

DISTINGUISHING LIMITATION ON CONSTITUTIONAL RIGHTS FROM THEIR SUSPENSION: A COMMENT ON THE *CUD* CASE

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Abstract

*Suspension of and limitation on fundamental rights and freedoms are justified violations of constitutional rights. Temporary suspension of some fundamental rights and freedoms can be made on the ground of a state of emergency. Since most constitutional rights are not absolute, they can be limited on basis of national security, public safety, public moral, public order, public health, and similar grounds. Although both suspension and limitation should comply with the requirements of necessity and proportionality, they are completely different in their conception and application. However, the Council of Constitutional Inquiry failed to distinguish suspension of constitutional rights from their limitation in *CUD v Prime Minister Meles Zenawi Asres*. The Council mistakenly held that declaration of the Prime Minister constituted limitation on right of assembly, demonstration and petition. Given its nature and the short period for which it lasted, the declaration should have appropriately held to constitute suspension of those rights.*

Keywords: *derogation, fundamental rights and freedoms, limitation, state of emergency*

I. Introduction

As justified violations of human rights, limitation and suspension have common features. Yet, limitation is different from suspension. Limitation can be imposed in normal situation for indefinite period while suspension is justified only in an emergency situation as temporary measures. The Council of Constitutional Inquiry (the Council) dealt with limitation in *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*

(*CUD* Case).¹ The Case was decided in the aftermath of 2005 Election on constitutionality of a Prime Minister's decree banning right of assembly, demonstration and petition on the morrow of the 2005 National Election. A brief decision of the Council that it does not involve constitutional interpretation did not distinguish between limitation and suspension.

The *CUD* Case has attracted attention of many human rights and constitutional law scholars.² The scholarly comments thus far made on the *CUD* Case focus on the decision of the Court in referring the Case to the Council and error of the latter in assuming jurisdiction over the Case. The content of the Council's holding did not succeed in attracting enough criticism. This comment is a modest attempt to contribute to the arguments by examining the content of the Council's decision. It argues that the Council went completely astray and mixed derogation from fundamental rights and freedoms with their limitations. The comment begins with summary of the Case in Part I with emphasis on ruling of the Council. Part II provides discussion to distinguish limitation on fundamental rights from their suspension. Part III analyses the decision of the Council against the

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1. *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005) (26 *Ginbot* 1997 E.C.)

2. Sisay Alemahu Yeshanew, *The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia*, 8 *AFRICAN HUM. RTS. L.J.* 273, 279-281 (2008); Sisay Alemahu, *The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia*, *J. ETH. L.* 135, 144 (2008); Takele Soboka Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, 19 *AFRICAN J. OF INT. AND COM. L.* 99, 100 (2011) and Getachew Assefa, *All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, *J. ETH. L.* 139, 155(2008). According to Sisay the Court erred in failing to refer the case to the Council of Constitutional Inquiry (the Council) without considering the provisions of Proclamation No. 3/1991 and without first deciding on whether there was lack of clarity of the Constitution; and the Council failed to decide on "whether there was 'constitutional dispute' giving rise to its jurisdiction." According to Takele, the Court not only failed to specify a provision that needed interpretation but also failed to frame question of law while the Council went beyond its power to apply the Constitution to factual situation. Getachew upheld the Court's referral to the Council as "it was acceptably prudent for the court to make this case a case for constitutional interpretation and get out of the flames." He is of the opinion that courts should avoid political confrontation with the executive. He also indicates that the case involved issues of constitutional interpretation.

discussion in the second part. Finally, this comment closes with concluding remarks.

II. Summary of the Case

At the end of 2005 national election, the Prime Minister of the Federal Democratic Republic of Ethiopia, Mr. Meles Zenawi Asres, issued a decree³ that freedom of assembly including public demonstration was banned in Addis Ababa and its vicinity. Following the ban on demonstration and assembly, the Coalition for Unity and Democracy (CUD), a political party, sued the Prime Minister in the Federal First Instance Court, Lideta Division.

In its claim, the CUD stated that the decree was null and void as per Article 9(1) of the Constitution since banning freedom of assembly and demonstration violated the rights of its members guaranteed under Article 30 of the Constitution.⁴ It quoted the first sentence of Article 30(1) which provides that “[e]veryone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition.” It also based

3. The Prime Minister’s declarations were published in *Addis Zemen*, a government owned newspaper published in Amharic. See *ADDIS ZEMEN*, 64th year No. 248, May 2005 (8 *Ginbot* 1997 E.C.), at 1 & 6. The plaintiff presented *Addis Zemen* as its evidence to prove the issuance of the Prime Minister’s declarations. The Newspaper did not use a literal Amharic translation of the term “decree.” The plaintiff and the Council of Constitutional Inquiry used *memmerya* (which means “directive” in Amharic). Since the term “directive” signifies a subsidiary legislation, which provides more detailed rules for the implementation of a regulation and its parent Proclamation, it is not used in this piece to avoid confusion. Besides, the declarations of the Prime Minister were closer to an emergency decree than a subsidiary legislation.

4. FDRE CONSTITUTION, Proclamation No 1/1995, FED. NEGARIT GAZETTE, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 9(1) provides that: The Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

Art. 30 provides that:

1. Everyone has the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition. Appropriate regulations may be made in the interest of public convenience relating to the location of open-air meetings and the route of movement of demonstrators or, for the protection of democratic rights, public morality and peace during such a meeting or demonstration.

2. This right does not exempt from liability under laws enacted to protect the well-being of the youth or the honour and reputation of individuals, and laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity.

its claim on Article 3(1) and Article 11 of Proclamation No. 3/1991 (the Proclamation to Provide for Peaceful Demonstration and Public Political Meetings).⁵ In its prayers, the plaintiff requested the Court to give an order lifting the ban on demonstration and assembly on two grounds. First, the plaintiff alleged that the Prime Minister had no right and power to make such decree; and secondly, there were no circumstances requiring the issuance of such decree.

The judge, Woldemichael Meshesha, believed that the case involved constitutional interpretation and referred the case to the Council of Constitutional Inquiry. He did not refer to any provisions relied upon by the plaintiff. His referral order did not show how the case involved issues of constitutional interpretation. He did not frame issue requiring constitutional interpretation either.

On 14 June 2005, the Council of Constitutional Inquiry handed down its decision that the case did not involve constitutional interpretation. To reach its decision the Council framed two issues: a) whether the decree issued by the Prime Minister violated the Constitution, and b) whether there were sufficient conditions to issue the decree. In dealing with the first issue, the Council considered the content of Article 30(1) of the Constitution and held that the provision contains limitation on the exercise of the right. It particularly referred to the limitation clause of the provision. It also relied on the preamble of Proclamation No 3/1991 and held that “the concerned executive organ can decide on place, direction, and time of public assembly and demonstration on the basis of the Proclamation.”

The Council considered the power of the Prime Minister to issue the said decree. It relied on Articles 49, 72(1) and 74(13) of the Constitution. The Council did not find the Prime Minister’s decree prohibiting demonstration in Addis Ababa for one month as a violation of the Constitution for two reasons. The first reason was that the Prime Minister is the highest executive organ vested with wide power. The other reason was that Addis Ababa city is accountable to the federal government under Article 49 of the Constitution and Article 61 of Addis Ababa City Charter.

5. *The Proclamation to Provide for Peaceful Demonstration and Public Political Meetings*, Proclamation No. 3/1991, FED. NEGARIT GAZZETA 50th Year No. 4, Addis Ababa, 12 August 1991.

Regarding the second issue, the Council held that whether there were sufficient conditions for prohibiting demonstration should be decided by the organ vested with such power in the Constitution. Anyone alleging absence of such condition had a burden of proving it. The Council did not decide on whether the plaintiff had provided sufficient evidence to prove the absence of conditions necessitating prohibition of demonstration in Addis Ababa since such issue is an issue of fact rather than an issue of constitutional interpretation. Finally, the Council rejected the case holding that it did not require constitutional interpretation.

III. DISTINGUISHING LIMITATION FROM DEROGATION

A. *Limitation*

Most fundamental rights and freedoms are not absolute. They are limited or restricted by the same provisions that guarantee them or by a general provision that applies to all rights in a particular constitution. Limitation refers to justifiable infringement of fundamental rights and freedoms.⁶ Limitations or restrictions are exception to the general rule that fundamental rights and freedoms should be protected.⁷ Unlike derogation from rights during public emergencies, limitations “may remain in force indefinitely.”⁸ Limitation, as the term implies, does not mean a total deprivation of rights whether that deprivation is temporary or permanent.

A provision in national constitutions or international human rights instruments that provides for limitation is a limitation clause (or claw-back clause). A general limitation clause is contained in a separate provision (section or article) and applies to all rights in a constitution or in a particular instrument. A provision that guarantees rights may also contain a specific limitation clause that applies to that specific provision only. A

6. *See generally* IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK*, at 165 (2005).

7. NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE*, at 184 (2002).

8. *Id.* at 182.

constitution may contain specific limitation clauses together with a general limitation clause or it may contain specific limitation clauses alone.⁹

Limitations, whether they are enacted in pursuance of a general or specific limitation clause, should comply with certain requirements. A mere existence of a limitation clause does not justify limitation on human rights. The African Commission on Human and Peoples' Rights (African Commission) laid down some of the requirements when it held that "[t]he reasons for possible limitations must be founded in a *legitimate state interest* and the evils of limitations of rights must be strictly *proportionate* with and absolutely *necessary* for the advantages which are to be obtained."¹⁰

First, limitations should be "*prescribed by law*." International human rights instruments and national constitutions usually require promulgation of certain law to place limitations on human rights.¹¹ The limitations must be "provided for by national law of general application."¹² Such laws should not be "arbitrary or unreasonable."¹³ They should also be "clear and accessible to everyone."¹⁴

Second, the purpose of limitations must be the protection of *legitimate state interest*. Protection of national security, public safety, economic well-

9. See, e.g., CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996) which contains a general limitation clause under §36 and specific limitation clauses under other provisions; CONSTITUTION OF UGANDA (1995), Art. 43(1). Some international human rights instruments also contain general limitation clauses. See, e.g., *Universal Declaration of Human Rights*, Art. 29; *International Covenant on Economic, Social and Cultural Rights*, adopted in New York on 16 December 1966 and entered into force on 3 January 1976 (here after ICESCR), Art. 4; *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982) (here after *African Charter*), Art. 27(2).

10. *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 69. Italics added.

11. See, e.g., *International Covenant on Civil and Political Rights* (ICCPR), adopted on 16 December 1966, N.Y., USA, GA res. 2200A (XXI) 999 UNTS 171 (here after ICCPR), Arts. 12(2), 18(3), 19(3) & Art. 21; FDRE CONSTITUTION, Arts. 26(3), 27(5) & Art. 29(6).

12. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, para 15, available at: <http://www.unhcr.org/refworld/docid/4672bc122.html> [accessed 2 July, 2012].

13. *Id.* para 16.

14. *Id.* para 17.

being of a country, public health, public moral, and rights and freedoms of others, and prevention of crime and disorder are some examples of legitimate state interest. International human rights instruments and domestic constitutions contain these factors in their limitation clauses.¹⁵

Third, the limitation must be *necessary* to protect legitimate state interest. Necessity implies “the existence of a ‘pressing social need’, or a ‘high degree of justification’, for the interference in questions.”¹⁶ Laws restricting rights are necessary only when there is no other alternative that preserve legitimate state interest without interfering in the enjoyment of fundamental rights and freedoms. Where all available alternatives interfere with the enjoyment of the right in question, a state must choose an alternative that less restricts such rights. “If a compelling governmental objective can be achieved in a number of ways, that which least restricts the right protected must be selected.”¹⁷ Limitation clauses in international human rights instrument and domestic clause clearly require that the limitations must be necessary in a democratic society.¹⁸

Finally, limitations must be *proportionate* with the purpose to be achieved.¹⁹ Proportionality requires “that a balance be struck between the requirements of the interests sought to be protected and the essential elements of the recognized right.”²⁰ Thus, states should balance protection of legitimate state interest with protection of individuals’ rights. A limitation that imposes more restriction than necessary to protect legitimate state interest fails to fulfil the requirement of proportionality.

1. *Limitation under the Constitution*

The Constitution does not contain a general limitation clause that applies to all fundamental rights and freedoms guaranteed in Chapter

15. See, e.g., ICCPR, Arts. 12(3), 14(1), 18(3), 19(3)(b), 21 & 22(2); FDRE CONSTITUTION Arts. 20(1), 26(3), 27(5) & 30.

16. JAYAWICKRAMA, *supra* note 7, at 186-187; and *Handyside v. United Kingdom*, European Court, (1976) 1 EHRR 737.

17. *Id.*, at 187.

18. See, e.g., ICCPR, Arts. 12(3), 18(3), 19(3), 21 & 22(2); FDRE CONSTITUTION, Art. 27(5).

19. Syracuse Principles, *supra* note 12, para 10(d).

20. JAYAWICKRAMAY, *supra* note 7, 189.

Three. Depending on their scope of definition and limitation, fundamental rights and freedoms in the Constitution may fall under three categories. The first category contains rights that are not restrictively defined. It also does not contain specific limitation clause. The rights in this category may be regarded as absolute rights. As such, they cannot be limited through any law. Examples include right to be protected against cruel, inhuman or degrading treatment or punishment, and prohibition of slavery.²¹

However, the absence of limitation clause in a provision of the Constitution that defines the content of a particular right or absence of phrases that restrictively defines content of that right does not elevate that right to the rank of absolute rights. For example, Article 32 (freedom of movement) does not restrictively define the right. It does not contain limitation clause either. An interpretation of Article 32 in line with Article 12 of the International Convention on Civil and Political Rights (ICCPR) suggests that freedom of movement can be restricted because the latter provides for restrictions “to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.” Otherwise, some prohibition under the Criminal Code such as prohibition from resorting to certain place, prohibition to settle down or reside in a place, obligation to reside in specified place or area, or withdrawal of official papers such as Identification cards and passports that can be imposed on a convicted person would directly violate Article 32 of the Constitution.²²

The second category of rights is restrictively defined. For example, Article 17(2) provides that “[n]o person may be subject to arbitrary arrest.” The provision does not prohibit an *arrest*. Rather, it prohibits an *arbitrary* arrest. If an arrest is arbitrary, it is “incompatible with the principles of justice or with the dignity of the human person.”²³ Thus, lawful arrest (e.g., arresting a person according to an arrest warrant or while committing a crime) is not an arbitrary arrest and it does not violate right to liberty. A

21. FDRE CONSTITUTION, Art. 18(1) & 18(2).

22. THE CRIMINAL CODE OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Proclamation No. 414/2004, FED. NEGARIT GAZZETE, Year No, 9 May 2005 (hereafter CRIMINAL CODE), Arts. 145-149.

23. JAYAWICKRAMA, *supra* note 7, at 376.

law that permits arrest and lays down its procedure in detail would not contravene Article 17.

The third category contains specific limitation clause which empowers the legislature to promulgate laws limiting rights guaranteed in the Constitution. The right to privacy under Article 26 of the Constitution is clear example of rights under this category.²⁴ Article 26(3), like similar other provisions, requires enactment of a specific law before limiting right to privacy. The purpose of such law must be legitimate state interest such as “safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others.”²⁵

2. Limitation on the Right of Assembly, Demonstration and Petition

The right of assembly, demonstration and petition guaranteed under Article 30 also falls under the third category. It permits making of “appropriate regulations.” As discussed above, limitations can only be made through laws,²⁶ which should be reasonable, clear and accessible. Ethiopian laws may fulfil the requirements of reasonability and clarity, but they are not accessible in general. Proclamations and Regulations are published in the Federal Negarit Gazeta, which is available only in Addis Ababa. Are they made for people in Addis Ababa only? Accessibility of regional laws is the worst. One cannot buy even regional constitutions, let alone other ordinary laws. Therefore, it seems that Ethiopian legislatures make laws for themselves, not for the citizens.

Although the Constitution does not clearly specify an organ concerned with the regulation of the right under Article 30, it is an inherent power of the legislature to regulate certain matters through promulgation of

24. Compare Arts. 15, 27(5), 29(6), 30 and similar provisions of the FDRE CONSTITUTION.

25. FDRE CONSTITUTION, Art. 26(3).

26. The term “law” has been defined to include proclamations, regulations, directives and international agreements. See Art. 2(2) of *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities* Proclamation No. 251/2001, FED. NEGARIT GAZZETE, 7th Year No 41.; see also Art. 2(5) of *Council of Constitutional Inquiry* Proclamation No. 250/2001, FED. NEGARIT GAZETA OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 7th Year, No. 40, 6 July 2001 (here after *Council of Constitutional Inquiry Proc.*).

proclamations.²⁷ The legislature may delegate some of its power to the executive which may make subsidiary laws. These subsidiary laws could be regulations issued by the Council of Ministers.²⁸ It may also be directives issued by individual ministries or other organs to implement regulations.

Article 30 does not allow all kinds of “regulations” to limit its application. It requires the “regulations” to be “appropriate.” Obviously, regulations should be issued by organs that have power whether that power is inherent or delegated. Regulations made by organs that do not have such power are not appropriate. As a legislature, the House of Peoples Representatives can regulate constitutional rights through laws. Other state organs should have authorisation from the House to make subsidiary laws for the regulations of constitutional rights. Laws made to take away the right of assembly, demonstration and petition in its totality even for the shortest period is not a limitation imposed through regulations.²⁹ Rather, it is a suspension or abrogation of the right. It is a suspension if taking away of the right is temporary and abrogation if it is permanent.

Even when the regulations do not extinguish the right of assembly, demonstration and petition, they would not be “appropriate” unless they address one of the aims enumerated under Article 30(1). The first aim of the regulations is ensuring public convenience by providing for “the location of open-air meetings and the route of movement of demonstrators.” If, for example, participants assemble on a very busy road, it would be inconvenient for the public to make proper use of the road. Thus, the regulations may prohibit assembly or demonstration on such road. However, the regulations should not impose blanket prohibition on access to “public streets and parks.”³⁰ When regulations are made to

27. FDRE CONSTITUTION, Art. 55(1).

28. FDRE CONSTITUTION, Art. 77(13). Enacting regulations is not an exclusive power of the Council of Minister. For example, the National Electoral Board is empowered to make regulations and directives under Art. 110 of the *Amended Electoral Law of Ethiopia* Proclamation No. 532/2007, FED. NEGARIT GAZETA, 13th Year No. 54; similarly, the House of Federation is also empowered to make regulations under Art. 58 of *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities* Proclamation No. 251/2001, FED. NEGARIT GAZETA, 7th Year No. 41.

29. See JAYAWICKRAMA, *supra* note 7, at 184-185. “The power to impose restrictions on fundamental rights is essentially a power to ‘regulate’ the exercise of these rights, not extinguish them.”

30. CURRIE & DE WAAL, *supra* note 6, at 414.

prohibit open-air meetings or demonstration in certain places, they should leave alternative places for meeting or demonstration.

The second aim of the regulations should be “the protection of democratic rights.” Unlike other provisions of the Constitution, Article 31(1) does not refer to protection of rights and freedoms of others in general.³¹ The Constitution guarantees democratic rights under Part Two of Chapter Three (from Articles 29 to 44). If regulations are made to restrict right of assembly, demonstration and petition to protect, for example, freedom of expression (which falls under democratic rights), *a priori*, such regulations should also be made to protect right to life (which does not fall under democratic rights). Thus, understanding Article 30(1) as permitting regulations restricting rights of assembly, demonstration and petition to protect rights and freedoms of others is more logical and in line with international human rights instruments.

The third aim of the regulations should be the protection of public morality which refers to “the ideals or general moral beliefs of a society.”³² The concept of “public morality varies over time and from one culture to another.”³³ Public morality can be invoked when it is essential to maintain “respect for fundamental values of the community.”³⁴ As multi-ethnic nation, there are no common moral standards in Ethiopia. What may be considered as appropriate in the Southern Ethiopia may be considered morally shocking in the Northern Ethiopia. Thus, regulations restricting right of assembly, demonstration and petition should take into consideration part of the country to which they apply. For example, nude demonstration may be prohibited on the ground of protecting public morality in part of the country where nudity is immoral.

The fourth and last aim of the regulations should be the protection of public peace.³⁵ Regulations made for the purpose of avoiding violence and public disturbance may restrict right of assembly, demonstration and petition. Such regulations may prohibit “riotous or disorderly assembly.”³⁶

31. *Compare*, FDRE CONSTITUTION, Art. 26(3) & 27(5). *See also* ICCPR, Art. 21.

32. BLACK'S LAW DICTIONARY 1025 (7th ed. 1999).

33. Syracuse Principles, *supra* note 12, para 27.

34. *Id.*

35. ICCPR uses “public order” instead of “public peace.”

36. MAHENDRA P. SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA, 123 (2001).

Article 30(2) implies that laws may be enacted to protect well-being of the youth, honour and reputation of individuals, and to prohibit propaganda for war and public expression of opinions intended to injure human dignity. In other words, these laws can limit the right guaranteed under Article 30(1). Exercise of the right of assembly, demonstration and petition is not a defence for civil and criminal liability that could be imposed for violation of those laws. For example, defamation is a crime and entails criminal liability, and at the same time it is a tortious act resulting in civil liability.³⁷ Thus, a defendant in a defamation case cannot invoke Article 30(2) as a defence.

B. Derogation

Derogation refers to temporary suspension of human rights during a state of emergency.³⁸ Emergency, as opposed to normalcy, is a situation “outside an ordinary course of events.”³⁹ It refers to “a sudden, urgent, usually unforeseen event or situation that requires immediate action, often without time for prior reflection and consideration.”⁴⁰ It may include “armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and similar threats.”⁴¹ Derogation from fundamental rights and freedoms “enables the government to resort to measures of an exceptional and temporary nature in order to protect the essential fabric of that society.”⁴²

A state of emergency is classified into *de jure* and *de facto*. A *De jure* state of emergency exists when states comply with legal requirements for

37. CIVIL CODE OF THE EMPIRE OF ETHIOPIA (1960), Proclamation No 160/1960, FED. NEGARIT GAZZETE, 19th Year No 2, Art. 2044; CRIMINAL CODE, Art. 613.

38. Awol Kassim Allo, *Derogation or Limitation? Rethinking the African Human Rights System of Derogation in Light of the European System*, 2 ETH. J. LEGAL EDUC. 21, 25 (2009).

39. Oren Gross, “Once more unto the breach”: *The systemic failure of applying the European Convention on Human Rights to Entrenched Emergencies* 23 YALE J. INT. L. 438, at 439 (1998).

40. *Id.*

41. Emilie M. Hafner-Burton, et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INTERNATIONAL ORGANIZATION 673, at 673 (2011).

42. JAYAWICKRAMA, *supra* note 6, at 202.

its declaration. If states exercise their emergency power without complying with preconditions prescribed in their constitutions and international human rights instrument, they are in a *de facto* state of emergency.⁴³ A *de jure* state of emergency becomes *de facto* when emergency “measures are extended beyond the formal termination of a declared state of emergency.”⁴⁴

1. A State of Emergency under the Constitution

Declaring a state of emergency is a concurrent power of the federal and state governments. State governments can declare state-wide states of emergencies on two grounds: an occurrence of natural disaster and a breakout of an epidemic.⁴⁵ Decrees of state executives should be approved by a two-third majority vote of state legislatures.⁴⁶ Like the Federal Constitutions state Constitutions require establishment of state of emergency inquiry boards.⁴⁷

The Federal Constitution gives the power of declaring and lifting “national state of emergency and states of emergencies limited to certain

43. Yehenew Tsegaye Walilegne, *State of Emergency and Human Rights under 1995 Ethiopian Constitution*, 21 J. ETH. L. 78, at 87 (2007).

44. *Id.*

45. FDRE CONSTITUTION, Art. 93(1)(b); *See* REVISED CONSTITUTION OF AFAR STATE (2001), Art. 106; THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Proclamation No. 59/2001, ZIKRE HIG OF THE COUNCIL OF THE AMHARA NATIONAL REGIONAL STATE, 7th year No. 2, 5 November 2001, Bahir Dar, Art. 114; REVISED CONSTITUTION, 2001, OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE CONSTITUTION, Proclamation No. 35/2001, Art. 121; THE REVISED CONSTITUTION OF BENSANGUL-GUMUZ STATE, 2002, Art. 115; The Revised Constitution of Gambela Peoples’ Regional State, Proclamation No. 27/2002, Art. 117; THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Proclamation No. 46/2001, Art. 108; THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, 2002, Art. 105; THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76.

46. *Id.*

47. *See* REVISED CONSTITUTION OF AFAR STATE, Art. 107; THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Art. 115; REVISED CONSTITUTION OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE, Art. 122; THE REVISED CONSTITUTION OF BENSANGUL-GUMUZ STATE, Art. 116; THE REVISED CONSTITUTION OF GAMBELA PEOPLES’ REGIONAL STATE, Art. 118; THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Art. 109; THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, Art. 106; THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76(5).

parts of the country” to the Federal Government.⁴⁸ Both the legislature and the executive can declare a state of emergency.⁴⁹ A state of emergency declared by the Federal Executive (Council of Ministers) must be approved by a two-third majority vote of the House of Peoples’ Representatives, otherwise it lapses.⁵⁰ To obtain the approval of the House, the Council of Ministers must present its decree within 48 hours if the House is in session or within 15 days if the House is in recess.⁵¹ The decree remains in force for six months unless it is extended for an additional four months by two-third majority vote of the House.⁵²

The grounds for declaring a state of emergency is limited to four: “an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic.”⁵³ The state of emergency may be declared as soon as external invasion occurs. Since the adoption of the Constitution, Ethiopia faced one external invasion, the Eritrea invasion of June 1998.⁵⁴ The invasion did not result in declaration of a state of emergency.

Another ground for declaring a state of emergency is a breakdown of law and order which may include violence and public disturbance due to riots or rebellions. If public peace, safety and tranquillity of the society are in danger, the Council of Ministers can declare a state of emergency. Not all kinds of breakdown of law and order are a ground for a state of emergency though. If it does not endanger the constitutional order or if it can be handled by regular law enforcement without involving the defence force, it is not necessary to declare a state of emergency. Since the Constitution requires the occurrence of a breakdown of law and order before declaring a state of emergency, it is not proper to declare a state of emergency for an eminent danger to law and order.

48. FDRE CONSTITUTION, Art. 51(16).

49. *Id.*, Arts. 55(8) & 77(10).

50. *Id.*

51. *Id.*, Art. 93(2).

52. *Id.*

53. *Id.*, Art. 93(1)(a). State executives have also similar power.

54. See KINFE ABRAHAM, ETHIO-ERITREAN HISTORY AND ETHIO-ERITREAN WAR, at xi (Ethiopian International Institute for Peace and Development) (2004).

Natural disaster and epidemic are other grounds of declaring a state of emergency. Natural disaster may include earth quake, flood, tsunami and other similar occurrence. Although flood in Dire Dawa caused significant loss of life and property and displacement of people in 2006, it was not invoked as grounds for declaring a state of emergency. Epidemic refers to the appearance of a particular disease, such as cholera and flu, in a large number of people at the same time. Epidemic has not been invoked to declare a state of emergency since the adoption of the Constitution.

The House of Peoples' Representatives must establish a State of Emergency Inquiry Board when it declares a state of emergency or when it approves a state of emergency declared by the Council of Ministers.⁵⁵ The Board consists of seven members from the House and legal experts. The Board has three functions. First, it makes public the names of individuals arrested and the reason for their arrest within one month. Since it is an emergency situation, arrested persons cannot claim their right to be brought before a court within 48 hours.⁵⁶ In normal situations, every person has a right to know reasons for his or her arrest at the time the arrest takes place.⁵⁷

Second, the Board monitors respect for Article 18(1) of the Constitution, prohibition of inhumane treatment. Although there are other provisions of the Constitution that cannot be suspended during a state of emergency, Article 18 is more likely to be abused. Thus, the Constitution creates the Board as an organ to protect every person against cruel, inhuman or degrading treatment during emergencies.⁵⁸ If the Board finds incidences of inhumane treatments, it recommends to the Prime Minister or to the Council of Ministers that inhumane treatments must cease.⁵⁹ It also ensures that persons who commit such act are prosecuted.⁶⁰ Finally, the Board submits its recommendation to the House whether a state of emergency should be continued or lifted.⁶¹

55. FDRE CONSTITUTION, Art. 93(5).

56. *Id.*, Art. 19(4).

57. *Id.*, Art. 19(1).

58. *Id.*, Art. 93(5)(a).

59. *Id.*, Art. 93(5)(b).

60. *Id.*, Art. 93(5)(c).

61. *Id.*, Art. 93(5)(d).

2. *Suspension of Rights During a State of Emergency: Is it allowed?*

According to Article 93(4), once a state of emergency is declared, the council of ministers can suspend “political and democratic rights” guaranteed in the Constitution except the prohibition of torture (Article 18(1)), the prohibition of slavery (Article 18(2)), the right to equality (Article 25), and the right to self determination (Article 39(1) and 39(2)) which are non-derogable rights.⁶² Reading Article 93(4) alone suggests that the Council of Ministers can suspend most of the rights under chapter three of the Constitution. However, interpreting chapter three in light of Article 13(2) and Article 9(4) of the Constitution suggests otherwise.⁶³

According to Article 13(2), interpretation of fundamental rights and freedoms in the Constitution should conform to international human rights law and other instruments adopted by Ethiopia.⁶⁴ Since the Constitution uses the terms *instruments adopted* instead of treaties or agreements ratified, reference should be made to declarations, resolutions etc, adopted within the framework of the United Nations, the African Union or others international organization to which Ethiopia is a member.⁶⁵ The Constitution also refers to Universal Declaration of Human Rights which is not a treaty.⁶⁶

Meaning, scope and categories of rights under chapter three of the Constitution must not contradict with International Human Rights Law including ‘soft’ law. Derogation clause in the Constitution affects scope of rights during a state of emergency. It also creates two categories of rights: derogable rights and non-derogable rights. Can the Council of Ministers suspend all provisions of chapter three that are not listed under Article

62. See generally, Adem Kassie Abebe, *Human Rights under the Ethiopian Constitution: A Descriptive Overview*, 5 MIZAN L. REV. 2, 41-71 (2011).

63. FDRE CONSTITUTION, Art. 13(2) provides that “[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.” Art. 9(4) provides that “[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land.”

64. The Amharic version of Art. 13(2) the FDRE CONSTITUTION refers to *alem akef yesebawi mebroch hegegat* (which means International Human Rights Law).

65. Compare, FDRE CONSTITUTION, Art. 13(2) with Art. 9(4).

66. The binding Amharic version does not refer to the Universal Declaration of Human Rights.

93(4)(c)? For example, can it suspend the right to life (Article 15) or freedom of religion (Article 27)? The answer is negative if one reads chapter three in line with Article 13(2) and Article 9(4). Consideration of some international human rights treaties to which Ethiopia is a party makes the point more clear.

Under Article 4 of the ICCPR, states including Ethiopia cannot derogate from prohibition of torture, prohibition of slavery, right to life, prohibition of retrospective criminal law, right to be recognised as a person, and freedom of thought, conscience and religion.⁶⁷ The Human Rights Committee, an organ that monitors implementation of the ICCPR, further expanded the category of non-derogable rights by identifying provisions of the ICCPR containing elements that cannot be subject to lawful derogation.⁶⁸ According to the Committee, the rights of prisoners to be treated with humanity and freedom of opinion contain elements that cannot be subject to lawful derogation.⁶⁹

The Human Rights Committee requires states to change their constitutions when the latter allow derogation from rights that are listed under Article 4 of the ICCPR as non-derogable. For example, the Constitution of Tanzania expressly allows derogation from the right to life.⁷⁰ In its concluding observation on Tanzania's report, the Human Rights Committee observed that "[c]oncern is expressed over the constitutional provisions allowing derogations from the right to life, which are not compatible with Article 4 of the Covenant. In this regard, changes are clearly necessary."⁷¹

67. ICCPR, Ethiopia became party to ICCPR on 11 June 1993. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-3&chapter=4&lang=en (accessed on 13 November 2012).

68. Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 13; Human Rights Committee, *General comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (2011)*, para 5.

69. *Id.*

70. CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA (as amended), passed on 25 April 1977, Art. 31(1).

71. *Concluding Observation ICCPR*, United Republic of Tanzania, A/48/40 vol. I (1993) 35 at para 171.

Ethiopia submitted its first report on the implementation of the ICCPR to the Human Rights Committee in 2009.⁷² The report states that a state of emergency had never been declared since entry into force of the Constitution.⁷³ It also refers to “the right to equality, the right to self-determination, the right to develop and speak one’s own language, the right to promote culture and preserve history, as well as the right to be protected from inhumane treatment” as non-derogable rights.⁷⁴ Despite the absence of right to life and other rights that are non-derogable under the ICCPR from the Ethiopian list of non-derogable rights, the Committee did not raise any concern. Given the Committee’s concern on derogable right to life in Tanzanian Constitution, one may surmise that the Committee would only be worried when constitutions expressly permit derogation from rights that are non-derogable under the ICCPR or when states actually suspend such rights.

Rights that are non-derogable under the ICCPR have corresponding provisions in the Constitution. They are Article 15 (right to life), Article 21 (rights of persons held in custody and convicted prisoners), Article 22 (non-retroactivity of criminal law), Article 24(3) (right to be recognised as a person), Article 27 (freedom of religion, belief and opinion), and Article 29 (right of thought opinion and expression). Since the ICCPR as interpreted by the Human Rights Committee defines these rights as non-derogable rights, an understanding of the Constitution in light of Article 13(2) puts them in the same category. That is to say, the Council of Ministers cannot suspend Articles 15, 21, 22, 24(3), 27 and 29 of the Constitution during a state of emergency. Of course, there is nothing in the Constitution that expressly authorise the Council of Minister to suspend these provisions. The Council of Minister may make reference to the ICCPR which is a domestic law according to Article 9(4). Here, it will find a proscription that rights guaranteed under these provisions cannot be suspended during a state of emergency.

72. Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant, First periodic report of States parties: Ethiopia*, CCPR/C/ETH/1, 22 October 2009.

73. *Id.*, para 32.

74. *Id.*, para 31.

Interestingly, constitutions of regional states provides for additional non-derogable rights. The executives of regional states cannot suspend right to life, right to security of person, right to be recognised as a person, right of prisoners to be treated with dignity, and freedom of religion during a state of emergency declared by regional states.⁷⁵ Almost all constitutions of regional states provides for wider list of non-derogable rights than the Federal Constitution. Thus, regional constitutions are additional domestic law showing that the list of non-derogable rights in Ethiopia is more rights than those listed under Article 93(4)(c) of the Constitution.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), albeit adopted at the same time with the ICCPR, does not contain a derogation clause.⁷⁶ That may raise an assumption that it is not necessary to suspend economic, social and cultural rights during a state of emergency. The implication is that states including Ethiopia cannot suspend them by reading a derogation clause into the ICESCR where none exists.

The Constitution provides for economic social and cultural rights framed in terms of state duties instead of individual entitlements. These rights are guaranteed under Article 34 (marital, personal and family rights), Article 41 (economic, social and cultural rights) and Article 42 (labour rights). Compared to its predecessors, the 1987 Constitution, the (1995) Constitution is a normative regression. Framed in individual entitlement, the 1987 Constitution provides for right to work, right to free education, and right to health care of all Ethiopians.⁷⁷ The (1995) Constitution only

75. See REVISED CONSTITUTION OF AFAR STATE (2001), Art. 106(4); THE REVISED CONSTITUTION OF THE AMHARA NATIONAL REGIONAL STATE, Proclamation No. 59/2001, ZIKRE HIG OF THE COUNCIL OF THE AMHARA NATIONAL REGIONAL STATE, 7th year No. 2, 5 November 2001, Bahir Dar, Art. 114(4); REVISED CONSTITUTION, 2001, OF THE SOUTHERN NATIONS, NATIONALITIES AND PEOPLES REGIONAL STATE CONSTITUTION, Proclamation No. 35/2001, Art. 121(4); THE REVISED CONSTITUTION OF BENSANGUL-GUMUZ STATE, 2002, Art. 115(4); THE REVISED CONSTITUTION OF GAMBELA PEOPLES' REGIONAL STATE, Proclamation No. 27/2002, Art. 117(4); THE REVISED CONSTITUTION OF OROMIA NATIONAL REGIONAL STATE, Proclamation No. 46/2001, Art. 108(4), THE REVISED CONSTITUTION OF SOMALI NATIONAL REGIONAL STATE, 2002, Art. 105(4); THE REVISED CONSTITUTION OF HARARI NATIONAL REGIONAL STATE, 2004, Art. 76(4).

76. ICESCR, Ethiopia ratified it on 11 June 1993. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en accessed on 13 November 2012.

77. FDRE CONSTITUTION, Arts. 38, 40 & 42.

acknowledges obligation of the state “to allocate ever increasing resources to provide [...] health, education and other social services” to the people.⁷⁸ Be that as it may, an understanding of the Constitution in light of the ICESCR denotes that the Council of Ministers cannot suspend Articles 34, 41 and 42 of the Constitution during a state of emergency.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁷⁹ like ICESCR does not contain a derogation clause. The Committee that supervise the implementation of CEDAW clearly held that ‘obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters.’⁸⁰ Similarly, the rights of women under Article 35 of the Constitution cannot be suspended during a state of emergency.

The Convention on the Rights of the Child (CRC)⁸¹ has no derogation clause, too. That means, the rights of children are non-derogable. An understanding of Article 36 (rights of children) of the Constitution in light of the CRC would mean that these rights cannot be suspended even during a state of emergency. Although the case does not involve derogation issue, the Federal Supreme Court has invoked the CRC as part of the domestic law in *Tsedale Demissie v Kifle Demissie*.⁸²

The African Charter on Human and Peoples’ Rights (African Charter) is the main human rights instrument of the African Union.⁸³ The African

78. *Id.*, Art. 41(4).

79. *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature in New York on 18 December 1979 and entered into force on 3 September 1981. Ethiopia signed and ratified CEDAW on 10 July 1980 and 10 September 1981 respectively. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en accessed on 13 November 2012.

80. Committee on the Elimination of Discrimination against Women, *General recommendation No. 28 on the core obligations of States parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, para 11.

81. *Convention on the Rights of the Child*, adopted in New York on 20 November 1989 and entered into force on 2 September 1990. Ethiopia ratified the CRC on 14 May 1991. See United Nations Treaty Collections at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 13 November 2012).

82. *Tsedale Demissie v Kifle Demissie*, File No. 23632, decided on 26 Tekemt 2000 E.C, Fed. Sup. Ct., Cass. Div. Jud., Vol. 5, at 189.

83. *African Charter*, Ethiopia acceded to the African Charter on 15 June 1998. See OAU/AU Treaties, Conventions, Protocols and Charters at <http://www.au.int/en/treaties> (accessed on 13 November 2012).

Commission on Human and Peoples' Rights (African Commission), a quasi-judicial organ, monitors the implementation of the African Charter.⁸⁴ The Charter is silent on a state of emergency and subsequent suspension of human and peoples' rights. In dealing with individual communications, the African Commission exercised its mandate of interpreting the African Charter and held consistently that derogations from Charter rights are prohibited.⁸⁵

In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the African Commission considered a communication in which the defendant state invoked civil war in its territory as a defence.⁸⁶ In *Article 19 v. Eritrea*, the African Commission dealt with the Eritrea's argument that it can suspend Charter rights during war where its existence is threatened.⁸⁷ The holding of the Commission is the same in both communications. States cannot invoke "existence of war, international or civil, or other emergency situation" within their territory to defend violation of any right guaranteed in the Charter.⁸⁸ The African Commission confirmed similar position in other communications.⁸⁹ Therefore, the African Commission "elevated all Charter rights to the level of regional *jus cogens*."⁹⁰

In *Jawara v The Gambia*, the African Commission dealt with a communication alleging violation of the African Charter as a result of suspending the whole bill of rights in the Constitution following a *coup d'état*.⁹¹ The Commission examined the implication of suspending

84. AFRICAN CHARTER, Art. 45.

85. *Id.*, Art. 45(3).

86. *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995), para 19.

87. *Article 19 v Eritrea*, African Commission on Human and Peoples' Rights, Communication No. 275/2003, AHRLR 73 (ACHPR 2007), para 87.

88. *Id.*, para 98-99.

89. *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 84; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998), para 67; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41; *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999), 42; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), para 165 & 167; Communication 250/2002, *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Seventeenth Activity Report 2003–2004, Annex VII, para 60.

90. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA, at 252 (2007).

91. *Jawara v The Gambia* (2000), AHRLR 107 (ACHPR 2000), para 48-50.

constitutional rights under the African Charter and concluded that suspending bill of rights in the Constitution amounts to violation of Articles 1 and 2 of the African Charter.⁹²

Therefore, an organ interpreting chapter three of the Constitution according to the African Charter reaches two conclusions. First, all rights guaranteed under chapter three of the Constitution cannot be suspended during a state of emergency. Besides, the African Charter forms part of the domestic law. Second, suspension of the rights under chapter three implies that Ethiopia violates its international obligation under the African Charter.

IV. CRITIQUE OF THE COUNCIL'S DECISION

As an organ with the power to recommend interpretation of the Constitution to House of Federation, it is reasonable to expect the Council of Constitutional Inquiry (the Council) to provide exposition of constitutional provisions. In *CUD v Prime Minister Meles Zenawi Asres*, the Council did not make a detailed analysis of constitutional provisions invoked in the case. Rather, it erred in a number of instances.

First, the Council followed an incorrect step to reach its conclusion. The Council should have ascertained the meaning, nature and scope of the right that was alleged to have been infringed. It should have defined the content of freedom of assembly, demonstration and petition before it proceeded to its limitation. To do so, the Council should have referred to international human rights law as required by Article 13(2) of the Constitution and Article 20(2) of the Council of Constitutional Inquiry Proclamation.⁹³ Given that limitation is an infringement of the right, it would be erroneous to reach a conclusion before ascertaining the content of the right in question.

Second, the Council confused limitation on fundamental rights and freedoms with their suspension during a state of emergency. It wrongly assumed a complete suspension of constitutional rights as their limitation. Limitation on fundamental rights as discussed above does not justify

92. *Id.*

93. *Council of Constitutional Inquiry Proc.*

suspension of fundamental rights and freedoms no matter how short the period is. However, the Prime Minister's ban on right of assembly, demonstration and petition completely suspended the right. Besides, limitations are usually a permanent restriction while the Prime Minister's ban was temporary since it was imposed only for one month. Such ban would have been denoted more appropriately as suspension of (derogation from) fundamental rights and freedoms.⁹⁴

The conclusion that the Prime Minister made suspension of rights during a state of emergency presupposes other premises. The decree of the Prime Minister must comply with procedural and substantive requirements laid down in the Constitution. To begin with procedural requirements, a state of emergency must be declared by the Council of Minister and approved by the House of Peoples' Representatives. Then the question is: does the Prime Minister's decree amount to declaration of a state of emergency? Of course, it is the power of the Council of Ministers to declare a state of emergency subject to approval by the House of Peoples' Representatives. The Council of Ministers speaks through its chairperson, the Prime Minister. When it makes regulations, for example, it is the Prime Minister that signs them, not every member of the Council. Thus, the decree of the Prime Minister is presumed to be the declaration of the Council of Ministers in the absence of contrary proof.

Unfortunately, the Court and the Council of Constitutional Inquiry did not call the defendant for defence. Since the Prime Minister issued the decree as head of the government, the Ministry of Justice as the legal representative of the government or legal advisor of the Prime Minister could have been called to defend the suit. It was not necessary to call the Prime Minister to appear before the court in person. Had the Court or the Council called the defendant, it would have been highly probable that the defendant would have raised the suspension power under Article 93. The Court did not seem to have the courage to call the defendant. As Getachew observed the Court was in a hurry to send the case for interpretation and get out of the political flame.⁹⁵

94. See Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)*, 1 MIZAN L. REV. 1, at 17 (2007).

95. Getachew Assefa, *supra* note 2.

The House of Peoples' Representatives was in session when the decree was issued on *Ginbot 7* because the House recesses "in the month of *Yekatit* as well as from *Hamle* (1) up to the last Sunday of *Meskerem* each year."⁹⁶ The decree must have been presented to the House within 48 hours for approval. As the plaintiff did not challenge the constitutionality of the decree on this point, it is not clear from the record whether the decree was sent to the House for approval. Assuming that the case was not sent to the House for approval, would that make a state of emergency non-existent? Legally speaking, the answer is positive. No state of emergency exists for more than two days without the approval of the House when it is in session. But lack of legal life does not erase the facts on the ground. Thus, the situation can be described as a *de facto* state of emergency.

Even if the decree was presented to the House for approval, it would not have passed the substantive constitutional requirements that a state of emergency is declared only on four grounds (assuming that the House is not a rubber stamp).⁹⁷ The decree was based on the ground that there was a looming threat to law and order. Its purpose was to make the process of counting and announcing results of election peaceful and avoid post election disorder. Does this amount to "a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel" within the meaning of Article 93(1)(a)? The textual reading of the Constitution clearly requires an *ex post* declaration of a state of emergency. But the decree was an *ex ante* declaration as a breakdown of law and order did not occur at the time of the declaration. Rather, there was a threat of breakdown of law and order and the decree was made to avoid a future danger.

Although not clear from the Constitution, a formal requirement of an emergency decree may call for a passing comment. Can declaration of a state of emergency be made orally? The Constitution does not require the Council of Minister to make its decree in writing and publish it in the Federal Negarit Gazeta. In the absence of such formal requirements the Council of Ministers has the discretion to choose the means of

96. FDRE CONSTITUTION, Art. 58(2); the *House of Peoples' Representatives of The Federal Democratic Republic of Ethiopia Rules of Procedures and Members' Code of Conduct* Regulation No. 3/1998, Art. 24(1).

97. FDRE CONSTITUTION, Art. 93(1)(a).

communicating its decree to the general public. In this case, the Council of Ministers through its chairperson chose an oral decree that was published in *Addis Zemen*, a news paper that has wider circulation than the Federal Negarit Gazeta.

Third, it is conspicuously clear from the Council's holding that it did not consider the matter meticulously. If the Council based its decision on specific limitation clause under Article 30(1), it should have decided two important issues:

- a) Whether the Prime Minister's decree falls within the meaning of "appropriate regulation."
- b) Whether the decree was made for the aim enumerated under Article 30(1).

Regulation of the right of assembly, demonstration and petition as discussed above should be provided by law which may include proclamations, regulations or directives. However, the Prime Minister's decree was a notice to the general public in the form of a press release than rules made to regulate constitutional rights because it was a declaration orally made through mass media and reported by print media, *Addis Zemen*. Thus, it would have been difficult for the Council to find the Prime Minister's decree as an "appropriate regulation" within the meaning of Article 30(1).

Regulations restricting rights guaranteed under Article 30(1), albeit appropriate, should address aims enumerated thereunder as discussed above. In other words, the Council should have considered whether the Prime Minister's decree was made to ensure public convenience, to protect democratic rights, public morality or peace. It could have made an argument that the decree was issued to protect public peace. But the effect of the decree and its appropriateness militates against this argument.

Fourth, the Council erred in justifying what it called 'limitation' on right of assembly, demonstration and petition. The Council did not find the decree in violation of the Constitution since the Prime Minister is the supreme executive organ vested with wide power. Here, the Council seems to confuse "wide power" with "absolute power." The Prime Minister does not have absolute power. One of the purposes of entrenching fundamental rights and freedoms in the Constitution is to limit power of the government including power of the Prime Minister. Having wide power does not entitle

a state official to encroach on fundamental rights and freedoms unless such official wants to be above the supreme law of the land.

Finally, the Council's decision that there was no need of constitutional interpretation is erroneous. If the Council interpreted fundamental rights and freedoms in conformity with the international human rights law, it would have found the constitutional provision authorising the Council of Minister to suspend "political and democratic rights" inconsistent with international human rights law.⁹⁸ In resolving the inconsistency, the Council could have adopted one of the arguments on the hierarchy of international human rights treaties in domestic laws.⁹⁹ Obviously, prohibition of suspension advances respect for human rights and the Constitution should conform to international human rights law. Therefore, the Council should have recommended to the House of Federation that derogation from fundamental rights and freedoms is prohibited under the Constitution.

V. CONCLUSION

In the CUD Case, the Council of Constitutional Inquiry considered constitutionality of a decree suspending right of assembly, demonstration and petition for one month. The Council mistakenly assumed as a limitation on right of assembly, demonstration and petition what should have been regarded as derogation therefrom. It did not properly analyse the provision of Article 30 to test the decree against the essential elements of the limitation clause provided in that provisions. Instead, it gave a wrong justification for consistency of the decree with the Constitution.

Moreover, the decision of the Council was very brief and lacked explanation of constitutional provisions and other relevant principles. The decision of the Council was not based on appropriate research. It should have done some research and at least see how similar issues were resolved

98. *Id.*, Art. 93(4)(b).

99. For the arguments on the hierarchy of international human rights treaties. See Takele Soboka Bulto, *The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human rights Treaties under the Ethiopian Constitution* 132, 23 (1) J. ETH. L. (2009); Ibrahim Idris, *The Place of International Human Rights Convention in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution* 113, 20 J. ETH. L. 2000.

in other jurisdictions. Given the requirement of Article 13(2), the Council should have resorted to international human rights instruments for reference. The jurisprudence of organs monitoring these instruments such as decisions of the United Nations Human Rights Committee and the African Commission on Human and Peoples Rights would have been of great help in understanding a nature of limitation and their difference from suspension. The Council missed the opportunity to lay down tests of limitations for future references.

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