

Assessment of the State of Human Rights
During States of Emergency in Ethiopia:
The State of Emergency Proclamation
5/2021 in Focus



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List of Abbreviations

FDRE	Federal Democratic Republic of Ethiopia
COMs	Council of Ministers
SOE	State of Emergency
HPR	House of People's Representatives
ICCPR	International Covenant on Civil and Political Rights
UNHRC	United Nations Human Rights Committee
SEIB	State of Emergency Inquiry Board
TPLF	Tigray People's Liberation Front
Art	Article
Proc.	Proclamation
No.	Number

Introduction

A state of emergency (SOE) is a politico-juridical regime that secures the government with extraordinary power to deal with extraordinary circumstances.¹ It is an exceptional scenario by which the executive is entrusted with an exceptional and extraordinary power to address emergencies and restore normalcy. The provision of the government with extraordinary power, on the other hand, means and results in derogation of the human rights of individuals. An unregulated government entrusted with this exceptional power may result in a gross violation of human rights. In order to mitigate and overcome such practical challenges, international human rights law and state constitutions have come up with means of safeguards. The safeguards fundamentally take three forms. These are: limiting emergency circumstances where the declaration of a state of emergency is allowed, provision of absolute rights that shall not be derogated even in emergencies, and regulating the state conduct during emergencies.²

In Ethiopia too, apart from ratifying the international human rights treaties, the Federal Democratic Republic of Ethiopia (FDRE) Constitution has laid the foundation for regulating the declaration of a state of emergency.³ Nonetheless, the state practice of declaring a state of emergency in Ethiopia, which has become a usual business of the government since the 2015 public protest, is criticized for its politicization and legalizing and legitimizing the state's gross violation of human rights.⁴ Specifically, how far the making, the contents and the lifting of the 2021 SOE⁵ declared in relation to the conflict in the Tigray region is also exposed to such criticisms is worth considering.

Consequently, this piece attempts to doctrinally analyze and synthesize how far the making, contents, and lifting of Ethiopia's 2021 state of emergency have departed from its predecessors and observed the requirements of international human rights law and the FDRE Constitution.

The paper is organized into four sections. Section I explains the concept of an SOE and its approaches. Section II briefly discusses an SOE regulation under international human rights law and the FDRE Constitution. Against the international human rights law and FDRE Constitution's requirements, Section III assesses and analyses the making, contents, and lifting of Ethiopia's 2021 SOE. Then the conclusion follows.

¹ Jaime Oraá, *Human Rights in States of Emergency in International Law* (1992) at 7.

² Evan J. Criddle and Evan Fox-Decent, *Human Rights, Emergencies, and the Rule of Law*, 34(1) *HUM. RTS. Q. Quarterly* (2010).

³ The Federal Democratic Republic of Ethiopia Constitution (1995). (hereinafter cited as FDRE Constitution) Art. 93.

⁴ AHRE, *Human Rights during State of Emergency in Ethiopia* (2021).

⁵ A State of Emergency Proclamation Enacted to Avert the Threat Against National Existence and Sovereignty No. 5/2021. (Hereinafter cited as SOE Proc. No. 5/2021). In this document the term a state of emergency proclamation, emergency decree, or emergency proclamation are used interchangeably.

1. State of Emergency: Concept and Approaches

A SOE, also known as a "state of exception," a "state of siege," or "martial law," is a politico-judicial regime that involves "governmental action taken during an extraordinary national crisis that usually entails broad restrictions of human rights."⁶ It is a legitimate measure by which governments can limit or 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.⁷ As opposed to normalcy, which denotes the general rule, the permanent and regular state of things, emergency exceptionally confers temporary limited extraordinary power.

However, particularly after the 9/11 terrorist attack, two fundamental conceptual approaches having different normative consequences about whether an SOE is required to be regulated in law or not have emerged.⁸ The first approach situates the state of emergency "within the sphere of the juridical order."⁹ Accordingly, it claims that the rule and the exception are distinguishable and the legal regime of emergency can be objectively regulated by law.¹⁰ This rule of law model thought is entrenched in and informed and influenced the modern written constitutions and international human rights instruments as discussed later. It argues for the legal regulation and prescribing of objective requirements (both substantive and procedural) to declare an SOE.

Contrary, the second approach of thought that predominantly emerged after the 9/11 terrorist attack, on the other hand, questions the very possibility of a normative distinction between the rule and the exception. In support of this claim, the harbinger theory of terrorism argues that in an era defined by the threat of transnational terrorism, nations must reject all limits on the measures they take to reinforce state security.¹¹ Here, an SOE 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."¹² 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."¹³ 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 entrusts

⁶ 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* 35, 35 (1986).

⁷ Euro. Comm. for Dem'y Through Law, *Rep. on Emergency Powers by Mr. Ergun Ozbudun and Mr. Mehmet Turhan*, at 3, Doc. No. CDL-STD(1995) 012.

⁸ Ryan Alford, The harbinger theory of terrorism and the rule of law: the danger of 'balancing' non-derogable rights against security when relying on threat assessments produced by self-interested intelligence agencies, *The International Journal of Human Rights* (2018).

⁹ Giorgio Agamben, *State of Exception* (Kevin Attell trans.) (2005) at 22-23.

¹⁰ *Ibid.*

¹¹ Alford, n 8 above.

¹² Stephen Humphreys, Legalizing Lawlessness: On Giorgio Agamben's State of Exception, *17 EURO. J. INT'L L.* (2006) at 678.

¹³ THE FEDERALIST No. 23 (Alexander Hamilton).

the governments to limit human rights in any manner and to do anything with the assumption that the first general will (the people's intention) is that the state shall not perish.¹⁴

In contemporary liberal constitutional democracies and international human rights law, an SOE is considered an exceptional situation that calls for extraordinary state measures to secure and protect the state's vital interests. "In a time of crisis, a democratic, constitutional government must temporarily be altered to whatever degree is necessary to overcome the peril and restore normal conditions."¹⁵ These exceptional state measures must be at the threshold of necessity and the rule of law, and argued as it concedes with "most human rights are not absolute but rather reflect a balance between individual and community interests."¹⁶ The views in contemporary liberal democracies and international human rights law align with the first approach of the state of emergency discussed above.

2. The Legal Regulation of State of Emergency

During public emergencies, grave and systematic human rights violations and abuses are common challenges as the states apply extraordinary powers to resolve threats to public order.¹⁷ Leaving an SOE unregulated, in effect, exacerbates the violations and abuses. Cognizant of this fact and treating an SOE under the sphere of juridical order, international human rights law and nations' constitutions, including FDRE Constitution, have regulated it. The legal regulation of an SOE is fundamentally aimed at striking a balance between the public demand for public order and welfare, on the one hand, and respect and protection of the individual's human rights by containing the possible heightened threat of human rights abuse by public emergencies. Below is a brief discussion about an SOE regulation under International human rights law and the FDRE Constitution.

2.1. International Human Rights Law

International Human Rights instruments, particularly International Covenant on Civil and Political Rights (ICCPR), have come up with threefold regulations of an SOE. These are delimitation of the nature of the dire circumstances which warrant an SOE, provision of restrictions on derogation of rights, and regulation of the nature of state response and conduct in handling the emergency.¹⁸ The first regulation establishes when a declaration of an SOE and derogation from state's human rights

¹⁴ Awol Allo, Protests, Terrorism, and Development: On Ethiopia's Perpetual State of Emergency, *19 Yale Hum. Rts. & Dev. L.J.* (2017) at 145.

¹⁵ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 5 (1963).

¹⁶ Dominic McGoldrick, The Interface Between Public Emergency Powers and International Law, *2 INT'L J. CONST. L.* (2004) at 383.

¹⁷ Criddle and Fox-Decent, n 2 above.

¹⁸ 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.

obligations is allowed. It requires the state to establish the dire circumstance (*Jus ad Tumultum*) that warrants the declaration of a state of emergency and officially declare it.

The ICCPR states that State parties are allowed to derogate from their human rights obligations when confronted by a "*public emergency which threatens the life of the nation.*"¹⁹ It requires the crisis or danger must be actual or imminent that affects the whole of the population and whole or part of the territory of the state by threatening 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. The real and perceived crises include the paradigmatic threats of foreign military intervention and insurrection, political unrest, general civil unrest, criminal or terrorist violence, labour strikes, economic emergencies, the collapse of public institutions, the spread of infectious diseases, and natural disasters.²⁰ Moreover, the happening of the public emergencies and the need for derogations must be officially declared for the maintenance of the principles of legality and the rule of law at times when they are most needed.

The second regulation is about the kind of derogation allowed. Under international human rights law, not all human rights are derogated during a state of emergency. Notably, Article 4(2) of the ICCPR, and subsequent General Comments of the United Nations Human Rights Committee (UNHRC), which are an authoritative interpretation of the relevant provisions of the treaty, specify the absolute human rights which are not subjected to derogation during an SOE. In Article 4(2) right to life, prohibition of torture, cruel, inhuman, and degrading treatment, prohibition of medical or scientific experimentation without consent, prohibition of slavery, the slave trade, and servitude, prohibition of imprisonment because of inability to fulfil a contractual obligation, the 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, that was in force at the time the act or omission took place, except in cases where a later law imposes a lighter penalty, recognition everywhere as a person before the law, and freedom of thought, conscience and religion are listed as non-derogable rights. Moreover, UNHRC in its in General Comments 24, 29, 34, and 35 have identified additional rights and prohibitions that cannot be subject to lawful derogation.²¹

The third regulation is about the state's conduct during emergencies (*jus in tumult*). Even if the circumstances are sufficiently dire to justify initiating an SOE and an SOE is declared accordingly, the state is not at absolute liberty to take all measures to restrict the derogable rights. Instead, there are

¹⁹ Ibid.

²⁰ 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).

²¹ For details see General Comment No 24, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017); General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); General Comment No 34, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); General Comment No 35, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

substantive and procedural standards and principles that impose limitations on the measures a state may employ to address the emergency's threats to public order. 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, colour, sex, language, religion, or social origin."²² These requirements 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 legislature oversight of measures in times of taking emergency measures.

2.2. FDRE Constitution

The FDRE Constitution has also laid the foundations for regulating an SOE regime in Ethiopia. The regulations prescribe the list of public emergencies, non-derogable rights and principles defining the state's conduct during an SOE. Concerning establishing an emergency that warrants an SOE declaration, Article 93(1a) provides an exhaustive list of dire circumstances. Accordingly, it is declared that when there is "[external invasions], 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 occur."²³

In terms of limiting the derogations, the FDRE Constitution also lists out absolute rights derogation from which is prohibited even during an SOE. These are a 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).²⁴ Compared to the international human rights law, what the FDRE Constitution stipulates as non-derogable rights are very few. Let alone incorporate the new additions through the General comments, the FDRE Constitution does not incorporate all of the lists of non-derogable rights in ICCPR. Given the constitutional supremacy clause,²⁵ on the one hand, and the Constitution's requirement of interpretation of the human rights clauses in the FDRE constitution in the manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and international instruments adopted by Ethiopia²⁶ on the other hand, it will raise contradictory

²² ICCPR, n 18 above, Art. 4.

²³ FDRE Constitution, n 3 above, Art 93(1a).

²⁴ Id, Art 93(4c).

²⁵ Id, Art 9(1)

²⁶ Id, Art 13(2).

interpretations.²⁷ However, how the state treats the ambiguity will be discussed in the next section dealing with the state practice of declaring an SOE.

The FDRE Constitution also provides rules and principles that guide and regulate the state's conduct during emergencies. The rules and principles are meant to regulate the process of making, the extent of derogation among the derogable rights, and the lifting of an SOE. Concerning the making of an SOE, besides requiring the establishment of public emergencies and observation of non-derogable rights, the FDRE Constitution further demands the legislature's approval of the emergency decree with a special vote.²⁸ The decree must be approved by a two-thirds majority vote of the House of People's Representatives (HPR) within 48 hours and fifteen days when the house is in session and res, respectively.²⁹ This requirement, in effect, paves the way for the legislature's oversight of the need and contents of the emergency measures.

Regarding the extent of derogation within derogable rights, the FDRE Constitution also adopts the principle of necessity, proportionality, and temporal nature of emergency measures. The Constitution requires the suspension of the derogable rights to "the extent necessary to avert the conditions that required the declaration of a state of emergency."³⁰ It also requires the derogation to be temporal for a maximum of six months which, of course, in subsequent time, renewed every four months successively by two-third votes of the HPR.³¹

Furthermore, the FDRE Constitution also introduces an institutional setup to control the state's conduct during an SOE and to initiate the lifting. Innovatively, uncommon in other nations' constitutions, it 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.³² 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."³³

²⁷ For contradictory interpretations see 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); Takele Sokaka Bulto, *The Monist-Dualist divide and the supremacy clause: revisiting the status of human rights treaties in Ethiopia*, *J. Ethiopian L.* 23 (2009).

²⁸ FDRE Constitution, n 3 above, Art 93(2).

²⁹ *Ibid.*

³⁰ *Id.*, Art 93(4b)

³¹ *Id.*, Art 93(2 and 3).

³² *Id.*, Art 93(5 and 6); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L. J.* (2004) at 1055.

³³ FDRE Constitution, n 3 above, Art 93(6).

However, when we see the power of SEIB in scrutinizing human rights violations, the Constitution seems to limit it to the right to freedom from inhumane treatment. It, in effect, limits the HPR from relying on the executive's report to get information about the situation of other human rights.

When lifting an SOE, mainly when an extension is requested, the SEIB is also constitutionally empowered to submit its views to the house. This situation provides the HPR not to rely on the executive's information only to decide on extending an SOE. It serves as an alternative and independent source of information to approve the executive's request for an extension or not.

The question is to what extent the Ethiopian government observes the international human rights law and the FDRE Constitution's regulations of an SOE while declaring it. The subsequent section attempts to answer this question by taking the 2021 SOE declared concerning the conflict in the Tigray region as a case.

3. The State Practice of Declaring the State of Emergency in Ethiopia: The Case of State of Emergency Proclamation No. 5/2021

On 2 November 2021, the Federal Government of Ethiopia declared a nationwide SOE named “The state of emergency proclamation enacted to avert the threat against national existence and sovereignty No 5/2021” to the conflict in the northern part of Ethiopia.³⁴ Initially meant to last for six months,³⁵ the decree is lifted early in mid of February 2021.³⁶ Before this decree, another region-wide State of emergency was declared by the Federal Council of Ministers (COMs) in the Tigray Region on a day the Tigray forces attacked the North command of the National Defence force – 3 November 2020.³⁷ However, the assessment here does not include the latter SOE. It is limited to the nationwide SOE Proclamation No. 5/2021. Consequently, the below assessment is made about its making, contents and lifting against the international human rights standards and the requirements of the FDRE Constitution discussed above.

3.1. The Making of State of Emergency Decree No. 5/2021

In Ethiopia, as discussed above, bringing/making a state of emergency into effect usually involves:

1. A proposal or initial decision to declare a state of emergency;
2. Approval or confirmation of the HPR;
3. Establishment of the SEIB.

³⁴ SOE Proc. No. 5/2021, note 5 above.

³⁵ Id, Art 11(1).

³⁶ REUTERS, Ethiopia's cabinet approves lifting of state of emergency (26 Jan. 2022) <https://www.reuters.com/world/africa/ethiopias-cabinet-approves-lifting-state-emergency-2022-01-26/>.

³⁷ ALJAZEERA, Ethiopia declares state of emergency in opposition-ruled Tigray (4 Nov. 2020) <https://www.aljazeera.com/news/2020/11/4/ethiopia-declares-state-of-emergency-in-opposition-tigray-region> .

These stages are often shared between the executive branch and the legislature. Since the declaration of SOE switches between the 'normal' and 'emergency' modes of a government's operation, the process must be swift enough to enable the authorities to respond to urgently arising needs. However, it must also provide adequate safeguards against attempts to invoke or prolong an SOE for partisan, repressive or otherwise inappropriate reasons.³⁸

As mentioned above, like in any other state, in Ethiopia, the power of initiating a state of emergency is designated to the executive – the COMs at the Federal level. It is not a random assignment. It is because:

1. The chief executive has a general and ongoing responsibility, implicit in the nature of the executive power even if not explicit in the Constitution, to protect the public and the state from harm;
2. The executive branch also has the resources needed to respond to an emergency, including access to intelligence information, discretionary funds, and control of military, police and civil defence assets;
3. In terms of expertise, skills, and proximity, it is in a better position to determine the question of fact of whether the situation requires emergency power for a timely response.³⁹

Coming to the making of Emergency Decree No. 5/2021, the initial decision came from the Federal COMs on 2 November 2021 and the content of which was officially promulgated on the national television on the same date.⁴⁰ It is almost a year after the federal government had declared 'the law enforcement operations in Tigray region that had proceeded as planned ended';⁴¹ after the Amhara region had declared its region-wide SOE on 31 October 2021;⁴² and when the Tigray Forces pressed south toward the Capital, Addis Ababa, following the capture of two key towns – Dessie and Kombolcha.⁴³

It implies that the timing of making the SOE is not done proactively. As a result, three alternative inferences may be made from the delay in initiating it. These are: either the executive might not have made the proper assessment of the security threat and danger to establish the emergency circumstance (issue of capability); or it had been applying the emergency power even before the declaration (issue

³⁸ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18 (2018) at 12.

³⁹ Id, at 13.

⁴⁰ Fana Television, የሚኒስትሮች ምክር ቤት በመላ ሀገሪቱ ያወጀው የአስቸኳይ ጊዜ አዋጅ (2 Nov. 2021) <https://www.youtube.com/watch?v=-T2X1og7uRs>.

⁴¹ REUTERS, Ethiopian military operation in Tigray is complete, prime minister says (28 Nov. 2020) <https://www.reuters.com/article/us-ethiopia-conflict-idUSKBN28809E>.

⁴² Addis Standard, <https://addisstandard.com/update-amhara-state-council-declares-emergency-including-region-wide-curfew-suspension-of-activities-by-state-institutions/> .

⁴³ The New York Times, Ethiopia Declares State of Emergency as Rebels Advance Toward Capital (17 Nov 2021) <https://www.nytimes.com/2021/11/02/world/africa/ethiopia-state-of-emergency.html>.

of legality); or it initiated the SOE when the Tigray Forces become a threat to its power (issue of politicization).

Moreover, when establishing the emergency circumstance to declare an SOE, the gravity of the danger must be appropriately assessed. Because, as discussed above, the emergency measures taken are required to be necessary to avert the danger. In the case at hand, the Federal COMs had appreciated the danger initially as a 'threat to the constitutional order' and the National Defence Force operation as a 'law enforcement operation' aimed to preserve the constitutional order and enforce the law. However, it was later, and only the council appreciated the danger as a threat posed to 'the country's survival, and that is why the emergency decree was named 'A State of Emergency Proclamation Enacted to Avert the Threat Against National Existence and Sovereignty'.

In observation of the FDRE Constitution's requirement of post-declaration approval of the emergency decree within 48 hours when the parliament is in session, the decree was presented to the parliament for deliberation and was unanimously approved on 4 November 2021. On the same day, the parliament also approved the appointment of the Members of State of Emergency Inquiry Board proposal that was tasked to oversee the implementation of the emergency decree.

3.2. Contents of the Emergency Decree

The State of Emergency Proclamation No. 5/2021 is comprised of the preamble and 11 articles. It fundamentally provides the general justifications and scope of application of the decree, a list of the emergency measures and prohibited activities, a list of the non-derogable Rights, the institution established to enforce the decree,⁴⁴ suspended institutions and laws and criminal liability for violations, and the duration of the decree. Let us assess what is provided in these contents and where they fit into the international human rights standards and the FDRE Constitution's requirements of SOE separately.

3.2.1. Justifications and Scope of Application of the Decree

As noted in section II, one area of legal regulation of emergency power is the delineation of the public emergencies guaranteeing the declaration of the SOE and geographic limit of emergency power use. Declaring an SOE is permitted when the state faces an actual or imminent threat that endangers the nation's life and when it is impossible to control the situation through ordinary law enforcement. In addition, the principle of limited geographical application requires that the emergency power application be limited to the place where the exigency is situated.

⁴⁴ It is not important to discuss about the State of Emergency enforcing institution.

On this basis, the preamble of the SOE Proclamation No. 5/2021 establishes the existence of circumstances that necessitated the declaration of the SOE. It provides that "the terrorist TPLF and its affiliates pose a grave and imminent danger against the existence and sovereignty of the country."⁴⁵ The preamble states three ways by which the nation's survival is threatened. These are: in terms of (1) "the gravity of the killings, looting, and other cruel and inhuman attacks that the terrorist TPLF and its affiliates are perpetrating against civilians in several parts of the country;" (2) the severe threat "posed by individuals who live among the civilian population and work as operatives of the TPLF and its terrorist affiliates;" and (3) the fact that "the terrorist TPLF is working in close cooperation with foreign powers that desire to weaken and destroy Ethiopia."⁴⁶ Consequently, it is mentioned that the government has the moral responsibility and the legal duty to safeguard the existence and sovereignty of the nation.⁴⁷

Concerning the geographic scope of application, Proclamation No. 5/2021 under Article 3 prescribed its nationwide application. It states that the Proclamation applies to all parts of Ethiopia.⁴⁸ In sub-article 2, it also mentions the possibility of narrowing the scope of application. Specifically, it empowers the State of Emergency Operation Command to determine part of the country where the application of this Proclamation would be lifted contingent upon the magnitude of the problem and to publicize the same.⁴⁹ This exception enables to lift of the emergency restrictions and prohibitions and enables the people in part of the country where the threat and danger is mitigated to enjoy and exercise their human rights in normalcy without waiting for the total lift or lapse of the emergency decree.

3.2.2. The Emergency Measures and Prohibitions

It is repeatedly mentioned that the SOE empowers the executive branch with extraordinary power that it does not possess in normalcy. This power fundamental enables it to take measures and introduce duties and prohibitions that can ultimately derogate individuals' human rights and freedoms. However, in taking the measures and imposing the duties and prohibition, it is required that the executive is required to observe the non-derogable (absolute) rights, and the measures and prohibitions must be non-discriminatory, proportional and necessary to avert the danger. Consequently, it is imperative to assess how far these principles are observed in the Emergency measures and prohibitions introduced under Ethiopia's State of Emergency Proclamation No. 5/2021.

⁴⁵ SOE Proc. No. 5/2021, note 5 above, preamble.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Id, Art 3(1).

⁴⁹ Id, Art 3(2).

The State of Emergency Proclamation No. 5/2021 under Articles 4 and 6 introduces an exhaustive list of emergency measures and prohibitions. The emergency measures – the to-do measures – that the State of Emergency Operation Command may take when necessary include:

- *Deploying the armed forces or other security forces in any part of the country to maintain peace and security;*
- *forcing citizens whose age are fit for military service and who are in possession of firearms to take military training, to take orders for military missions, or to hand over their firearms in case they are unable to do so;*
- *Imposing curfew;*
- *closing or termination of any means of communication and public transportation;*
- *Arresting any person without a court warrant upon reasonable suspicion that he cooperates with terrorist groups; detain such person for the period that this Proclamation is in force or hold the same accountable under the law;*
- *Searching any person's house, place, and vehicle upon reasonable suspicion that he cooperates with terrorist groups; stop any person to search and to ascertain his identity; confiscate seized firearms;*
- *Closing of a given street or a service providing institution for a certain period; or give an order for persons to stay in a certain place, ban from entering into or evacuate from a given place for a certain period;*
- *Partially or fully suspending local administrative structure, change or replace administrators with civilian or military administrators in parts of the country where there are serious security threats and problems of the country;*
- *Suspending or permanent cancellation of licenses of civil society organizations that have been suspected of providing direct or indirect, moral or material support to terrorist organizations;*
- *Suspending or permanent cancellation of licenses of mass media or journalists who have been suspected of providing direct or indirect, moral or material support to terrorist organizations.*⁵⁰

From the scrutiny of the above measures, it is inferred that the SOE has derogated the right to liberty, the right to privacy, the right to property, Freedom of movement, Freedom of association, Freedom of expression, the right to self-administration, the right to thought, opinion and expression, and the rights of arrested persons. Moreover, it can be inferred from Article 5(2) that the Emergency Decree makers have based on the FDRE Constitution's listing of non-derogable rights in listing the emergency measures and prohibitions.⁵¹

From the perspective of human rights protection, three critical issues are worth considering. The first one is whether the non-derogable rights in the international human rights standards are observed. The emergency measures have derogated non-derogable rights in international human rights like the freedom of thought and conscience, which are listed as non-derogable rights under Article 4 of ICCPR. Remarkably, the measure of suspending or permanently cancelling the licence of mass media or journalists for the suspicion of providing direct or *indirect, moral* or material support to terrorist organizations without fair trial has the direct effect of derogating the freedom of thought and conscience. Moreover, the measures have also derogated the human rights made non-derogable

⁵⁰ Id, Art 4.

⁵¹ Id, Art 5(2).

through the General Comments, an authoritative interpretation of the treaty of the UNHRC. For instance, the measure of detaining the suspect for the duration that the SOE is in force is totally against the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention, which was regarded as a non-derogable right under the General Comment No. 35.⁵²

The second important point is whether the SOE Decree has observed the non-derogable rights listed in the FDRE Constitution. As discussed in section II, the FDRE Constitution provides its own list of non-derogable rights. Although in terms of breadth, the non-derogable rights in FDRE Constitution are significantly narrower than the non-derogable rights under international human rights standards, we can find a new type of non-derogable right in the FDRE Constitution. The typical one is the right to self-determination. It is provided in the Constitution that the Nation, Nationalities, and peoples of Ethiopia have the right to unconditional self-determination, including secession, and the right to speak, to write, and to develop their own language; to express, to develop and to promote their culture; and to preserve their history are made non-derogable rights.⁵³ Nevertheless, the SOE measure of *partially or fully suspending local administrative structure and changing or replacing administrators* is a direct derogation of the right to self-determination.

The final issue regarding the emergency measures is that some of the measures are designed subjectively and are susceptible to interpretation and abuse. Those measures discussing the provision of *'indirect'* and/or *'moral'* support to terrorist organizations are ambiguous to determine objectively. As a result, they open a door for bureaucratic discretion and abuse.

On the other hand, the prohibitions require individuals to abstain from conducting in some way. Under Article 6, in addition to requiring individuals to observe the duties lied by and orders of the State of Emergency Command, the SOE Decree provides the following list of prohibited activities. These are:

- *Prohibition of any form of expression that opposes the operation of the Emergency Operation Command and the purpose of the Proclamation contributes to the success of terrorist groups' objectives, encourages the activities of the terrorist group, or terrorizes the civilian population;*
- *Prohibition of provision of any form of monetary, information, material, or moral support, either directly or indirectly, to terrorist groups;*
- *Prohibition of demonstrations or public gatherings without permission of the Emergency Operation Command or any other delegated authority;*
- *Prohibition of moving around with firearms without the permission from National Defence Force, Federal Police, or other relevant security institutions;*
- *Prohibition of moving around cities without holding an identity card, driving license, employee identity card, passport, or any other similar identity card;*

⁵² General Comment No 35, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

⁵³ FDRE Constitution, n 3 above, Art 39 (1 and 2) and Art 93(4c).

- *Prohibition of disrupting the activities of any essential service or production sector or carrying out acts of economic sabotage;*
- *Prohibition of engaging in abuse of power with intent to gain an illicit benefit under the pretext of enforcing the Proclamation or detaining individuals deliberately without reasonable suspicion or engaging in any such abusive behaviour.⁵⁴*

When we critically assess the prohibitions, most of the prohibitions are not extraordinary prohibitions expected under the SOE. They are prohibitions prescribed as a crime in criminal/terrorism law or as a fault in tort law. For instance, any form of assistance of the terrorist group, economic sabotage, and abuse of power are prohibited activities even under ordinary circumstances and in normalcy. Consequently, incorporating them under the SOE is redundant. In an SOE, what is required is to prohibit activities allowed during normal times.

Besides, the other prohibitions derogate human rights, basically freedom of expression, freedom of movement, and the right to assembly and demonstration. The '*prohibition of any form of expression that opposes the operation of the Emergency Operation Command and the purpose of the proclamation... [and]that terrorizes civilian population...*' derogates the freedom of expression. However, this prohibition undermines the genuine criticisms of the operation of the Emergency Operation Command and the Proclamation, and the dissemination and access to necessary information of the society because the information is considered terrorizing. Moreover, determining whether the expression terrorizes the civil population is absurd and challenging. This prohibition, then, opens a space for the use of excessive limits on the freedom of expression and results in derogation of the principle of proportionality. As mentioned above, the notions of 'indirect' and 'moral' support in the prohibitions are also subjective and open for interpretation and abuse.

3.2.3. List of Non-Derogable Rights

Section II emphasizes that there is difference between the international human rights instruments Ethiopia ratified and the FDRE Constitution in providing the list of non-derogable rights. While the non-derogable rights under international human rights laws are broader and expanding through General Comments, the FDRE Constitution is narrow and static. However, it is also noted that given the existence of a clause requiring the human rights chapter of the Constitution to be interpreted 'in a manner conforming to the international human rights instruments Ethiopia adopted,⁵⁵ there is a chance to broaden the non-derogable rights in Ethiopia without going through a constitutional amendment.

However, did the practice of declaring the SOE take that turn? The answer is negative. The State of Emergency Proclamation No. 5/2021 under Article 5(2) expressly referred to the FDRE Constitution's Article 93(4) in delineating the non-derogable rights. It implies the Ethiopian government's stand to

⁵⁴ SOE Proc. No. 5/2021, note 5 above, Art 6.

⁵⁵ FDRE Constitution, n 3 above, Art 13(2).

only consider non-derogable rights in the FDRE Constitution. Moreover, the very wording of the SOE declaration seems to require the observation of the non-derogable rights in the FDRE Constitution on the measures, directives and decisions of the State of Emergency Operation Command but not on the emergency declaration itself. It states:

*"The State of Emergency operation command shall respect the provisions and rights enshrined under Article 93(4) of the FDRE Constitution on its directives, decisions, and measures."*⁵⁶

Such stipulation creates a wrong impression that the SOE declaration is not required to observe the non-derogable rights.

3.2.4. Suspended laws and Criminal Liability for Violations

The other important measure a state of emergency proclamation No. 5/2021 takes is suspending institutions and laws and introducing criminal liability for violations of the prohibitions and measures introduced. Under Article 8, the emergency decree envisages the deprivation of the judicial power of the judiciary to enforce the emergency decree until the expiry of the same.⁵⁷ It also prescribes that except for diplomatic immunities indicated under the Vienna Convention on Diplomatic Relations, the substantive and procedural laws inconsistent with the emergency decree remain suspended for the duration of the emergency decree.⁵⁸

As discussed above, emergencies require concentrated and decisive action, for which the executive is better suited than any other branch of the government. That is why most constitutions of nations in the world enable the executive to take actions during an emergency, including issuing orders having the force of law. Such concentration of lawmaking power in the executive branch disturbs the usual balance of powers in a democratic system and may tempt the government to over-use these powers.⁵⁹ Consequently, there should be legislative and judicial oversight concerning both the substance of such executive orders and the process of enacting and implementing them.

As discussed in Section II, the FDRE Constitution introduces a constitutional design of legislative oversight by requiring a special majority (2/3) to approve the SOE declared by the COMs and establishing an autonomous SEIB to follow up on the implementation of the emergency measures and mitigate the effect of the monopoly of information by the executive.⁶⁰ Consequently, the making of the State of Emergency Proclamation No. 5/2021 has passed through this process.

⁵⁶ SOE Proc. No. 5/2021, note 5 above, Art 5(2).

⁵⁷ Id, Art 8(1).

⁵⁸ Id, Art 8(2).

⁵⁹ Bulmer, note 38 above, at 25.

⁶⁰ FDRE Constitution, n 3 above, Art 93.

In Ethiopia, the judicial oversight of the SOE comes into the picture when a person brings a legal action in relation to the SOE Proclamation. The abuse of power, taking of measures and the introduction of prohibitions and restrictions which were not listed in the SOE Proclamation and the subsequent directives can be prevented and checked when there is functioning judicial oversight. Moreover, the presence of judicial oversight ensures the right to a fair trial, the right to an effective remedy in the case of violations, the right to be tried by a competent, independent, and impartial tribunal established by law, and the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention which are regarded as non-derogable rights under the General Comments of UNHRC. Consequently, the SOE Proclamation No. 5/2021 prohibition of the judicial organ from enforcing the claims emerging for it means avoiding the judicial oversight of the executive implementation of the emergency measures and prohibitions and subjecting the above non-derogable rights under the international human rights law to derogation.

The SOE Proclamation No.5/2021 also introduces criminal liability for violating the Proclamation and its directives. Under Article 9 it states that:

1. *Whosoever violates the provisions of this Proclamation or directives issued in accordance with this Proclamation shall be punished with simple imprisonment of up to three years or depending on the gravity of the offense rigorous imprisonment of up to ten years.*
2. *If the violation stated under Sub-article 1 of this article entails grave punishment in other laws, such punishment shall apply.*
3. *Violations of this Proclamation and directives issued pursuant to it that have been committed during the course of this state of emergency will entail criminal liability in accordance with ordinary criminal procedure rules even after the expiry of the state of emergency.*⁶¹

The provisions under article 9 disregard the principle of legality of criminal law. The principle of legality in criminal law, which is in the list of the non-derogable rights in the ICCPR, is the requirement that criminal liability and punishment are limited to clear and precise provisions in the law that is in force at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.⁶² However, when we see Article 9 without specifying the criminal act, it introduces a generic punishment. Even in some cases, it stipulates the punishment before specifying the crime. For instance, it stipulates punishment for the crime to be defined in the directives in the future. Moreover, contradicting the principle of legality, Article 9 demands the application of grave punishment when the violation is punishable by other laws too. It further requires the continuation of the criminal liability for violating the state of emergency proclamation and directives issued in accordance with the Proclamation, even if the state of emergency expires.

⁶¹ SOE Proc. No. 5/2021, note 5 above, Art 9.

⁶² ICCPR, n 18 above, Art 4 and Art 15.

3.2.5. Duration of the State of Emergency

As noted in section I, a SOE is a temporary response to a particularly urgent and emergency need. The objective is to use the powers conferred by a SOE only to address that urgent and emergency need and then restore normalcy as soon as possible. Accordingly, the FDRE Constitution attaches a maximum of six months' time limit to any declaration of a state of emergency.⁶³ It automatically lapses unless renewed by the 2/3 majority vote of the HPR.⁶⁴ Since the FDRE Constitution simply puts the maximum duration, it is the SOE that specifies its life span.

In most state practices of declaring a SOE in Ethiopia, the maximum six months duration is put as a life span of emergency decrees. A state of Emergency Proclamation No. 5/2021 is not an exception. Under Article 11(1) it stipulates that *"the state of the emergency proclamation shall remain in effect for six months starting from its promulgation by the Council of Ministers."*⁶⁵ The Proclamation still stipulates the possibility of cessation of the emergency proclamation before the six-month period expires. *"The House of People's Representatives may determine the cessation time of the proclamation before the end of the six months."*⁶⁶ On this basis, the SOE Proclamation No. 5/2021 was lifted three months earlier than the expiry time.⁶⁷ The lifting, however, has caused unusual opposition. The following section assesses the process of lifting.

3.3. Lifting of State of Emergency

An SOE may come to an end in three different situations. These are:

1. when the duration for which it is declared lapses and no renewal is requested,
2. when renewal is not guaranteed though requested, and
3. When it is terminated before the lapse of the initial period it was declared due to the restoration of normalcy.

When the initial period of the SOE lapses and renewal is not requested or guaranteed, then no further process is required to lift it.

However, if it is terminated before the lapse of the period, there are issues about when and who should decide the termination. It is evident that a state of emergency may be terminated before the date upon which it is due to lapse if there is no longer a need for the state of emergency to continue. The Constitutions of nations may come up with three possibilities. The executive, at its own discretion, can take the decision, or the legislature may assume the right to end a state of emergency at

⁶³ FDRE Constitution, n 3 above, Art 93(3).

⁶⁴ Ibid.

⁶⁵ SOE Proc. No. 5/2021, note 5 above, Art 11(1).

⁶⁶ Id, Art 11(2).

⁶⁷ REUTERS, note 36 above.

its own initiative, typically by passing a resolution to this effect, or/and the executive may submit a proposal for termination and the legislature may be required to approve it.⁶⁸

In Ethiopia, the FDRE Constitution seems to assign the power to lift a state of emergency to the HPR. Under Article 51(16) the FDRE Constitution expressly states that the House of People's Representatives "... has the power... to lift [the] national state of emergency...." However, whether it does it by its own initiative or upon the proposal of the Council of Ministers is not clear.

During the lifting of an SOE Proclamation No. 5/2021, the state practice reveals that the COMs proposed terminating the emergency decree. After that, it was submitted for approval by HPR. After most of the rebel forces had retreated to their home region of Tigray, the COMs approved a proposal for the lifting of the SOE about cutting short the emergency measures and submitted the same to the HPR for approval stating that security conditions in the country have improved and reached a stage where threats can be neutralized through regular law enforcement mechanisms on 26 January 2022.

The HPR, after three weeks of submission, voted for the lifting of the SOE on 15 February 2022.⁶⁹ An unusual to the state practice, the decision to lift it has faced severe opposition from some house members. Of the 312 lawmakers who attended the session, 63 opposed lifting the state of emergency, while 21 abstained from the vote.⁷⁰ Those who opposed the lifting argued that there is still a security threat as the Tigray Forces are still in Afar Region. They are preparing to march towards and occupy Amhara Region, and the Oromo Liberation Front is attacking different parts of the Oromia Region.⁷¹ It may seem absurd to witness the members of the house opposing the lifting of the state of emergency, which by nature is restrictive and derogates human rights, and while the executive is claiming that it is possible to control the existing situation through the normal law enforcement mechanism. However, it is indicative of the existence of politicization of the state of emergency and distrust of the executive in the country still.

Moreover, the way the SOE Proclamation No. 5/2021 was lifted raises some legal and practical questions. The first one is whether there is any prohibition of the executive (COMs) from lifting the emergency decree by its own discretion. In the FDRE Constitution, there is no express provision that demands the COMs to submit the proposal of lifting the state of emergency to the HPR. As it is the process of restoring normalcy, de-concentration of power, and removing the derogation of human

⁶⁸ Bulmer, note 38 above, at 19.

⁶⁹ ALJAZEERA, Ethiopia parliament votes to lift state of emergency early (15 Feb 2022), <https://www.aljazeera.com/news/2022/2/15/ethiopia-parliament-votes-to-lift-state-of-emergency>.

⁷⁰ Ibid.

⁷¹ Fana Television, የአስቸኳይ ጊዜ አዋጁ መነሳት (15 Feb 2020) <https://www.youtube.com/watch?v=HrYGaKn3xMY&t=187s>.

rights, there would not be any rationale that demands the COMs to demand the approval of the HPR to lift it.

The second issue is if it is necessary to get the legislature's approval for a lifting of the SOE, when it must be submitted, and the state of emergency status until the legislature approves lifting. As explained above, after the proposal for the lifting of the SOE Proclamation No. 5/2021 made by the COMs, it has taken almost three weeks to get the legislature's approval. There is no legal foundation in the FDRE Constitution or in subsidiary laws to govern the matter. To fill the legal vacuum, two alternative arguments can be forwarded. If it is believed that the state of emergency is effective even after the COMs' proposal of lifting until approved by the HPR, the approval by the HPR must be forthwith. Alternatively, suppose the COMs' proposal of lifting makes the SOE ineffective; the approval of the HPR is ceremonial. In that case, the time within which it is submitted for approval by HPR can be anytime.

4. Conclusion

In an SOE, striking a balance between dealing with extraordinary circumstances and minimal derogation of human rights is very challenging. It is believed that one of the fundamental practical challenges human rights face is enormous grave and systematic human rights violations and abuses that occur during public emergencies as the states apply extraordinary powers to resolve threats to public order. It is also assumed that states may use public emergencies as a blessing in disguise to threaten grave human rights abuses. Consequently, the International Human Rights system and most constitutions of nations have developed a normative design that allows the state to assume extraordinary power to resolve a threat to public order and, at the same time to contain the possible heightened threat of human rights abuse by public emergencies.

To strike a balance, mostly the International Human Rights system and state Constitutions stipulate a threefold normative design. These are establishing the emergency circumstances, providing non-derogable /absolute/ rights, and regulating state conduct during emergencies. On this basis, the International Human Rights Instruments, like ICCPR and its authoritative interpretation by UNHRC, demand that the state can exercise extraordinary power when there is a dire circumstance that warrants the declaration of a state of emergency 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 too adopts the threefold normative design to regulate the declaration of a state of emergency. It differs from the International Human Rights design in delineating the non-derogable rights, as it provides a narrow-static list of non-derogable rights. Additionally, it establishes an autonomous institution SEIB to follow the implementation of the SOE.

Against this backdrop, the assessment of an SOE proclamation enacted to avert the threat against national existence and sovereignty Proclamation No 5/2021, enacted concerning the conflict in the Tigray Region, reveals the violations of international human rights standards and requirements of the FDRE Constitution. In the making, the initiation by the COMs was not done proactively. It was declared after the threat had caused the damage, which would have been avoided or mitigated had it been timely. Content-wise, the measures and prohibitions, the suspension of institutions like the judiciary, and criminal punishments introduced in the decree imply derogating the non-derogable rights in the International Human rights Law and FDRE Constitution. Notably, the non-derogable rights under the international human rights law such as the right to fair trial, the principle of legality in criminal law, the right to be tried by a competent, independent, and impartial tribunal established by law; and the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention are derogated. Among the list of non-derogable rights in the FDRE Constitution, the right to self-determination is also derogated. Moreover, the decree has incorporated subjective terms open for interpretation and abuse. Lifting the decree has manifested the politicization of the state of emergency and the prevalence of distrust of the executive and the legal vacuum to govern it.



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ASSOCIATION FOR HUMAN RIGHTS IN ETHIOPIA

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