight, legality and non-retroactivity in State of Emergency
- Provide the least possible control measures and the period that is needed so as to control and counter exigencies.

To Human Rights Organizations

- Advocate for and lobby the Government of Ethiopia to recognize the non-derogable rights in light of international human rights instruments.
- Urge the Ethiopian government to observe the requirements that are found in international human rights instruments regarding State of Emergency.
- Follow-up the implementations of the emergency measures and expose the abuses and human rights violations during emergencies.
- Advocate for holding perpetrators of human rights violations accountable and ensure that victims are compensated

1. Introduction

State of emergency, as opposed to normalcy, is a situation “outside an ordinary course of events.”¹ It is an exceptional measure of government to temporarily suspend basic norms, including certain human rights, and to restore the rule of law with the view to address an exigent situation that poses *existential threat to public order or health and which is impossible to avert through ordinary measures*.² On the fiduciary theory, states bear an obligation to safeguard their subjects’ equal freedom during emergencies-even if this requires derogation from some human rights norms such as the freedoms of expression, movement, and peaceful assembly.³ It can be said that it is not all that is lost during a state of emergency and human dignity is still respected.

In Ethiopia, especially following the mass protest of 2015, declaration of state of emergency has become routine. There have been three states of emergencies declared nationwide since then. These are the 2016 State of emergency ‘for the maintenance of Public Peace and Security’,⁴ the 2018 State of Emergency to ‘Constitution and Constitutional Order Defence from Threat’⁵ and the 2020 State of Emergency ‘to Counter and Control the Spread of COVID-19 and Mitigate its Impacts’.⁶

The former two declarations (the 2016 and 2018) were meant to address different circumstances, specifically protest and popular resistance. The 2020 emergency declaration is indeed more different and is pronounced to respond to the threats of COVID-19. However, the three emergency declarations were subject to similar substantive and procedural preconditions. The preconditions are meant to regulate the states’ conduct during a state of emergency. These

¹ Abdi Jibril Ali, ‘Derogation from constitutional rights and their implication under the African Charter’ (2013) 17 *Law Democracy and Development* 78; Gross Oren, ‘Once more unto the breach: The systemic failure of applying the European Convention on Human Rights to entrenched emergencies’ (1998) 23 *Yale Journal of International Law* 437, 439;

² Jaime Oraá, ‘Human rights in states of emergency in international law’ 1 (1992) 7.

³ Criddle et al, ‘Human Rights, Emergencies, and the Rule of Law’ (2012) 7_ <https://scholarship.law.wm.edu/facpubs/153>.

⁴ State of Emergency for the Maintenance of Public Peace and Security No. 1/2016.

⁵ State of Emergency Proclamation Issued to Defend the Constitution and Constitutional Order From Threat Council of Ministers Proclamation No. 2/2018.

⁶ State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No. 3/2020.

regulations are three-stage inquiries aimed at delimitation of the nature of the exigencies which warrant a state of emergency, provision of restrictions on derogation, and regulation of the nature of state response and conduct in handling the emergency. This is with the view to mitigating grave human rights violations that occur during public emergencies as states apply extraordinary powers to resolve threats of public order.⁷

Any declaration of State of emergency in Ethiopia is expected to follow the substantive and procedural conditions stipulated in international human rights treaties Ethiopia ratified and the Constitution.⁸ Consequently it is imperative to analyse how far the preconditions prescribed in the Constitution fit into international human rights standards and to examine the extent the preconditions are observed in the three emergency declarations already identified. Moreover, the federal design for declaration of states of emergencies by both federal and regional organs is examined taking a case study of the Covid-10 emergency declarations by both the federal government and the regional state of Tigray.

Hence, this paper, using a human rights perspective, analyses the three emergency proclamations and the constitutional state of emergency clauses in light of international standards. Systematic explanation, presentation, identification, analysis, and synthesis of the normative framework of State of Emergency, the process of making, and the substantive contents of the three national state of emergencies are made. As such the international human rights instruments, the Constitution, the three proclamations with their respective Regulations and Directives, relevant literature and empirical reports are used as a source of data.

The balance of the paper is organized into four parts. Part I discusses the conceptual overview and requirements of the State of Emergency under International Human Rights Law. Here the theoretical analysis of the state of emergency with international human rights standards aimed at regulating the State's possible abuses of human rights is made. Part II unfolds the regulation of the State of Emergency under the FDRE Constitution. It briefly discusses procedural and substantive preconditions of the state of emergency prescribed in the FDRE Constitution and assess the extent they fit into the international human rights standards. It also explains how the interpretive statements by the federal executive might have theoretically paved for violation of

⁷ Joan F. Hartman, Working Paper for the Committee of Experts on the Article 4 Derogation Provision, 7 HUM. RTS. Q. (1985).

⁸ Federal Democratic Republic of Ethiopia Constitution, Proclamation No. 1/1995, hereinafter FDRE Constitution.

human rights during the state of emergency taking the 2020 state of emergency declarations by the federal government and a regional state at the same time as a showcase. Part III explains the human rights implication of the states of emergency. Taking the three declarations of state of emergencies mentioned above, this part attempts to analyse the extent to which the practice of declaration of State of emergency in Ethiopia has fulfilled the preconditions of the human rights standards. It is then followed by a conclusion.

2. The Concept and International Human Rights Requirements

a. The Concept of State of Emergency

State of emergency, also known as a "state of exception," a "state of siege," or "martial law," is a politico-juridical regime that involves "governmental action taken during an extraordinary national crisis that usually entails broad restrictions of human rights."⁹ It is a legitimate measure where governments can suspend the enjoyment of some human rights to quash the crisis and restore the normal state of the nation when exposed to a national crisis that threatens the life of the nation, such as war.¹⁰ As opposed to normalcy, emergency exceptionally confers temporary limited extraordinary power.¹¹

However, there are two fundamental conceptual strands which have normative implication about whether a state of emergency is required to be regulated in law. The first strand situates the state of emergency "within the sphere of the juridical order."¹² Accordingly, it claims that the rule and the exception are distinguishable and the legal regime of emergency can be objectively regulated by law.¹³ This rule of law model is entrenched in, informed and influenced by the modern written constitutions and international human rights instruments as will be discussed later. It argues for the legal regulation and prescribing of objective requirements (both substantive and procedural) for the declaration of a state of emergency.

⁹ Claudio Grossman, 'A Framework for the Examination of States of Emergency Under the American Convention on Human Rights' 1 AM. U. J. INTL L. & POL'Y (1986) 35

¹⁰ Ergun Ozbudun and Mehmet Turhan, 'Euro. Comm. for Dem'y through Law, Rep. on Emergency Powers' Doc. No. CDL-STD 012 (1995) 3.

¹¹ Jaime (n 2) 21, 22

¹² Giorgio Agamben, *State of Exception* (Kevin Attell Tran.) (2005) 22, 23

¹³ *Ibid*

On the other hand, the second strand of thought questions the very possibility of a normative distinction between the rule and the exception. Here, a state of emergency, and the necessity that underpins it are "something before or other than the law," and "the pretence of regulating by law" is rejected as it is a matter of "essentially extra-judicial."¹⁴ It is with the view that "the circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional [and human rights] shackles can be imposed on the power to which the care of it is committed."¹⁵ As such, the sovereign, to whom the care of the normal state of the nation is entrusted, must have unlimited power to restore it. This line of thought gives room for governments to abuse human rights and to act in *carte blanche* ways as its pretext is to save the nation.

b. International Human Rights Requirements in State of Emergency

One of the fundamental challenges that international human rights law faces is the practice of systematic violation and abuse of human rights during public emergencies. On the one hand, states might use public emergencies to ensure public welfare containing the enjoyment of human rights. On the other hand the international human rights framework sets criteria to regulate state conduct during state of emergencies. The framework allows states to legally depart from their international obligations in exceptional circumstances.

Most international human rights instruments, except the African Charter on Human and People's Rights, allow state parties to derogate their human rights obligations in times of emergency, while at the same time setting stringent safeguards against abuse. These safeguards are: delimitation of the nature of the exigent circumstances which warrant a state of emergency, provision of restrictions on derogation, and regulation of the nature of state response and conduct in handling the emergency.¹⁶ The safeguards are themed into three-tiers of inquiry as discussed in the following subsections.

¹⁴ Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' 17 *EURO. J. INT'L. L.* (2006) 678

¹⁵ The Federalist No. 23 (Alexander Hamilton)

¹⁶ International Covenant on Civil and Political Rights (ICCPR), opened for signature Dec. 19, 1966, S. EXEC. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171, Art 4; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), opened for signature Nov. 4, 1950, 213 U.N.T.S. 222, Art 15; American Convention on Human Rights (ACHR), opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123, Art 27

c. Establishment of the Existence of Emergency Situation

Regarding the first safeguard, the international human rights framework regulates the establishment of an exceptional circumstance (*Jus ad Tumultum*) in which party states are entitled to legitimately derogate their human rights obligations.¹⁷ For instance, Article 4 of ICCPR provides that state parties are allowed to derogate from their human rights obligations when faced with a public emergency which threatens the life of the nation.

Further explanation is provided for the notion of ‘public emergencies’ by the European Commission on Human Rights (ECtHR) and *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (Siracusa Principles)*. ECtHR sets out four cumulative elements. These are: (i) The crisis or danger must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger must be exceptional, in that the normal measures or restrictions are inadequate.¹⁸

*On the other hand, the Siracusa Principles defines a public emergency as “a threat to the life of the nation that: (a) affects the whole of the population, and either the whole or part of the territory of the State and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions that are indispensable in ensuring and protecting the rights. Such real and perceived crises, including not only the paradigmatic threats of foreign military intervention and insurrection, but also political unrest, general civil unrest, criminal or terrorist violence, labor strikes, economic emergencies, the collapse of public institutions, the spread of infectious diseases, and natural disasters”.*¹⁹

Generally, the whole story in delineating the constituting elements of public emergency is to restrain the state from declaring an emergency as a preventive measure for the crisis that can be handled by the normal state functioning.

¹⁷ Criddle et al (n 3) 6

¹⁸ *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961) (No. 3) (Court) 56

¹⁹ American Association for the International Commission of Jurists, *SIRACUSA PRINCIPLES on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985)

d. Limit on Derogation of Human Rights

The second, substantive safeguard is limiting the derogations themselves, by setting non-derogable rights. Derogation clauses often provide a list of absolute rights that shall not be derogated in states of emergency. States may legally derogate from their international obligations provided that the rights do not fall under the non-derogation clause. International human rights instruments such as the ICCPR stipulate a list of rights that are non-derogable. Furthermore, the trends of expanding non-derogable rights in human rights instruments is increasing as evidenced from global and regional human rights instruments.²⁰ In addition, the number of rights in this category is increasing from time to time through General comments as is the case in ICCPR. For the sake of this research, it is essential to analyse those incorporated in the ICCPR to which Ethiopia is a party.

ICCPR enunciates two sets of non-derogable rights. The first one is those listed in the Covenant expressly under article 4. These rights are Right to life (art 6); Prohibition of torture, cruel, inhuman, and degrading treatment (art 7); Prohibition of medical or scientific experimentation without consent (art 7); Prohibition of slavery, slave trade, and servitude (art 8); Prohibition of imprisonment because of inability to fulfil contractual obligation (art 11); Principle of legality in criminal law i.e. the requirement that criminal liability and punishment are limited to clear and precise provisions in the law (art 15); Recognition everywhere as a person before the law (art 16); and Freedom of thought, conscience and religion (art 18).²¹

However, the above list is not static. Over time, additional non-derogable rights are introduced through General Comments (GC) as indicated above. The United Nations Human Rights Committee (UNHRC) in its GCs, which are an authoritative interpretation of the relevant provisions of the treaty, have identified and interpreted additional examples of peremptory norms, elements within derogable rights, and additional rights and prohibitions that cannot be subject to lawful derogation. In GC No. 29, non-derogable rights include fundamental principles of a fair trial, presumption of innocence (art 14(2)); prohibition of arbitrary deprivation of liberty (art 9(1)); and prohibition of collective punishments as peremptory norms.²² In the same GC, UNHRC has identified and interpreted illustrations of elements of the derogable rights that are not subjected to lawful derogations. These are the right of persons

²⁰ Abdi (n 1) 84

²¹ ICCPR, Art. 4

²² General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001)

deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person; prohibitions of taking hostages, abductions, or unacknowledged detention; the rights of persons belonging to minorities; and deportation or forcible transfer of population without grounds permitted under international law (art 7(1)(d) Rome Statute).²³

Moreover, in General Comments 24, 29, 34, and 35, UNHRC has also identified additional rights and prohibitions that cannot be subject to lawful derogation. It includes the right to an effective remedy in the case of violations under the ICCPR;²⁴ the right to be tried by a competent, independent, and impartial tribunal established by law;²⁵ the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention;²⁶ the right not to be compelled to testify against oneself or to confess guilt;²⁷ prohibition of statements or evidence that are obtained in violation of art 7 of ICCPR and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 15;²⁸ prohibition of prolonged incommunicado detention;²⁹ and prohibition of the death penalty for States that are party to the Second Optional Protocol to the ICCPR.³⁰

The above progression in broadening of non-derogable rights and tightening of the derogation clause indicates the trajectory of international human rights jurisprudence in restraining the possible use of state of emergency to abuse human rights.

e. Regulation of State's Conduct within Emergencies

The final measure is defining the standards that regulate the state's conduct within emergencies (*jus in tumult*).³¹ Even if the circumstances sufficiently justify initiating a state of emergency and the state of emergency declared accordingly, the state is not at absolute liberty to take all measures to restrict the derogable rights. Rather, there are substantive and procedural standards that impose limitations on the measures employed to address the emergency threats to public order.

²³ Ibid

²⁴ Ibid; General Comment No 24, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017)

²⁵ General Comment No 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007)

²⁶ GC 29 (n 22); General Comment No 35, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014)

²⁷ GC 32 (n 25)

²⁸ Ibid

²⁹ GC 35 (n 26); GC 29 (n 22)

³⁰ GC 29 (n 22)

³¹ Criddel (n 3) 8

ICCPR, for instance, requires that (1) the measures undertaken are those "strictly required by the exigencies of the situation," (2) "such measures are not inconsistent with their other obligations under international law" and (3) they "do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin."³² These requirements, in effect, require the observation of the principles of legality and non-retroactivity, notification and official proclamation, strict necessity and proportionality, non-discrimination, temporality and geographical scope, and legislative oversight of measures in time of taking emergency measures.

In sum, this three-tier inquiry of the state's use of emergency power is designed to ensure the need for utmost care and protection for human rights during emergencies. Nonetheless, the extent to which such international human rights requirements are incorporated in national Constitutions is another question.

3. State of Emergency under the Ethiopian Constitution

The Constitution stipulates two important promulgations about human rights and state of emergency. The first one is Article 93, which prescribes the three-tier inquiry of state of emergency discussed above.³³ The second one is Article 13, which defines the juridical relation of the constitutional human rights and international human rights.³⁴ It is thus necessary that an examination of the non-derogable rights is made as they are found in the FDRE Constitution vis a vis international advancements.

Requirements

i. Public Emergencies

Concerning establishing an emergency that warrants a declaration of the state of emergency, Article 93(1(a)) of the FDRE Constitution provides an exhaustive list of exigent circumstances. Accordingly, it is declared when there is '[external invasion], a breakdown of law and order which endangers the constitutional order and cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occurs.'³⁵

³² ICCPR Art 4

³³ FDRE Constitution (n 8) Art. 93

³⁴ Id Art 13

³⁵ Id Art 93(1a)

ii. Non-Derogable Rights

Article 93(4(c)) of the FDRE Constitution, on the other hand, provides a very limited list of absolute or non-derogable rights even in times of emergency. These are prohibition against inhuman treatment (Art 18), the right to equality and non-discrimination (Art 25), the right to self-determination up to secession (Art 39(1 and 2)), and the federal nature of the State and its nomenclature (Art 1).³⁶

Compared to the international human rights regime, the Constitutional list of non-derogable rights is very few. Let alone to incorporate the new additions stipulated through General Comments, the Constitution doesn't incorporate the list of non-derogable rights in ICCPR. Given the constitutional supremacy clause on one hand,³⁷ and the constitution's requirement of interpretation of its human rights clauses in the manner conforming to the principles of the Universal Declaration of Human Rights, the Covenants, and international instruments adopted by Ethiopia on the other hand,³⁸ it, in turn, begs the question how such two-tiered dimensions can be resolved.

The academic discourse provides two tired dimensions to resolve the above juridical relation about the status of treaties. One side considers that the principles of international human rights don't have an overriding effect on the FDRE Constitution. They have only the effect of clarifying the understanding of the human rights recognized under the FDRE Constitution.³⁹ It doesn't over-rule the supremacy clause of the Constitution. This line of interpretation, paves a way for the government to raise the domestic constitution as a defense to disregard international human rights obligations.

The other side claims that the Constitution has introduced an exception to the constitutional supremacy clause. For the human rights section of the Constitution, it stipulated that the international human rights instruments to which Ethiopia is a party "share parity of status with the Constitutional Bill of Rights."⁴⁰ However the apparent contradiction, as the case in the non-

³⁶ Id Art 93(4c)

³⁷ Id Art 9(1)

³⁸ Id Art 13

³⁹ Belay Frenesh Tessema, 'a critical analysis of non-derogable rights in a state of emergency under the African system: the case of Ethiopia and Mozambique' (unpublished LLM thesis, University of Pretoria) (2005)

⁴⁰ Takele Seboka Bulto, 'The Monist-Dualist divide and the supremacy clause: revisiting the status of human rights treaties in Ethiopia' J. Ethiopian L. 23 (2009) 134, 150-153

derogable rights, raises competing concerns. Consequently, this line of thought allows the interpretation of the non-derogable rights of the Constitution from the perspective of the ratified human rights treaties.

Apart from academic discourse, it is imperative to see which line of interpretation is upheld by the Ethiopian government in time of declaring the State of emergency. To determine this one has to go through the state of emergencies declared so far and see their contents. In this regard, it is worthy to consider the 2016, 2018, and 2020 states of emergencies declared. The 2020 State of Emergency enacted to counter and control the spread of COVID-19 and mitigate its impact expressly referred to the non-derogable rights in the Constitution only. The Council of Ministers Proclamation No. 3/2020 ratified by the House of People’s Representatives (HPR) provides:

“The Regulations to be enacted and measures to be taken by the Council of Ministers shall not in any way infringe on provisions specially protected by the FDRE Constitution Article 93 (4) (c).”⁴¹

The 2016 state of emergency for ‘the Maintenance of Public Peace and Security,’ imposed following protests,⁴² lasted for ten months⁴³. The 2018 state of emergency for ‘Constitution and Constitutional order defense from threat’, was adopted following resignation of the former Prime Minister Hailemariam Dessalegn and with the continuation of the anti-government protests⁴⁴. Both declarations in their respective articles dealing with ‘state of emergency measures’ indicated those non-derogable rights listed in the Constitution.

iii. Regulation of State Conduct during Emergency

Concerning regulating state conduct during emergencies, the Constitution stipulates substantive and procedural principles and standards that limit the measures the state may take to address the emergency. In line with the principle of necessity and proportionality, the Constitution requires the derogation of rights to be to “the extent necessary to avert the conditions that required the declaration of a state of emergency.”⁴⁵ It also requires the

⁴¹ Proc. No. 3/2020 (n 6) Art 4(2)

⁴² Proc. No. 1/2016 (n 4) Art 4

⁴³ Financial Times, Ethiopia Lifts 10-Month State of Emergency, <<https://www.ft.com/content/293b05b6-78fb-11e7-90c0-90a9d1bc9691>> 4 August 2017

⁴⁴ Proc. No. 2/2018 (n 5) Art 4

⁴⁵ FDRE Constitution (n 8), Art 93(4b)

derogation to be temporary for a maximum of six months; this can however be renewed subsequently every four months by a two-third vote of the House of Peoples Representatives (HPR).⁴⁶

Moreover, as part of the legislature oversight, the declaration of the state of emergency is required to be approved by the HPR within 48 hours when the parliament is in session, and within 15 days when it is not.⁴⁷ Innovatively, uncommon in other nations' constitutions, the FDRE Constitution requires the HPR to establish the State of Emergency Inquiry Board (SEIB) to control the possible abuse of information and rights by the executive during emergency periods.⁴⁸ SEIB comprises seven persons to be chosen and assigned by the HPR from among its members and from legal experts. It has the powers and responsibilities:

“to make public within one month the names of all individuals arrested on account of the state of emergency together with the reasons for their arrest; to inspect and follow up that no measure taken during the state of emergency is inhumane; to recommend to the Prime Minister or the Council of Ministers' corrective measures if it finds any case of inhumane treatment; to ensure the prosecution of perpetrators of inhumane acts; to submit its views to the HPR on a request to extend the duration of the state of emergency.”⁴⁹

However, when we see the power of SEIB concerning scrutinizing the human rights violation, the Constitution seems to limit it to the right to be free from inhumane treatment. This, in effect, limits the HPR to rely on the executive's report to get information about the situation of other human rights.

Except for the region-wide state of emergency, which is required to be declared by regional states in case of natural disaster or outbreak of pandemic affecting the particular Regional State,⁵⁰ the FDRE Constitution doesn't provide a condition for the geographic application limit of emergency measures. It doesn't expressly stipulate the principle of legality and non-retroactivity and principle of non-discrimination as principles guiding the conduct of the state within emergencies. As the practices of the declaration of State of Emergency reveal (see the discussion in Part 3) the government disregards these principles.

⁴⁶ Id Art 93(3)

⁴⁷ Id Art 93(2)

⁴⁸ Id Art 93(5)

⁴⁹ Id Art 93(6)

⁵⁰ Id Art 93(1b)

b. State of Emergency in Federalism

One of the basic features and a defining element of the notion of federalism is the apportionment of powers between the federal government and the federating states.⁵¹ The division of powers and functions between the two levels of government isn't simply about the demand for power decentralization. It is also concerned with the autonomy of the self-governing federated states and the principle of non-intervention in each other's powers and functions.

Concerning the declaration of the state of emergency, the FDRE Constitution specifies the situations in which each level of government – the federal and state – can declare the same. According to Article 93(1), both levels of government are empowered to declare a state of emergency in time of natural disaster or when epidemics occur. The provision doesn't explicitly specify the nature or kind of natural disasters or epidemics to delineate which level of government has the power to declare the emergency. The Constitution simply provides the area limit to the scope of application of a state of emergency declared by a regional state. This is an obvious fact. This stipulation may lead one to think that regional states can decree a state of emergency that applies in their respective administrative boundaries where a natural disaster or an epidemic occurs without awaiting for the federal government.

Nevertheless, the cumulative reading of Articles 93 and 51(16), on the other hand, delineates about the nature of natural disaster or epidemic that the federal or state governments are entitled to decree.⁵² Accordingly, the federal government has the power to declare a state of emergency when a natural disaster or epidemic occurs having nation-wide effect or when it affects two or more states. If the effect is limited to a single state, it is arguably the power of that particular state to declare a state of emergency.

This line of interpretation also poses another legal puzzle about what will happen if the given level of government fails to declare a state of emergency while the situation of epidemic or natural disaster requires it to do so. Can another level of government be entitled to do so? At least yes, as far as the power of state of emergency of the federal government is concerned. Again what would happen when the two levels of government declare their respective state of

⁵¹ Ronald L Watts, 'Federalism, federal political systems, and federations' 1 Annual Review of Political Science (1998) 121; Kenneth C. Wheare. Federal government (1964) 32-33

⁵² FDRE Constitution (n 8) Art. 93 and Art 51(16)

emergencies at the same time regarding the same exigent circumstances of natural disaster or epidemic? How is the juridical relationship between the two going to be regulated taking into account human rights protection?

For the first time, these and related questions have practically been raised with emergency measures in response to COVID-19 in Ethiopia. In Ethiopia, in the fight against COVID-19, the first state of emergency was declared by Tigray Regional State on March 26, 2020. This declaration came after the first case was confirmed on March 13, 2020.⁵³ It was only on April 8, 2020, that Prime Minister Abiy Ahmed stated that the federal government had declared a nation-wide state of emergency.⁵⁴ The two declarations of state of emergency were in effect parallel.

As long as the regional state declares a state of emergency to contain the danger posed by the pandemic and with the assumption to fill the lacuna created as a result of the inaction of the federal government, there will not be a problem. The problem in this regard comes into picture when the federal government enacts a state of emergency which contradicts an earlier declared regional state of emergency (The regional state, it should be noted incidentally, might have rushed and acted contrary to constitutional emergency clauses, including constitutional rights and its actions might be subject to the three-tires of inquiry same as the federal government's emergency actions).

Two contradicting assertions had been made from the Federal Government side and the Tigray Regional State side which is concerning the juridical relation between the federal state of emergency and the Tigray State of emergency. From the perspective of Tigray, Amanuel Assefa, the then Head of the State Bureau of Justice, mentioned that the federal state of emergency applies in the state as far as it doesn't contradict the state of emergency declared by the region.⁵⁵ In contrast, the Federal State of emergency Decree No. 3/2020 Article 3(3) provided a self-declared supremacy clause. It stated that any federal government or State laws,

⁵³ GARADAWORLD, 'Ethiopia: State of emergency declared in Tigray Region' <<https://www.garda.com/crisis24/news-alerts/326976/ethiopia-state-of-emergency-declared-in-tigray-region-march-26-update-5>> 27 March 2020

⁵⁴ Aljazeera, Ethiopia declares state of emergency to fight coronavirus, <<https://www.aljazeera.com/news/2020/4/8/ethiopia-declares-state-of-emergency-to-fight-coronavirus>> 8 April, 2020.

⁵⁵ Tigray Television, 11 April 2020

practice, or decision which contravenes this decree or regulations enacted based on it shall be of no effect for the duration the decree is valid.⁵⁶

The possible contradictions between the two decrees happen in terms of the scope and magnitude of restrictions and limitations to rights and freedoms and extent of liabilities in case of violations. Accordingly, lesser restrictions and limitations to rights and lenient liabilities may be imposed by Tigray's state of emergency than the federal one or vice-versa. Such contradictions in most federal systems are resolved by a concept of supremacy clause enshrined in their constitutions; stating that the Constitution and federal laws made in furtherance of the Constitution are supreme law of the land and states can't regulate, interfere with or control federal issues. Instead, in the FDRE Constitution, we find two separate clauses. The first one is the supremacy clause of the Constitution. As provided under Article 9, the Constitution is the supreme law of the land and it requires all laws, customary practice, or decisions of any authority to be in line with the Constitution.⁵⁷

The second one is the mutual-respect clause. This clause in Article 50(8) demands that each level of government must respect the power and function of each other.⁵⁸ This means that one level of government shouldn't intervene with the power and function of the other level of government. Any intervention is regarded as a violation of the FDRE Constitution and calls for the application of the supremacy clause of the Constitution.

Nevertheless, Billene Seyoum, from the Press Secretariat Unit of the Prime Minister Office of Ethiopia, in her short video briefing aimed at giving context and clarity on the nation-wide state of emergency on April 9, 2020, did not rely on the mutual respect clause or the power division clause of the Constitution.⁵⁹ She came up with a new line of interpretation to govern the juridical relationship between the national and state-wide state of emergencies. In her statement, she brought the idea of the supremacy of the national state of emergency and it supersedes the state-wise one unless the *latter took more restrictive measures* in preventing the

⁵⁶ Proc. No. 3/2020 (n 6) Art 3(3)

⁵⁷ FDRE Constitution (n 8) Art 9(1)

⁵⁸ Id Art 50(8)

⁵⁹ Office of the Prime Minister – Ethiopia, 'COVID19 Status Briefing by Billene Seyoum' <<https://www.youtube.com/watch?v=4BrReLEaPLI>> April 9, 2020

virus.⁶⁰ She mentioned that the federal enactments provide the minimum restrictive measures.⁶¹ The States can take more restrictive measures.

From the human rights perspective, this line of interpretation doesn't go in line with the exceptional nature of a state of emergency and it opens a loophole for the furtherance of abuse of people's rights and freedoms. As discussed in Part I in its very nature, save for the non-derogable rights, state of emergency aims at a temporal suspension of the rights and freedoms. With the view to contain dangers like an epidemic, state of emergency suspends rights and freedoms to the extent that enables the government to address the phenomena. Once there are restrictions and limitations imposed by the national state of emergency, allowing the states to have their state-wise emergency that imposes high and severe restrictions and limitations serve no good purpose than abusing people's rights and freedoms. It also goes against the principle of non-discrimination and the principle of necessity and proportionality.

4. Appraisal of the Human Rights Implications of the Practice of Declaration of State of Emergency

The current part evaluates the experience of the declaration of the state of emergency in Ethiopia. By taking the three national State of emergencies that were declared, this part attempts to appraise the extent to which the international human rights and constitutional requirements were practically observed.

a. Establishment of Emergencies

The practice of declaration of a state of emergency in Ethiopia is often criticized as a means for the incumbent government to stay in power rather than truly addressing public emergency which threatens the life of the nation and the public health crisis.⁶² Particularly, the state of emergency declared on 8 October 2016, in response to a nationwide protest, provided the military and security forces with sweeping new powers to counter what the then government described as the threat posed by "anti-peace groups" working "in close collaboration with

⁶⁰ Ibid

⁶¹ Ibid

⁶² Marew Abebe Salemot, 'Constitutional Silence on Election Postponement in Ethiopia: A critique of Constitutional Interpretation' <<https://lexforti.com/legal-news/election-postponement-in-ethiopia>> 9 September, 2020

foreign elements,”⁶³ while what the protestors demanded were democratization, respect for human rights and rule of law. Initially, while the protests were peaceful, it was the then incumbent that responded with force which resulted in the death of close to 700 (largely protestors but also included security personnel), and detained more than 26,000 protestors in "rehabilitation camps."⁶⁴ This state of emergency lasted for 10 months and was meant to serve the then ruling party's ability to stay in power on the pretext of '*maintenance of public peace and security*.'

The protests continued even after the release of opposition leaders, journalists and protestors;⁶⁵ the government's declaration of retreat from implementing the Addis Ababa Master Plan,⁶⁶ and the unexpected resignation of the former Prime Minister Haile Mariam Dessalegn,⁶⁷ which forced the then incumbent to declare another state of emergency which lasted only for two months in February 2018.⁶⁸ This time, while the facts on the ground were similar to the situations of the 2016 state of emergency, the circumstance was named as 'a threat to Constitution and Constitutional order' and justified the declaration of the state of emergency as to 'defend Constitution and Constitutional order from threat'.⁶⁹ However, when the Tigray People's Liberation Front (TPLF) lost its dominance in the government, the state of emergency came to an end ahead of its period. These two facts imply that the 2018 State of emergency like its predecessor was declared arguably to ensure the stay-in-power of the then incumbent.

A similar claim, although not wholly accurate, was made against the current government in relation to the 2020 state of emergency declared to control and counter the spread of COVID-

⁶³ Tesfaye Wolde 'Letter to the Editor, Ethiopia's State of Emergency Will Work' (Washington Post Oct. 16, 2016) <https://www.washingtonpost.com/opinions/ethiopias-state-of-emergency-will-work/2016/10/16/52f87c0a-923b-11e6-bc00-1a9756d4111b_story.html>

⁶⁴ U.N. News, In Ethiopia, UN Rights Chief Urges Authorities for Greater Freedoms; Space for Critical Voice, <https://news.un.org/en/story/2017/05/556572-ethiopia-un-rights-chief-urges-authorities-greater-freedoms-space-critical> > (4 May 2017); Felix Horne, 'Ethiopia Lifts Some State of Emergency Restrictions: Time to End Mass Arbitrary Detentions' (HRW 16 March 2017) <<https://www.hrw.org/news/2017/03/16/ethiopia-lifts-some-state-emergency-restrictions>>

⁶⁵ DW, 'Ethiopia releases high profile political prisoners' <<https://www.dw.com/en/ethiopia-releases-high-profile-political-prisoners/a-42590273>> 14 February 2018

⁶⁶ The Guardian, 'Ethiopia scraps Addis Ababa 'master plan' after protests kill 140' <<https://www.theguardian.com/world/2016/jan/14/ethiopia-addis-master-plan-abandoned>> 14 January 2016.

⁶⁷ BBC, 'Ethiopia PM Hailemariam Desalegn in surprise resignation' <<https://www.bbc.com/news/world-africa-43073285>> 15 February 2018

⁶⁸ CNN, 'Ethiopia lifts state of emergency two months early' <<https://edition.cnn.com/2018/06/05/africa/ethiopia-lifts-state-of-emergency/index.html>> 5 June 2018.

⁶⁹ Proc. No. 2/2018 (n 5)

19 and to mitigate its effects. It was declared in April for five months and came to an end in August.⁷⁰ Because of the State of emergency and the COVID-19 crisis, the election that was scheduled for August 2020 was postponed through Constitutional interpretation.⁷¹ The election was postponed due to COVID-19 for the sake of protecting public health and preventing the risk of spreading of the pandemic. This gives the incumbent government the power to extend its office terms though some of the opposing political parties have also agreed to postpone the election.⁷²

b. Nature of Legislative Oversight

As noted in Part II, the Constitution provides legislative oversight of state of emergency regarding assessment of the exigent circumstance, the necessity and proportionality of the measures, the observance of non-derogable rights, and the duration of the emergency measures. To curtail the information monopoly of the executive, the Constitution also designed a mechanism by which the legislature can follow up the implementation of the emergency measures through an independent institution called SEIB. How far these legislative oversights are practically effective can be inferred from the manner of the HPR's approval of the state of emergencies, among other things.

In the three State of emergencies declared in 2016, 2018, and 2020 the parliament has been occupied by the Ethiopian People's Revolutionary Democratic Front (EPRDF).⁷³ It was not possible to imagine that the members of the parliament scrutinize the emergency measures introduced by the executive which was formed from the very political party that has the majority of the seats in the parliament.⁷⁴ What the parliament did was a mere endorsement of the state of emergencies.

Under Article 93(2) of the Constitution, the decree of State of emergency must secure a two-third majority vote of approval of the HPR to stay in force for the duration it is demanded. Members on duty the day that the parliament voted for the approval of the decree were 539 out

⁷⁰ Proc. No. 3/2020 (n 6) Art 8

⁷¹ CGTN, 'Ethiopia extends PM and lawmakers' terms after elections postponed' <<https://news.cgtn.com/news/2020-06-11/Ethiopia-extends-PM-and-lawmakers-terms-after-elections-postponed-RewOTIWsx2/index.html>> 11 June 2020

⁷² Yoseph Badwaza, 'Ethiopia: Restoring Peace and Democratic Reforms' (Freedom House Dec. 3, 2020) <<https://freedomhouse.org/article/ethiopia-restoring-peace-and-democratic-reforms>>

⁷³ Vaughan, Sarah. 'Revolutionary democratic state-building: party, state and people in the EPRDF's Ethiopia' *Journal of Eastern African Studies* 5.4 (2011) 619-640

⁷⁴ FDRE Constitution (n 8) Art 56, Art 76-77

of which two-third of the members were 360. Nonetheless, Abadula Gemed, the then speaker of the parliament declared that:

“Out of the members of parliament we have, eight are not available in their duty due to death and other reasons. The total number of members of parliament we have is therefore 539. Of these 539, according to the proclamation, two-third of it will be 339. The vote we have got in support of is 346; against is 88; and 7 have abstained.”⁷⁵

Although the Speaker regarded it as an arithmetic mistake and asked for an apology, and altered the vote for the number to 395 afterward, keeping the vote against and abstain as it was, and also stated that the total number of attendees was 490.⁷⁶ While opposition leaders and critics claimed that the vote was rigged.⁷⁷ Apart from the confusion in the voting, what is exciting here was the number of votes against the State of Emergency. From the parliament where the whole seat is occupied by the ruling party, getting 88 against and 7 abstaining votes was strange in the political history of Ethiopia but a precursor for the later fracturing relations in the ruling coalition. Some argue this showed the fact that the state of emergency was declared partly to ensure that the then incumbent stays in power and to suppress any opposition under the guise of 'defending the Constitution and the Constitutional order from threat'.

c. Provision of Blank Check to the Executive?

Apart from the absence of legislative oversight, the Parliament did not prescribe detailed guidance in its approval proclamations as inferred from the three declarations of state of emergency under investigation here. In most cases, it simply grants the executive with a short of blank check to take any measure it deems necessary and endorses a decree issued by the Council of Ministers (COMs) as it is.⁷⁸ This is, in fact, without disregarding the variations manifested in the state of emergencies.

⁷⁵ Addis Standard, Did Ethiopian Parliament rig the state of emergency vote?, <https://addisstandard.com/video-did-ethiopian-parliament-rig-the-state-of-emergency-vote/> 3 March 2018

⁷⁶ Addis Standard, 'House Speaker Abadula Gemed, apologizes for erring vote counting on state of emergency as decision sparks fresh protests' <<https://addisstandard.com/news-house-speaker-abadula-gemed-apologizes-erring-vote-counting-state-emergency-decision-sparks-fresh-protests/>> 4 March 2018

⁷⁷ Reuters, Dispute over Ethiopia emergency rule vote after footage posted online, <<https://www.reuters.com/article/us-ethiopia-politics-idUSKCN1GE1XJ>> March 2, 2018; Opride, Here is how and why the Ethiopian parliament RIGGED the state of emergency vote, <<https://www.opride.com/2018/03/04/ethiopian-parliament-rigged-state-emergency-vote/>> March 4, 2018

⁷⁸ See State of Emergency for the Maintenance of Public Peace and Security Council of Ministers Proclamation No.1/2016 Ratification Proclamation No. 984/2016; Constitution and Constitutional order Defence from Threat State of Emergency Proclamation No.2/2018 Approval Proclamation No. 1083/2018; A Proclamation to Approve

For instance, the common features of the three state of emergencies can be listed as follows, among others: they provide the geographical scope of application, the duration for how long the state of emergency lasts, a listing of non-derogable rights, establishing special body responsible for execution (command post or ministerial committee), establish the SEIB, suspension of laws and the imposition of criminal liabilities. In defining the geographical scope of application the parliament simply endorsed the nation-wide application declared by the COMs without inquiring whether the ‘exigent circumstances’ were happening throughout the country or not. For instance, the anti-government protests which supposedly caused the declaration of 2016 and 2018 state of emergencies occurred in some limited areas predominately in Oromia and Amhara Regions.⁷⁹ This fact was also recognized by the COMs as it stated in the preambles of its two state of emergency decrees stating: “...some parts of the country...” and “...in certain areas of our country...” respectively.⁸⁰ However, the parliament, instead of limiting the application of the emergency measures in those areas; opted for its application throughout the country. This approach goes against international human rights instruments and the Constitution’s requirement of necessity and proportionality.

With respect to the duration of the state of emergencies too, what the experiences of the parliament reveal is the simple endorsement of the period proposed by the COMs. In the three state of emergencies, the COMs always proposed a longer duration which in effect derogate human rights for a long period. Except for the 2020 State of Emergency which was declared and lasted for five months,⁸¹ the rest were imposed for the maximum duration of 6 months which is stated in the Constitution.⁸² Even the 2016 state of emergency was renewed for another four months.⁸³

With regard to the substantive emergency measures, the Ethiopian Parliament without providing any guidance simply endorses the decrees issued by the COMs as they are. Unlike the 2020 state of emergency, the 2016 and the 2018 state of emergency decrees issued by

the State of Emergency Proclamation No. 3/2020 Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No. _/2020

⁷⁹ Amnesty International, ‘Ethiopia: draconian state of emergency measures’ <<https://www.amnesty.org/en/documents/afr25/5669/2017/en/>> 10 February 2017; Amnesty International, commentary on the Ethiopian state of emergency proclamation, AFR 25/7982/2018, (2018) at 9

⁸⁰ See preamble of Proc. No. 1/2016 (n 4); preamble of Proc. No. 2/2018 (n 5) 3

⁸¹ Proc. No. 3/2020 (n 6) 4, Art 8

⁸² FDRE Constitution (n 8) Art 93(3); Proc. No. 1/2016 (n 4) 2, Art 14(1); Proc. No. 2/2018 (n 5) Art 18(1)

⁸³ Reuters, ‘Ethiopia extends state of emergency by four months’ <<https://www.reuters.com/article/us-ethiopia-security-idUSKBN1711FD>> 30 March, 2017

COMs had provided a list of the emergency measures in an open-ended way which allowed the parliament to evaluate their necessity and proportionality.⁸⁴ Nonetheless, in the approval process, the parliament never questioned them disregarding the opposition that some members of the parliament raised against the approval of the 2018 state of emergency.

Whereas, the 2020 COMs decree of state of emergency approved by the parliament did not provide any list of emergency measures. It rather delegated the power to determine prohibitions and duties imposed to the executive. While approving, it just delegated the executive (i.e. the COMs) to decide on specific emergency measures and suspension of rights. The government in the explanatory note to the State of Emergency Proclamation justified the approach in terms of the need for flexibility for ever-changing circumstances.⁸⁵ Nevertheless, this legislative approach provided the executive with unchecked power and undermined the legislative oversight of the emergency powers.

d. Disregard to Principle of Non-retroactivity and Legality

The practice of declaration of State of emergency in Ethiopia also tends to disregard the principle of legality and non-retroactivity of emergency measures. The principle of legality requires the contents of an emergency decree to be available and accessible to the public and provisions with legal consequences be clear and precise.⁸⁶ The related principle of non-retroactivity, on the other hand, demands the emergency measures to have prospective effect and to have force after its promulgation.⁸⁷ This is to enable people to know what actions are allowed or prohibited and to shape their behaviour accordingly and also foresee the consequences of acting against the measures.

In the three state of emergencies under analysis, these principles were set aside. In the case of the 2016 State of emergency, although it was declared on 8 October 2016, its content was not officially available to the public by the end of 2016.⁸⁸ Moreover, even in the State of Emergency Proclamation 1/2016, which was approved by the HPR on 20 October 2016, the

⁸⁴ Proc. No. 1/2016 (n 4) Art 4; Proc. No. 2/2018 (n 5) 3, Art 4

⁸⁵ Office of the Prime Minister – Ethiopia (n 60)

⁸⁶ Daniel Grafđinaru, ‘The Principle of Legality’ Working papers 044DG, Research Association for Interdisciplinary Studies (2018); Peter Westen, ‘Two Rules of Legality in Criminal Law’ 26(3) Law and Philosophy, (2007)

⁸⁷ Ibid

⁸⁸ Amnesty (n 79) 5

date of issuance was referred to as 25 October 2016.⁸⁹ Its Regulation issued on 27 October 2016 was meant to have effect as of 14 October 2016.⁹⁰ The state of emergency measures retroactively authorized the detention of people for their involvement and role in coordinating protests against the Ethiopian government since the end of 2015.⁹¹ They also used imprecise phrases like ‘other necessary activities’,⁹² and ‘national security’ and ‘sovereignty’ to prohibit communications with international non-governmental organizations and foreign government bodies.⁹³ These practices in collaboration with the then televised special State of Emergency press briefings of Prime Minister Hailemariam Dessalegn and Federal Prosecutor-General Getachew Ambaye, before the parliamentary approval of the State of Emergency were a clear indication of disregard to the basic principles of legality and non-retroactivity.⁹⁴ Particularly, the retroactive effect of laws was introduced to legitimize illegal acts committed before the enactment of the state of emergency and relieving the security forces of liability.

A similar trend was also followed in the promulgation and imposition of the 2018 State of Emergency decree. This State of Emergency to ‘protect and defend the Constitution and Constitutional Order from Threat’ was declared on 16 February 2018 a day after the resignation of former Prime Minister Hailemariam Dessalegn. Since the HPR was not in session the approval was made within fifteen days as per the requirement of the FDRE Constitution on 2 March 2018.⁹⁵ Nonetheless, apart from media reports the content of the emergency measures, prohibitions, restrictions, and suspension of rights were not officially available to the public until 23 March 2018.⁹⁶ Besides, the emergency measures used imprecise and vague phrases such as ‘incites grievance or suspicion among people’, ‘signs or messages inciting violence including writings or displaying a show,’⁹⁷ ‘constitutional order’⁹⁸ and ‘take all necessary measures,’⁹⁹ which compromised the principle of legality and opened room for abuse.

⁸⁹ Proc. No. 1/2016 (n 4)

⁹⁰ State of Emergency Proclamation for the Maintenance of Public Peace and Security Implementation Council of Ministers Regulation No. 391/2016, Art 5

⁹¹ Amnesty (n 79) 5

⁹² Proc. No. 1/2016 (n 4) 2, Art 4(12)

⁹³ Amnesty (n 79) 5

⁹⁴ Ethiopian Human Rights Project, *The State of Emergency (2016-2017) Its Cause and Impact*, (2018)

⁹⁵ Xinhua, ‘Ethiopian parliament approves 6-month state of emergency’ <http://www.xinhuanet.com/english/2018-03/02/c_137011748.html> 16 February 2018

⁹⁶ Proc. No. 2/2018 (n 5)

⁹⁷ Id Art 4(1)

⁹⁸ Id Art 4(4)

⁹⁹ Id Art 4(16)

The approach to compromise the principle of legality and non-retroactivity of emergency measures has continued with the current government of Ethiopia. Disregard to the principle of non-retroactivity was made on the emergency measures introduced in the Regulation to counter and control the spread of COVID-19 and to mitigate its impact.¹⁰⁰ The regulation, that defined the long-listed measures in terms of prohibitions (prohibited acts) and impositions (prescribed duties), the notification and official proclamation of which was done on April 20, 2020, expressly stated that it had an effect as of its adoption by COMs on April 11, 2020.¹⁰¹ This stipulation required almost 10 days of retroactive application of the measures before it was notified, officially proclaimed and the public was made aware of the measures and the legal consequences of their violations.

In the same fashion, the principle of legality was also disregarded in the State of Emergency decree to control and counter the spread of COVID-19 and mitigate its impact as approved and ratified by the HPR. The decree, without listing out the acts constituting crime, introduced a hasty criminal liability (extent of punishment) clause. In the decree passed on April 8, 2020, and approved by the HPR, it was mentioned that: ‘notwithstanding relevant provisions of the Criminal Code, any person who violates the suspension of rights, measures, an instruction or command issued per this Proclamation shall be punished with simple imprisonment of up to 3 years or a fine of no less than one thousand Birr and not exceeding two hundred thousand Birr.’¹⁰² The decree didn’t mention the acts constituting crimes and it was only in the subsequent regulation adopted by the COM three days later that the conducts constituting crimes were specified.¹⁰³

e. Excessive Material Scope of derogations

One of the fundamental principles in international human rights and in the Constitution that guides state's conduct within emergencies is the principle of proportionality and necessity. It is to mean that the measures taken under a state of emergency must be strictly required by the exigencies of the situation that gave rise to the declaration of the state of emergency. In this regard, the UNHRC in its General Comment No. 29 provides:

¹⁰⁰ State of Emergency Proclamation No. 3/2020 Implementation Regulation No.466/2020

¹⁰¹ Id Art 8

¹⁰² Proc. No. 3/2020 (n 6) Art 6(1)

¹⁰³ Reg. No. 466/2020 (n 100), Art 4 & 5

A fundamental requirement for any measures derogating...is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage, and *material scope of the state of emergency* and any measures of derogation resorted to because of the emergency...[T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.¹⁰⁴

Also, as discussed in Part II the Constitution requires the emergency measures taken to be to “the extent necessary to avert the conditions that required the declaration of a state of emergency.”¹⁰⁵ Nonetheless, from the three states of emergencies under investigation, the practice in Ethiopia reveals non-observance of this principle in the state of emergency declarations made so far. For instance, the 2016 and 2018 state of emergency declarations, apart from excessiveness of the geographic scope as noted above, introduced restrictions on communication, including with foreign states and foreign Non-Governmental Organizations,¹⁰⁶ and the prohibition of 'moving in groups'.¹⁰⁷ Although the cause for the emergency declaration was the violence that occurred in some districts and regions in the country, it was not clear how these restrictions contribute towards curtailing and controlling the violence. Furthermore, the 2018 State of Emergency prohibited 'criticizing the State of Emergency Proclamation and the Directive', which serves no better than unnecessarily restricted freedom of expression.¹⁰⁸

The 2020 State of Emergency declaration concerning the COVID-19 pandemic had also taken a similar path with its predecessors. Although the cause for the declaration of the state of emergency here was different – public health crisis – it had followed a similar restrictive ‘command-and-control’ approach which was adopted in case of violence and national security threat. This is, perhaps, because of the assumption that the policymakers in Ethiopia have taken about the notion of a state of emergency. That is whenever they think of state of emergency they assume the imposition of an extraordinary list of prohibitions and bans, the violation of which results in liability and gaining of the military and security forces officially sweeping new legal powers.

¹⁰⁴ GC 29 (n 22) Para 4

¹⁰⁵ FDRE Constitution (n 8) Art. 93(4a)

¹⁰⁶ Amnesty (n 79) 9

¹⁰⁷ Proc. No. 2/2018 (n 4) Art 4(3)

¹⁰⁸ Amnesty commentary (n 79) 9

This fact was manifested in the material scopes of derogations introduced in the 2020 State of Emergency declaration concerning COVID-19. Its Regulation and Directive had incorporated and prescribed long-listed acts as crimes, commission, or omission of which results in criminal liability as defined in the State of Emergency Proclamation. Most of the crimes were not clearly and precisely defined, and the establishing elements were not delineated which in effect opens room for interpretation and abuse. For instance, crimes like prohibition 'to disseminate any information about [COVID-19] and related issues which would cause terror and undue distress among the public',¹⁰⁹ and prohibition 'to stop, obstruct or suspend the transportation of liquid or dry cargo, construction, manufacturing and agricultural activities'¹¹⁰ were open for interpretation. Moreover, the extent of the criminal liability and punishment was not specified to each criminal conduct. Without taking into account the gravity of the crime, the state of emergency proclamation simply stipulated the punishment in a generic term as discussed above. This approach goes against the principle of legality.

Besides, although the emergency measures adopted in the state of emergency regulation of COVID-19 were necessary measures based on existing scientific evidence and globally accepted social distancing guidelines that are important to contain the spread of the virus, some of the measures introduced were considered excessive and in violation of the principle of proportionality. A good elaboration in this regard can be deduced from the restriction imposed on prisoner's right to be visited. The Regulation, rather than allowing a limited visitation of detainees with the necessary precautions and/or arranging systems for prisoners to have a phone call with families and their religious leader, introduced a blanket prohibition of visitation rights.¹¹¹ A similar type of excessive measure, which was open for abuse, was imposed in the form of prohibition of resigning from work,¹¹² the prohibition of termination of an employment contract without imposing an obligation on the state to provide economic stimulus,¹¹³ and overly restrictive and discriminatory bans on travel or free movement, etc¹¹⁴. Furthermore, the regulation unnecessarily criminalized certain conducts and behaviours which can be handled by public health programs. For instance, prohibition on a handshake and the duty to wear masks in public to prevent the spread of the virus were matters of public education as opposed to

¹⁰⁹ Reg. No. 466/2020 (n 100) Art 3(27)

¹¹⁰ Id Art 3(26)

¹¹¹ Id Art 3(9)

¹¹² Id Art 3(25)

¹¹³ Id Art 3(19)

¹¹⁴ Id Art 3(14)

criminal sanction.¹¹⁵ This was a clear manifestation of over-criminalization and disregard to the principle of necessity.

In the same fashion, the COVID-19 regulation unduly authorized the state to interfere with and encroach on the right to private property. The regulation specifically imposed the duty to transfer any type of private property, other than property used for daily personal maintenance, to the government where such property is sought for COVID-19 response operations.¹¹⁶ Although it introduced temporal compulsory acquisition, it did not provide detailed rules about: how and by which particular authority the power of expropriation is to be exercised, the compensation scheme, for how long the expropriation lasts, etc. This might enable the state to exercise overly broad power of expropriation, which may not be necessary for and proportional to control and counter the spread of COVID-19.

f. Derogation of the Principle of Non-discrimination

Derogation of the principle of non-discrimination in the Ethiopian government practice of declaration of State of Emergency happened during the 2020 state of emergency. In its implementation, regulation measures that derogate the principle of non-discrimination and exposes vulnerable persons to stigma were introduced. Specifically, the regulation's imposition of an obligation to report those suspected of the disease by transport operators and the general public opened room for the discriminatory and disproportionate measures. Under Article 4 of the Regulation, it is provided that:¹¹⁷

4/ A transport operator shall inform the head of the nearest entry port or to the Covid-19 screening team about any passenger suspected of being infected with Covid-19.

5/ Any person should inform the police, the Ministry of Health, or the nearest health officials of any person he suspects of being infected with Covid-19.

These stipulations are susceptible to abuse and expose COVID-19 patients and vulnerable persons to stigma and discrimination. Besides, as the phrase ‘persons suspected of being infected with COVID- 19’ is not clear and defined in the regulation, it exposes individuals to harassment as it allows non-professionals to report potential suspects. It also unnecessarily causes encroachment on the right to privacy and confidentiality of COVID-19 patients.

¹¹⁵ Id Art 3(3) and Art 4(7)

¹¹⁶ Id Art 4(15)

¹¹⁷ Id Art 4(4 and 5)

g. Legalizing Ill-Treatment through Use of Force as Enforcement Mechanism

One of the non-derogable rights during state of emergency both in international human rights instruments and the Constitution is the right to be free from torture and ill-treatment. Nonetheless, the introduction of the use of force as an enforcement mechanism of emergency measures in Ethiopia has opened room for torture and ill-treatment. Use of force as a law enforcement mechanism is allowed even in the normal course of things. As it is assigned to regular law enforcement agents, there may not be excessive use and abuse. And if there is an abuse of power in such a case, there will be a liability. However, in case of emergencies specific reference of the use of force in addition to the normal law paves a way for torture and ill-treatment. This is because of the following reasons: (1) the law enforcement is handed to the Military and Security forces and (2) there may be disregard to the liability clause in case of abuse.

In Ethiopia, in all the three state of emergency declarations under investigation, use of force is stipulated as an enforcement mechanism. The way the declarations are stipulated, however, differs in terms of when to use force. The 2016 State of Emergency Declaration authorized the use of proportional force which [emergency command post] finds necessary for the execution of the emergency measures.¹¹⁸ Whilst, the 2018 state of emergency was declared for similar cause of action but in different nomenclature limited the 'use of necessary and proportional force... to... control a threat... posed by riot involving firearms or violence'.¹¹⁹ Here, unlike its predecessor, and successor (subsequently seen below) the use of force, at least theoretically, is limited to a situation that could not be handled and controlled by any means other than force. Nonetheless, in both cases, there were practical reports documented about torture and ill-treatment.¹²⁰

The 2020 State of Emergency declaration, on the other hand, authorized the '*use of proportionate force to enforce* the suspension of rights and measures.'¹²¹ This declaration like the 2016 declaration did not limit the situation where the use of force is authorized. Unlike the two declarations, it did not make use of force as the last resort mechanism of enforcement.

¹¹⁸ Proc. No. 1/2016 (n 4) Art 4(11)

¹¹⁹ Proc. No. 2/2018 (n 5) Art 4(6)

¹²⁰ Center for International Human Rights Law and Advocacy University of Wyoming College of Law, Divide, Develop and Rule: Human Rights Violations in Ethiopia (June 2018) 26-36

¹²¹ Proc. No. 3/2020 (n 6) Art 5(3)

Because in the earlier two declarations, use of force was authorized when it is necessary, i.e. when it is not possible to enforce the emergency measures in other non-violent enforcement mechanisms. However, in the latter one, use of force was not conditioned on necessity. It can be used without exhausting the other possible and non-violent enforcement mechanisms. It did not consider the compatibility of the enforcement mechanism with the nature of the exigent situation. It did not introduce other human rights-friendly enforcement mechanisms such as providing the necessary protection equipment, public education, awareness creation, solidarity, an ethic of care, kindness, which are empowering people with knowledge and tools to protect themselves and others.¹²² It, in effect, in practice resulted beating, insulting, harassing, and kneeling in public of those who violated the prohibitions and imposed duties and in some cases extra-judicial killings in enforcing them.

h. Excessive Restrictions on Freedom of Expression

During emergencies, access to information and freedom of speech have a critical role in informing the public about the prohibitions and restrictions, and to check and balance the government in terms of whether the measures taken are proportional and necessary. Especially in case of pandemics, like COVID-19, it is only through the correct and readily available information on how COVID-19 is transmitted and how it can be prevented that we can contain and mitigate its spread. Consequently, people must be empowered to protect their health and seek assistance where necessary. Public health professionals likewise require timely and accurate information to act quickly and effectively. Community leaders are often best at ensuring the spread of information and reassurance. All these actions are only possible if the information is freely exchanged and accurate. However, at the same time, unregulated access to information and freedom of speech during the State of Emergency exposes the public to false/misinformation that causes unnecessary frustration and turmoil, and it may be used as a channel to aggravate the emergency. Consequently, it requires a balanced approach as opposed to outright and absolute restriction on access to information and freedom of speech, depending on the nature of the circumstance that caused the declaration of a state of emergency.

In Ethiopia, the experience of the declaration of state of emergency shows the use of solemn and excessive restriction on access to information and freedom of speech. The government,

¹²² UNAIDS, 'Rights in the time of COVID-19 Lessons from HIV for an effective, community-led response' (2020)

particularly the command post empowered with executing and implementing the emergency measures assumes the monopoly of information.¹²³ Other entities and private individuals were prohibited from providing information about the emergency and enforcement of emergency measures. This situation exposed the public only to the government's story and narratives. It in turn hampered the public scrutiny of the human rights violations committed in the enforcement of the emergency measures. With all those odds, for instance, in the 2016 State of Emergency, it was the political parties and individual activists that have been key sources of information, for the media and human rights organizations, on the human rights violations committed by government security forces.¹²⁴

Besides, the emergency measures also imposed other specific restrictions which serve no good cause other than derogating access to information and freedom of speech. For instance, the 2018 state of emergency has, hastily, prohibited 'criticizing the state of emergency proclamation and the directive', and 'disseminating and receiving publications from abroad without the permission of the Command post'.¹²⁵

Similarly, the 2020 state of emergency rather than creating an enabling environment for the free dissemination information and protection of the public from false information had followed the same path with its predecessors in introducing prohibitions only due to fear of misinformation. The prohibition had taken two ways. The first one is about the nature of the information itself. Under Article 3(27) it prohibited the dissemination of any information that causes "terror and undue distress among the public", a violation of which results in criminal liability.¹²⁶ The prohibition here refers to the information which truthfulness/genuineness is not contested, but which may cause 'terror and undue distress among the public'. This is, in fact, without disregarding that a lot of information related to COVID-19 may be considered unsettling in nature or is bound to cause psychological anxiety or distress. However, the ordinary understanding of the provision would entail criminalizing ordinary reporting on the spread of the virus or expert predictions on fatality rates from the pandemic.

The second prohibition is related to the prohibition of the dissemination of false information through the media. Under Article 4(10) it was required that information provided through

¹²³ Proc. No. 1/2016 (n 4) Art 7; Proc. No. 2/2018 (n 5) Art 7; Proc. No. 3/2020 (n 4) Art 3(16)

¹²⁴ Amnesty (n 79)

¹²⁵ Amnesty Commentary (n 79) 9

¹²⁶ Reg. No. 466/2020 (n 100) Art 3(27)

media outlets about COVID-19 should not be exaggerated or understated and should not be prone to cause panic and terror among the public.¹²⁷ This prohibition require the media to take utmost care to provide appropriate information and analysis of the virus. However, drawing a line between appropriate, exaggerated, or understated information is very subjective and open for abuse and interpretation. As such it possibly discourages the media from disseminating information to the public due to fear of liability.

i. Excessive Restrictions on Fair Trial and Access to Justice

The right to fair trial and access to justice are fundamental rights which need special protection in time of state of emergency. It is because besides being an end by themselves, they are a means to control the possible abuses and violations of human rights by the government during states of emergencies. That is why the international human rights system has considered and recognized them as non-derogable rights in the later General Comments. Accordingly, the UNHRC in its General Comment 29 provides:

*The Committee believes that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offense. The presumption of innocence must be respected. To protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a state party's decision to derogate...*¹²⁸

However, the Ethiopian experience of the declaration of the state of emergency reveals a total disregard of the right to fair trial and access to justice during emergencies. In the 2016 State of Emergency, although it was not incorporated in the decree issued after more than three months, an official statement specifying the measures by the then-Attorney General Getachew Ambaye, indicated that the Command Post was authorized to suspend implementation of non-specified substantive and procedural laws of the country.¹²⁹ The emergency decree also introduced specific measures that undermined the right to a fair trial. These measures include: arresting any person without a court warrant, detaining any person while the State of Emergency is in force,¹³⁰ search any house, place, and carrier without the requirement of the court order, and

¹²⁷ Id Art 4(10)

¹²⁸ GC 29 (n 22) Para 16

¹²⁹ Amnesty (n 79) 7

¹³⁰ Proc. No. 1/2016 (n 4) Art 4(4)

reasonable suspension with "a view to seize any material may be used to perpetrate a crime."¹³¹ As an extension of the 2016 State of Emergency, the 2018 State of Emergency also adopted similar measures which undermined the right to a fair trial.¹³²

The restriction on the right to fair trial and access to justice was worsened in the 2020 declaration of State of Emergency in Ethiopia. In the fight to control and counter COVID-19 one of the measures introduced in the State of Emergency was the total suspension of criminal procedure law, which in effect caused the suspension of fair trial guarantees¹³³ and suspension of civil lawsuits by the decision of the federal and state supreme courts.¹³⁴ The Regulation listing the emergency measures required the federal and regional courts to establish dedicated benches and wholly suspended the criminal procedure law. Under Article 6(1) of the regulation, it was stated that "the criminal procedure code and criminal procedural provisions in other laws are suspended."

This suspension, in effect, means that the rights of arrested persons to be informed of the reasons for their arrest and any charges against them, to be brought to trial within a reasonable time, to challenge the lawfulness of their detention; the right to a fair and public hearing by a competent, independent and impartial tribunal; the right to presumption of innocence; the right to be tried without undue delay; the right to defend oneself in person or through legal assistance; the right to examine witnesses; freedom from coerced self-incrimination; and the right to appeal to a higher court are suspended. Suspension of some of these procedural guarantees might be justified and necessary to control and counter the spread of the virus. But, an entire suspension of these procedural guarantees does not serve any good purpose other than abusing the human rights of accused and arrested persons.

On top of this, the right to access to justice the regulation under Article 6(4) had provided the possible suspension of civil lawsuits based on the decision of the federal and regional supreme courts. These measures as a restriction of the right to access to justice unduly hindered pressing civil cases like maintenance allowance, unfair dismissal from work, eviction, and human rights issues. In later times, although Courts were allowed to see those pressing cases, the already instituted cases were adjourned for after the lapse of the emergency period.

¹³¹ Id Art 4(5)

¹³² Proc. No. 2/2018 (n 5) Art 4(4 and 5)

¹³³ Reg. No. 466/2020 (n 100) Art 6(1)

¹³⁴ Id Art 6(4)

5. Conclusion

No doubt that the respect, fulfillment, protection, and promotion of human rights demands normalcy – a permanent and normal state of things. During emergency the concerns of the government should shift to an effort to restore normalcy that usually entails broad restrictions of human rights and temporary suspension of the state's human rights obligations. Nonetheless, unless the State's derogation of human rights during emergencies is regulated, it opens a room for systematic human rights violations as the State assumes extraordinary power. That is why international human rights instruments and national Constitutions introduced three-stages of inquiry in regulating State of Emergency declarations.

International human rights instruments to which Ethiopia is a party provide a leeway to the state to exercise extraordinary power when there is an exigent circumstance that warrants emergency declaration, in observation of the non-derogable rights which have expanded through time, and only to the extent strictly required by the exigencies of the situation.

The FDRE Constitution has also recognized these three-stages of inquiry. However, it fails to fit into the lists of and progression made on non-derogable rights in the international human rights system. Moreover, the adoption of the 'more restrictive and harsh measures prevail' interpretation approach by the executive adopted to reconcile contradictions between the nation-wide and region-wide State of Emergencies in the Ethiopian Federal setup indicates the least concern given to human rights and disregard to the principle of non-discrimination and the principle of proportionality and necessity.

The appraisal of experience of the declaration of state of emergency in Ethiopia against the above three-stage inquiry reveals the continuity and use of similar trends to disregard the human rights requirement. Particularly, the analysis of the 2016, 2018, and 2020 nation-wide declared State of Emergency arguably showed the government's tendency to establish the exigencies situation with the view to consolidate its power. There was also non-observance of the basic principles: as the principles of proportionality, necessity, non-discrimination, legislative oversight, legality and non-retroactivity, which guides the states entry and conduct during emergencies. As a result, the declarations of the state of emergency in Ethiopia were instrumental for systematic human rights violations.

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Association for Human Rights in Ethiopia



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