THE EXTENT OF REASON OF STATE IN THE ETHIOPIAN CONSTITUTIONAL ORDER: THE QUEST FOR RESTRAINING AND LEGITMIZING

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List of abbreviations

CCI	Council of Constitutional Inquiry
CUD	Coalition for Unity and Democracy
EPRDF	Ethiopian Peoples Revolutionary Front
FDRE	Federal Democratic Republic of Ethiop
HOF	House of Federation
HPR	House of Peoples representative
ICCPR	International covenant on civil and political rights
UNCHR	United nation for the commission of human rights
TPLF	Tigray Peoples Liberation Front

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Abstract

Providing institutional and procedural guarantees that could control abuse of opportunities for derogating and restricting rights should be secured so that the measures will remain in a constitutional paradigm to the extent it is essential to legitimize a necessary power of reason of state discourse for the survival of the constitutional order, in the essence of international standards, established concepts, and relevant experience of modern constitutions. Taking this hypothesis as it should be, the research is concerned with the analysis of the modes and extent of reason of state in the Ethiopian constitutional order accordingly. To this end both primary and secondary data are consulted in the research process.

The writer's investigation of the extent and modes of reason of state in the Ethiopian constitutional system based on the rational reason of state as it should be that will remain in a constitutional paradigm show two major findings. While the system does not adopt a restrained reason of state to the extent it should have guaranteed institutional and procedural safeguards against abuse on the one hand, there exists constitutional gap with a need to legitimize a reason of state discourse power to address a constitutional crisis on the other hand. The constitutional gaps that quest to restrain reason of state in the Ethiopian constitutional set up are found with a depth analysis of the state of emergency and limitation clauses in the FDRE constitution, the political parties registration proclamation, the anti terrorism proclamation, and the criminal code in relation to political rights with a special emphasis on the right to political association. And the power lacuna with a need to legitimize reason of state discourse, found in the paper, is up on the state of emergency mode alone. The absence of constitutional guardian in case an emergency situation arise in a care taker government regime when the parliament is dissolved and in case the council of ministers is not in a position to determine the state of emergency for crisis of disagreement among the members in the existence of a situation that imperatively needs an immediate response is discovered as a power lacuna.

Adopting institutional, procedural and constraining guidance at the constitutional level is recommended in response to the first finding that need to restrain reason of state discourse. And empowering the president to bring the motion to declare state of emergency to the parliament and establishing a permanent deputation of the house to assume the powers of the latter during its dissolution are recommended as a remedy to fill the power lacuna with regard to the second finding.

Chapter One: Introduction

1.1.Background

"In a properly organized political community, the state exists for society and not a society for the state; yet, however socially advanced a people may be, the society which it constitutes- made up of families, clubs, churches, trade unions etc- is not to be trusted to maintain itself without the ultimate arbitrament of force."[1]

Strong has stated the above statement in a way to affirm the necessity of a state, which has a sovereign power both internally and externally, in order to maintain the society. Many modern constitutional and political thinkers, irrespective of the differences in the perspectives from which they justify it, have agreed as state is a necessary and primary value save society is ultimate than it.

As a necessary and primary value, the doctrine of reason of state allows for a state to take a measure which insures its survival when it faces with a threat, both internal and external, for its life.[2] The question is as to the extent of the measure to be taken to preserve the security of the state. Though there is no sound philosophical foundation for an absolute reason of state except its long domination as a theory of state, the extent of reason of state is not as such an issue in unconstitutional states. Unconstitutional states do not have a legal fence which formulates the power limits of the government that it must not transgress, and which warns it will be safe in its authority so long as it doesn't intrude them.[3]

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[1]. C.F. Strong, Modern Political Constitutions:An Introduction to the Comparative Study of Their History and Existing Form (7th Ed.), th111e English language book society and Sedgwick and Jackson limited, London, 1966, p. 5.

[2] C.J. Fredrick, Constitutional Reason of State:the survival of constitutional order, Brom University press, 1957, pp. 1-4.

[3] .Woodrow Wilson, on his work Constitutional Government in the United States, while discussing the difference between a constitutional system and unconstitutional system states: "In a constitutional system the requirements of opinion are clearly formulated and understood, while in unconstitutional they are vague and conjectural. The unconstitutional ruler has to guess where his subjects will call a halt upon him, and

And it is meaningful to worry about the extent of reason of state of constitutional state which is the system of nearly every modern state today. Unlike that of the unconstitutional state, it is a serious and difficult task for a constitutional state to balance the anxious worry of security and keeping the very fabric of constitutionalism which aims at guaranteeing the liberty of the citizens by limiting the arbitrary action of the government since adjusting the power of the governor, and the rights of the governed is the very reason of constitutional state. It raises a question how can the constitutional order, the democratic state, survive when the very essence of it is guaranteeing freedom for its citizens, and the threat of security emanate from freedom.[4] It raises a question shall the constitutional order, the democratic state, waits until it be destroyed by enemies using itself as a Trojan horse. The question in package is as to the extent of constitutional reason of state; how power and rights are appropriately adjusted.

The idea of reason of state as to its necessity and extent is replete with a lot of philosophical contentions. The philosophical debate extends from those advocates of the modern state as a power system in large part in which its first characteristic expression is found in Machiavelli up to those liberal political and constitutional thinkers such as John Locke who advocates the modern state as a justice system that recognizes both maintaining the constitutional order and protecting individual liberty inclining to the latter as a reason of state. The philosophical debate is not about all – nothing argument as to the need of taking a measure to save the life of the state, instead it is a continuum of the degree of the measure which should be taken justifying as a reason of state.

With the contribution and influence of different philosophers in the above continuum as to the extent of reason of state, many modern constitutional states have regulated it in their respective constitutional orders. Adjusting the power of the governor, and the rights of the governed becomes an established purpose of having a constitutional state.

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experiment at the hazard of his throne and head; the constitutional ruler definitely knows the limits which must not transgress and is safe in his authority so long as he doesn't overstep them.", Woodrow Wilson, Constitutional Government in the United States, Columbia University Press, 1908, P.21.

[4] Fredrich has raised it as a core question of constitutional reason of state in his work of constitutional reason of state at the prologue, Supra note 2.

Though a state with any form of government could face the threat for the survival of the political community, the threat is immense in constitutional democratic states since there is a possibility that enemies of democracy will destroy the constitutional order with democratic ideal using the right to democracy as an instrument. Hence democracy needs to be armed with an instrument which enables to defend itself from enemies. And the constitutions which incorporate the democratic ideals need to recognize the defending measure to be taken. The measure should be something which realizes the survival of the constitutional order there by the democratic order; it shall also have a mechanism for the defending measure not to be anti democratic and threat to rights and freedoms.

The German jurisprudence of militant democracy under the recognition of the 1949 Basic Law of Germany is prominent exemplary in devising a mechanism for a democracy to defend itself. The German formula of militant democracy have tried to strike a balance between the risk of in action in the face of totalitarianism threats, and the danger of the instruments of militant democracy being turned against democracy itself.[5] As a defense to the rise of the totalitarian movement it has introduced militant democracy, and in order to protect the democratic order itself from the weapon of militant democracy, it has provided an independent institutional custodian with extraordinary procedure in order to expel an individual or a political party from the marketplace of politics. The Federal constitutional court is entrusted as a custodian of it.

The South African constitution has also regulated a similar scenario adequately in its state of emergency clause. While it allows suspending certain fundamental rights with state of emergency to save the life of the state, it urges the state of emergency to be conditioned and controlled so that it will be compatible with the protection of human rights. The constitution also provides stringent general limitation clauses which limits the limitation of rights measure. It makes both emergency and limitation measures subject to judicial review.

[5] .Thilo Rens Mann, Procedural Fairness in a Militant Democracy; 'the uprising of the decent' fails before the Constitutional Court, German law journal, Vol. 04 No. 11, p. 1122,available at http://www.germanlawjournal.com/pdfs/voil04 no11/pdf-vol04-no 11-1117-1136-public-Rens mann.pdf (Last visited on June 8,2011).

Some major international human rights instruments and principles have recognized the power to take a derogative measure of suspending rights to save the state from an exceptional threat taking into account certain substantive principles and procedural safeguards which help to prevent the government in order not to abuse the power using it as a pretext. Among them include: The existence of an exceptional threat to the security of the state and its people which cannot be averted through the ordinary law and order; strict necessity and proportionality towards the exceptional threat to the security of the state and its people; keeping the non-derogable rights intact during the emergency; applying the derogative measure in non discriminatory manner; the derogation must not be incompatible with the states' obligations under international law; making an official declaration of the existence of the emergency situation threatening the life of the nation; the duty to notify/ inform up on the state availing itself of the power to declare state of emergency to other member states of the relevant covenant; and securing a legislative and judicial safeguards to control abuse of emergency power. The South African constitution has incorporated a state of emergency clause formulated in the spirit of the international standards.

To sum up, a constitutional democratic order shall regulate the extent of reason of state so that the state will take a measure for its survival giving due care of fundamental rights, and freedoms establishing a real custodian of it in which the judiciary is believed to be an appropriate organ in the existing modern age.

Following my appreciation of the natural tension of security and freedom, and the need to regulate the extent of reason of state in the above manner, I am triggered to study how it is regulated in the Ethiopian constitutional setup.

1.2.Statement of the Problem

When we see the modes of reason of state in the Ethiopian constitutional system, it seems their extent is not rationally formulated as it ought to be in a constitutional state. The writer stands from such hypothesis for the following personal observations of legal lee poles and practical scenarios as to the modes of reason of state intended subject to study:

To start with the state of emergency measure as a mode of reason of state, there are lee poles for abuse during state of emergency regime in the Ethiopian constitutional order. When we see the list of non derogable rights, it does not include the guaranty of independence of the judiciary, and the right of access to justice and fair trial. In the absence of such a judicial and procedural guarantee, the fate of the derogable human rights is at stake. The constitutional duty and responsibility imposed up on the judiciary to respect and enforce the human rights chapter [art 13(1)],doesn't refer to the power to question the constitutionality/legality of state of emergency decree since the provision governing the latter is provided in another chapter(chapter eleven, art. 93),not in the human rights chapter. Moreover, Arts62 and 83 of the constitution which are the very provisions to regulate the power to interpret the constitution clearly makes the HOF the custodian of the same.

Provided it is asserted as such, the constitutional provision that imposes the duty to obey, and ensure observance of the same up on all organs of the state including the court (art9 (2)) would not have any help in granting the power to question state of emergency laws to the court. Instead, it could restrain the organ in order not to extend its power towards the power to interpret the constitution through judicial activism since it has the duty to obey the constitutional provision that clearly makes the power to interpret the constitution that of the HOF. Accordingly, if the decree is approved by the parliament, its constitutionality issue could be questioned by the CCI/HOF. What about as to the assessment of regulations and acts issued to enforce the emergency proclamation? When state of emergency is declared, the council of ministers will exercise the power to maintain public order in accordance with regulations it issues [Art 93(4) a].And the emergency decree could be questioned before its approval by the parliament or is challenged for short of that requirement. The question whether the court has the jurisdiction to entertain the constitutionality of executive acts and decisions becomes a point of divergent views among the constitutional lawyers in the country. It seems to this effect that the parliament has come up with proclamation No.250/2001and 251/2001 that clearly excludes the court from entertaining the constitutionality claim of executive acts and decisions.

Save the constitutionality issue of these laws, the judiciary couldn't see the constitutionality issue of executive acts and decisions in the existing legal frame work and practice. The HOF which is entitled to have a jurisdiction by the stated laws is not a trusted impartial body to be custodian of the constitutional order with that regard. It couldn't, yet, built, a public confidence from the practice it has undertaken so far. These all makes the rights and freedoms of individuals at stake which could arbitrarily be violated at the pretext of the modes of reason of state of limitations and derogation of rights by the executive acts and decisions.

And the state of emergency provision of the constitution doesn't have a protection the other human rights provisions have get through the amendment procedure and the interpretation provision that urges to use the international human .rights instruments as guiding interpretation principles.

The limitation of rights measure which is a mode of reason of state to be taken at normal times could easily be abused in the existing constitutional frame work of the country. The constitution confines special limitation clauses in the specific provisions of most of the rights. But the grounds of limitation such as national security, public peace and public interest are subject to abuse unless they are circumscribed by other limitations such as proportionality, necessity, considering democratic values, rationality, and other factor which helps to assess the legitimacy of the limitative act; and these all are absent in the FDRE constitution. Though those countries with stable Democracies such as U.S could use their long standing culture of democracy as a guarantee of controlling abuse, a detailed general limitation clause is very important in the newly emerged constitutional states like that of ours that do not develop the culture of democracy to make a rational weighing and balancing of the conflicting values of security and freedom. Despite the fact that the immediate history of the country is history of excess and atrocity, a general limitation clause with a necessary factors to limit a limitation measure in a well balanced manner is absent in the FDRE constitution. Moreover, there are limitation clauses which left the grounds to be determined at the mercy of the law maker; art 12(1) of the

constitution provides the right to liberty could be deprived on the grounds and procedures to be established by law.

Militant democracy which is a special sort of limitation measure is another mode of reason of state in constitutional states. And many democracies in either of the models-substantive or procedural-do have militancy regardless of the degree of difference in response to their historical back ground and political culture. One democracy could be militant in both substance and procedure, or in either of them.

The FDRE constitution has established a federal and democratic state structure, which is a new political system to the country, which incorporates fundamental rights and freedoms, the rule of law, sovereignty of the citizen and that of the nations, nationalities and the peoples including the right to secession to the latter, secularism, transparency and accountability of government institutions etc. Though they are the higher norms of the constitution, they are not out of the political process in which political parties couldn't take political aims against them. The democracy adopted in the constitution, then, is not militant in substance, but, in procedure.

It is prohibited to assume state power in a manner other than that is provided under the constitution [art9 (3)]. Political power is assumed through political parties provided that they involved and won an election (art56).As far as they are not formed to illegally subvert the constitutional order or promote such activities, political parties are not prohibited to intend a political aim of amending any part of the constitution following the amendment procedure provided in it. What is prohibited is to illegally subvert the constitutional order such as revolution, rebellion, or to change the constitution disregarding the amendment procedure. In light of this, the criminal code has criminalized such acts stating as crimes against the constitution or the state. And the political parties' registration proclamation has barred any group or body that pursues the above subversive acts as its objectives from registering as a political party. The same proclamation provides the possibility of canceling a political party up on court decision if it acts in violation of the constitution, the proclamation, and other laws of the state. While it is proper for the constitutional, democratic order to defend itself, the system doesn't

prepare a guaranty so that such militant democracy measure will not turn in to anti democrat once. Moreover, the political party will have a procedural protection less than the protection provided in the ordinary criminal proceeding if it is charged with a crime of terrorism.

In the absence of values out of the political process in the constitution, the ruling party raises the idea of militant democracy stating the Ethiopian opposition would have been expelled from the market place of politics had they been in Europe such as Germany. Such position on the side of the ruling party was reflected in different times. One was in the after math of 2005 election when the former HPR speaker ''Dawit Yohans'' said ''CUD'' would not have been allowed to take power in Europe even had it won the election. And Prime Minister ''Meles'', while making an election campaign in 2010 in Tigrigna program in the form of question and answer serious reflected MEDREK would not have been allowed to participate for it collects former ''Dergists''; and he said they are allowed to participate on the reason his party should not violate its principle of democracy. And the EPRDF campaign on the ground in Tigray against ''Medrek'' was based on ''Dergism'' saying the former senior TPLF/ EPRDF leaders(the Siye-Gebru group split from the party in2001) "come with the 'Dergs' to return the history of atrocities; and ''to show them the way for that purpose". This was the core election propaganda opened against the opposition in Tigray in the 2010 election. And the prime Minister bitterly reflected similar thing affiliating the Ethiopian opposition parties with the Nazis for they don't accept the 'pillars of the constitution'.

In Germany, the law provides a guarantee both for democratic order and the political parties. As a defense to the rise of the totalitarian movement it has introduced militant democracy; and in order to protect the democratic order itself from the weapon of militant democracy, it has provided institutional guarantee with extra ordinary procedure in order to expel an individual or apolitical party from the market place of politics; the protections have constitutional guarantee.

But we don't have such legal frame work in our case. It is in the absence of substantive militant democracy and without appropriate procedural protection against abuse with

regard to the procedural militancy that the ruling party during the election, and the Government (when Prime Minster Meles makes a speech to the parliament) warning the opposition with militant democracy.

The above ruling party political rhetoric together with the question of political space in the country has a bad repercussion upon the opposition. Though they are not dissolved by law, they could be expelled from the market for the public fear of the rhetoric. If they are died without being a threat to the constitutional democratic order because of "false propaganda", it will be bad for the parties, for the society, and for the constitutional and democratic order itself. If they are really a threat to the conditional order, they should have been dissolved by law before an independent competent organ with adequate procedural protections.

Having said this as to the points that reflect the unrestrained aspect of reason of state, with regard to state of emergency and limitation of rights measure mode in the Ethiopian constitutional system, there is constitutional Power lacuna which needs legitimatization to prevent constitutional crisis. The constitution does not provide a provision as to the question whose power is to take the necessary measure in case a state of emergency crisis happened at a time the parliament is dissolved, or the establishment of government becomes impossible. The paper will quest for an appropriate institution that fills this constitutional power lacuna.

The raised questions of law together with the above practical scenarios enable me to study the extent of reason of state in the Ethiopian constitutional order.

The above problems leads the main research question of the paper to be whether the extent of reason of state in the Ethiopian constitutional setup is regulated wisely friendly to the survival of the constitutional democratic order, and securing the freedom of its citizens.

In order to address the main question a number of subsequent questions need to be addressed. The following are among others.

i) What is the extent of reason of state the FDRE state modern is allowed to have? How can we reconcile security and freedom?

ii) What is the appropriate organ to take the necessary measure in case an emergency situation arises when the parliament is dissolved or it becomes impossible to establish a Government?

iii) What will be the fate of Human Rights especially those of the derogable ones during emergency? How can we control the abuse of human rights during emergency

iv) What type of militancy is adopted in the Ethiopian democratic order? Does the system incorporate an institutional and procedural safeguard for the measure will not be abused?

v) Is not it appropriate for the Ethiopian constitutional system to incorporate a limitation clause for the limitation measures to be taken

1.3. Objective of the Study

General objective: The general objective of the study is to determine the proper and legitimate scope of 'reason of state' in the Ethiopian constitutional setup.

Specific objective: And the paper will have the following specific objectives to achieve the above general objective:

- Exploring the extent of reason of state in the FDRE state.
- To come up with an appropriate organ to take a necessary measure to respond the crisis in case the emergency crisis occurred while the parliament is dissolved.
- Determining the existence of militant democracy in the Ethiopian constitutional system, identifying the gaps towards abuse, and coming up with solutions.

1.4. Significance of the Study

The study has significance in creating awareness on the political actors in the country so that they will contribute for the survival of the constitutional order. To be specific, it will have the following advantages:

- It enables the political forces and policy framers in the country to be armed with the knowledge as to the proper and legitimate extent of reason of state so that they will struggle towards its achievement.
- It will come up with suggestions which help for our constitutional order to survive and our democracy to be stable and long standing.
- It will serve as a bench mark for further research up on the area.

1.5.Scope of the Study

The paper will cover the measures to be taken by the states to save its life, and the limitations of the measures on the ground of human rights protection as 'reason of state' discourse. And it will determine the 'is' and 'ought to' extent of reason of sate in the current federal democratic republic of Ethiopian constitutional order. Though reason of state has both internal and external aspect, the thesis is limited in studying internal constitutional reason of state with regard to adjustment of power and rights. To this end, the paper will cover state of emergency, limitation of rights in general and militant democracy in particular as modes of constitutional reason of state analyzing how they are formulated in the Ethiopian constitutional system.

1.6.Methodology

The research is a doctrinal research type interested with the discovery and development of a well balanced reason of state that will be remained in a constitutional paradigm investigating the extent and the modes of the same in the Ethiopian constitutional set up. To this end, the study is to be conducted due regard to qualitative research methodology. A qualitative analysis of relevant theoretical concepts, international standards, legislations and constitutions of some modern states will be made. In doing this, both primary and secondary data will be employed as a research process to study the various issues involved in the paper. While the secondary data will be collected from text books journals, scholarly articles and bar reviews, consultation of legislations, constitutions, and international instruments and documents will be used as a primary data. As part of the methodology, the writer's personal observation will also be used to substantiate the issues analyzed through the primary and secondary data.

1.7. Organization of the Study

The paper will be organized in to five chapters .The first chapter is an introductory part that will deal with the points as to why and how the research is to be conducted. The Second chapter will expound the notion and the underpinning philosophical foundation of constitutional reason of state. The third chapter will explore the modes and extent of reason of state that will remain in a constitutional paradigm based on experiences from international and national perspectives. The fourth chapter will analyse the modes and extent of reason of state in the Ethiopian Constitutional system. The fifth and the last chapter of the paper will be the conclusion and recommendation part.

CHAPTER TWO: The Notion and Philosophical Background of Constitutional Reason of State; Conceptual Framework

2.1. The Notion of Constitutional Reason of State: an Overview

To begin with doctrine of reason of state, leaving aside the form of government, it refers to the taste of identifying the legitimate extent, and manner of exercising political power in order to ensure the security and survival of the state in face of threat. As the threat may either come from internal subversives or external aggression, the idea of reason of state has also two aspects, internal and external reason of state, in which the former is the concern of this paper.

As the significance of political power and keeping the security of the state is an established concept, it will be a mere waste of time to deal with such old debate. What is vital in the existing modern age is the extent, and manner of exercising the political power, which is at the heart of reason of state, to maintain the security and survival of the state during threat. This is a critical question which needs a critical response because of the existence of two contradicting virtues, important for the betterment of the society, at the time of exercising the political power. There is a natural tension between maintaining a stable political power, and freedom-security, and freedom- in which both are essential values for the society.

As a result of the problem to relax the above two virtues, the idea of reason of state is understood as a problem. The doctrine of reason of state allows the state to take appropriate measures to maintain, or ensure a stable political order, and the task's being of a problem becomes clear when one tries to determine the scale of appropriate measure the very aspect in terms of which reason of state is defined and rationalized. In relation to this, Friedrich has stated: ''reason of state is merely a particular form to the general proposition that means must be appropriate to the end, must, in other words, rational in

regard to the end, and that those means are the best which are most rational in the sense of being most likely to succeed.''[6]

The question, yet, is determining the end and the means to achieve the same. Close look to the ultimate purpose of state in a sense of modern constitutional state relaxes the tension between security, and freedom, and the issue of determining a means and an end in the quest of a rational constitutional reason of state. To this end, though the emphasis given varies depending on the historical situation during the life of the advocates, most, if not all, theories of law, and state who are the genesis of a constitutional state have recognized both security, and freedom, without saying the one is merely a means to the other, as ultimate purposes of state.[7] Both security, and freedom are the ultimate ends of a modern constitutional state in which the measure to achieve one of them could not freely destroy the other unless a rational compromise is made for the betterment of the society. And Neumann in his work introduction to the sprite of the law clearly expresses as reason of modern state- constitutional state- urges the reconciliation of freedom and political power. To state his terms in verbatim:

> *"The problem of political philosophy, and its dilemma, is the reconciliation of freedom and coercion. With the emergence of a money economy we encounter the modern state as the institution which claims the monopoly of coercive power in order to provide a secure basis up on which trade and commerce may flourish and the citizens may enjoy the benefit of their labor. But by creating this institution, by acknowledging its sovereign power, the citizen created an instrument that could and frequently deprive him of protection and of the boon of his work. Consequently, while justifying the*

[6] . Friedrich, supra note 2, pp4-5.

[7]. Franz Neumann affirmed the need to made a rational compromise between freedom, and security as an ultimate end of constitutional state saying "there is no modern theory of law, and state which do not accept both force and law even if the emphasis accorded to each of these component has varied in accordance with the historical situation.", The Democratic and the Authoritarian State, the free press of Glencoe, 1964, P.23.

sovereign power of the state, he sought at the same time to justify limit up on the coercive power. The history of modern political though since Machiavelli is the history of this attempt to justify might and right, Law and power. There is no political theory which doesn't do both things" [8] This Neumann's assertion is at the heart of constitutional reason of state.

Of course, every form of state has its own reason consisting of maintaining its form or its basic institutions intact."[9] However, reason of state and determining its extent is not as such an issue, not understood as a problem in unconstitutional states. It will not even be meaningful to worry about limiting it since there is no substantive and institutional guarantee for its observance.

Unlike that of unconstitutional state, a constitutional state has specific and clear provisions, in its constitution that limits the arbitrary action of the government, guarantees the rights of the governed, and defines the operation of the sovereign power[10]. As it is difficult to master state of necessity that threats the public order by law, it is impossible, albeit the difficulty, and against the essence of the system, to make the state of necessity completely prevail over the law in a constitutional state that guarantees rule of law, human right and democracy for its citizens there by limit an arbitrary power of the government. A constitutional state is urged to balance the anxious worry of security and survival of the constitutional order on the one hand, and keeping the very fabric of constitutionalism which aims at guarantying the liberty of the citizens on the other hand. On top of this, the possibility that enemies of democracy will destroy the democratic, constitutional order using the right to democracy as a Trojan horse makes the threat to the order immense in a constitutional state.

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[8]. Montesquieu, Introduction to the Sprite of the Laws as cited in Neumann, The democratic and the authoritarian state, ibid, P. 182.
[9]. Friedrich, Supra note 2, P 36.
[10].Strong, supra note 1, P11-12.

A constitutional state could escape the above worries and difficulties by adopting a balanced reason of state. On the one hand, it could not say state of necessity completely prevails over the law - and there by absolute reason of state. On the other hand, it could not restrain the state not to take a measure which is necessary for its survival. It needs to adopt a rational solution in constitutional terms that ensures the survival of the constitutional order. There will not be security and survival of constitutional order without taking risks form the liberty realm. Not with standing that, there should be clear, and adequate provisions for the constitutionally guaranteed rational solution- reconciliation of security and freedom- balanced reason of state so that the sovereign will not abuse it, and the risk to be a calculated risk .And the constitutional state need to have laws that establish permanent institutions with recognized powers and functions consisting of principles according to which the powers of the governor and the rights of the governed, and the relationship between the two are adjusted[11]. Hence, a constitutional state clearly marks the principles, and institutions according to which the powers of the government, and the rights of the governed, and the relationship between the two are adjusted in addition to its specific and clear body of laws that limits the arbitrary action of the government, guarantee the rights of the governed, and define the operation of the sovereign power. This helps so that reason of state will not be abused.

In conclusion, constitutional reason of state is a doctrine which allows the state to take a measure to save its life without freeing itself from the obligation to respect the rights and freedoms guaranteed in the constitution. As to its mode of exercise, it could be exercised through various discourses such as state of emergency and militant democracy which is a sort of limitation of rights. Such modes of constitutional reason of state will be dealt separately in the next chapter.

2.2. Philosophical Foundation of Constitutional Reason of State

The doctrine of constitutional reason of state which allows the constitutional order to defend itself from enemies is related with what was considered by many as axiomatic that human beings had to defend themselves, by law of nature, in its broad and formal

[11] .Ibid, p11.

sense. The broad, and formal statement of self defence based on the law of nature did not, however, deliminate the scope of the permissible.[12]

Another idea, associated with the constitutional reason of state was the Christian tradition developed by the times of St. Augustine during the Roman Empire which preached just war in defense of the faith, and the communities which live by the faith.[13]This was in contrast to the prevailing thought in the Christian tradition which preaches to the effect that it is better to endure than to fight back when faced with an aggressor, more particularly with an oppressive government.[14]

The Roman Catholic Church, with its fathers such as St. Augustine had developed the "reason of church" tradition in defense of its life, security and survival when it was threatened by the rising of heretical movements and theological controversies of the time. Using the opportunity that the faith had become fully enthroned as the official religion of the Roman Empire, the defensive assertiveness of the church had become transformed in to recognition that the church may ask the state authorities to draw the sword not only in the defense the faith, but also with the purpose of spreading it.[15] It is an indication that such, and else similar measures are subject to abuse if we leave the scope of the permissible open, and unregulated. In addition to the possibility of abuse, it also raises an issue whether it is a problem at all. Though it is not clear they have raised it in away to discern the "reason of church" as a problem, there was objections felt by many Christians of the time against the measure. This as it might be, the " reason of church" doctrine of the Roman Catholic Church raise certain issues which helps to consider the discourse whether it is a problem. Modern constitutional and political thinkers who makes the ''reason of church'' tradition as point of remark for the study of reason of state consider there is problem of reason of church if it is believed the organization (the church) is essential for the survival of the moral value (Christianity)- there can be no Christianity without a christen church-, and is believed that the survival

[12] .Friedrich,supra note2,p3.
[13]. Friedrich has termed such church's measure and tradition ''reason of church." supra note 2, p.6.
[14]. This is clear from the biblical passages of Romans X III, Mathew V, and from the actual conducts of many saints and martyrs.
[15].Friedrich,supranote2,p4.

of the church is threatened in the form of certain movements. Of course, the reason of church will be a problem provided that the movements such as heretical movements are rights, or not for bidden once, or provided that the faith itself demands passioncy in such occasions. And the above ‘‘reason of church” doctrine of the Christian tradition which is a problem with the stated assumptions became a bench mark for the study of problems of reason of state in general, and constitutional reason of state in particular in the modern times.[16]

And many modern constitutional and political thinkers have dealt with the problem of reason of state answering it in a number of ways. Though they have not solved the problem which is very perplexing especially for the constitutionalists, they have contributed various essential ideas that served as a foundation for the various modes of approaching the problem of constitutional reason of states being exercised in different states today.

Giovanni Botero is the one who is credited with inventing, and popularizing the term problem of reason of state, however, he is not a constitutionalist.[17] For Botero, reason of state is the doctrine by which the conducts as would rationally be required for the survival and security of the sate are fitted to the value system of Christian morals.[18] Giving due respect to Botero for his inventing, and popularizing the term, we will deal with those constitutionalists who have tried to address the problem of constitutional reason of state.

2.2.1 The Machiavellian Strand of Thought

The philosophical thoughts of Machiavelli (1469-1527) and others who followed his footsteps and rectified some of his failures, due to his lack of secure grasp of the principles of constitutionalism, to certain extent such as James Harrington (1611-1677), Baruch Spinoza (1632-1677), and Montesquieu (1689-1755) will be discussed here subtitled as the Machiavellian strand of thought on constitutional reason of state. All of

[16].Ibid.
[17] .Della Ragion distato(1559)and in Latin De Ratione Status(1666)passim as cited in Friedrich,ibid,p24.
[18] .Friedrich,supra note2,p24.

the stated thinkers have dealt with the problem in a secular reasoning, and understanding.

We perceive many of the thinkers on constitutional reason of state freely acknowledge their indebtedness to Machiavelli if we glance once more at the historical evolution of the idea. Friedrich Meinech who has contributed one of the most important contributions to the history of political ideals in his study of reason of state started with a chapter on Machiavelli and asserted that Machiavelli was the first thinker who "thought thoroughly'' the nature, and essence of reason of state despite the fact that he never used the term.[19] We will see the nature, and essence of reason of state understood by Machiavelli emphasizing on his thought which links him to the constitutional theorists.

For Machiavelli, state is the supreme and all inclusive good, and no genuine good can be found outside the state. And to the measure taken which is necessary for the building, and maintaining of the state needs no justification for him.[20] He advises the ruler take the measure which is necessary regardless of it is just or not. To quote his statement; " the ruler must prepare to vary his conduct as the winds of fortune and changing circumstances constrain him, and not deviate from right conduct, if possible, but be capable of entering up on the path of wrong doing when this becomes necessary."[21]

As a result, it might be said the problem of reason of state doesn't exist for Machiavelli since the necessity of acting in accordance with the state's requirements needs no justification for him. But since Machiavelli places the state as the highest virtue in the believe that it is a source of all virtues inclining himself to the Roman republic tradition, he is bound to find himself confronted with a conflict between the type of virtue which the Romans, and more especially the Stoics were stressing, and the survival posit.[22]The following quote from his work on the discourse (chapter10) in commenting Caesar

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[19] .Ibid,p15.

[20]. Machiavelli at the end of chapter 18 of the prince states as the means will always be judged to be honorable and be praised by every one provided the ruler strives to concquer and to preserve the state advising "so let a prince set about the task of conquering and maintaining his state; his methods will always be judged honerable and will be universally praised", Niccolao Machiavelli, The prince, (translated with an introduction by george bull), richard clay Ltd., 1981, p.101.

[21] .Ibid.

[22].Fredrich, supra note2, p.26.

indicates as he recognized moral virtues such as law and liberty and attributed survival values to the state and the prince and there by faced with the problem of reason of states:

> *Nor let anyone be deceived by the glory of that Caesar who has been so much celebrated by writes; for those who praised him were corrupted by his fortune, and frightened by the long duration of the empire that was maintained under his name, and which did not permit writers speak of him with freedom. And if any one wishes to known what would have been said of him if writers, had been free to speak their minds, let them read what catilined said of him. Caesar is as much more to be condemned, as he who commits an evil deed is more guilty than he who merely has the evil intention… let him also note how much more praise those emperor merited who, after Rome became an empire conformed to the laws like good princes, than those who took the opposite course.*

In such a way, Machiavelli clearly demands, and recognizes the need for the adjustment of might and law, security and freedom. That is why he is categorized in the constitutionalists taken as a fountainhead of the study of constitutional reason of state. He notes the recognition and protection of moral virtues is also vital for the survival of the state, and the prince himself. In relation to this, he says the emperor who conform to good princess are seen secured amidst their people living in security, with prevailed peace, and justice, the authority of the senate respected, the magistrates honored, everywhere with tranquillity, and well being ; and those emperors did not need legions to defend them, ‘‘because they were protected by their own good conduct of the good will of the people and the love of the senate” and those who took the opposite course will behold all animosity, all noble ambition extinct in which even all the armies in the world could not protect them from the enemies their bad conduct and evil lives had raised up against them.[23]

Accordingly, the moral virtues such as freedom are to be enjoyed with the provision of good laws are also higher values and need to be achieved as far as they do not interfere with the works of the common wealth. For example, if one possesses a corrupt state, and

[23] .Ibid,p27.

if it is necessary to abolish the principality for its proper organization, his failure to give good laws for the sake of preserving the sovereignty may be entitled to some excuse.[24] The measure which suppresses the freedom under the law will be justified provided that it is expedient to preserve the state. However, Machiavelli does not allow any excuse for the one who failed to provide good law if he could have been able to organize or maintain the state, and yet preserve the sovereignty without violating the law, and suppressing freedom. By this, he clearly appreciates and recognizes the problem of constitutional reason of sate. He is highly Concerned so that reason of sate will not be abused extending his sharp criticisms to the abuse of the institution of dictator ship of the Roman Empire especially that of Caesar.

The classical philosophers, albeit their profound contribution of too many ideals reflected in modern constitutional sates, they did not appreciate, and made depth thought on the problem of reason of state. One could observe, a certain attempt, however, on the works of Cicero (106-43 BC) in his series book called republic. Analyzing the reasons attributed for the failure of the great roman republic of his time, he had sought the establishment of dictatorship as a remedy.[25]

Cicero with his idea of the function of government in terms of legal right formulated what end the state would serve in light of the "happy life for citizens" and the solution for challenges that could disrupt such attainment. He proposes for the establishment of dictatorship in case of crisis that disrupts the state not serve its end stating as ''there is no appeal as an exception''[26] justifying the state could take whatever measure it deems proper without legal liability. It is in line with the established classical doctrine of "might makes right" which is considered by many writers as a cause of their defeat.

As a result there had been a provision for the establishment of a temporary dictatorship in times of crisis in the roman republic. And this was often resorted in order to cover the despotic act of some triumphant military commanders like marius or sulla when civil

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[24] . Nicholas Machiavelli, The discourse, Penguin books, 1983, p.283.
[25].Bruce haddock, Western political thought: historical introduction from the origins to Rousseau, oxford university press, 1947, PP. 90-91.
[26] .Ibid,pp.95-97.

war rife in Italy during the last country B.C.[27] And Julius Caesar crushed pompey in 48 BC, the senate, recognizing its own impotence, made him dictator for life, and the imperium in fact, if not, in name was born.[28] Finally, what was at the time of change from republicanism to despotism which was an emperor sovereign power in fact came at last to be regarded as an emperor sovereign power- by Right.[29] The words of Justinian that what pleases the princes had the force of law-was the truth of the day. And certain writers have a blame that the Roman constitutional dictatorship had facilitated, in large part, to lead Rome in to despotism.

In spite of the fact that certain writers have blamed the Romans who first introduced the practice of dictatorship as being calculated in time to lead despotism in Rome, and his sharp criticism to the abuse of the recognition to dictatorship by the Roman emperor, Machiavelli had nothing to propose than such constitutional dictatorship for the security and survival of a constitutional order. He proposed the constitutional dictatorship as a mode of approaching the problem of constitutional reason of state rejecting those blamed it lead Rome to despotism saying as the authority of the dictatorship has always proved beneficial to Rome, and never injurious in his work of the discourses I, 34 and 35. What really caused the trouble in Rome, according to Machiavelli, was the authority citizen usurped to perpetuate themselves in the government, and the fact that the attachment to the constitutional order had became so weak as to make such usurpation possible.[30] Strong in his work on modern political constitution stated an argument similar to Machiavelli for the cause of roman despotism in the following manner: "national feeling was entirely absent in the Roman Empire. The subject people knew nothing of the rights enjoyed by the people of the roman republic under a constitution which was always that of a city, and this made the growth of autocracy all the easier".

Machiavelli forwarded several reasons to substantiate his argument that the Roman constitutional dictatorship had benefited the republic whenever the dictator was

[27]. strong, supra note1, P 20.

[28]. Ibid, pp.20-21.

[29]. Ibid, p.22.

[30] .Ibid,p28.

appointed according to ‘‘public law’’- whenever the citizen authority was not usurped, and had a strong attachment to the constitutional order: first, the constitutional dictator was appointed for a limited term only; Second, the power of the dictator was restricted to removing a particular emergency; Third, the dictator could not alter the constitutional order itself, abolish existing institutions or create new ones; Fourth, the appointment of the dictator was precisely circumscribed by the constitution itself.[31]He Claims the institution of dictatorship was among those essential to Rome’s greatness asserting without it Rome would with difficulty have escaped extra ordinary emergencies; and it was beneficial when the above stated conditions were fulfilled, and as long as, “the Roman people were not yet corrupted.” In addition to the stated conditions, Machiavelli suggested the emergency powers of the venetian council of ten, as parallel, mentioning the slowness with which regular constitutional arrangement work.[32]

With all his depth thought above, we get Machiavelli clearly aware of the problem of constitutional reason of state advocating constitutional dictatorship, with the content of the Roman institution of dictator ship, as a solution.

And a republic needs to have some sort of such a system so as to maintain itself when it face extra emergent situation. If a republic lacks some such system, it will be confronted with either to perish itself, or disregard the constitutional order in which both are not advisable in the possibility to adopt a solution which saves the life of both virtues. Machiavelli dealing with importance of not re coursing to extra constitutional measure to approach with the problem of constitutional reason of sate show how those dictators appointed for a long period, and with undefined power were able to convert in-to tyrant asserting those dictators clearly confined with to deal with a particular situation in a limited period, and under the supervision of the established constitutional authorities could not do that.[33] However, he did not advance the solution for survival of the constitutional order, aware of it well, beyond praising the institution of the Roman dictatorship. Albeit his criticism for the abuse of institution of dictatorship by the Roman

[31]. Fredrich, supra note 2,pp28-29.
[32] .Ibid,p29.
[33]. Ibid, p.29.

rulers, and making the people" not being of corrupted as a condition for the success of the institution in preserving the constitutional order, he did not elaborate an institutional or behavioural modes as a solution for this problem.[34]

Whatever his faults and his astigmatism, he is the one faced with laudable rigor the problem of security, and survival touching up on the problem of an immanent conflict involved in the security and survival requirement of constitutional government. And many writers on constitutional reason of state have acknowledged their indebtedness to him.

We will see other thinkers found in the same strand that under took to develop the Machiavellian heritage in the field following his footsteps: Harrington, Spinoza and Montesquieu. Just like that of Machiavelli, Harrington considered, and makes the political requirements of the state as primary and predominant from other virtues in the belief that the building of a common wealth is the highest achievement of man.[35] In his book 'Ocenea', James Harrington developed the idea of constitutional dictatorship to deal with the security, and survival of the constitutional order. He clearly agrees with that of Machiavelli's allowing of even immoral action to be taken whenever the constitutional order is at issue provide that the immoral action is necessary for the survival of the constitutional order, and with that of Thomas Aquinas's principle which says '' necessity is not subject to law''.

Though Harrington is optimistic about reason of state in democracy for it prevents concentration of power there by avoidance of an abuse of constitutional dictatorship, he believes it will play such role provided it is well arranged.[36] For this purpose, he proposes the empowerment of the regular legislative bodies to set up a council to deal with threats to security and survival of the constitutional order-dictatorial power. The established council can do all that is necessary to defend the constitutional order including making of laws subject to revocation when the regular legislature demands it,

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[34]. Rudolf von Albertini's das florentinische staatsbe wusstseinim ubergang vonder republic zum prinzipat(1955) as cited in friedrich,constitutional reason of state, supra note 2,p32.
[35]. Fredrich, supra note 2,p39.
[36] Ibid,p36.

limited as to time and persons for which it is competent, and it must not subvert the established order.[37] He says he decided the empowerment of the given power to save the life of the constitutional order to a council taking a lesson from the abuse made of individual dictatorship in last year of the Roman republic.

Though he doesn't solve the problem sufficiently, Harrington is aware of the problem of security and survival of a constitutional order, and tried to propose a constitutional reason of state in a way that would not corrupt the order itself. The most important contribution for the solution to the problem, by Harrington, is the need for institutional safeguard he provided for the exercise of emergency power. Yet, he generalized the institution of security council- the dictatorian-with discretionary power of undefined scope.

Baruch Spinoza is another thinker who developed the Machiavellian thought of constitutional reason of state. As Harrington has contributed the need of an institutional safe guard to solve the problem of survival of the constitutional order, Spinoza develops the important distinction between subversive acts and opinions insisting on how allowing the latter is essential for the survival, and security of the political order.[38] As the requirement of the "commonwealth" is overriding for him, Spinoza doesn't tolerate subversive acts that have disastrous result upon the security and survival of the state. He stresses upon the acts someone takes than his opinions to limit liberty. With regard to opinion, he advises for the government should go easy as much as possible though it could be subversive. The government should tolerate even seditious opinion as far as it doesn't disturb the public peace.[39] In advising the government to tolerate subversive opinion as distinguished from subversive acts taking into account the level of the danger, Spinoza provides:

> *Supposing a man shows that a law is repugnant to sound reason and should therefore be repealed; if he submits his opinion to the judgment of the authorities…and meanwhile acts in accordance with that law, he has deserved*

[37]. Ibid, p.36.
[38] .Ibid,p53.
[39] .Ibid.p46.

well of the state, and has behaved as a good citizen should; but if he accuses the authorities of injustice, and stirs up the people against them, or if he seditiously strive to abrogate the law without their consent, he is a mere agitator and rebel[40].Such Spinoza's position in distinguishing subversive acts and opinions seems to influence the current understanding of freedom of thought and expression of opinion that allows a citizen or a group of citizen such as political parties to think and express that an existing Law is harmful or, the constitution of the state needs an amendment in the belief that it is misguided etc without the advocacy of Law breaking.

The purpose of government, for Spinoza, is to enable human beings develop their minds and bodies, not to change men from rational beings into puppets or beasts. Arguing free thought should be granted because it is a virtue, and free speech because it helps to develop that virtue, he asserts the maintenance of such freedom enhance the security of the state. He emphatically states the maintenance of freedom of thought, and speech, and freedom in general as a true constitutional reason of state. That "the aim of government is liberty''[41] is Spinoza's quoted statement.

Accordingly, while freedom of thought and speech enhance security of the state, going to the contrary will result public disorder. Yet he condemns subversive speeches, and acts that disturb the public peace and that are as against the constitutional order.

Another constitutional thinker in the same strand of the above thinkers is Montesquieu. Though he aware the problem of security and survival of the constitutional order, Montesquieu was fairly pessimistic as to the remedy.[42] He was profoundly troubled by the potential abuse of any institutional safeguard based on his strong believe that men are inclined to abuse the power at their disposal.[43]

In spite of that, Montesquieu did not weary himself from forwarding possible solutions. One possible solution to the problem forwarded by Montesquieu is having an effective

[40]. Ibid,p46.
[41] .Ibid,p46.
[42] .Ibid,p54.
[43] .Ibid,p53.

amendment power so that the constitutional order could be adapted to changing environment.[44] He proposes the amendment power as a solution for he thought that security problems such as an emergency situation could arise when state and its authority fails to understand and defies to reflect the spirit of the people. Montesquieu understands politics as a science that relates authority to the whole social fabric ,and the sprit or character existed in every people in which their laws and institutions must reveal.[45]And he thought to understand the society, to show the influence of underling conditions such as that of climatic, geographic and economic, the customs and traditions, and the modes of thought and the standards of life that prevail among the people so that the Laws and institutions of the state be revealed as a mode of expression of the whole complex life of the people.[46] And when there is a changing environment with the sprite or character of the people, the laws and institutions of the state need to be amended in a way to reflect the changing environment. This proposed solution is not, however, advisable for different reasons. Firstly, the security problem may occur, and occurs for practical reasons, though the constitutional order does not defy from the sprite or the character of the people. Secondly, granting the amendment power at the time of crisis amounts to giving a free hand for the government to abuse its power.

Yet, Montesquieu did not think the amendment power is a true remedy for the internal problem of constitutional reason of state unless the republic is organized in a federal system. This emanates from his belief that "it is natural to a republic to have only a small territory; otherwise it cannot long subsist."[47] By structuring the constitutional order in a federal arrangement, Montesquieu hopes the need of any sort of special emergency power, which is vulnerable to abuse, will be avoided. This Montesquieu proposed solution doesn't help in solving the dilemma in which the federal arrangement doesn't rectify it.

2.2.2 The Moralists Strand of Thought

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[44]. Ibid, p.53.

[45].R.M.MacIVER, The Modern State, Oxford University Press, 2006, p437.

[46]. Ibid.

[47]. Montesquieu, as cited in Franz Neumann, The democratic and the authoritarian state, Supra note 7, P 126.

The writes which lay in the moralist strand of thought here are those liberal thinkers who tried to touch up on the constitutional reason of state based on natural law virtues. The prominent among them include John Milton, john lock and**.** They have undergoes significant evolution in approaching the constitutional reason of state in a different way from the strand of thought discussed above. Yet, the problem will not be solved sufficiently here again as it is not solved in the Machiavellian strand.

In cognizant of the significant role of revolution, and hence of dynamic change in the political order, the above all moralist thinkers, believe as reason of state must be expressive of a mode or modes of progressive change.[48] They all are liberty friendly imposing a duty up on the government to preserve it; and the society will use the liberty for a progressive change. And if the government doesn't suit to their change need, the people have the right of revolution as they have it in terms of resistant to a tyrant according to John Milton. He claims that the people have a right to fashion their Government as they see fit before seeking a basic change; they do not have to await the ruler turning tyrant.[49] However, this Milton's claim could not be a distinct reason of state in a constitutional thought. Because his suggested claim as a reason of state raises question as to the belief of the Revolutionaries could no longer be tenable or in fact held, and as the state may lead to anarchy.[50]

Locke, the thinker in the same strand, tries to address the questions raised up on Milton's claim. The right of revolution, to lock, is altering the basic law and the form of government to suit the people, and is as such accepted.[51] He balances the right of revolution" with the "executive prerogative" as a safeguard for it might easily mean anarchy. Locke defines the prerogative power as ''the power to act according to discretion for the public good, without the preservation of the law and sometimes even against it.''[52] In contradiction with what he said in defining the prerogative power as a

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[48]. Friedrich, supra note 2, p.90.
[49] .Ibid,p82.
[50].Ibid,pp81-82.
[51]. Ibid, p.82.
[52] .The English Revolution and Locke's Two Treaties on Government,Cambridge Historical journal,xII(1956),pp.40-55,as cited in Friedrich,Ibid,p83.

power to act contrary to the law, he proposes the prerogative to be determined by law so as not to be abused and employed contrary to the public good. This clear contradiction created by Locke seems his explanation as encountered with difficulty to solve the problem.

All in all, reason of state for Milton and Locke is an expressive of a mode or modes of progressive change. This progressive change to Locke is the ultimate legitimating of the political order by any people, composed of reasonable men. They leave the task of choosing the necessary means to the effective and representative leader. The means chosen by the leader is the reason of state in which it will be rational because of the "inherent moral rationality of the men"[53] employing; that is why their thought termed as the moralists strand of thought.

The above all thinkers, in both strands, did not have a definite answers to the problem. However, all of the thinkers as discussed above, have contributed an important and interesting contribution to its solution. The different modes of approaching the problem being exercised in the current modern age are developed out of the philosophical foundation discussed above. We will see state of emergency, limitation of rights in general and militant democracy in particular as modes of exercising constitutional reason of state here in below.

[53] .Friedrich,supra note 2,p90.

CHAPTER THREE: Modes of Constitutional reason of State; experiences from international and national perspectives

Introduction

The Doctrine of constitutional reason of state as discussed in the previous chapter is about an adjustment of public order, and human rights in a rational manner. To this end, the constitutional system of a given state need to legitimatize modes of constitutional reason of state which grant the power to transgress or violate human right in defence of public order or national security with an adequate restraining mechanisms that provide substantial, and procedural limitations not to be exceeded together with a strong, and trust worthy institutional safeguard to maintain the limitations and control abuse.

Human rights could be restricted or violated legally through derogation means using the power to declare state of emergency during an exceptional emergency situation, and limitation measures which subject right to restriction of one sort or another at all times that apply in the daily life of states. While derogation measures intend to save the life of the state and maintain the constitutional order from the danger it face at a particular period, limitation of rights are there with a purpose of having a normal situation at all times without which all the periods may be periods of exceptional threat. Hence both measures as modes of exercising constitutional reason of state are justified for the maintenance, and survival of the constitutional order which is a foundation of public interest provided that there are restraining safeguards against its abuse. We will try to sketch on state of emergency, limitation of rights, and militant democracy as constitutive part of limitation as modes of constitutional reason of state in the following sections.

3.1 State of Emergency

As highlighted in the forgoing chapter, it seems clear that there are underpinning philosophical foundation and normative understandings for a modern constitutional state to recognize, and exercise constitutional reason of state in a way to enable it preserve the

constitutional order while striving to ensure the advancement of values of its very fabric such as rule of law, democracy, constitutionalism, and human rights norms.

The need to have some sort of power to save the state from certain subversion which endangers its life becomes an established principle. However there exists a tension between democratic values and responses to exigencies and acute crises. A constitutional, democratic state faced with exigencies and acute crises must maintain and protect fundamental rights and freedoms while the crises directly challenge the most fundamental concept of constitutional order.

This tension of "Tragic dimension" between democratic values and responses to the exigencies or emergencies arises a question to what extent violations of fundamental democratic values can be justified in the name of the survival of the democratic, constitutional order itself; if they can be justified, to what extent a democratic, constitutional government can defend the state without transforming itself in to an authoritarian regime.[54] While it needs to give a necessary power to the relevant organ on the one hand, it needs a necessary control so that the power will not be abused on the other hand.

The decline of absolute monarchs and the rise of constitutional government since the beginning of the 19th C have led to the modern form of granting emergency powers according to defined constitutional rules, and procedure as a solution to the problem of constitutional reason of state.

Constitutionally entrenched emergency power with adequate control against abuse is a species of constitutional dictatorship which had so many advocates in the philosophical foundation we have discussed. The philosophers in the Machiavellian strand of thought, including Machiavelli, himself, were advocating the institution of dictatorship terming constitutional dictatorship as a mode of exercising constitutional reason of state in the believe the conditions, and the institutions proposed to be fulfilled will restrain the dictatorian not to abuse the temporary power given to save the life of the constitutional

[54]. Vickic. Jackson and Mark Tushnet, Comparative Constitutional Law (2nd edition), foundation press, 2006, P. 868.

order. And Clinton L. Rossister who is a 20th C constitutional writer defined "constitutional dictatorship" as the enforced democratic use of autocratic power and procedures in time of national emergency making a clear distinct from dictatorship pure and simple.[55] Hence, constitutionally entrenched state of emergency power is a species of constitutional dictatorship.

State of emergency which refers to state of siege, state of exception, suspension of guarantees, suspension of right; derogations, state of alarm, state of national necessity etc is the catch word of the contemporary world beginning from the 20th century. The growing importance of fundamental human rights in international law have immense contribution in advocating a necessary and restrained power of state of emergency as a mode of constitutional reason of state.

State of emergency power as a mode of constitutional reason of state allows for the state to take a measure to save its life with a rational adjustment of the democratic values at the very heart of the constitutional state, and without abusing it towards the rulers' interest. To this end, the international human rights instrument and their respective interpretive minimum standards have provided a number of substantive and procedural principles to govern state of emergency regime.

3.1.1. Substantive and procedural principles governing state of emergency

An examination of the relevant provisions of the ICCPR, the Siracusa principles and the Paris minimum standards provide the following principles as to the characteristic of state of emergency and the circumstances under which it should be declared.

First, there should be an exceptional threat threatening the life of the nation. Art 4(1) of ICCPR Provides that" in time of public emergency which threaten the life of the nation…..the state parties to the covenant….may take measures derogating from their obligation under the covenant…" Secondly, the principle of proclamation; Art 4(1) of the ICCPR provides that the existence of a public emergency threatening the life of the

[55]. Clinton L. Rossister, Constitutional Dictatorship: Crisis Government in the Modern Democracies, Prince ton University Press, 1948,PP.15-25.

nation should first be "officially proclaimed" before the state party derogates from its obligation in the covenant.

Thirdly, the principle of proportionality, Art 4(1) of the ICCPR provides that "the state parties to the covenant may take measures derogating from their obligation…to the extent strictly required by the exigencies of the situation, in time of emergency."

Fourthly, the principle of non-discrimination; the derogation measures shall apply equally to all persons in the territory where by the state of emergency is declared without discrimination solely on the grounds of race, colour, sex, language, religion, or social origin.

Fifthly, the principle of consistency; the derogation measure by the state parties to the ICCPR shall not be inconsistent with their obligations under international law as it is provided in Art 4(1) of the covenant. It refers to the consistency of measures of derogation with the states' other international obligation.

Sixthly, the principle of non-derogability of fundamental rights; notwithstanding the state parties have the sovereign right to take derogation measures from their obligation in the covenant as per Art 4(1) of the ICCPR, there are rights which are under no circumstance to be suspended even in times of public emergencies threatening the life of the nation pursuant to Art 4(2) of the same covenant. The non derogable rights listed under Art4 (2) of the ICCPR are: The right to life, the right not to be subjected to torture or cruel, in human or degrading treatment or punishment (Art 7); the right not to be held in slavery or involuntary servitude (Art 8(1) (2); prohibition of retroactive penal laws (Art 15); the right to recognition as a person before the law (art 16), freedom of thought, conscience, religion and belief (Art 18).

However, it doesn't mean there are not additional non derogable human rights outside the list of Art 4(2) of the covenant above. Any derogation measures on the derogable rights shall be taken if and only if it is necessary and in proportion to the threat posed to the life of the nation, and not be taken just because a particular human right is not explicitly made non derogable. The ICCPR in its Art 5(2) forbids a derogation measure on the

pretext that the covenant does not recognize such right or that it recognizes them to lesser extent. In relation to this, Art 5(2) of the covenant which prohibit using of the treaty as an excuse for limiting or derogating from the human right recognized in municipal law or in other treaties. Art 5(1) of the same that prohibits the state from engaging in any activity aimed at destroying or limiting to a greater extent than is provided in the covenant.And Art 2(3) of the covenant which provides the right to effective remedy before domestic courts, or other competent body provided by the legal system of the state in case of violation of human rights should be considered as non derogable by implication. Otherwise, it will be futile for the covenant to adopt the substantive and procedural principles discussed earlier as prerequisites of derogation without making such prohibition to abuse, and the right to remedy provision non derogable. It makes very difficult, if not impossible, to control the state not to take excess measures at the pretext of constitutional reason of state-state of emergency.

And the expression public emergency which threatens the life of the nation as used in the covenant is general that could be abused and be characterized based on different grounds. It is to avoid the abuse of constitutional reason of state-state of emergency, to balance security and freedom, and to ensure rule of law during emergency that efforts are made at international level through the "Siracusa principles on the limitation and derogation provisions of the ICCPR" and the "Paris minimum standards of human right Norms in a state of emergency". For this purpose, the Siracusa principles and the Paris minimum standards have characterized emergency as: it must be actual or at least imminent as opposed to the so called state of emergency of a preventive nature; its effect must involve the whole of the population including an emergency in one part of the territory that affects the whole as well as an emergency in one part of the territory that which it could be threat to the physical integrity of the population, the political independence or the territorial integrity of the state, the existence or the basic functioning of the organization; the declaration of emergency must be a last resort to be taken only when the normal measures of public order have been exhausted and are not sufficient to deal with the situation; the declaration of state of emergency must be a temporary measure in which it must be for a well defined period, and can only be extended in accordance with the law.

The stated principles and standards which were considered by the formulating experts and participants of the study to reflect the state of international law have provided limitation for the derogative measure, during emergency. They are formulated to assure as constitutional reason of state is not absolute, and rule of law shall still prevail in a state of emergency.[56]

In order to ensure Government and other concerned bodies interpret the provisions of the covenant that allow derogations during emergencies restrictively, and the constraining substantive and procedural principles be maintained, the Siracusa Principles, and the Paris minimum standards have emphasized on the institutional and minimum procedural safeguards to be established, and respected during emergency. Accordingly, every state that assumes or exercises emergency power shall respect the following institutional and procedural safe guards.

Firstly, the constitution of every state shall define the procedure for declaring state of emergency; whenever the executive authority is competent to declare state of emergency, such official declaration shall always be subject to confirmation by the legislature, with in the shortest possible time. Notwithstanding that the declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions, it shall be subject to the prior approval of the legislative organ if extension is needed, and declared. Despite the fact that the executive will have an expanded authority, the fundamental functions of the legislature shall remain intact; it shall provide general guidelines to regulate executive discretion in respect of permissible measure of delegated legislation. In order to play such roles, the immunities of the legislature shall remain intact.

Secondly, the judiciary shall have the power to entertain cases of emergency measures. It shall have the power to decide whether or not an emergency legislation is in conformity

[56].Art64 of the Siracusa principles reads: "in a public emergency the rule of law shall still prevail. Derogation is an authorized and a limited prorogation to respond adequately to a threat to the life of the nation. The derogating state shall have the burden of justifying its actions under the law."The Siracusa Principles on the limitation and derogation provisions in the ICCPR, 1985.

with the constitution, and the particular exercise of emergency power is in conformity with the constitution and emergency legislation of the state. Ensuring the fact that there is no encroachment up on the non-derogable rights and that derogatory measures derogating from the deorogable rights are in compliance with the substantive principles such as proportionality and necessity shall lie up on the judiciary. Where existing municipal law and order are not specifically rescinded or suspended, it shall continue to regard them as being in effect. To this end, the constitution of the state shall prohibit the use of emergency powers to remove judges or to change the structure of the judiciary branch, or to restrict the independence of the judiciary. The guarantees of the independence of the judiciary and of the legal profession shall remain intact during emergency.

Thirdly, although the right to fair and public hearing in the determination of a criminal charge, and the protection against arbitrary arrest and detention may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation as they are derogable rights, there are certain species of such procedural rights fundamental to human dignity which cannot be necessary in any conceivable emergency taking into account a rational adjustment of security and freedom. And respect for the following minimum procedural right during emergency will be very essential in order to ensure enjoyment of non derogable rights, and to provide an effective remedy against their violation. All arrests and detentions and the place of detention shall be recorded, and made available to the public without delay. No person shall be detained for an indefinite period of time as he shall not be held in isolation without communication with his family, friend or lawyer for longer than a few days with an average of three to seven days. Where persons are detained without charge, the need for their continued detention shall be considered periodically by an independent review tribunal. Any person charged with a criminal offence shall be entitled to a fair trial by a competent, independent; and impartial court established by law with the procedural rights such as the right to presumption of innocence, the right to be informed of the charges promptly in detail, and in a language he understand, the right to have adequate time and facilities to prepare the defence including the right to communicate with his/her lawyer, and the right of an indigent defendant to have free legal assistance in every case where the interest of justice so

requires, the right to present at the trial, the right not to be compelled to testify against himself or to make a confession, the right to obtain the attendance and examination of defence witnesses, the right to be tried in public save where the court orders otherwise on the grounds of security with adequate safeguards to prevent abuse, and the right to appeal to a higher court. An adequate record of the proceedings shall be kept in all cases. No person shall be tried or punished again for an offence for which he has already been convicted or acquitted. Civilians shall normally be tried by the ordinary court unless it is found strictly necessary to establish military tribunals or special court to try civilians. If it is found so, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority.

For this purpose, the creation of special court or tribunal, in a state of emergency, with punitive jurisdiction for trial offences which are in substance of a political nature could not be justified on the ground of necessity as its independence and impartiality is not safe from the outset. It is contrary to rule of law since the institution of an independent and impartial judiciary is essential for the assurance of the latter, particularly in time of emergency. And if one has been a victim of unlawful arrest or detention, he shall have an enforceable right to compensation.

The various principles embodied in the Siracusa principles, and the "Paris minimum standards of human right norm in state of emergency" documents discussed above are believed to have a great significance in relaxing the tension of "tragic dimension" a constitutional, democratic state faces between the protection of human rights, and the need to maintain the constitutional order responding to emergencies.

The problem, however, is the documents are not official document of the UN, and do not have a binding nature up on state parties to the ICCPR. Irrespective of their binding nature, it is advisable for a constitutional state to formulate norms to be applied during an emergency in a manner the documents have formulated as they have made a good adjustment between freedom, and security which is expected of a rational constitutional reason of state.

The above being as it should be, state of emergency is a matter left, in its large part, for states to formulate norms of its exercise in their own laws without prejudice to certain accepted binding principles at international level. It is also impossible to exhaust all potential circumstances governments may declare state of emergency. The international law agency in its Paris conference of formulating the standards said: "It is neither desirable nor possible to stipulate in abstract what particular types of events will automatically constitute a public emergency within the meaning of the term; each case has to be judged on its own merits taking in to account the overriding concern for the continuance of a democratic society."

However, the UNCHR has tried to identify: international conflict, war, invasion, defence or security of the state or parts of the country; civil war, rebellion, insurrection, subversion or harmful activities of counter revolutionary elements; disturbances of peace, public order or safety; danger to the constitution and authorities created by it; natural or public calamity or disaster; danger to the economic life of the country or parts of it maintenance of essential supplies and services for the community as circumstances in which state of emergency could be declared in municipal law. Such attempt could not, yet, curve the difficulty of anticipating emergency situations, and the need to establish a balanced norm of emergency taking in to account to the protection of human rights, and the maintenances of public order in domestic legislation and constitution of a respective state. The unwillingness of states to submit their sovereignty or the right to take measure necessary in the public interest to international law is also a big challenge, in addition to the difficulty to have universal norm for that purpose. And it is advisable for states to formulate norms of emergency as far as practicable, when no emergency exists.

Having said this about state of emergency as a mode of constitutional reason of state from international perspective, we have also an experience of constitutional states with regard to the formulation and jurisprudence of the discourse in reflection to the sprite of the international standards.

The trend in the modern European constitutions is restraining abuse of emergency power with both legislative and judicial controls.[57] And some African constitutions have adopted exemplary judicial and legislative control mechanisms against abuse of state of emergency.

The 1996 South African constitution explains when and under what conditions a state of emergency may be declared and fundamental rights suspended; it allows the state to declare state of emergency when the life of the nation is threatened and an exceptional measures are temporarily necessary to restore peace and order. The constitution puts conditions to be fulfilled to declare state of emergency as well as during the declaration with a similar content of many international human rights instruments and standards.[58] As it is clearly provided in sec 37(1) of the Constitution of the republic, a state of emergency could be declared only in terms of an act of parliament without prejudice to the substantive and procedural safeguards provided in the former .The country need to have a pre determined state of emergency act; and it adopts state of emergency act 64 of 1997 to this end. In terms of the act, the president of the republic of South Africa may declare state of emergency in the republic or in any area in the republic by proclamation in the national government gazette.[59]The state of emergency act empowers the president to make regulations as are necessary or expedient to restore peace and order with the power

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[57]. Art 55(2) of the Spanish Constitution clearly recognizes the role of the judiciary and the legislature during emergency stating ''An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in section 17, subsection 2, and 18,subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups."And the basic law of Germany in its arts 81 and115c(2)(2)+115g formulates legislative and court controls of state of emergency, and the possibility of appeal to the European court of human rights by member states of European citizens is an additional safeguard.

[58]. Sec 37 of the south African constitution incorporates the substantive and procedural safeguards governing state of emergency including : the existence of an exceptional threat to the life of the nation; principles of necessity, proportionality, and non retroactive application of the declaration measure ;principles of publication and consistency with international obligations of the state; the right of access to legal representative ,a medical practitioner, family ,friends e.t.c of the detainees of the declared emergency, and the judicial role to review the detention as soon as possible with in a maximum of 10 days from the date of detention; and in order to prevent the detainees from disappearance, the government is obliged to publish a notice in the national government gazette of the persons detained stating their name and the place where they are detained within five days from the date of detention.

[59].See sec 1 of the Republic of South Africa State of emergency act 64/1997.

to impose penalties for the contraventions of the regulations.[60]The act protects the constitutional state of emergency clause providing as no derogation is possible from section 37. It also limits the imprisonment terms for the contravention of emergency regulations to three years; prohibits rendering of military service other than that provided in the defence act; and protects the powers of the parliament and the provincial legislatures keeping them intact during the emergency so as to play their role of controlling the executive emergency decree.[61]The 1993 Ghanaian constitution has adopted similarly effective system that combines both legislative and judicial control of emergency powers and situations.[62]

3.2. Limitation of Rights

Limitation is inherent to human rights; rights and freedoms are not absolute. They are subject to limitations on various grounds which could be generated as the right of others, and the legitimate needs of the society. Public order /and national security is one of the legitimate needs of the society. Limitation of rights as constitutional reason of state refers to the restrictions imposed upon rights, and freedoms on the grounds of public order/ Nation security-the constitutional order.

Limitation of rights need to be undertaken for reasons that are recognized as justifications for infringing rights in a democratic society based on human dignity, equality, and freedom.[63]

The mere recognition of public order or else as a ground doesn't justify the limitation. It needs to satisfy other restraining criteria provided in the constitution. To this end, a constitution has to adopt limitation clauses which limit the limitation itself.

Providing general limitation clause which sets a set of criteria to be applied for all bills of rights to assess the legitimacy of the limitation in the constitution is one way of adopting

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[60]. Ibid sec 2(1)(b).

[61].Sec 37(2) (b) of the South African Constitution provides as the national assembly has a pivotal role with regard to the extension and the termination of the declared state of emergency.

[62]. Charles manga fombad,camerron's emergency powers :a Recipe for(un)constitutional dictatorship, Journal of African law,vol48.no-1, 2004,p76.

[63].Vickic,andTushnet, Supra note54 ,p145.

limitation for a limitation measure. And having a special limitation clause which is built in to each and every rights provision so that the limitation imposed on the exercise of each right can be judged on the basis of the specific clause spelt out in each, and every provision.

The criteria of limitation consist of a number of factors which are helpful to assess the legitimacy of a limitation; they are considered as limitations for the limitation act. The factors include principles such as legality and necessity. The principle of Legality requires for every limitation to be prescribed by law in order for it to be valid. And for necessity requirement be fulfilled and stay on valid, there must be a cause that calls for the imposition of the legal limitation. Necessity is to be assessed in the context of a democratic society, which is based up on human dignity, equality, and freedom, in the interest of national security or public safety, public order, the protection of public health or morale or the protection of the rights and freedoms of others as they are embodied in the special limitation clauses of the ICCPR provisions. However, the covenant doesn't define what the terms of the grounds of limitation such as national security or public order exactly signify. Without having a limitation to interpret the limitation clauses, the rights and freedoms protected by the covenant or a constitution of a respective state will be at stake in which the constitutional reason of state could easily be abused, and used as a pretext by the state for measure, for instance, aimed at suppressing opposition or at perpetrating repressing practices against its people.

In response to the above fear of potential abuse, the "Siracusa principles on the limitation and derogation provisions of the international covenant on civil and political rights" which is the work of 31 highly esteemed experts of international law has formulated interpretive principles of the limitation clauses of the covenant. Accordingly, the limitation clauses should not be interpreted so as to jeopardize the essence of the rights concerned, all limitation clauses shall be interpreted strictly and in favour of the right concerned, all limitations shall be interpreted in the light and context of the particular right concerned, no limitation shall be applied with arbitrarily and unreasonable limitation act, not only the limitation should be necessary to the legitimate aim provided

in the covenant, the extent of the limitation should also be proportionate to that aim and every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application making the burden of justifying a limitation upon a right guaranteed under the covenant with the state. For the effectiveness of this, the principles propose adequate safeguards and effective remedies shall be provided by law against illegal and abusive imposition or application of human rights.

Moreover, the document of Siracusa principles has defined the terms of the grounds of limitations provided in the specific limitation clauses such as public order, national security, public health, morals, democratic society etc. For example, it defines public order as it refers to the constitutional order saying it may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded in which respect for human right is its part. To control abuse, the document requests state organs or agents responsible for the maintenance of the public order shall be subject to controls in the exercise of their power through the parliament, courts or other competent independent bodies.

And it clarifies as national security may be involved only when the limitation measures are taken to protect the existence of the nation, its territorial integrity or political independence against force or threat of force; it cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. It underscores national security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safe guards and effective remedies against abuse; the systematic violation of human rights undermines national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practice against its population.

As discussed above, the necessity of the limitation measure is to be assessed in the interest of the recognized legitimate purpose based on the context in a democratic society. The Siracusa principles states as the expression “in a democratic society” shall be

interpreted as imposing a further restriction on the limitation clauses it qualifies; and the state that imposes limitation is with a burden to demonstrate the limitations do not impair the democratic functioning of the society. Recognizing as there is no single model of a democratic society, a society which recognizes, respects, and protect the human right set forth in the charter of the United Nations and the universal declaration of human rights may be viewed as a democratic society under the Siracusa principles.

Though the document is not binding upon the state parties to the covenant /the ICCPR/, it is a good compromise between freedom, and constitutional order, or national security – a rational constitutional reason of state. Besides, the issues of state sovereignty and margin of appreciation to regulate public interest discourse is very challenging to urge states to make a recourse for such international framework standards. In consideration of such challenge, it is advisable for a constitutional state, especially for the newly emerged once, to formulate and legitimize such sort of interpretative principles.

Though many modern constitutions of the West including that of U.S constitution do not confine a detailed limitation clause that guide the rational adjustment of security and freedom, their stable culture of democracy with the capacity to make a reasonable weighing and balancing of the tensioned values of security and freedom plays a role of guaranty. The newly emerged constitutional states in which the culture of democracy with a potential to relax the security –freedom tension in a reasonable manner is not developed, however, need to constitutionalize a general limitation clause that embodies necessary factors, procedures and institutions to make a rational adjustment of power and rights-security and freedom when limitation measure is taken.

And the South African constitution is the best example of adopting a restrained reason of state in light of the discussed international standards and in response to the immediate history of the country which was the history of Atrocity. It provides both general limitation clause and special limitation clauses inserted in the specific provisions. The general limitation clause is a limitation for the limitative act and set out specific criteria for the restriction of the fundamental rights. Similar to the state of emergency clause, the general limitation clause helps to control the state not to abuse its power. As per sec 36(1)

of the constitution, the right in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in a democratic society based on human dignity, equality, and freedom taking in to account the relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose. The criteria that the law must be general in is application entails as it must be sufficiently clear, accessible, and precise in its form in which those affected by it can ascertain the extent of their rights and duties weighing their proportionality based on the stated factors; and it must apply equality to all, should not be arbitrary and the one that targets specific individuals or groups.[64] And the court will determine the legitimacy of the limitation in line with the stated general limitation clause. Hence, the South African constitution has adopted a reasonably restrained reason of state which could be a best experience in that regard.

3.2.1 Militant Democracy

Militant democracy is a concept first defined by the German exile political scientist in U.S. Karl Loewenstern in his work on the issue of defending the constitutional democratic order.[65] At the time Lowenstein coined the term, and defined the concept (1937), it was common for many European countries to be taken over by authoritarian movements using democratic means to disable democracy. Though the authoritarian movements of the time in Europe in general shared the 1930s' the doctrinaire construction of the issue, the root of militant democracy is mainly traced back to Germany in response to the breakdown of the Weimar republic.

Notwithstanding his work did not use the term, it was coined by Lowenstein later in 1937, Carl Schmitt was the first to propose a solution to the problem of defending the constitutional, democratic order based on his experience in the Weimar constitution.[66]

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[64]. ibid

[65]. Karl Lowenstein, Militant democracy and fundamental rights, The American political science review, vol xxxI, 3,417ff, 1937.

[66]. Carl Schmitt on his work of legalitatot und legitimitat published in 1932 associates the possibilities of defending democracy to the existence of an unbreakable constitutional core to existence of an unbreakable

Making the classical theory a root of the problem for the breakdown of the Weimar republic, and constitution, Schmitt concluded to have unbreakable Constitutional core with values which have constitutional shield against their reform as a solution to defend the democratic, constitutional order. This Schmitt's idea of impossibility to reform a certain precept of the constitution is used by later writers on the area to classify democracy between tolerant, and militant.[67]

Carl Schmitt's work did not call an action as defense; he simply proposed the "no amendment clause". It is the 1937 Lowenstein's thesis that calls for an action as a defense of the democratic, constitutional order. Lowenstein had written his work thinking the authoritarian, fascist movements of the time. Arguing democracies were in capable of defending themselves against fascist movements if they continued themselves to subscribe to 'democratic fundamentalism', legalistic blindness', and an 'exaggerated formalism of the rule of law" he call for democracies to find political and legislative answers to anti democratic forces such as banning parties and militias, and restricting the rights to assembly, free speech, and, not least, the activities of those suspected of supporting fascist movements who could be guilty by association.[68]

While that of the Carl Schmitz quest for no amendment clause is reflected in article 79.3 of the Grund gesetz, the same constitution has incorporated the Lowenstein's approach of militant democracy. And the European convention for the protection of human rights and fundamental freedoms reflect that concern in a way that justifies militant democracy

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constitutional core, impossible to reform denouncing the lack of political substance in the Weimar constitution. He made classical theory of democracy, procedural democracy model, which is utterly neutral in political aims, the root of the problem.

[67]. G. Foxy G. Nolte, "intolerant democracies," Harvard international law journal, vol.36 1995, 1ff have classified the models of democracy – procedural and substantive according to the criteria tolerant /militant using the possibility /or lack of reforming any precept of the constitution, which is Schmitt's work, as a factor for the criteria.

[68]. Lowenstein calls for an action in the form of banning antidemocratic forces, and limiting of right based on his belief that democracies could not compete fascism with no proper intellectual content which relies on a kind of emotionalism. His solution is extreme militancy, and strong republicanism calling a fire for a fire stating "fire should be fought with a fire; and that fire could only be lit by a new, disciplined or even "authoritarian democracy."

measure.[69]The term refers to a paradigm of constitutional democracy which has an appropriate means to confront those who attempt to destroy democracy by taking advantages of the many opportunities to do so, present in an open society. It is exercised mostly based on a system that limits the right of political association, and its corollary freedoms such as the freedom of speech, and assembly; any individuals, and associations who set out to undermine, or subvert the constitutional order also faces the risk of the measure to be taken by the system.

Regardless of the difference in the volume of the list of the grounds, and the degree of militancy, most constitutions of the modern world have adopted militant democracy as a constitutional defence -Constitutional reason of state. It is a long time for its need to be adopted from theoretical perspective. Many writers believe as it will be one of the best jokes of democracy that it provides its own lethal enemies with the means which it can be destroyed. In addition to the historical merit as a response to the totalitarian movements, militant democracy is being adopted to different circumstances such as to restrain social conflicts and ensure public peace and order, to secure the transition to democracy after decades under just one party /authoritarian government, to fight those who question or attack democratic values, to struggle terrorism, revolution, violence, to safeguard the polity against territorial partition tendencies, and to develop political culture.

However, the constitutional state with a militant democracy as constitutional reason of state need to adopt a procedural and institutional safeguard so that the government will not eliminate troublesome opposition parties abusing reason of state. constitutional state's self defence will remain within a constitutional paradigm only if it is capable of excluding, conceptually, and institutionally, the abuse of opportunities for restricting rights, or more realistically, at least keeping such abuses with in rational bound.[70] The acceptance today of robust conception of Rule of law, and the legitimacy of the judiciary offers the potential for the emergence of a more nuanced approach to the balance of

[69].The European convention for the protection of human rights and fundamental freedoms, 1950, art 17.

[70] .Andras Sajo, From militant democracy to the preventive state? available at http://www.cardozo law review.com/content/27-5/sajo.wedsite.pdf,vol27:5,pp2257-58(last visited on june 8,2011).

values where individual rights meet the public space replacing the historically extreme militancy and strong republicanism.

Extreme militancy unless modified towards a balanced approach will easily be turned in to anti democracy, and exacerbate volatile social cleavages. It will also preclude political compromise, and potential consensus that is vital for the integrity of the polity. To the extent tolerance in open society could destroy the constitutional, democratic order; prosecution could also destroy liberty which is at the heart of the democratic order. In relation to this**,** Lord Acton states: "at one period toleration would destroy society at another persecution is fatal to liberty.''[71] To this end, there need to formulate militant democracy with adequate guiding framework to harmonize constitutional liberties, and threat to the constitutional, democratic order. The German jurisprudence of militant democracy with its procedural fairness and institutional guarantee is the best experience in this regard.

Militant or defendant democracy in the basic law is a reaction to the Weimar republic/constitution. The Weimar democracy was neutral which was value free, and did not believe in itself; it was suicidal democracy in which the enemies of democracy/the constitution used the rights of freedom in the constitution to break it.[72]The basic law, however, is prepared to defend itself adopting militant democracy providing specific provisions to protect the free democratic order with a legal possibility to prohibit political parties, associations and societies as well as forfeiture of individual fundamental rights.[73]The federal constitutional court is entrusted to decide the forfeiture and extent of the individual fundamental rights and the question of unconstitutionality with regard to political parties.

The German formula of militant democracy have tried to strike a balance between the risk of inaction in the face of totalitarian and anti democratic threats, and the danger of

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[71]. Ibid,p2262.

[72] .Gunter During, An introduction to the Basic Law of the Federal Republic of Germany,in Ulrich Karpen's(ed) ,Essays on the basic rights and principles of the Basic Law with a translation of the Basic Law : nomosverlagsgesellschaft baden-baden,1988,pp13-16.

[73] .See art 18 of the Basic Law of Germany with regard to the forfeiture of individual fundamental rights, and art21(2) of same as the possibility of prohibition or dissolution of political parties and other assoc ions.

the instruments of militant democracy being turned against democracy itself.[74]As a defence to the rise of anti democratic movement, it has introduced militant democracy; and in order to protect the democratic order itself from the weapon of militant democracy, it has provided "extra ordinary procedure" in order to expel an individual or political party from the market place of politics.

The federal constitutional court which is entrusted with a power to expel has enacted a law with a provision saying "in proceedings to prohibit and dissolve a political party, any decision with negative consequences for the respondent requires a two thirds majority of the members of the senate of the court seized with the application."[75] The Act also urges preliminary proceedings to be held before entering into the full examination of the alleged unconstitutionality of the respondent in proceedings to ban a political party.[76]The proceedings will be continued if the court, in its preliminary proceedings, concludes that the application is admissible and sufficiently founded on the basis of the reasons put forward in the written application and in light of any written response filed by the respondent within a certain time limit.[77]

And the decision of the Federal constitutional court to enter in to the full examination of the application requires a two third majority as it is agreed that the continuation of such proceedings have a negative consequence up on the respondent.[78]The mandatory preliminary proceedings and granting of a veto power of the court's minority through the 'enhanced majority' requirement are designed to serve as a procedural safeguard against the abuse of power to exclude political rivals from the political process.[79]Such strict standard of procedural fairness applied in proceedings to outlaw political parties is due to the special constitutional status they are granted in the Basic Law.[80]

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[74].Thilorens Mann, Supra note 5, pp 1122-1133.
[75]. Ibid
[76]. See sec 45 of the Federal constitutional court act of the republic of Germany, available at http://www.goethe.de/in/dpresse/e/gesetze-e-f.html(last visited on June 8,2011).
[77].Ibid.
[78].Thilorens Mann, Supra note 5, p1123.
[79]. Ibid,pp1122-1123.
.[80].Ibid p1125.

CHAPTER FOUR: The extent and modes of reason of state in the Ethiopian constitutional system

Introduction

Ethiopia has embarked a new political system with a constitution that recognizes the rule of law, fundamental rights and freedoms, sovereignty of the nations, nationalities and the peoples, and that of the citizen, secularism etc since the fall of the military regime in 1991. It has adopted the 1995 FDRE constitution that incorporates both power and rights which is expected of a modern constitutional state.

The constitution in its preamble clearly provides as the nation, nationalities, and peoples of Ethiopia have firmly committed to build a political community founded on rule of law and capable of ensuring lasting peace, guarantying a democratic order and advancing their economic and social development in full and free exercise of their right to self determination as their objective. And the nation, nationalities and peoples have convinced individual and peoples fundamental freedoms and rights shall be respected for the fulfilments of the stated objective.

The human rights chapter of the constitution goes on to state a vast list of rights and freedom. It embodies fundamental rights and freedoms including: the right to life, the security of person and liberty, prohibition against in human treatment, the rights of persons arrested, the rights of accused, the rights of persons held in custody and convicted prisoners, non-retroactivity of criminal law, prohibition of double jeopardy, right to honour and reputation, right to equality, right to privacy, freedom of religion, belief and opinion, right of thought, opinion and expression, the right of assembly, demonstration and petition, freedom of association , freedom of movement , right to vote and to be elected, rights of access to justice, the right of nation, nationalities, and peoples, the right to property, right of labor; chapter three of the constitution has dealt with civil and political rights as well as socio economic rights at length . And all federal and state

legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the fundamental rights and freedoms specified in chapter three.[81]

In addition, the supremacy clause of the constitution imposes a duty to ensure observance of the constitution up on all citizens, organs of state, political organizations, other associations as well as their officials.[82] In relation to the duty of political organizations, the constitution has prohibited to assume state power in any manner other than that is provided under the constitution.[83] And it is a political party or coalition of political parties that has the greatest number of seats in the House of People's Representatives that shall form the executive and lead it.[84] To this end, the government can limit political rights towards the observance of and obedience of the constitution. Most of the human rights provisions have confined limitation clauses on certain specified general grounds. And the state can declare state of emergency in case a crisis which can't be addressed by the ordinary law & order occurred in the country. The preamble has also provided ensuring peace and security and guarantying of the democratic order is the objective of the state. Hence, the constitution contains rights and powers as a reason of state which is expected of a modern constitution.

Having said this as an over view of security and freedom which are the conflicting values as enshrined in the constitution, we will see how those conflicting values are adjusted analyzing how state of emergency, limitation of rights & militant democracy are legitimized and restrained in the FDRE constitution and its subordinate laws to the extent it is justifiable in a democratic society. The rational reconciliation of freedom and security –that is ensuring public order without destroying the liberty realm arbitrarily is the true constitutional reason of state. We will analyze the constitutional and legislative frame work of the modes of reason of state of the Ethiopian system in the following sections.

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[81]. The Constitution of the Federal Democratic Republic of Ethiopia 1995, art13 (1).
[82]. Ibid, art9 (2).
[83] . Ibid, art9 (3).
[84].Ibid,art56 .

4.1 The power to declare state of emergency under the FDRE constitution

Though the power to initiate towards declaring state of emergency always lies up on the council of ministers under the FDRE constitution, the power to declare the same is not that of the council of ministers in all stages. The power shifts from the council of ministers to that of the parliament after the time the constitution requires to be submitted to the latter. In such a case, the constitution adopts both the executive and parliamentary models of declaring state of emergency. We will see how the two models are adopted in the FDRE constitution followed by showing the power lacuna existed in it.

4.1.1The executive model of declaring state of emergency in the FDRE constitution

The FDRE constitution in its art 93(1)(a) grants the council of ministers the power to declare state of emergency on the grounds of an external invasion, a natural epidemic , and breakdown of law and order which endangers the constitutional order and that cannot be controlled by the regular law enforcement agencies and personnel. And sub art (1)(b) of the same provision provides ''state executives can declare state –wide state of emergency should a natural disaster or an epidemic occur.'' sub Art (1)(a) of art 93, as stated above, indicates it is the council of ministers that is empowered to declare state of emergency if the situation that justify the declare are a war of aggression and internal disturbance such as rebellion and subversive movements be it a countrywide or state wide. The expression of the constitution in this regard is not granting the power to initiate a decree to be approved by the parliament; rather it is about the power to declare.

In addition to its expression as to the council's power to declare state of emergency which is in light with the executive model, the constitution's adoption of the executive model is clearer when it sets a time limit where by the decree declared by the council of ministers will have a force of law.

The state of emergency decreed by the council of ministers in accordance with art93 (1) (a) shall be submitted to the house of people's representative with in forty-eight hours of

its declaration provided that it is declared when the house is in session.[85] The house of people representative may approve or reject the decree submitted to it. If the house does not approve it by a two –thirds majority vote of its members, it shall be repealed forthwith.[86] When the constitution says it shall be repealed forthwith, the decree has a force of law within the 48 hours of its declaration. In relation to this, in case the state of emergency is decreed when the house of people's representative is not in session, it shall be submitted to it with in fifteen days of its adoption by the council of ministers.[87]Similar to the one decreed when the house is in session this shall also be repealed forthwith if it is not approved by a two-thirds majority vote of members of the house of people's representative. In both instances, the state of emergency decreed by the council of ministers by itself shall have a force of law until it is submitted to the house of people representative within the specified period of time under the constitution. The emergency decree in this stage has status of an executive act which is authorized to be issued by the executive organ.

Besides, the council of ministers has all necessary power to protect the countries peace and sovereignty, and to maintain public security, law, and order, in accordance with regulations it issues, when state of emergency is declared.[88] The council of ministers is constitutionally empowered to issue regulations necessary to the implementation of state of emergency decree -thereby to maintain the constitutional order. This power to issue regulations, as it is related with the implementation of the decree, applies no matter at what stage the decree is found. Accordingly, the council could issue necessary regulations to implement the decree at its disposal before its submission to the house as far as it keeps the constitutionally allowed period of time to that effect.

In a nut shell, it can be concluded that the FDRE constitution has adopted an executive model of declaring state of emergency allowing the emergency decree issued by the executive to have a force of law until it will be repealed with the rejection of the house

[85] .Ibid, art 93 (2) (a).
[86]. Ibid.
[87].Ibid, art93 (2) (b).
[88].Ibid Art93 (4) (a).

following its submission within the specified period of time. And the expression that the council of ministers shall have the power to declare state of emergency which is the executive model is proper in those circumstances, and periods; and the laws to be termed as executive act/decree, and regulations.

4.1.2 The parliamentary model of declaring state of emergency in the FDRE constitution

The constitution follows the parliamentary model of declaring state of emergency when it requires the approval and renewal of the house of people's representative so that the emergency decree will continue with a force of law. Not with standing that the decree issued by the council of ministers has a force of law until it is rejected by the parliament and could remain in effect for 15 days when it is declared when the parliament is not in session, the house is empowered either to approve, or reject the decree submitted to it. It is if approved by the house of peoples' representative by two thirds majority that the state of emergency declared by the council of ministers can remain in effect; and it is the power of the house either to deny, or allow renewal of the state of emergency proclamation at every four months after the lapse of six month period.[89]

In the stage the decree is submitted to the house, the decree amounts to a motion, or a draft law brought by executive as it is the case in ordinary legislative laws and resolutions. We cannot say council of ministers has a law making power on the ground that it initiates draft law which need to be approved by the parliament to remain valid. While the power to declare state of emergency shifts from the executive to the parliament at this stage, the name of the decree will be changed in to a proclamation after its approval by the house.[90] In such a way, the constitution adopts a parliamentary model of declaring state of emergency.[91]

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[89] . Ibid, art93 (3).

[90].Ibid.

[91]. There are two major models with regard to the power to declare state of emergency: the parliamentary, and the executive model. While the chief executive, either the president or the prime minister or the council of ministers is empowered to declare state of emergency in the executive model, the prerogative to declare the same is vested in the parliament in the parliamentary model.

4.1.3 The power lacuna to declare state of emergency

Both the executive and the house of people's representatives are entrusted with the power to declare state of emergency under the FDRE constitution.

In its adoption of the executive model, the constitution doesn't grant the power to the chief executive, the prime minister; the power lies in the council of ministers. And the council of ministers as a composition of ministers needs an agreement to decide up on the issue. The question here is who is responsible to address the problem if a crisis happened in the council of ministers at a time the country need to respond to a certain constitutional danger.There is power lacuna in the FDRE constitution with this regard.

Of course, there is a similar lacuna in many constitutions assessed by the writer. For instance, the Spanish Constitution in its sec116 (3) provides as state of emergency shall be proclaimed by the government decree agreed in council of ministers, after prior authorization by the congress. And the Basic Law of Germany in its art115a (1)states as the determination of state of defence(state of emergency) shall be made by the Bundestrag with the consent of the Bundesrat at the request of the Federal Government that consist of the Federal Chancellor and the Federal Ministers. Even those states that have empowered the chief executive to declare state of emergency needs the involvement of the council of ministers in the decision; the President of India can declare state of emergency with the aid and advice of the council of ministers.[92]Such empowerment, in the thought of the writer, is made in the presumption that government ministers will not differ by far to save the life of their state and its constitutional order that will be endangered by the emergency situation. This could be realistic in the stable democracies with a culture of one voice in their national interest and core pillars of their constitutional system in which the ground of state of emergency could not be abused towards making it a political devise.

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[92]. The Indian Government, availableat www.allindianNewsPapers.com/government.htm/(last visited on 18 October 2011).

The above being as it may be, there is no guarantee a disagreement crisis will not happen in those states that do not develop such culture of democracy and being of one in the common interest of their polity. A certain institution which is politically neutral shall take the responsibility in case a situation the council of ministers could not reach on timely decision occurred in the country in the presence of a certain visible danger to the constitutional order, The preferable institution to the writer is granting the president the power to bring the issue to the attention of the parliament so that the latter will decide provided that the house is not dissolved.

A similar power lacuna could also occur in the absence of a crisis of disagreement within the council of ministers. The constitution provides the circumstance when by the HPR could be dissolved .Art 60(1) and (2) which is the very article of dissolution of the house reads:

1, with the consent of the house the prime minister may cause the dissolution of the house before the expiry of its term in order to hold new election.

2, the president may invite political parties to form a coalition government with in one week, if the council of ministers of a previous coalition is dissolved because of the loss of its majority in the house. The house shall be dissolved and new elections shall be held if the political parties cannot agree to the continuation of the previous coalition or to form a new majority coalition.

When the house is dissolved in either of the above grounds, new elections shall be held within six months of its dissolution.[93] The previous governing party or coalition of parties shall continue as a care taker government until new government is formed with a new election held following the dissolution of the house. The role of the care taker government is constitutionally limited towards conducting the day to day affairs of government and organizing new election; it may not enact new proclamation, regulation

[93].The FDRE Constitution, Supra note 81,Art 60(3).

or decrees, nor may repeal or amend any existing law.[94] Hence, there is a power lacuna of responding an exceptional threat of constitutional danger occurred at this time.

In Germany, the Government is competent to declare state of emergency if the situation imperatively calls for immediate action and if the Bundestrag or the joint committee could not factually make such determination.[95] If competent organs of the Federation are not in a position to make the determination with regard to state of emergency, the Federal president shall announce the state of emergency as if the determination is made and promulgated by the competent organs at the time the situation occurred as soon as circumstances permit.[96]In the event of such national crisis, the President is designated as a mediator to declare state of emergency in the Republic of Germany.[97]And the Spain constitution has prepared a temporary guardian in case a state of emergency occurred in the event the congress has been dissolved or its term has expired, or when it will be in recess. In such events, the powers of the government shall be assumed by its permanent deputation.[98] In both parliamentary houses of Spain, there shall be a permanent deputation consisting of 21 members who shall represent the parliamentary groups in proportion to their numerical importance, and assume the powers of the houses when dissolved or their terms expired until the constitution of the Cortes Generals (consist of the congress and the senate), and that of safeguarding the powers of the houses when they are not in session.[99]

And it will be very important to fill the power lacuna in the FDRE constitution mixing both the Spanish and Germany remedies at a time. There need to have a permanent deputation that will assume the power of the house when it is dissolved or its term expired until the next parliament is constituted. This will also enable to urge the council

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[94] .Ibid, art 62(5).

[95]. Karl Doehing(professor Dr.),The special character of the Constitution of the Federal Republic of Germany as a Free Democratic Basic Order,in Ulrich karpen's(ed),Essays on the Basic Rights and principles of th Basic Law with a translation of the Basic Law,p38.

[96] .See art115a(4) of sec Xa of the Basic Law of Germany in which the whole section is inserted by the 1968 reform of emergency constitution.

[97]. The Government of Germany, available at www.mongabay.com/reference/country-studies/germany/government/htm/.(last visited on September 21).

[98]. See sec116 (5) of the Spain Constitution.

[99] .Ibid,sec 78.

of ministers to submit the emergency decree soon to the Permanent Deputation though the house is in session without the need to wait for15 days in the requirement of the constitution. Establishing a permanent deputation as such, the president of the republic shall be empowered to bring the motion for the declaration to the former with the advice of the care taker government. In case all the competent organs including the permanent deputation is not are not in a position to respond an immediate situation, the President need to declare the state of emergency playing as a mediator role if he/she believes it is necessary and legitimate in the requirements of the constitution.

It is also the most legitimate organ that could fill the lacuna, at this time, for the following reasons: 1, the president is very nearest to fill the gap as he/she is also constitutionally required to facilitate the formation of coalition government during loss of majority in the house. 2, H is the head of state who is the symbol and representative of its people. 3, as he is required to vacate his seat from the parliament, he is said to be politically neutral. In light of this, extending the power to respond emergency situations with the advice of the care taker government to the president in such a case does not seem to have an option. Hence, the President of the Federal Democratic Republic of Ethiopia with the aid and advice of the care taker government shall have the power to bring the motion to declare state of emergency to the permanent deputation which shall be established if in the event the parliament has been dissolved, a situation giving rise to state of emergency occurred. To this effect, granting the power to fill the power lacuna to respond an exceptional constitutional danger in such a way, the constitution shall shift the power to command the army in such circumstances towards the president.

4.2 The substantive and procedural safe guards against abuse of state of emergency under the Ethiopian constitutional system

We have seen as the emergency decree could be that of an executive act and regulations, or a proclamation in accordance with the executive, and parliamentary models the FDRE constitution has adopted in my analyses above.

The question here is the adequacy of the substantive , and procedural safe guards the system has provided against abuse taking in to account to the legal status of the emergency decree varies before, and after its submission to the parliament. The constitution attempts to incorporate some substantive principles which are help full to safe guard against abuse of state of emergency.

It requires the actual occurrence of an exceptional threat to the constitutional order. The circumstances of breakdown of law and order that endangers the constitutional order should be something which cannot be controlled by the less restrictive measures of the ordinary law.[100]As state of emergency is an exceptional situation, the emergency measures are to be taken exceptionally as a last resort when possible ordinary law restrictive measures could not avert the crisis.

The principle of proportionality is also clearly provided under the FDRE constitution. Art 93 (4) (b) empowers the council of ministers to suspend the rights and freedoms in the constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.

And the proportional measure is further limited to be applied only against the derogable rights. In the adoption of the principle of non- drogability of fundamental rights, the constitution provides a catalogue of non- derogable rights. The list of non- derogable rights as provided in Art 93(4)(c) are: the nomenclature of the state as the federal democratic republic of Ethiopia (art 1); the prohibition against inhuman treatment (Art 18); the right to equality (Art 25); and the right to self determination, including the right to secession , and language, culture, and history of the nation , nationality , and people (Art 39 (1)(2)).

Though the trend of international human rights instrument with this regard is towards increasing the list of non derogable rights, the constitution contains a catalogue of only three non- derogable rights. The prohibition of retroactive penal law, the right to recognition as a person before the law, the right to life, freedom of thought, conscience,

[100] .The FDRE Constitution, Supra note 81, art 93 (1)(a).

religion, and belief, the right to effective remedy before the court or other competent body are categorized as non derogable under international human rights instruments and standards. All of those stated rights, however, are not guaranteed as non derogable under the FDRE constitution.

Art 37 of the constitution which guarantees the right to access to justice before a court of law or any other competent body with judicial power is not in the list of non derogable provisions. The constitutional article with a list of non-derogable provisions protects the nomenclature of the state as a federal and democratic republic of Ethiopia which is a system at the heart of the recognition and enjoyment of rights and freedoms. It does not, however, prohibit the use of emergency power to restrict the independence of the judiciary, to remove judges or to change the established structure of the institution.

Minimum procedural rights of the arrested and the accused which are fundamental to human dignity, but not necessary to any conceivable emergency crisis are not also guaranteed in the catalogue of non derogable rights and freedoms in the constitution. It is very essential for all arrests, and detentions together with the place of detention to be recorded, and made available to the public without delay.

The south African constitutional emergency clause has obliged the government to publish a notice in the national government gazette of the government of the persons detained stating their names and place whereby they are detained within five days from the date of detention. In relation to this, FDRE constitution gives the power and responsibility to publicize the detainees on the account of state of emergency to the state of emergency inquiry board to be established by the house of people's representatives; the board has to publicize the same within one month. On top of the problem that where the notice is to be published is not specified, allowing one month of unpublicized detention is a very long time.

Since any procedural rights are not safe not to be derogated, the constitutionally allowed one month unpublicized detention entails persons could be detained without communication with their family, friends or a lawyer at least for a month which is a very

long time open for violation of the rights of the arrested at the guise of state of emergency.[101]

With regard to the person charged with a criminal offence, they shall be entitled to a fair trial by a competent, independent and impartial court established by law with the necessary procedural rights to defend themselves. In spite of its demand from the perspective of rule of law, and experiences from national and international standards, the FDRE constitution does not give such procedural and institutional protection towards persons charged with a criminal offence during emergency. There is no constitutional guarantee so that the government will not try civilians establishing a military, or a special tribunal, regardless of its independence, impartiality, and providing of procedural safeguards. There is no guarantee that the government will not derogate the right of access to court. There is no guarantee that the government will not derogate the minimum procedural rights of persons detained during emergency.

Moreover, the judiciary does not have also the power to entertain the constitutionality of emergency laws. It could not decide whether or not an emergency legislation is in conformity with the constitution; it could not decide whether or not any particular exercise of emergency power is in conformity with the constitution.[102]

Academic works of constitutional interpretation in the country varies in addressing the issue of whether the courts have the power, and the jurisdiction to dispose the constitutionality of executive acts and decisions.[103]

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[101] .The Paris minimum standard formulates no person shall be held in detention without communication with his family, friend, or a lawyer for longer than few day tolerating three to seven day.

[102]. The FDRE Constitution, Supra note81, Art 83(1) states all constitutional disputes shall be decided by the HOF.

[103].Assefa Fiseha in his number of articles takes a position that the review of the constitutionality of decrees, regulations ,directives, orders, notices lays under the competence of the ordinary courts arguing the constitution is silent with that regard; Ibrahim Idris in his article "constitutional adjudication under the 1994 FDRE constitution" in Ethiopian law review, vol 1,no1 (2002),concludes any petition on the unconstitutionality of an administrative actor a decision or a custom is within the judicial jurisdiction of an ordinary court under Ethiopian law; Yonatan Tesfaye in his article "the courts and constitutional interpretation" in Journal of Ethiopian Law firmly concludes that the courts in Ethiopia do not have the

Despite the divergent views of the academic works on the issue, a close and comprehensive look at the relevant provisions of the constitution pronounces as the house of federation is the ultimate organ to settle all issues of constitutionality be it constitutionality of a proclamation, regulation, decree, no matter how the status of the law, or a decision of a governmental organ or an official.[104] Those writers with a position saying reviewing the constitutionality of executive acts and decisions with in the competence of the ordinary courts bases their argument mainly on art 84(2 of the constitution on the ground that the provision regulates "only federal or state parliamentary acts." such approach of interpretation, however, is not convincing since the very articles as to the powers and functions of the house of federation and interpretation of the constitution are clear in granting the power to dispose all constitutional disputes which are the sources of constitutional interpretation.[105]

Article 84 in general and sub 2 of the same article in particular could not be read in isolation to determine the jurisdiction of constitutional interpretation. It could be used, however, as a supportive one with that regard since it is a provision that regulates the powers and functions of the council of constitutional inquiry in which it implies the powers of the HOF as the former does not have an exclusive power to be exercised solely by it. In such usage, the provision assures as the power to review the Constitutionality of laws enacted by the Federal Parliament and state councils lies up on the HOF disregarding the wording of the English version that makes the power to review the constitutionality any Federal and State Laws including executive acts the jurisdiction of the HOF taking the Amharic version that shall have a final legal authority as it is argued

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power to interpret the constitution urging them to refrain from giving meaning to the constitution and resolving a constitutional dispute.

[104]. Getachew Assefa, all about words: Discovering the intention of the makers of the Ethiopian constitution on the scope and meaning of constitutional interpretation, Journal of Ethiopian law, vol24,no2(2010) asserts "the reading of the relevant provisions of the constitution as well as the documents recordings making process demonstrate that the interpretative jurisdiction of the HOF/CCI is meant all-encompassing"

[105].The Constitution of FDRE, Supra note 63, art 62(1)states "the house of federation has the power to interpret the constitution";art83(1)"reads all constitutional disputes shall be decided by the house of federation." and art 84(1)indicates as it is the constitutional dispute that would arise a constitutional interpretation saying "should the council(the council of constitutional inquiry) up on consideration of the matter(the constitutional dispute brought to it),find it necessary to interpret the constitution, it shall submit its recommendations to the house of federation"

by Assefa. Beyond that, we cannot invoke as if it implies the courts have the power to review the Constitutionality of executive acts. Instead, the wordings of the provision (art84 (2)) seems to provide procedure how the inquiry will deal with a constitutional dispute submitted to it using a contested federal or state laws for illustrative purpose.[106]

The writers arguing the judiciary has the power to see the constitutionality of executive acts and decisions also supports their argument by art 13(1) of the constitution that stipulates that ''all federal and state legislative , executive and judiciary at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter.'' Of course, this provision does have significance for the courts to determine the meaning and the scope of the constitutional human rights provisions while entertaining cases at their disposal. They can do this, yet, as far as it does not raise a constitutional dispute in quest of constitutional interpretation. Hence, the duty of the court to respect and enforce the human rights chapter provided in art 13(1) couldn't enable courts to entertain the constitutionality of executive acts such as regulations, directives, and decrees as it is a clear issue of constitutional interpretation clearly given to the HOF. Regardless of its plausibility to conclude the courts have the power to question the constitutionality of executive acts and decisions even in ordinary laws and matters, such argument will not hold water in deciding the fate of emergency measure as the state of emergency clause in which the principles against which the emergency measure will be judged is not found in the human rights chapter.

Though the argument with divergent views seems to continue, the parliament has enacted laws that clearly exclude the courts from the power to review constitutionality of regulations, and directives which are executive acts in consistent with the sprite of the constitution as discussed above.[107]

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[106]. Getachew, also believes Art 84(2) is not meant to determine the jurisdiction of the HOF asserting as "it is rather principally meant to set down procedures for the CCI to go about determining a dispute involving a federal or state law submitted to it by a court or an interested party", supra note 104, p. 166.

[107] The council of constitutional inquiry proclamation No. 250/2001 and the consolidation of the house of the federation and definition of its powers and responsibilities proclamation No. 251/2001.

The analysis of the constitution and the legislations above show that the courts in the Ethiopian constitutional system do not have the power to entertain cases of constitutionality of emergency measures including that of an emergence decrees and regulations before their submission to the parliament, and the emergency proclamation approved by the parliament. The organ empowered in this regard is the HOF. And the HOF as a political organ is not expected to be independent and impartial institution to dispose constitutional disputes of emergency laws which involves political issues with an impact on the rights and freedoms of citizens.. This is contrary to the world trend of spreading the adoption of judicial review of legislations by the constitutional court or the judiciary.[108]

Therefore, the Ethiopian constitutional system does not have a restrained reason of state in this regard. There are not institutional and procedural guaranties to control abuse of state of emergency. Such absence of institutional and procedural safeguards during emergency could make the enjoyment of both derogable, and non derogable rights at stake. The enjoyment of the rights will only depend on the whim of the government without having a legal mechanism to control abuse. And it is futile to incorporate substantive principles governing state of emergency in the absence of the right of access to justice. It is also very difficult to know whether the emergency measure trespasses the guaranteed non derogable fundamental rights in the absence of access to justice to that end.

The constitution attempts to adopt parliamentary control mechanism against abuse of state of emergency requiring the confirmation and renewal of the state of emergency decree/proclamation by the HPR for its continuation and extension respectively. However, the Parliament does not have a permanent representative (Deputation in the wording of the Spanish Constitution) that assumes its function in case it is dissolved, or when it will be in recess as we discussed it in the power lacuna section. In consequence of such default, the constitution allows the emergency decree to remain valid for 15 days without the confirmation of the HPR when it is declared at a time the house is not in

[108] .C.Neal Tate andTorbjorn Vallinder, The global expansion of judicial power, NYU press, 1955, as cited in,Tamanaha,infra note121,p108.

session. And the power of the house is either to reject or approve the decree brought to it; it does not include the power to modify the decree. The Constitution does not also guarantee the functions of the parliament and the immunities of the members to remain intact during emergency. Such would enable the house to make an effective oversight over the council of ministers by regulating its discretion and guiding it to go in a Constitutional and proper way .Hence, the parliamentary control as a safeguard against abuse of reason of state with state of emergency mode is also inadequate as that of the judicial control.

4.3 The human rights limitation clauses under the FDRE constitution

Limitation of rights as constitutional reason of state refers to the restriction imposed up on rights, and freedoms on the ground of public order /national security – the constitutional order. The FDRE constitution doesn't have a general limitation Clause which applies to all human rights provisions recognized in it; instead, it contains specific limitation clauses built in each and every provision of human rights.

The specific limitation clauses under the constitution which are general and vague are subject to abuse. The constitution doesn't incorporate a limitation for the limitation clause as a safe guard not to be abused by the government.

Let me state some human rights provisions in the constitution in order to enable us observe the vulnerability to abuse of the limitation clauses .Art 17 which is the very article of the right to liberty in its sub article 1 reads "no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law." Accordingly, one could be deprived of his or her liberty on the grounds, and procedures established by law. What is required to be fulfilled in order to limit the right to liberty is to state a certain grounds and procedures and make it to be approved by the parliament; only principle of legality is required to be fulfilled.

In relation to the limitation of the right to privacy, Art 26(3) states "no restriction may be placed on the enjoinment of such rights except in compelling circumstances and in accordance with specific laws whose purposes shall be the safeguarding of national

security or public peace, the prevention of criminal or the protection of health, public morality or the rights and freedoms of others." The grounds of limitations such as national security or public peace are very general in which they could easily be abused unless they are circumscribed by other specific limitations. And with regard to freedom of expression, and information, legal limitation can be laid down in order to protect the well being of the youth, and the honor and reputation of individual;[109] what is the extent of protecting the honour and reputation of individual is vulnerable to abuse in which it may be a ground for the leader to evade from criticism, and public complaints.

And as to the limitation of the right to bail of persons under arrest, Art 19(6) states "in exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person." The purpose of the limitations is not recognized under the stated constitutional provision. The only requirement to be fulfilled is to prescribe a certain ground / purpose, as exceptional circumstance. It makes the discretionally power of the court either to deny bail or demand adequate guarantee for the conditional release of the arrested even on those exceptional circumstance prescribed by law. But this doesn't even escape from the question how the court will exercise its discretion; what factors shall be taken in to account to limit the right of bail in this regard. Making the power to decide on the limitation discretionary without urging certain factors to be considered could not be a limitation for the limitation clause not to be abused. Everything about the decision is left at the mercy of individual judges after the exceptional circumstance is determined under the mercy of the law maker.

Art 31 of the constitution in relation to limitation of freedom of association states "organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activities are prohibited." It indicates freedom of association could be limited by a law. The content of a respective regulatory law, however, depends on at the mercy of the law maker. The constitution doesn't

[109] .The FDRE Constitution, Supra note 81, art29 (6).

provide the grounds, and factors the law maker shall consider in its enactment of the appropriate law, and for the interested person in terms of which would challenge.

There are also rights in the constitution without any limitation clause built to them. For instance, the right to vote and to be elected (art38) and freedom of movement (art32) do not contain any limitation clause. These rights are at stake more than that of the rights with vague and general specific limitation clauses discussed above. Because the power holders could limit them on the grounds of their whim justifying human rights are no more absolute.

All in all the limitation clauses under the constitution are not adequate enough to control abuse. The constitution needs to have adequate substantive and procedural safe guards to control the potential abuse.

Taking a lesson from the South African constitution, and the international standards, the FDRE constitution needs to incorporate a general limitation clause that limits the specific limitation clause built in each, and every provisions of the human rights chapter. The general limitation clause to be incorporated shall clarity how the general purposes such as national security /and public order are interpreted when invoked as a ground of limitation.

Ethiopia as a founding member of the united nation is a democratic society that incorporates the united nation charter, the universal declaration of human rights, the international covenant on civil and political rights, and other international human rights instrument including the African charter on human rights; one third of its constitution is also devoted to human rights provisions. And it is being of a democratic republic in which Art 1 of the constitution provides "the federal democratic republic of Ethiopia" as the nomenclature of the state gets higher place in the hierarchy of values under the constitution. Notwithstanding that Art 93(4)(c) deals with non derogable rights, not about institution, structure etc., it includes the constitutionally established federal and democratic state structure in the list of non derogable rights.[110]

[110].This shows the country's commitment towards its being of a democratic society and the existence of hierarchy of values in the FDRE constitution.

As the country is a democratic society, then, the necessity of the limitation measures need to be assessed in the interest of the recognized legitimate purpose based on the context in a democratic society. The constitution need to have a general limitation clauses that limits limitative acts urging the bill of rights to be limited only in terms of law general application to the extent that the limitation is reasonable and justifiable in a democratic society based on human dignity, equality ,and freedom providing certain help full relevant factors such as the nature of the right, the importance of the purpose of the limitation , the relationship between the limitation and the purpose of the limitation as the south African constitution has provided the same in its Art 36(1).

Requiring the limitative measure to be of a law of general application entails the restrictive law should not be made arbitrarily without following the normal law making process targeting specific individual or groups. Such constitutional frame work would contribute much in the task of controlling abuse of reason of state so that the government will not suppress its opposition or perpetrate a repressive practice against its people using law as an instrument.

Putting a sort of the above general limitation clause alone in the constitution, doesn't however, avert the problem. The constitution, shall also guarantee an institutional safe guard recognizing a politically neutral competent organ that will determine legitimacy of the limitation measure in line with the general limitation clause to be incorporated. The power to consider the constitutionality of any laws and governmental decisions is given to CCI /HOF in the FDRE constitution; the court doesn't have the power to decide a dispute of constitutionality of laws .And the HOF which is an organ with a power to give a final decision with such cases is not a politically neutral competent body to determine the constitutionality of limitation measures taken by the government.

Let alone the vague, and general purpose such as national security , the specific factors supposed to be included in the general limitation clause are subject to interpretation which need an adequate institutional safeguard and effective remedy against abuse. The FDRE constitution has neither substantive nor procedural/institutional safeguard against

abuse of reason of state with regard to limitation measures. It opens a door for the government to undertake a systematic violation of human rights. The absence of culture of tolerance and compromise in the history of the country highly triggers the need to incorporate a general limitation clause in the constitution

4.4 Democracy and its defence in the Ethiopian constitutional system; the existence of militant procedural democracy as a mode of reason of state

4.4.1 Militant democracy in the Ethiopian constitutional system

The 1995 FDRE constitution adopts a "federal and democratic state structure" making it the nomenclature of the state. (Art1); this constitutional value is included in a list of non derogable rights in away to indicate the country's strong constitutional commitment to democracy .To this effect, the constitution recognizes a vast list of rights, and freedoms including the right to assembly, freedom of association, freedom of speech, the right to vote, and to be elected etc.

The question, here, is the extent, and the manner those values of democracy are allowed in the Ethiopian constitutional system; it is a question as to the existence, and the level of militant democracy in the system as reflected in its relevant laws including the constitution.

Militant democracy as a mechanism for democracy to defend itself from antidemocrat forces is exercised based on a system that limits the right of political association, freedom of speech, and assembly. We have seen as those rights including others could, and should be subjected to limitations based on legitimate social needs and with substantive and procedural guarantees against abuse. Though militant democracy is a sort of limitation measure as it is taken by providing restrictions upon the stated rights, it needs its own special consideration since the level of the measure, and the procedural and institutional safeguards that need to be guaranteed against its abuse is different from limitation of rights in its ordinary sense.

We will see the militant procedural democracy adopted in the Ethiopian constitutional system making analysis of the constitution, the criminal code, the political parties

registration proclamation, the antiterrorism proclamation concentrating on the measure against the right to political association.

1. The constitution

The FDRE constitution doesn't have core values with a shield against reform; it doesn't have a clause that prohibits the amendment of certain ''pillars.'' The rights, and freedoms specified in chapter three are entrenched with a strict amendment procedure. There are also some rights guaranteed as non derogable during emergency. Those constitutional entrenchments show the existence of hierarchy of norms within the constitution; this doesn't, however, mean they are values out of the political process. The FDRE constitution is with no political aims that are not subject to reform, and the political process; and it is not militant in its substance.

The constitution is militant, however, in its procedural democracy aspect. It regulates how a political power is assumed. Accordingly, it is a political party, or a coalition of political parties that has the greatest number of seats in the house of people's representative that shall form the executive and lead it.[111] A political association shall be formed, and involve in election, then, won the election –in order to assume apolitical power. It prohibits assuming state power in a manner other than such legal process at the pain of militant measure up on those organizations that follow subversive procedures to come to power.

The constitution recognizes civil and political rights which are necessary inputs to effectuate state power in a procedure it is interested in to be under taken.

Firstly, it guarantees right of thought, opinion and expression and in general and the right to freedom of expression and of the press and other mass media in particular.

Secondly, the right to assemble and to demonstrate together with others peaceably, and unarmed, and to petition is recognized for everyone. The right of assembly and

[111].The FDRE Constitution, Supra note81, art 56.

demonstration could not be ensured with a denial of the right of thought, opinion and expression; hence, they are very much interrelated.

Thirdly, freedom of association is guaranteed in the constitution stated as "every person has the right to freedom of association for any cause or purpose."The above rights of freedom of expression, of the press and mass media, and the right to assembly are inextricably essential to exercise the right to freedom of association. As everyone has the right to freedom of association for any cause or purpose, everyone has the right to form a political organization intending to assume a political power regardless of the substance of political aim it will insure when it comes to power. And everyone has a right to be a member in a political organization of his own will.[112] Since political power is to be assumed through political parties, political parties are required to involve, and contest each other to get a greatest number of seats in the house of people's representatives in order to hold political power. To this end, while every Ethiopian national is entitled with the right to vote and to be elected, the constitutionally established national election board is duty bound to conduct a free and fair election in a federal and state constituencies in an impartial manner.[113] And the political party or a coalition of political that has greatest number of seats in the house of people's representative passing through the utilization of the above constitutionally guaranteed rights and freedoms will assume the state power with the political power to form, and lead the executive.

The constitution does not require the political parties to come up with a certain minimal political aim in substance. They can have a political aim contrary to the values enshrined in the constitution. For example, a political party could have a political aim that deviates from the right to self determination of nation, nationality and peoples up to secession recognized in the constitution.

The constitution, however, prohibits assuming state power in a manner that is provided under it as stated above; state power is assumed through winning of an election. Political

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112.Ibid,38(2).
[113]. Ibid, Art 102.

parties have to follow the constitutionally legal procedure to come to power. They have to be formed following an appropriate law.

Any association including political association formed in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activates are prohibited.[114]

Having a political objective of assuming state power through revolution or rebellion amounts to an illegal subversion of the constitutional order as it is a manner other than provided under the constitution. Any organ including a political organization with such objective is prohibited by the FDRE constitution; and they have the duty to ensure observance of the constitution and to obey it.[115] Such duty to ensure the observance of the constitution and its obedience does not mean the political parties could not have a substance of political aim that opposes the provisions of the constitution. It means, rather, they should not violate the principle of law abidingness up on the constitution as they should not do the same against any other Law of the country. Let alone political parties in which their normal business is struggling for change coming up with alternatives, individual citizens can express their opinion saying a certain Law is pernicious and the constitution misguided being obeyed by it and without urging breaking of it which is an attack to the first business of the constitutional order.

The political parties' loyalty to the Constitution shall continue even after its assuming of state power. The Party that assumes the Political/state power following the manner provided under the constitution could not impose its political aim contrary to the constitution disregarding the latter. It could not change the constitution at the guise of assuming state power; but it could make it to be amended following the amendment procedure provided with in it. Changing the constitution or saying as if amended without following the procedures provided in it is an illegal subversion of the constitutional order; and is prohibited.

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[114].Ibid, Art 31.
[115].Ibid, Art [9(2).]

The analysis so far shows the FDRE constitution adopts a militant procedural democracy requiring the political actors to follow the process or the manner provided in it. Adopting a militant democracy in such manner, the constitution doesn't incorporate a procedural guarantee to defend abuse of the militant measure to be taken by the state in power. The following section will show how the FDRE constitution lacks providing of a necessary protection for the political parties against abusive militant democracy measure that could be taken by the government in power.

a. The place of political parties under the FDRE constitution VS their protection against abusive militant democracy measure.

As discussed in the above analyses, political parties have a prominent role in the Ethiopian constitutional system in which they are sole instruments of assuming state power under the FDRE constitution. The nations, nationalities, and peoples of Ethiopia which are holders of all sovereign power[116] including the political power needs an establishment of political parties in order to express their sovereignty to assume a state power.

And the people with an interest for the state power to be assumed by a certain political party with certain political aim will participate, and express its affiliation with that party; the parties play a great role in reflecting the parallel societal interests in the country. In short, political parties are constitutionally placed in away to be a forum on which the will of the people will be expressed.

While the constitution gives a prominent role with the sole legitimate potential to assume state power, the constitution puts political parties in the same status other associations have in terms of protection and regulation.

The right to form a political party is to be invoked from the general provision of freedom of association which states "every person has the right to freedom of association for any cause or purpose".[117] The same provision provides limitations that applies for all with the

[116].Ibid, Art8.
[117].Ibid, Art 31.

statement saying "organizations formed, in violation of appropriate laws, or to illegally subvert the constitutional order, or which promote such activates are prohibited." Art 38 of the constitution that deals with the rights to vote and to be elected in its attempt to obligate the internal affairs of associations doesn't provide a special concern in order to make the internal organization of political parties conforms to democratic principles.[118] And the Constitution does not protect and regulate political parties contrary to the status and responsibility they are entrusted with.

Political parties should have been regulated and protected separated from other associations under the constitution in the sprite of the vital role entrusted by the constitution itself. As it is an organization formed intending to assume state power reflecting societal parallel interest of the country making the respective citizens on its side, it needs to be protected specially and differently than other associations. The need to have a strong political party that will assume the coming state power on the reason that it is the only option in the dictation of the constitution itself makes the special protection a necessity. On the other hand, political parties needs a different constitutional provision for their regulation as the possibility of being a threat to subvert the constitutional order is immense on the ground that they are very much strong than other associations in terms of public support ,fund ,the opportunity of getting necessary materials for their objective.[119] But, such is not the case in the FDRE Constitution. In consequence of the treatment of political association and other associations in the same way, the FDRE Constitution appears to allow foreigners to form a political organization making the subject of the right every one[120] which is in deviance to principle of democracy.[121] Democracy requires the political rights and affairs to be enjoyed and decided by citizens. The involvement of foreigners in such right is against the self determination of the

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118. Ibid,Art 38(2)(3).

119. Art 21 of the Basic Law of Germany is devoted to regulate and protect political parties treating them differently from other associations.

120. The FDRE constitution, supra note81, in its art31 makes freedom of association which includes political association the right of every one.

121 .Brian z.Tamanaha, On the Rule of Law: History. Politics, theory, Cambridge University press, 2004, p104.

country.[122]The writer does not believe the drafters of the constitution adopt the provision intending to allow foreigners to involve in the political affairs of the country.[123] It indicates, however, that they did not appreciate the need to differently regulate and protect a political association from other associations.

2. The criminal code

In line with the constitution that prohibits illegal subversions of the constitutional order, the criminal code has provided constitutional defence criminalizing offences against the constitutional order and the security of the state. The one who, intentionally, over throws, modifies or suspends the federal or state constitution; or over throws or changes the order established by it through violence, threats, conspiracy or any other unlawful means is punishable with rigorous imprisonment from three years to twenty-five years.[124] Violence, threats, conspiracy, rebellion, revolt etc. are illegal subversive acts under the constitution. No one is allowed to over throw, modify, or change the constitution through those illegal acts. The constitution itself provides the mechanism whereby it could be amended; any attempt to go in deviance of that amounts to an illegal subversion, and there by prohibited.

Not only outrages against the constitution or the constitutional order itself but obstruction of the exercise of constitutional powers is also criminalized by the criminal code.[125] In doing this, the criminal code has regulated the political process by putting limitations upon the procedure the actors should follow. If they have a substance of political aim that opposes the provision of the constitution, they can do it only through the legal process provided under the constitution itself. As the constitution does not have untouchable constitutional cores out of the political process, the criminal code does not criminalize to

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[122]. Moreover, it is against the historical heritage of the state that does not allow the involvement of foreigners as it is the only African country never ruled by the west during the colonization era.

[123].The problem might emanate from the difficulty the drafters faced how to recognize the right to establish none governmental organizations for everyone including foreigners in which the government needs their involvement to help its development projects.

[124]. The Criminal Code of the Federal Democratic Republic of Ethiopia, proclamation no. 414/2004, Art 238.

[125].Ibid, Art 239.

take a political position contrary to the values embodied under the constitution. One could have a political objective that opposes the federal arrangement; and this does not make him criminal. But it is a crime under the criminal code to destroy the federation by violence or any other unconstitutional means.[126]

Like that is in the constitution**,** the constitutional defence incorporated in the criminal code is militant measure against the procedure to be followed in the political process; it is not militant towards the substance of the political aim to be taken by the political actors. The problem, however, is the crime against the constitutional order and security of the state under the criminal code will not govern political parties as an organization since it applies to wards the members of the political parties on their own personal and individual involvement. In consequence of such problem to apply the ordinary criminal law against political parties as an organization, it becomes necessary to come up with separate laws targeting political organizations. The political party's registration and the anti terrorism proclamations are the relevant separate laws in relation to the measure to be taken against political parties in our country.

3. The political Parties registration proclamation.

The federal democratic republic of Ethiopia had different political parities registration proclamations at different time such as proclamation No. 46/1993, proclamation No. 82/1993 and the currently working proclamation No. 573/2008. We will analyze the latter which is the main governing law of political parties as this time for the purpose of this paper.

In consistent with the constitution and the criminal code, the proclamation lists the illegal means of extending political aims. Accordingly, a group or a body is barred from being registered as political party if it aims to foment conflict and war by preaching hatred and enmity among nation, nationalities and peoples on the basis of different in the race, religion, and the like, in violation of the constitution federal republic of Ethiopia; is organized to advance its political objectives by force of arms; aims to take over political

[126]. Ibid, Art 241.

power by over throwing the government by armed force; having members of foreign nationals; formed for the purpose of pursuing unlawful activities; formed to breakdown the constitutional order by way of illegal means.[127]

Political party that pursues its political aims by the stated illegal means after its registration is punishable by the law. To this end, the proclamation incorporates a militant democracy measure that goes up to making the political party to be dissolved by the order of the court if it acts in violation of the constitution, the registration proclamation and other laws of the state.[128] A political party may be cancelled due to its serious criminal charge as the result of court decision. The decision depends on the discretion of the court; the court could give warring notice or suspend the party for a specified period for a political activity or cancel the registration or penalize the party depending on the seriousness of the crime.[129]

The problem here is there is no constitutional entrenchment that political parties could only dissolved by the order of the court. The power of the parliament is unfettered one in limiting the jurisdiction of the court through laws with ouster clauses. Besides, the grounds invoked for the dissolution of the political parties could necessarily need the involvement of the house of federation. For instance, in case the tactics of political struggle the party follows arises a constitutional disputes, it is a must case for the house of federation to come to the picture since it is the organ with an ultimate power to dispose constitutional disputes under the constitution. And it is frequently asserted that the house of federation is not an appropriate organ to dissolve such cases impartially. Hence, on top of the problem of constitutional entrenchment towards having an institutional guaranty of political parties not to be dissolved arbitrarly, the existing political parties proclamation that makes the power to dissolve political parties does not seem it takes in to account the constitutional dispute that could arise in the proceeding to make the dissolution.

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[127]. The political parties registration proclamation no. 573/2008, Art 10 (1-8).
[128].Ibid, Art 40.
[129]. Ibid, Art 40(3).

The political party will have a procedural protection less than the protection provided in the ordinary criminal proceeding if thes government charges it with a crime of terrorism. Intelligence report prepared in relation to terrorism, hearsay or indirect evidences and evidences gathered through interception or surveillance are admissible in court for terrorism cases.[130]

Taking into account the neutrality of the intelligence and security service agency is a big political question in the country, dissolving a political party with such evidentiary and procedural rules could be a hurdle to achieve political compromise and potential consensus up on common interests of the polity which is essential for the integrity of the same. Hence, adequate procedural and institutional guaranty shall be adopted to expel a political party from the market place of politics by dissolving it.

4. The anti terrorism proclamation

Though it is not a clearly defined concept in which neither international nor domestic law has provided a satisfactory definition of it, it is frequently repeated assertion that "terrorism is a threat to democracy" as it is clearly stated in professor Gerard Soulier's article on terrorism.'[131] Democracy is based on the conception of law which entails the recognition of fundamental rights and freedoms, and requires individual or groups to rely on those recognized right and freedoms in their movement against the governments or the ruling system; it is a good virtue which demands as well as could enable a peaceful regime change with the consent of the people. Terrorism as phenomena of violence, however, is "the evil" set against democracy which is "the good"[132] For this reason, it is justifiable that democracy need to defend itself from terrorism. The state could not, however, take whatever measure it deems necessary in the name of terrorism.[133] The

[130]. The Anti Terrorism Proclamation No. 652/2009, Art 23(1) (2) and (4).

[131]. Mireille Delmas , The European convention for the protection of human rights: international protection versus national restrictions, kluwer academic publishers, 1992, P.15.

[132]. Ibid.

[133].In relation to this, the European court of human rights in the case of klass and others, 6 sept/1978 provides "the court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground defending itself, affirms that the contracting states may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate", ibid.

response to terrorism could be turned against democracy, instead of defending the same. There needs to have institutional and procedural safeguard to control abuse of the state in taking measures on the ground of terrorism as it is also important when it takes other similar measures.

The principle that the power of the state, and its authorities should not be left unfettered lies as the very heart of democracy. The decision of the European court of human rights in the Lawless case entails "by no means every measure is a priori legitimate if taken by the state in the name of the fight against terrorism". As it is very much vulnerable to abuse it needs to be reviewed and checked by an independent organ, if it is not taken by the latter from the outset.

When we see our respective law in light of this, the measure of proscribing terrorist organization adopted in the Ethiopian anti terrorism proclamation seems in deviance of principle of democracy opening a door for the struggle against terrorism will turn against democracy. Proscribing an organization as a terrorist organization is a militant democracy measure which is equated with dissolution in relation to the political parties. Any organization, including political organizations, shall be proscribed as terrorist organization if it directly or indirectly commits acts of terrorism; prepares to commit acts of terrorism; supports or encourages terrorism; or is otherwise involves in terrorism in the proclamation.[134] And the power to proscribe and de-proscribe an organization lies up on the house of people representatives, up on submission by the government.

Such granting of the power to proscribe to the parliament up on the submission of the executive could make the life of political parties at stake as it is difficult to expect the parliament will be neutral in giving such sort of resolutions taking in to account to the party discipline in parliamentary system of government and the political reality in the country. Principle of democracy and separation of powers demands the power to proscribe an organization as a terrorist organization to be that of the judiciary. In light of this, western democracies are reviewing their security legislation towards making the proscription power completely that of the judicial process believing a judicial review

[134]. The anti terrorism proclamation No.652/2009, Supra Note 130, Art 25(2).

after an executive decision is not adequate safeguard. Following the announcement made by the Australian parliamentary joint committee on intelligence and security to review the provisions of the security legislation that regulates the proscription of organizations as terrorist organization since 2006, a number of organizations that were asked to propose a framework and draft criteria that they would consider appropriate to guide the exercise of the proscription power firmly recommends the need to have a clear criteria for the proscription of an organization as a terrorist organization, and for the proscription process to be a judicial process.[135] Though the security legislation empowers the attorney General to proscribe the organization through regulation at the pain of disallowing by the parliament, and with a way out for a judicial review, such empowerment and arrangement with an attempt to adopt a checking safeguard could not escape from strong criticisms.[136]

The measure under the Ethiopian anti terrorism proclamation above does not even provide a way out for the party to institute the case to be reviewed before the court or an independent organ. The law does not also provide any clear Criteria that need to be considered in order to proscribe an organization as a terrorist organization. Let alone this, it is not clear which department of the executive organ is empowered to initiate and submit the proscription or de-proscription to the parliament. In the absence of

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[135].The Australian law council proposes for the process of proscription to be a judicial process believing it is the judicial process that would be best able to deliver transparency, natural justice, and safe guards against un necessary rights infringement ;and it requires the need to have legislated clear criteria such as particular legitimate aim, necessity, and proportionality to " guide and constrain the exercise of proscription power.", available at www.aph.gov.au/house/committes/pjcic/proscription/submissions/sub31.pdf(last visited on 11 july2011).

[136]. The criminal bar association of Victoria states "empowering judicial bodies to review an executive decision rather than judicial determination of the initial proscription itself is undesirable. Organizations wrongly proscribed face significant loss of reputation and members are subject to severe criminal penalties. In order to achieve effective over sight, judicial power is better exercised through the decision to proscribe, rather than as a consequential review of the decision to proscribe."available at,www.aph.gov.au/house/committes/pjcic/proscription/submissions/sub24.pdf(lastvisitedon11july 2011).;the law council also regards such post facto review on the reason that people who seek to challenge a proscription after it has come into effect may expose themselves to prosecution if they disclose member ship of or support for the relevant organization during the course of application for review; it does not also believe the parliament will play its independent supervisory role taking in to account to the reality of parity discipline in the country.

institutional and procedural safeguards, and clear criteria required to be considered, the current process of proscribing an organization as a terrorist organization carries high potential for the generation of an arbitrary and politicized decisions in which the government could use as a political device to suppress its rival political group without its being of a terrorist.

The measure adopted in the proclamation with framework that gives a free hand for the government to abuse it taking against its bitter rivals seems a reflection of the constitutional gap to protect political parties. The constitution itself should have dealt with such institutional safeguard as it is embodied in the Basic Law of Germany. In the absence of such constitutional safeguard, the power of the court to decide up on the dissolution of the political parties provided in the political parties registration proclamation does not have certainty. There is no constitutional limit for the parliament will not enact a proclamation with an ouster clause that excludes the court to entertain such cases. The government could also use the proscription measure under the anti terrorism proclamation as a forum shopping to dissolve the legal political organizations in the country.

To sum up, with all of the above gaps that give a free hand for the government to abuse it, the extent of reason of state in the Ethiopian Constitutional system, in the militant democracy measure mode, is not restrained in a way to leave the measure in a constitutional paradigm.

Chapter Five: Conclusion and Recommendation s

Conclusion

There are underpinning philosophical foundation and normative understanding for a modern constitutional state to recognize, and exercise constitutional reason of state in a way that enables it to preserve the constitutional order while striving to ensure the advancement of rule of law, democracy, constitutionalism, and human rights norms which are values of its very fabric. Nicholas Machiavelli, James Harrington, Baruch Spinoza, Montesquieu, John Milton, John Lock, and Kant are some of the major constitutional and political thinkers who have contributed important and interesting contributions in terms of understanding reason of state as a problem, and contributing for its solution.

The notion of constitutional reason of state is an idea which allows the state to take a measure to save its life without freeing itself from the obligation to respect the rights and freedoms of the governed. States of emergency, limitation of rights in general and militant democracy in particular are the prominent modes of exercising reason of state discourse. The need to make a rational compromise between rights and freedoms of the governed, and security/public order is at the heart of constitutional reason of state. With the contribution and influence of various constitutional thinkers including the above once and because of the natural tension between security and freedom, reason of state is understood as a problem which needs a solution. To the effect that a rational adjustment between the two conflicting virtues will be a reality, a constitutional state need to have laws that establish permanent institutions with recognized powers, and functions constituting of principles according to which the powers of the governor and the rights of the governed, and the relationship between the two will be adjusted. It shall also have a clear body of laws that guarantees the rights and freedoms of the governed, limits the arbitrary action of the government, and define the operation of the sovereign power. Taking into account their vitality to the very essence of a constitutional state, and in order to guarantee the permanency of the institution, such laws should be incorporated within

the constitution entrenching them not to be changed at the will and whims of the parliament.

International human right instruments, standards, and national constitutions have recognized state of emergency, limitation of rights, and militant democracy as a special part of limitation for the maintenance and survival of the constitutional order with the incorporation of restraining safeguards against abuse.

There are substantive and procedural principles governing state of emergency in the sprite of international human rights instruments, and standards: There must be an exceptional threat threatening the life of the nation. The exceptional threat must be actual or at least imminent; its effect must involves whole or part of the population, it must target to the very existences of the nation; the declaration must be a last result; it must be a temporary measure; the measure need to be proclaimed officially; it must be proportional to the extent strictly required by the exigencies of the situation; the measure shall apply to all without discrimination; it shall not be in consistent with the obligation of the state under international law.

The three modes of constitutional reason of state discourse are embodied in the FDRE constitution, and other relevant laws. All of them have pit falls of necessary protection against their abuse by the power holder. With regard to state of emergency, the constitution doesn't provide adequate procedural and institutional safeguards against abuse. Though it attempts to incorporate some sustentative principles for that purpose; the catalogue of non derogable rights contains only three rights (The prohibition against in human treatment, the right to equality, and the right to self determination). The rights such as prohibition of retroactive penal law, the right to recognition as a person before the law, the right to life, freedom of thought, conscience and religion, the right to effective remedy before the court and minimum procedural rights of the arrested and the accused which are categorized as non-derogable under international human rights instruments and standards are not guaranteed as non-derogable under the FDRE constitution. Giving the power and responsibility for the state of emergency board to publicize the detainees on the account of state of emergency within one month, it allows a possible one month

detention of persons without communication with their family, friends or a lawyer which is a very long time. The independence of the judiciary is not also protected. Moreover, the judiciary doesn't have the power and the jurisdiction to entertain the constitutionality of emergency laws. The HOF is the organ with the power to entertain such cases; and this organ as a political body with members from the political parties that assumes the public power in the regional states is not an independent competent organ from the outset to dispose constitutional disputes of emergency laws which involves a pure political question. The existing political reality of the public power being assumed by one party in all regional states aggravates the problem.

The parliamentary control provided in the constitution is not also attractive to be an adequate safeguard against abuse of state of emergency. The parliament is not empowered to formulate state of emergency norms at normal times to be applied during emergency as far as practicable. The power of the house is either to approve or reject the decree submitted to it by the council of ministers; it doesn't have the power to modify the decree .The 15 days allowed for the executive decree to have a force of law when it is declared at a time the house is not in session without the confirmation of the latter is a very long time.

Once a state of emergency is declared, the council of ministers shall have all necessary power to rectify the emergency situation in accordance with regulations it issues. But the parliament doesn't have the power to provide general guidelines, and to regulate the executive discretion in this regard. The normal functions of the parliament such as over sighting the exercise of the emergency measure with the duty to report up on the executive is not guaranteed to remain intact during emergency under the constitution. It is not also guaranteed for the immunities of the legislature to remain intact during emergency.

And the placement of the emergency clause is not convenient to fill the above gaps by interpreting the clause in a manner conforming to international human right instruments. Though emergency clause is part of human right provisions and protections, it is not placed in the human rights chapter in the FDRE constitution. For this reason, the

constitutional provision that obliges "the fundamental rights and freedom specified in chapter three to be interpreted in a manner confirming to the principles in the universal declaration of human right, and international instruments adopted by Ethiopia" may not apply, safely, to interpret the emergency clause of the constitution.

Hence, with the absence of institutional and procedural safeguard to control abuse of state of emergency, the Ethiopian constitutional system doesn't have a restrained reason of state in their regard.

Having said this as to the gaps of institutional and procedural guaranties to control abuse of state of emergency, there is a constitutional power lacuna to address an emergency crisis. In case a constitutional crisis of disagreement happened in the council of minister and in a time of a care taker government following the dissolution of the house in which its power is constitutionally 1imited not to enact new proclamation, regulation or decree, there is no constitutionally empowered organ to declare state of emergency. There is not also a permanent representative of the parliament that will assume its function in case it is dissolved, or is not in session. While there is no constitutionally provided solution to the former, the state of emergency decree proclaimed by the council of ministers will remain in force for a maximum of 15 days, which is a long period of time, in case the situation arise when the house is in recess.

In relation to the power to limit human rights, the FDRE constitution in its most of the human rights provisions contains specific limitation clauses. The specific limitation clauses under the constitution, as they are general and vague, are vulnerable to abuse. The government may also consider limiting at its whim with regard to the rights with no limitation clause at all. In spite of this, the constitution doesn't incorporate a limitation for the limitation act which is a safeguard to control the government not to abuse the general and vague grounds of limitations and to protect the provisions without limitation clauses.

Militant democracy as a special sort of limitation measures that mainly targets the rights of political association exist in the FDRE constitutions, and its subsidiary laws. By

prohibiting an illegal subversion of the constitutional order and violation of appropriate laws, and regulating the constitutionally legal procedure how a state power to be assumed, the constitution adopts militant democracy in its procedural aspect. It does not, however, provide a special institutional and procedural protections as a safeguard to control abuse of such militant democracy measures to be taken against political associations despite the fact that they are entrusted with a prominent role constitutionally placed in away to be a forum on which the will of the people will be expressed, and the parallel societal interests in the country be reflected.

Though the currently working political parties registration proclamation provides as political parties involved in serious criminal change could be dissolved with a court decision, there is no guarantee that the parliament itself will not take such power by enacting another proclamation as there is no constitutional entrenchment that protects the political parties to be dissolved only by the order of the court. The Anti-terrorism proclamation makes the power to proscribe an organization as a terrorist organization which is a militant democracy measures similar to dissolution that of the parliament with the submission of the executive in reflection to the constitutional Gap of protecting political parties. As it is difficult to expect the impartiality of the parliament in giving such sort of resolutions taking into account to the party discipline in parliamentary system of the government, and the same political reality in the country, granting such power to the parliament up on the submission of the executive could open to abuse making the life of political parties at state. Moreover, both the Constitution and the relevant proclamation do not provide any requirements and factors the initiative executive and the approving parliament will consider in taking the proscription measure.

Recommendations

The writer will forward the following recommendations based on the above mentioned findings:

1. The absence of institutional and procedural guarantees in the constitution quests for constitutional amendment to their incorporation in which their constitutional entrenchment is very important to have a restrained reason of state that makes a rational adjustment of power and rights, security and freedom. To this end, I recommend a constitutional amendment for the incorporation of the following points:

- The catalogue of non-derogable rights in the emergency clause need to increase its list guarantying the right to access to court, the independence, structure, and power of the judiciary, minimum due process right of the arrested and the accused in addition to the need to constitutionalize the non-derogable substantive rights in the ICCPR (the right to life, freedom from slavery or involuntary servitude, the right not to be imprisoned for contractual debt, prohibition of retro- active penal laws, the right to recognition as a person before the law; freedom of thought, conscience, religion and belief which are fundamental human rights which should not be suspended at any time. The one month possible detention without communication with family, friend or a lawyer as the state of emergency board is obliged to publicize the detainees within one month need to be reduced in large. It is a very long time that opens for the violation of various right of the detainee; it is incomparably long with that of the constitutional duty of the South African government to publicize the same within a maximum of 5 days from the date of detainee.
- The emergency clause of the constitution shall be placed in chapter three as it is part of human right provision, and in order to enable it to be benefited from the safeguards of interpretation and amendment procedure provided to chapter three. Placing the emergency clause in chapter three, for example, enables to increase

the list of non-derogable rights. The clause will also be benefited from the rigid amendment procedure towards the human rights chapter entrenched in the constitution.

- Allowing the emergency decree declared by the executive when the parliament is not in session to remain in force for 15 day is a long time that need to be reduced into a reasonable short period of time. Moreover, establishing a permanent deputation that assumes the power of the house when it is in recess will solve such problem.
- The sole power either to approve or reject the emergency given to the parliament need to include the power to modify the same. And the house shall have the power to provide general provisions that regulates the discretion of the executive to issue regulations for the implementing of the emergency proclamation.
- The constitution shall guarantee for the immunities of the legislature to remain intact during emergency protecting the right to speak, and expression of the opposition which are the minority in the parliament; it helps the public to attend the situation enabling to get a parallel view. The normal functions of the parliament need also to remain intact which will enable it to oversight thereby control the exercise and the progress of the emergency measure.
- The constitution need to adopt a general limitation clause that limits a limitative act to be enacted based on the specific limitation clause built in most of the human right provisions, and in order to control possible arbitrary limitations up on those which do not have any limitation clauses. As Ethiopia, as a founding member of the United Nation, is a democratic society that incorporates the united nation charter, the UDHR, the ICCPR, and other international human rights instruments, and in which one third of its constitution is devoted to human rights provisions giving a special protection, the general limitation clause shall require the limitation laws (presupposes the principle of legality to be required) to be a law of general application; and for the limitation to be proportional to the extent it is reasonable and justifiable in a democratic society based on human dignity, equality, and freedom. It shall also urge the nature of the right, the importance of

the purpose of the limitation, and the relationship between the limitation and the purpose of the limitation to be considered.

- The judiciary shall be constitutionally empowered to have a jurisdiction to entertain the constitutionality of laws of such measures; alternatively, a special constitutional court shall be established as a custodian of the constitutional order. The robust notion of rule of law and the acceptance of the judiciary as an appropriate organ to dispose cases with an issue of political questions increases the adoption of judicial review of legislations by the judiciary, or a special constitutional court around the world today since the Second World War. Adopting judicial review by putting such formulated emergency and limitation clauses under the constitution is the best response to the tension between Democracy and Rule of Law; the clause do not only limit the power of the parliament and the executive but also that of the judiciary by obliging it consider certain factors while entertaining the constitutionality of the laws.
- In light with the status, and the prominent role they are entrusted in the constitutional system, institutional and procedural safeguards shall be provided to the political parties to control abuse of militant democracy measure to be taken against them. The power to decide the unconstitutionality of political parties to the effect of dissolution or proscription as a terrorist organization shall lie up on the judiciary or the constitution court to be established; and such shall be constitutionally entrenched. Clear criteria that guides and constrains the exercise of proscription power need to be formulated.

2. The constitution need also to legitimize the power to address emergency situation in a time of care taker government and in case the council of ministers that has the power to initiate the decree is not in a position to respond on certain reasons such as internal political crisis. The constitution shall fill the power lacuna to be created in both cases by legitimizing the president of the republic to have the power to bring the motion to declare an emergency measure to the parliament. There shall be a permanent deputation of the

house that will assume the powers and functions of the latter when it is dissolved, or is not in session. The president of the republic need to play a mediator role in case the competent organs are not in a position to respond the situation. And the Constitution need to empower to the president in a way that enables him/her plays such role.

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