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ADDIS ABABA UNIVERSITY SCHOOL OF LAW GRADUATE STUDIES

STATES OF EXCEPTION UNDER THE FDRE CONSTITUTION

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of the Requirements of Master of Laws (LL M) Degree in Constitutional and Public Law**

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Declaration Statement

I, Shishay Abraha Mehari, declare that this dissertation is original and has never been presented in any institution or university. In addition, I also declare that all information used in this study has been duly acknowledged.

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Abstract

The FDRE Constitution has empowered the federal and regional governments to exercise their respective powers and functions autonomously. States establish and administer their own police force and maintain public order and peace within their territory. Moreover, the Constitution has included a comprehensive list of human rights. Individuals and groups enjoy such rights within the bound of some limitations. This is true in the period of normalcy. Some odd situations, however, dictate the government to deviate from the rules applicable in ordinary time. Therefore, it is wise to govern such conditions in advance.

The Constitution has provided federal intervention and state of emergency as states of exception to cope with inevitable exigencies. However, such exceptions in turn have come up with problems on the autonomy of states and enjoyment of human rights. First, situations that require federal intervention are not sharply delineated from the ordinary situations and are simply left to be determined by the federal government, in many cases. Besides, the measures taken consequently are intrusive on the autonomy of states. Second, the Constitution and subsequent laws left gray areas that can be used as grounds for federal intervention or state of emergency. This opens a way for the federal government to choose either of the states of exceptions to suspend human rights or regional governments alternatively. Third, practically, problems are escalating because the federal government is using its security forces to hush down challenges against its legitimacy, rather than solving them peacefully. Furthermore, human rights are suspended beyond the extent necessary to avert the exigency.

To avoid such problems, the researcher suggests that states of exception should be strictly applied after all peaceful means resorted are found ineffective and should only target on averting extraordinary conditions. Care should be taken not to unnecessarily subdue states' autonomy and human rights using states of exception as a principle.

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Acronyms

CoM – Council of Ministers

CSA – Constitution of South Africa

FDRE – Federal Democratic Republic of Ethiopia

GBL – German Basic Law

HoF – House of Federation

HPR – House of People’s Representatives

ICCPR – International Covenant on Civil and Political Rights

MoFA – Ministry of Federal Affairs

PM – Prime Minister

UN – United Nations

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CHAPTER ONE

INTRODUCTION

1.1. Background of the study

Under federal government structures, the federal and state layers of government are required to be autonomous within their own jurisdictions. Both formulate and implement their respective policies, except the policies common to the whole federation in which both layers of government coordinate through the intergovernmental relation systems. They legislate, execute and adjudicate their own affairs.¹ This is the case in states having dual federalism opposed to states with executive federalism. In the latter case, the federal government enacts laws while the regional government executes the same.² This is in the regular and ordinary situation. They preserve, for instance, their respective territorial peace and security through their respective security forces, but the whole nation through the federal one.

In the Ethiopian federation, both the federal and state governments have a constitutional duty to protect and defend the federal constitution.³ They use their arms to preserve security, protect and enforce human rights of residents of their respective jurisdiction, and preserve the Constitution and constitutional order. They have their own police forces to maintain security and prepare a conducive environment for the enjoyment of human rights.

However, there are exceptional situations or states of exception where the ordinary government layer setup is set aside. In such situations, the federal government dives over the state jurisdiction through federal intervention or state of emergency formula.

Some exigent situations necessitate the federal government to intervene in regions or declare state of emergency. Security deterioration, violation of human rights and endangering the constitutional order are the reasons for federal intervention, while external invasion, constitutional disorder, natural disaster and epidemics are grounds for state of emergency under the FDRE Constitution.

¹ Constitution of the Federal Democratic Republic of Ethiopia 1995 (hereinafter FDRE Constitution), Proclamation no 1, *Neg. Gaz.*, Year 1 No 1, art 50(2).

² Ronald Watts, cited in Assefa Fisha, *Federalism Teaching Material* (Prepared under the Sponsorship of the Justice and Legal System Research Institute, 2009) 359-362.

³ FDRE Constitution (n 1), arts 51(1) and 52(2(a)). Both governments have also the duty to respect and enforce human rights in particular. See art 13(1) of the Constitution.

1.2. Statement of the Problem

The FDRE Constitution as well as the System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003 contained broad and vague provisions. Phrases like ‘deteriorating security situation’, ‘violations of human rights’, ‘violation of the constitution’ and ‘endangering the constitutional order’ are too broad to trap several situations within their sphere. There is no watertight separation between the ordinary situation and the states of exception. It may be abused by the federal government and infringe state autonomy and hence the effect of such vague provisions needs study.

The extent of federal intervention is also another problem. It extends from giving directive to suspension of state organs. The state autonomy stipulated under the federal compact fails under question here since the measures to be taken through intervention may enable the federal government to make and unmake regional governments. This is because that it is the federal government that decides the proportionality and necessity of measures, and establishes the fact that a state violates the constitution and endangers the constitutional order. The effectiveness of the federal interventions in managing conflicts is another issue that requires examination since conflicts are still persisting, even worsening, regardless of the interventions.

Moreover, there is no clear distinction between the grounds of state of emergency and federal intervention and their respective effects on the structures of regional governments and human rights of individuals. Although such and other problems related to the states of exception necessitate deep studies, a little has been researched and is insignificant in bringing solutions for such problems. The researcher believes that this research fills the gap of study.

1.3. Literature review

The notion of federalism from the outset implies unity of entities for some purpose and autonomy for another. It is based on the shared rule for all and self-rule for each.⁴ The FDRE Constitution has affirmed the sub-national sovereignty and autonomy of states. Among other things, it has stated that states have the power to adopt their constitutions.⁵ Moreover, both governments have the responsibility to respect the powers of one another.⁶ This is the

⁴ Hashim Tewfiq, ‘Conflict Management Structures and Federal Intervention under the Ethiopian Constitution,’ in First National Conference on Federalism, Conflict and Peace Building (Addis Ababa: United Printers, 2003) 238.

⁵ FDRE Constitution (n 1), art 50(5).

⁶ Ibid, art 50(8).

manifestation of sovereignty if it is widely construed, and may even lead to the notion of ‘dual sovereignty’, where both layers of government are sovereign and autonomous.⁷

Under the FDRE Constitution, state governments have powers and functions to ensure the maintenance of peace and order within their respective territories.⁸ Security problems, human rights violations, calamities and epidemics may not be controlled by the ordinary system of governance. In such circumstances, the federal intervention and state of emergency come into picture as a last resort after all other peaceful conflict-handling mechanisms are exhausted.⁹

Many constitutions have paved the way to bring abnormal conditions into status quo through the declaration of states of exception, i.e., either through federal intervention or state of emergency. The German Basic Law (hereinafter GBL) has stated that:

[A] Land may call police forces of other Länder or the Federal Border Police in order to avert an imminent danger to the existence or free democratic basic order of the Federation. When the Land where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that Land and the police forces of other Länder under its own orders and deploy units of the Federal Border Police.¹⁰

The GBL has used the word ‘internal emergency’ to refer to federal intervention in regions equivalent to the Ethiopian one. In Spain, also, the federal government takes action when a state is in contempt of the federal constitution.¹¹ In India, the President may by a proclamation declare the state to be under the authority of parliament when the state machinery fails.¹² Ethiopia has also provided federal intervention under its Constitution under Arts. 51(14), 55(16) and 62(9) and the System of Federal Intervention in Regions Proclamation No. 359/2003.

State of emergency is the other exception to the law of normalcy. Almost all international and regional human rights instruments have recognized the suspension of some rights for the interest of the state during state of emergency (state of public emergency), except the African Charter for

⁷ Assefa (n 2) 123. From the international relations perspective, it is the federal government alone that is considered sovereign.

⁸ FDRE Constitution (n 1), art 52(2)(g).

⁹ Hashim (n 4) 237.

¹⁰ The German Basic Law (hereinafter GBL), art 91(1) and (2).

¹¹ Getachew Assefa, *Ethiopian Constitutional Law with Comparative Notes and Materials* (2012) 354.

¹² Assefa (n 2) 347.

Human and Peoples Rights.¹³ Many national and international laws temporarily suspend rights to restrain exigencies.¹⁴ Circumstances force the state to take extraordinary measures to safeguard the democratic order.¹⁵ However, States at least have to consider whether the crisis is severe enough to declare state of emergency and whether the extent of the measures used is proportional to avert the danger.¹⁶

1.4. Objectives of the Study

1.4.1. General Objective

The basic objective of the study is to examine states of exception in Ethiopia. It critically analyzes federal intervention and state of emergency and their effects in striking balance between state autonomy, and protection of security, human rights and constitutional order.

1.4.2. Specific Objectives

The study specifically:

- ❖ Examines the grounds of federal intervention and state of emergency;
- ❖ Identifies regular situations and states of exception and differentiate among types states of exception;
- ❖ Scrutinizes the effectiveness of the states of exception in solving problems; and
- ❖ Examines implications of the states of exception on states' autonomy and human rights.

1.5. Research Questions

- What are the grounds for federal intervention in regions and the grounds for state of emergency?
- How do we differentiate states of exception from the ordinary situation?

¹³ See the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 4(1), American Convention on Human Rights (adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) 1144 UNTS 123, art 27, and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222, art 15.

¹⁴ Yehnew Tsegaye, 'State of emergency and human rights under 1995 Ethiopian Constitution' (2007) *Journal of Ethiopian Law*, Vol 21, 83.

¹⁵ Asanga Welikala, 'States of Emergency: Issues for Constitutional Design' (2016) CPA Working Papers on Constitutional Reform No. 5, August 3.

¹⁶ United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985) § C.

- Are the states of exception effective in solving problems?
- What are the effects of the states of exception on the states' autonomy and enjoyment of human rights?

These and other related questions are raised and answered based on the analysis of relevant sources.

1.6. Significance of the Study

It is believed that the study contributes valuable input in clearing the blurry points between the states of exception and their effects on states' autonomy and human rights. Moreover, it will also be a base for potential researchers to conduct further studies on the issue.

1.7. Methodology and Source of Information

In analyzing the data gathered, the researcher applied qualitative approach in identifying key issues, such as the grounds for states of exception and their impacts. The researcher used primary and secondary sources and collected data through interviews and literature analysis. Primary authorities like the 1995 FDRE Constitution and the System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003 are analyzed. The study has also used the relevant literature materials as secondary sources.

1.8. Scope of the Study

The scope of the research is limited to assess states of exception under the FDRE Constitution and subsequent laws.

1.9. Limitation of the Study

The study has faced some limitations. The government bureaucracy has been a big challenge in collecting sources for the research. It takes weeks to contact a certain official. Lack of sufficient data is the other potential limitation.

1.10. Structure of the Study

The thesis contains four chapters. The first chapter is an introductory part. The second chapter defines and assesses states of exception from a comparative perspective. The third chapter examines states of exception in Ethiopia. The grounds for and the relationship between states of exception stipulated under the FDRE Constitution is discussed under this chapter. The last chapter deals with the measures and effects of the states of exception on the structure of state governments and human rights and the problems in taking the laws into practice. Conclusion and recommendations are provided at the end.

1.11. Citation rule

The Oxford Standard for Citation of Legal Authorities (OSCOLA 2006) is pursued throughout the research. Available on <http://denning.law.ox.ac.uk/published/oscola.shtml>

CHAPTER TWO

STATES OF EXCEPTION FROM A COMPARATIVE PERSPECTIVE

2.1. Introduction

Federalism is constitutional sharing of powers and functions between federal and constituent units, each being independent and supreme within its allocated spheres and acts in a coordinated way. Both the federal and constituent units enjoy equal status and are in no way subordinated to one another.¹⁷ Ethiopia has adopted a federal government structure since 1995, in which both the federal government and states have their respective powers and functions.¹⁸ As Federalism allocates, through constitutional provisions, political power to a general government and regional governments, in a way that creates substantially autonomous component units as well as a federal nation,¹⁹ the FDRE Constitution has stipulated the respective powers of the governments. Authority is divided between the center and the sub-units to enable joint action for the whole federation and self-government for the component units (shared rule and self-rule). Both of the governments have their own legislative, executive and adjudicative powers²⁰ and are autonomous since they are free from interference as a rule.²¹

As a core tenet, the Constitution recognizes the federal structure, in which government authority is divided in to federal and state governments²² and the inviolability of human rights.²³ However, there are constitutionally prescribed circumstances where the federal-regional relation and the inviolability of human rights hold no more. These circumstances are exceptions to the rule. In this paper, the term ‘states of exception’ is used to refer to such extraordinary circumstances where the autonomy of states as well as the status of human rights is compromised. An ‘exception’ is departing from the rule of ordinary time. Many literatures have used state of exception to refer to state of emergency only. This is due to two reasons. First, the phrase

¹⁷ Thomas Fleiner, *federalism, federal states and decentralization*: In Lidija R. Basta and Thomas Fleiner (eds.), *federalism and multi-ethnic states: the case of Switzerland* (1996) 1-2; Hashim Tawfiq (n 4) 226.

¹⁸ FDRE Constitution (n 1), arts 51 and 52.

¹⁹ Thomas Schaeubli, *Federalism and Autonomy in Switzerland and China* (2008) 4.

²⁰ FDRE Constitution, art 50(2).

²¹ *Ibid*, art 50(8).

²² *Ibid*, art 50(1).

²³ *Ibid*, art 10.

‘internal state of emergency’ is used in some Constitutions to refer to federal intervention.²⁴ Second, the public is much aware of state of emergency and treat it as the only state of exception, because the grounds, the procedure of declaration and the measures to be taken are serious in state of emergency than federal intervention. For these two reasons, people tend to use state of exception to refer to state of emergency, disregarding the term ‘federal intervention’. However, as far as the rules of ordinary time are left out, it is an exception. For that matter, I have used the term ‘states of exception’ throughout the research to include ‘federal government intervention in regions’ and ‘state of emergency’.

2.2. Definition and Historical Background of State of Exception

There is no commonly agreed definition of states of exception among scholars. It is sometimes used interchangeably with state of emergency. It is a reason of state, state of emergency, or *etat de siege*(state of siege) that refers to the situation in which a state responds by doing things that would never be justifiable in normal times. It refers to a state’s response that is exceptional to its rules applicable in a normal state of things.²⁵ The state of exception uses ‘justifications that only work *in extremis*, when the state is facing a challenge so severe that it must violate its own principles to save itself’.²⁶ It is a state of necessity used to control civil war, insurrection or resistance.²⁷ State of emergency is also used as the same with state of exception, siege, necessity, or martial law.²⁸ Though state of exception is assimilated to state of emergency, some of the definitions are broad enough to cover situations other than state of emergency, especially in the Ethiopian case.

Departing from this understanding of the notion of state of exception, the FDRE Constitution has provided federal intervention and state of emergency to be applied in exceptional situations. Therefore, both federal intervention and state of emergency can be termed as states of exception, though the Constitution nowhere used the term ‘state of exception’.

²⁴ See GBL (n 10), art 91.

²⁵ Kim Lane Scheppele, ‘Law in a Time of Emergency: States of Exception and the Temptations of 9/11’ (2004) *Journal of Constitutional Law*, Vol 6, No.5, 1004.

²⁶ *Ibid.*

²⁷ Kevin Attel (trans), *State of Exception* (The University of Chicago press 2005) 1.

²⁸ Stephen Humphreys, ‘Legalizing Lawlessness: On Giorgio Agamben’s State of Exception’ (2006), *The European Journal of International Law* Vol 17 No 3, 677.

The modern formulation of the state of exception arrives with a 1789 decree of the French constituent assembly, distinguishing a ‘state of peace’ from a ‘state of siege’ in which ‘all the functions entrusted to the civilian authority for maintaining order and internal policing pass to the military commander, who exercises them under his exclusive responsibility’.²⁹ The state of exception is ‘gradually emancipated from its war context and is introduced during peacetime to cope with social disorder and economic crises’.³⁰ It is based on the maxim that *necessitas legem non habet* (necessity has no law). It is necessity that creates the exception, ignoring the ordinary law.³¹ It is the point of imbalance between law and political fact or a ‘no man’s land’ between public law and political fact.³² The law needs to withstand situations rigidly, while the politics requires being flexible according to circumstances.

2.3. States of Exception in the Constitutions of Germany, India and South Africa

The vast majority of democratic constitutions have provided states of exception to depart from their ordinary system of governance. However, the Constitutions of Japan³³ and Belgium³⁴, exceptionally, contain almost no reference to states of emergency. The Constitution of the United States also contains only ‘indirect and rudimentary references’ to this matter.³⁵ There is no term martial law, state of emergency or state of siege in the American constitution. It only authorizes the writ of Habeas Corpus stating that ‘the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it’.³⁶ This is an indirect stipulation that there may be times when the normal rules do not work and the courts are precluded from reviewing the legality of detentions.³⁷ Nevertheless, there were clear

²⁹ Ibid, 679.

³⁰ Ibid.

³¹ Agamben (n 27) 1

³² Ibid.

³³ The Japan Constitution has stated that ‘the Cabinet may in time of emergency convoke the House of Councilors in emergency session’. It only gives a clue that state of emergency may be declared. See the 1947 Japan Constitution, art 54.

³⁴ The Belgian Constitution nowhere regulated state of emergency, but empowered the federal legislative to intervene and supervise the observance of laws in provinces. See the 1831 Belgian Constitution as revised on 2014, art 162(6).

³⁵ Samuel Issacharoff & Richard H. Pildes, ‘Emergency Contexts without Emergency Powers: The United States’ Constitutional Approach to Rights during Wartime’ (2004) I.CON, Vol 2, No 2, 296.

³⁶ Article I, § 9, clause 2 of the US Constitution.

³⁷ Scheppele (n 25) 1006.

states of emergency declarations on many occasions.³⁸ As to the federal intervention, The US Code reads:

*[T]he President, by using the militia or the armed force ... shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it so hinders the execution of laws of that State...*³⁹

How states of exception is dealt in Constitutions of Germany, India and SA and what are their impacts on the self-governance of states and human rights are discussed below to analyze the Ethiopian one from a comparative perspective.

2.3.1. The Distinction between State of Emergency and Federal Intervention

Instead of separating federal intervention from state of emergency, several constitutions have stipulated different kinds of states of emergency. The GBL distinguishes between an ‘internal emergency’ (Innerer Notstand)⁴⁰, a ‘state of tension’ (Spannungsfall)⁴¹, and a ‘state of defence’ (Verteidigungsfall)⁴².

Under the GBL, an internal emergency is declared when there is ‘an imminent danger to the existence or free democratic basic order of the Federation or of a Land.’ A State with imminent danger may request the services of the police forces of other States, or of the forces and facilities of other administrative authorities and of the Federal Border Guard.⁴³ If the State is unwilling or unable to combat the danger, the federal government can combine police forces of the State and other States together with its Federal Boarder Guard and place them in the respective State to avert the danger.⁴⁴ Therefore, internal emergency measures could be taken in three forms. A state government itself could request the use of federal troops and police forces of other states; it could give its consent to the use of the federal army by the federal executive; or the federal executive could act alone if a state is not prepared or in a position to meet the emergency.⁴⁵ This

³⁸ Proclamation No. 7463/2003 was, for instance declared on September 14, 2001 following the 9/11 attack. See Scheppele (n 25) 1001.

³⁹ 10 United States Code, § 333 (1964)

⁴⁰ GBL (n 10), arts 91 and 87 (a (4)).

⁴¹ Ibid, arts 12(a(5)) and (6), and 80 (a).

⁴² Ibid, arts 115 (a)–115 (l) and Articles 91, 87a(4), 12a(5)-(6), 80a.

⁴³ Ibid, art 91(1).

⁴⁴ Ibid, art 91(2).

⁴⁵ C. C. Schweitzer, ‘Emergency Powers in the Federal Republic of Germany’, the Western Political Quarterly, West Berlin, 120. <<http://journals.sagepub.com/doi/pdf/10.1177/106591296902200109>.> accessed 20 April 2018.

type of emergency is similar to the ‘deteriorating security situation’ that necessitates federal intervention in the Ethiopian case. Differing from the Ethiopian laws, the GBL has explicitly allowed the federal government to declare internal emergency when the State is *unwilling* to combat the danger.

A state of defence may be declared when the ‘federal territory is under attack by armed force or imminently threatened by such an attack.’⁴⁶ There are three ways of determination of state of defence. The two Parliamentary Houses (the Bundesrat and Bundestag) in joint session determine it as a principle.⁴⁷ If insurmountable obstacles prevent the timely convening of the Houses in quorum, the Joint Committee does so.⁴⁸ Lastly, if the competent federal authorities are not in a position at once to make the determination, it shall be deemed to have been made and promulgated at the time the attack began, *without any formal proclamation*, and the Federal President announces that time as soon as circumstances permit.⁴⁹

In the Indian Constitution, the President can declare state of emergency when India or part of it is threatened by grave emergency whether by war or external aggression or armed rebellion.⁵⁰ Emergency is defined as ‘war, external aggression, armed rebellion, failure of constitutional machinery and a threat to financial stability that threatens the security of the State or part of it’.⁵¹ It does not include natural disaster and epidemics in the list of emergencies and nowhere used the clause ‘federal intervention’. State of emergency is the only state of exception stated there. However, ‘the Union is duty bound to protect every State against external aggression and *internal disturbance*’ (emphasis added) by declaring state of emergency.⁵² This type of state of emergency, though not termed as ‘federal intervention’, is the same to Ethiopian federal intervention in case of security deterioration in states.

⁴⁶ GBL (n 10), art 115a(1).

⁴⁷ Ibid, art 115a(1).

⁴⁸ Ibid, art 115a(2).

⁴⁹ Ibid, art 115a(4).

⁵⁰ Indian Constitution, art 352(1).

⁵¹ Ibid, art 352(1).

⁵² Ibid, art 355. The phrase ‘internal disturbance’ under Art. 352 is replaced with ‘armed rebellion’ by the Constitution (Forty-fourth Amendment) Act, 1978 and the word ‘grave’ under Art. 352 is not used under Art. 355, just to make distinction on the types of emergencies. Hence, it may mean to include all kinds of problems of law and order ranging from public disorder to threat to the security of a state.

The Constitution of SA, however, clearly distinguished federal intervention from state of emergency. It has stated state of emergency under Art. 37 and federal intervention under Art. 100. A state of emergency is declared when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency.⁵³ The national executive body also intervenes when a province cannot or does not fulfill its executive obligation to implement laws.⁵⁴ A failure, in this case, has to be prejudicial to ‘essential national standards, established minimum standards for the rendering of a service, economic unity, or national security, or that is prejudicial to the interests of another province or the country as a whole’.⁵⁵ The national government intervenes in provincial government either through issuing directives to the provincial executive to discharge its executive obligation, or through assuming responsibility to the extent necessary to ensure fulfillment of the provincial executive obligation.⁵⁶ When the federal government intervenes through assuming responsibilities, the National Council of Province approves or disapproves the intervention explicitly or implicitly. However, the federal government is empowered to intervene and to determine the form and extent of the intervention. The Constitution states that ‘the national executive may *intervene* by taking *any appropriate steps* to ensure fulfillment of that obligation⁵⁷ (emphasis added).

2.3.2. Measure to be taken by the federal government and its effects

The Roman Empire was known for establishing a ‘temporary dictatorship’ until a period of crisis lapses. State of emergency was a merit to suspend an existing constitutional setup. This trend of constitutional suspension during state of emergency opened a way for dictators to abuse it. For instance, the Nazi regime has used national security as a means of circumventing the Weimar Constitution.⁵⁸ Taking lesson from history, modern constitutional provisions often proscribe any change or modification of the constitution itself during an emergency, or at least any change to, or modification of, the nature of the regime and its core constitutional norms.⁵⁹ The Algerian

⁵³ The Constitution of South Africa (hereinafter CSA), art 37(1(a)).

⁵⁴ Ibid, art 100(1).

⁵⁵ Ibid, art 100(1(b)).

⁵⁶ Ibid, art 100(1(a and b)).

⁵⁷ Ibid, art 100(1).

⁵⁸ Daphne Barak-Erez, *The National Security Constitution and the Israeli Condition: in Constitutional Rights and ‘State of Emergency’*, 436.

⁵⁹ Asanga Welikala (n 15) 11.

Constitution, however, provides that ‘during a period of state of war, the Constitution is suspended and the President of the Republic assumes all the powers’.⁶⁰

2.3.2.1. Effects of States of Exception on States’ Autonomy

During state of defence, the GBL empowers the Federation to enact laws on matters within the legislative jurisdiction of the States.⁶¹ In India also, the national Parliament has the power to enact laws applicable to the whole country or a specific territory during state of emergency is in effect. Any law enacted by the State parliament before or after the law enacted by the national parliament is of no effect to the extent they are repugnant to the latter.⁶² Moreover, when a situation that the State government cannot control by itself arises, the President of the Union may intervene in the state and assume all or any of the powers of the former.⁶³ The Union Parliament acquires the power to make laws on matters which may fall within the legislative or executive competence of the state government.⁶⁴ It may also dismiss (or prevent the formation of) State governments when rival political parties control the power.⁶⁵ Besides, the national government can control the distribution of revenues.⁶⁶ Hence, both under the German and Indian Constitutions, the federal government suspends the State’s legislative body during states of exception.⁶⁷ The Constitution of SA is silent as to the effect of state of emergency on the Provinces. It is clear, however, that the national executive assumes responsibility of the Provincial administration during the national intervention.⁶⁸

2.3.2.2. Effects of States of Exception on Human Rights

Suspending human rights during state of emergency is common in almost all modern constitutions, but certain fundamental rights maintain full validity because of the ‘fear of abuse’

⁶⁰ Algeria’s Constitution of 1989, Reinstated in 1996, with amendments through 2016, art 96 (1).

⁶¹ GBL (n 10), art 115c (1).

⁶² The Constitution of India (n 50), art 250(1).

⁶³ Ibid, art 356(1(a)). The president can also declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the national parliament.

⁶⁴ D.K. Singh, Emergency and the Constitution of India, Indian Constitution: Trends and Issues, 291. <<http://14.139.60.114:8080/jspui/bitstream/123456789/735/24/Emergency%20and%20the%20Constitution%20of%20India.pdf>> accessed 16 April 2018.

⁶⁵ Rahul Sagar, Emergency Powers (2016) 225. <<https://nyuad.nyu.edu/content/dam/nyuad/faculty/social-science/rahul-sagar/publications/rahul-sagar-ohb-indian-constitution.pdf>> accessed 12 April 2018.

⁶⁶ Constitution of India (n 50), art 354(1).

⁶⁷ Under both the German and Indian Constitutions, state of emergency generally includes the federal intervention and the state of emergency per se.

⁶⁸ CSA (n 53), art 100(1(b)).

of the emergency powers.⁶⁹ States used either the positive list approach (the constitution identifies which rights and freedoms may be restricted under emergency powers) or the negative list approach (the constitution sets out explicitly which rights and freedoms may not be so restricted even in the midst of acute crisis) in specifying the suspension of rights.⁷⁰ From the angle of human rights protection, though it is better to list the derogable rights and leave the rest as non-derogable, many constitutions use the second approach which is also followed by the ICCPR and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷¹

The GBL has used positive list approach. Freedom of movement is subject to suspension during internal emergency⁷² while the right to property and liberty can be suspended during the external emergency.⁷³ The Indian Constitution, however, provides that any law may be enacted or executive action may be taken to suspend any of the rights provided under Part III of the Constitution, except Art. 20 and 21.⁷⁴ Moreover, Art. 25 of the Basic Law has included the ‘primacy of international law’ clause which gives international laws precedence over national laws. The Indian one, however, does not make reference to international laws. Nevertheless, since States cannot justify non-observance of their treaty obligations invoking their domestic laws, Indians are rightful to oppose derogations of rights that are non-derogable under the ICCPR.⁷⁵ There is also consensus among human rights scholars that, in case national and international laws contradict, the law that affords better protection shall be given priority.⁷⁶

The Constitution of SA has also used the second approach.⁷⁷ But, it is better than the Indian Constitution in protecting human rights. First, it has put many rights under the basket of non-

⁶⁹ András Jakab, ‘German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse’ (2005), *German Law Journal*, Vol 07 No 05, 463.

⁷⁰ Asanga Welikala (n 15) 12.

⁷¹ See ICCPR (n 13), art 4(1); European Convention (n 13), art 15(2).

⁷² GBL (n 10), art 11 (2).

⁷³ *Ibid*, paragraph 3 of Article 14(2), and paragraph 2 and 3 of art 104.

⁷⁴ Indian Constitution (n 50), art 359 (1). The non-retroactivity of criminal law, prohibition of double jeopardy, the freedom from self-incrimination and the right to liberty are the rights and freedoms enshrined under Arts. 20 and 21.

⁷⁵ Vienna Convention on the Law of Treaties, adopted on 23 May 1969 at Vienna and entered into force on 27 January 1980, art 27.

⁷⁶ Habtamu Birhanu, ‘derogation of the right to life and its suspension during state of emergency: Art.93 of the FDRE Constitution’. <<https://www.abysinnialaw.com/component/k2/item/1758>> accessed 1 May 2018.

⁷⁷ FDRE Constitution (n 1), art 93(4(c)), and CSA (n 53), art 37.

derogable rights.⁷⁸ Second, it has restricted legislations to be consistent to international law applicable to states of emergency.⁷⁹ Third, the bill of rights provided under Arts. 7-39 of the Constitution are required to be interpreted in consideration of international law.⁸⁰

To sum up, states of exception have serious fall-outs with the union-state relations and fundamental rights of citizens. The national governments jump over jurisdictions of states enjoyable during normalcy. Besides, human rights are subject to suspension during states of emergency, except those stated as non-derogable. Yet, derogations of rights should be to the extent necessary to avert the danger that caused the declaration of the state of emergency. Emergency laws list the rights that are susceptible to suspension depending on the grounds of the emergency declaration.

2.4. Organs of Control of State of Exception

Under the German Constitution, the Bundesrat (the upper house) controls and even rescinds, at any time, the federal government intervention in the Länder and state of defence.⁸¹ In India, the President is the sole judge to decide whether it is necessary to declare an emergency, and his decision cannot be challenged in a court of law.⁸²

The Constitution of SA has explicitly determined which organ is empowered to control declaration and extension of state of emergency. Any competent court controls it through judicial review. It has stated that:

*[A]ny competent court may decide on the validity of a declaration of a state of emergency; any extension of a declaration of a state of emergency; or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.*⁸³

As to the national intervention, the National Council of Provinces decides on declaration of intervention and reviews the measures taken thereafter when national government assumes the

⁷⁸ See the table of non-derogable rights under Art. 37 of the CSA (n 53). At least, seven human rights are non-derogable.

⁷⁹ CSA (n 53), art 37(4(b(i))).

⁸⁰ Ibid, art 39(1(b)).

⁸¹ GBL (n 10), arts 91(2) and 115I(2).

⁸² Singh (n 64) 289.

⁸³ CSA (n 53), art 37(3).

Provinces responsibility, while the National Executive's intervention through issuing directive is free from control.⁸⁴

⁸⁴ CSA, art 100(2)(b) and (c).

CHAPTER THREE

STATES OF EXCEPTION IN ETHIOPIA

This chapter deals with the states of exception recognized under the FDRE Constitution and subsequent laws. It assesses the laws that govern these states of exception and how such exceptions are practiced. Types of federal intervention, organs that declare such interventions, state of emergency, principles of state of emergency and other related issues are briefly covered under this chapter.

3.1. Kinds of States of Exception

As stated above, the federal government and states respect the powers of one another based on the principle of federal comity.⁸⁵ States primarily safeguard the security and human rights within their territory independent from the federal government interference.⁸⁶ However, there are circumstances where the state security and protection of human rights fall under peril. For such circumstances, the FDRE Constitution has come up with two kinds of state of exception: federal intervention and state of emergency.

3.1.1. Federal Intervention

At normal times, states are independent and free from federal intervention in discharging their functions to the extent the Ethiopian federalism is assimilated to confederation by some scholars.⁸⁷ However, states may sometimes be unable to arrest acute situations within their domain and may demand the federal government to intervene and curb it. Citizens under federal system have double governmental protection and one of the purposes of having federal compact is to enable the federal government to protect citizens in regions in case the regional government

⁸⁵ Tsegaye Regassa, 'Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia: An Overview' (2010), Mizan Law Review, Vol 4, No 1, 93. There is no federal supremacy clause in the FDRE Constitution. However, states, by themselves, incorporated such clause in their respective constitutions. See Arts. 47(3(a)), 49(3(3.1)), 49(3(3.1)), 51(3(a)), 51(3(3.1)), 49(3(a)) and 49(3(a)) of Afar, Amhara, BenshangulGumuz, SNNPR, Gambela, Oromia and Somali regional states Constitutions respectively states that Council of States enact law that should not contravene the Federal Constitution and other federal laws. The Harari and Tigray Constitutions are an exception.

⁸⁶ Safeguarding rights is not, however, an exclusive prerogative of the state government. Both the federal and state governments have the duty to respect and enforce human rights provisions. See FDRE Constitution (n1), art 13(1).

⁸⁷ Minasse Haile (1966) cited in Wondwossen Wakene, 'Self-governing Addis Ababa, the federal government & Oromia: bottom lines and limits in self-governance' (LL M thesis, Addis Ababa University School of Law 2010) 68.

fails to do so.⁸⁸ The federal government is also responsible to see the healthy relationship between the various ethnic groups living in the country.⁸⁹

The FDRE Constitution has provided three types of federal intervention. Accordingly, the Federal government intervenes in the regions upon the request of a member state in case of security deterioration⁹⁰, upon the initiation of the House of Peoples' Representatives, and joint decision with the House of Federation in case of human rights violation⁹¹, and thirdly upon the order of the House of Federation when any State, endangers the constitutional order.⁹² The System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003 came up to deal with federal intervention in detail. This proclamation used the word 'intervention' and nowhere used 'emergency'. Assefa raises an issue why the term 'intervention' that has implications much wider than emergency is used, since the Constitution has emphasized on 'sovereignty of nationalities'.⁹³ He has asserted that 'emergency situation' refers to extraordinary crisis while 'intervention' may refer to situations even in normal circumstances or situations not contemplated by the constitution.⁹⁴ But, some consider the law on federal intervention as an inherent part of Art. 93 of the Federal Constitution while others say intervention is wider than emergency.⁹⁵ Such issue was raised in discussions made by the Constitutional Assembly during the constitutional making period. One has raised a question whether a state of emergency is ordered at times the ordinary legal mechanism and federal intervention is ineffective to solve problems, though not answered then.⁹⁶

Federal intervention is not clearly defined under the FDRE Constitution as well as the Proclamation. The Proclamation has simply defined federal intervention as a system of intervention in regions pursuant to Article 62 (9), 51 (14) or 55 (16) of the Constitution.⁹⁷ It is

⁸⁸ Legal and Administrative Affairs Standing Committee's Minutes of Discussion on the Draft Proclamation for the System of Federal Intervention in Regions (Amharic), June 25, 2003, 792.

⁸⁹ Institute for Peace and Security Studies in Collaboration with Friedrich Ebert Stiftung, Anthology of Peace and Security Studies, Volume IV (December 2013, Addis Ababa, Ethiopia) 74.

⁹⁰ FDRE Constitution (n1), art 51(14). The Prime Minister deploys the federal defence forces in states.

⁹¹ Ibid, art 55(16).

⁹² Ibid, art 62(9).

⁹³ Assefa (n 2) 343.

⁹⁴ Ibid.

⁹⁵ Ibid, 339.

⁹⁶ Minutes of the Ethiopian Constitutional Assembly, 1994, Vol 5, 119.

⁹⁷ System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003, *Neg. Gaz.*, Year 9 No. 80, art 2.

intentionally left not to include other interventions other than those listed under the Constitution through construction of the definition.⁹⁸

The word ‘intervention’ is used under the Constitution in relation to ‘endangering the constitutional order’ under Art. 62(9) only. However, it is also used in ‘violations of human rights’ in the Proclamation, because the measure taken is not different from intervention, while it is used in ‘deteriorating security situation’ to use the word ‘intervention’ consistently throughout the Proclamation.⁹⁹

To exercise the Constitutional mandate to intervene in serious security matters, the federal government has intervened in the regions several times to maintain peace and order which the latter fails to do so. In the 2001 and 2002, for instance, the federal government has intervened five times in the regions. There was Federal Army intervention in the conflict between the Orthodox and Pentecostal church followers in Tigray region and in the disagreement of the Berta people concerning the involvement of settlers in elections in Benshangul Gumuz region. It had also intervened in the power sharing conflict in Gambella region, inter-ethnic conflicts on administrative demarcation in Somali region and ethnic conflicts in Oromia region.¹⁰⁰ Furthermore, in the case of Somali region, a removal of state president by a coup caused federal intervention. In the SNNPRS, the state government and its security and police force was practically dissolved and replaced by a federal police force until the local party reorganized itself and elected a new president for the state.¹⁰¹ The federal government has intervened in the regions several times, but it was limited in bringing lasting solutions. So do the state of emergency. Both the federal intervention and state of emergency are bringing temporary solutions, but the problems resume when the intervention or state of emergency is lifted away.¹⁰²

⁹⁸ የፌዴራል መንግስት በክልሎች ጣልቃ የሚገባበትን ሥርዓት ለመደንገግ በተዘጋጀው ረቂቅ አዋጅ ላይ የተሰጠ ማብራርያ (1995) 758.

⁹⁹ Ibid.

¹⁰⁰ Tirsit Girshaw, ‘Conflict Mapping in the Year 1994 (E.C)’ (2003) : In First National Conference on Federalism, Conflict and Peace Building, Organized by Ministry of Federal Affairs and German Technical Cooperation, 68-74.

¹⁰¹ Assefa, (n 2) 343. All these interventions were ordered before the enactment of the Proclamation No.359/2003 (n 97).

¹⁰² Interview with Ato Muluye Welelaw, law and identity affairs directorate director (Addis Ababa 7 May 2018).

3.1.1.1. Types of Federal Intervention

The FDRE Constitution has provided three grounds upon which the federal government can interfere in regions.¹⁰³ Therefore, it can be concluded that there are three types of federal intervention in Ethiopia. These are intervention on the basis of a request of a member state, intervention on the joint decision of the HPR and HoF, and intervention on the basis of the order of the HoF.¹⁰⁴ Such types of federal intervention are discussed below in detail.

A. Intervention Based on States' Request

Article 51(14) of the FDRE Constitution has provided that the federal government shall deploy federal defence forces at the request of the region in case a security deterioration, which cannot be controlled by the state machinery, happened in the region. The Constitution has not defined what deteriorating security situation is. It is because Constitutions are general in nature. Defining the term provides certainty in the process of intervention and guarantee regional autonomy.¹⁰⁵ Some questions can be raised here.

1. Who determines the existence of security deterioration? It can be argued that it is the state government that should determine it for two reasons. First, since the Constitution does not explicitly empower any organ to determine it, it should be considered as a residual power and left to regions.¹⁰⁶ Second, regions have the power and function to maintain peace and security within their territory.¹⁰⁷ Hence, it is legitimate to leave the power to regions to determine what a deteriorating security situation is.

However, the federal government has already determined what a deteriorating security situation constitutes. Proclamation No. 359/2003 reads:

[T]he security situation shall be deemed to have been deteriorated where there is an activity that disturbs the peace and safety of the public and the law enforcement agency and the

¹⁰³ FDRE Constitution (n 1), arts 51(14), 55(16) and 62(9).

¹⁰⁴ Hashim (n 4) 238.

¹⁰⁵ Yitages Alamaw, 'Supervisory Power of the Centre to Regions in South Africa and Ethiopia: A Comparative Analysis' (LL M Thesis, University of the Western Cape 2009) 38.

¹⁰⁶ FDRE Constitution (n 1), art 52(1).

¹⁰⁷ Ibid, art 52(2(g)).

*judiciary of the Region are unable to arrest the security problems in accordance with the law.*¹⁰⁸

Even if the federal government has already determined the security situation that should be considered being deteriorated, its practical existence is left to be judged by the respective region, since it is after determination of the fact that states request intervention. However, it can also be argued that it is the federal government that determines its existence, because the power to decide whether to intervene or not is vested on the federal government itself. But, this line of argument does not hold water. Both the Constitution and the Proclamation seem to oblige the federal government to intervene at any time a region requests intervention claiming that security is deteriorated and the latter is unable to arrest it. Moreover, the federal government is not required to make its own assessments of the alleged deterioration of security in the requesting state. The phrase ‘it shall deploy’¹⁰⁹ in both laws dictates the federal government to intervene as an obligation. It cannot refuse to intervene stating that the security situation is not deteriorated.

2. Is this an intervention from the outset? Intervention in this case comes into picture upon the willful request of the region itself, while a genuine federal intervention is a unilateral act of the federal government. Therefore, it can be argued that it is simply a ‘help’.¹¹⁰ But, it can also be argued to the opposite. Since the measures taken involves the deployment of federal defence and police forces akin to the intervention in case of constitutional disorder provided under Art. 62(9) of the Constitution, it is clear intervention. Moreover, the Proclamation orders the state government to provide information and facilitate conditions to arrest the security problem. In this case, the federal government orders the regions to do so through the Proclamation. This is an intervention and is even against the autonomy of states.

The Proclamation says where any region faces a deteriorating security situation and *unable* to arrest it on its own. However, when is a state said to be ‘unable’, and what will be the effect if the state government fails or refuses to maintain peace and security within its territory? Section 333 of title 10 of the United States Code empowers the federal government to intervene in a state

¹⁰⁸ Proclamation No. 359/2003 (n 97), art 3.

¹⁰⁹ FDRE Constitution (n 1), art 55(14), and 359/2003, art 5(1).

¹¹⁰ Yitages (n 105) 40.

when the latter is *unable, fail or refuse* to control security problems.¹¹¹ Both the FDRE Constitution and the Federal Intervention Proclamation are silent to solve the issue when a state fails or refuses to preserve security. The researcher contends that, even if a state refuses or fails to control security problems, the federal government has to intervene since it has a duty to ensure the observance of the Constitution.¹¹²

3. What will be the case when states do not request federal intervention regardless of the occurrence of security deterioration that cannot be averted by the state? In such cases, the federal government deploys its federal defence forces through the declaration of state of emergency.¹¹³ This is because of the fact that security deterioration in one region, if not arrested timely, has an adverse effect on other regions and the federal system as a whole.¹¹⁴ However, a deteriorating security situation could also be a danger to the constitutional order or human rights, hence, the other modalities for federal intervention could also offer an avenue for the federal government to intervene. Therefore, there should be explicitly stipulated legal provision in the Ethiopian laws that enable the federal government to control security deterioration, through either federal intervention or state of emergency, in case states fail to request the federal government. Nevertheless, care should be taken to control undue federal intervention that shrinks autonomy of states.

B. Intervention on the Joint Decision of the HPR and HoF

The second type of federal intervention is an intervention in case human rights, which are stipulated under the FDRE Constitution, and laws enacted pursuant to the Constitution, are violated and a state is unable to arrest such violations of human rights.¹¹⁵ The government itself may cause the violation of human rights, directly or indirectly.

¹¹¹ ‘Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy’, Duke Law Journal, Vol 1966 No 415, 416.<<https://scholarship.law.duke.edu>> accessed 12 March 2018.

¹¹² FDRE Constitution (n 1), art 13(1). The GBL allows the federal government to intervene even if the state is unwilling to solve the issue.

¹¹³ በተወካዮች ምክር ቤት የፀደቀው የሕገ-መንግስት ረቂቅ አጭር ማብራርያ (አዲስ አበባ ጥቅምት 18፣1987) 107.A security deterioration beyond states’ capacity is; when a state requests federal government intervention, when the state participates in deteriorating security or regardless of state participation when the chaos threatens the security of the state or the whole federation. Such deterioration is governed under Arts. 51(14), 62(9) and 93 of the Constitution respectively.

¹¹⁴ የሕግና አስተዳደር ጉዳዮች ቋሚ ኮሚቴ የፌዴራል መንግስት በክልሎች ጣልቃ የሚገባበትን ሥርዓት ለመደንገግ በተዘጋጀው ረቂቅ አዋጅ ላይ ያደረገው የህዝብ ይፋ ውይይት ቃለ-ጉባኤ (አዲስ አበባ ሰኔ 18፣ 1995) 804.

¹¹⁵ Proclamation No. 359/2003 (n 97), art 7.

This type of intervention needs the fulfillment of two cumulative requirements. First, there should be violation of human rights. Second, the state should be unable to arrest such human rights violation. In this case, the federal government intervenes in the region without a request from the latter.

Some issues need discussion here. First, what is the extent of the violation of human rights that necessitates intervention? A mere incident of human rights violation does not simply allow the federal government to intervene. The extent of the violation should be grave enough in a sense that cannot be controlled by the arms of the state government. It must be critical that might possibly grow to create a danger to the constitutional order.¹¹⁶ Second, the FDRE Constitution has classified rights as human and democratic rights, and the proclamation is referring to violation of human rights under the Constitution. Can this be construed that the federal government is not empowered to intervene when democratic rights are violated and the state government is unable to arrest it? This can be raised as a question. However, since human rights are interrelated and interconnected and the violation of the rights categorized as democratic rights under the Constitution causes the violation of those under the category of human rights, it is hard to treat them separately.¹¹⁷ Moreover, since rights that are listed under chapter three of the Constitution should be interpreted in line with international human rights instruments, both categories of rights have to be enforced by the government equally.¹¹⁸

C. Intervention on the Basis of the Order of the HoF

The third type of intervention comes into effect, if any State, in violation of this Constitution, endangers the constitutional order.¹¹⁹ This type of intervention springs from the constitutional obligation of the federal government to protect and defend the Constitution.¹²⁰ It is ordered by the HoF, which is the ultimate defender of the Constitutional order in Ethiopia.¹²¹

¹¹⁶ Hashim (n 4) 241.

¹¹⁷ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23 9 (12 July 1993), art 5

¹¹⁸ FDRE Constitution, art 13.

¹¹⁹ Ibid, Art.62(9), Proclamation No. 359/2003 (n 97), art 12

¹²⁰ FDRE Constitution (n 1), art 51(1).

¹²¹ Fasil Nahum, *Constitution for a Nation of Nations: the Ethiopian Prospect* (Asmara: The Red Sea Press, Inc., 1997) 75.

According to the proclamation, acts that endanger the constitutional order shall be carried out through the participation or consent of a regional government and should violate constitutional provisions. Armed conflict; non-peaceful resolution of conflicts between another region, nation, nationality or people; disturbance of peace and security of the federal government; and violation of directives given as an intervention in case of violations of human rights are the activities that are considered as acts that violate the Constitution and endanger the constitutional order.¹²²

The Proclamation has tried to define what ‘constitutional disorder’ is only through listing activities that endanger the constitutional order. A state is said to endanger the constitutional order when it commits acts contrary to the Constitution, for instance, by disregarding the division of power between regions and federal government or ignoring constitutional dispute resolution mechanisms.¹²³ Therefore, the federal government intervenes in a region, when either of the acts stated above are committed and the regional government has either participated in or consented to the violation of the Constitution that endanger the constitutional order.¹²⁴

However, what if the constitutional disorder is caused without the participation or consent of the regional government is a question. This is a gap both in the Constitution and in the Proclamation. The Constitution reads ‘... if any state ...endangers the constitutional order’, while the proclamation reads ‘...an act carried out by the participation or consent of a Regional Government ... endangers the constitutional order’. Under both laws, the regional government should endanger the constitutional order for the federal intervention to take place. However, other forces may endanger the constitutional order without the participation or consent of the regional government. Although the Proclamation and Art. 62(9) of the Constitution are silent as to this issue; the federal government has a constitutional power to safeguard the Constitutional order. The federal government is mandated to protect and defend the Constitution together with the states.¹²⁵ Therefore, even if the federal government is not explicitly empowered to intervene in such cases, the holistic reading of the constitutional provisions dictates the federal government to take some measure.

¹²² Proclamation No. 359/2003 (n 97), art 12.

¹²³ *ማብራርያ* (n 98) 765.

¹²⁴ Proclamation No. 359/2003 (n 97), art 12.

¹²⁵ *Ibid*, art 51(1) and 52(2(a)).

The understanding of the HoF in such case is that ‘participation’ of the state government in the constitutional disorder includes failure to preserve it.¹²⁶ Even if the case does not constitute ‘participation’ in a strict sense, it can be assumed that the state has indirectly participated through its failure to avoid situations that endanger the constitutional order. In the discussion on the draft of the Proclamation, it is stated that it is proper to suspend an organ which does not discharge its duties properly.¹²⁷ The researcher does not agree with this position. Looking on the measures taken during such type of intervention, it is sound to suspend an institution only when it directly participates in or consented to acts that endanger the constitutional order. The Constitution has also clearly stated that federal intervention is to be ordered when the regional government endangers the constitutional order and does not need interpretation. Such matter can only be solved through state of emergency.

3.1.1.2. Organs and Procedures of Intervention

In the first type of intervention, the regional government itself requests the federal government to intervene in case security is deteriorated and the former is unable to arrest it on its own. The FDRE Constitution simply puts who requests and to whom the request is presented in general terms. It simply says that the regional government requests the federal government. The Proclamation made it specific. Under the proclamation, the State Council or the highest executive organ of the state submits its request to the Prime Minister (hereinafter ‘PM’) through the intermediary of the Ministry of Federal Affairs (hereinafter MoFA), which works as a bridge between the federal and regional governments.¹²⁸ The PM does not investigate the existence of the alleged security deterioration and simply orders intervention upon the receipt of the request. Finally, the PM produces periodic report to the House of Peoples’ Representatives on the activities carried out by the forces in the region.¹²⁹ In this case, the law is not clear as to within what period the PM has to make such a report.

¹²⁶ Interview (n 102).

¹²⁷ የሕግና አስተዳደር ጉዳዮች ቋሚ ኮሚቴ የፌዴራል መንግስት በክልሎች ጣልቃ የሚገባበትን ሥርዓት ለመደንገግ በተዘጋጀው ረቂቅ አዋጅ ላይ ያደረገው የህዝብ ይፋ ውይይት ቃለ-ጉባኤ (አዲስ አበባ ሰኔ 18፣ 1995) 804. In USA, the president can deploy the federal army through insurrection law act when there is a situation that endangers the constitutional order. In Nepal, the federal government can depose the regional executive and replace with a new one and enact laws.

¹²⁸ Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, *Neg., Gaz.*, Year 17, Proclamation No. 691/2010, art 14(1(d)). The rights and obligations of the Ministry of Federal Affairs are transferred to the Ministry of Federal and Pastoralist Development Affairs by Art. 41 of Proclamation No. 916/2015. See also art 14 of proclamation 916/2015.

¹²⁹ Proclamation No. 359/2003(n 97), art 6.

The procedure is, therefore, request from Council of State or the highest executive of the region goes to PM through the office of MoFA, and the PM orders intervention and produces periodic report of the activities to HPR.

The organs who are involved in such type of intervention, briefly, are the state government (the Council of State or the highest executive body) in requesting the intervention, providing information and facilitating conditions to control the problem, the MoFA in coordinating the implementation of decisions authorizing the intervention of the federal government in the affairs of regional states. The PM is involved in deploying the federal defence and police forces, while the HPR participates in checking up how the intervention is going on and the activities are carried out to arrest the deteriorating situation in the Region through the reports of the PM.

In the second type of intervention, the HPR sends an investigating team when it receives information about violation of human rights that requires federal intervention exists in the region and the latter is unable to arrest it. The information may come from the Human Rights Commission, representatives of the region, or any other person.¹³⁰ The phrase ‘... *any other person*’ here may also refer to the state government, but, giving information does not imply request. That is why the Constitution has stated that the procedure of intervention is started on the HPR’s own initiative.¹³¹

The state government is obliged under the Proclamation to cooperate with the investigating team.¹³² Two questions can be raised here. Can the federal government order regions to cooperate? What will be the result if the region refuses to do so? It is an intrusive provision in degrading regional autonomy.

The investigating team compiles its report that includes the act of the violations of human rights in the Region, the sources of the problem and persons responsible for it, efforts made and measures taken by the Region to arrest such violations of human rights and whether or not such Region will be able to arrest the act.¹³³ The HPR calls a joint session of the HPR and HoF where it finds that the matter requires federal intervention. The HPR produces its justification on the

¹³⁰ Ibid, art 8(1).

¹³¹ FDRE Constitution (n 1), art 55(16).

¹³² Proclamation No. 359/2003 (n 97), art 8(3).

¹³³ Ibid, art 9(2).

necessity of federal intervention to the joint session. Finally, if the joint session is convinced as to the necessity of the federal intervention, the HPR gives directives to the region to arrest human rights violation and bring those who violated the human rights to justice. In this case, it is the joint session of the two houses that decides on whether to intervene or not. The directive, here, refers to a ‘mandatory order to the concerned state to stop human rights violations’.¹³⁴

In the third type of intervention, the HoF, upon its own initiative or when it receives information from the HPR or any other body, after having conducted a necessary investigation, order the Council of Ministers (hereinafter CoM) to investigate whether the region has endangered the Constitutional order by violating the Constitution or not. Why further investigation is needed, once the HoF has investigated it already is, not clear. Upon receiving the report of investigation, the HoF decides to order federal intervention or not. Apart from this, the CoM may, on its own initiative, carry out investigation when it receives information that any region has endangered constitutional order and submit its investigation to the HoF if it finds that the danger requires federal intervention.

The cumulative reading of Art. 13(1) and (2) of the Proclamation, indicates that the CoM has vital role in determining the existence of violation of the Constitution that endangers the constitutional order though the final say is vested on the HoF. The House decides not only on the intervention but also on the type, level and timing of the intervention.¹³⁵

To sum up, in case security is deteriorated, the PM orders federal intervention upon the receiving request from the concerned region, while the HPR gives directives to the region upon the decision of joint session of the HPR and HoF on the report that describes the act of the violations of human rights in the Region presented by the HPR. In third case, the HoF orders intervention when it finds it necessary upon the examination of reports of the investigation made by the CoM or any other federal organ.

3.1.2. State of Emergency

State of emergency, which is also called state of war, state of siege or reason of state is a case in which a government ‘suspends certain rights of the population based on the actual or alleged

¹³⁴ Hashim (n 4) 241.

¹³⁵ Proclamation No. 359/2003 (n 97), art 13 (4).

occurrence of extra-ordinary circumstances, which are outside an ordinary course of events, endangering the state'.¹³⁶ It as an exceptional situation of crisis or public danger, 'actual or imminent', which affects the whole population of the area to which the declaration applies and constitutes threat to the organized life of the community of which the state is composed.¹³⁷ Such situation necessitates taking drastic action and disturbing the normal operation of the constitutional provisions.¹³⁸ In many states, state of emergency is declared by the executive arm of government and is considered as the 'hour of the executive'.¹³⁹ When state of emergency is ordered, the government suspends rights of individuals enjoyable in ordinary times. Hence, some call it 'constitutional dictatorship'.¹⁴⁰ It is the temporary suspension of the norm, where the rule of man replaces the rule of law.¹⁴¹

3.1.2.1. Types of state of emergency

State of emergency has *de jure* and *de facto*, and internal and external types. *De jure* state of emergency exists when States declare it in compliance with all legal requirements for its declaration. It is a legally declared state of emergency, while *de facto* state of emergency is where States exercise their emergency power without complying with the preconditions prescribed in their constitutions and international human rights instruments.¹⁴² It is when there is no official declaration of emergency but the very crisis in the justice system itself has suspended the right of the people.¹⁴³ Sometimes, a *de jure* state of emergency may be turned into *de facto*. For instance, exercising lapsed state of emergency proclamation creates a *de facto* state of

¹³⁶ Resenthal (Ed.), *Constitutionalism and Rights* (Colombia University Press, New York, 1990) 176, cited in Dessie Mulatu, 'The Power to Declare State of Emergency under the FDRE Constitution' (LLB thesis, Addis Ababa University, 1997) 2.

¹³⁷ The Paris Minimum Standards of Human Rights Norms in a State of Emergency, sec (A) 1(b), reproduced in Richard B. Lilich, The Paris minimum standards of human rights norms in a state of emergency: current developments, *American journal of international law*, Vol 79, 1073. The FDRE Constitution is not clear whether the CoM can declare state of emergency when danger is imminent. It only provides if the danger occurs. The Indian Constitution, however, allows such power.

¹³⁸ D.K. Singh (n 64) 288.

¹³⁹ Schweitzer (n 45) 112.

¹⁴⁰ Ibid.

¹⁴¹ Awol Allo, Protests, 'Terrorism, and Development: On Ethiopia's Perpetual State of Emergency' (2017), *Yale Human Rights and Development Journal*, Vol 19, Issue. 1, art 4, 133.

¹⁴² Yehenew (n 14) 87. State of emergency after the danger has vanished by itself is also a *de facto* one.

¹⁴³ Basil Fernando, 'de facto state of emergency' (2016) *Colombo Telegraph*, <<https://www.colombotelegraph.com/index.php/de-facto-state-of-emergency/>> accessed 3 May 2018.

emergency, notwithstanding that it was initially declared in full compliance with all the necessary conditions.¹⁴⁴

Depending on the grounds, a state of emergency can be also classified as external and internal emergency. An external emergency is an emergency arising due to war or external aggression and an internal emergency is an emergency arising due to internal disturbance.¹⁴⁵

3.1.2.2. Principles of State of Emergency

There are four universally agreed principles of state of emergency. These are the principle of necessity, principle of proportionality, and principle of non-derogability. These principles are enshrined under the ICCPR, Article 4(1). It reads:

*[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*¹⁴⁶

A. Necessity Principle

Necessity principle requires choosing a lesser evil. Here are two competing evils. One is security or safety of the nation, and the other is protection of human rights. The state is under pressure and forced to favour safety of the mass over individual rights. In this case, individuals surrender their right in favour of the state. It is because, 'if the state lives, these rights live, and if the state does not live, these rights would die'.¹⁴⁷ However, the danger that necessitates state of emergency should be actual or imminent one,¹⁴⁸ it should threaten the life of the nation,¹⁴⁹ and it should be exceptional¹⁵⁰.

¹⁴⁴ Yehenev (n 14) 87. A de facto imposition or continuation of a state of public emergency is not permissible. See Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (adopted by the Conference on Security and Co-operation in Europe on 4 October 1991 at Moscow).

¹⁴⁵ Singh (n 64) 289.

¹⁴⁶ ICCPR (n 13), art 4(1).

¹⁴⁷ Syed Sharifuddin Pizarda, 'fundamental rights and constitutional remedies in Pakistan' (1966), All Pakistan legal decision: In Dessie (n 136) 9.

¹⁴⁸ Paris (n 137) 1072.

B. Proportionality principle

The measures taken during state of emergency should be proportional to the extent required by the exigencies of the situation.¹⁵¹ Not only the decision to derogate in itself, but each specific measure taken under the derogation, must be demonstrably required by the exigencies of the situation.¹⁵² This requirement relates to the duration, geographical coverage, and substantive scope of the state of emergency.¹⁵³

As to the duration of state of emergency, the rule is required to be ‘when the crisis goes, the emergency also goes.’¹⁵⁴ The FDRE Constitution does not clearly specify when state of emergency is terminated and who has the power to terminate it, though it is logical to think that it will be terminated when the danger that necessitated the declaration disappears.¹⁵⁵ The state of emergency proclamation No. 948/2016 had been in force for ten months, i.e., extended for four months after the six month declaration has lapsed.¹⁵⁶ The extension was tolerable since some upheavals were not completely simmered down.

As to the geographic coverage, however, though the grounds for the state of emergency were limited to some parts of the country, the proclamation was applicable throughout the nation. The preamble of the 2016 state of emergency proclamation states that ‘illegal activities are committed in some parts of the country’¹⁵⁷, but as to the scope of its application, it provides that the ‘Proclamation shall be applicable in all parts of the country’.¹⁵⁸ The February 2018 state of

¹⁴⁹ ICCPR (n 13), art 4(1).

¹⁵⁰ Orta, ‘human rights in state of emergency in international law’, (clerdon press, Oxford, 1992, 19, in Dessie (n 136) 17.

¹⁵¹ European Convention (n 13), art 15(1).

¹⁵² Amnesty international, *Commentary on the Ethiopian state of emergency* (2016) 6. <<https://www.amnesty.org>> accessed 25 April 2018.

¹⁵³ UN Human Rights Committee, *General Comment Number 29*, Paragraph 4.

¹⁵⁴ Anthony S. Mathews, *Freedom of state security and the rule of law* (university of California press, 1986) 192.

¹⁵⁵ Dessie (n 136) 47. The FDRE Constitution has only stated that the state of emergency is terminated when the time of emergency lapses and not renewed.

¹⁵⁶ In Ethiopia, it is hard to distinct between the rule and the exception, and between normalcy and emergency. The *de jure* state of emergency formally imposed on October 8, 2016, is nothing more than a recodification of the *de facto* state of emergency that has been in place since the Constitution came into force. See Awol Allo (n 141) 114. State of emergency, in Ethiopia, remains up to six months and the HPR, by two-third vote, can renew it for four months successively. However, it is not clear for how many times the emergency can be renewed. See FDRE Constitution (n 1), art 93(3).

¹⁵⁷ State of Emergency Proclamation for the Maintenance of Public Peace and Security No. 948/2016, Neg. Gaz., Year 23 No. 1, preamble.

¹⁵⁸ *Ibid*, art 3.

emergency was also disproportionate to the exigencies of the situation. Though the problems were alleged to be in Somali, Oromia and Amhara, the measures were imposed under the Proclamation to be applicable in all parts of the country.¹⁵⁹ Since state of emergency is required only to avert a danger, the measure should target on the specific danger only. An excessive measure is against the principles of the human rights instruments in general and the FDRE Constitution in particular and may be equated with *de facto* state of emergency.

As to the substantive proportionality, some provisions under state of emergency proclamations and command post directives go further to derogate rights not related with the exigency. For instance, closing one's own business is prohibited.¹⁶⁰

C. Legality principle

This principle requires that laws shall be available and accessible to the public. In Ethiopia, the Federal Negarit Gazeta Establishment Proclamation No.3/1995 under Art. 2(2) states that all Laws of the Federal Government shall be published in the Federal Negarit Gazeta. Practically, the exact contents of the proclamation does not appear to the public. This principle further requires that laws should be clear and precise. The phrases used in the state of emergency proclamation and its implementation proclamations, however, are broad and vague.¹⁶¹ Generally, the laws of emergency are not precise and not publicized.

D. Non-derogability principle

State of emergency suspends human rights. However, international and national human rights laws have recognized the non-derogability of some rights. The ICCPR has stated that the right to life and freedom from arbitrary deprivation of life; freedom from torture and other forms of ill-treatment; freedom from slavery and servitude; freedom from imprisonment due to failure to fulfill contractual liability; freedom from non-retroactive application of criminal law; right to recognition before the law; and freedom of thought, conscience and religion as non-derogable rights during state of emergency.¹⁶² The UN Human Rights Committee has also identified additional non-derogable provisions, including: non-discrimination; the right to an effective

¹⁵⁹ Amnesty international (n 152) 9.

¹⁶⁰ Command post directive No. 1/2016, art 4.

¹⁶¹ Amnesty international (n 152) 7.

¹⁶² ICCPR (n 13), art 4(2).

remedy; right to fair trial; and the right to take proceedings before a court to challenge the lawfulness of detention on habeas corpus stated under the ICCPR, Art. 2(1), 3, 14, and 9(4) respectively.¹⁶³

When we see the FDRE Constitution, five rights are listed as non-derogable. These are nomenclature of the state, equality, freedom from slavery, self-determination and the right not to be subjected to inhuman and degrading treatment.¹⁶⁴ This provision has some problems. First, is Art.1 (nomenclature of the state) a right from the beginning? Listing some provisions, which do not contain human rights, as non-derogable implies that the Constitution is not derogating only human rights provisions but also others.¹⁶⁵ Second, why are some non-derogable rights recognized under international human rights instruments not included in the list under Art.93(4(c)) of the FDRE Constitution? Thanks to Art. 13(2) of the Constitution, human rights are to be interpreted in line with international human rights instruments to which Ethiopia is a party. Therefore, the rights that are treated non-derogable in international human rights ratified by Ethiopia are also non-derogable in Ethiopia, regardless of Art. 93(4(c)).¹⁶⁶ Third, Art. 93(4(b)) of the Constitution has empowered the CoM to suspend only political and democratic rights to the extent necessary to avert the danger. Can it suspend civil rights (which are neither political nor democratic rights), such as, the right to life, liberty and security? Through its first impression seems like that, the fact that all human rights, save the exceptions, are subject to derogation is clear from the provision that lists non-derogable rights.

3.1.2.3. Grounds for State of Emergency

Under the FDRE Constitution, the occurrence of four situations calls state of emergency. These are an external invasion, a breakdown of law and order that cannot be arrested through the regular law enforcement mechanisms, a natural disaster, and an epidemic that threatens the lives

¹⁶³ UN Human Rights Committee (n 153) Paragraphs 13-16.

¹⁶⁴ FDRE Constitution (n 1), art 93(4(c)). The right to equality, self-determination and prohibition of trafficking in person are non-derogable under the FDRE Constitution, though not under the ICCPR (n 13).

¹⁶⁵ Making the federalism non-derogable right would be tantamount to limiting the right to self-determination. See Belay Frenesh, 'A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique' (LLM Thesis, Center for Human Rights Faculty of Law University of Pretoria, 2005) 35.

¹⁶⁶ Since Art.93 of the FDRE Constitution (n 1) is not part of the human rights chapter, some argues that it should not be interpreted in conformity with international human rights instruments. See Adem Kassie, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview', Mizan Law Review Vol 5 No.1, 2011, 48.

of the population.¹⁶⁷ Such grounds are open to varying interpretations and may make it possible for the executive to take far-reaching action.

The Constitution does not seem to allow state of emergency when there is potential and imminent existence of these grounds. Unlike this, the GBL and Indian Constitution have allowed the declaration of state of emergency in advance, even if the danger does not occur.¹⁶⁸ It would be better to incorporate under the Ethiopian Constitution an emergency declaration in case imminent danger is posed on the nation.¹⁶⁹ The grounds that necessitate declaration of state of emergency should be severe to the extent it can get two-third majority vote of the HPR.

In the constitutions of the regional states, the only grounds to declare state of emergency are the existence of natural disaster and an epidemic.¹⁷⁰ They cannot declare state of emergency in case of constitutional disorder or external invasion. Federal intervention or federal state of emergency is a solution for the first case,¹⁷¹ while federal state of emergency is the only solution for the second, since every state's territory is part of the federation.¹⁷²

3.1.2.4. Declaration, Extension, and Termination of State of Emergency

The CoM declares state of emergency by issuing a decree, when either of the grounds for declaration of state of emergency occurs.¹⁷³ The decree's life depends upon the approval of the HPR.¹⁷⁴ If it is approved by the HPR, it remains in force for six months, subject to renewal for four successive months.¹⁷⁵ The power to enact regulations and directives is given to the CoM and

¹⁶⁷ FDRE Constitution (n 1), art 93(1).

¹⁶⁸ GBL (n 10), art 115a(1) and 87a(4); Indian Constitution (n 50), art 352(1). The researcher believes that it is good to declare state of emergency, especially in case external invasion, natural disaster or epidemics occur.

¹⁶⁹ Interview (n 102) has shown that the states of emergency declared on 2016 and 2018 were even late in responding to prevalent extreme emergencies, let alone to control imminent dangers.

¹⁷⁰ FDRE Constitution (n 1), art 93(1(b)). see also, for instance, Oromia state constitution, art 47(2(q) and 108(1), Afar state constitution, art 47(3(r)) and 106(1).

¹⁷¹ የአገር አስተዳደር ጉዳዮች ቋሚ ኮሚቴ የፌዴራል መንግስት በክልሎች ጣልቃ የሚገባበትን ሥርዓት ለመደንገግ በተዘጋጀው ረቂቅ አዋጅ ላይ ያደረገው የህዝብ ይፋ ውይይት ቃለ-ጉባኤ (n 127) 808. However, how a constitutional disorder in states, without the participation or consent of the regional government, can be solved is a legal lacuna. See Proclamation No. 359/2003 (n 97), art 12.

¹⁷² FDRE Constitution, arts 2 and 93(1(a)).

¹⁷³ Ibid, art 93(1). The Constitution uses the word 'decree' and 'proclamation' interchangeably.

¹⁷⁴ Ibid, art 93(2) and (3). The Constitution uses the word 'decree' and 'proclamation' interchangeably. The Proclamation is declared by the CoM and approved by the HPR. See FDRE Constitution (n 1), arts 93(1(a)), 93(3) and 55(8) of the Constitution. Unlike, the GBL, the FDRE Constitution has not stated what the fate of the decree would be when the HPR has not decided on it due to various reasons.

¹⁷⁵ FDRE Constitution (n 1), art 93(3).

the State of Emergency Command Post respectively.¹⁷⁶ The HPR establishes a State of Emergency Inquiry Board which is composed of members of the House and legal experts.¹⁷⁷ The Board inspects and follows up that no measure taken during the state of emergency is inhumane.¹⁷⁸ It is a checking mechanism against abuse, which will protect human rights in times of emergency. Nevertheless, the Constitution is silent as to who controls the overall state of emergency. The HPR, which determines the declaration of state of emergency, seems an appropriate organ to do so.¹⁷⁹ Generally, the CoM declares while the HPR extends the state of emergency, though it is not clear as to which organ terminates it. Practically, the CoM requests the HPR to terminate the state of emergency. Upon assessing the situation that called state of emergency, the HPR terminates or keeps quit.

¹⁷⁶ Ibid, art 93(4(a) and Proclamation No. 948/2016 (n 157), art 13. The State of Emergency Command Post is established under Art. 6 of the Proclamation to enforce the state of emergency proclamation. However, it does not have constitutional basis.

¹⁷⁷ FDRE Constitution (n 1), art 93(5). Under the English version of this provision, it seems that the HPR declares state of emergency.

¹⁷⁸ Ibid, art 93(6(b)).

¹⁷⁹ Dessie (n 136) 50.

CHAPTER FOUR

MEASURES AND EFFECTS OF STATES OF EXCEPTION IN ETHIOPIA

4.1. Measures to be taken during Federal Intervention and their Extent

The measures taken during the federal intervention and their extent differ according to the ground of intervention. The measures taken in each type of intervention and the extent of such measures are discussed below.

In the intervention upon states' request, the PM deploys the federal defence force or the federal police or, both. The type and amount of the force that the PM deploys depends on the gravity of the situation.¹⁸⁰ Though the force intended in the Constitution to interfere in regions was the defence force only, using lesser force, like the federal police, does not contravene the constitutional provision if such secondary force can control the security deterioration.¹⁸¹ In case it can be controlled easily, it is possible and legal to apply the easier mechanisms. Some also contend that the phrase '... federal defence *forces*' (emphasis added) under Art. 51(14) of the Constitution is denoting to both the federal defence and police forces, and the deployment of either or both of the forces stated under the Proclamation does not contravene the Constitution.¹⁸² The PM deploys the defence force because he is the 'commander-in-chief of the national armed forces',¹⁸³ and the federal police because he is the highest executive officer of the federal government.¹⁸⁴

The force to be deployed and the measures to be taken are required to be proportionate to arrest the security deterioration.¹⁸⁵ It should also take necessary legal measures to bring to justice those who are involved in deteriorating the security.¹⁸⁶ Who determines the 'proportionality' and 'necessity' of measures and how is it determined is, however, contentious. The other problem in relation to the intervention in case of security deterioration is that it makes the regional

¹⁸⁰ Proclamation No. 359/2003 (n 97), art 5(1).

¹⁸¹ ማግረጫ (n 98) 760. Using both forces together is, however, beyond the constitutional intent.

¹⁸² Yitages (n 105) 45.

¹⁸³ FDRE Constitution (n 1), art 74(1).

¹⁸⁴ Ibid. The federal police was accountable to the MoFA under Art. 3(2) of Proclamation No. 720/2011. But now it is accountable to the PM. See art 2 of Proclamation No. 944/2016. Therefore, the PM, nowadays, is the chief of the federal defence and police forces.

¹⁸⁵ Proclamation No. 359/2003 (n 97), art 5(2).

¹⁸⁶ Ibid, art 5(4).

government responsible to provide information and facilitate conditions to enable the federal forces to arrest the situation.¹⁸⁷ The constitutionality of this provision is questionable, because it has a tendency to make subordination between the federal and state layers of government.

The federal intervention ordered in such case is terminated when the deteriorating security situation is arrested or when the regional government (the highest executive or the Council of state) requests the PM to order the termination of the mission.¹⁸⁸ The regional government can claim termination of the intervention at any time it needs, since the intervention, from the beginning has come into effect upon the state's request. However, the law is not clear when security deterioration is said to be arrested. Whether it is when the security situation is restored to a position it can be controlled by state machinery or when it is completely settled, is an issue. Can the highest executive organ of the state request termination of an intervention that is ordered upon the request of the Council of State and vice versa is another issue. The Regional Council is the highest State authority in the Region. Therefore, it has a power to terminate an intervention requested by the Regional State's highest executive organ. The power of the highest executive organ of the region to terminate intervention requested by the Regional Council is, however, questionable.¹⁸⁹ Lastly, what if the defence forces refuse to terminate their mission even after the security deterioration is arrested? The PM has to order the termination; otherwise, the HPR can call and question him.¹⁹⁰

In the case of violations of human rights, the measure is giving directives to the respective state to arrest the violations of human rights, bring to justice those who violated such human rights and take other necessary measures.¹⁹¹ If the joint session of the HPR and the HoF decides that intervention is necessary, the HPR gives directives to states to arrest the case. In this case, the federal government is not empowered to deploy its forces. It only gives directives. Some questions beg answer here. First, is giving directive by itself an intervention? It can be argued from both sides. In the positive side, since the federal government, in its own initiative or without request from the state, investigates the situation and orders the states to arrest the matter through directive, it is an intervention in the issues of states. The otherwise argument is that since

¹⁸⁷ Ibid, art 5(3).

¹⁸⁸ Ibid, art 5(5).

¹⁸⁹ Yitages (n 105) 46.

¹⁹⁰ FDRE Constitution (n 1), art 55(17).

¹⁹¹ Proclamation No. 359/2003 (n 97), art 11.

it is the state itself arresting the violation of human rights, simply giving directive does not constitute intervention. The researcher holds the first position.

Second, how can the federal government give directive to states to arrest the human rights violation in case it is clear that the state is unable to do so? Once a state is proved to be unable to arrest the violations of human rights, giving directives to do so seems senseless. The federal government's directive can be effective if a directive is given along with warning that the state government is going to be suspended upon noncompliance with the directive. The law should have differentiated among *inability*, *failure* and *refusal* of the regional government to arrest the violations of human rights. Lastly, the period the directive given to states remains in force is not determined. Unlike the other types of interventions, the termination of intervention in the violations of human rights is not provided.

In the third case, the HoF has to ensure the exhaustion of other formal and informal venues and make careful balancing of possible outcomes before deciding federal intervention. The use of force or threat of coercion may come as a last resort when the peaceful mechanisms and efforts are found insufficient to bring about peace and order.¹⁹² The type and level of the federal intervention should be of limited character and with specific goals to avert the unfolding constitutional crisis.¹⁹³ It should be an intervention which enables to arrest the situation that has endangered the constitutional order.¹⁹⁴ No more, no less. Otherwise, it may intrude the regional autonomy which is supported through constitutional granting of many powers and functions, including the residual powers and the right to self-determination.¹⁹⁵

As a last resort, the HoF may give directives to the PM to deploy federal defence force or police force, or both depending on the gravity of the matter. Moreover, it can suspend the Council of State and the highest executive organ of the state, and establish a provisional government that is directly accountable to the federal government instead.¹⁹⁶ Some questions may be posed here. First, are these measures cumulative or alternative? Second, is it constitutional to suspend these organs of regional government? As to the first issue, Yitages has argued that constitutional order

¹⁹² Hashim (n 4) 237.

¹⁹³ Fasil (n 121) 76.

¹⁹⁴ Proclamation No. 359/2003 (n 97), art 14(1).

¹⁹⁵ Fasil (n 121) 75.

¹⁹⁶ Proclamation No. 359/2003 (n 97), art 14(1) and (2).

cannot be controlled through deployment of federal defence forces unless the state organs are suspended, and at the same time, a regional government cannot be suspended without the deployment of such forces. So, the measures are cumulative, though no conjunction is used in the Proclamation.¹⁹⁷ If the state endangered the Constitutional order, it is must to suspend the organs of the state. If they are not suspended, it is hard to restore the situation into its normalcy. It is proper to suspend an organ which does not discharge its duties properly.¹⁹⁸ The HoF has never ordered federal intervention yet and it is hard to know the practice as to this issue.¹⁹⁹

As to the second issue, suspension of state organs is not provided in the constitution. The Constitution simply states that the HoF can order federal intervention in case any state violating the constitutional provisions endangered the constitutional order.²⁰⁰ Can the federal government suspend both the highest executive and the Council of State, at times one of them has participated in or consented to any of the acts that have endangered the Constitutional order? It is unreasonable to suspend an organ that has not participated in or consented to the constitutional disorder.

The provisional government exercises the powers and functions of the suspended highest executive body of the regional state and some powers of the Council of State.²⁰¹ Lastly, as to the composition of the provisional government, Art. 14(4) of the Proclamation gives a clue that the Federal Government personnel may hold the executive power of the region.

4.2. Measures to be taken during State of Emergency and their Extent

Though the Constitution is silent, the federal government deploys the federal army and federal police when it declares statewide state of emergency under the command of the command post.²⁰² During state of emergency, the federal government may take two measures: derogation

¹⁹⁷ Yitages (n 105) 1.

¹⁹⁸ የሕግና አስተዳደር ጉዳዮች ቋሚ ኮሚቴ የፌዴራል መንግስት በክልሎች ጣልቃ የሚገባበትን ሥርዓት ለመደንገግ በተዘጋጀው ረቂቅ አዋጅ ላይ ያደረገው የህዝብ ይፋ ውይይት ቃለ-ጉባኤ (n 127) 804. In USA, the president can deploy the federal army through insurrection law act when there is a situation that endangers the constitutional order. In India (Nepal), the federal government can depose the regional executive and replace with a new one and enact laws.

¹⁹⁹ Interview (n 102).

²⁰⁰ Proclamation No. 359/2003 (n 97), art 62(9).

²⁰¹ Ibid, art 15 (2).

²⁰² Proclamation 948/2016 (n 157), art 6.

of human rights and suspension of state organs. The first measure is clearly provided under the FDRE Constitution, while the latter can be brought through interpretation.

During the discussion by Constitutional Assembly, it has been stated that the rights that can be suspended are political rights.²⁰³ But, a closer look on Art. 13(2) and 94(4(c)) shows that all rights other than these listed under the Constitution and international human rights instruments are subject to derogation.

As to the measures on the organs of the state, the researcher argues that the silence of the Constitution does not preclude the federal government from suspension of the state organs during state of emergency. The federal government suspends state organs during federal intervention caused by constitutional disorder in regions. Since the constitutional disorder that can be taken as a ground for state of emergency is graver than the ground for federal intervention, it is sound to argue that the federal government can suspend state organs if the state government endangers the constitutional order. One may argue that state of emergency only suspends human rights by simply looking on Art. 93(4(c)) of the Constitution. But, the Constitution goes further to list provisions that do not contain human rights. This implies that the federal government can suspend provisions other than the list of non-derogable rights.

The otherwise argument may come from the reading of Art. 39(1) and (2) cumulative with Art.93(4(c)). But, since sub article 3 of Art. 39 is derogable, the researcher argues that the state or nation, nationality or peoples to have their own institutions of administration is subject to derogation.

4.3. The Comparison between the States of Exception

As their name indicates, states of exception (federal intervention and state of emergency) are exceptions to the period of normalcy. Both are required to be tested through rules of legality, proportionality, necessity and temporality, i.e., they are required to be prescribed under the law; proportional to the extent necessary to restore the turmoil to its status quo; last resorts when other peaceful mechanisms are incapable to solve the problem; and stay in force only until the misery is solved.

²⁰³ Minutes of the Constitutional Assembly, Vol 5, 123.

However, the grounds that trigger the declaration of federal intervention and the measures to be taken thereafter are different from that of state of emergency, though there are some overlaps.²⁰⁴ Security deterioration, human rights violation and constitutional disorder are the grounds for the former, while external invasion, constitutional disorder, natural disaster and epidemics are for the latter. Under federal intervention, the measures are deployment of federal defence and police forces, giving directives, and deployment of federal defence and police forces plus suspension of regional government organs, in case of security deterioration, violation of human rights, and constitutional disorder respectively. But during state of emergency, the measure provided under the Constitution is suspension of human rights only.

The issue of constitutional disorder is a point of interception of both states of exception. Constitutional disorder may demand federal intervention or state of emergency. The existence of constitutional disorder stated both under Art. 62(9) and 93(1) of the Constitution may call federal intervention or state of emergency. The phrase ‘breakdown of law and order which endangers the Constitutional order’ is ambiguous. Is it referring to situations where the federal intervention under Art. 62(9) does not or could not arrest the danger? The federal government may use federal intervention first. When it is found unfruitful, state of emergency comes into effect. The latter is declared in extremely difficult situations only. However, this does not necessarily mean that the state always make a resort to federal intervention before declaring state of emergency, i.e., it can simply declare state of emergency without resorting to federal intervention.²⁰⁵

When constitutional disorder can be controlled through federal intervention, there is no need to use state of emergency.²⁰⁶ Hence, the declaration of federal intervention or state of emergency depends on the gravity of the constitutional disorder. The government can use either of them. It is because the demarcation line between the constitutional disorder that requires federal intervention and state of emergency is not clearly marked under the law. The extent of the danger may be the only difference. In this case, the constitutional disorder under Art. 62(9) seems lesser than what is stated under Art. 93(1) of the Constitution. Hence, the measure to be taken also

²⁰⁴ All of the grounds for federal intervention stated under the FDRE Constitution and the Federal Intervention Proclamation can be also taken as grounds of state of emergency. Security deterioration, human rights violation and violation of the constitution may be used to declare state of emergency as they are related to ‘a breakdown of law and order which endangers the constitutional order’ stated under Art. 93(1(a)) of the Constitution.

²⁰⁵ Interview (n 102).

²⁰⁶ በተወካዮች ምክርቤት የፀደቀው የሕገ-መንግስት ረቂቅ አጭር ማብራርያ (n 113).

varies accordingly. The HoF can suspend the organs of the regional government in the former case. For a stronger reason, it is proper to argue that the CoM can suspend the Council of State and the highest executive organ of the regional state that endanger the constitutional order, and regulate the matter through military command. Therefore, the federal government erodes state's autonomy in both cases.²⁰⁷

4.4. Effects of states of exception

4.4.1. Effects of States of Exception on the States' Autonomy

As discussed somewhere above, the federal government can intervene in states and suspend state government organs when the regional government endangers the constitutional order. The Constitution does not clearly stipulate such an intrusive measure to be taken by federal government. However, the federal intervention Proclamation No. 359/2003, vividly stated that the federal government can deploy security forces and suspend the Council of State and highest executive organs of the region alleged to endanger the constitutional order.²⁰⁸ Therefore, an intervention, in case the constitutional order is endangered, legitimately limits the self-governance of the regions.²⁰⁹

Hashim has stated that federal intervention is aimed at safeguarding the constitutional order and is not meant to shrink of the autonomy of the member states.²¹⁰ Despite of the purpose of the law, it may be twisted and used to threaten states' autonomy. Assefa also asserted that federal intervention may be used by the federal government as a way 'to cross the federal-state division to limit or suspend temporarily state autonomy in the name of safeguarding the constitutional order of the federation.'²¹¹ The researcher contends that the law has an intention to limit states autonomy or at least is susceptible to be misused. First, putting responsibility on states to provide information under Art. 5(3) of the Proclamation, erodes states' autonomy and creates hierarchy between the state and federal governments. Besides, defining a states' matter under federal laws by itself restricts states powers to determine their own matters. Second, federal government's deployment of investigating team in states without the consent of the latter, determining the

²⁰⁷ Interview (n 102).

²⁰⁸ FDRE Constitution (n 1), art.14(2(b)).

²⁰⁹ Wondwossen (n 87), 54.

²¹⁰ Hashim (n 4) 240.

²¹¹ Ibid, 348.

existence of human rights violation in states, and deciding to intervene without the consent of the respective state affect the autonomy of the same.²¹² Third, the severe measure taken by the federal government during federal intervention is when a State violates the Constitution and degrades the constitutional order.²¹³ In this case, the federal government lonely decides on the necessity of the intervention and even suspends the legislative and executive bodies of the regional government. Therefore, all types of federal intervention affect the states' autonomy.

As to the state of emergency, though the Ethiopian Constitution is not clear as to its effects on state governments, the following reasoning leads to conclude that state of emergency seriously affects self-governance of regions. First, the assumption of some powers of the state by the federal government, for example, commanding state police and monitoring security in the state, implies that state of emergency has an effect on the powers and functions constitutionally granted to states. Second, suspension of state organs through federal intervention in case the state causes constitutional disorder warrants the same or graver measure in case such disorder necessitates state of emergency. Third, the experience of other states shows that the federal government can, at least, partially suspend state governments from their functions during state of exception. Fourth, the inclusion of Art.1 of the Constitution in the list of non-derogable rights shows that state of emergency is not restricted to suspend human rights only. Due to such and other reasons, it is apt to conclude that states of exception under the FDRE Constitution highly affects states autonomy.

4.4.2. Effects on the Bill of Rights

The three grounds of federal intervention under the FDRE Constitution and the federal intervention Proclamation are highly related with violation of human rights. Security problems, human rights violation and violation of the Constitution bring adverse effects on the enjoyment of human rights. The measures to be taken during interventions are also required to settle such infringement. Therefore, federal intervention has positive implications on human rights.

When the federal intervention is found ineffective to solve the problem, state of emergency is the only way to do away with the evils.²¹⁴ Nevertheless, state of emergency by itself starts its effect

²¹² Proclamation No. 359/2003 (n 97), arts 7, 8 and 11.

²¹³ Ibid, arts 12 and 14(2(1(b))).

²¹⁴ The effect of federal intervention in solving conflicts depend on the existence of anti-peace forces in the locality that requires intervention. Even if temporarily solved, the problem restarts after the intervention is withheld.

by suspending the enjoyment of the rights. In many constitutions, it suspends the enjoyment of human rights. The Ethiopian one is also not exception to this. It has negative derogation clause. It has listed non-derogable rights and left others to be suspended. Moreover, it has omitted some rights that are recognized under ICCPR as non-derogable, such as the right to life and the non-retroactivity of criminal law.

Human rights are suspended if it is necessary to avert the danger and the measures should be proportional. When we look on the Ethiopian emergency proclamations, rights which do not have relation or not necessary to avert the danger are suspended. Besides, the measures are not also proportional in the extent of suspension of rights and geographic application of the proclamations.²¹⁵

Generally, although the purpose of both federal intervention and state of emergency is to return odd situations to normalcy, their effect on human rights is not alike. While federal intervention safeguards human rights by restoring peace and order, state of emergency temporarily suspends the same to bring their better enjoyment. Federal intervention threatens autonomy of states, while state of emergency do on human rights.

4.5. Problems and Solutions Related with States of Exception

The FDRE Constitution is silent as to which organ of government terminates state of emergency. Though it is the HPR that approves or rejects state of emergency that is declared by the CoM, it is not clear whether the same organ terminates it. The GBL and Constitution of SA have provided controlling mechanisms of the states of exception. Either the HPR which decides on the declaration of the emergency or the HoF which is the ultimate defender of the Constitution would be appropriate organs to bring state of emergency to an end.²¹⁶

The grounds for each intervention are stipulated under the Constitution and the Proclamation though they do not have significant difference. Security deterioration may cause the violation of human rights and human rights violation in turn is constitutional violation or constitutional degradation. Such creates a problem on what type of problem has occurred and which organ is

Intervention in Afar region to solve Issa conflict was among the effective. Interview with Ato Gebreyesus W/gerima, Ministry of Federal Affairs officer in zonal administrations (Addis Ababa 4 May 2018).

²¹⁵ Amnesty international (n 152) 9.

²¹⁶ The *ad hoc* State of Emergency Inquiry Board monitors and follows up the situation to ensure that no measure is inhumane.

responsible to curtail it. The Constitution of SA Rather than creating complexities has eased it stating that the federal government intervenes in Provinces ‘when a Province cannot or does not fulfill an executive obligation in terms of the Constitution or legislation’. Moreover, it is hard to distinguish ordinary time and a time that requires intervention. It is subjective and open to bias.

The other problem is in distinguishing grounds for federal intervention and state of emergency. Generally, state of emergency is taken as a last resort when federal intervention fails to solve problems regardless of the ground. Under the Constitution of SA, state of emergency is declared in case the danger is against the ‘nation’ while federal intervention is in case the problem concerns the Province and the latter cannot or does not fulfill its duty. The geographical coverage is used as a sharp line of demarcation between federal intervention and state of emergency.

Furthermore, the FDRE Constitution is not clear as to the effect of the state of emergency on states’ autonomy. This loophole opens a chance for the federal government to infringe the autonomy of states. Both in the GBL and in the Indian Constitution, state of emergency clearly enables the federal government to assume the legislative and executive powers of the regional government. The FDRE Constitution should also have to be clear in this respect.

Finally, the Constitution has problems related to derogation of states of emergency. Art. 93(4(b)) of the Constitution looks as if it subjects only political and democratic rights to suspension, but the contrary reading of Art. 93(4(c)) implies that rights other than the list are derogable rights. The problem in the list is that it has omitted rights recognized as non-derogable under international human rights instruments, and included provisions which are not related to human rights. For a better protection of human rights, it is wise if interpretation of this provision is seen in conformity with international human rights laws and constitutional interpretations.²¹⁷

²¹⁷ FDRE Constitution (n 1), Art. 13(2); Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/200 I, *Neg. Gaz.*, Year 7 No. 41, art 7(1 and 2).

CONCLUSION AND RECOMMENDATION

Conclusion

In a period of normalcy, constitutions of federations distribute powers between the national and regional governments. Both are autonomous and not subordinate to one another. However, they also have way outs to deal with abnormal times taking extraordinary measures. Extreme and inescapable situations force states to deviate from the laws applicable in ordinary times. States of exception helps states to avert exigencies and return it in to status quo.

In Ethiopia, two kinds of exception are constitutionally recognized: federal intervention and state of emergency. Three types of federal intervention are stipulated under Arts. 51(14), 55(16) and 62(9) of the Constitution respectively. The System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003 also regulated the matter in detail. The grounds for federal interventions are security deterioration, human rights violation and constitutional disorder. The federal government intervenes through deployment of federal defence and police forces to control the security situation, while it provides directives to states to curtail human rights violations. When the state governments violate the Constitution and endanger the constitutional order, the federal government deploys its defence and police forces and suspends state legislative and executive bodies. The Constitution is silent as to the measures taken on states when the latter, through either participation or consent, endangers the constitutional order. The proclamation has provided that the federal government can suspend the regional legislative and executive bodies. The constitutionality of such provision is questionable from the angle the Constitution's emphasis on autonomy and self-rule of states.

Both the Constitution and the Proclamation, however, fail to make a distinction among the grounds for federal intervention. Organs of the federal government are confused to take action since it is difficult to distinguish the ground of intervention from the beginning. The determination of the existence of the grounds is also challenging and hard to distinct from the ordinary time.

State of emergency is the other state of exception in Ethiopia provided under Art. 93 of the FDRE Constitution. It is declared when external invasion, constitutional disorder, natural catastrophe or epidemics occur. The CoM declares it and the HPR decides on its approval. It

suspends rights other than Arts. 1, 18, 25 and 39 (1 and 2) of the constitution. The occurrence of the grounds for state of emergency is subjectively determined. The Constitution has not clearly demarcated the grounds for federal intervention and state of emergency. It has not also stipulated the effects of state of emergency on the powers and autonomy of states.

Recommendation

- The states of exception are ineffective in creating lasting solutions to exigencies. It is because of the fact that the government tries to solve problems using its forces. The government has to try to solve problems through peaceful solution mechanisms. Therefore, the government has to try to solve it before it reaches its apex.
- The grounds for federal intervention are left to be subjectively determined by the federal government and are not clearly alienated from the ordinary time. This creates a leeway for the federal government to interfere in state affairs and thereby degrade autonomy of the latter. Therefore, it is wise to leave state matters to be defined or determined by the states themselves.
- State of emergency suspends human rights. However, the suspension of rights should be based on proportionality, necessity and non-derogability principles. The practice of states of emergency in Ethiopia shows the opposite. It is wise to establish a government organ that controls the observance of these principles during states of emergency. The list of non-derogable rights under Art.93(4(c)) should also be broadened to match international laws.
- Constitutional disorder is a common ground for federal intervention and state of emergency in Ethiopia. The HoF can order federal intervention or the CoM declares state of emergency. The federal government is, hence, free to declare either of the states of exception. It can order federal intervention when it needs to suspend the state government or state of emergency to suspend human rights. It is wise if the law is amended to split grounds for intervention from those for state of emergency.

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