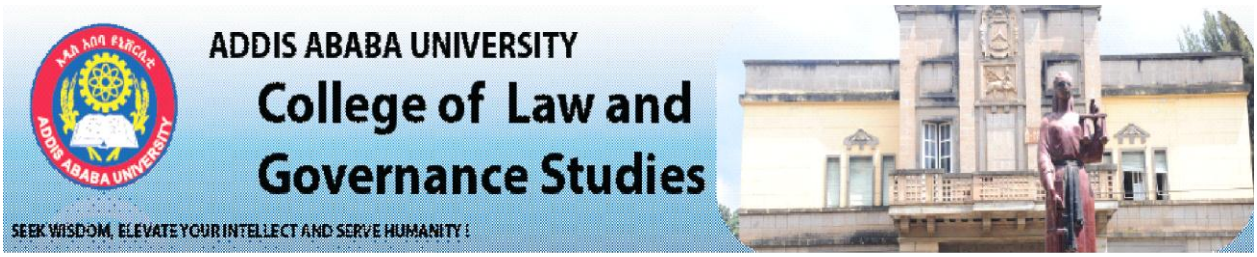

ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

LLM PROGRAM IN CONSTITUTIONAL AND PUBLIC LAW

STATE OF EMERGENCY AT SUB-NATIONAL LEVEL: THE NORMATIVE IMPLICATIONS OF THE STATE OF EMERGENCY PROCLAMATION NO. 1/2020 OF THE TIGRAY REGIONAL STATE

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DECLARATION STATEMENT

I, Gebrecherkos Gebrezgabher, declare that this paper 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.

Name: Gebrecherkos Gebrezgabher Signature: ---------- Date: ----------

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LIST OF ABBREVIATIONS

- Art- Article
- COM - Council of Ministers
- ECHR- European Convention of Human Rights
- FDRE- Federal Democratic Republic of Ethiopia
- HOF- House of Federation
- HPR- House of Peoples' Representatives
- HRC- Human Rights Committee
- ICCPR- International Covenant on Civil and Political Rights
- IGR- Intergovernmental Relations
- NEBE- National Election Board of Ethiopia
- PP- Prosperity Party
- SNNP- Southern Nations Nationalities and Peoples
- SOE- State of Emergency
- TPLF- Tigray People Liberation Front
- USA- United States of America
- WHO- World Health Organization

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ABSTRACT

To minimize abuse of SOE powers, different principles are developed both internationally and nationally to regulate SOE. In addition to this, due to the constitutional division of powers between the federal government and states, in federations, there is an additional issue of allocating SOE powers to both governments. Unlike constitutions of other federations, the FDRE Constitution introduces pure concurrent SOE powers in cases of natural catastrophe and epidemic, without devising mechanisms to regulate possible inconsistencies. This constitutional gap created an illusion on what powers are for the federal government and what others for the states? And how inconsistencies between federal and state laws can be managed? This research, hence, examines the normative implications of the Tigray regional state SOE in the light of the principles of SOE and division of powers. The research shows that in addition to the violation of fundamental principles of SOE, by the SOE law enacted by the Tigray regional state, its enactment and implementation also violated the supremacy clause of the Tigray regional state constitution and was contrary to federal division of SOE powers of different federations. This paper looks at mechanisms of managing concurrent SOE powers in other federations, and attempts to show the shortfalls in the area of the Ethiopian Constitution that may call for its amendment. Accordingly, the findings of the study imply that legislative, executive and judicial mechanisms of managing concurrency as experienced in other federations need to be included in the FDRE Constitution in order to prevent and/or reconcile inconsistencies. These mechanisms also play a great role in avoiding unlawful SOE laws and regulations for they, by their nature, promote checks and balances between the two tiers of governments.

CHAPTER ONE

INTRODUCTION

1.1. BACKGROUND OF THE STUDY

State of emergency (SOE) is characterized as a rational response to domestic political uncertainty by which governments with grave threats to have time and legal breathing space from voters, courts, and interest groups to confront crises while requiring the governments to show to these audiences that rights restrictions are momentary and legal.[1]

Although its historical roots may be stretched back to the Roman Empire times practice of appointing a *"dictator"* to deal with internal rebellions or external aggressions, the modern concept of SOE is a new development which was started in the French Revolution of 1789 by which "state of peace" and "state of siege" was differentiated, the latter referring to the abnormal conditions of the state that results in the total transfer of powers of ensuring peace and order from the civil authorities to the military leader to handle them exclusively.[2] By then, not only the constitution of the Second French Republic introduced an article concerning "state of siege", the concept became very important in the US constitutional law and constitutional practice too.[3]

The rationale behind allowing SOE decrees for governments is linked with the very responsibility of the sovereign state to protect the nation and its citizens.[4] Although what constitutes "public emergency threatening the life of the nation" remains controversial, pandemics, unexpected and large scale immigration, terrorism, transnational organized crime and natural catastrophes, among other things, are, currently, being common justifications for the

[1] Emilie M. Hafner-Burton, et al, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties', (2011), 65, International Organization, 673.

[2] Scott P. Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics', (2013), 34, Michigan Journal of International Law, 496.

[3] Ibid.

[4] Emilie M (n 1) 677.

declaration of SOE.[5] The possible danger is that governments may abuse it to dismantle democracies, consolidate their power, and harm political opponents.[6]

There are many instances of limiting the discretion of the executive, however, to reduce the annoying nature of the power to suspend laws as well as fundamental rights and freedoms by the government during exigencies.[7] These, among other things, are, listing some non-derogable rights; requirement of strict necessity and proportionality that requires strong justification to declare SOE and the measures has to be taken to the extent of averting the danger only; requirement of non-discrimination; and requirements of proclamation and notification.[8] Judicial review of the activities of the body managing the crisis by applying emergency measures is the other mechanism of reducing the abuse of power on the part of the executive during emergency situations.[9]

With this rationale in mind, currently, constitutions of most (federal) countries and almost all international human rights instruments incorporate clauses for the possibility of declaring SOE along with the substantive and procedural requirements that reduce the magnitude of the possible abuses. With the exception of the African Charter on Human and Democratic Rights (ACHPR), all international and regional human rights instruments recognize the possibility of suspension of human rights though they differ in terminology and the scope of the rights to be derogated.[10]

Including some earlier constitutions, before the adoption of the international human rights instruments, modern constitutions include SOE clauses applicable during exceptional threats to the state they establish. In 1848, for example, the constitution of the Second French Republic incorporated an article dealing with SOE focusing on the need of enacting law (principle of

[5] Anna Khakee, Securing Democracy? A Comparative Analysis of Emergency Powers in Europe, (DCAF) (2009) Policy Paper no 30, available at https://www.files.ethz.ch/isn/99550/PP30_Anna_Khakee_Emergency_Powers.pdf . Accessed on 21st March 2021.

[6] Emilie M (n 1) 677.

[7] Getachew Assefa, *Ethiopian Constitutional Law with Comparative Notes and Materials* (Addis Ababa, 2012) 500.

[8] Ibid 500- 504.

[9] Ibid 500.

[10] Yehenew Tsegaye Walielegne, 'SOE and human rights under the 1995 Ethiopian Constitution', (2007), 21, Journal of Ethiopian Law, 84.

legality) that describes the occurrence, procedure and consequence of the emergency situation.[11] In Germany too, Art.48 of the Weimar Constitution empowered the president with extraordinary powers that include deploying of the army and suspending some rights, to avert exceptional threats.[12] Currently, more than 90 % of constitutions permit the government, in their emergency provisions, to ignore the ordinary constitutional framework during emergency actions and administer through proclamations with low or limited supervisions on its power.[13]

What is more is, in federations, since the two layers of governments i.e. the federal government and the states have their own powers as stipulated in the federal constitution,[14] most of the time, the power to proclaim SOE decree, especially in the case of internal SOE, is given to both the federal and states in the federal constitution. This is to help leaders at the sub-national level respond to extraordinary situations by issuing emergency proclamations which clearly contain the rights to be suspended, measures to be taken and the duration of the decree.[15] The problem is that in case the party in power at the center and another party ruling at the state level are in disagreement on certain matters, there is a high probability of abusing the power of declaring a SOE. It has been indicated in India that despite different suggestions to improve the federalism in the country, the central government has been criticized for destructing regional governments on the pretext of breakdown of rule of law and then applying SOE.[16]

In the FDRE Constitution as well, SOE is regulated in such a way that allows both the federal government and the regional states to declare SOE decree subject to the fulfillment of the conditions provided in the Constitution. At the federal level, the Council of Ministers may decree a SOE in case there exists, an external invasion, a breakdown of law and order that endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies

[11] Scott P. Sheeran (n 2) 496.

[12] Ibid 497.

[13]Tom Ginsberg and Mila Versteeg, Covi-19 state of emergencies: Part 1, available at https://blog.harvardlawreview.org/states-of-emergencies-part-i/ accessed on March 26 5 2021.

[14] Getachew Assefa (n 7) 372.

[15] Gregory Sunshine, (etal) 'An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency' (2019), 17 Mary Ann Liebert, Inc., 1.

[16] Shylashri Shankar, 'The SOE in India: Böckenförde's Model in a Sub-National Context,' (2018), 19, German Law Journal, 210.

and personnel, a natural disaster, or an epidemic.[17] Whereas state executives may share the power with the federal government to declare state level SOE in two circumstances i.e. in case of natural disaster or epidemic.[18] The Tigray Regional State SOE Proclamation No.1/2020 was enacted accordingly.

1.2. STATEMENT OF THE PROBLEM

The SOE proclamation No.1/2020 of Tigray Regional State clearly violates some of the principles of SOE such as the requirements of necessity, non-derogation and proportionality. Regarding the principle of non-derogation, despite the derogation clauses under the ICCPR, the proclamation provides only the provisions that are non-derogable under the FDRE Constitution and the Tigray Regional State Constitution only. Particularly, regardless of the right to appeal is stipulated as a non-derogable right in the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, the proclamation, in some circumstances clearly provides that appeal is not possible. The decree also clearly violates the principles of necessity and proportionality, in declaring the emergency decree before the first Covid-19 case is confirmed in the region and stipulating more stringent measures than the federal SOE decree respectively.

The other problem is related to the constitutional division of power. There is a problem in identifying the factual situation that necessitated the declaration of emergency decree. This is because the issue of Covid-19 is the concern of the whole nation and even it is an international concern as opposed to the issue of a single regional state. What makes the issue more complicated is that even after the nationwide SOE is declared not only the regional level SOE decree remains intact, but also despite the supremacy clause under the Tigray Regional state Constitution, officials of the regional state repeatedly say that the federal SOE Proclamation is applicable in the state so long as it is consistent with the regional SOE Proclamation. Having the above implications in mind, the research examines the implications of the SOE Proclamation No. 1/2020 of the Tigray Regional State and the possible ways of averting the implications.

[17] Constitution of the Federal Democratic Republic of Ethiopia 1995 (hereinafter FDRE Constitution), Proclamation No 1, Neg. Gaz., Year 1 No 1, art 104 and 93 (1) (a).

[18] Ibid Art. 93 (1) (b).

1.3. RESEARCH QUESTIONS

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

- What are the principles governing SOE in federal systems?
- Is the SOE Proclamation No. 1/2020 of the Tigray Regional State harmonious with the SOE principles in federal systems?
- What rules of interpretation should apply to reconcile inconsistencies between the federal and state level SOE laws and regulations?

1.4. OBJECTIVES OF THE STUDY

1. 4.1 Main Objective

The main objective of this study is to examine the normative implications of the SOE Proclamation No.1/2020 of the Tigray Regional State. It particularly investigates the implications of the decree from the viewpoint of the SOE principles and constitutional division of power.

1.4.2 Specific Objectives

- To examine the principles governing SOEs.
- To explore international experiences relating to SOE in general and SOEs at sub national level in particular.
- To analyze the necessity of declaring SOE Proclamation No. 1/2020 of the Tigray Regional State.
- To examine proportionality of the measures included in the SOE Proclamation No. 1/2020 of the Tigray Regional State.
- To assess whether all non-derogable rights are respected in the SOE Proclamation No. 1/2020 of the Tigray Regional State.
- To scrutinize whether the Tigray regional state has a mandate to declare a SOE of such nature.

1.5. METHODOLOGY OF THE STUDY

1.5.1 Nature of the Research

The study is purely doctrinal research in type, interested in examining the normative implication of SOE Proclamation No. 1/2020 of the Tigray Regional State Declared to Protect the Public from Covid-19. Practical experiences as are available in written materials and personal observations however are analyzed for the purpose of this research.

1.5.2. Research Approach and Sources of Data

In undertaking this study, the researcher used a qualitative approach. Therefore, the primary and secondary sources that cover the subject matter of the research particularly, laws (international hard and soft human rights instruments, national constitutions, domestic constitutions and proclamations) books, book chapters, articles, constitutional and different legal commentaries, journal articles, or LLM theses, among other things, pertaining to SOE are examined qualitatively.

1.6. The Scope of the Study

Although it is clear there might be many practical problems in managing the SOE in the Tigray Regional State, for the purpose of manageability, this study focused only on examining the normative implication of SOE Proclamation No.1/2020 of the Tigray Regional State as opposed to practical challenges.

1.7. SIGNIFICANCE OF THE STUDY

This study will be of paramount importance for law makers, managers of emergency situations, policy framers, and constitutional practitioners in granting considerable knowledge concerning SOE principles and power division between federal and states on declaring emergency decree in the FDRE Constitution. Furthermore it will come up with recommendations which help for the FDRE Constitution and Tigray Regional State Constitution to upgrade their SOE provisions in light of the international SOE principles. Lastly, it will serve as a source for potential constitutional and human rights researchers so as to dig out the issue more deeply.

1.8. LIMITATION OF THE STUDY

The study was confronted with the following problems. Since the area is new and undiscovered, the first problem was lack of relevant materials on the subject matter under the Ethiopian legal system especially in the area of sub-national SOE. However, the researcher tries as far as possible to reduce this problem to a lesser extent by resorting to materials written in other legal systems and trying to compare them with the provisions of the FDRE Constitution. Besides, the absence of a full-fledged internet access for conducting the research was also another limitation to the study particularly after the closure of universities due to Covid-19 epidemic.

1.9. ORGANIZATION OF THE STUDY

The thesis is organized in five chapters. The first chapter is an introductory one which includes introduction, statement of the problem, research questions, objective of the study, research methodology, significance of the study, scope and limitation of the study as well as organization of the study. The second chapter contains theoretical and conceptual framework of SOE with special focus on practices of federal systems. The third chapter focuses on SOEs in Ethiopia as enshrined in the FDRE constitution and Ethiopian sub-national constitutions in general and the Tigray Regional State Constitution in particular, with comparative notes of other federal states. The fourth chapter analyzes the normative implications of the SOE Proclamation No. 1/2020 of the Tigray regional state to the constitutional division of power along with the possible mechanisms of avoiding inconsistencies, and/or reconciling the inconsistencies between concurrent federal and state SOE laws and regulations. The last chapter, chapter five, closes the paper by concluding the finding, and forwarding recommendations.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORK OF SOE

2.1 Notion and Historical Origins of SOE

A SOE is declared by the government in response to an unprecedented event that poses a serious threat to the state.[19] That announcement of SOE by the government may interrupt certain normal functions of government, may make citizens ready for the adjustment of their usual behavior in line with the situation, or may empower agencies of the government to implement emergency preparedness plans which include the power to limit or suspend civil liberties and human rights.[20]

Although attempts are made by the international as well as regional human rights instruments along with elaborations by organs with treaty monitoring task to define SOE, it still remains an equivocal concept lacking an objective definition that clarifies its nature, content and scope.[21] Many terminologies are employed to refer to the term SOE interchangeably, which include "state of alarm", "state of siege", "state of exception" etc.[22] Following the FDRE Constitution and the constitutions of Ethiopian regional states, this paper uses "SOE" (SOE) for the purpose of consistency.

The essence of SOE is related with the rationale of reconciling security of the state and human rights and freedoms of individuals.[23] It is also a situation that permits the government to deviate

[19] Geneva Centre for the Democratic Control of Armed Forces (DCAF)**, '**Backgrounder SOE' (2005), available at www.dcaf.ch/publications/backgrounders accessed on September 15, 2020.

[20] Ibid.

[21] Yibeltal Assefa, 'Upholding International Human Rights Obligations during a SOE: An Appraisal of The Ethiopian Experience', (LLM Thesis (unpublished), Addis Ababa University February, 2019) 13.

[22] DCAF (n 19)1.

[23] Gebreabezgi W/slassie, 'The Extent of Reason of State in the Ethiopian Constitutional Order: The Quest for Restraining and Legitimizing', (LLM Thesis (unpublished), Addis Ababa University, November, 2011) 9.

from its normal constitutional and legal obligations due to the extraordinary danger to the public in order to restore the state or its affected part to normalcy.

In line with this, Thomas Jefferson, the 2nd president of USA, as quoted by Tadesse, said the following regarding SOE;

> *"The laws of necessity, of self-preservation, of saving our country in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, (and with it) life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means".*[24]

Thinking broadly, although its scope is not sufficiently defined, the need for the self-defense of the state is concomitant with the clearly admitted ancient view of self-defense of a man that human beings have to defend themselves by the law of nature.[25]

In similar way to the above justification of self-defense, during the Roman Empire, St. Augustine came up with a unique teaching which came to be known as "reason of the church" i.e. self-defense of the Catholic Church and of its followers, which was in contradiction with the traditionally developed teaching of the church that prefers patience to resistance.[26]

Outside the religious affair, during the Roman Empire, in the political sphere too, there was a practice of appointing a "dictator" in times of emergency, with significant powers that enable the dictator to restore the state into the ordinary situation.[27] Tadesse pointed out that the practice of appointing a dictator can be seen as a foundation of the contemporary constitutional SOE.[28] This is because, as to him, there were four requirements in appointing the Roman Dictator all of them are prevalent conditions in the current practice of constitutional SOE.[29]

The *first* requirement is that the way of nominating the dictator had to follow clear constitutional standards. *Secondly*, the dictator shall neither have the power of declaring the SOE nor the power to terminate by himself an already declared SOE. The *third* requirement is, related to the duration of the emergency; put in other words, the discretionary power of the dictator not only

[24] Tadesse Melaku, *Ethiopian constitutional law past and present*, vol.2 (1st edition, Alpha printers, 2017) 135.

[25] Gebreabezgi (n 23) 23-24.

[26] Ibid 24.

[27] Scott P. Sheeran, (n 2) 496.

[28] Tadesse Melaku (n 24) 136.

[29] Ibid.

shall remain for a precise period of time only, but also shall not be extended for an indefinite period. The *fourth* and the last condition is that the ultimate purpose of the SOE shall be defending the constitutional order and restoring it to its normalcy.

In the contemporary world, SOE is common for all states, be them constitutionalists or otherwise. The problem comes in the intensity of the powers to be given to the executor of the emergency. Regarding the nature of the emergency power of the body responsible for the administration of the problem that caused the declaration of SOE, there are two prominent antagonistic views; the "*rule of law model*" and "*sovereignty model*".[30]

The supporters of the rule of law model claim that since unsupervised and concentrated emergency powers out of checks and balances may result in the emergence and entrenchment of authoritarian systems with grave violation of human rights, SOEs must be legally supervised.[31] On the other hand, for the proponents of the sovereignty approach, SOE cannot be regulated by the law and even if it is possible to regulate, it is not desirable to do so since such action may be an obstacle to the well management of the emergency.[32] One of the main proponents of this approach, Carl Schmitt, as quoted by Scott P. Sheeran, has the following to say in support of the sovereignty approach:

> *"The precise details of an emergency can't be anticipated nor can be spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited*."[33]

This approach is somehow similar to the Machiavellian strand of thought that makes the state at the upper level. The strong influence of the classical thinking of Machiavelli on SOE to the supporters of the sovereignty approach is visible in their preference to sovereignty rather than legality. As far as emergencies endangering the security of the state is concerned, Niccolo Machiavelli, a political thinker, who was said to be one of the first political thinkers who deal with the notion of SOE, though without using the term, emphasized on the security of the state glorifying the state as the absolute good, source of all virtues, without which no honest good may

[30] Scott P. Sheeran (n 2) 500.

[31] Ibid 501.

[32] Ibid 500-501.

[33] Ibid 501.

be found, and every action pursued by the state to build or maintain itself is always right so that not to be questioned.[34]

This being the difference between the two thoughts, the *rule of law approach* is now more acceptable by many scholars as well as in the international human rights system that reflect human rights should be protected by rule of law, than the sovereignty model, which its supporters are criticized by some scholars such as Cole, for their failure to bring reliable support to their argument for the suspension of rule of law during emergency.[35]

Due to several reasons, such as limiting arbitrary power of SOE, better human rights protection during SOE, drawing a clearer way of returning to the normalcy etc., currently, the desire of human rights lawyers for the constitutionally regulated SOEs is overt.[36] With this view in mind, almost all international and regional human rights instruments contain provisions which allow States to adopt measures suspending the enjoyment of these rights to the extent strictly required by situations of emergency. The widely accepted grounds for the declaration of SOE are armed conflict (internal conflicts or external invasion), and different natural as well as man-made disasters.[37] The only exceptions, with no clause for derogation of rights during emergency, are the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter on Human and People's Rights (ACHPR).[38] Art.4 of the ICCPR provides the following stipulation:

"In 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."

[34] Gebreabezgi (n 23) 25-26.

[35] Scott P. Sheeran (n 2) 501-502.

[36] Kim Lane Scheppele, 'the international SOE: challenges to constitutionalism after September 11' (2006), 47.

[37] Olivier De Schutter, I*nternational Human Rights Law: Cases Notes and Commentary*, (1st edition, Cambridge University Press, New York, 2010) 513.

[38] Yibeltal Assefa (n 21) 1.

Similar stipulations are included under Art.15 and Article 27 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), American Convention on Human Rights (ACHR) respectively. The function of derogation clauses in the three human rights instruments, therefore, is not to free the state from observing its duty towards human rights in the face of certain emergency situations. Rather to the opposite, they help careful delineation that under which conditions certain guarantees may be suspended. The movements by the international human rights lawyers is also visible in developing some principles (to be discussed shortly in the next sub section) that govern SOEs at the international level through soft laws that elaborate the requirements of derogation under international human rights treaties, like the Siracusa Principles on the Limitation and Derogation of Rights in the ICCPR, of 1985, Queensland Guidelines for Bodies Monitoring Respect for Human Rights during SOE, of 1990, the Paris Minimum Standards of Human Rights Norms during State of Emergency, of 1984, etc..[39]

2.2 Principles governing SOE

2.2.1 Principle of strict necessity

This principle requires the presence of actual danger or at least imminent danger to the public, in order to declare a SOE. It has four components within it.[40] Particularly, the presence of actual danger or the fact that it is imminent to occur; the danger has to be in a position to affect the whole population; the risk also should be exceptional; and the danger is capable of bringing threat to the organized life of the community concerned.

The requirement of temporality refers to the exceptional and timely bounded nature of the declaration of a SOE as opposed to the ordinary situation.[41] SOE laws applied for years or even decades like that of Israel which continued starting from the time of its independence up to now, are highly blamed.[42] Similarly, the HRC also has expressed its concern on the SOE of Syria

[39] Kim Lane Scheppele (n 36) 47-48.

[40] Daniel O'Donnell, 'Human Rights Quarterly', (1985), *7*, Johns Hopkins University Press, 24.

[41] DCAF (n 19) 2.

[42] International Bar Association and UN High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, (New York and Geneva, 2003) 822.

which was in effect for a longer period of time since 1963 contending that it is in violation of Art.4 of the ICCPR.[43] The other important element regarding the geographical location the SOE is going to be applied in is that the danger must be such that to affect the total population of the territory on which the SOE decree is declared.

The magnitude of the danger has also to be considered. Since not all risks cannot be hazardous to the life of the nation, the situations that could be accepted as valid justifications have to be those that can affect the organized life of the community, as opposed to some situations which could be perceived as threats to a nation, such as some natural disasters, that in the opinion of HRC can be easily solved applying the limitation clauses permitted by the international covenant (ICCPR) on some rights such as freedom of assembly and association, right to movement, etc..[44] Moreover the danger is not to be taken as if a serious danger to the public because of the mere claims of the government as such, in such instances i.e. where the reason for the declaration of SOE is related with natural catastrophes, mass protests, and the like, strong justification is required and the burden of proof to justify that the SOE is necessary and legitimate is on the state party derogating from its obligation on the covenant as a result of the SOE.[45]

Regarding the presence of the extraordinary risk as a precondition to declare SOE, there should be sufficient evidence that proves either the presence of an objectively distinguishable actual risk to the nation wholly or partly, or the likelihood occurrence of the risk. Some instances qualified to be SOE by the (HRC) are, internal and external armed conflicts, mass protests containing violence, natural catastrophe, and industrial accident.[46] Therefore, save other preconditions at national constitutions and laws, at least for the purpose of international human rights law, the real occurrence or the likelihood of occurrence of the above situations may constitute a valid reason to declare SOE to derogate from obligations in the covenant.

2.2.2 Principle of strict proportionality

Principle of strict proportionality requires that the measures of SOE must be directed for the purpose of satisfying the legitimate public interest caused for the declaration of SOE and using

[43] Dominic McGoldrike, 'The interface between public emergency powers and international law', (2004), 2 International Journal of Constitutional Law, 392-393.

[44] Daniel O'Donnell (n 40) 24.

[45] International Bar Association (n 42) 822.

[46] Dominic McGoldrike (n 43) 392-393.

excessive force while some other lower measures could have averted the danger is a violation of this principle.[47] Moreover, strict observance of this principle requires the incorporation of effective safeguard mechanisms in the domestic constitution as well as in each emergency decree.[48] Generally, it is this principle that guides whether the emergency measures are being applied for the purpose of public interest, only in the territory where the danger occurred, and only during the time specified as emergency period.[49]

2.2.3 Principle of non-derogation of certain fundamental rights

The other limitation for states derogating from their obligation under human rights instruments is the principle of non-derogation of certain human rights. This requirement tries to provide a list of some important fundamental human rights which can't be violated even during an emergency period. The main purpose for having such non-derogable rights is that for one thing, there are some basic human rights which already became peremptory norms due to the fact that they are unquestionably fundamental and essential, and for another thing these rights accepted as non-derogable are of no direct connection with emergency.[50]

The following rights are listed as non-derogable rights under Art.4 the ICCPR. The right to life (Art.6) ; freedom from torture, cruel, inhuman, or degrading treatment and punishment along with the right not to be subjected to medical or scientific experimentation (Art. 7); right to be free from slavery Art.8 (1) and forced servitude Art.8 (2); the right not to be imprisoned for non-fulfillment of contractual obligation (Art.11); the right to be recognized every were as a person Art.(15); non retroactivity of criminal law and the right to a lighter latter punishment Art. (16); the right to freedom of thought, conscience and religion Art. (18).

Some regional human rights instruments also came up with additional non-derogable rights. At regional level while Art.15 (2) of the ECHR contains, more or less, similar list of non-derogable rights like that of ICCPR, Art.27 (2) of the Inter American Human Rights Convention puts additional non-derogable rights which include, right to fair trial and the writ of habeas corpus, the right of family, the right of the child, the right to name, the right to participate in government

[47] Yibeltal Assefa (n 21) 20-21.

[48] Ibid 21.

[49] Ibid 20-21.

[50] Ibid 22-23.

and the right to nationality.[51] It is also the opinion of the (HRC) that since the enjoyment of all human rights is highly dependent on it, the right to fair trial should be taken as a non-derogable right.[52] The HRC further underlined that the listing of non-derogable rights is not simply to mean the rest of the rights are free to be suspended during emergency, it rather recommended derogation from each and every right has to be based on analysis of cause and effect between the threat and the obstacle that may occur, by the enjoyment of the particular right to be derogated, to avert the threat.[53]

2.2.4 Principle of consistency with other obligations under international law

It is also clearly stipulated under Art.4 of the ICCPR a derogation by a state from its obligations under the covenant may only be tolerated so long as such deviation from the obligations in the covenant are consistent with other international obligations of the state.[54] This requirement is also stipulated in the two prominent regional conventions, the ECHR (Art.15) and the ACHR (Art.27).[55] The HRC also in its General Comment No.29 on derogation recommended that states can't violate their international obligations like that of obligations in international humanitarian law, under the pretext of derogation under Art.4 of the ICCPR or because such obligation is not part of the covenant. For instance, they cannot derogate from their obligations under the Convention on the Right of the Child (CRC), which is ratified by almost all states for it does not allow derogation at all but clearly prohibits derogation under Art.38 of the convention.[56]

It also adds states also are required to consider the developments in international human rights law referring to the reports of the Secretary General to the Human Rights Commission, the Paris Minimum Standards of Human Rights Norms in a State of Emergency, Siracusa Principles on the Limitations and Derogation of Rights in the International Covenant on Civil and Political Rights, reports of special rapporteurs, different declarations on human rights, and some guiding principles.[57]

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[51] Olivier De Schutter (n 37) 551.

[52] Ibid.

[53] Annual Report of the Human Rights Committee, 49th session, UN Doc.A/49/40 (1994) Para 6.

[54] Olivier De Schutter (n 37) 551.

[55] Ibid 551.

[56] General comment 29 (n 53) Para 10.

[57] Ibid.

2.2.5 Principle of non-discrimination

Art.4 of the ICCPR also puts another important requirement that the derogation intended should not contain any discrimination solely on the ground of race, color, sex, language, religion, or social origin. Although the non-discrimination phrase under Art.27 of the ACHR, which contains prohibition of discrimination on same grounds as listed in the ICCPR Art.4, is clear and unconditional, the word *"solely"* under Art.4 of the ICCPR may be an obstacle to the full application of the principle since it may be manipulated by the state derogating state in order to apply discriminatory emergency measures adding some other reasons.[58] For instance, in cases of civil unrest, emergency measures of a state may target a certain ethnic group which the state claims to be alien to the rebels so long as such measures are proportional.[59]

2.2.6. Principles of proclamation and notification

These two more principles are rules procedural in nature to be followed in the way of the SOE after the substantive norms discussed in the preceding subsections are fulfilled.

The important procedural principle under Art.4 of the ICCPR is the requirement of official declaration of the emergency decree. The principle of proclamation of the SOE is said to be a very important requirement which requires adherence to the effective implementation of the principle of legality and rule of law at a critical time i.e. emergency.[60] This principle obliges state parties to officially proclaim SOE according to their constitutionally stipulated procedures and formality requirements in ordinary laws to pass emergency decree.[61] More importantly, the requirement of official proclamation is of great importance in informing the public of the emergency as well as reducing the occurrence of *de facto* SOEs.[62] The HRC marked that the requirement of notification, another procedural requirement under Art.4 of the ICCPR, is very crucial not only for the HRC in order to assess the necessity of the derogation and the proportionality of the measures there to, but also to enable state parties to monitor such derogation.[63]

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[58] Olivier De Schutter (n 37) 447-448.

[59] Ibid.

[60] General comment 29 (n 53) Para 2.

[61] Ibid.

[62] Yibeltal Assefa (n 21) 24.

[63] General comment 29 (n 53) Para 17.

Notification in its content must contain sufficient information about the derogation (which include, the list of provisions to be suspended with logical reasons for their suspension based on analysis of cause and effect between the threat and the obstacle that may occur, by enjoyment of the rights, to avert the threat, and the measures, to be taken and already taken) and also must be made to other states parties through the UN Secretary General and other relevant treaty-monitoring bodies.[64] The notification requirement should be as early as the proclamation of the emergency decree or extension of a previously declared decree. Changes of different nature to the emergency decree (such as in the territorial application of the emergency decree, or in the addition or reduction of the rights derogated) and termination of the SOE has also to be notified.[65]

2.3. SOEs in federations

One of the main features common to all federations is constitutional division of powers, as stipulated in the national constitution, between the central government and the constituent units[66] of the federation not for mere administrative purpose but with some autonomy of self-government within their defined territory.[67] One area of power division that should be regulated by the federal constitution is SOE.

What make SOE in federations special is, in addition to the lifting of human rights protections, the constitutional division of power may also be affected since the federal government may suspend state constitution and state laws at least partially or deploy federal forces to the territory of a state.[68] The same logic works if power is given for states to declare SOEs of their own in their respective territory. More importantly, when power is given to states and the federal governments concurrently, there is a possibility of gridlock, for instance, in case both

[64] DCAF (n 19) 2.

[65] General comment 29 (n 53) paragraphs 17.

[66] Constituent units of federations are called by different names in different federations such as Landers, autonomous entities, provinces, regions, cantons. The term "state(s)" is applied in the FDRE Constitution as well as in the sub-national constitutions. The same is true in this paper also for the sake of uniformity. However, terms such as "regions" and "regional states" as the case may be are also used in this paper.

[67] Assefa Fiseha, and Zemelak Ayele 'Concurrent powers in the Ethiopian federal constitution' in Nico Steytler (ed), *Concurrent Powers in Federal Systems Meaning, Making, Managing,* vol. 8, (Brill Nijhoff, 2017) 241.

[68] Tadesse Melaku (n 24) 138.

governments enact emergency laws of their own on the same matter and at the same time with some inconsistencies in their content.[69] The latter i.e. conflict of jurisdiction is the main thesis of this paper in areas of SOE in Ethiopia with particular focus on the Tigray Regional SOE Proclamation No.1/2020 which had been in operation from March up to September last year.

As one may easily understand from the reading of Art.93 of the FDRE Constitution, there are two types of emergency powers. One is that which is exclusively given to the federal government (external invasion as well as breakdown of law and order which can't be controlled by the regular law enforcement agencies) while the other being the power given to both the federal as well as states concurrently on areas of disaster and epidemic.[70] However, under the emergency clause, proper dispute resolution mechanisms to settle the jurisdictional conflicts that may possibly occur when each level of government trying to declare SOE are not devised.

2.4. A brief history of practiced SOEs in the constitutional history of Ethiopia

When we look at the Ethiopian history of constitutional regulation of SOEs, in the first written constitution of 1931, of Ethiopia, there was no constitutional clause regarding SOE. In the Revised 1955 constitution of Ethiopia, however, emergency power was given by the constitution to the Emperor to declare SOE though without putting clear preconditions and procedural requirements.[71] During the Derg regime, despite the silence of the 1987 PDRE Constitution on the issue of SOE, there were some practices of SOE before and after the adoption of the constitution. For example, SOEs were declared by the military government in Addis Ababa on September 30, 1975, (which was lifted on December 6, 1975) and on May 14, 1988.[72]

The current FDRE Constitution of 1995 regulates SOE under Art 93 of the constitution. It particularly contains the conditions after the fulfillment of which SOE can be declared, the organs empowered to declare and approve SOE, the procedures to be followed to declare, as well as the maximum duration of the SOE decree, rights that can't in any way be derogated, and an institution to monitor the emergency management.

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[69] Assefa and Zemelak (n 67) 257.

[70] FDRE Constitution (n 17) Art.93 (1) (a) and (b).

[71] The 1955 Revised Constitution of Ethiopia Art.29.

[72] Ethiopia (1942-present),>available at https://uca.edu/politicalscience/dadm-project/sub-saharan-africa-region/ethiopia-1942-present/ >accessed on April 25, 2021.

There was no clearly observable practice of SOE in Ethiopia for more than two decades until 2016. It was even surprising that Ethiopia did not declare SOE during the Ethio-Eritrean war of 1998-2000 while SOE is declared about six times between October, 2016 (the first SOE based on the FDRE Constitution Art.93 (1)) and April 18, 2021, the last SOE declared in Amhara Regional State by the federal government.

One may argue however there was a SOE in 2005 after the then election and before announcement of the result by the National Election Board of Ethiopia (NEBE), which bans the right to peaceful assembly and demonstration, for a month. Abdi Jibril, however, has rightly characterized it as "*de facto SOE*" for it is not limitation in proper sense as the CCI claimed, while it did not follow the constitutional requirements (for instance it was not reviewed by the HPR) for declaring SOE.[73] In any case, the first, undisputed, SOE was declared on 9th October of 2016 by the federal government for six months due to the existence of breakdown of law and order as per Art.93 (1) of the FDRE Constitution and also extended for another term of four months.[74] In February 2018, another SOE was declared by the COM, for similar reasons to the previous SOE.[75] Last year, on Friday 10 April 2020, a proclamation to counter, control and mitigate Covid-19 was passed by the HPR weeks after the State Council of the Tigray Regional State had passed a similar state wide emergency proclamation.

This year also two more SOEs are declared in Ethiopia. In November 04/2020, the COM, decreed a six-month SOE in Tigray regional state.[76] On Sunday April 18, the government of Ethiopia through its Ministry of Defense announced that it has declared another SOE decree in Amhara regional state due to the internal disturbance in the City of *Ataye*.[77]

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[73] Abdi Jibril Ali, 'Distinguishing Limitation on Constitutional Rights from Their Suspension: A Comment on the *CUD* Case', (2012), 1, Haramaya Law Review, 24.

[74] Soreti Berhanu Workneh, 'The Ethiopian Human Rights Commission's Power of Investigation of Human Rights Violations and Its Application during State of Emergencies', (LLM Thesis, (unpublished), December, 2019) 33.

[75] Ibid 34.

[76]Council of Ministers Declares SOE in Tigray Regional State, >available at https://www.ena.et/en/?p=18174 > accessed on April 28, 2021.

[77] Ethiopia declares SOE in Amhara, >available at https://www.focusonafrica.info/en/ethiopia-declares-state-of-emergency-in-amhara/ >accessed on April 28, 2021.

What makes the Tigray Regional State SOE proclamation No.1/2020, (the subject of this study) special is that, it was the first, and yet the only state wide SOE law, declared at sub-national level, by a state council, that makes it attractive for study from two points. The *first* one is from the point of view of the SOE principles of necessity and proportionality, for, not only, the SOE was declared before the first case was confirmed in the region but also the measures also were started to apply before that confirmation. The second and more bewildering point is that since SOE on ground of epidemic is concurrent power of the federal government and the states, problems associated with federal division of powers are clearly observed especially after the federal SOE decree was declared later.

CHAPTER THREE

Constitutional Regulation of SOE in Ethiopia: Overview of the FDRE Constitution and Constitutions of Regional States

3.1 SOE in the FDRE Constitution

It is very common for federal constitutions to stipulate a clause on the case of SOE in which some contents of the constitution may be suspended temporarily. But that does not mean all federations share this pattern. If we see the US Constitution there is no word *"emergency"* or another equivalent term throughout the text of the constitution and all amendments to it.[78] Even more clearly, the Belgian constitution stipulates a provision that prohibits any kind of partial and total suspension of the constitution.[79]

Like many other federal constitutions the FDRE Constitution provides a clause for SOE under Art.93 of the constitution. The FDRE Constitution does not provide any definition apart from providing constitutional requirements for the declaration and implementation of SOE. The explanatory note of the FDRE constitution, however, tries to define SOE as an administrative measure to be taken by the government when it is faced with problems, that the government can't resist applying the ordinary law enforcing procedure, such as man-made crises (external invasion or internal political problems) or natural catastrophes (that include storm and fire).[80]

The constitution stipulates the grounds i.e. the events upon occurrence of which SOE may be declared; the organs empowered to declare, (dis)approve and renew the SOE at national level; the maximum duration of the SOE; the rights or provisions which can't be derogated in enacting

[78] William B. Fisch, "Emergency in the Constitutional Law of the United States", Am. J. Comp. L. (1990) 1.

[79] For example, art 187 of the Belgian Constitution (as revised in 31 January, 2014) stipulates that any kind of suspension be it partial or total is not permissible. Therefore, SOE at least can't suspend constitutional provisions, in the Belgian constitutional law.

[80] Commentary note on the FDRE Constitution approved by the HPR, on October 28, 1995, 124.

and applying the SOE law; and the establishment of a supervising ad hoc board along with its powers and functions for each SOE.[81]

3.1.1 Requirements to declare SOE

Substantive as well as procedural requirements are provided in the constitution. At national level the COM of the federal government may declare a SOE on grounds of external invasion, exceptional breakdown of law and order, natural disaster or epidemic.[82] These substantive requirements are more or less similar to the conditions in the international and regional human rights instruments as well as requirements in many other federal constitutions.

The first one is the existence of actual danger before declaring SOE is necessary. Unlike, in other federal constitutions and many international hard and soft human rights law instruments which include both actual and eminent risks to a state, as valid grounds, the FDRE Constitution puts the existence of only actual danger excluding eminent threats as unqualified grounds for declaring SOE in Ethiopia.[83] There should be actual external aggression, internal violence, epidemic or other kind of natural disaster. The word breakdown of law and order refers to cases of internal disturbances with in the state and this requirement has another additional requirement to fulfill since any disturbance is not qualified in the words of the constitution to declare SOE rather it has to be a disturbance of an exceptional nature which can't be controlled by the regular law enforcement mechanisms.[84]

3.1.2. Power to declare and approve SOE at national level

After the declaration of the SOE decree by the COM, it has to be submitted to the HPR for approval within 48 hour if the house is in session or within 15 days if the House is in recess at the particular time.[85] The House may approve by majority vote the SOE decree to be applied for a maximum of 6 months period of time or may disapprove the decree. In addition the HPR has the power to renew it for a maximum of four months for each renewal the frequency of which is

[81] FDRE Constitution (n 17) Art.93.

[82] Ibid Art.93 (1).

[83] Yehenew Tsegaye (n 10) 105.

[84] Ibid.

[85] FDRE Constitution (n 17) Art.93 (2) (a) and (b).

unlimited.[86] Two thirds majority of members of the HPR have to support the decree in order to be renewed.[87]

3.1.3. Non-derogable provisions

The constitution allows the CoM to suspend all political and democratic rights if it is found to be necessary to avert the problems that necessitated the declaration of the emergency decree.[88] The constitution, however, lists non-derogable rights which the CoM can't, in any way, suspend or limit for whatever reason while enacting and applying the SOE. [89] The list of non-derogable rights of the FDRE Constitution is very short if contrasted with the internationally recognized non- derogable rights. It has been criticized, for instance, for failure to include even the right to life among with the non-derogable provisions.[90] It also lacks procedural safeguards to ensure the protection of non-derogable rights of the constitution. For instance, although it is clearly provided in the constitution that the right to self-determination up to secession is non-derogable, the denial of protection from suspension of the right to self-rule has undermined the protection to the substantive right to self-determination.[91] If the procedural part of the right to self-determination under Art.39 is not included in the list of non-derogable rights, the full enjoyment of the right could not be achieved through partial protection of the substantive rights to self-determination. Furthermore, despite the recommendation of the HRC for the protection of right to fair trial from suspension during emergency, due to its significance for the enjoyment of all the non-derogable human rights, such right is not included within the non-derogable list in the FDRE Constitution. No right may be protected in such a way if one of whose rights (even those non-derogable) are violated is not able to resort to a court of law to get some remedy.

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[86] FDRE Constitution (n 17) Art.93 (3).

[87] Ibid Art.93 (2) (a).

[88] FDRE Constitution (n 17) Art.93 (4). (b).

[89] Ibid Art.93 (4) (c). This provision lists Art.1 the nomenclature of the state, Art.18 Protection against inhuman treatment, Art.25, the right to equality, and Art.39 (1) and (2) the right to self-determination including secession and the right to protect and promote one's history, culture and language as non-derogable provisions.

[90] Adem Kassie, 'Human Rights under the Constitution: a Descriptive Overview', (2011), 5, Mizan Law Review, 62.

[91] Shimeles Ashagre, 'The House of Federation to Approve an Emergency Regime in Ethiopia: Peeking through the Preamble', [2017], 8, Beijing Law Review, 283.

3.1.4. An organ to review the implementation of SOE

Moreover, the HPR shall establish an ad hoc board called SOE Inquiry Board, by the time it approves the SOE.[92] The powers and responsibilities of the board are listed in the constitution.[93] These include, to publicize the name of arrested individuals in connection with the SOE, along with the reason of their arrest within a month; inspection and follow up of SOE measures with the aim of preventing inhuman SOE measures and recommending corrective measures to the prime minister or CoM on inhuman treatments; ensuring the prosecution of perpetrators of the inhuman acts; submission of recommendation to the HPR, on whether to renew or repeal the SOE decree, when renewal of the SOE decree is requested.

However, the role of the judiciary in following up SOEs is unclear in the FDRE constitution. The SOE inquiry board to which the constitution empowers the power to supervise SOE has no judicial power since the board's power is limited to submitting recommendations rather than binding decisions.[94] What it makes worse is that, as we shall see in the next sub section, save some distinctions such as in number of board members of the board which has no role in filling the gap of the FDRE Constitution, the Ethiopian state constitutions also follow the federal model in this regard that makes the Ethiopian constitutional system very much weak in judicial control of SOEs both at national and sub national level.

There are two antagonistic arguments however, regardless of the silence of the constitution, on the role of courts in considering the constitutionality of emergency laws and actions by the ordinary courts. Some argue that courts shall have the power to interrogate the existence of valid grounds for declaring SOE and the proportionality of the measures deemed to be applied to avert the problem so that the internationally developed SOE principles may be fully applied in Ethiopia.[95] Others argue to the contrary that the determination of the emergency and the extent of measures to avert the challenge shall be left to the political bodies –the legislature and/or the

[92] FDRE Constitution (n 17) Art.93 (5)

[93] Ibid Art.93 (6).

[94] Getachew Jima, 'The Role of Courts in Protecting Human Rights During a SOE in Ethiopia', (LLM Thesis (Unpublished), Addis Ababa University, June, 2020) 63.

[95] Yehenew Tsegaye (n 10) 109.

executive branches.[96] But the internationally developed guidelines such as *Paris Minimum standards* and *Siracusa principles* suggest that not only courts should have the power to review the necessity of the SOE and the proportionality of the measures to be applied but also to provide remedy against abuses of such powers in derogable rights and any infringement of non-derogable rights.[97] An interesting approach in this regard is the position in the South African Constitution which clearly stipulates that a court of law can decide on whether declaration and extension of SOE is necessary, in addition to reviewing the validity SOE of laws and actions.[98]

3.2 Overview of SOE in sub-national constitutions in Ethiopia

Under this subsection, constitutional regulation of SOE in different regional constitutions in Ethiopia is discussed, with special focus on the Tigray Regional State Constitution. Focus also is made on the deviations from the FDRE Constitution. It is Professor Saunders, in analyzing the importance of sub-national constitutions in Australia, who provides the role and importance of state constitutions symbolically, historically, practically and potentially.[99] They play, she says, a symbolic role for the self-government of the communities for which the constitutions are designed. More importantly state constitutions may be found to be important even in designing the federal constitution in cases when the former precede the latter. The practical significance of state constitutions is all about the role of sub-national constitutions that is apparently observed in establishing the sub-national political entity with different institutions and structures. The last one, the potential role of state constitutions, is the fruitful experiment of the state constitutions in using the constitutional space in different ways that conform their specific circumstances by their innovative institutions, designing and structures of government. This may also serve as experience for other sub-national states of similar nature. In his well-known dissenting opinion, in a case *(New State Ice Co. v. Liebm)* Justice Brandeis of the US Supreme Court argued in favor of sub national policy autonomy in the following manner: *"It is one of the happy incidents of the*

[96] Yehenew Tsegaye (n 10) 109.

[97] Ibid 110-111.

[98] Constitution of South Africa (1996) S 37 (3).

[99] Cheryl Saunders, 'Australian State Constitutions', (2000), 3, Rutgers Law journal, 1002-2009.

federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[100]

Brandeis further argued if such a regional state fails in its experiment in social and economic policy the danger will be limited to that particular state only but if succeed the new innovation will be shared among the rest of states too.[101] Although sub-national constitutions are deemed to serve as laboratories of democracy in their respective areas, such expectation is not evident in the experience of Ethiopia. Of course that does not mean that the FDRE Constitution and the constitutions of states are the same. Nor to say that the different state constitutions are the same in all matters. Rather it is to mean that the difference is not as it should be.

3.2.1. Power to declare SOE

Unlike the 48 hours' time limit for the CoM to obtain approval of the SOE decree, by the HPR, if the latter is in session, at the federal level, in all sub-national constitutions, the executive council may only declare a SOE decree when the state council is not in session. Therefore, in principle, SOE may only be declared by the state administrative council while exceptionally the state executive may do so if the former is not in session at the time the grounds for the declaration of SOE occurred at the regional state.

For instance Art.114 (1) of the Amhara Regional State Constitution stipulates the following:

"Whenever any natural disaster sets in, or epidemic disease endangering public health occurs,.....and ***when the regional council is not in session,*** *the council of the Regional Government shall, in accordance with the provisions vested in it under Art.58 (8) of this constitution hereof, declare state of emergency"*

Similar stipulations are in all other regional state constitutions, except the constitution of the SNNP Regional state constitution. What makes the Amara Regional Constitution unique in this regard is that, unlike the rest of the regional state constitutions, which are silent on the role of the executive council on declaration of SOE when the state council is in session, it clearly specifies under Art.58 (8) and (9) of the constitution, the role of the regional executive in the process of

[100] G. Alan Tarr, 'Laboratories of Democracy? Brandeis, Federalism, and Scientific Management', (2001), 31, OUP, 40.

[101] Ibid 42.

declaration of SOE when the regional council is in session is preparing the draft of the decree and submitting it for the regional council to be declared. There is a deviation in the SNNP Regional State Constitution, in which the state council is given only the power to approve the declared SOE as opposed to declaring the decree by itself.[102] It is not, therefore, clear whether the state executive can declare SOE when the state council is in session or not in the SNNP regional state. The other important distinction in the Amhara Regional State Constitution is that only if the regional council (term used to refer to state council) is unable to convene a session, the council of the regional government may declare and implement SOE.

3.2.2 Approval and renewal of SOE

Almost all regional constitutions follow the pattern of the federal constitution regarding renewal of the SOE decree. That means SOE decree may be extended so long as the state council of the regional states approves it, for an unlimited period of time. The very important distinction in the Afar Regional State Constitution is that the renewal of the SOE decree period may not be made for more than 3 times.[103]. The same also is stipulated under the Tigray Regional State Constitution.[104]

Regarding the level of majority vote required to approve and renew the SOE by the state councils, unlike the case of renewal, the same in all regional constitutions, the required majority for approval is not the same rather it has three dimensions. The first dimension is all about approving the SOE decree of the executive by simple majority vote, which is expressly provided in the Benshangul /Gumuz Regional State Constitution[105] but for the renewal of the SOE decree like other Constitutions two-thirds majority is required.[106] While the second is two-thirds majority votes of the state council members for approving the decree, which is applied by SNNP Regional State,[107] the third dimension, which is stipulated in the rest of states' constitutions, is being silent as to the required majority in declaring SOE which is indirectly referring to simple majority vote.

[102] The Revised SNNP Regional State Constitution (2001) Art.66 (7).

[103] The Revised Afar regional state constitution (2001) Art.106 (3).

[104] The Revised Tigray Regional State Constitution (2001) Art.103 (3).

[105] The Revised Benshangul Gumuz Regional State Constitution (2001) Art.115 (2).

[106] Ibid Art.115 (4).

[107] SNNP constitution (n 102) Art.121 (2).

3.2.3 The inquiry board

Slight difference among the states' constitutions, is also observed in the composition of members of the inquiry board of the SOE. In this case, the Afar Regional State Constitution is special for it stipulates that the SOE inquiry board is composed of 3 members[108] which is a unique composition from that of boards in the rest of regional constitutions that are composed of 7 members. Moreover, in the case of Harari regional state, the powers and functions of the board are referred to that of under the FDRE Constitution which is almost the same with that of under the rest of regional state constitutions, in deviation of the conventional way of listing the powers under the rest of states' constitutions.[109]

3.2.4 Non-derogable provisions

The most important and interesting improvement in the sub-national constitutions of Ethiopia regarding SOE is that they have a more extensive list of non-derogable provisions as compared to the federal constitution. All constitutions commonly list the following provisions as non-derogable provisions. The right to life; the right to bodily security of a person; the right to be recognized everywhere as a person; the right to equality; the right of detained/arrested persons to be visited by legal counsel, religious counsel, spouse, relatives, friends; protection against cruel, degrading and inhuman punishment or treatment; protection from slavery and forced servitude; protection from human trafficking; the right to self-determination up to secession and proportional representation in federal institutions.

Some of the states also include the nomenclature of the regional state as non-derogable provision. The Amhara, Gambela, and the new regional state, Sidaama, are those that list the nomenclature of the state among the non-derogable provisions. There are also slight differences among the states' constitutions on the scope of non-derogation of the right to self-determination. While three states namely, Amhara, Gambela and the new regional state, Sidaama, following the pattern of the federal constitution, prefer to protect the substantive rights only instead of blanket protection to the whole provision, the rest 7 states give total protection of the substantive and procedural stipulations of the right to self-determination.

[108] Afar Constitution (n 103) Art.107 (1).

[109] The Revised Harari Regional State Constitution (2005) Art.76 (5).

3.3. Constitutionality of the Tigray Regional State SOE Proclamation

As stipulated in the preamble of the previous Tigray Regional State SOE Proclamation No. 2021 to Protect the Public from Covid-19 Pandemic, the following were the main reasons for the declaration of the emergency decree. The first one is that the fact that the pandemic has been declared by the WHO as pandemic and as a global threat. Secondly, the pandemic has entered Ethiopia and that the pandemic may easily be transmitted to many areas, creating a threat to the people and state of Tigray. Thirdly, because of the absence of medication for the cure from this virus, and taking in to account the people's relations and movements are convenient for the spread of the disease, measures of prevention, are better to tackle it and the movements and relationships of the public that are convenient for the spread of the disease has to be regulated by law. Fourthly, the government's ability to protect the public from the pandemic through the existing ordinary laws is found to be very narrow.

Despite the above justifications, however, the proclamation was enacted in clear violation of many of the constitutional principles of SOE, such as the principle of necessity, proportionality, and non-derogation of certain protected rights. To start with principles of necessity and proportionality, the proclamation was enacted before the first covid-19 case was confirmed in that regional state, and even to understand from the preamble it is because the pandemic has entered in Ethiopia (Addis Ababa) that the declaration of the decree was needed. This is beyond what is necessary. The proclamation also said nothing on the situation of Tigray, whether the pandemic reached the region or not rather it raises the fact that the pandemic has reached Ethiopia as a reason to declare SOE.

Although in both the FDRE Constitution and the Tigray Regional State Constitution, eminent danger is not a qualified ground to declare SOE in Ethiopia in general and in Tigray in particular, what had been done by the government was simply rushing to declare a regional level SOE decree disregarding the constitutional requirement. Moreover the measures indicated in the decree were not proportional to preventing the state from transmission of the disease, rather it contains total ban of public transportation from town to town, which after some time allowed and amended in line with the federal SOE regulation, prohibition of any gathering (including many religious festivities which by their nature require the assembly of worshipers).

We can easily understand through the comparison of the measures stipulated in the two emergency laws that both SOE laws share similarities in many of the measures they stipulate to prevent the transmission of the epidemic. In some areas, the Tigray SOE Proclamation includes more severe measures than the federal laws.[110] Both emergency laws totally prohibit, meetings for whatever purpose (be it religious, governmental, social, political), visits to detainees in police stations and detaining centers, recreational services such as in bars and clubs, entertainments such as cinemas, theatres, games similar services that cause public gathering such as serving chat etc.. But if we see in light of freedom of movement, there was a significant difference between the two emergency laws. Inter-city transportation, any town to town and town to village travel was prohibited in the Tigray SOE decree. However, it was allowed under the federal SOE regulation up to a maximum of 50% of the capacity of the vehicle.

Therefore, the violation of the principle of proportionality was clear in the Tigray SOE Proclamation from two respects. One is that some of the measures under the Tigray SOE proclamation which are similar with that of the federal SOE law by themselves were disproportionate for they do not relate transmission of the epidemic from the outside to the state. Secondly, the severer prohibitions in the Tigray SOE proclamation as compared to the federal SOE laws, for stronger reason, are disproportionate measures. What makes them very disproportionate measures was the measures were being applied before the first covid-19 case was confirmed in Tigray, as if the epidemic had occurred in the territory. So in the opinion of the researcher, it should have been enough to employ measures relating to quarantine on persons coming from places out of Tigray and other similar measures at the boundaries of the state as opposed to total ban of transportation as well as some services throughout the territory of the state.

Moreover, save the rights that are not non-derogable in the federal as well as the state constitution, but should have been included in the list of non-derogable rights from the internationally accepted principles such as the right to fair trial including the right to appeal, the

[110] For the better understanding of the similarities and differences in the measures applied by the two laws, it is important to cumulatively read Art.5 of the Tigray SOE proclamation, Art. 3 of Regulation No.466/2020 SOE Proclamation No. 3/2020 Implementation Regulation along with Art.4 of Proclamation No. 3 /2020 SOE Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact.

SOE proclamation even violates some of the constitutionally protected rights also. Despite the fact that the right to religion is listed among the non-derogable provisions in the Tigray regional state constitution,[111] the SOE proclamation puts an obligation under Art.17 of the same that religious institutions must change their worship procedures into covid-19 friendly procedures. In the same manner regardless of the right to be visited by one's spouse, relatives, friends, counsel (both religious and legal), is non-derogable right under the Tigray state constitution,[112] Art.5 (16) of the SOE proclamation unconstitutionally suspends such right.

More importantly, had the pandemic occurred in the territory of the Tigray Regional State, the question of whose power is to declare the SOE decree in this regard as the pandemic is not only nationwide concern but it is also declared as an international threat?, has to be seen. There is no reference to the national government in the said regional level SOE proclamation. No stipulation in the proclamation shows the failure of the federal government or any other reason that makes the Tigray Regional State different from other states and/or the federal government to declare SOE separately from other states or from the federal government.

Some weeks later, the federal emergency proclamation had been declared on the whole territory disregarding the fact that the Tigray emergency proclamation was in effect at the time. Nothing had been said in the proclamation by the federal legislator too on how to go with the regional governments' SOE law in Tigray. In fact, Art.3 of the proclamation provided that the proclamation is applicable throughout the territory of the country, (including the Tigray Regional State) which impliedly denied the Tigray Regional SOE.[113] The wording of the provision appears as:

[111] Tigray Constitution (n 104) Art 27 (1). This particular provision stipulates that the right to freedom of thought, conscience and religion which includes the right to worship and profess once religion publicly both individually and collectively is among the non-derogable rights.

[112] Ibid Art.24 (1).

[113] State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No. 3/2020, Federal Negarit Gazette No.33, April 16th 2020, Art.3.

'Any federal or regional law, procedure or decision that is in contravention with this proclamation or regulations issued pursuant to this proclamation shall have no effect while this proclamation is valid.'[114]

More importantly, it is clearly stipulated in that proclamation, that 'region' for the purpose of the proclamation refers to those regions under Art.47 of the FDRE Constitution but including Addis Ababa and Dire Dawa city administrations.[115] That clearly shows that it is intentionally proclaimed to apply the decree in Tigray too.

On the other hand, the former Attorney General (Head of Justice Bureau) of the Tigray Regional State appeared in the Regional State owned TV and elaborated the inconsistency in which he said that the SOE declared latter by the federal government can only be applied in the territory of the Tigray Regional State so long as it is not inconsistent with that of previously declared by the government of the regional state.[116] This statement by the official of the regional state is in a sharp contradiction to the Tigray Regional State Constitution that stipulates supremacy of federal laws to state laws.[117]

It is easy to infer from the above discussion, the misunderstandings were the results of the political difference between the federal government, led by the new Prosperity Party (PP), the successor of the Ethiopian People's Revolutionary Front (EPRDF), and the regional government in Tigray led by the Tigray People Liberation Front (TPLF). The constitutional principle of mutual respect that requires the federal and regional governments to respect each other seems totally forgotten.[118]

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[114] Federal State of Emergency Proclamation (n 113) Art.3 (3).

[115] Ibid Art.2 (4).

[116] Tigray Mass Media Agency (TMMA) News, Friday 10 April 2020.

[117] Tigray Constitution (n 104) Art.49 (2) (a). This provision of the Tigray Regional state constitution prohibits enacting laws by the state council of the Tigray Regional State which are contrary to the federal constitution and federal laws.

[118] Art.50 (8) of the FDRE Constitution reads *"Federal and State powers are defined by this Constitution. The States shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the States."*

What can be concluded is that, firstly, from the very beginning, it is very rare to have pure concurrent SOE powers between the federal government and states in federations in the way provided in the FDRE Constitution. The FDRE Constitution, therefore, is unique in this regard in allocating SOE emergency powers to states unchecked by the federal government. Secondly, even if we tolerate such concurrency, taking into account the unique nature of the federation that promotes more self-rule of the nations nationalities and peoples of Ethiopia, not only some dispute prevention and resolution mechanisms should have also been stipulated in the constitution to avoid possible conflicts of the like between the federal government and the states but also mechanisms of check and balance between the two governments were relevant to avoid unqualified SOE laws and regulations –for instance SOE laws that violate the SOE principles like in our case. In the following chapter, thus, these mechanisms of preventing and resolving disputes and checkup mechanisms are dealt with, taking experience of different federations into account.

CHAPTER FOUR

MANAGING CONCURRENT POWERS: MECHANISMS OF REGULATING INCONSISTENCIES BETWEEN FEDERAL AND STATE SOE LAWS

4.1. Nature of concurrent powers

Although, classically, federalism was understood as a watertight division of power between the federal governments and states, it is currently common in the older as well as infant federations that some common powers are to exist and concurrency can't easily be avoided.[119] Concurrency may literally be defined as 'running together', 'going on side by side', 'conjoint', or 'acting in conjunction'.[120]

Concurrent powers may be, provided explicitly or inferred impliedly from the circumstances.[121] In the latter case the concurrency is not clearly visible but it is yet an important aspect of concurrency that exists in cases where neither the powers of states are exclusively listed nor the states are clearly prohibited from sharing the center's exclusive powers.[122] In such instances there surely will be exercise of powers by the states from the powers allocated to the center and concurrency may occur. *Explicit concurrence*, on the other hand, is the most common concurrency in which all the federal government and the regional states share powers commonly on powers that are stated as "concurrent" in the constitution.[123] Explicit concurrent powers have

[119] Assefa and Zemelak (n 67) 256.

[120] Nico Steytler, 'The Currency of Concurrent Powers in Federal Systems' in Nico Steytler (ed), *Concurrent Powers in Federal Systems Meaning, Making, Managing*, vol. 8, (Brill Nijhoff, 2017)16-17.

[121] Ibid 8-10. Outside of this dichotomy, however, there are also concurrences distinct from, but still related the explicit or implied concurrences. These are *shared (overlapping)* powers that are given to both layers of governments but in different aspects; *executive concurrency*, in cases legislative and executive power is divided between the two spheres of governments (the federal government enacts the law and states have the power to executive it); and *de facto concurrency* that occurs when the federal government unconstitutionally intrudes into the power of the regional states.

[122] Ibid 8-9.

[123] Ibid 9.

many aspects. *Complete (pure) concurrency* exists when powers are shared between the federal government and states on the same matter, same time and in a given territory. The other one, known as *'conditional concurrency'* exists when concurrent powers are commonly given to both layers of governments but subject to some requirements (e.g. national interest) on the part of the federal government to enact federal laws on the matters. There is also *complementary (framework) concurrency*, by which the federal government enacts general standards and the states are left with filling in the details of the federal law.

Concurrency has different advantages. Concurrency can be a gorgeous compromise in case the power in consideration is uncertain as to in favor of which government such power should be allocated. It is also very important to give effect to federal principles such as subsidiarity and cooperation.[124] For this reason, the current trend is toward managing concurrency rather than avoiding it in the area of division of powers. The main problem in the constitutional law of Ethiopia, regarding the powers of SOE is not allowing the states with some emergency powers nor the concurrent nature of the SOE powers. Rather it is the unregulated nature of the concurrency despite the concurrency being of pure concurrency type, which is the most susceptible to conflict as compared to other kinds of concurrent powers discussed earlier above.

The FDRE Constitution allows state authorities with a power to declare emergency laws in case of epidemic and/or natural disaster occur within their respective territory.[125] This power is not clear, however, since the federal government also has the same power. The constitution is silent as to what kinds of catastrophes or epidemics are on the legislative power of states' governments and what others for the federal government. Even it is not clear whether or not the federal government has a power to declare SOE when epidemic or natural catastrophe occurred in a single regional state only or to the contrary whether or not a single regional state may declare SOE in such cases even in inter-state (affecting more than one state) natural catastrophes or epidemics.

Although it is rare in federations to stipulate pure concurrence on emergency powers to both the federal and states, some federations empower their constituent units with limited SOE powers by ways of delegation from the federal to the regions or by allowing the latter to declare SOE decree

[124] Nico Steytler (n 120) 13.

[125] FDRE Constitution (n 17) Art.93 (1) (b).

of their own, in their respective territories, if the former is incapable of doing so, at the time the danger occurred. Art.115 of the German Basic Law, for example, allows both possibilities. Another important experience may be found in the Nigerian Constitution in that it allows a regional governor to initiate SOE decree and submit to the Assembly (both federal houses) for resolution to require the president declare SOE. The president has no power to declare SOE in a single state only, unless he is satisfied the governor of the state has failed to submit his/her initiation to the assembly and then to the president.[126] Therefore, what can be inferred from this is that, in the Nigerian Federation, governors of state can only initiate (can't declare by themselves SOE decree unilaterally) and SOE decree can only be declared by the president of the federation. The same provision stipulates that the president of the federation also has no power to declare a SOE decree in a single regional state unless the governor of the state failed to initiate the SOE decree. The two governments therefore can check and balance each other in this manner in the Nigerian federation.

With a view to prevent possible conflicts in areas concurrently given to both (federal and states) governments, it is common for federations to put constitutional processes and establish institutions of coordination between different governments.[127] Accordingly, the following mechanisms (legislative, executive and judicial mechanisms) are put in place in different federations with a view to prevent contradiction from the very beginning or to reconcile the rules and regulations in contradiction after their occurrence. Although some of these mechanisms are mostly related to concurrent powers in general, they can successfully be applied analogically to SOE concurrences.

4.2. Legislative mechanisms

4.2.1. Preconditions and parameters before legislation

These preconditions and parameters are among the mechanisms which are helpful to minimize the declaration of inconsistent SOE laws from the outset. Constitutions of federal states provide parameters that delineate which sphere of government has to legislate on what conditions and circumstances. Sometimes, when concurrent powers put in place in the constitutions, far from

[126] Constitution of the Federal Republic of Nigeria (1999) S 305.

[127] Assefa and Zemelak (n 67) 256.

simply expressing the term, conditions are stipulated up on fulfillment of which the concurrent powers may be exercised.[128] Such model is demonstrated mostly by Germany, in which powers characterized as concurrent may be eligible expressly by reference to considerations of subsidiarity, which precludes exercising of a concurrent power by the federation unless justified from the circumstances for federal legislation on the matter.[129] In Germany, therefore powers to legislate on matters of public welfare, food products, hospitals and natural resources, by the center requires special justification to do so.[130] However, with respect to some powers relating to the adequacy of supply of food, transmissible diseases and controlling air pollution etc., the conditions do not apply, for regulation by the center can be assumed in such matters.[131]

The other mechanism of preventing conflict between federal and state laws is that empowering either of governments with the power to declare SOE while at the same time empowering the other to do so if the former is found to be reluctant to declare the SOE decree despite the fulfillment of the conditions for the declaration of the SOE. This helps to prevent inconsistent SOE laws mainly due to the clear reason that if one government is reluctant there is no desire to enact such a similar law on the matter hence the other government may enact the law without any fear of contradictory law. Therefore, a clearly proven inaction on the part of the body empowered to declare SOE must be established first. The Nigerian Constitution prohibits declaration of SOE in a single regional state by the president of the federation unless the governor of the state failed to initiate the SOE decree despite the fulfillment of conditions in the constitution for the declaration of SOE.[132]

Some federations also allow states to have some involvement in emergency issues affecting their territory in the second level provided that the organ empowered to declare SOE is found to be reluctant regardless of the fulfillment of the requirements for the declaration of SOE. Good example is the Nigerian federation that allows the president to declare SOE at sub national level

[128] Dziedzic and Saunders, 'The meanings of concurrency' in Nico Steytler (ed), *Concurrent Powers in Federal Systems Meaning, Making, Managing*, vol.8, (Brill Nijhoff, 2017) 18.

[129] Ibid.

[130] Ibid

[131] Ibid.

[132] Constitution of Nigeria (n 126) s 305.

in principle while allowing the states to approach the national assembly to require the president to do so if the latter fails to undergo his constitutional responsibilities to declare SOE to protect the public. Although still it is limited to initiation of the SOE as opposed to full power to declare the SOE by them, there is participation of a concerned state in the process of declaring SOE law.

4.2.2. Veto power as means of legislative supervision

In many federations it is provided that states and the federal government have to be collaborative in their works. What matters is, in case such collaboration may be questioned, there are mechanisms by which each government reviews the decisions of the other in cases that affect its interests. Federations also share powers and check each other by allowing one sphere of government (for example say the federal government) declare the SOE, and the other (for example the concerned state(s) or the second chamber) is/are allowed to veto it. For instance the constitution of the Islamic Republic of Pakistan provides that the president of the republic has the power to declare SOE in a certain regional state if he/she is satisfied that internal disturbance that the state in question is incapable to control, has occurred or is likely to occur.[133] But if the SOE has been declared by the president on his own motion (as opposed by the request of the province in question), it has to be approved by the parliament in each of the federal houses within ten days of its declaration.[134]

It is also possible to compromise the interest of both regional and federal governments by permitting either of the governments to declare SOE and allowing the other to have veto on it if it affects its interests unduly. The constitutional regulation of SOE in ST. Christopher and Nevis shows this experience.[135] The president can declare SOE in the island of Nevis but the assembly of the regional state shall approve the decree through resolution.[136] Adem Kassie correctly challenges the absence of the power to HPR to review SOE declared by states as a constitutional gap.[137] To the contrary too, the same gap is observed in the constitution for states are not allowed to veto on SOE laws of the federal government affecting their own interests.

[133] Constitution of the Islamic Republic of Pakistan (2012) Art.232 (1).

[134] Ibid Art.232 (2).

[135] The Constitution of Saint Christopher and Nevis (1983) Art.19 (4).

[136] Ibid.

[137] Adem Kassie (n 90) 62.

4.2.3. The institutional role of second Chambers

Second chambers play an important role in avoiding conflict between federal and state laws if they have the opportunity to participate in the legislative procedure of the federal legislature representing the interest of regional states. In Germany for instance participation of regional states (landers' governments) in the federal legislative process through the second chamber (Bundesrat) is believed to reduce the possibility of inconsistency in concurrent powers.[138] In our case, it is to mean the HOF shall represent states if the decision is such that to affect the interests of certain states. The HOF, as second chambers in many other federations, is assumed to be the representatives of states or more acutely, as in the case of Ethiopia, representative of nations, nationalities and peoples of Ethiopia. The fact that the members of the HOF are to be elected by the people through elections to be facilitated by the state councils of regional states or simply appointed by the same,[139] seems to assert that the house is intended to serve as an institution to represent states in the federal shared rule. Unlike second chambers in other federations, however, the HOF has no clear legislative power in the areas the federal government has the power to legislate.[140] Like in other legislative matters, the house is neglected from emergency powers too.

Shimeles Ashagre, argued in this regard, learning from the preamble, Art.8 and throughout the FDRE Constitution, that sovereignty is vested in the nations, nationalities, and peoples, and the constitution is founded on the consent of them, the absence of any power for the HOF in the constitution on the issue relating to situations that endanger the existence of the state is just out of the spirit of the constitution.[141] His argument is not about the allocation of some emergency powers to the HOF rather, on the other extreme, all emergency powers should be reserved to the HOF which is composed of the true holders of power -the nations, nationalities, and peoples of Ethiopia.

He further argued that a deep and careful scrutiny of the preamble along with the operative provisions of the FDRE Constitution implies that it should have been the HOF, rather than the

[138] Dziedzic and Saunders (n 128) 20-21.

[139] FDRE Constitution (n 17) Art.61 (3).

[140] Yehenew Tsegaye (n 10) 102.

[141] Shimeles Ashagre (n 91) 271.

HPR, that should be authorized to approve the proclamation of SOE.[142] For him, since the HPR is composed of representatives of individuals and not the representative of the nations, nationalities and peoples of Ethiopia, as a group, the former is illegitimate to exercise the highest authority in general and emergency powers in particular. Therefore, the COM instead of submitting the required SOE to HPR, for approval, it shall do so to the HOF.[143]

In fact that argument seems to go on the other extreme that totally avoids the lower house, HPR, from having any role on the SOE powers which is totally against the interest of the federal government and even far from the federal principle of integrating self-rule and shared rule. But what can be argued is that the HOF should not totally be excluded from decision making on SOE for one thing, as it is a guarantor of the constitution, it has to have its own say on emergency powers, which is important power at a crucial time to the constitutional order and for another thing, to avoid conflicts between federal and state SOE laws by raising in advance the concern of each state in the federal legislative process.

Hence, due to the above two reasons, there should have been and it should be devised for the future, a mechanism in which the HOF can participate in enacting SOE laws by the federal government. That can particularly be possible in two ways. The *first* may be by empowering the HOF with veto power after the lower house (HPR) passed the emergency decree but before applying it. This is what is applied in many federations. For instance in the Nigerian federation, a SOE that affects the whole federation or any part thereof, by the president should get not only two-thirds majority of all members of the lower house but also the same majority of all members of the upper house so that it will be approved.[144] Similarly the Constitution of St. Christopher and Nevis also has same articulation in that the decree has to obtain not only the support of two-thirds of all members of the lower house (house of representatives), but also the same vote is needed in the upper house (house of senators), so that to be approved.[145] The *second* way through which the HOF can participate in the legislative process is by way of having joint sessions. There are provisions in the FDRE Constitution that provide for such kinds of legislative

[142] Shimeles Ashagre (n 91) 281.

[143] Ibid 282.

[144] Constitution of Nigeria (n 126) s 305 (60 (b).

[145] Constitution of St. Christopher and Nevis (1983) Art.19 (8).

processes in other areas not related to SOE that can be applied by analogy to SOE powers also. For instance, in relation to tax powers that are not yet determined, the FDRE Constitution stipulates that the HPR and the HOF shall decide in a joint session of both houses for which of the governments (to the federal or the states) shall the power to levy tax on the matter to be assigned.[146] Similarly, in the amendment procedure of the same constitution, a joint session of the HPR and HOF is required to decide on amendment proposals of the constitution in relation to any part of the constitution other than the amendment clause itself and the bill of rights part of the constitution.[147] Such kinds of arrangements are necessary in the emergency clause to avoid conflicts between the federal and state SOE laws that could exist because of the pure concurrency.

4.3. Executive mechanism

The most common way of preventing (at least reducing) conflicts in concurrent powers in general and concurrent SOE powers in particular, by the executive branch of government is through legislative inter-governmental relations (IGR). This is taken as an executive mechanism by the researcher not only because IGR is purely an executive role in parliamentary systems, but also the functions of these kinds of IGR forums in other federations are mainly facilitated by the executive branch. These intergovernmental legislative forums are said to be very important institutions in federations where the second chamber has limited or no role in legislative matters in the federal law making process.[148] These kinds of forums are particularly important for they serve as means of communication, interactions and consultation between the two governments in areas of concurrent powers that prevent possible enactment of conflicting laws had such forums not existed.[149]

As experiences of other federations show, legislative intergovernmental forums function in different ways. Among the approaches applied in federations, there is a system that the executive branches of both layers come together and draft a law to be submitted to their respective legislative bodies known as mirror legislation; both spheres of government may also come in to

[146] FDRE Constitution (n 17) Art.98.

[147] Ibid Art.105 (2) (a).

[148] Assefa and Zemelak (n 67) 257.

[149] Ibid.

agreement to approve a policy instead of negotiating on a draft bill; or they may also agree on jurisdictional limits of each government and act in accordance with the agreed limits of jurisdiction when each government wants to legislate on the area.[150]

Assefa and Zemelak, accepting that there is a meeting of speakers of state councils and the speaker of the federal parliament meet once a year, argue that there is no such kind of institutional set up that coordinates the federal and state legislators in Ethiopia.[151] They are not satisfied with that kind of institution mainly due to the fact that the role of the conference as an institution is not clear so as to consider it as a legislative intergovernmental relation forum.[152]

From the above premise, the researcher believes, the problem that existed in Ethiopia in relation to the previous SOE in Tigray Regional State could have been easily solved through intergovernmental relations. But the absence of strong legislative IGR in Ethiopia along with the Political tensions between the parties leading the two governments (the PP of the federal government and TPLF of the Tigray Regional State), contributed to the legal uncertainty and discriminated measures for the same objective.

4.4. Supremacy clause

In implicit and pure explicit concurrent powers, inconsistencies between the federal and state legislations are solved through supremacy clauses.[153] This comes if the above discussed mechanisms failed to prevent the conflict between the laws of the two governments. In cases of conflict between federal laws and state laws which is very probable in areas of concurrent powers (especially in implicit and pure explicit concurrent powers) due to the clear power overlap between the two governments, it is assumed and even some times stipulated in the constitution that the federal law shall prevail to state law, regardless of the time of enactment of the laws.[154]

Art.6 paragraph 2 of the US Constitution reads;

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

[150] Assefa and Zemelak (n 67) 257.

[151] Ibid 258.

[152] Ibid.

[153] Nico Steytler, (n 120) 9.

[154] Assefa and Zemelak (n 67) 258.

the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

What can be derived from the above constitutional provision is that federal laws enacted in accordance with the federal constitution are superior in hierarchy to, not only state laws but also state constitutions in the US constitutional law. Assefa and Zemelak, are in the opinion that the mere existence of concurrent power does not entail that the federal and state laws stand on equal foot, rather it has to be understood that so long as the federal law covers some area, state laws shall have to withdraw from engaging in such area and if they do so, the state law shall be ineffective to the existence of its inconsistency with the new federal law.[155]

Although preference to federal law is the most common way in federations in case of contradiction, that is not always the case. In the case of South Africa, for instance, in line with the principle of subsidiarity that triggers to empower the body which is closer to the public, there are instances where state laws may prevail over federal law unless the matter is related to national security, economic unity or similar area that needs uniformity throughout the nation.[156] Similarly, in the constitution of Canada supremacy of state laws over federal laws is established in age pensions.[157]

Assefa and Zemelak also seem to prefer, in the Ethiopian case, for case by case determination as a better way to simply favor federal laws over state laws.[158] This is because due to the silence of the constitution in this regard and the presence of two opposite views (one supporting federal law supremacy while the other state law supremacy as the constitution is the pact of nations nationalities and peoples of Ethiopia) in the matter.[159]

Although the FDRE Constitution is silent with respect to supremacy clause, all states' constitutions stipulate the concept of federal law preeminence.[160] Despite the supremacy clause in the Tigray Regional State Constitution, MR. Amanuel Assefa, the then head of the Justice Bureau of Tigray Regional State, in apparent contradiction to the state constitution, said that the

[155] Assefa and Zemelak (n 67) 258.

[156] Dziedzic and Saunders (n 128) 22-23.

[157] Ibid 23.

[158] Assefa and Zemelak (n 67) 259.

[159] Ibid.

[160] Tigray Constitution (n 104) Art.49 (2) (a).

federal SOE laws are applicable in Tigray so long as they are not inconsistent with the previously decreed emergency decree of the Tigray regional state.[161] That was simply unconstitutional.

4.5. Judicial mechanism

With respect to judicial mechanisms of reconciling inconsistencies between federal and state laws, it is referring to judicial review of legislations by the court, be it ordinary courts, constitutional courts or any other body entrusted with the task of reviewing constitutionality of legislations. There are varieties of institutions in different federations which are empowered with the power of constitutional interpretation in general and review of constitutionality of laws in particular. In some federations ordinary courts are empowered with that task while in some others there are separate courts solely assigned with the power of constitutional interpretation known as constitutional courts.[162] What is unique is the experience of Ethiopia by which the second chamber is entrusted with the power of constitutional review including review of constitutionality of legislations.[163]

Unless inconsistencies between federal and state laws are solved through mechanisms in the above sections, such a problem may need to be solved through constitutional review. It is the power of the HOF to invalidate the law which in the eye of the constitution found to be invalid. However this institution is circumscribed by many problems related to competency. There are controversies between constitutional and federalism scholars as to the appropriateness of the HOF as interpreter of the constitution. For the drafters of the FDRE Constitution, what the justification of establishing the institution instead of entrusting the power to the courts is that it is firstly related with the believe that the judiciary is undemocratic and allowing the unelected and virtually unaccountable institution shouldn't be allowed to strike the laws enacted by the elected.[164] Some scholars, such as Andrias Eshetie, also support the position taken by the FDRE Constitution in empowering the HOF to interpret the constitution and solve constitutional

[161] (TMMA) (n 116).

[162] Yonatan Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', (2006), 14, African Journal of International & Comparative Law, 55-56.

[163] Getahun Kassa, 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System', (2007), 20, Afrika Focus, 280-81.

[164] Yonatan Tesfaye (n 162) 69.

disputes, mainly due to the fact that the house is composed of the representatives of nations nationalities and peoples of Ethiopia, the holder of the sovereign power as per the constitution.[165] Others argue against the position of the constitution mainly due to matters relating to separation of powers, independence/impartiality, and competency. For instance, Yonatan argues that not only the HOF is incompetent institutionally due to issues of independence and impartiality but also it does not meet the counter majoritarian objective for which it was designed to serve mainly due to the members of the HOF are not elected by the people and there is no difference between the judges and the members of the HOF because of the fact that both of them are elected by the HPR and state councils respectively and not directly by the people.[166] This implies that the legitimacy justification provided by supporters of the position of the constitution in empowering the HOF to interpret the constitution and review (un)constitutionality of legislations is somehow unfounded. What is more is, unlike the constitutional court of South Africa which has the power to decide on the validity of legislations before their promulgation, the HOF of Ethiopia has no such preliminary powers of reviewing laws in general and SOE laws in particular before their promulgation. Having the above problems in the judicial review in Ethiopia, and taking in to account that SOE laws have devastating effects with in a shorter period of time, the researcher believes that it is important to focus on the reforms to the judicial review of the Ethiopian constitutional system, in addition to the previously discussed mechanisms that prevent the occurrence of inconsistencies in SOE laws from the outset.

[165] Yonatan Tesfaye (n 162) 70.

[166] Ibid 72-73.

CHAPTER FIVE

CONCLUSION

Many theories have been developed to characterize the SOE, two of which are the prominent ones; the *sovereignty model* and the *rule of law model*. The proponents of the *sovereignty model* argue for an unregulated SOE and believe that since each emergency differs in its nature from the other, emergency measures could not be anticipated in advance. As a result, it is the sovereign who shall determine the extent of the emergency measures to be applied to avert the extraordinary danger to the state, disregarding any constitutional and legal obstacles. On the other hand, those on the side of the *rule of law model* argue that, SOE too shall be regulated by law taking into account examples of abuses of SOEs applied to suppress political opponents and/or violate human rights unduly, in history.

Considering that both models had their own contribution to the development of SOE, currently, the rule of law model is more acceptable than the sovereignty model. This is manifested in the regulation of SOE in international human rights law at least with respect to protection of human rights and in many constitutions for many other reasons. Thus, international hard and soft laws as well as national constitutions stipulate some conditions for the declaration and application of SOEs. These include the requirements of, strict necessity, proportionality, non-discrimination, declaration as well as notification, non-derogation of some fundamental rights/provisions, and observation of international obligations.

For federations, there is an additional issue of division of powers of emergency nature. Although it is common for federations to stipulate a clause that regulates SOE emergency in their constitutions, there are some, like the US, that do not provide any space for the regulation of SOE in their constitution. The main problem in the Ethiopian constitutional law, however, is not stipulating concurrent SOE powers though that in itself is rare in federations. What makes it more problematic is there are no mechanisms to solve the possible inconsistencies between the federal and state laws that will probably occur due to the overlap of the powers between the two governments in (pure) concurrent powers in general and (pure) SOE concurrent powers in particular.

This has been once observed in the first regional SOE decree of Ethiopia, which has been declared last year in Tigray, in relation to the covid-19 epidemic. Although the proclamation has been declared in violation of the principles of division of powers of federations as well as some of the main principles of SOE such as the principle of strict necessity, proportionality and non-derogation of certain fundamental rights, nothing has been done by the federal government to check the constitutionality of the SOE proclamation. This was mainly due to the silence of the constitution on the matter.

Even though, the said SOE proclamation is obsolete at this time, with the aim to bring some solutions to such kind of problems in the future, this paper tries to collect legislative, executive and judiciary mechanisms of dealing with concurrent powers in addition to constitutional arrangement of supremacy clause in the experiences of federations in case of concurrence of powers, on how to prevent inconsistencies from the very beginning or deal with inconsistencies after their occurrence. These mechanisms also play a greater role in avoiding unlawful SOE laws and regulations for they, by their nature, promote check and balance between the two tiers of governments.

To prevent inconsistencies, many federations establish legislative intergovernmental relations (IGR) by which the executive branch of the governments agree on policy areas, issue guidelines, and prepare together drafts to be submitted to their own legislatures. There are also other methods, related to the process of legislation to prevent inconsistency. One way is empowering with veto power, before approval of the decree, of the other sphere of government which did not participate in the declaration of the SOE. Some federations also prefer the participation of regional states in the legislative process of SOE at national level through the second chambers. More importantly, federations like South Africa and Germany provide important parameters and conditions on fulfillment of which each sphere of government may legislate on what matters. In cases inconsistencies happen, despite the above methods of prevention, supremacy clause and judicial review are the most common ways in federations to solve the inconsistency.

In the experience of Ethiopia, the above mechanisms are not applied or are applied in unclear and incomplete manner at least when we consider concurrency in SOE. The FDRE Constitution is very weak in protecting non-derogable fundamental rights with lower protection than the regional states constitutions, let alone full adherence to the international requirements on the

matter. The constitution, when stipulating pure concurrent SOE powers, also failed to articulate parameters that delineate the powers of the two governments, and put conditions up on fulfillment of which each government can legislate SOE laws and regulations. No checking mechanisms are also stipulated in the constitution so that each tier of government may review SOE laws of the other, before its implementation. Furthermore, the legislative IGR in Ethiopia is not as effective as in other federations and its roles as legislative IGR are unclear. The silence of the constitution as to the supremacy clause is also another problem. The last but not the least concern is that the judicial review of the Ethiopian constitutional system, as entrusted to the HOF, also is not effective for problems of institutional competence, independence and impartiality of the HOF. This paper, thus, calls for the adjustment of the emergency clause of the FDRE Constitution in line with the above experiences of other federations.

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