

Advocacy Paper on the Protection of
Human Rights During States of
Emergency in Ethiopia



ASSOCIATION FOR HUMAN RIGHTS IN ETHIOPIA

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1. Introduction

A state of emergency (SOE) is a politico-judicial regime that secures the government with extraordinary power to deal with extraordinary circumstances. SOE is an exceptional measure of government to suspend basic norms, including certain human rights temporarily, and to restore the rule of man instead of the rule of law with the view to address a dire situation that poses *existential threats to public order or health and which is impossible to avert through ordinary measures*.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. To mitigate and overcome such practical challenges, international human rights law and state constitutions have developed safeguards.

In Ethiopia, especially following the mass protest of the 2015 declaration of formal SOE has become the usual business of the Ethiopian government, not to mention the informal or the *de facto* one. Since then, the Ethiopian government has declared four nationwide-applicable emergencies. These are the 2016 SOE 'for the maintenance of Public Peace and Security',² the 2018 SOE to 'Constitution and Constitutional Order Defence from Threat',³ the 2020 SOE 'to Counter and Control the Spread of COVID-19 and Mitigate its Impacts'⁴ and the 2021 SOE 'to Avert the Threat Against National Existence and Sovereignty'.⁵ This is, in fact, without disregarding the *de facto* SOEs in operation, particularly since the aftermath of the 2005 national election.

The State Practice of frequent declaration of formal SOEs and use of *de facto* SOEs in some parts of the country have raised serious human rights concerns. Consequently, the Association for Human Rights in Ethiopia, with the financial assistance of Friedrich Ebert Stiftung, has conducted a two-day expert workshop on 'policy dialogue on Human Rights Situation during State of Emergency in Ethiopia' in Addis Ababa, on June 6–7, 2022. The

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

² State of Emergency for the Maintenance of Public Peace and Security No. 1/2016.

³ State of Emergency Proclamation Issued to Defend the Constitution and Constitutional Order From Threat Council of Ministers Proclamation No. 2/2018.

⁴ State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No. 3/2020.

⁵ A State of Emergency Proclamation Enacted to Avert the Threat Against National Existence and Sovereignty No. 5/2021.

following research papers were presented and discussed to develop an advocacy paper and identify the agenda for reform. The papers are:

1. The making, content, and lifting of a state of emergency in Ethiopia: Human rights dimension (By Dr. Brightman Gebremichael)
2. Regulatory observation of the implementation of state of emergency measures in Ethiopia (By Dr. Solomon Tekle)
3. The human rights of vulnerable groups during a state of emergency in Ethiopia (By Ms. Mahlet Aberham)
4. Comparative perspectives of state of emergency (By Mr. Zelalem Eshetu)
5. The role of the judiciary in redressing human rights violations during a state of emergency in Ethiopia (By Mr. Zerihun Waza)
6. The practice of implementing state of emergency measures in Ethiopia (By Mr. Mesganaw Mulugeta)

The papers, as well as the two-day expert discussions with participants from university lecturers, different CSOs leaders, legal practitioners, and legal experts from the Ethiopian Human Rights Commission, have highlighted that the Constitutional regulation of declaration of SOEs and the Ethiopian state practice of making, renewing, implementing and lifting of SOEs haven't possibly avoided or mitigated the gross violation and abuse of human rights. Moreover, the government's use of unchecked *de facto* emergency powers exuberated the grave violation of human rights. Consequently, to enhance the protection of human rights during SOEs in Ethiopia, the papers and the discussions highlighted the areas where legislative and state practice reforms should be made. The following section elaborates on the areas and how they must be reformed. Nonetheless, it is imperative first to provide conceptual background about the interplay between Human Rights and SOE.

2. Conceptual Background

SOE 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 or other forms of social upheaval.⁶ As opposed to normalcy, which denotes the general rule, the permanent and

⁶ 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.

regular state of things, emergency exceptionally confers temporary limited extraordinary power.⁷

However, two fundamental conceptual strands have normative implications 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."⁸ Accordingly, it claims that the rule and the exception are distinguishable and the legal regime of emergency can be objectively regulated by law.⁹ 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) for the declaration of a state of emergency.

Contrary, the second strand of thought, on other hand, 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 pretense of regulating by law" is rejected as it is a matter of "essentially extra-judicial."¹⁰ 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."¹¹ 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 the governments to limit whatsoever 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.¹²

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."¹³ These exceptional state measures must be at the

⁷ See above note 1 at 21-22.

⁸ Giorgio Agamben, *State of Exception* (Kevin Attell trans.) (2005) at 22-23.

⁹ Ibid.

¹⁰ Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, 17 *EURO. J. INT'L L.* (2006) at 678.

¹¹ THE FEDERALIST No. 23 (Alexander Hamilton).

¹² Awol Allo, *Protests, Terrorism, and Development: On Ethiopia's Perpetual State of Emergency*, 19 *Yale Hum. Rts. & Dev. L.J.* (2017) at 142.

¹³ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* 5 (1963).

threshold of necessity and the rule of law, and argued as it concedes that "most human rights are not absolute but rather reflect a balance between individual and community interests."¹⁴

Against this backdrop, the International Human Rights Law, particularly International Covenant on Civil and Political Rights (ICCPR), has 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.¹⁵ The first regulation establishes when a declaration of an SOE and derogation from state's human rights 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 their human rights obligations when confronted by a "*public emergency which threatens the life of the nation.*"¹⁶ 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.¹⁷ 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

¹⁴ Dominic McGoldrick, *The Interface Between Public Emergency Powers and International Law*, 2 *INT'L J. CONST. L.* (2004) at 383.

¹⁵ 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.

¹⁶ *Ibid.*

¹⁷ 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).

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 fulfill 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, 32, 34, and 35 have identified additional rights and prohibitions that cannot be subject to lawful derogation.¹⁸ The General Comment 29 have identified and interpreted that fundamental principles of a fair trial, including the presumption of innocence; prohibition of arbitrary deprivation of liberty; and prohibition of collective punishments as peremptory norms.¹⁹ Moreover, the right of persons 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; deportation or forcible transfer of population without grounds permitted under international law; prohibition of propaganda for war or advocacy of national, racial or religious hatred that would constitute an incitement to discrimination, hostility or violence are regarded as non-derogable rights in the same General Comment.²⁰

In General Comments 24, 32, 34, and 35, HRC has also identified additional rights and prohibitions that cannot be subject to lawful derogation. These are: the right to an effective remedy in the case of violations under the ICCPR;²¹ the right to be tried by a competent, independent, and impartial tribunal established by law;²² the right to take proceedings before a court to enable the court to decide without delay the lawfulness of detention;²³ the right not to be compelled to testify against oneself or to confess guilt;²⁴ prohibition of statements or evidence that are obtained in violation of art 7 of ICCPR and Convention Against Torture and

¹⁸ 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).

¹⁹ General Comment No 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001)

²⁰ Ibid.

²¹ Ibid; General Comment No 24, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

²² General Comment No 32, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

²³ Above note 19; General Comment No 35, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

²⁴ Above note 22.

Other Cruel, Inhuman or Degrading Treatment or Punishment, art 15;²⁵ prohibition of prolonged incommunicado detention;²⁶ and prohibition of the death penalty for States that are party to the Second Optional Protocol to the ICCPR.²⁷

The third regulation concerns 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, substantive and procedural standards and principles 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."²⁸ 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.

However, assessing how far these international human rights standards are translated into the domestic Constitution of nations and how far the government is observing those standards in the declaration, renewal, implementation, and lifting of SOE is imperative. Otherwise, the domestic Constitutional regulation of SOE and the state practice of declaring, renewing, implementing, and lifting SOE may open room for gross violation of human rights. Below is an assessment of the Ethiopian case with clearly identifying areas for reform.

3. The Human Rights Situation During SOE in Ethiopia: Agenda for Reform

3.1. Constitutional Rules

The Federal Democratic Republic of Ethiopia Constitution (FDRE Constitution) has 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

²⁵ Ibid.

²⁶ General Comment No 35, note above 18.

²⁷ Above note 19.

²⁸ ICCPR, Above note 15, Art. 4.

93(1a) provides an exhaustive list of dire circumstances. Accordingly, it is declared that when there are "[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."²⁹

Regarding limiting derogations, the FDRE Constitution lists absolute rights derogation, 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).³⁰ The lists of non-drogable rights in the FDRE Constitution are problematic and defective in two grounds. The first one is the Constitution has made the right to secession a non-drogable right. This is an unusual and unprecedented approach in any jurisdiction that may introduce another crisis in a time of crisis.

Second, 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,³¹ 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 Ethiopia³² on the other hand, it will raise contradictory interpretations.³³ However, all the nationwide declared SOEs had referred to the FDRE Constitution's provision of non-drogable rights. Hence, to make the FDRE Constitution compatible with the International Human Rights Law in this regard, either the state can expand the non-drogable rights through constitutional interpretation based on Article 13(2) of the FDRE Constitution or by Constitutional amendment amending the section of the Constitution that lists the non-drogable rights.

²⁹ The Federal Democratic Republic of Ethiopia Constitution (1995). (hereinafter cited as FDRE Constitution), Art 93(1a).

³⁰ Id, Art 93(4c).

³¹ Id, Art 9(1)

³² Id, Art 13(2).

³³ 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).

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.³⁴ 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.³⁵ 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."³⁶ 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.³⁷ However, concerning renewing the SOE, the FDRE Constitution does not adopt super majoritarian scale vote of the HPR. It simply reduces the duration for which the renewed SOE lasts for four months, without any limit on the frequency. Consequently, adopting a super majoritarian scale vote is recommended in renewing SOE.

Furthermore, the FDRE Constitution also introduces an institutional setup to control the state's conduct during an SOE and 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 period.³⁸ SEIB comprises seven persons to be chosen and assigned by the HPR from among its members and from legal experts. However, the FDRE Constitution does not provide any criteria for selecting the SEIB members. As a result, the members may become partisan and favor the executive in their works. To redress this problem, a subsidiary law

³⁴ FDRE Constitution, Above note 29, Art 93(2).

³⁵ *Ibid.*

³⁶ *Id.*, Art 93(4b)

³⁷ *Id.*, Art 93(2 and 3).

³⁸ *Id.*, Art 93(5 and 6); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L. J.* (2004) at 1055.

must be promulgated that establishes criteria like impartiality, personal integrity, and public acceptance etc to be selected for SEIB.

The FDRE Constitution also lists out the powers and responsibilities of SEIB. The SEIB 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."*³⁹

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. Thus, it is recommended to empower the SEIB to oversee the other human rights situation as well.

When lifting an SOE, mainly when an extension is requested, the SEIB is 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.

Apart from reforming the provisions of the FDRE Constitution, the papers presented and the discussions made in the workshop have also identified areas of reform concerning the state practice of using SOE powers in Ethiopia. The below sub-section pinpoints the areas where reform is needed in the state practice of Ethiopia's use of SOE powers to make it friendly with human rights protections.

3.2.State Practice

As noted in the introduction, since the promulgation of the 1995 FDRE Constitution, the Government of Ethiopia has declared four formal nationwide SOEs. However, there is a claim "that Ethiopia's *de jure* emergency is merely the latest manifestation of the *de*

³⁹ FDRE Constitution, Above note 29, Art 93(6).

facto state of emergency in operation since the new Constitutional order was set in motion in 1995.⁴⁰ Moreover, the formal SOEs declared so far are criticized for opening the room for gross violation of human rights and being used as political instruments to silent political oppositions. The below discussion explains how the state practice of dealing with SOE open caused gross human rights violations and suggests the changes to be made.

3.2.1. Outlawing the persistent use of informal SOE

Leaving aside the claim that the *de facto* SOE has been operating since the Constitutional order was set in motion in 1995, a series of situations clearly evidenced the Federal Government of Ethiopia drawn emergency powers without declaring SOE to manage 'security crises'. In the past, the declaration by the late PM, Meles Zenawi, on the night of the controversial 2005 election that suspended demonstrations and meetings and involved the arrest of thousands of people, and the counter-insurgency efforts in Somali Regional State (marked by the suspension of law, securitization of the political process, security forces taking political decisions, suspension of due process etc.), as well as the suppression of election demonstrations in 2005 but without formally declaring SOE as per the Constitutional procedure are worthy of mentioning. Currently, command posts have been established in areas with security issues in different parts of the country, giving security forces a wide range of powers tantamount to an SOE. To mention, West Wellega in Oromia Region, Konso Zone in Southern Nations, Nationalities and peoples' Region, Qimant area in Amhara Region, and Metekel and Kamashi zones in Benshangul Gumuz region are still being administered through a command post.

The establishment of use of *de facto* SOE power first violates the Constitutional rule. Notably, under the FDRE Constitution Article 93, the suspension of human rights and assumption of extraordinary power, and under Article 88(2), deployment and the use of National Military forces require the declaration of SOE in accordance with the Constitution. Second, it avoids the possibility of legislative oversight. Since, in the case of *de facto* SOE, there is no declaration of the SOE as per the Constitution, the legislative is not in a position to review whether the dire circumstances demand emergency power to restore normalcy, whether the emergency measures, restrictions, and prohibitions are temporal, geographically limited to the area where the dire circumstance prevails, per the proportionality and necessity requirement, and observed the non-drogable rights. Finally, it avoids the possibility of

⁴⁰ Awol, Above note 12.

reviewing and oversight the identity of the arrested persons, whether the inhumane treatment has happened, and determining whether the extension of SOE is required by SEIB. Consequently, it is fundamental to make the de facto SOE unconstitutional and advocate for the state to stop using informal emergency powers.

3.2.2. The Making of the SOE must be in accordance with the International Human Rights Law Standards and FDRE Constitution Requirements

It is explained above that the International human rights law and the FDRE Constitution incorporate three levels of inquiry to mitigate gross and grave human rights violations during SOE. Almost all national-wide SOEs declared by the Federal Government of Ethiopia are criticized for non-observation of the requirements and opening a room for gross human rights violations. First, except for the 2021 SOE declared in relation to the war in Tigray, establishing an emergency to declare SOE is used as instrumental to suppress political oppositions and ensure the stay-in-power of the incumbent. Remarkably, the state of emergency declared on 8 October 2016, in response to a nationwide protest by Ethiopia's two largest ethnic groups: Oromo and Amhara, provided the military and security forces with sweeping new powers to counter what the government described as the threat posed by "anti-peace groups" working "in close collaboration with foreign elements,"⁴¹ for the fact that the protestors demanded democratization of the nation, respect for human rights and the rule of law, and respect for self-determination rights. Initially, while the protests were peaceful, it was the then incumbent who forcefully responded, which resulted in the deaths of close to 700 protestors and detained more than 26,000 protestors in "rehabilitation camps."⁴² This state of emergency lasted for ten months and was meant to serve the then ruling party's stay in power on the pretext of '*maintenance of public peace and security*.'

The continuation of the protests even after the release from jail of opposition leaders, journalists, and protestors,⁴³ the government's declaration of retreat from implementing the

⁴¹Tesfaye Wolde, Letter to the Editor, *Ethiopia's State of Emergency Will Work*, Washington Post, https://www.washingtonpost.com/opinions/ethiopias-state-of-emergency-will-work/2016/10/16/52f87c0a-923b-11e6-bc00-1a9756d4111b_story.html , 16 October 2016.

⁴² U.N. News Ctr., In Ethiopia, *UN Rights Chief Urges Authorities for Greater Freedoms; Space for Critical Voices*, <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, <https://www.hrw.org/news/2017/03/16/ethiopia-lifts-some-state-emergency-restrictions>, 16 March 2017.

⁴³ DW, Ethiopia releases high profile political prisoners, <https://www.dw.com/en/ethiopia-releases-high-profile-political-prisoners/a-42590273>, 14 February 2018.

Addis Ababa Master Plan,⁴⁴ and the unexpected resignation of the former Prime Minister Haile Mariam Dessalegn,⁴⁵ again forced the then incumbent to declare another state of emergency which lasted only for two months in February 2018.⁴⁶ This time, while the facts in grounds were similar to the situations of the 2016 state of emergency, the government changed the name of the circumstance as 'a threat to Constitution and Constitutional order' and justified the declaration of the state of emergency to 'defend Constitution and Constitutional order from threat'.⁴⁷ 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 to ensure the stay in power of the then incumbent.

A similar claim was made against the 2020 SOE declared to control and counter the spread of COVID-19 and mitigate its effects. It was declared in April for five months and came to an end in August.⁴⁸ Because of the SOE and the COVID-19 crisis, the elections scheduled for August 2020 were postponed through highly discontented Constitutional interpretation.⁴⁹

Even in the case of the 2021 SOE declared in relation to the war in Tigray, there is criticism against the government in terms of timing, and it declared it when the situation threatened and shook the power of the central government. The critics built their claim on the fact that the declaration came almost a year after the federal government had declared 'the law enforcement operations in Tigray region that had proceeded as planned ended';⁵⁰ after the Amhara region had declared its region-wide SOE on 31 October 2021;⁵¹ and when the Tigray Forces pressed south toward the Capital, Addis Ababa, following the capture of two key

⁴⁴ 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.

⁴⁵ BBC, Ethiopia PM Hailemariam Desalegn in surprise resignation, <https://www.bbc.com/news/world-africa-43073285>, 15 February 2018.

⁴⁶ 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.

⁴⁷ Proc. No. 2/2018, above note 3.

⁴⁸ Proc. No. 3/2020, above note 4, Art 8.

⁴⁹ 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.

⁵⁰ REUTERS, Ethiopian military operation in Tigray is complete, prime minister says (28 Nov. 2020) <https://www.reuters.com/article/us-ethiopia-conflict-idUSKBN28809E>.

⁵¹ Addis Standard, <https://addisstandard.com/update-amhara-state-council-declares-emergency-including-region-wide-curfew-suspension-of-activities-by-state-institutions/>.

towns – Dessie and Kombolcha.⁵² Consequently, it is recommended that the government must stop the use of SOE for its political end than addressing the actual dire circumstances.

Moreover, content-wise, the SOEs are also criticized for sticking to the non-drogable rights in the FDRE Constitution than in the international human rights law, closing the possibility of legislative oversight, adopting a command-and-control approach, being excessive, disregarding principles of legality and non-retroactivity, and being declared for the maximum duration. As highlighted above, the FDRE Constitution has highly narrowed the list of non-probable rights compared with the International Human Rights law. In all the national-wide SOEs declared so far, the reference to non-drogable rights is made with regard to those listed in the FDRE Constitution. The declarations expressly stated that the emergency measures shouldn't infringe the provisions and rights enshrined as non-drogable in the FDRE Constitution. Moreover, the specific emergency measures and prohibitions listed in the declarations have infringed the other non-drogable rights under International Human Rights Law. In some cases, for instance, the 2021 SOE even derogated the right to self-determination, which is regarded as a non-drogable right in the FDRE Constitution. This demands the state practice of listing the emergency measures, and prohibitions in the SOE declarations must observe the non-drogable rights both in the FDRE Constitution and International Human Rights Law.

Except for the 2021 SOE, the rest SOEs have closed the possible legislative oversight at the time of making. It is through without introducing the list of emergency measures and prohibitions at the time of parliamentary approval. The FDRE Constitution provides legislature oversight of a state of emergency in terms of whether:

- The dire circumstance demands a declaration of a state of emergency to address.
- The emergency measures are necessary and proportional to overcome the emergencies.
- The non-drogable rights are observed.

In most cases, they grant the executive a blank check to take any measure it deemed necessary and endorses a decree issued by the COMs as it is.⁵³ The declarations submitted to

⁵² 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>.

⁵³ 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

parliamentary approval only provide the geographical scope of application, the duration for how long the SOE lasts, a list of non-derogable rights, and established special body responsible for execution (command post or ministerial committee), establish the SEIB, suspension of laws, the imposition of criminal liabilities, and the proper and necessity clause that empower the COMs to take any measures and prohibitions necessary.

This practice changed in the 2021 SOE when the COMs tabled the declaration consisting of the list of emergency measures and prohibitions for approval on the parliament floor. This has, at least theoretically, provided the legislature to review the compatibility of the measures with the international human rights law standards and the FDRE Constitution requirements.

Again, the state practice of declaring SOE in Ethiopia has taken the path of a command-and-control approach. Irrespective of the nature of the dire circumstance, the declarations introduced emergency measures, prohibitions, and violations resulting in liabilities. So far, the state practice of declaring SOE in Ethiopia has happened on two grounds. These are 'break down of law and order' and the outbreak of pandemic – COVID-19. In both cases, the declaration of SOEs has taken a similar path. Without considering the nature of the dire circumstance, the SOEs have incorporated a long list of emergency measures and prohibitions and introduced criminal liability for violations. Nonetheless, in case of an outbreak of a pandemic like COVID-19, it is highly suggested to introduce human rights-friendly enforcement mechanisms such as providing the necessary protection equipment, public education, awareness creation, solidarity, an ethic of care, and kindness, which are empowering people with knowledge and tools to protect themselves and others.⁵⁴

Moreover, some emergency measures and prohibitions introduced in each SOE were excessive and violated the principle of necessity and proportionality. The international human rights law and the FDRE Constitution require the emergency measures taken must be "the extent necessary to avert the conditions that required the declaration of a SOE."⁵⁵ Nonetheless, the practice in Ethiopia reveals non-observation of this principle in the SOEs declared so far. Commonly, the excessive measures and prohibitions were manifested in the

Approve 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.

⁵⁴ UNAIDS, Rights in the time of COVID-19 Lessons from HIV for an effective, community-led response (2020).

⁵⁵ FDRE Constitution, above note 29, Art 93(4a).

form of excessive geographic scope application, restrictions on communications,⁵⁶ prohibition of 'criticizing the State of Emergency Proclamation and the Directive',⁵⁷ and excessive restrictions on fair trial and access to justice. This is, in fact, without disregarding the excessive measures and prohibitions specific to each SOE. Therefore, it is recommended that the emergency measures and prohibitions being introduced by SOE must be compatible with the nature of the dire circumstance and must be necessary and proportional to restoring normalcy.

Furthermore, the Ethiopian SOEs have violated the principle of legality and non-retroactivity. The principle of legality requires the contents of an emergency decree to be available and accessible to the public and provisions with legal consequences to be clear and precise.⁵⁸ It is in the list of the non-drogable rights in the ICCPR requires 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.⁵⁹ 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.⁶⁰ This is to enable people to know what actions are allowed or prohibited and to shape their behaviors accordingly and also foresee the consequences of acting against the measures.

These principles were set aside in the SOEs declared by the Ethiopian government. This is done by taking a long time after the declaration of SOE to reveal the emergency measures and prohibitions,⁶¹ by backdating the date of issuance of SOE,⁶² retroactively authorizing its application,⁶³ introducing generic punishment without specifying the criminal act or acts to be regarded as a crime in the future, and demanding the application of grave punishment when the violation is punishable by other laws and requiring the continuation of the criminal liability for violating the SOE even if the SOE expires. Such practice must be outlawed.

⁵⁶ Amnesty International, ETHIOPIA: DRACONIAN STATE OF EMERGENCY MEASURES, AFR 25/5669/2017 (2017) at 9.

⁵⁷ Amnesty International, COMMENTARY ON THE ETHIOPIAN STATE OF EMERGENCY PROCLAMATION, AFR 25/7982/2018, (2018) at 9.

⁵⁸ Daniel GrÄfdinaru, 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).

⁵⁹ ICCPR, Above note 15, Art 4 and Art 15.

⁶⁰ Ibid.

⁶¹ Amnesty International, Above note 56 at 5.

⁶² Proc. No. 1/2016, above note 2; State of Emergency Proclamation for the Maintenance of Public Peace and Security Implementation Council of Ministers Regulation No. 391/2016, Art 5.

⁶³ Amnesty International, Above note 56 at 5.

Finally, content-wise, all the SOEs were declared for the six-month maximum duration stipulated in the FDRE Constitution for granted. Except for the 2020 SOE, which was declared and lasted for five months,⁶⁴ the rest were imposed for the maximum duration in the FDRE Constitution – six months.⁶⁵ Even the 2016 one was renewed for another four months.⁶⁶ This approach goes against the objective of SOE, which is to use the powers conferred by an SOE only to address that urgent and emergency need and then restore normalcy as soon as possible. None of them, except the 2021 SOE, stipulated the possibility of lifting the declaration before the expiry of the duration. The 2021 SOE stipulates that *"The House of People's Representatives may determine the cessation time of the proclamation before the end of the six months."*⁶⁷ On this basis, the 2021 SOE was lifted three months earlier than the expiry time.⁶⁸

However, the decision to lift the 2021 SOE 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.⁶⁹ 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.⁷⁰ 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 normal law enforcement mechanism. However, it is indicative of the existence of politicization of the SOE and distrust of the executive in the country still. Consequently, the declaration and lifting of SOE for the political end must be curtailed, and the process and situation of lifting SOE must be clearly regulated and determined.

3.2.3. Clear Determination of Implementing Bodies and Empowering the Oversight Bodies

⁶⁴ Proc. No. 3/2020, above note 4, Art 8.

⁶⁵ FDRE Constitution, above note 15, Art 93(3); Proc. No. 1/2016, above note 2, Art 14(1); Proc. No. 2/2018, above note 3, Art 18(1).

⁶⁶ Reuters, Ethiopia extends state of emergency by four months, <https://www.reuters.com/article/us-ethiopia-security-idUSKBN1711FD>, 30 March, 2017.

⁶⁷ Proc. No. 5/2021, Above note 5, Art 11(2).

⁶⁸ 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/>.

⁶⁹ Ibid.

⁷⁰ Fana Television, የአስቸኳይ ጊዜ አዋጁ መነሳት (15 Feb 2020) <https://www.youtube.com/watch?v=HrYGaKn3xMY&t=187s>.

In Ethiopia, after the declaration of SOE, one of the things done is the establishment of emergency measures implementing bodies through regulation. Fundamentally the nature and composition of SOE implementing bodies are determined by the nature of the dire circumstance that necessitated the declaration of SOE. When the SOE is declared in relation to security problems and break down of law and order, the enforcing agencies are commonly called 'state of emergency command post' or 'state of emergency operation command.' The members are predominately from the head of government from each level of government structure, law enforcement agencies, defense force, national intelligence, and public prosecutors. There is centralization of decision-making, and the chain of command is one. It is with the assumption that national security crises require a centralized, secretive and security-oriented approach.⁷¹ Whereas, when the exigency is pandemic, like COVID-19, the enforcing agency at the central government will be the council of Ministers or the Ministerial Committee and the task of implementation is assigned to both law enforcement agencies, public health Institutes, and health offices. The decisions are made in a highly decentralized way providing the opportunity to consider the local contexts. Crises relating to natural disasters or pandemics call for a more decentralized, open-information, and technocratic approach.⁷² However, in both approaches, what is not clearly determined and indicated is the responsible entities with the power to implement the SOE. This has opened room for abuse of power under implementing SOE.

With regard to oversight bodies, the SOEs took the approach of disempowering them. Except for the House of Federations (HF), the House of People's Representatives (HPR), and the SEIB, the other oversight bodies like the Ethiopian Human Rights Commission, Civil Society Organizations, Media, and the Judiciary were prohibited or suspended from reviewing the implementation the SOE. As an organ empowered with constitutional interpretation, the HF has the power to review any laws and government actions that contradict the Constitution. Then, if the declaration of SOE in whole, specific measures thereon, or the SOE implementing bodies' actions contravenes the Constitution, the HF is empowered to make them null and void. However, an application must be submitted to the HF to claim nullification. In order to do one must show and fulfill the 'vested interest' requirement. As a result, there is no practice in Ethiopia whereby nullification of the SOE or a specific part of Ethiopia or actions of SOE implementing bodies is submitted to the HF. Therefore, it is

⁷¹ Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers during the Pandemic' (2020).

⁷² Ibid.

recommended to introduce public interest litigation to challenge the human rights effect of SOE and state acts during emergencies.

Apart from the defect raised above in relation to oversight by HPR and the SEIB, the domination of the House by the ruling party and the selection of the members of SEIB by the same House,⁷³ put a doubt on the effectiveness of the supervision and oversight by these entities. It was only in the 2018 SOE that the members of HPR showed a solid commitment to opposing its declaration,⁷⁴ and in the 2021 SOE in its lifting. The oversight role of SEIB was made ineffective due to the fact that the proper functioning of its role depends upon the willingness and coordination with the Command post, for instance, to reveal the identity of the arrestees and their whereabouts and resource constraints. Consequently, the HPR must make itself independent from the influence of the executive. In case of failure, liability must be imposed on the Command post to avail the necessary information to SEIB, and the SEIB must be provided with the necessary resource to make effective oversight.

With regard to the oversight role of the Ethiopian Human Rights Commission, media and Civil Society Organization, the SOEs took two approaches to curtail it. The first one is the express prohibition of conducting human rights monitoring activities. The second approach is introducing criticizing the SOE declarations and the activities of the implementing bodies as prohibited. However, in order to overcome such prohibitions, the Ethiopian Human Rights Commission forced the government to amend its establishing proclamation and succeeded in inserting monitoring human rights situations during SOE as its mandate.⁷⁵ The media and Civil Society organizations must also be provided with similar freedom to review and publicize the human rights threats of the SOEs and the implementation process.

Regarding the judicial oversight, the emergency decrees envisage the deprivation of the judicial power of the judiciary to enforce the emergency decree until the expiry of the same.⁷⁶ They also introduced a general suspension of substantive and procedural laws inconsistent

⁷³ Menna Asrat, “State of Emergency Inquiry Board’s First Report Expected in November”, *Fortune*, October 25, 2016 [VOL 17 ,NO 860], available at: (accessed 10 May 2022).

⁷⁴ Reuters, Dispute over Ethiopia emergency rule vote after footage posted online, <https://www.reuters.com/article/us-ethiopia-politics-idUSKCN1GE1XJ>, 2 March 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/>, 4 March 2018; Addis Standard, House Speaker Abadula Gemedda apologizes for erring vote counting on state of emergency as decision sparks fresh protests, <https://addisstandard.com/news-house-speaker-abadula-gemedda-apologizes-erring-vote-counting-state-emergency-decision-sparks-fresh-protests/>, 4 March 2018.

⁷⁵ Ethiopian Human Rights Commission Establishment (Amdendment) Proclamation No. 1224/2020, Art. 2.

⁷⁶ See for instance, Proc, No, 5.2021, Above note 5, Art 8(1).

with the emergency decree.⁷⁷ 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 action during an emergency, including issuing orders with 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.⁷⁸ Consequently, there should be judicial oversight concerning both the substance of such executive orders and the process of enacting and implementing them.

In Ethiopia, the judicial oversight of the SOE comes into the picture when a person brings a legal action in relation to the SOE. The abuse of power, taking of measures and the introduction of prohibitions and restrictions 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. The prohibition of the judicial organ from enforcing the claims emerging for the SOEs 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. It also deprives the judiciary of its constitutional power to entertain any justiciable matter. Therefore, the judiciary's power to oversight the SOE shouldn't be suspended in any case. Even during SOE, a special bench should be designed for entertaining matters related to the SOE.

3.2.4. Vulnerable Groups of Society should be Given Special Attention

The vulnerable groups of society, such as women, children, persons with disabilities, and the elderly, are more affected by SOE than the other sections of society. Their needs and conditions are not taken into account in the making and implementation of SOE in Ethiopia. The emergency measures and prohibitions are communicated to them in the same way as to normal people. In Ethiopia, since the declaration of SOE and the emergency measures and

⁷⁷ Id, Art 8(2).

⁷⁸ Elliot Bulmer, *Emergency Powers*, International IDEA Constitution-Building Primer 18 (2018) at 25.

prohibitions are communicated to the public orally in the national media and subsequently published in the Federal *Negarit Gazzetta*, persons with hearing and reading impairments may not be able to know and understand the declaration of SOE and the contents thereof. It, in effect, requires adopting those other possible ways to communicate with them about the SOE.

Moreover, as the previous experiences indicate, the emergency measures and prohibitions don't provide the exceptional scenario of considering the needs and conditions of the vulnerable groups in Ethiopia. For instance, during the 2020 COVID-19 SOE, the closure of schools and the courts initially exposed girls to rape and early marriage and women to domestic violence. It was at later time courts were exceptionally allowed to entertain these matters. Such exceptions must be introduced from the outset and when declaring SOE.

Furthermore, in some instances, implementing emergency measures in relation to vulnerable groups requires preparedness and provision of assistance. In the absence of it, they are exposed to further danger. A case in point here is when evacuation from a particular place is required as an emergency measure. A sudden ordering of people to evacuate from a certain place without making them be prepared and providing assistance makes them more vulnerable. Consequently, it is highly recommended to provide early warning and assistance and make necessary preparedness ahead to mitigate the negative impact of SOEs on vulnerable groups.

3.2.5. The practice implementation of SOE measures and prohibitions must be in observance of the Human Rights

In Ethiopia, it is claimed that not only the contents of the SOE declarations but also the practice of implementing the SOE measures and prohibitions have caused gross human rights violations. In the workshop, it is revealed that the government uses telecom and internet blockage, mass detention and arrest, house-to-house and personal search, curfew, and extra-judicial killing as implementation. Furthermore, these measures weren't taken in compliance with the principles of necessity, proportionality, and non-discrimination.

Notably, in practice, the application of the SOE has mainly been manifest through the widespread arrest of people, including journalists, intimidation, and warnings to some media houses and politicians. Three types of arrests have occurred;

- Firstly, there are arrests of those who the law enforcement claim to have concrete evidence;
- The second category – and by far the one with the most significant number of detainees – concern anyone the authorities suspect of supporting and involving in public disorder;
- The third category is those arrested for violating restrictions under the SOE and its directives.

The detainees were exposed to gross human rights violations. Many of those arrested were kept in local police stations and other temporary detention centers, including facilities such as military camps and training centers. They were taken away from their locality to avoid families or oversight bodies visiting. As a result, there were detainees detained incommunicado or in unknown locations where family members had not received information about where their detained relatives were being held. Those arrestees taken to military camps were forced to take rehabilitation training by regarding them as guilty without court trial and verdict. The detention conditions were dire, and the detention places were overcrowded. Consequently, the entire practice of implementing SOE measures and the detentions and arrests made disregarded human rights standards. Such practice must be avoided, and the implementation must be done in accordance with human rights standards.

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