KONRAD ADENAUER STIFTUNG

THE ARCHITECTURE AND USE OF EMERGENCY POWERS: The Case of Ethiopia

From 1995 until 2020

Zelalem Eshetu Degifie

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Foreword

The idea for this book was born in the spring of 2020. We were experiencing the first year of the worldwide Covid-19 pandemic and had to watch how one lockdown followed the next. At the end of March 2020, after six years of being the Head of the Rule of Law Programme for Sub-Sahara Africa in Nairobi, I was supposed to move to Ethiopia with my family. That never happened – shortly before the moving vans were supposed to arrive, Nairobi's airport shut down. In the hope that this would only be temporary (the airport was in fact closed until August), I informed myself about the current Covid-19 situation in Ethiopia. I learned that the government under Prime Minister Abiy Ahmed had declared a state of emergency from April to September. This resulted in considerable restrictions of fundamental rights. For example, travelling freely within the country and organizing and/or taking part in demonstrations was prohibited. The elections planned for May were postponed (they – partially – took place in June 2021) and citizens had to accept further, sometimes severe, infringements of their fundamental rights.

What was the Ethiopian government's legal basis for this? The Ethiopian Constitution, like that of many other countries worldwide, sets out specific rules for a declared state of emergency. The Covid-19 pandemic was certainly a sound reason for this, seeing as restricting social contacts served to combat the spread of the highly infectious disease. However, this at the same time raises questions as to how far such infringements of fundamental rights are justified. Can they be fully revoked? And how long can such a state which gives the government an enormous increase of executive power last? Last but not least: what is ultimately still reasonable when balancing the measures to combat the pandemic and the resulting infringements of fundamental rights?

In the context of a virtual seminar held by the KAS Rule of Law Programme for Sub-Saharan Africa (anglophone countries) and hosted by Prof. Charles Fombad from the University of Pretoria titled „Implications of Covid-19 Pandemic Regulations on Human Rights and the Rule of Law in Africa" in August 2020, the fear war quickly expressed that the state of emergency laws in effect in several countries could be abused in a variety of ways by the respective governments. In light of historical experience (addressed by Prof. Fombad in his preface) and the still weak rule of law system, there is too great a concern that fundamental rights will be undermined by unwarranted state action. For example, the opportunity was (and continues to be) beneficial for some presidents to, under the pretext of the pandemic, considerably restrict or even fully prohibit campaign efforts by the opposition. The election in Uganda in January 2021 is a good example of this. Even in highly developed countries in terms of the rule of law such as in Central Europe, legal uncertainty remains regarding the scope in which a government may restrict fundamental rights in the context of an unprecedented pandemic.

These and further questions can only be answered when aware of the respective emergency powers of individual states. It is therefore much welcomed, that Zelalem Degifie agreed to present and academically question the legal situation in his home country of Ethiopia. The result is a publication worth reading which not only enriches Ethiopia's legal literature but also provides a good starting point for further comparative law studies. The Konrad-Adenauer-Foundation is pleased to have given an impetus for this book and being able to support its publication.

Dr. Arne Wulff

Former Head of the KAS Rule of Law Programme for
Sub-Saharan Africa (Anglophone Countries)
Accra (Ghana), June 2021

Preface

Modern states, both democratic and undemocratic, face a myriad of threats and challenges, sometimes of a complex, unfamiliar and unpredictable nature that may require the invocation of emergency powers to enable prompt and decisive action to be taken. The use of emergency powers and more specifically, declarations of states of emergency in Africa are not a rare occurrence. Prior to the 1990s, it was the mainstay of most of the autocratic regimes in power. In fact, one of the major causes of the dictatorships that quickly emerged on the continent in the post-independence period was the ease with which governments arbitrarily invoked and abused emergency powers to suppress dissent and entrench their power. As Zelalem Degifie shows us in this book, this has been part and parcel of the political history of Ethiopia. Further afield, Egypt was under a continuous state of emergency for 44 years; beginning with the Arab-Israeli war of 1967 and ending only in the revolution that ousted Hosni Mubarak in 2011.[1] Another example is Zambia, which remained under a state of emergency for 27 years until its first multiparty elections brought new incumbents to power in 1991. There are many more examples of such abuses.

The extensive human rights abuses associated with the exercise of emergency powers that were conferred on governments, especially in Africa, to deal with the global COVID-19 pandemic that started slowly in December 2019 in China and continues to cause untold hardship globally is a wake-up call. Unless more robust legal frameworks that can respond promptly, effectively and efficiently to emergencies backed by strong oversight mechanisms are adopted, national or global emergencies, such as the COVID-19 will continue to be used by governments to reverse the gains in constitutionalism, respect for the rule of law and protection of human rights that have been made since the third wave of democratisation started in the early 1990s. More importantly, as the deleterious effects of the pandemic rages on, it is important to realise that the time for taking corrective actions to prevent abuses of emergency powers is now as the world struggles not only to control the spread of the virus but also an opportunity to prepare for the next pandemic.

The controversial measures adopted by most governments, especially in Africa to counter the COVID-19 and the threats it has posed to constitutionalism, democracy, respect for human rights and the rule of law has provided us with an opportunity to reassess the legal framework for dealing with emergencies. Although numerous seminars and conferences and even books have been written on this topic,[2] Zelalem Degifie's book provides one of the most comprehensive studies on the use and misuse of emergency powers and how this can be checked.

1 During this period, the state of emergency was lifted for 18 months in 1980 but reimposed for another 31 years after Sadat's assassination in 1981. In spite of the January 2011 revolution, in which one of the demands was for an end to emergency rule, it remained in force until 31 May 2012. Since August 2013, however, a state of emergency has been declared again in many parts of Egypt. See further Yussef Auf, 'The state of emergency in Egypt: An exception or rule? Available at http://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule (accessed in July 2018).

2 See for example, the online seminar on "Assessing the implications of the COVID-19 pandemic regulations on human rights and the rule of law in eastern and southern Africa," jointly organized by the Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria and the Konrad Adenauer Stiftung's Rule of Law Program for Sub-Saharan Africa, Nairobi, Kenya in Pretoria on 11 and 12 August 2020. The papers are published in the 20 *African Human Rights Law Journal (2020)*.

The title of the book gives the impression that it is only about Ethiopia. Its focus is certainly on Ethiopia but it goes much further than that. The first two chapters provide a rich and comprehensive historical and philosophical background about the origins of the exercise of emergency powers that goes back to the Roman and medieval periods. Contemporary understanding and approaches to addressing the present weaknesses of the legal framework for dealing with emergencies is considerably enhanced by the discussion of the different background theories that have guided the framing of emergency legislation such as the theory of dictatorship, the theory of prerogative, the theory of exception, the Madisonian approach and the theory of constitutional absolutism. It is these theories that have informed the three main regulatory approaches to dealing with states of emergency viz, the constitutional approach, the legislative approach, and the extra-constitutional approach. Although all 54 African countries have adopted the constitutionally entrenched model of regulating emergency situations, in almost all these cases, this is combined with the legislative emergency model.[3] Whilst constitutional entrenchment of emergency powers is ideal as it limits the scope for opportunistic and arbitrary executive changes, its effectiveness depends on the nature, scope and depth of such entrenchment.

The crux of an effective legal framework for regulating the exercise of emergency powers and preventing their misuse and abuse lies in the constraints that are put in place to check against this. This depends on the scope of what is covered in the emergency clauses in the constitution and other relevant legislation. A number of critically important issues, many of which are discussed by Degifie in section 3 of chapter 2 must be clearly spelt out in the emergency clauses. These include;

-The conditions (both procedural and substantive) for declaring a state of emergency;

-An indication of those who have the powers to declare a state of emergency;

-An indication of those who have the power to prolong and terminate the state of emergency;

-The human rights standards that must be complied with and the limitations and derogations that are permissible;

-The oversight mechanisms during a state of emergency (legislative, judicial, national human rights institutions and civil society).

From an examination of the nature, scope and depth of constitutional entrenchment of emergency powers under modern African constitutions,[4] three main patterns emerge: the minimalist, moderate and elaborate constitutional regulatory approach. The constitutions of 27 African countries fall in the minimalist category because they provide little details defining the nature, scope and limitations on the emergency powers conferred on the executive. They thus leave too much room for abuse. The 10 countries that fall in the moderate category

3 For a full discussion of this, see Charles M. Fombad and Lukman A. Abdulrauf, "Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa', 20 African Human Rights Law Journal (2020), pp. 376-411.

4 Ibid.

provide a slightly more detailed framework which also allows some scope for executive abuse. The 14 countries that include Ethiopia, which have constitutional provisions that provide a fairly elaborate framework with better safeguards, still leave room for abuse. Although there was some tinkering in most of the new or revised post-1990 African constitutions with the emergency clauses, the COVID-19 pandemic has shown that in almost all the cases, the changes were not enough to limit the abuses that have taken place as governments scrambled to bring the COVID-19 pandemic under control with harsh lockdown and a myriad of other controversial restrictions.[5]

As Degifie shows in chapters 3 to 5 of this book, abuse of emergency powers has been a common pattern in Ethiopia. In this respect, Ethiopia provides a typical example of what has been happening in almost all African countries; a situation made worse by the COVID-19 pandemic crisis. Although emergency powers in the different Constitutions, starting with that of 1931 have been progressively improved, the manner of their formulation and their scope of application as well as the safeguards provided against abuse have remained weak and vulnerable to political manipulation and abuse. Hence, save for the exceptional measures introduced to address the COVID-19 pandemic, emergency powers have been regularly used by incumbent regimes to perpetuate themselves in power. In spite of the elaborate nature of the legal framework for regulating declaration of states of emergencies in Ethiopia today, there are two main flaws, which to a large extent are common with many emergency regulations in African countries.

Firstly, some of the important provisions regulating the procedural and substantive conditions for invoking emergency powers are formulated in obscure language that gives the executive too much discretion that can easily be abused. Secondly, because of weak oversight mechanisms due partly to a dominant party system which makes legislative oversight impossible and the absence of a system of judicial review, neither the legislature nor the courts can effectively monitor and compel the executive to operate within the legal and constitutional limits for exercising emergency powers.

Carefully crafted constitutional provisions regulating declarations of a state of emergency, as the experiences of the last three decade show, may not prevent abuses. Nevertheless, they may limit and at least reduce the incidence of repression and human rights violations experienced during the exercise of emergency powers. To counter the risks that emergency powers pose to Africa's fledgling democracies, there is a need to adopt a constitutionally entrenched regulatory framework based on good international practices, such as the International Covenant on Civil and Political Rights (ICCPR) and the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards), as well as take into account the Human Rights Committee General Comment No. 29. Emergencies must be defined in terms that ensure that it can be invoked only in serious crises where the survival of the state and its institutions is at stake. The conditions for declaring a state of emergency must be clearly defined in a manner that ensures that emergency powers are not used as a pretext for solving other temporal political problems, or as an indirect and illegitimate means to modify the legal order, even the constitution itself. Such abuses are tantamount to abrogating or amending the constitution rather than functioning to preserve it.

5 The latest Human Rights Report is extremely critical of the human rights abuses committed by most African countries during the enforcement of COVID-19 lockdown regulations. See, Human Rights Watch, The World Report 2021 accessible at, https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf accessed in January 2021.

Ideally, declarations of a state of emergency should be preceded by prior authorisation or immediately followed within 72 hours by legislative approval. The poor human rights record of African states means there is a need to ensure that citizens' human rights are protected. The list of non-derogable rights contained in the ICCPR and Paris Minimum Standard constitute the lowest standard of human rights protection that should be recognised and protected. One of the major lessons to be drawn from the experience of the last three decades has to do with enforcement. However, elaborate a constitutional framework for regulating states of emergency, this will serve no purpose if there is no effective enforcement mechanism in place to monitor and ensure compliance with its provisions. This, as Degifie shows, is the major weakness of the Ethiopian regulatory framework.

Some African constitutions have been innovative in this respect. Two important good practices seem to emerge. Firstly, the legality of any declarations of a state of emergency as well as any actions carried out in its implementation must be subject to judicial review for conformity to the constitution. Secondly, to expedite the process of dealing with these matters, specific courts, such as the High Court, must be given the powers to deal with these disputes in expedited proceedings.

Whilst some commendable strides have been made since the 1990s to enhance the prospects for constitutionalism and respect for the rule of law during states of emergencies in Africa, further progress depends on a number of important reforms. These reforms must mediate the tension between, on the one hand, the need for prompt and effective intervention to deal with emergencies, and on the other, the need to ensure the protection of democracy, respect for the rule of law and human rights and constitutionalism. There are four broad areas that these reforms must cover. Firstly, the constitutional entrenchment of emergency provisions that clearly lay down the procedures and substantive standards and conditions that are consistent with international minimum standards that governments must comply with. Secondly, comprehensive oversight mechanisms that will ensure continuous monitoring and accountability throughout the period of crisis. Thirdly, measures to ensure that emergency regulations are promptly repealed once the crisis comes to an end and do not endure to become a new way of life. Fourthly, adequate measures to counteract the negative social, political and economic impact of any restrictions that were necessitated by the declaration of the state of emergency.

Pending future reforms, and as Degifie shows, an activist judiciary and a vibrant and assertive civil society can considerably help to minimise the weaknesses of existing frameworks for dealing with states of emergencies in Africa. From this perspective, the book is an excellent and indispensable reference work for policy makers, lawyers and other researchers. It provides an invaluable source of material for the debates and discussions that are bound to take place as governments all over the world review their legal frameworks for dealing with emergencies in the light of the global criticisms of the responses to the COVID-19 crisis.

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1

Towards Understanding the Problem of Emergency Powers

1. Introduction

Constitutional democracy upholds a limited government in which political power is exercised and controlled on the basis of rules that determine the validity of such a government's legislative and executive actions.[1] Constitutions then specify the nature of the rules to be observed in making political decisions; furthermore, they provide institutional arrangements to control governmental actions and behaviour, thereby ensuring that restrictions on the powers of the government are enforceable.[2] Constitutionalism hence promotes a limited government whose power is restricted by constitutionally defined and legally enforceable rules; as such, it stands opposed to the unlimited and arbitrary exercise of powers, and aims at preventing tyrannical rules that impose little restraint on the actions of public officials.[3]

Constitutionalism has five core elements: recognition of fundamental rights and freedoms; separation of powers; judicial independence; review of the constitutionality of laws; and control of the amendment of the constitution.[4] These principles function together to tame in particular the powers of the executive, which monopolises the armed forces of the country and thus poses the risk of becoming the most dangerous branch of government.

Crises and disasters, which are inherent to the human condition, raise the need for quick and decisive action to be taken without waiting on ordinary decision-making processes.[5] In the face of crisis, the executive is the organ of government most capable of acting swiftly and deftly;[6] however, ordinary constitutional rules and institutional arrangement might constrain

1 Charles Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects' (2011) 59 Buffalo Law Review 1007; Kassahun Berhanu, 'Constitutionalism and Human Security in the Horn of Africa: Examination of State of Affairs in Ethiopia, Kenya and Sudan' (Conference on Constitutionalism and Human Security in the Horn of Africa, Addis Ababa, Ethiopia, 2017) 10–12.

2 Charles Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 Am. J. Comp. L. 1,7–10

3 Charles Fombad, 'Constitutional Reforms and Constitutionalism' (n 1)

4 Ibid, 1014.

5 John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 I.CON 210.

6 Ibid.

it and consequently hinder its ability to respond promptly to emergencies.[7] Accordingly, the ordinary procedures and rules of the constitution may be suspended temporarily in emergency situations.[8]

Does it make sense, indeed, to limit the powers of the executive in times of crisis, and if so, to what extent and in which ways? These are questions as ancient as the Roman Republic, yet as relevant as ever in the day and age of the coronavirus disease (COVID-19) pandemic.[9] In the life of a nation, there may come a time when a situation arises that seriously threatens the state, the population or any part of the territory, be it invasion, war, rebellion, civil war, rioting, revolution, public disturbance, natural disaster, pandemic or economic crisis.[10] Under the circumstances, governments often invoke emergency powers and take actions beyond the standard procedures for dealing with calamities.[11]

The invocation of emergency powers has far-reaching consequences for the conventional structures and functions of democratic regimes.[12] For instance, it concentrates powers in the hands of the executive at the expense of the other branches of the government,[13] given that additional, extraordinary powers are conferred to the executive.[14] Similarly, it could affect the vertical distribution of powers too by increasing the powers of the central government to the detriment of subnational authorities.[15] This is a consequence more visible in federal rather than unitary states, since federal states distribute legislative, executive and financial powers among different levels of government.[16] Invoking emergency powers also entails the suspension of basic rights and freedoms recognised under national constitutions and international human rights regimes.[17] The recourse to such powers consolidates the might of the executive.

The use of emergency powers in times of crisis is an old practice that can be traced back to the Roman Republic.[18] During crises caused by insurrection, sedition, and external enemies, the Roman senate would direct the consuls to appoint a dictator for up to six months.[19] The latter was empowered to suspend rights and legal processes, and also took command of the military and other forces in order to resolve the threat to the republic.[20] He was expected

7 Michael Zuckert and Felix Valenzuela, 'Constitutionalism in the Age of Terror' in Ellen Frankel Paul, Fred D Miller, Jr., and Jeffrey Paul (eds), What Constitutions Do (Cambridge University Press 2011).

8 Ibid.

9 Oren Gross and Fionnuala N´ı Aolain, Law in Times of Crisis: Emergency Powers in Theory and Practice (Cambridge University Press 2006) 1–2; Jonathan Murphy, Parliaments and Crisis: Challenges and Innovation (International IDEA 2020) 1.

10 Bryan Rooney, 'Emergency Powers in Democratic States: Introducing the Democratic Emergency Powers Dataset' (2019) Research and Politics 1, 2.

11 Ibid.

12 Elliot Bulmer, Emergency Powers (International IDEA 2018) 24–27; Alexander N Domrin, The Limits of Russian Democratisation Emergency Powers and States of Emergency (Routledge 2006) 50–55.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ronald L Watts, Comparing Federal Systems (3rd edn, McGill-Queen's University Press 2008) 90.

17 Charles Manga Fombad, 'Cameroon's Emergency Powers: a Recipe for (Un)Constitutional Dictatorship?' (2004) 48 Journal of African Law 62; Grossman Claudio, 'A Framework for the Examination of States of Emergency under the American Convention on Human Rights' (1986) 1:35 American University International Law 35.

18 Sanford Levinsont and Jack M Balkin, 'Constitutional Dictatorship: Its Dangers and Its Design' (2009–2010) 94 Minn. L. Rev. 1789; Marc De Wilde, 'Why Dictatorial Authority Did Good, and not Harm, to the Roman Republic: Dictatorship and Constitutional Change in Machiavelli' (2018) 31 International Journal of Jurisprudence and Philosophy of Law 86.

19 Ibid.

20 Ibid.

to step down and relinquish his powers as soon as he averted the danger that led to his appointment.[21] As Machiavelli, Rossiter and others have noted, the purpose of the office of the dictator was conservative,[22] in that it was intended to deal with exigencies as they arose and restore normality without fundamentally changing the system.[23] In addition, the Romans were careful to curb the dictator's expansive powers by various legal, political and ethical means.[24]

The Roman constitutional traditions surrounding emergency powers were rediscovered and brought into modern politics by Niccolo Machiavelli in particular, who regarded emergency powers as the saviour of a state under crisis.[25] Nevertheless, he believed that rules for using emergency powers should be set in advance and the rule of law upheld when dealing with emergency situations. As he argued:

> *In a well-ordered republic it should never be necessary to resort to extra-constitutional measures; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under the pretext for evil purposes. Thus no republic will ever be perfect if she has not by law provided for everything, having a remedy for every emergency and fixed rule for applying it.*[26]

Machiavelli's thinking influenced many modern constitutions.[27] Likewise, John Locke, who relied on the English doctrine of the prerogative of the sovereign to address unforeseen necessities, argued for the 'power of the executive to act according to discretion when the law is quiet, and sometimes even against the direct words of the law, for the public good'.[28] He envisaged popular resistance as a possible limitation to the abuse of prerogative powers.[29] Locke's ideas influenced numerous other political thinkers, among them Thomas Jefferson, who understood emergency powers as based on the principle of necessity.[30] Jefferson maintained that

> *[a] strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.*[31]

21 Gross and N´ı Aolain (n 9) 17–26.

22 Ibid.

23 Ferejohn and Pasquino (n 5) .

24 Gross and N´ı Aolain (n 9) 25–26.

25 Ferejohn and Pasquino (n 5) 213.

26 Niccolo Machiavelli, Discourses on the First Decade of Titus Livius (Translated from the Italian by Ninian Hill Thomson, MA London Kegan Paul, Trench & Co. 1883) .

27 Ferejohn and Pasquino (n 5) 212–213; Levinsont and Balkin (n 17)

28 Zuckert and Valenzuela (n7) 80–82; Gross and N´ı Aolain (n 9) 119–120

29 Ibid.

30 Ibid.

31 Jules Lobelt, 'Emergency Power and the Decline of Liberalism' (1989) 98 Yale Law Journal 1385, 1393. This response was given when he was asked about the limit of necessity.

Jefferson did not deny the unlawfulness of emergency actions; rather, he argued that unlawful emergency actions by the executive require popular ratification by Congress.[32] Alexander Hamilton, by contrast, held that emergency powers should be exercised within the constitutional framework as implied powers derived through an expansive understanding of the constitution.[33] Both of the founding fathers of the United States (US) Constitution shared the view that the emergency powers of the executive are unlimited on the basis of the constitution, but, in the case of Jefferson, believed that extra-constitutional actions justified on the grounds of necessity should be judged by the people.[34] The position of James Madison sits between those of the two founding fathers in that he advocated for powers implied by the constitution but constrained by a legislature that exerts control through its power of authorisation;[35] accordingly, the emergency powers of the executive are exercised within the limits of the authorisation law made by Congress.[36]

Carl Schmitt, a German jurist and philosopher of law, took a Hobbesian position in his 'doctrine of the exception' and advocated that the sovereign should have unlimited powers in dealing with emergency situations.[37] In fact, Schmitt is a proponent of the notion of an inherent lack of legal certainty (subjectivity) and regards the decision to declare the state of the exception as having a primarily political character.[38] He argues that the 'sovereign is he who decides on the exception; whether there is an extreme emergency as well as what must be done to eliminate it'.[39] The sovereign, Schmitt maintains, is not limited by the existing legal order and its norms.[40] Schmitt contends that liberal constitutionalism is incapable of dealing with crises that call for rapid action, and argues for unlimited powers for responding to situations that threaten the life of the nation.[41]

All in all, the contemporary debate on the design and exercise of emergency powers is shaped by the thought of Machiavelli, Locke, Madison and Schmitt.[42] Within that debate, the key issues concern, on the one hand, the sources and scope of emergency powers, and, on the other, the nature of the constitutional and institutional constraints upon them.

In the 21st century, the issue of emergency powers has taken on major relevance due to the rising incidence of terrorism, economic crises and public health challenges, all of which could easily overwhelm ordinary settings and infrastructures.[43] The attacks of 11 September 2001 were especially significant in shaping the debate on the use of emergency powers at

32 Ibid.

33 Zuckert and Valenzuela (n 7).

34 Ibid.

35 Ibid.

36 Ibid.

37 Gross and N´ı Aolain (n 9) 162–166.

38 Ibid.

39 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab (trans.), University of Chicago Press 2005) 5–7.

40 Ibid; Gross and N´ı Aolain (n 9) 162–166.

41 Ibid; Marc de Wilde, 'Silencing the Laws to Save the Fatherland: Rousseau's Theory of Dictatorship between Bodin and Schmitt' (2019) 45:8 History of European Ideas (2019) 1107; Rawin Leelapatana, 'The Kelsen-Schmitt Debate and the Use of Emergency Powers in Political Crises in Thailand' (Dissertation, University of Bristol 2018) 1–42; John E Finn, Constitutions in Crisis: Political Violence and the Rule of law (Oxford University Press 1991) 149–151.

42 Ferejohn and Pasquino (n 5) 211–212.

43 Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112:101 Yale Law Journal 1014; Anna Khakee, 'Securing Democracy? A Comparative Analysis of Emergency Powers in Europe' (Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper No. 30 2019) 1, 1.

national and international levels.[44] Before then, discussion of emergency powers had been relatively neglected,[45] with the subject attracting little attention in legal scholarship. As Gross and Niaolain note, it 'lurked in a dark corner at the edge of the legal universe'.[46] Globally, it was also a marginal area of constitutional law.[47]

Although 9/11 revived scholarly interest in the theoretical and philosophical aspects of emergency powers,[48] appealing to emergency powers to deal with crises is not a new phenomenon – for instance, these powers have been used in Africa since the colonial period.[49] In the past two decades, emergency powers nevertheless have been employed in many emerging and established democracies to handle crises and disasters.[50] The COVID-19 pandemic has only made the recourse to emergency powers in times of crisis more apparent than usual, given that numerous countries worldwide declared COVID-19-related states of emergency in order to take extraordinary measures for protecting the health and well-being of their populations.[51]

However, emergency power is a double-edged sword that can be wielded in pursuit of entirely opposing aims. On the one side, it is essential for dealing with crises quickly and thereby maintaining or restoring democratic and constitutional order; it enables a government to respond to crises by setting aside various institutional checks and balances in abnormal situations that demand swift, decisive action.[52] On the other side of the sword, concerns arise about potential abuse of emergency powers. For instance, a government may declare a state of emergency to keep itself in power, then suspend or abrogate constitutional standards and in effect rule by decree for an undefined period, thus making the 'exception a rule'.[53] This permanent emergency renders constitutional norms invalid by making them permanently ineffective.[54]

Abuses of emergency powers also raise concerns about human rights, the rule of law, and democracy.[55] The government uses the emergency as a constitutional pretence under which to exercise unchecked powers that suppress liberties and rights and to establish or consolidate an authoritarian regime.[56] The government, in other words, may invoke an emergency

44 Ibid; see also Gross and N´ıAolain (n 9) 1–3.

45 Ibid.

46 Ibid.

47 András Jakab, 'German Constitutional Law and Doctrine on State of Emergency: Paradigms and Dilemmas of a Traditional (Continental) Discourse' (2005) 7:5 German Law Journal 454.

48 Gross, 'Chaos and Rules' (n 43); Gross and N´ıAolain (n 9).

49 John Hatchard, 'States of Siege/Emergency in Africa' (1993) 37 Journal of African Law 104, 104–108; John Hatchard, Muna Ndulo and Peter Slinn, Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern And Southern African Perspective (Cambridge University Press 2004) 276–279.

50 Rooney (n 10); Anna Lührmann and Bryan Rooney, 'Autocratization by Decree: States of Emergency and Democratic Decline' (V-Dem Working Papers, April 2020) 1.

51 Magnus Lundgren, Mark Klamberg and Julia Dahlqvist, 'Emergency Powers in Response to COVID-19: Policy Diffusion, Democracy, and Preparedness' (2020) <https://bit.ly/3sB8mAg> accessed on 4 November 2020.

52 Fombad 'Cameroon's Emergency Powers' (n 17).

53 Alan Greene, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of (Hart Publishing 2018) 65–98; Marc de Wilde, 'The State of Emergency in the Weimar Republic Legal Disputes over Article 48 of the Weimar Constitution' (2010) 78 Legal History Review 135.

54 Ibid. For instance, in Zambia a state of emergency declared in 1993 lasted 27 years. States of emergency in Egypt have been in force for 40 years.

55 Domrin (n 12) 26–30; Kim Lane Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6:5 Journal of Constitutional Law 1001.

56 Ibid; Luke Cooper and Guy Aitchison, 'The Danger Ahead: Covid-19, Authoritarianism and Democracy' (LSE Conflict and Civil Society Research Unit, 2020).

improperly to circumvent democratic accountability, human rights standards and the rule of law.[57] Again, the power can be exploited to the extent of rejecting a democratic constitution and then enforcing an authoritarian regime.[58] Emergency powers can also be misused to target political opponents and thereby tilt the playing field in favour of incumbents.[59]

As empirical evidence shows, states of emergency can have pernicious consequences for the future of democracy at national and global level. The world has witnessed many examples of abusive states of emergency that served as a 'smokescreen for repressive governmental policies'[60] and normalised arbitrary rule, police repression and the violation of human rights.[61] As Scott Sheeran observes, 'serious violations of human rights often accompany states of emergency'.[62] Governments use states of emergency as an excuse to deny the application of basic constitutional standards and to take derogating measures which are excessive and in violation of international human rights regimes.[63] Additionally, they employ emergency declarations to justify actions that set aside democratic standards such as holding free, fair and periodic elections.[64] In this regard, Anna Jabauri notes that states of emergency pave the way to authoritarianism.[65]

The misuse of emergency powers has also been evident during the COVID-19 pandemic. Political leaders passed legislation and decrees that expanded their power to impose invasive surveillance, close national courts, take over private businesses, crack down on dissent, suspend constitutions, postpone elections, and deploy the military and deprive people of the right to life.[66] Fionnuala Ni Aolain, the United Nations Special Rapporteur on counterterrorism and human rights warned that 'we could have a parallel epidemic of authoritarian and repressive measures following close if not on the heels of a health epidemic'.[67]

57 Anna Luhrmann and Bryan Rooney, 'When Democracy Has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization' (V-Dem Institute 2020).

58 Ibid; see also Stephen Ellmann, 'Constitution for All Seasons: Providing against Emergencies in a Post-Apartheid Constitution' (1989–1990) 21 Colum. Hum. Rts. L. Rev. 163, 168–171: Dormin (n 12) 28–30.

59 Ibid; Scott P Sheeran, 'Reconceptualising States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics' (2013) 34 Mich. J. Int'l L. 491.

60 Domrin (n 12) 28–39; Andrej Zwitter, 'The Arab Uprising; State of Emergency and Constitutional Reform' (2014) ASPJ Africa & Francophonie 49; Amnesty International, Policing the Pandemic: Human Rights Violations in the Enforcement of COVID-19 Measures in Europe (Amnesty International 2020, EUR 01/2511/2020).

61 Ibid.

62 Sheeran (n 59). The same idea was reflected at the beginning of the 1990s: Jaime Oraá observed that 'in the last decades the gravest violations of fundamental human rights have occurred in the context of states of emergency'. See Domrin (n 12) 30: Jaime Oraá, Human Rights in States of Emergency in International Law (Oxford Press 1992) Review by: Robert McCorquodale, 52:1 Cambridge Law Journal (1993) 163, 163–164.

63 Hatchard, Ndulo and Slinn (n 49) 279–303; Grossman (n 17); Lili Bayer, '13 Countries "Deeply Concerned" over Rule of Law' (Politico, 1 April 2020) <https://www.politico.eu/article/viktor-orban-hungary-13-countries-deeply-concerned-over-rule-of-law/> accessed on 4 November 2020; Yoav Dotan, 'Continuous Judicial Review in Coronavirus Times' (The Regulatory Review, 11 May 2020) <https://www.theregreview.org/2020/05/11/dotan-continuous-judicial-review-coronavirus-times/> accessed on 4 November 2020.

64 Ibid.

65 Ana Jabauri, 'State of Emergency: A Shortcut to Authoritarianism' (2020) 1 Journal of Constitutional Law Special Edition 121.

66 International IDEA, The Impact of the COVID-19 Crisis on Constitutionalism and the Rule of Law in Anglophone Countries of Central and West Africa (Analytical Report, Webinar 28 May 2020); International IDEA, The Impact of the COVID-19 Crisis on Constitutionalism and the Rule of Law in Northern African Countries (Analytical Report, Webinar 30 June 2020); Selam Gebrekidan, 'For Autocrats and Others, Coronavirus is a Chance to Grab Even More Power' (New York Times, 14 April 2020) <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html> accessed on 4 November 2020.

67 Gebrekidan (n66).

Recent studies show, furthermore, that there is a link between states of emergency and a decline in the democratic quality of regimes. Anna Lührmann and Bryan Rooney found that democracies are 75 per cent more likely to erode under a state of emergency,[68] and concluded that the use of emergency powers substantially increases the likelihood of autocratisation.[69]

The abuses and executive overreach noted above are the main problems posed by emergency powers; what is more, as Pozen and Scheppele demonstrate, the COVID-19 crisis also brought to light dramatic examples of executive underreach, which is a new and less-discussed problem.[70] Overall, the crux of the present-day debate on emergency powers is the question of how to allow government sufficient powers to address crises while at the same time limiting and controlling its actions so as to check abuses of emergency powers.[71] As John Finn remarks, the real problem posed by emergency powers is 'not so much to curtail the use as to limit the abuse of those powers'.[72]

In this regard, various models have been proposed and adopted. For instance, as mentioned, Carl Schmitt, one of the classical theoreticians of the field, advocated for unbounded emergency powers.[73] Oren Gross likewise argues in favour of extra-constitutional emergency powers for dealing with emergency situations. However, unlike Schmitt, Gross proposes an ex post public ratification of extra-legal actions following a government's confession to the public of the extra-legal nature of the measures taken.[74] Bruce Ackerman also questions existing emergency provisions in constitutions, and proposes a bounded emergency power through a cascade of supermajorities, minority control of information in the legislature, differential treatment of emergency situations, and judicial scrutiny.[75] Tom Ginsburg and Mila Versteeg, in recent work on COVID-19, defend bounded emergency powers, with their findings supporting a Madisonian vision of emergency governance that embodies institutional checks and balances during emergencies.[76]

As the literature on emergency powers demonstrates, the main debate is between those who believe emergencies can be dealt with only outside the constitution (that is, through extra-constitutional power) and those who think responses to emergencies should be constrained by law as far possible (that is, through constitutional or legislative power). Further points of debate concern the nature of limitations and forms of institutional control that should be applied to emergency powers. These debates, however, are not merely theoretical, since the issues surrounding whether such powers are to be conceived of as extra-constitutional or as rule-bound are reflected in national constitutions.[77] As a result, national constitutions vary in regard to the legal basis, scope, limitations and consequences of emergency powers for human rights and the distribution of powers.[78]

68 Lührmann and Rooney (n 50).

69 Ibid.

70 David E Pozen and Kim Lane Scheppele, 'Executive Underreach in Pandemics and Otherwise' (2020) 114 Am.J.Int'l L. (forthcoming October 2020) 1.

71 Gross and N´ı Aolain (n 9) 1–10.

72 Finn (n 41) 28.

73 Schmitt, Political Theology (n 39) 6–7; Zuckert and Valenzuela (n 7) 76–78; Gross and N´ı Aolain (n 9) 164–166.

74 Gross and N´ı Aolain (n 9) 110–169.

75 Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029.

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

77 Anna Khakee (n 43) 18–26; Ergun Özbudun and Mehmet Turhan, 'Emergency Powers' (European Commission for Democracy through Law (Venice Commission,) Strasbourg 1995) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD (1995) 012-e> accessed on 10 October 2020.

78 Ibid.

2. Locating the issues in the Ethiopian context

The oldest state in sub-Saharan Africa, Ethiopia is situated in the Horn of Africa and bordered by Sudan in the west, Eritrea in the north and north-east, Kenya in the south, Somalia in the south-east, and Djibouti in the east. Unlike other African countries, Ethiopia was not colonised and maintained its independence, apart from a short period of Italian occupation from 1936–1941.[79] It is home to 80-plus ethnic groups, and has experienced political turmoil as well as civil and external war; among the factors underlying this history are the country's state-formation and nation-building process, unmanaged ethnic divisions, contending and rival nationalisms, underdevelopment and geopolitics.[80] Insurgencies are hence a key feature of Ethiopian politics: the centre has been always challenged by powerful centrifugal forces posing the threat of secession or autonomy and occasionally succeeding in defeating it.[81] In the past, these forces were represented by the great provincial lords who sought to rule their provinces with a minimum of imperial interference.[82] In modern history, they have been represented by ethnically-based liberation fronts and insurgents that mobilised ethnic militias or elites for self-rule and, sometimes, for secession.[83]

Ethiopia was ruled by successive emperors until 1974, at which point the last emperor, Haile Selassie I, was toppled by the military intervention that followed several months of popular uprising and the country lived under military rule until 1991.[84] The Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of ethnic-based opposition groups dominated by the Tigray Peoples Liberation Front (TPLF), staged a long, bloody battle for 17 years and eventually overthrew the military in May 1991.[85] The EPRDF established a transitional government with an interim constitution (Transitional Charter) and embarked on

79 Bahru Zewde, A History of Modern Ethiopia 1855–1991 (2nd ed Addis Ababa University Press 2002) 150–160.

80 John Markakis, Ethiopia: The Last Two Frontiers (Easter Africa Serious 2011); Semir Yusuf, 'Constitutional Design Options for Ethiopia Managing Ethnic Divisions' (Institute for Security Studies, Monograph 204, September 2020).

81 John Markakis and Asmelash Beyene, 'Representative Institutions in Ethiopia' (1967) 5:2 Journal of Modern African Studies 193, 201.

82 Ibid.

83 The Tigray Peoples Liberation Front (TPLF), Oromo Liberation Front (OLF), Ogaden National Liberation Front (ONLF) and Eritrean People's Liberation Front (EPLF) represent typical centrifugal forces and insurgents in Ethiopia. The EPLF achieved the secession claim of Eritrea after 30 years of war, while the TPLF secured not only self-rule but also control of Ethiopian politics for 25 years (1991–2018) after 17 years of civil war. The ONLF and OLF waged an armed struggle for decades on the basis of self-determination, and since 2018 they agreed to a peaceful political competition by denouncing their insurgency. See Gudina, Merera, 'Party Politics, Political Polarization and the Future of Ethiopian Democracy' (2007) International Conference on African Development Archives 1; John Young, Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975–1991 (Cambridge University Press 1997) 1–15; Merera Gudina, 'The Ethiopian State and the Future of the Oromo: The Struggle for "Self-Rule" and "Shared-Rule"' (2008) 15:1 Journal of Oromo Studies 113; Tsenay Serequeberhan, The Eritrean People's Liberation Front: A Case Study in the Rhetoric and Practice of African Liberation (Trotter Institute 1989) 23–29.

84 Zewde (n 79) 1–9, 256–268; Aregawi Berhe, A Political History of the Tigray People's Liberation Front (1975–1991): Revolt, Ideology and Mobilization in Ethiopia (Amsterdam University 2008) 40–44. The popular uprising against the regime attained its peak in February 1974 in most of the urban areas, and a group of junior officers in the military sided with the social uprising. The civilian groups and the military allied each other to strengthen their opposition against the regime.

85 Ibid.

a 'controlled process of democratic transition'.[86] As a result, the current Federal Democratic Republic of Ethiopia (FDRE) Constitution was ratified in 1994 and took effect in 1995. This Constitution reorganised the country as a federation and introduced a federal state structure based largely on ethnicity.[87] The federation consists of 11 member states, commonly known as national regional states, and two municipal districts (the capital city, Addis Ababa, and a further city, Dire Dawa).[88]

The EPRDF controlled the government from the 1990s until its successor, the Prosperity Party (PP), was formed in December 2019 through a merger of three of the four ethnically-based parties in the EPRDF coalition.[89] In the 5th national elections held in 2015, the EPRDF and its affiliated parties won all 547 seats in the House of People's Representatives (HoPR), thus securing power for a fifth consecutive five-year term.[90] However, following years of public protests that broke out in 2015, the then Prime Minister, Hailemariam Desalegn, resigned in February 2018 and in April 2018, the party and the legislature selected Abiy Ahmed Ali as a new Prime Minister to lead broad reforms.[91]

The Ethiopian legal regime envisages a rule-bound constitutional model of emergency powers. Accordingly, the FDRE Constitution and national regional state constitutions contain emergency provisions that allow the executive to declare a state of emergency to restore normality in times of crisis.[92] In terms of these provisions, external invasions, breakdowns of law and order that endanger the constitutional order, natural disasters and epidemics are basic grounds for declaring a state of emergency.[93] Regional states have limited power and may declare states of emergency only in case of natural disasters or epidemics.[94] The framework provides, furthermore, that the breakdown of law and order or the threat must be one that cannot be controlled by the regular law enforcement agencies and personnel.[95] In addition, Ethiopia has ratified several international and regional human rights instruments, including the International Convent on Civil and Political Rights (ICCPR), which under the Constitution are made an integral part of the national legal system.[96]

86 Alemante G. Selassie, 'Ethiopia: Problems and Prospects for Democracy' (1992) 1 Wm. & Mary Bill Rts. J. 205

87 Proclamation No. 1/1995, The Federal Democratic Republic of Ethiopia Constitution, Federal Negarit Gazeta, 1st Year, No. 1, Addis Ababa, 8 December 1994 (hereinafter FDRE Constitution), art 1, 8, & 39(5)

88 Ibid, art 47. The constituent units of the Ethiopian federation are the State of Tigray; the State of Afar; the State of Amhara; the State of Oromia; the State of Somalia; the State of Benshangul-Gumuz; the State of the Southern Nations, Nationalities and Peoples; the State of the Gambela Peoples; the State of the Harari People; and the newly created State of Sidama and South-western Ethiopia regional state

89 Jone Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath' (2006) 105 (419) African Affairs 173; Leonardo R Arriola and Terrence Lyons, 'Ethiopia's 100% Elections' (2016) 27:1 Journal of Democracy 76; Melaku Habtweld, 'Why Prosperity Party is Needed' (Ethiopian Insight, 24 December 2019). The Oromo Democratic Party (ODP), Amhara Democratic Party (ADP) and Southern Ethiopian People's Democratic Organization (SEPDO) merged to form the new Prosperity Party, while the TPLF refused to join it.

90 Arriola (n 89).

91 Awol Allo, 'Protests, Terrorism, and Development: On Ethiopia's Perpetual State of Emergency' (2017) 19 Yale Hum. Rts. & Dev. L.J. 133, 134–140.

92 FDRE Constitution, Proclamation, arts 77(10) and 93; Revised Constitution of Tigray National Regional State (2001), art 96; Revised Amhara National Regional State Constitution (2001), art 114; Revised Constitution of the Southern Nations, Nationalities and Peoples Regional State Constitution (2001), art 121; Revised Constitution of Benshangul-Gumuz National Regional State (2001), art 115; Revised Constitution of Gambela Peoples' National Regional State (2001), art 117; Revised Constitution of Oromia National Regional State (2001), art 108; Revised Constitution of Somali National Regional State (2001), art 105; Revised Constitution of Harari National Regional State (2005), art 76; and Revised Constitution of Afar National Regional State (2001), art 106.

93 FDRE Constitution, art 93(1)(a).

94 Ibid, art 93(1)(b).

95 Ibid, art 93(1)(a).

96 Ibid, arts 9 and 13(2).

Emergency provisions were invoked on the grounds of constitutional disorder and public health pandemics in 2005, 2016–2017, 2018 and 2020. In the case of COVID-19, Tigray National Regional State, unlike other units of the federation, declared a region-wide state of emergency on 25 March 2020 to prevent the spread of the pandemic; the federal government also exercised special powers through legislative emergency powers by invoking the Federal Intervention Proclamation.[97] More widely, Ethiopia's political history has been marked by bloody power struggles in which victorious revolutionary groups come to power by toppling a repressive regime but soon become as repressive as their predecessors.[98] Given that the new regimes use emergency powers to target political competitors and consolidate their authoritarian positions,[99] the government's exercise of emergency powers has been contested by opposition parties since its first invocation in 2005.

In view of these trends, Ethiopia remains at risk of political instability even after having seen successive revolutions and reforms since 1974. The 1974 revolution that overthrew the imperial regime promised a republic but governed for years through permanent emergency rules.[100] Similarly, while the 1991 revolution that toppled the socialist and unitary regime promised a federal republic under the banner of the 1995 FDRE Constitution, the ruling EPRDF frequently invoked emergency powers to deal with political instability and, in so doing, often targeted opposition political parties, journalists and human rights activists.[101] The recent reforms of April 2018 that brought Prime Minister Abiy Ahmed to power do not change the equation of political instability either.

According to the 2020 Global Peace Index (GPI), which ranks 163 independent states and territories according to their level of peacefulness measured across three domains (the level of societal safety and security; the extent of ongoing domestic and international conflict; and the degree of militarisation), Ethiopia is one of the five countries with the lowest score.[102] Following the rise to power of Prime Minister Abiy Ahmed, a winner of the Nobel Peace Prize, deadly ethnic conflict and civil unrest have become common in parts of the country, variously due to disputes over the postponement of elections during the COVID-19 pandemic, the contested imprisonment of opposition political figures, demands for political and constitutional change, and a stand-off between the federal government and Tigray National Regional State which at the time of this writing had led to a military confrontation between them. As a result, the federal government declared a new state of emergency, geographically limited to this region, for six months.[103] National and international organisations reported gross human rights violations and abuses, including mass killings, indiscriminate attacks against civilians, looting, abductions, and sexual violence against women.[104]

97 Shishay Abreha, 'State of Exception under the FDRE Constitution' (LLM thesis, Addis Ababa University 2018) 20–21.

98 Pietro S Toggia, 'The State of Emergency Police and Carceral Regimes in Modern Ethiopia' (2008) 24:2 Journal of Developing Societies 107.

99 Ibid.

100 Ibid.

101 See, for instance, Ethiopian Human Rights Project (EHRP), 'The State of Emergency (2016–2017): Its Cause and Impact' (January 2018); Amnesty International, Ethiopia: Draconian State of Emergency Measures (Public Statement 2017).

102 Institute for Economics & Peace, Global Peace Index 2020: Measuring Peace in a Complex World (Sydney 2020) <https://www.visionofhumanity.org/wp content/uploads/2020/10/GPI_2020_web.pdf.> accessed on 12 October 2020.

103 Proclamation No. 4/2020, State of Emergency Proclamation for the Protection of the Constitution and Constitutional Order No. 4/2020, 27th Year, No. 1, Addis Ababa, 9 November 2020.

104 Ethiopia Human Rights Commission (EHRC), Tigray: Maikadra Massacre of Civilians is a Crime of Atrocity (EHRC Press Statement, 24 November 2020); Cara Anna, 'UN: Ethiopia's Conflict has "Appalling" Impact on Civilians' (AP, 10 December 2020) <https://apnews.com/article/international-news-coronavirus-pandemic-ethiopia-massacres-united-nations-e6f32b038f6d6a27b6a3be59a9d3343f> accessed on 15 January 2021.

Ethiopian political history and culture thus make the subject of emergency powers acutely relevant, since the government often uses them to deal with the frequent crises that threaten either the life of the nation or the power of incumbents; moreover, the country has also experienced abuses of emergency powers, with declarations of emergencies accompanied by human rights violations and repression. The state of emergency declared to combat COVID-19, for example, was abused to violate human rights, including non-derogable rights such as the right to life. Arbitrary arrests and police brutality were observed during the enforcement of COVID-19 response measures.[105] In addition, the national elections scheduled for 2020 were postponed on the basis of a constitutional interpretation that was contested among political parties,[106] with the incumbent executive using the postponement as an opportunity to consolidate its power and thereby distort the political playing field in its favour.

If emergency powers are a double-edged sword, Ethiopia has felt both sides of it – emergency powers as a safety valve that preserves the constitutional order, and emergency powers as an instrument of repression. In this regard, the FDRE Constitution grants some ex ante powers enabling the legislature, the HoPR, to exercise control over the executive during states of emergency.[107] It gives ex post powers of oversight as well to the State of Emergency Inquiry Board (Inquiry Board) which the HoPR established when approving the state-of-emergency declaration.[108] Recently, the Ethiopian Human Rights Commission (EHRC) was also vested with a power to monitor the human rights situation during a state of emergency.[109] The emergency framework marginalises the role of the judiciary in states of emergency, however, and, considered overall, these and other safeguards against abuses of emergency powers are either insufficient or ineffective.

Engagement with the institutional and practical problems associated with emergency powers in Ethiopia is thus imperative. It is against this backdrop that the present study examines the legal framework and practice of emergency powers to understand their implications for human rights, rule of law and constitutionalism. The study raises a number of questions. First, how has the legal framework for states of emergency been designed? Secondly, how is emergency power exercised in Ethiopia? Thirdly, what constitutional oversight mechanisms are available to control abusive emergency powers? Finally, what are the implications of abusive emergency powers for human rights and the rule of law? This book endeavours to examine these and related questions in detail and consider how the answers impact on the rule of law and the protection of human rights in Ethiopia.

105 Yared Tsegaye, 'Democracy in Action Amid Authoritarian Reaction (Ethiopian Insight, 23 June 2020) <https://www.ethiopia-insight.com/2020/06/23/democracy-in-action-amid-authoritarian-reaction/> accessed on 23 October 2020.

106 FDRE House of Federation Decision, House of Federation 5th Year 2nd Regular Session, 10 June 2020.

107 FDRE Constitution, art 93.

108 FDRE Constitution, art 93(6).

109 Art 6(2) of Proclamation No. 1224/2020, Ethiopian Human Rights Commission Establishment (Amendment), Federal Negarit Gazeta, 26th Year, No. 75, Addis Ababa, 18 August 2020.

3. Organisation of the book

This book has five chapters, including this first chapter. The basis of Chapter 2 is that present-day understandings and exercise of emergency powers in Ethiopia should be analysed by taking into account the philosophical and historical development of emergency powers. As such, the chapter examines how these philosophical and historical antecedents shaped the emergency provisions of modern constitutions; it goes on to scrutinise the basic structures and contents of emergency clauses and, generally, deals with the theoretical and conceptual frameworks of emergency powers.

Chapter 3 examines the legal regimes of emergency powers in Ethiopia. Since 1931, when its first written constitution was introduced, the country has had four further such written constitutions: the 1955 revised Constitution, the 1974 draft Constitution, the 1987 PDRE Constitution, the interim 1991 Transitional Charter, and the FDRE Constitution of 1995. These are all part of Ethiopian constitutional history and each, except for the Transitional Charter, explicitly incorporates emergency provisions. Since the constitutional history and culture of a country have an impact on the design, understanding and use of the extant emergency framework, this chapter examines the emergency provisions of these constitutions. The Ethiopian experience affords a unique a case study of emergency provisions, given that each constitution was drafted and implemented under different regimes (monarchical, socialist-military and semi-authoritarian) and different state structures (unitary and federal). Focusing on the 1995 FDRE Constitution and comparing it with the previous ones, this chapter discusses the patterns, structures and contents of constitutional emergency clauses in Ethiopia. The scope and limitations of emergency powers and the available safeguarding mechanisms against abusive emergency powers are also the concerns of the chapter.

Chapter 4 focuses on the practical exercise of emergency powers. Ethiopia has witnessed periodic states of emergency since the imperial regime, with the emergency clause of the current 1995 FDRE Constitution having been invoked five times between 2005 and 2020. All these emergencies were declared on the grounds of constitutional disorder and political instability, except for the one of April 2020, which was imposed in response to COVID-19. The chapter explains the chronology and political background of these emergency declarations, historical periods that were marked by police intervention and extensive use of repressive measures by security forces and law enforcement agencies. Mass arrests, torture and killings have been common since 2005; by the same token, accountability is cast into the shadows during states of emergency. This chapter thus explores the practices of controlling emergency powers in an attempt to identify the challenges of ensuring accountability. It shows how emergency powers give excessive and unconstrained leverage to the executive and thereby impair human rights protection and rule of law.

Throughout the book, the crux of the discussion is the FDRE Constitution and the extent to which its design constrains abusive invocation and exercise of emergency power. These insights are gathered together in the final chapter, which presents this study's conclusions and recommendations.

A note on usage: It was not until the end of the 18th century that the term 'dictatorship' came to be associated with tyranny and authoritarianism. In the early Roman Republic, the concepts of 'dictator' and 'dictatorship' denoted the power of government officials appointed to confront emergency situations. In this book the terms 'dictator' and 'dictatorship' are used in the sense they had under the Roman Republic; conversely, they should not be conflated with authoritarianism, tyranny or despotism, which are what they have come to signify in the contemporary era.

2

Conceptual and Theoretical Frameworks of Emergency Powers

1. Introduction

No country in the world is free from the occasional crises that threaten its existence. As history shows, it is common for governments to react immediately to threats that endanger the life of the nation by taking extraordinary measures.[110] For this reason, the legal frameworks of political orders usually provide for mechanisms to deal with these unusual situations through emergency powers. Today the institution of emergency powers is a near-universal feature of all legal systems,[111] one noticeable in all countries irrespective of their socio-political arrangements and levels of economic development. There is also little divergence in opinion among scholars and politicians about the importance of emergency powers.[112] As Charles Fombad notes, the exercise of emergency powers is a fact commonly observable in both democratic and undemocratic governments.[113] Every government, in short, needs to wield some emergency powers in times of crisis.

However, governments have abused emergency powers since the age of the Roman Republic, when Dictator Sulla and Caesar used their powers of office to destroy their opponents and transform the republic to their liking.[114] Governments have often violated fundamental human rights, democratic values and the rule of law under the guise of overcoming emergencies and restoring order. How to allow governments to act responsibly, that is, with sufficient powers to overcome national crisis, but without undermining democratic values and liberties, is an old but pertinent question. There are numerous contentious issues regarding emergency powers. These include determining the sources of emergency powers; the nature of what constitutes sound emergency powers; the design of normatively sound emergency powers; the means of constraining abuses of emergency powers; and the

110 Domrin (n 12) 1.

111 Christian Bjørnskov and Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 I•CON 16 (2018) 101.

112 Ibid.

113 Fombad, 'Cameroon's Emergency Powers' (n 17) 1.

114 Marc de Wilde, 'Just Trust Us: A Short History of Emergency Powers and Constitutional Change' (2015) Comparative Legal History 1; Marc de Wilde, 'The Dictatorship and the Fall of the Roman Republic' (2013) 130 ZRG RA 1.

extent to which international human right norms regarding states of emergency affect the national design and exercise of emergency powers. Scholars and states have approached such questions in different ways.

This chapter explores these and related issues. The first section deals with the philosophical and historical origins of emergency powers. It highlights major points of convergence and divergence in the conceptualisation as well as institutional design of emergency powers during the Roman, medieval and modem periods. The second section looks at models of emergency powers. Given that scholars approach the questions above in different ways, there is no one-size-fits-all model of emergency powers; instead, there are varying perspectives on the sources, scope and limitations of emergency powers – it these perspectives that are the concerns of the second section. The third section discusses the structure and content of emergency clauses. It is descriptive as well as prescriptive, in the sense that it hints at the safer design of emergency powers that promote constitutional democracy while preventing dangers which threaten the life of the nation. It is against this background that the situation in Ethiopia is analysed.

2. The historical and philosophical development of emergency powers

The way in which emergency powers are conceptualised and institutionalised has evolved since the days of the Roman Republic. Over the centuries, political thinkers have engaged with the problem of emergency powers, in the process articulating ideas that have been foundational in the development of a variety of models of emergency powers.

2.1. Emergency powers in the Roman era

Emergency powers were employed for the first time in the Roman Republic. Romans appointed a special governmental official, the dictator, when the Republic was threatened by war or civil strife.[115] In the Republic, there was a separation of powers between the senate, the magistrates, and the people, who were represented by elected officials called tribunes. Usually, these institutions checked each other in the process of decision-making.[116] The senate, composed of wealthy and high-ranking individuals, had an advisory role; magistrates in turn were free to accept or reject its advice. However, over time the opinions of the senate become de facto binding, with the result that it became the chief governing force of the Republic.[117]

115 Ibid; Levinsont and Balkin (n 18).

116 Ibid.

117 Ibid; De Wilde, 'Why Dictatorial Authority Did Good' (n 18). See also Catherine H Zuckert, Machiavelli's Politics (University of Chicago Press, 2017) 130–131, 258–259, 403–404.

As for magistrates, they had administrative powers, and the two annually elected magistrates, called consuls, were the supreme magistrates and vested with military powers (imperium). They were elected for a year-long term of office and their primary task was political leadership and command of the army.[118] The two consuls, who closely resembled the modern-day executive, possessed equal powers. They were appointed at the same time and each had a veto over the other's commands.[119] In effect, the actions of the one magistrate could be hindered by the other, thereby checking abuses of powers.[120] The citizens of Rome also had the right to appeal to the popular assemblies.

While these checks and balances made decision-making processes inclusive, consultative and appealable,[121] the effect of 'consular collegiality and veto over each other's commands' could render the office impotent and leave it incapable of making swift decisions in times of crisis. The Romans duly invented the 'office of the dictator' for responding expeditiously to a crisis that endangered the life of the Republic.[122] He was appointed by the senate for a period of no more than six months, for the purpose only for discharging special and specified functions, and was expected to resign from office when his task was completed.[123]

The dictator was vested with far-reaching powers and authorised to take all measures he deemed necessary to protect the Republic. He was thus allowed to issue emergency decrees, undertake military campaigns, and even prosecute and sentence Roman citizens to death without appeal.[124] Unlike the consuls, the dictator did not have a colleague of similar rank and his decisions could not be vetoed; moreover, his decisions were not subject to appeal and consultation,[125] as traditional checks and balances were suspended during dire emergencies.[126]

The powers of the dictator were not unlimited, however. There were significant legal restrictions and informal restraints on his power.[127] The most important was the temporary character of the office. As a result, a dictator handed over his power once the peril that triggered his appointment had ended. The Roman traditions held that it was the dictator's duty to give up his powers as soon as possible, in days or weeks rather than months.[128] Moreover, dictators were appointed for a maximum term of six months, after which they were required to resign.[129] Another constraint on the dictator's power was that he remained financially dependent on the senate, which had to approve every withdrawal from the public treasury.[130] Furthermore, he was not allowed to start a new offensive war, as it was the prerogative of the popular assemblies to decide on war and peace.[131]

118 Alissa M Ardito, Machiavelli and the Modern State: The Prince, the Discourses on Livy, and the Extended Territorial Republic (Cambridge University Press 2015) 149–153.

119 Ibid.

120 Ibid.

121 Ibid; Greene (n 53) 3–9; Levinsont and Balkin (n 18).

122 De Wilde, 'Why Dictatorial Authority Did Good' (n 18); D Cohen, 'The Origin of Roman Dictatorship' 10 (1957) 300.

123 Ibid.

124 Ibid.

125 Ibid.

126 Ibid.

127 Gross and N´ı Aolain (n 9) 25–26; Ardito (n 118); De Wilde, 'Why Dictatorial Authority Did Good' (n 18); 89–92; Greene (n 53) 7–10.

128 Ibid.

129 Ibid.

130 Ibid.

131 De Wilde, 'Just Trust Us' (n 114); Levinsont and Balkin (n 18).

The dictator's moral virtues and interest in public welfare were additional constraints on his office.[132] This limitation is illustrated by the story of Lucius Quinctius Cincinnatus, a famous Roman statesman whom the senate called from his plough to become dictator and rescue the country from invasion.[133] After saving the Republic within 16 days, he promptly resigned his dictatorship and returned to his plough. Cincinnatus was viewed as a model of republican virtue both for his willingness to abandon his family and property to serve the Republic and his decision to give up absolute power and return to life as a farmer.[134]

As Marc de Wilde notes, the story of Cincinnatus is instructive as to the moral qualities that were required of a dictator. The latter was expected to be virtuous, trustworthy, and committed to the safety of Rome and preservation of its constitution.[135] This implied, among other things, that the dictator did not pursue personal wealth or glory; rather, he strove to defend the public good and subordinated his own interests to it. He also had to show lenience to the enemy and restraint in the exercise of his powers.[136] Cincinnatus is said to have spared the lives of his captives, who were humiliated by being sent under the yoke and thereafter released uninjured.[137] He thus exemplified such virtues of a dictator as fidelity to the republican constitution, commitment to the public good, and willingness to protect those dependent on his power.[138] These virtues were part of the fides publica, or public trust, which was considered a general standard of conduct for all public officials and those endowed with state powers.[139] De Wilde observes that the fides publica constrained the emergency powers of the dictator for a century.[140]

However, in the first century B.C., two dictators violated the requirements of fides publica. The first to abuse emergency powers in the history of Roman Republic was Sulla.[141] He was, in the first place, a self-appointed dictator, and also assumed unprecedented authority 'to write the laws and to restore a constitution to the state'; although Sulla was granted these powers for an indefinite term, he abdicated voluntarily after a year, thereby emphasising his fidelity to the republican constitution,[142] but he nevertheless set a bad precedent that showed how a more authoritarian government could be established within the constraints of the republican constitution by manipulating emergency powers.[143]

The second abuse of emergency powers was by Caesar, who proclaimed himself a dictator for a one-year term, thus violating the traditional six-months' restriction and following Sulla's example.[144] Two years later, he acquired another dictatorship for an unprecedented 10 years, and then, in 44 BC, weeks before being stabbed to death, was designated as dictator for life.[145] Caesar distorted the temporary emergency powers of the dictatorship into a

132 Ibid.

133 Ibid.

134 Ibid; see also Greene (n 53).

135 De Wilde, 'Just Trust Us' (n 114); De Wilde, 'Why Dictatorial Authority Did Good' (n 18).

136 Ibid.

137 Ibid.

138 Ibid.

139 Ibid.

140 Until the second century BC, more than 90 dictatorships were appointed, none of whom is known to have abused his emergency powers. De Wilde argues that this was due to the fides publica, which required the dictator, among other things, to respect the limited republican nature of his power.

141 De Wilde, 'The Dictatorship and the Fall (n 114); Kaius Tuori, 'Schmitt and the Sovereignty of Roman Dictators: From the Actualization of the Past to the Recycling of Symbols' (2015) 42:1 History of European Ideas 95; Levinsont and Balkin (n 18) 1799–1800.

142 Tuori (n 141); De Wilde, 'The Dictatorship and the Fall (n 114); Levinsont and Balkin (n18) 1799–1800.

143 Ibid.

144 Ibid.

145 De Wilde, 'The Dictatorship and the Fall (n 114).

form of permanent authority, which was contrary to the republican constitution.[146] De Weld notes that while the dictatorship and the normalisation of emergency powers contributed to the erosion of republican institutions and the emergence of a more authoritarian mode of government,[147] a fundamental factor in this process was the violation of the requirement of public trust. Since the power of the dictator was abused to overcome legal restrictions, it could be turned against the very constitution it was established to protect.[148]

2.2. Emergency powers in the medieval period

Medieval intellectuals, most of them canonists, approached the problems of their society with ideas formed in the earlier sophisticated civilisations of Greece and Rome.[149] The medieval period was also characterised by a fusion of religious and secular ideas and institutions. Thus, the canonist intellectuals mingled classical thought with their own Christian worldviews and brought the result to bear on the political experience of their own times.[150]

The same trend was evident in the case of emergency powers, which was an issue too during the medieval period. The medieval understanding of emergency powers was premised on the doctrine of necessity,[151] the main element of which was the principle that 'necessity has no law'. This originated in early-medieval theological beliefs that the rules of canon law were to be applied with a certain flexibility in cases of necessity. As such, church lawyers argued that the laws of the church did not apply in 'cases of supreme necessity'.[152]

The idea begun to be applied outside the ambit of cannon law to state authorities, which were allowed to derogate temporarily from customary and canon laws for reasons of supreme necessity.[153] More specifically, the canonists held that the use of emergency powers could be legal only if it were necessary to protect public safety and preserve the community. As a result, using emergency powers to advance private aims was considered as tyrannical and an illegal act.[154] From the 12th century onwards, secular lawyers followed the path of canonists, arguing that a king or emperor was temporarily exempted from his normal legal obligations in times of war or invasions.[155] Thus, the king was allowed to derogate from the laws to protect the public safety and preserve the realm.

In the second half of the 13th century, Thomas Aquinas developed a fully-fledged theory of emergency powers. Aquinas regards the state of necessity as '[a] legal space, in which those invested with emergency powers are temporarily allowed to derogate from human laws, but remain subject to divine and natural law'.[156] He defines human law as 'an ordinance of reason for the common good, made by him who has care of the community, and promulgated'.[157]

146 Ibid.

147 De Wilde, 'Just Trust Us' (n 114) 9.

148 Ibid.

149 Brian Tierney, Religion, Law, and the Growth of Constitutional Thought 1150–1650 (Cambridge University Press 1982) 11–13.

150 Ibid.

151 De Wilde, 'Just Trust Us' (n 114) 9–11.

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid.

156 Marc De Wilde, 'Emergency Powers and Constitutional Change in the Late Middle Ages' (2015) 83 Legal History Review 26.

157 Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law (Revised ed, Universal Law Publishing 2009) 25.

Aquinas incorporates the concept of reason in his definition of law and, consequently, human laws that are just and reasonable contribute to the preservation of the community.[158] In exceptional circumstances, however, those just laws designed for the preservation of the community may become obstacles to the community's survival.[159] Hence, in these exceptional cases that endanger the well-being of the community, authorities may derogate temporarily from the laws of man to protect the public safety and preserve the community.[160] In doing so, they do not act extra-legally, since they remain faithful to the laws of nature, which prescribe that the community must be preserved under any circumstances.[161]

Aquinas thus conceptualises emergency powers as entailing exceptions to human laws; however, the exercise of these powers is limited on the basis of natural law, which is the inclination to act according to reason and virtue, an inclination that includes the natural human instinct of self-preservation.[162] Therefore, the use of emergency powers can be justified only if it is necessary for preserving the community from existential threats. If such a necessity is lacking, there can be no derogation from the law, only its violation.[163] That is to say, if there is no existential threat, the claim of necessity rings hollows as excuse for tyranny, which threatens the community instead of protecting it.[164]

Unlike the Roman conception, the medieval conception of emergency powers was not rule-bound in the sense of being subject to known and predefined rules. This line of thinking contributed to the development of the contemporary principle of necessity in times of emergency.[165] In effect, it led to unlimited, absolute monarchs who used their emergency powers to strengthen their own authority. De Wilde argues that medieval kings vested with emergency powers by virtue of principle of necessity abused that power and produced permanent emergency.[166] Therefore, the limited and constitutional features of the Roman model of emergency power were undermined, with 'unlimited and unconstitutional dictatorship' coming to prevail.[167]

2.3. Modern thought: From Machiavelli to Oren Gross

Brian Tierney quotes the words of Figgis, who wrote that 'no subject illustrates more luminously the unity of history than the record of political ideas'.[168] The validity of Figgis's assertion is all too apparent with the subject of emergency powers, given that the Roman model and the medieval doctrine of necessity had a significant influence on modern constitutional thought regarding emergency powers.

158 Ibid, 23–26.
159 De Wilde, 'Emergency Powers and Constitutional Change (n 156).
160 Ibid.
161 Ibid.
162 Bodenheimer (n 157) 24–25.
163 De Wilde, 'Emergency Powers and Constitutional Change (n 156).
164 Ibid.
165 Guy Lurie, 'Medieval Emergencies and the Contemporary Debate' (2015) 1:1 Athens Journal of Law 53.
166 De Wilde, 'Emergency Powers and Constitutional Change (n 156).
167 Fombad, 'Cameroon 's Emergency Powers' (n 17) 65.
168 Tierney (n 149) 4.

2.3.1. Theory of dictatorship

Among modern political thinkers, Niccolo Machiavelli was the first to revive the Roman's constitutional traditions and develop a theory of constitutional dictatorship that deems emergency powers a necessary element of a well-functioning republic.[169] As Ferejohn and Pasquino note, Machiavelli linked the Roman model of dictatorship with the modern idea of constitutional emergency powers.[170] Machiavelli praised the institution of dictatorship as the main reason for the greatness of Rome. He argued that the Republic could not survive extraordinary dangers without recourse to the office of the dictator, which had the primary purpose of protecting the republic from threats.[171] Machiavelli asserted that 'those Republics which cannot in sudden crisis resort either to a dictator or to some similar authority will always be undone'.[172] He argued further:

> *As the ordinary institutions of a commonwealth work but slowly, no council and no magistrate having authority to act in everything alone, but in most matters one standing in need of the other, and time being required to reconcile their differences, the remedies which they provide are most dangerous when they have to be applied in cases which do not brook delay. For which reason, every republic ought to have some resource of this nature provided by its constitution.*[173]

Machiavelli acknowledges not only the significance of emergency powers, but also the need to prescribe rules in advance in the constitution.[174] The creation of the office of the dictator was crucial because it cured one of the basic flaws in how republics deal with crisis: since many people are involved in making decisions, republics proceed slowly.[175] The appointment of a dictator, who could bypass time-consuming procedures of consultation and punish without appeal, enabled the Romans to react quickly to urgent dangers.[176] Machiavelli also locates emergency powers within the framework of law and constitutionality inasmuch as he maintains that the dictator should be appointed, and enabled to act, in accordance with predetermined procedures.[177]

Machiavelli argues that republics devoid of such procedures in their legal framework are liable to collapse at two points.[178] First, the strict adherence to the law leads to inaction in the face of crisis, which indirectly allows the state to be conquered. The second point of failure is that breaking laws to secure the immediate survival of the republic leads to its ultimate demise as it undermines the legitimacy of the political order.[179] It sets a dangerous precedent: 'breaking the orders for the sake of the good, then later, under that coloring

169 Ferejohn and Pasquino (n 5) 213.
170 Ibid.
171 Ardito (n 118) 152.
172 Machiavelli (n 26) 124–126.
173 Ibid.
174 Levinsont and Balkin (n 18) 1800.
175 Machiavelli (n 26) 124–126.
176 Ibid.
177 Ibid.
178 Ibid.
179 Ibid.

[breaking them] for ill'.[180] Machiavelli argues strongly for the rule of law in times of crisis, stressing that constitutional designers can and should prepare for dictatorships through regular procedures.[181]

Machiavelli adheres to the traditional view that the dictator was given the discretion to make emergency decisions without prior approval and consultations.[182] On this point, he argues that 'power was indeed given the dictator to determine by himself what measures the exigency demanded; to do what he had to do without consultation; and to punish without appeal'.[183] However, the powers of the dictator were not absolute but balanced and controlled within the system. First, the dictator's power was constrained by the good virtues of the citizen who rejected actions contrary to the interests of the republic.[184] The second restriction was the limited term for which dictators were appointed. As noted, the dictator was not created for life but a fixed term of six months' tenure.[185] Thirdly, the grant of powers of the dictator was limited both in its goal and extent. Powers were exercised to respond to a specific danger, and the dictator had no authority to do anything to the prejudice of the republic, such as depriving the senate or the people of their privileges, subverting the ancient institutions of the city, or introducing new ones.[186]

Furthermore, Machiavelli recognises the need to neutralise the pernicious potential of concentrated power in one institution, and proposes a variety of ways to dilute it.[187] This could be accomplished by procedural rules regarding the appointment of the dictators. First, the powers of the dictator were contained within the constitution, thereby guided by predetermined rules. The dictator could neither declare an emergency nor extend his term.[188] The senate would decide when a dictator was required and instruct a consul to appoint a dictator; the procedure thus wisely separated the execution of emergency measures from the identification of emergency.[189] As Levinsont and Balkin remark, this prevented the dictator from attempting to extend his rule by re-characterising the situation to his advantage.[190] According to Machiavelli, the dictator does not threaten the political order because he is appointed and vested with power in accordance with public ordinances; conversely, the rise to power of a dictator out of public view and through an unconstitutional usurpation of power would harm the republic.[191] Machiavelli concludes that the limited time and authority of the dictator, along with uncorrupted citizens of Rome, made it impossible for him to abuse emergency powers.[192]

Many recent authors and scholars consider Machiavelli an advocate of legally constrained constitutional emergency powers. As Marc de Wilde observes, Machiavelli conferred authority on the dictator which was limited by law, public morality, and the constitution.[193] Rossiter also affirms that Machiavelli's rationale for constitutional dictatorship was essentially

180 Ibid.
181 Levinsont and Balkin (n 18) 1804–1805.
182 Ardito (n 118) 151.
183 Ibid.
184 De Wilde, 'Why Dictatorial Authority Did Good' (n 18).
185 Ibid.
186 Zukert (n 117) 158–159.
187 Ardito (n 118) 152.
188 Ibid.
189 Ibid.
190 Levinsont and Balkin (n 18).
191 Machiavelli (n 26) 126.
192 Ibid.
193 De Wilde, 'Why Dictatorial Authority Did Good' (n 18).

conservative inasmuch as the dictator had limited authority to end the crisis and restore normality; consequently, he could not alter the constitutional structure of the state in ways that could not be reversed with the restoration of normality.[194] It was not permissible for him to make exceptions the ruling order by establishing a more authoritarian form of government that would remain in place after the crisis had ceased, or by permanently abolishing the rights and liberties of the people.[195] Levinson and Balkin describe Machiavelli as 'perhaps the most important theorist of emergency powers in the West'.[196]

However, the power of the dictator to change the constitution is a matter of debate among contemporary scholars. While Rossiter and Lazar note that Machiavelli's dictator could not change the constitution which is put in danger by emergency situations, De Wilde re-reads Machiavelli differently and suggests that the limited power of the dictator did not preclude him from making constitutional changes. De Wilde maintains that, according to Machiavelli, the dictator could initiate legal reform as long as it was deemed important for protecting the constitution by making it more stable and effective.[197]

Machiavelli, as noted, is a strong proponent of the rule of law: he argues that constitutional designers can and should prepare for dictatorships through regular procedures.[198] He thus makes three main contributions to contemporary understanding of emergency powers. First, emergency powers must be exercised on the basis of predefined rules. Secondly, the powers of the dictator are limited on legal, political and moral grounds. Thirdly, abusive emergency powers have pernicious consequences for the health of the state. Finally, states must deal with emergency situations within the ambit of the rule of law.

2.3.2. Theory of prerogative

John Locke presented a theory of prerogative regarding emergency powers. In this context, prerogative is the 'power to act according to discretion for the public good, without the prescription of the law and sometimes even against it'.[199] Prerogative power, that is to say, enables the executive to act at its discretion either where the law is silent or where going against the direct letter of the law serves the public good. Locke regards this power as a necessity in situations where strict and rigid observation of the laws could lead to grave social harm.[200] As he argues,

In some governments the law-making power is not always in being and is usually too numerous, and so too slow for the dispatch requisite to execution, and because, also, it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way.[201]

194 Levinsont and Balkin (n 18).

195 Ibid.

196 Ibid.

197 De Wilde, 'Why Dictatorial Authority Did Good' (n 18) 88.

198 Levinsont and Balkin (n 18) 1804–1805.

199 John Locke, Two Treatises of Government (From the Works of John Locke, A New Edition, Corrected, London: Printed for Thomas Tegg, 1823) 176.

200 Gross and N´ı Aolain (n 9) 120.

201 Locke (n 199).

In these remarks, Locke sets out the reasons for conferring prerogative power on the executive. The first is the inability of the legislature to anticipate in advance and regulate by statute all that may be beneficial to society. The second reason is the slowness of the law-making process in responding adequately to the exigencies of the times. Accordingly, the executive may use its prerogative power when unexpected circumstances arise and rapid response is required, or when the legislature cannot respond with the necessary measures due to its size, because it is not in session, or owing to any other reasons.[202] Locke clearly recognises that extraordinary situations require something more than mere legalism, and allows for the executive to deal with emergencies by acting outside, and at times even against, the law.[203] The theory of prerogative thus entitles governments to take refuge in extra-legal or extra-constitutional measures when faced with emergency situations.

Nevertheless, Locke understood the danger posed by prerogative power. As Ardito Alissa points out, his notion of prerogative is remarkably open to abuse, since there are no temporal limits upon it and no safeguards to hem in the discretion of the executive, who decides himself when the situation calls for an exercise of his prerogative.[204] In view of this, Locke did not leave the exercise of prerogative power unchecked: the purpose of the exercise of the prerogative, namely promoting the public interest, is the limitation. Zuckert and Valenzuela note that the legislature has the right to reassert its supremacy and to judge whether the executive has indeed used its extra-constitutional power for the public good.[205] In the event of controversy between the executive and legislature as to the proper exercise of the prerogative power, the people are regarded as the final judge.[206] As a result, revolution or rebellion would be the available remedy for abuses of prerogative powers.[207] Locke, in sum, argued for prerogative power as an extra-constitutional and extra-legal means to deal with emergencies.

There have been mixed views about Locke's theory of prerogative. As Oren Gross suggests, Locke was usually sceptical about the ability of legal rules and institutions to deal with unforeseen exigencies, and so he regards the prerogative as a purely political power that does not emerge out of legal and constitutional structures.[208] Lazzar praises Locke as a pragmatic liberal who understood the deficiencies of liberalism during emergency situations.[209] However, Locke's theory of prerogative has been criticised for relying principally on the good faith of the executive and failing to allow for institutions to check the latter's misuse of its powers. Levinsont and Balkin contend that the resort to 'appeal to heaven' to overthrow the government is not an argument of constitutional design; rather, it is 'an invitation to meet one example of law breaking with another one.' [210] Notwithstanding these criticisms, the theory has been influential in shaping some of the debates on emergency powers. For instance, it influenced the founding fathers of the United States and their contemporaries,[211] as well as Oren Gross's model of emergency power as an extra-legal measure.[212]

202 Zuckert and Valenzuela (n 7) 78; Locke (n 199) 176; Gross and N´ı Aolain (n 9) 120.

203 Ibid.

204 Ardito (n 118) 153.

205 Zuckert and Valenzuela (n 7).

206 Gross and N´ı Aolain (n 9) 119. Jefferson and Oren gross can be mentioned in this regard.

207 John Locke (n 199) 176; Gross and N´ı Aolain (n 9) 174.

208 Ibid.

209 Nomi Claire Lazar, States of Emergency in Liberal Democracies (Cambridge University Press 2009) 68–69.

210 Levinsont and Balkin (n 18) 1804–1805.

211 Gross and N´ı Aolain (n 9) 119.

212 Ibid, 120–125.

2.3.3. Theory of the exception

Carl Schmitt, one of the most important critics of liberalism in the 20th century, questions the ability of liberalism to respond to emergencies. According to him, liberal democracy fails on at least three counts.[213] First, its openness paves the way for destructive forces within the state; secondly, its diffuse power structure makes it impossible to address such forces effectively; and, thirdly, its insistence on the maintenance of liberal values even in times of crisis renders it incapable of dealing with exceptional situations.[214] On the basis of these criticisms, Schmitt developed the theory of the exception.

This theory entails the sovereign's exercising unrestrained power in times of crisis.[215] For Schmitt, the sovereign exercises state powers freed from any legal and political restrictions at the time of exceptional situations.[216] The exception can at best be characterised as 'a case of extreme peril, a danger to the existence of the state, or the like'.[217] The relations between the exception/normalcy and sovereign are at the core of Schmitt's theory. Schmitt argues that every legal norm presupposes the existence of a certain normal state of affairs. As a result, the norm can be applied only as long as the ordinary state of affairs continues to exist. When this normal state of affairs ceases to exist and exceptional circumstances prevail, the legal norm is no longer applicable and cannot fulfill its ordinary regulatory function.[218] The exception is not codified in the existing legal order.[219] As Schmitt insisted, the precise details of an emergency and the counter-measures to be taken to eliminate the danger cannot be predicted and formulated within the law. Additionally, no one can spell out what may take place in such exceptional cases.[220] Schmitt maintains that the exception and the extent of emergency powers cannot be specified in advance, and thus the existence of the exception and the scope of emergency powers to be used in order to overcome the peril are the result of political decisions instead of rules.[221]

These political decisions are made by the sovereign. According to Schmitt, the sovereign dictator enjoys unfettered discretionary powers to decide on exceptions.[222] Such unlimited powers relate both to the existence of the exception and to the nature as well as scope of the counter-emergency measures that must be taken in order to deal with the threat.[223] When deciding on such counter-measures, the sovereign dictator is not limited by the existing legal order or the constitution which is included within it. He may disregard existing norms, and can also replace them with new ones.[224] The sovereign dictator has the power not only to suspend, but also to amend, revoke, and replace the existing norms.[225] His powers are unlimited and indivisible, and there is no external and objective limitation against the invocation and use

213 Lazzar (n 209) 36–37.

214 Ibid.

215 Schmitt, Political Theology (n 39) 5–10; Gross and N´ı Aolain (n 9) 162–166; Greene (n 53) 71–78.

216 Ibid.

217 Ibid; Zuckert and Valenzuela (n 7) 75–78.

218 David Dyzenhaus, 'The State of Emergency in Legal Theory' in Victor V. Ramraj, Michael Hor and Kent Roach (eds) Global Anti-Terrorism Law and Policy (Cambridge University Press 2005).

219 Ibid.

220 Ibid.

221 Ibid.

222 Schmitt, Political Theology (n 39) 5–10; Gross and N´ı Aolain (n 9) 164–166; Greene (n 53).

223 Ibid.

224 Ibid.

225 Ibid.

of the emergency powers.[226] When he deems it necessary, he can invoke these powers, which control and at the same time constitute the norm.[227] Consequently, the powers may be exercised legitimately not only in extreme cases but so too under ordinary conditions.[228] Eventually, the norm merges with the exception; as such, the exception becomes normality and replaces it entirely.[229] As the sovereign's power is indivisible, one cannot say that only some of his powers are operational at any given moment: the sovereign's unlimited powers may be used at any time based on the personal decision of the sovereign dictator.[230]

The sovereign executive is hence legally uncontrolled in the time of emergency situations. It decides on the existence of the emergency as well as the way of dealing with it.[231] Schmitt empowers the executive as unbound by constitutionalism and thereby undermines the role of the judiciary in times of crisis;[232] accordingly, courts have no significant role in the matter of state security.[233] Schmitt's theory has been criticised for its authoritarian flavour and for leading slowly to despotic regimes that use emergency powers or quasi-emergency laws to suppress legitimate competitors for office.[234] The Indian experience under Indira Gandhi and the collapse of the Weimar Republic are examples in this regard.[235]

2.3.4. A Madisonian perspective on emergency powers

James Madison is considered a proponent of a balanced perspective on emergency situations. He said that 'you must first enable the government to control the governed; and in the next place, oblige it to control itself'.[236] As the first task in constitution-making is to enable a government to do all the things the government must do, empowering it to deal with emergencies is a primary task of the constitution.[237] Lazar called this task 'executive enablement'.[238]

However, the extent of executive powers in times of crisis was a subject of controversy in the United States, where the text of the Constitution lacks specific clauses that give emergency powers to the executive.[239] The suspension clause gives Congress the power to suspend the writ of habeas corpus in cases of rebellion or invasion,[240] but this provision is silent about other kinds of dangers, such as economic crisis, pandemics or terrorist attacks. In view of that, the American legal system responded to crises largely through constitutional construction.[241] Madison was against the strict construction of constitutions and extra-constitutional appeals

226 Gross and N´ı Aolain (n 9) 162–166.
227 Ibid.
228 Ibid.
229 Ibid.
230 Ibid.
231 David Dayzenhaus, 'Intimating Legality Amid Arms' (2004) 2:2 I.CON 247.
232 Ibid.
233 Ibid.
234 Ferejohn and Pasquino (n 5) 232–233.
235 Ibid.
236 Zuckert and Valenzuela (n 7).
237 Ibid.
238 Lazar (n 209) 2.
239 Levinsont and Balkin (n 18) 1810–1812.
240 Constitution of the United States of America, arts 1 and 9.
241 Levinsont and Balkin (n 18) 1810–1812.

for extraordinary powers in emergency situations: [242] regular recourse to extra-constitutional actions and requests that the people validate these actions imply that the government is defective and undermine respect for it.[243]

Madison also rejected broad readings of the Constitution which, like that of Hamilton, find emergency measures within it.[244] Madison's approach acknowledges that the executive may go beyond the enumerated powers in the constitution to deal with emergencies. It is logically necessary for any government to draw a power out of the constitution during an emergency, but the implied powers must be seen as means to the enumerated powers.[245] Thus, the executive can exercise emergency powers derived from constitutional interpretation. Madison suggested a balanced approach that involves neither a strict nor a loose construction in regard to the question of constitutional interpretation. As a result, the executive can exercise far-reaching emergency powers to deter, prevent, and repel attacks against the country. These emergency powers are not unbounded but have boundaries.

Madison was also concerned about the danger posed by the executive during emergencies and hence considered legislative control of the executive important.[246] He never downplayed the importance of the executive, but was inclined to the view, like that of Locke, that the legislature had supremacy; the executive is thus required to have legislative authorisation to exercise emergency powers.[247] However, on certain occasions such as surprise attacks, the executive must act without authorisation, albeit seeking ex post authorisation without delay.[248] Madison affirmed the significance of enforceable constitutional rights as a limitation against the powers of the government.[249] He therefore advocated a legislative-centred approach in dealing with emergencies and endorsed emergency responses undertaken within the framework of the law. In this regard, for executive actions to remain within the legal order, Madison rejects an elastic understanding of the Constitution[250] in favour of real limits that hamper the power of the government in emergencies.[251] His approach is thus a balanced one that enables the government to deal with a crisis and at the same time limits its powers.

This view was reflected in the United States' limitation on the powers of President Abraham Lincoln during the country's civil war. The President asserted that, on his own authority, he had the power to take emergency measures to save the Union and proceeded to suspend the writ of habeas corpus nationwide through unilateral executive action.[252] However, within a year Congress reacted by adopting legislation that expressly authorised suspension of habeas corpus. In so doing, Congress both empowered as well as constrained the President by obliging him to exercise these powers within the limits set by the legislation.[253] In the Ex Parte Milligan case, the majority of the court stated that 'the rights contained in the

242 Zuckert and Valenzuela (n 7).

243 Ibid.

244 Ibid.

245 Ibid.

246 Ibid.

247 Ibid.

248 Ibid.

249 Ibid.

250 Ibid.

251 Ibid.

252 Samuel Issacharoff and Richard H. Pildes, 'Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime' (2004) 2:2 I.CON 296.

253 Ibid.

Constitution with the exception of the writ of habeas corpus could not be suspended by either the President or Congress'.[254] Consequently, the power of the executive is limited on the basis of the bill of rights in times of emergencies. This Madisonian approach, as Ginsburg notes, was evident in the governance of numerous countries during the COVID-19 pandemic.[255]

2.3.5. Theory of constitutional absolutism

Proponents of constitutional absolutism are animated by an anxiety about executive powers that impels them to maintain rigid constitutional constraints on the executive at all times.[256] They are not attentive to the risk that constitutionalism poses during emergency situations, even though these situations are contingencies that cannot be ignored in the political life of a nation.[257] Constitutional absolutists impose stringent limitations from which there are no exceptions and thereby disarm the executive branch of the government in times of crisis. They have hence been termed 'naïve constitutionalists'.[258] The proponents of this perspective do not recognise any exceptional circumstances that call for extraordinary powers: they allow for few to no special emergency powers, and the executive deals with crises without the assertion of new or additional powers.[259] As a result, emergency conditions, whatsoever their nature, do not enlarge the constitutional powers of the executive, and the existing constitutional framework is equally applicable in times of crisis and normality.[260] Oren Gross describes it as a 'business-as-usual' approach,[261] while Lazzar calls it 'neo-Kantian' to highlight the lack of empiricism in its understanding of emergency powers and constitutionalism.[262] Instead of confronting the tension inherent in emergency powers, constitutional absolutists simply deny the existence of the necessities that arise in times of crisis.[263]

The proponents of constitutional absolutism justify their positions based on reasons of constitutional perfection and questions of values. The argument of constitutional perfection provides that a constitutional framework can forestall future emergencies by incorporating all the powers that would be necessary to respond to a crisis.[264] Constitutional absolutists have a conviction both in the completeness and perfection of the existing legal system and in the government's ability to respond to crises without claiming additional powers.[265] According to this view, the constitution contains all powers that a government might need to exercise in order to carry out its functions and duties in the times of normalcy as well as crisis.[266] The second justification is based on the hierarchy of values and provides that 'individual liberty prevails over the preservation of the nation' even during emergencies.[267]

254 Lobel (n 32) 1387.
255 Ginsburg and Versteeg (n 77).
256 Lobel (n 31) 1385–1387.
257 Ibid.
258 Zuckert and Valenzuela (n 7).
259 Ibid; Gross and N´ı Aolain (n 9) 86.
260 Ibid.
261 Ibid.
262 Lazar (n 209) 53–80.
263 Lobel (n 31) 1388.
264 Gross and N´ı Aolain (n 9) 87–88.
265 Ibid.
266 Ibid.
267 Lobel (n 31) 1388.

The reasoning of this theory is reflected, for instance, in the Milligan case in the United States.[268] The African Charter on Human and Peoples' Right also reflects some elements of this theory by making all rights non-derogable during a state of emergency.[269] However, the theory of absolutism has been criticised as unrealistic by accommodationists who require the system to be relaxed in exigent circumstances.[270] In practice, constitutional absolutism does not prevent governments from resorting to exceptional measures in times of crisis.[271] Conversely, its proponents argue that the absolutist approach seeks to avoid the likelihood of misuse and abuse of emergency provisions in times of apparent situations that do not warrant a state of emergency.[272] The approach also has a symbolic and educative purpose in that it aims to slow down the executive's 'rush to use' special powers impulsively when conditions do not justify them.[273] Indeed, the position is not entirely groundless. For instance, in an empirical study, Keith and Poe found that the existence of constitutional emergency provisions increases governments' tendency to abuse human rights.[274]

3. Strategies for regulating emergency powers

The theories above support models that answer the basic questions of emergency powers in different ways. Constitutional absolutism, for example, leads, as mentioned, to a 'business-as-usual model' in which ordinary legal rules and norms continue to be applied strictly without any substantive change even during emergencies.[275] In effect, the law in times of peace remains the same in times of war or crisis. According to Paulsen, it is an approach that could turn a constitution into a 'suicide pact'.[276] Emergency situations pose challenges to the notion of modern constitutionalism, and it is for these reasons that Schmitt called key features of liberal democracy into doubt. In turn, Lazaar, Zuckert and Valenzuela opine that Hobbes and Schmitt's criticism of the ability of liberal democracy (as understood by

268 Ibid. Ex Parte Milligan, 71 US (4 Wall.) 2, 120–21 (1866). The majority opined that the Constitution grants the government sufficient power to preserve its existence without resorting to suspending rights or extraordinary emergency power. Emergency does not 'create or increase' power. The Constitution was adopted in a period of grave emergency and its grants of power were determined in the light of emergency and are not altered by emergency.

269 African Charter on Human and Peoples' Rights (Adopted by the OAU in Nairobi, Kenya on 27 June 1981, entered in to force on 21 October 1986) (hereinafter ACHPR). The ACHPR has no derogation clause akin to the ICCPR, elevating the rights thereof to the status of absolute rights in times of emergency. The issue is debatable even in the making of national constitutions. For instance, see Ellmann (n 58).

270 Gross and N´ı Aolain (n 9) 98–105.

271 Ibid.

272 Ibid.

273 Ibid.

274 Linda Camp Keith and Steven C Poe, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration' (2004) 26 Human Rights Quarterly 1071.

275 Gross, 'Chaos and Rules' (n 43) 1021.

276 See also Michael S Paulsen, 'The Constitution of Necessity' (2004) 79 Notre Dame L. Rev. 1257.

constitutional absolutists) to withstand crisis is not merely a fantasy.[277] A critical issue that constitutional designers face is thus the question of how modern legal systems can be made to meet all the needs a state may have during crisis situations.

In this regard, the theories discussed previously entail three distinct approaches to emergency powers. The theory of dictatorship supports a constitutional approach to them; Madison's balanced perspective supports a legislative approach; and the theory of prerogative and theory of the exception endorse an extra-constitutional approach. These approaches are reflected in national legal frameworks and practices, which vary accordingly in regard to the sources, scope and limitations of emergency powers.[278]

3.1. The constitutional approach

The constitutional approach to regulating emergency powers involves making explicit provisions within the text of a constitution. In particular, the emergency provision of the constitution specifies the institution that can declare an emergency and the conditions that necessitate the declaration;[279] it also identifies the institution that can confirm the declaration. Furthermore, the emergency clause specifies the additional powers that are activated by the declaration of a state of emergency and the actors which are authorised to exercise those powers.[280] In the constitutional approach, emergency powers are thus regulated at the constitutional level by means of predefined and explicit rules.[281] The basic idea underlying the constitutional approach is that emergency situations can be predicted and counter-measures formulated in advance in provisions in the constitution.[282] In keeping with model of the Roman dictatorship, the constitutional approach requires an explicit constitutional provision to be made in advance for the regulation of emergency powers. In effect, the emergency power is constitutionalised and exercised within that framework,[283] where it is subjected to regulation by constitutional emergency rules.

France was the first modern state to institute constitutional emergency provisions, a trend which spread into those countries influenced by its legal system.[284] Spain was the first to be inspired by the French model. The Spanish Constitution of 1812, which was the country's first liberal constitution, contained explicit emergency provisions, as in the French model, and in turn influenced the constitutions of many Latin American countries.[285] By 1950, all of the countries to have adopted the French civil law tradition had constitutional emergency provisions.[286] The spread of constitutional emergency provisions was not confined to Latin

277 Lazar (n 209) 65–66; Zuckert and Valenzuela (n 7).

278 Victor V Ramraj, 'The Emergency Powers Paradox' in Victor V Ramraj and Arun K Thiruvengadam (eds), Emergency Powers in Asia: Exploring the Limits of Legality (Cambridge University Press 2010) 21–28.

279 Bjørnskov and Voigt (n 111) 103.

280 Ibid.

281 Ibid.

282 Ferejohn and Pasquino (n 5) 211–213.

283 Ibid; see also Oren Gross, 'Constitutions and Emergency Regimes' in Tom Ginsburg and Rosalind Dixon (eds), Comparative Constitutional Law (Edward Elgar 2011) 334–336.

284 Bjørnskov and Voigt (n 111); William Feldman, 'Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege' (2005) 38:3 Cornell International Law Journal 1022, 1024–1027; Domrin (n 12) 21. These authors differ on the year it was introduced, but this does not alter the fact that among modern states France was the pioneer in regulating emergency powers.

285 Bjørnskov and Voigt (n 111); Madison Chapman, 'Constitutional History in Context: Mexican Federation and Spanish Liberal Influence (2017) 30:1 Berkeley Undergraduate Journal 1.

286 Ibid.

American countries but made its way too into Africa, Asia and the Middle East.[287] The number of constitutions with emergency provisions has thus increased since 1950,[288] albeit that it is not a universal norm. For instance, the constitutions of the United States, Japan and Belgium are entirely devoid of emergency provisions that explicitly regulate the invocation and use of emergency powers.[289]

The end of decolonisation and the Cold War, in tandem with the onset of the post-9/11 war on terrorism, contributed to the global proliferation of emergency clauses.[290] The latter are often the result of new constitution-making processes, and are rarely introduced through constitutional amendments.[291] As Bjørnskov and Voigt observe, once a country includes an emergency provision in its constitution, it is unlikely ever to remove it.[292] Today, most countries of the world incorporate emergency provisions in their constitutions; indeed, explicit emergency regulations have become a common feature of modern constitutions.[293]

A constitutional emergency provision standardises the invocation and exercise of emergency powers. It sets forth legal rules that specify the authoritative bodies that can declare a state of emergency, the point in time and conditions in which authorities may invoke emergency powers, and the effects of emergency declarations on fundamental rights and the distribution of powers embodied in the constitution.[294] In addition, it puts rules in place to determine the substance of emergency measures taken by the government during an emergency.[295] In other words, the emergency clause of a constitution determines not only the legal basis for emergency powers but also the extent and scope of emergency measures taken by the executive.[296] In so doing, the constitutional approach locates the emergency powers of the government within constitutional norms.[297]

The inclusion of these rules in the constitution thus implies that the government can deal with exigencies only in accordance with such rules specified in the constitution. It hence marks out the boundaries that are constitutionally allowed to the executive in times of crisis.[298] States of emergency, as noted, raise the question of whether the emergency power is located within or outside the law.[299] In this regard, constitutional emergency provisions situate that power within the constitutional rules and thus guaranteeing the rule of law by containing the power to declare states of emergency (that is, the question of who has the

287 Ibid.

288 The Comparative Constitutions Project, 'State Of Emergency' (2011) <https://bit.ly/2QLjJaS> accessed on 14 November 2020.

289 Gross, 'Constitutions and Emergency Regimes' (n 283) 336; Issacharoff and Pildes (n 252).

290 Bjørnskov and Voigt (n 111) 104–105.

291 Ibid.

292 Ibid.

293 The Comparative Constitutions Project (n 288); Rooney (n 10). Constitutional emergency provisions are nearly universal among Latin America and sub-Saharan African countries. Only 50 per cent of constitutional texts in Western Europe, the United States and Canada mention states of emergency.

294 Ginsburg and Versteeg (n 76) 13–15; Hatchard, Ndulo and Slinn (n 49) 177–182.

295 Ibid.

296 Ibid.

297 Greene (n 53) 66–69.

298 Ibid.

299 Eric A Posner and Adrian Vermeule, 'Inside or Outside the System?' (2013) 80:4 University of Chicago Law Review 1743; David Dyzenhaus, 'The State of Emergency in Legal Theory' in Victor V Ramraj, Michael Hor and Kent Roach (eds) Global Anti-Terrorism Law and Policy (Cambridge University Press 2005)

authority to declare a state of emergency and under what conditions) and the scope of the emergency measures (that is, their substantive elements) within the ambit of law.[300] The constitutional approach to regulating emergency powers therefore makes the declaration of states of emergency a legal rather than a political decision.

Moreover, given that it entails setting rules to determine when the powers are invoked, the approach minimises the subjective aspects of decision-making in regard to the invocation and use of emergency powers.[301] Subjective assessments are among the factors that lead to abuses of emergency powers;[302] conversely, predefined rules are helpful in checking arbitrary exercises of power in that they make the conditions for invoking and using emergency powers objective, or at any rate less subjective, and thereby reduce the likelihood of these powers being misused by politicians to serve their own interests.[303] As Domrin notes, emergency clauses are guarantees against possible misuse of that power by the executive, especially so in circumstances that do not pose serious threats.[304]

These assertions are nevertheless open to doubt in view of past and contemporary abuses in which emergency powers were invoked to advance the self-interests of political leaders. For instance, in ancient Rome, Sulla and Caesar exploited these powers to expand their authority; similarly, the emergency clause of the Weimar constitution was invoked frequently to serve personal ambitions and led to the state's collapse.[305] In post-Arab Spring North Africa and Middle East, emergency declarations have been abused to suppress political opposition even though the relevant constitutional provisions seem well-developed.[306] Keith and Poe note that emergency clauses do not necessarily affect the behaviour of governments in regard to the protection of human rights; instead, as mentioned, the authors find that such clauses increase governments' inclination to abuse rights.[307] While Keith and Poe do not offer any solutions, Greene has argued that a robust judiciary is a necessity for ensuring that emergency provisions are safe and effective.[308] As Lazar points out, the presence of emergency provision has not proven to be safe, but the lack of them has not made people any safer either.[309] 'Emergency powers', he argues

> *are only more or less safe: a good set of emergency powers is safer than a bad set, and safer still than no emergency powers at all. Hence an effective critique must go beyond a charge of 'unsafe' to outline what is safer.*[310]

In this context, there is no ideal constitutional emergency provision, although some authors attempt to design a typical emergency constitution. For instance, Bruce Ackerman calls for a sweeping revision of the emergency provisions currently found in many of the world's constitutions.[311] Ackerman further suggests a new design of emergency provision that aims to reassure the public that the situation is under control and that the state is taking effective

300 Ibid; Fombad, 'Cameron's Emergency Powers' (n 17).
301 Ibid. It is impossible to avoid subjectivity entirely.
302 Ibid.
303 Ibid.
304 Domrin (n 12) 33.
305 De Wilde, 'Just Trust Us (n 114); De Wilde, 'The State of Emergency in the Weimar Republic' (n 53).
306 Zwitter (n 60).
307 Keith and Poe (n 274).
308 Greene (n 53).
309 Lazar (n 209) 8-9.
310 Ibid.
311 Ackerman (n 75).

short-term actions to prevent the recurrence of a crisis.[312] In Ackerman's proposed emergency regime, an emergency may be declared only after an actual attack; it can be prolonged for short intervals by increasing supermajorities in the legislature; minority parties must have opportunities to access information about the operation of the declaration and to publicise the facts as they see fit; and the scope of emergency measures has to be limited to relief and prevention measures.[313]

3.2. The legislative approach

The legislative approach to an emergency is exercised on the basis of ordinary legislation that grants the required power to the executive.[314] As mentioned, constitutional emergency provisions have become common around the world, especially in newer and fragile democracies.[315] Unlike established democracies, countries in Latin America, Africa, and southern Asia have constitutional emergency clauses, with the latter having been employed repeatedly to deal with crises.[316] By contrast, only 50 per cent of constitutional texts in Western Europe, the United States and Canada mention states of emergency,[317] and even such countries of this kind as do have emergency clauses seldom invoke their provisions in times of emergencies.[318] This does not mean that emergency powers do not matter in the West or in established democracies. Instead, most of the world's stable democracies prefer to adopt a legislative approach to emergency situations.[319] They attempt, that is to say, to deal with crises by enacting ordinary statutes that delegate special and temporary powers to the executive: crises are handled by way of legislative measures without the resort to (extra)constitutional emergency powers.[320] In other words, the legislative approach to crisis governance entails non-constitutionalised regulation of emergency powers.[321]

This is the model that has been developed in the past 50 years in advanced democracies, and the main reasons for it have to do, in essence, with either the silence of constitutions on emergency provisions or the disuse of any such provisions.[322] In constitutions like that of the United States which do not provide for the exercise of emergency powers, legislative emergency powers are one legal route by which to confront a crisis; here, a legislature makes ordinary laws that delegate special authority to the government or its agencies,[323] with constitutional emergency provisions eschewed for political and practical reasons.[324] To spell out these reasons, it is the case, first, that politicians and elected officials treat emergency provisions with caution owing to the risk of abuse of power, such as occurred under the

312 Ibid.

313 Ibid.

314 Ferejohn and Pasquino (n 5).

315 Ibid.

316 Ibid; The Comparative Constitutions Project (n 288).

317 Ibid.

318 Ibid.

319 Ibid. For instance, Germany, Italy, Spain, Great Britain, the United States and Canada.

320 Ibid. However, France has applied the state of emergency extensively in recent years as a result of terrorist attacks on it. There was also an attempt to constitutionalise emergency power through constitutional amendments. See Sébastien Platon, 'From One State of Emergency to Another: Emergency Powers in France' (VerfBlog, 9 April 2020) <https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/> accessed on 2 February 2021; Pasquale Pasquino, 'Constitutionalizing Emergency Power in a Time of Jihadist Terrorism: France 2016 as a Case of Misunderstanding and Failure' (2018) 19:2 German Law Journal 251.

321 Ginsburg and Versteeg (n 76).

322 Ferejohn and Pasquino (n 5).

323 Ibid; see also Dyzenhaus, 'The State of Emergency in Legal Theory' (n 218).

324 Ibid.

Weimar Constitution.[325] Secondly, certain crises might not be of sufficient magnitude to make a convincing case for invoking emergency provisions – politicians are then reluctant to court challenges and criticism.[326] Thirdly, recent technological advancements enhance the capacity of governments to handle emergency situations successfully on the basis of a few extra powers supplied by statutes.[327]

Moreover, the political context of advanced democracies makes 'extreme constitutional measures' unnecessary: rifts and deadlocks can be resolved through the political process and rarely lead to insurrection and civil war,[328] in addition to which the stable and uncontested nature of these countries' international borders reduces the risk of external invasion.[329] Even terrorism cannot be an existential threat to established democracies, their constitutional orders or their political regimes. As Ackerman observes, it is the public-reassurance rationale, rather than the existential-threat rationale, that justifies contemporary needs for emergency powers in Western countries.[330] They can deal with threats without invoking the emergency provision that gives extensive powers to the executive. The anti-terrorism legislation of the past two decades and the public health legislation used to combat COVID-19 are examples of how the West has dealt with crises by means of the legislative model of emergency powers.[331]

Like the constitutional approach, the legislative one presupposes the dualism of normal as opposed to exceptional circumstances,[332] with emergency powers understood as exceptional to the ordinary operation of the legal system and the assumption being that the regular way of life resumes as soon as the crisis that triggers these emergency powers is addressed.[333] Accordingly, a legislative emergency power is temporary in nature and aims to restore the status quo ante. The legislative approach, as with the Roman model discussed previously, is conservative in stance.[334] However, unless a sunset clause is incorporated in such legislation, there is a risk that restrictions become permanent fixtures.[335]

In the legislative approach, the legislature plays a fundamental role both in recognising an emergency and in conferring powers to respond to it: as Ferejohn and Pasquino note, the 'epistemic and power-creating functions are combined'.[336] It is, to reiterate, the legislature that recognises the facts of an emergency, sets the powers given to the executive and determines their limits.[337] In addition, it exercises its oversight function to regulate the use of the granted powers: the legislature can monitor the use of the emergency powers, investigate abuses, extend these powers if necessary, and suspend them once the emergency ends.[338] In this

325 De Wilde, 'Just Trust Us (n 114).

326 Ferejohn and Pasquino (n 5).

327 Ibid. The extra power may include permission for the detention of suspects without charges as well as suspension of their access to lawyers.

328 Ibid.

329 Ibid.

330 Ackerman (n 75).

331 Bonavero Institute of Human Rights, A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions (University of Oxford, Bonavero Report No. 3, 2020).

332 Ferejohn and Pasquino (n 5); Ramraj (278) 27–28.

333 Ibid.

334 Ibid.

335 Ginsburg and Versteeg (n 76) 16.

336 Ferejohn and Pasquino (n 5).

337 Ibid.

338 Ibid.

way, the legislative approach allows for close legislative control of the executive's use of legislatively created authority and provides for that delegation to be brought to a timeous end whenever the legislature thinks the emergency situation has passed or finds that the executive has proven itself untrustworthy.[339]

Hence, the legislative approach to emergencies is conducive to controlling the exercise of the granted powers. This is particularly useful in presidential and semi-presidential systems, where a separation of persons exists between the executive and legislature branches of government.[340] By the same token, it would not work very well in a system dominated or controlled by one party; the supervising role of the legislature is also less substantial in parliamentary systems that fuse the powers of the executive and legislature.[341] The legislature may thus choose to establish independent commissions to monitor the execution of emergency powers.[342] In addition to its advantage of ease of oversight, the legislative approach confers legitimacy on the actions of the executive that exercises the delegated powers, given that the legislature, which directly represents the people, is the source of those powers – the approach lends democratic support to the actions of the executive.[343] All in all, legislative emergency powers are a constrained, legitimate and efficient way of dealing with emergencies.

However, legislative regulation of emergency powers is not free of risks. First, the legislature may be reluctant to delegate in a timely fashion, which could undermine the executive's ability to respond to an emergency – this risk is a grave one if the executive has no alternative ways of responding other than via emergency powers.[344] Secondly, there may instead be a rush to legislate without much debate and observance of normal law-making procedures;[345] as a result, the legislature could enact emergency legislation that curtails rights and freedoms as well as eliminates valuable checks on the executive.[346] Similarly, the legislative model could impair the operation of the normal legal system by creating restrictive laws and unchecked powers that outlast the emergency.[347] Here, laws made for dealing with the emergency become embedded in the legal system and engender a permanent state of emergency.[348] This 'rush-to-legislate' syndrome is more likely than not where the legislature is dominated by a single party or coalition of parties supporting the executive without reservation, or where judicial review of legislation and executive administrative action is weak.[349]

3.3. The extra-constitutional approach

The constitutional and legislative approaches to emergencies rest on the assumption of a state of constitutionality in terms of which the emergency response has to originate within, and be limited by, a constitutional or legal framework. In other words, the assumption requires crisis to be governed and controlled on the basis of legal norms.[350] The extra-constitutional

339 Ibid.
340 Ibid.
341 Ibid.
342 Ibid.
343 Ibid.
344 Gross and N´ı Aolain (n 9) 66–77.
345 Gross, 'Chaos and Rules' (n 43) 1031–1034.
346 Ferejohn and Pasquino (n 5).
347 Ibid.
348 Ramraj (278) 27–28.
349 Gross, 'Chaos and Rules' (n 43) 1031–1034.
350 Ibid.

approach rejects this assumption and gives the executive leeway to go outside the law in times of crisis without being unconstitutional or illegitimate.[351] As a result, the approach tolerates emergency measures taken outside the constitutional framework in certain 'truly extraordinary circumstances'.[352] Although it is rooted in Locke's theory of prerogative and Jefferson's doctrine of necessity, the approach finds its fullest explanation in Oren Gross's 'extra-legal measures model' of emergency powers. In his seminal works, Gross argued that, in extreme situations, it is proper for the executive to act outside the constitution or disdain accepted constitutional principles to save the nation.[353] Gross's model thus entails an extra-constitutional approach to crisis governance in that the justifications for the use of emergency powers are external to the text of the constitution and constitutional framework.

The constitutional text, as noted, might be silent on emergency powers or give inadequate guidance on handling emergencies. In these circumstances, the extra-constitutional approach calls for the government to go beyond the constitutional framework by deviating from extant legal principles, rules, and norms in order to address extreme situations.[354] Extra-constitutional measures are not always a legitimate way of dealing with crises, however. For such actions to be appropriate, they must be aimed, in the first place, at the advancement of the public good.[355] Secondly, they should be disclosed openly, candidly and fully to the public.[356] Thirdly, there must be an ex post ratification of governmental actions by the general public, either directly or through its elected representatives.[357] It could happen, on the one hand, that the people show their commitment to the violated principles by holding the actors responsible for their extra-legal actions, in which event the acting officials amend their actions or face resignation, criminal charges, civil suits or impeachment: [358] politically, incumbents place their re-election at risk by taking extra-constitutional measures. On the other hand, the people may approve the extra-legal actions retrospectively by re-electing the government.[359] Unlike Locke, who trusted the executive to use its emergency powers appropriately, Gross puts his trust in the general public to check the unlimited power of the executive.

In this approach, it is the executive (rather than the legislature) that, in times of crisis, decides when to go outside the constitution and declare a state of emergency; it is also the executive that decides on the nature of the emergency measures and their duration.[360] As such, the executive has unrestrained powers to invoke and exercise emergency powers. In the course of doing so, it encounters no substantive and normative limitations on these powers except for the ethic of responsibility.[361] Gross held that the extra-constitutional approach calls for the government to abide by an ethic of responsibility that obliges it to publicly acknowledge

351 Ibid.

352 Ibid, 1028.

353 Oren Gross and Fionnuala N´ı Aolain, Law in Times of Crisis: Emergency Powers in Theory and Practice (Cambridge University Press 2006); Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112:101 Yale Law Journal 1014; Oren Gross, 'Constitutions and emergency Regimes' in Tom Ginsburg and Rosalind Dixon (eds), Comparative Constitutional Law (Edward Elgar 2011); Oren Gross, 'Extra-legality and the Ethic of Political Responsibility' in Victor Ramraj (ed), Emergencies and The Limits of Legality (Cambridge University Press 2008); Oren Gross, 'Stability And Flexibility: A Dicey Business' in Victor V Ramraj, Michael Hor and Kent Roach (eds), Global Anti-Terrorism Law and Policy (Cambridge University Press 2005).

354 Ibid.

355 Ibid.

356 Ibid.

357 Ibid.

358 Ibid.

359 Ibid.

360 Ibid.

361 Ibid

the extra-legal aspects of its actions.[362] This serves to curb public officials from invoking extra-constitutional power rashly. In addition, the requirement of ex-post public ratification or rejection creates uncertainty about the fate of the extra-legal emergency actions taken by the public officials: that uncertainty, indeed, raises the costs of employing emergency powers.[363] Therefore, the ethic of responsibility and the ex-post-public-ratification requirement are the only constraints on the extra-constitutional powers of the executive in times of crisis. Even when acting to advance the public good under circumstances of great necessity, the actors remain answerable to the public for their extra-legal actions,[364] a situation which ensures that no one is above the law. Such public checking is the main element that that draws the line between Gross and Schmitt.

Although Gross defended executive extra-constitutional emergency measures as important for maintaining the rule of law in the long-term by doing '[a] little wrong for the attainment of [a] great right', the approach is open to criticism.[365] It has been condemned, for instance, as self-destruction from within.[366] Adherence to the rule of law, it is argued, is a necessary element in a nation's security and safety, whereas Gross's approach instils the habit of lawlessness and paves the way for authoritarianism.[367] Furthermore, the emergency measures of a government attain moral legitimacy when the government uses that power only for protecting the public.[368] Public judgment is thus always implicit in the notion of emergency powers and tacitly applicable to the exercise of all types of emergency powers: if the government misuses the emergency power, it courts the disfavour of the public, which, in the case of democratic states, can assert itself in the next elections, or in the case of non-democratic states, manifest itself in resistance or rebellion.[369] What Gross proposed, according to his critics, is simply make these implicit constraints on emergency powers explicit and then turn them into the sole – and inadequate – protective mainstay of his model of emergency power.[370]

In addition, the public ratification/rejection requirement assumes a responsible government that discloses accurate information regarding the emergency measures; it also assumes a rational general public that gives genuine judgments based the disclosed information.[371] These assumptions might not hold water in actuality, particularly in contexts marked by discourses of populism: the public could be misled by disinformation disclosed by populist governments that seek ratification at any cost.[372]

In effect, the dividing line between Gross and Schmitt becomes ever thinner or disappears. Moreover, the workability of the model is also questionable in a divided society in which one section of the population approves the action while the other rejects it.[373] In such cases, extra-constitutional measures may well aggravate the rift, as a result of which the approach becomes increasingly less relevant to dealing with domestic political instability.

362 Ibid.
363 Ibid.
364 Ibid.
365 Dyzenhaus, 'The State of Emergency in Legal Theory' (218).
366 Ibid.
367 Ibid.
368 Ibid.
369 Ibid.
370 Ibid.
371 Ibid.
372 Populism is becoming a new challenge to democracy. See Pozen and Scheppele(n70)
373 Gross and N´ı Aolain (n 9).

4. The structure and content of emergency clauses

Bjørnskov and Voigt question the idea that the emergency provision of national constitutions are each unique and suggest the possibility of an ideal type of emergency constitutional design.[374] Although national constitutions vary in the content of their emergency regulations, the authors argue that, at a minimum, a satisfactory emergency clause should answer, or hint at, the 'who and what questions' of emergency powers: what are the necessary grounds for declaring a state of emergency; who has the power to declare it; who has the power to declare the end of an emergency; who has the power to control the legality of emergency measures; who exercises emergency powers; and what additional powers does a declaration confer on the government?[375]

4.1. Conditions for states of emergency

Constitutional emergency provisions often mention the necessary conditions for the declaration of a state of emergency. These clauses incorporate a variety of grounds that justify the invocation of that power,[376] with studies in the mid-1960s identifying at least seven such grounds. According to experts of the United Nations, common reasons for the declaration of an emergency included 'external threats, internal security, public order and safety, danger to constitutional order, natural disaster, economic crisis, and interruption of public services including essential spheres of the economy'.[377] The study also revealed closely related reasons such as foreign invasion; subversion of the constitutional regime, public order and security; catastrophes; strikes and unrest in essential spheres of the economy; disruptions in essential public services; economic and financial crisis; refusal to pay tax; and conflict between the centre and constituent units in federations.[378] War or foreign invasion, armed violence, internal disturbances, natural disasters, and threats to independence, territorial integrity, state institutions, economic stability, and public order and safety are mentioned as well.[379] These grounds were reflected in the national constitutions of the 1950s.

A recent comparative study identifies six possible conditions as prerequisites for invocation of emergency powers.[380] They are war or aggression, internal security, national disaster, general danger, economic emergency, and threats to the constitutional system.[381] Of these, war or aggression is listed in most national constitutions,[382] with internal security the second most common justification.[383] By contrast, threats to the constitutional system are less

374 Bjørnskov and Voigt (n 111) 123–124.
375 Ibid; Fombad, 'Cameroon's Emergency Powers' (n 17); see also Domrin (n 12) 38–66.
376 Ibid.
377 Domrin (n 12) 38–66.
378 Ibid.
379 Ibid.
380 Bjørnskov and Voigt (n 111).
381 Ibid; The Comparative Constitutions Project (n 288).
382 Ibid.
383 Ibid.

commonly mentioned in modern national constitutions. The latter were unknown in the emergency provisions of constitutions of the 1950s and became important only in recent emergency provisions.[384] Other justifications have also gained in significance: the number of emergency provisions that mention economic emergency, national disaster and internal security as grounds for declaring emergency has increased since 1950.[385]

Defining the factual circumstances that compel an emergency declaration is not an easy task, given that the terms employed to indicate conditions of emergency, such as 'a serious threat, undermining … order, threatening the nation', are elastic, vague and open-ended.[386] As a result, it is impossible to determine the precise degree of danger that justifies a declaration without resorting to making subjective judgments.[387] Put differently, exercising discretionary judgment in the declaration of an emergency is unavoidable – indeed, this would make the declaration more of a political decision than an objective determination.[388] Consequently, there is room aplenty for incumbent politicians to abuse their powers and mislead the public about the actual extent of the threats that are cited to justify the declaration of a state of emergency.[389] For instance, unprincipled or corrupt governments could cite an alleged danger as a pretext for justifying the repression of their competitors;[390] a paranoid incumbent could delude himself and the public into believing that individuals with the same ethnic or religious background as a potential aggressor are set to act as a fifth column unless counteracted.[391]

The power to determine the existence of conditions that trigger the declaration of an emergency can easily be manipulated to serve personal ambitions. In this regard, Ackerman argues that the 'clear and present danger' test generates unacceptable risks of political manipulation.[392] The same holds true for Lazar's 'urgency and scale test' for determining the existence of the danger warranting the declaration.[393] To avoid the slippery slope, Ackerman suggests that the triggering emergency provision should specify a quantitative bright line or mathematical formula requiring, for instance, the death of 1,000 people before the invocation of emergency powers.[394] Elster likewise proposes a two-actor procedure that separates the body declaring the emergency from that exercising the emergency powers.[395] Elster's suggestion is inspired by the classical Roman model in which the consuls declared an emergency while appointing a dictator who proceeded to exercise the relevant powers.[396] Charles Fombad in turn suggests that four factors mentioned by the European Commission on Human Rights be considered in assessing the circumstances that justify the declaration of emergency:

384 Ibid. Article 48 of the Greece Constitution lists 'an armed coup aiming to overthrow the democratic regime' as a condition for declaring a state of emergency. This provision would be irrelevant in a military coup if the coup leaders took control of the legislature, which is mandated to declare states of emergency. The provision can be understood as referring to insurgency and 'soft coups' arising from public protests.

385 Ibid.

386 Gross and N´ı Aolain (n 9) 4–6.

387 Ibid.

388 Fombad, 'Cameroon's Emergency Powers' (n 17) 71–77.

389 Jon Elster, 'Comments on the Paper by Ferejohn and Pasquino' (2004) 2:2 I.CON 240.

390 Ibid.

391 Ibid.

392 Ackerman (n 75) 1058–1060.

393 Lazar (n 209) 7–11.

394 Ackerman (n 75) 1060; see also Elster (n 389).

395 Elster (n 389).

396 Ibid.

> *[T]he emergency must be actual or imminent; its effect must involve the whole or part of the nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or restrictions for the maintenance of public safety, health and order, must be plainly inadequate.*[397]

It is to be noted, however, that none of these suggestions would work unless the sovereign that decides on the declaration exercises this power in good faith.[398]

4.2. Competence for declaring states of emergency

Since the circumstances that trigger states of emergency are not self-evident and precisely delineated, there has be an organ that decides on their existence.[399] For Schmitt, it is the sovereign that does so.[400] The location of the power to declare emergencies thus points to where sovereignty resides within a system. The question of who has the power to declare an emergency is, in other words, critical in the design of emergency provisions.

Emergency provisions answer this question in three ways. The first is an executive-centred approach in which the power to declare a state of emergency is placed in the executive and there is no need for the approval of other organs.[401] The French model of regulating emergency powers is an example of this approach, one that migrated to francophone Africa and most of the Latin American countries.[402] In addition, a similar approach is taken in the constitutions of Eastern Europe, East Asia, Middle East and sub-Saharan Africa.[403]

In the majority of countries that follow the executive-centred approach, it is the chief executive who decides by him- or herself whether there are sufficient grounds to impose a state of emergency.[404] As presidents are directly elected by the people, who hold sovereign power, this trend reflects the notion of popular sovereignty.[405] As a result, one person, the president, is the main decision-making body in times of crisis. Within the executive-centred approach, some emergency provisions – for instance, those in Ireland, Spain, Canada, Cyprus, Lebanon, France, Latvia and some African countries – grant the power to declare a state of emergency to councils of ministers.[406] About 10 per cent of all emergency constitutions allocate that competence to the entire cabinet. Although this trend shifts the locus of power from one person to a group of people, it does not alter the executive-centeredness of the emergency powers. It is hence an approach which is little likely to limit the misuse of powers by the executive.[407]

397 Fombad, 'Cameroon's Emergency Powers' (n 17) 70.
398 De Wilde, 'Just Trust Us' (n 114).
399 Bjørnskov and Voigt (n 111).
400 Ibid.
401 Domrin (n 12) 42.
402 Ibid.
403 Ibid, 55–56; see also the Comparative Constitutions Project (n 288).
404 Ibid.
405 Ibid.
406 Ibid.
407 Ibid.

The second approach is a legislative-centred one in which the legislature is responsible for declaring a state of emergency.[408] While it is the executive that recognises the need for dealing with a crisis, it is the legislature that exercises sovereign power by assessing the conditions that would justify the declaration of an emergency.[409] This is most commonly the case in parliamentary systems. The implication of the approach is that the executive has bounded emergency powers and that sovereignty is placed in the hands of the legislature, thereby reflecting the notion of parliamentary sovereignty. In the 19th century, about 25 per cent of constitutions granted parliament the authority to declare emergencies.[410] That was what some regard as a golden age of parliamentarism, with legislatures generally being able to influence executives more significantly than in the contemporary era.[411] The number decreased considerably as the 20th century progressed, however, falling to about 8 per cent in 2000.[412] Most of these constitutions were in force in Eastern Europe, along with a few others in Latin America and sub-Saharan Africa.[413]

The third is a multi-player approach in which the involvement of more than one body is required for the declaration of emergency. Poland was typical in this regard. The 1947 interim arrangement in Poland, presided over by what was called the Little Constitution, involved a three-actor process in the declaration of states of emergency.[414] The latter could be declared by the state council, which was the supreme governing body and consisted of the President of the Republic (as its chairman), the leaders of the lower house of parliament, the Sejm, and the chairman of the Supreme Auditing Chamber.[415] The state council declared the state of emergency in a resolution based on the proposal of the Council of Ministers.[416] The resolution was then forwarded to the Sejm for adoption and automatically repealed if it had not been submitted to the Sejm or if the latter failed to adopt it.[417] The Little Constitution thus took an approach to emergency declarations that was neither legislative- nor executive-centred.

Some emergency provisions also follow a consultative approach in which the executive is required to consult the other branches of the government.[418] This approach is in some ways close to the executive-centred approach, as it is the head of the state that plays the leading role in the process of declaring a state of emergency, but other branches of government are also involved. The president may exercise his special powers only after consultation with the prime minister, the chairpersons of both chambers of parliament, and the constitutional council or constitutional court.[419] However, the president is not bound by the opinions of the institutions he or she is required to consult and can disregard them, albeit that this may increase the political costs for the president by making the state of emergency less

408 Bjørnskov and Voigt (n 111); The Comparative Constitutions Project (n 288).

409 Ibid.

410 Ibid.

411 Yves Meny and Andrew Knapp, 'Governance and Politics in Western Europe: Britain, France, Italy and Germany' (Oxford University Press 1998) 181–218.

412 The Comparative Constitutions Project (n 288).

413 Ibid.

414 On the Structure and Competence of the Supreme Bodies of the Polish Republic (Adopted on February 19, 194 as a Temporary Fundamental Act until Adoption of a New Constitution), see Stephen Gorove, 'The New Polish Constitution'1954 WASH. U. L. Q. 261.

415 Articles 15(1) and 16(d) of the Little Constitution.

416 Ibid.

417 Article 19(2) of the Little Constitution

418 Bjørnskov and Voigt (n 111); the Comparative Constitutions Project (n 288).

419 Domrin (n 12) 44. Most francophone African countries follow this approach.

legitimate than it could have been.[420] In addition, some countries, such as India, require the consent of the second chambers for the declaration of states of emergency.[421] About 15 per cent of constitutions that contain emergency provisions require both chambers to approve state-of-emergency declarations.[422]

The multi-player approach increases the number of veto players and for this reason might not be compatible with the urgent nature of crisis situations, given the delays it introduces. As for the executive-centred approach, it concentrates emergency authority in the executive and produces weak ex ante legislative control, thereby conferring broad and less-checked powers on the executive at the stage of declaration.[423] This approach might not be particularly risky in advanced democracies in view of their democratic cultures and economic as well as political stability,[424] but it would appear to be open to abuse in the emerging democracies of Africa and Latin America, which lack well-developed democratic structures and cultures.[425] The legislative-centred approach, which grants the authority to declare states of emergency to the legislature, thus seems the safer option for democracy, particularly in developing countries.

4.3. The power to prolong and terminate states of emergency

The third element of emergency clauses specifies the power to prolong or end state-of-emergency declarations. Most emergency provisions allow a time-bound declaration, which is often for six months.[426] In such cases, the declaration automatically lapses with the expiry of the specified period. In other scenarios, the emergency provisions have a rule enabling the possible extension or termination of declarations. Because every state of emergency entails the danger of misuse and the possibility of making 'the exception a rule', it seems reasonable to grant the power to prolong or end an emergency to an actor other than the one endowed with the exercise of emergency powers.[427] Many emergency clauses thus try to constrain executive emergency powers by making any extensions dependent on the consent of the legislature.[428] Moreover, some emergency provisions, such as those of South Africa and Kenya, impose onerous requirements for extending emergencies.

In this regard, Ackerman has proposed a 'super-majoritarian escalator' – that is, a progressive increment of the required majority for the renewal of a declared state of emergency – to deter possible misuse of emergency powers.[429] A very similar approach has been taken in the constitutions of South Africa, Kenya and India. For instance, the South African Constitution demands qualified majority votes of 60 per cent for renewing the state of emergency more

420 Bjørnskov and Voigt (n 111).
421 Constitution of India, art 352(4).
422 The Comparative Constitutions Project (n 288).
423 Ferejohn and Pasquino (n 5) 226–236.
424 Domrin (n 12) 42.
425 Ibid.
426 Ferejohn and Pasquino (n 5) 226–236; Bjørnskov and Voigt (n 111).
427 Ibid.
428 Ibid.
429 Ackerman (n 75).

than once.[430] A special majority vote of two-thirds in either house of parliament is required for extending a state of emergency in India.[431] In Kenya, the first extension of a state of emergency requires a two-thirds majority, with any subsequent extensions needing a three-fourths majority.[432] As Ackerman notes, this helps to solve the problem of normalising emergency rule in that it makes it increasingly difficult to perpetuate the declaration.

4.4. The competence to exercise emergency powers

The executive branch of government, particularly its head, is the main institution that exercise emergency powers.[433] In addition, some emergency clauses give the military and technocrats the power to exercise emergencies.[434] The French model of emergency powers, for instance, grants expansive power to the military under what is termed a state of siege,[435] while the Hungarian Constitution establishes a Council of National Defense to exercise the powers of the government during a state of emergency.[436]

4.5. The effects of declarations of states of emergency

States of emergency confer far-reaching, extraordinary powers on emergency governments and thus affect the political, social and economic life of the state and its citizens. In view of this, emergency provisions often specify the consequences and implications of state-of-emergency declarations. First, emergency clauses proclaim the suspension or restriction of fundamental rights and freedoms.[437] Secondly, they prescribe the nature and extent of changes to the distribution of powers between the branches of government. For instance, they may reconfigure legislature-executive relations[438] as well as alter the vertical distribution of powers between the centre and subnational governments, especially so if the country is a federation or highly decentralised unitary state.[439] In addition, some emergency clauses regulate the survival of the democratic order and process during states of emergency.[440] For this purpose, they confer extraordinary powers on the emergency government for the postponement of elections, prolongation of parliamentary terms, and the compulsory convening of parliament during emergencies.[441]

430 Constitution of South Africa (1996), art 37.

431 Constitution of India, art 352(6).

432 Constitution of Kenya (2010), art 58(2).

433 Bjørnskov and Voigt (n 111).

434 Ibid; see also Özbudun and Turhan (n 77).

435 Feldman (n 284).

436 Özbudun and Turhan (n 77); Domrin (n 12) 59.

437 Fombad, 'Cameroon's Emergency Powers' (n 17); Evan J Criddle and Evan Fox-Decent, 'Human Rights, Emergencies, and the Rule of Law' (2010) Human Rights Quarterly 1.

438 Bulmer (n 12) 24–27; Domrin (n 12) 50–55.

439 Ibid; Watts (n 16).

440 Bulmer (n 12) 24–27; Özbudun and Turhan (n 77); Khakee (n 43).

441 Ibid.

An emergency clause may also limit the powers of government that can be exercised during normalcy, doing so by prohibiting the dissolution of parliament and amendments to the constitution during the period of emergency;[442] sometimes the ban may extend to other important legislation, such as electoral laws and the laws governing a state of emergency.[443] The intention in these cases is to ensure that incumbent leaders are unable to alter the rules of the game to perpetuate their stay in office and thus undermine constitutional democracy in the long run.[444]

4.6. Human rights standards during states of emergency

As human rights protections are the first casualties of emergency declarations, constitutional emergency clauses typically set minimum standards for the protection of human rights during states of emergency.[445] Two approaches are taken in this regard.

The first is a positive-list approach in which the emergency provision lists the rights that may be derogated during emergency rule.[446] Mostly the list includes freedom of movement, freedom of assembly, freedom of association, free speech, secrecy of correspondence or the right to privacy, the sanctity of the home, and certain rights during arrest and/or trial.[447] The German, Romanian and Irish constitutions employ this approach.[448] The second is a negative-list approach in which the emergency provision lists rights that are non-derogable in times of emergencies.[449] Most emergency provisions refer to the right to life, the right to equality and freedom from discrimination, the prohibition of torture and other inhuman or degrading treatment or punishment, the non-retroactivity of penal law, the inalienable dignity of the person, the right to a fair trial, freedom of religion and belief, and the prohibition of slavery and servitude.[450]

The effect of the two approaches is different in each case. Listing derogable rights has the effect of the making the remaining ones sacred, with the result that the government cannot suspend them during a state of emergency;[451] listing non-derogable rights, however, implies that it is possible to suspend the other rights. The first approach thus provides for a safer human rights regime by broadening the scope of protection.

Be that as it may, human rights protection is not only a matter for domestic laws.[452] From the perspective of international law, states are not free to shape their emergency legislation and emergency-related human rights norms and rules, given that they will be parties to various instruments than contain standards protecting human rights during states of emergency. These include the International Covenant on Civil and Political Rights of 1966 (ICCPR),

442 Ibid.
443 Ibid.
444 Ibid.
445 Bulmer (n 12) 20–22.
446 Khakee (n 43).
447 Ibid.
448 Ibid.
449 Ibid.
450 Ibid.
451 Ibid.
452 Ibid.

African Charter on Human and Peoples' Rights of 1982 (ACHPR), European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), and American Convention on Human Rights of 1969 (ACHR).[453]

In the Ethiopian context, the ICCPR is the most relevant of these, and contains a derogation clause under article 4. Accordingly, the right to life, the right not to be subjected to cruel, inhuman and degrading treatment, the right not to be subjected to slavery, slave trade and servitude, the right not to be imprisoned for failing to fulfill contractual obligations, the right not to be convicted of offences created retrospectively, the right to be recognised as a person before the law, and the right to freedom of thought, conscience and religion are non-derogable rights during the times of emergency.[454]

However, the omission of other rights from the list of non-derogable rights is not a license to governments to violate the rights recognised under the Covenant.[455] The latter provides five additional principles to guide the invocation and use of emergency powers. Accordingly, the principles of necessity, proportionality and non-discrimination are meant to shape the conduct of the government in times of emergency;[456] moreover, the principles of publicity and notification recognised under the ICCPR give protection to human rights during states of emergency. In contrast to the ICCPR, the ACHPR contains no derogation provision. In the view of the African Commission on Human and Peoples' Rights, this means that the Charter 'does not allow for states parties to derogate from their treaty obligations during emergency situations'.[457]

4.7. The ability to control emergency powers

The abuse of emergency powers is inevitable, and constitutional designers thus make explicit provisions for circumscribing them.[458] The main problem in designing emergency provisions is finding a way to balance the enabling power of the government with constraints that prevent, or at least minimise, the risk of the government and it agents abusing this power.[459] In this regard, emergency provisions often assign oversight roles to the legislature and/or the judiciary.[460]

Emergency clauses provide for judicial control over emergency powers in three ways. First, they explicitly recognise the power of the judiciary to review the validity of emergency declarations, prolongations and subsequent measures taken by the government to deal with the crisis.[461] The constitutions of South Africa and Kenya can be mentioned in this regard. These allow the judiciary to function normally even during emergency rule and empower it further to examine the constitutionality of the declaration of a state of emergency, its prolongation and the emergency measures subsequently taken by the emergency government.[462]

453 Fombad, 'Cameroon's Emergency Powers' (n 17); Criddle and Fox-Decent, 'Human Rights, Emergencies' (n 437).

454 ICCPR, art 4.

455 Ibid.

456 Ibid.

457 Laurent Serme, 'The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion' (2007) 7 African Human Rights Law Journal 142.

458 Ellmann (n 58) 57.

459 Ibid.

460 Fombad, 'Cameroon's Emergency Powers' (n 17); Ferejohn and Pasquino (n 5).

461 Ginsburg and Versteeg (n 76); Bulmer (n 12) 24–27; Özbudun and Turhan (77); Khakee (n 43).

462 Ibid. See, for example, the Constitution of South Africa (1996), art 37(3), and the Constitution of Kenya (2010), art 58(2).

Secondly, some constitutions expressly ban judicial review of the validity of declarations of states of emergency and subsequent operations.[463] Most constitutions are also silent on the power of the judiciary over states of emergency.[464] As noted earlier, the declaration of an emergency is more of a political decision than an objective determination, and this political quality leaves the justiciability of a state of emergency open to doubt; consequently, judicial control of emergency powers is not available in most jurisdictions.[465] However, emergency provisions do give significant controlling powers to the legislature. Accordingly, the latter can exercise oversight functions by approving, prolonging and terminating state-of-emergency declarations.[466] To support the legislature in this role, a significant number of emergency provisions prohibit dissolution of the legislature during states of emergency.[467] Constitutional emergency provisions, in sum, provide controlling functions of some form to either the judiciary or the legislature.

In addition, national human right institutions (NHRIs) stand to play a significant role in checking the use of emergency powers. These are organisations established by states for the purpose of protecting and promoting human rights at national level.[468] Although they are financed by the state from public funds and to that extent form part of the state structure,[469] NHRIs are subject to the international normative framework set out in the Paris Principles, which were the result of the 1991 international workshop on human rights institutions organised by the UN Commission on Human Rights and endorsed by the UN General Assembly in December 1993.[470]

Initially, the Paris Principles had no a direct binding effect on states, but over time they have been recognised in the UN system through different UN resolutions and conventions.[471] The ACHPR, moreover, requires member states to establish and promote NHRIs, albeit without providing a normative framework for them.[472] The African Commission on Human and Peoples' Rights later hinted at the standards for NHRIs by making a reference to the Paris Principles in a resolution granting observer status to African NHRIs in 1998.[473] Additionally, the Working Group on the 2030 Agenda for Sustainable Development and the African Agenda 2063 explicitly recognises the Paris Principles as a normative framework against which the status of African NHRIs is measured.[474]

463 For instance, the Federal Constitution of Malaysia, art 150(8). See also Cyrus-Vimalakumar Das, 'Emergency Powers and Parliamentary Government in Malaysia: Constitutionalism in a New Democracy' (Dissertation, Brunei University June 1994) 275–300.

464 Khakee (n 43) 15.

465 Fombad, 'Cameroon's Emergency Powers' (n 17) 72.

466 Ibid.

467 Bulmer (n 12) 24–27; Özbudun and Turhan (n 77).

468 European Union Agency for Fundamental Rights, Strong and Effective National Human Rights Institutions: Challenges, Promising practices and Opportunities (Report, 2020) 5–9.

469 Ibid.

470 Ibid.

471 Shiva Datta Bhandari, 'The Role of National Human Rights Institutions in Ending Impunity for Human Rights Abuses During Conflict: The Case of Nepal' (Master's Thesis, University of Southern Denmark and the Danish Institute for Human Rights European 2015) 15. For instance, arts 3 and 17–23 of the Optional Protocol to the Convention Against Torture (OPCAT), and art 33(2) of the UN Convention on the Rights of Persons with Disabilities (CRPD).

472 ACHPR, art 26.

473 African Commission on Human and Peoples' Rights, Resolution on Granting Observer Status to National Human Rights Institutions in Africa, 24th Ordinary Session, 31 October 1998, Banjul, Cambia, art 4.

474 Rachel Murray, Francesca Thornberry and Gilford Kimathi, African National Human Rights Institutions and Sustainable Development: An Overview of Good Practice (The Danish Institute for Human Rights and Network of African National Human Rights Institutions, 2019) 3–15.

NHRIs functioning according to the Paris Principles are thus considered as key to the implementation of the 2030 Agenda for Sustainable Development and the African 2063 Agenda.[475] The Paris Principles can be regarded, then, as setting out the minimum international standards for the establishment of NHRIs – they provide the normative framework for the status, structure, mandate, composition and power of NHRIs. As such, NHRIs which are in in compliance with the Paris Principles are essential for the protection and promotion of human rights.[476]

To be effective, NHRIs are required to comply with six main standards contained in the Paris Principles: a broad mandate based on the universality of human rights; autonomy from government; independence guaranteed by statute or constitution; pluralism; adequate resources; and adequate powers of investigation.[477] The Principles require the institutional and financial independence of NHRIs, which entails that they should be free from government influence and not subject to financial control liable to impair their autonomy.[478] Furthermore, the enabling law has to provide for pluralistic composition, acceptable working procedures, access to government information, and consultation, dialogue and networking with non-governmental organisations.[479]

The Paris Principles require too that NHRIs have a broad mandate to promote and protect human rights.[480] Article 2 stipulates that such mandates should be 'as broad as possible' and clearly provided for in the enabling act, whether it be a constitution or statute.[481] This means, inter alia, that NHRIs should address the full range of human rights, including economic, social and cultural ones, and contribute to national development strategies.[482] The Paris Principles also set out the main functions of NHRIs,[483] which include advising the executive or legislature on current or new administrative and legislative acts and making recommendations to facilitate compliance with international standards.[484] In addition, NHRIs are supposed to monitor any kinds of human rights violation, prepare reports drawing the government's attention to necessary actions, and conduct promotional activities such as awareness-raising and rights-education.[485] The 'broad mandate' clause implies that NHRIs should be authorised to deal with individual complaints, carry out investigations and make recommendations to the competent authorities.[486] Thus, in addition to promoting human rights, effective NHRIs serve oversight functions and thereby work to ensure accountability during incidences of human rights violations.

475 Ibid. Agenda 2063: The Africa We Want is a '50-year strategic framework for the socio-economic transformation of the continent implemented through a series of 10-year implementation plans. African Agenda 2063 aspires, among other things, to entrench democratic values, culture and practices; universal principles of human rights; gender equality, and justice and the rule of law. In its first 10-year implementation plan, it calls for the full implementation of a range of key international and regional human rights instruments, including the African Charter on Human and Peoples' Rights'.

476 Ibid.

477 Principles Relating to the Status of National Institutions (Paris Principles), Adopted by General Assembly Resolution 48/134 of 20 December 1993. See also International Council on Human Rights Policy, Assessing the Effectiveness of National Human Rights Institutions (Report, 2005) 6–9.

478 Ibid.

479 Ibid.

480 Paris Principles, art 1

481 Paris Principles, art 2.

482 Murray, Thornberry and Kimathi (n 474) 11–12; Bhandari (n 471) 11–12.

483 Paris Principles, art 3.

484 Ibid.

485 Ibid.

486 Ibid; Bhandari (n 471) 17–19.

That being said, the Paris Principles do not expressly state that controlling emergency powers is part of the mandate of NHRIs, nor do they offer guidance on the conduct of NHRIs in periods of emergency.[487] This raises the question of whether NHRIs have oversight roles at such times. Amnesty International argues that NHRIs should investigate the conduct of the police and security forces during states of emergency even if that authority is not explicitly provided for in the enabling legislation. NHRIs, the argument goes, have a general mandate to protect and promote human rights at all times, and so they should not be banned from operating during states of emergency.[488]

In the same vein, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights Sub-committee on Accreditation maintains that NHRIs should discharge their responsibility to protect and promote human rights in all circumstances without exception.[489] They should thus continue exercising their power during states of emergency by issuing public statements, conducting investigations, and releasing regular and detailed reports on human rights violations.[490] The Sub-committee further recommends that the scope of the mandate of NHRIs be broad enough to protect the public against human rights violations by military, police and special security forces.[491] The exclusion of the security organs of the state from the competence of the NHRIs and the unreasonable, arbitrary limitations on the powers of NHRIs in times of emergency undermine the credibility and effectiveness of these institutions.[492]

NHRIs can hence be said to contribute to controlling the executive during states of emergency by virtue of their mandate to promote and protect human rights, in the process of which they supplement parliamentary and judicial control of emergency powers.[493] This can be accomplished, for instance, by making recommendations about the implications emergency declarations and measures have for fundamental rights, reporting to the parliament on the human rights situation in times of emergency, calling for measures to be proportional and necessary, investigating allegations of abuses, and raising awareness of fundamental rights under emergency situations.[494]

487 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) Sub-Committee on Accreditation (ICC SCA), General Observations (As adopted in Geneva, May 2013) 48–49.

488 Amnesty International, Amnesty International's Recommendations on National Human Rights Institutions (AI Index: IOR 40/007/2001, October 2001) 21.

489 ICC Sub-Committee on Accreditation (ICC SCA (n 487).

490 Ibid.

491 Ibid, 50.

492 Ibid.

493 Nicos Alivizatos, Veronika BÍlková, Iain Cameron, Oliver Kask, and Kaarlo Tuori, Respect For Democracy, Human Rights and the Rule Of Law during States of Emergency – Reflections (European Commission For Democracy through Law (Venice Commission), 26 May 2020) 19.

494 European Union Agency for Fundamental Rights (n 468) 14–15, 71, 93–94.

3

The Framework for Emergency Powers in Ethiopia

1. Introduction

Ethiopia has had many constitutions, which were promulgated variously under imperial, military and semi-authoritarian regimes. The first constitution was adopted on 16 July 1931. Inspired by the 1889 Japanese constitution, the 1931 Constitution contained a total of 55 articles[495] and provided several human and democratic rights. However, certain rights (freedom of speech, association, and religion) and state-of-emergency provisions in the Japanese model were purposely left out of the Ethiopian draft.[496] This constitution was revised after 25 years by a constitutional commission led by American scholars. The result was the 1955 Revised Constitution, which was more explicit than its predecessor on the subject of emergency powers. In fact, both of them were imperial constitutions drafted, promulgated and used during the reign of Emperor Haile Selassie. The latter's regime was confronted for years by public protests and student movements until it was eventually overthrown by a group of low-ranking military officers in 1974.[497]

495 The first progressive intellectuals of Ethiopia were foreign-educated young men inspired by Japan's Meiji transformation from a feudal society, like that of Ethiopia, into an industrial power. They were called 'Japanisers', with Bejerond TakleHawaryat Tekle-Mariam, who drafted the 1931 Constitution, regarded as one of most the influential Japanisers of the time. Ethiopia's suspicion of Europe's colonial interests was another factor that led it to adopt the Meiji Constitution: the elites understood that Japan was a distant power that did not pose a threat to Ethiopia's sovereignty. See Tsegaye Beru and Kirk W Junker, 'Constitutional Review and Customary Dispute Resolution by the People in the Ethiopian Legal System' (2008) XLIII North Carolina Journal of International Law 1, 6–7.

496 James CN Paul and Christopher Clapham, Ethiopian Constitutional Development: A Text Book (Vol 1 Haile Selassie I University in association with Oxford University Press 1967) 340–341.

497 Zewde (n 79) 220–225.

The 1974 Provisional Military Government Establishment Proclamation, along with subsequent legislation enacted to define the powers and functions of the provisional military government, imposed a permanent state of emergency for more than a decade.[498] Finally, the military regime promulgated a new People's Democratic Republic of Ethiopia (PDRE) constitution in 1987. This 1987 PDRE Constitution reflected a socialist ideology and had some provisions on the use of emergency powers.

In addition to these constitutions, Ethiopia has had others that were drafted and used temporarily to address the political problems of the day. Examples are the 1952 Eritrean Constitution, which led to a decision by the UN General Assembly to confederate the autonomous unit of Eritrea with Ethiopia under the sovereignty of the Ethiopian Crown,[499] and the 1974 Draft Constitution, which introduced a constitutional monarchy.[500] These contained clear emergency provisions that dealt with some of the contemporary concerns that surround emergency powers.

The current Federal Democratic Republic of Ethiopia (FDRE) Constitution was promulgated in 1995 following the overthrow of the military regime in 1991 by liberation fronts operating under the umbrella of Ethiopian People's Revolutionary Democratic Front (EPRDF). Like the previous ones, this constitution contains emergency provisions that regulate government actions in times of emergency situations. In addition to the constitutional emergency powers, the current Ethiopian framework contains legislative emergency powers, with these having been granted to the executive through proclamations enacted by the House of People's Representative (HoPR). Ethiopia is also a party to a number of international human right treaties, which are parts of the Ethiopian legal system. The emergency legal regime of Ethiopia contains all of these national and international legal acts.

This chapter examines the framework, design and structure of Ethiopia's emergency regime in the light of historical and contemporary developments. Particular attention is paid to the basic question of emergency powers, that is, whether the architecture of the emergency regime is safe for constitutional democracy by countering abusive emergency powers and thereby promoting the protection of human rights and respect for rule of law. The chapter also highlights the federal aspect of the country's emergency powers. Indeed, successive regimes in Ethiopia have used emergency rules to address both real and imaginary crises. As Lutz notes, past experience and political culture are relevant to constitutional design and democratisation,[501] and with this in mind, the chapter explores the history of constitutional emergency clauses in Ethiopia in attempt to discern if there is any pattern to it.

498 Proclamation No. 1 of 1974, Provisional Military Government Establishment Proclamation, Negarit Gazeta, 34th Year, No. 1, Addis Ababa, 12 September 1974; Proclamation No. 2/1974, Definition of Powers of the Provisional Military Administration Council and its Chairman, Negarit Gazeta, 34th Year, No. 2, Addis Ababa, 15 September 1974; Proclamation No. 27, 1975, Provisional Military Government Establishment and Definition of Powers of the Provisional Military Administration Council and its Chairman Amendment, Negarit Gazeta, 34th Year, No. 23, Addis Ababa, 17 March 1975; Proclamation No. 108/1976, Definition of Powers and Responsibilities of the provisional Military Administration Council and the Council of Ministers, Negarit Gazeta, 36th Year, No. 10, Addis Ababa, 29 September 1976; Proclamation No. 110/1977, Redefinition of Powers and Responsibilities of the Provisional Military Administration Council and the Council of Ministers, Negarit Gazeta, 36th Year, No. 13, Addis Ababa, 11 February 1977.

499 The Eritrean Constitution as Ratified, 11 September 1952.

500 The 1974 Draft Constitution of Ethiopia by Higher Constitutional Commission Assembly, 8 August 1974.

501 Donald S Lutz, Principles of Constitutional Design (Cambridge University Press 2006) 1–19.

2. The legal regime of emergency powers in Ethiopia

The Ethiopian legal regime comprises both a constitutional and legislative model of emergency powers. The former is exercised by invoking the constitutionalised emergency provisions of the FDRE Constitution and the nine regional state constitutions.[502] These federal and subnational emergency provisions contain rules regulating the invocation and exercise of emergency. In addition, the emergency legal regime contains legislative emergency powers granting special and additional powers to the executive in times of crisis. These powers are available through ordinary proclamations made by the legislature.[503]

Ethiopia is also a party to a number of international human right treaties, such as the Universal Declaration of Human Rights (UDHR), ICCPR and ACHPR, which contain rules and standards with implications for emergency powers.[504] The ICCPR has a number of explicit provisions on the regulation of states of emergency. It has provisions on the circumstances in which a state of emergency may be declared and the principles that should regulate such a declaration.[505] Crucially, it provides a list of rights that are non-derogable in a state of emergency.[506] The ACHPR, by contrast, does not contain a provision on states of emergency and consequently has no any derogation clause.[507] The African Commission on Human and Peoples' Rights has interpreted this silence as a prohibition of derogation from the Charter's provisions in times of crisis.[508]

The FDRE Constitution, one-third of which is devoted to human rights, makes these international treaties an integral part of the Ethiopian legal system.[509] It also requires, in Chapter 3, that its human rights provisions be interpreted in conformity with them.[510] In

502 FDRE Constitution, art 93.

503 Proclamation No. 359/2003, System for the Intervention of the Federal Government in the Regions, Federal Negarit Gazeta, 9th Year, No. 80, Addis Ababa, 10 July 2003; Proclamation No. 200/2000, Public Health Proclamation, Federal Negarit Gazeta, 6th Year, No. 29, Addis Ababa, 9 March 2000; Proclamation No. 661/2009, Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009, Federal Negarit Gazeta, 16th Year, No. 9, Addis Ababa, 13 January 2010; Regulation No. 299/2013, Food Medicine and Health Care Administration and Control Council of Ministers Regulation, Federal Negarit Gazeta, 20th Year, No. 11, Addis Ababa, 24 January 2014; Proclamation No. 1112/2019, Food and Medicine Administration Proclamation, Federal Negarit Gazeta, 25th Year, No. 39, Addis Ababa, 28 February 2019.

504 Ethiopia has ratified the following UN and regional human rights treaties: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of Persons with Disabilities (CRPD); Convention on the Rights of the Child (CRC), International Convention on the Elimination of All Forms of Racial Discrimination (CERD); African Charter on the Rights and Welfare of the Child; and AU Convention Governing Specific Aspects of Refugee Problems in Africa

505 International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, art 4.

506 ICCPR, art 4(2).

507 ACHPR.

508 Abdi Jibril Ali, 'Distinguishing Limitation on Constitutional Rights From their Suspension: A Comment on the CUD Case (2012) 2:1 Haramaya Law Review 1.

509 FDRE Constitution, art 9(4).

510 FDRE Constitution, art 13(2). See also Adem Kassie Abebe, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview (2011) 5:1 Mizan Law Review 42.

effect, the ICCPR and ACHPR provisions are parts of the Ethiopian legal regime by virtue of articles 9 (4) and 13 (2) of the Constitution. Ethiopia's legal regime for emergency powers is thus stipulated in the abovementioned national and international legal instruments.

2.1. Constitutional emergency powers

Ethiopia has employed a neo-Roman model for regulating emergency powers ever since the promulgation of its first written constitution. Accordingly, all its modern constitutions, including the current one, have emergency clauses allowing for the invocation of a state of emergency. These constitutions have commonly, albeit to differing degrees, anticipated various emergency scenarios and then empowered the governments of the day to take extraordinary actions in response to them. However, the design and structure of the constitutional emergency provisions are not the same across regimes. The declaration, renewal, and termination of states of emergency, as well the scope of emergency measures, thus have been regulated in different ways since 1931.

2.1.1. The genesis of emergency clauses in Ethiopia

2.1.1.1. The era of unwritten constitutions

The 1931 Constitution is regarded as the first modern, written constitution in Ethiopia's history.[511] Before then, there were constitutionally important traditional documents, such as Kibre Negest ('the Glory of the Kings'), Fetha Negest ('the Law of the Kings') and Serate Mengist ('the Institutions of the Kingdom'), which functioned as sources of legitimate political authority.[512] Traditionally, the Emperor had boundless and uncontested powers, and was the supreme sovereign body of the empire.[513] He not only exercised essential functions, but was, more fundamentally, the guardian of the country's peace, national unity and independence who protected the people and territory from internal and external attack.[514] As Paul and Clapham note,

> *The Ethiopian Emperors of former times owed their power, the reverence which they received, and their legitimacy to the fact that they performed certain important functions. That is to say, they did things which were necessary or at any rate highly beneficial, to the welfare of Ethiopia, or so it was believed.*[515]

Ethiopian traditions thus conferred prerogative powers of emergency on emperors to enable them to address threats to the nation. However, they could not exercise these powers easily, as traditional norms imposed constraints that diluted their otherwise absolute powers.[516] The church was one such traditional limitation.[517] At the time, it was beholden on the Emperor to conform to Christian morality and ethics,[518] and he who went against this was considered to have offended church leaders as well as believers. It could lead to excommunication

511 Zewde (n 79) 109–110.

512 GWB. Huntingford, 'The Constitutional History of Ethiopia (1962) 3:2 Journal of African History 311, 311–315.

513 Paul and Clapham (n 496) 270; see also Markakis and Beyene (n 81).

514 Paul and Clapham (n 496) 290–291.

515 Ibid, 290.

516 Minasse Haile, 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the 'Republic's' – Cucullus Non Facit Monachum' (2005) 13 Cardozo J. Int'l & Comp. L. 4.

517 Markakis and Beyene (n 81) 195.

518 Ibid; Paul and Clapham (n 496); Haile (n 516).

and – given that excommunication freed people from their duty to follow his orders – the Emperor's ultimate loss of power.[519] In practice, the Emperor's power was thus not unlimited. Another limitation were the interests of regional (or provincial) governors.[520] The Emperor could not arbitrarily disregard the governors, who could revolt if he neglected their interests by acting outside the traditional parameters of his power.[521] In this regard, Paul and Clapham note that the powers of the Emperor were challenged more often in the provinces than at the centre.[522]

A further constraint were the virtues expected of the Emperor. According to the prescriptions of the Fetha Negest,

> *[t]he king shall rule his friends and soldiers with leniency and with clemency; he shall act according to the advice of the old grown with him, nor shall he make heavy his authority upon them [for he is] warned from what was done to Solomon's son by his father's friends.*[523]

This statement makes it clear that the Emperor was obliged to demonstrate certain moral virtues and make decisions in consultation with elders and those with experience; conversely, he was not allowed to act excessively, immorally or unilaterally. Traditional sources granted significant powers to the Emperor to protect and defend the state from internal and external threats; however, as in Europe's medieval monarchies, that power was restricted by the church, provincial potentates, and the moral virtues expected of a just emperor.

2.1.1.2. The era of written imperial constitutions

The 1931 Constitution was not the product of a popular uprising or revolution; rather, Haile Selassie granted it to the people of his own will without there having been unrest to that end.[524] Be that as it may, the Constitution simply formalised the power of government which had been conferred already on the Emperor by traditional norms; it did not empower the people[525] – as Markakis points out, the essence of the 1931 Constitution is in article 6, which states that supreme power rests in the hands of the Emperor.[526]

Indeed, centralisation and modernisation were the motive forces behind the introduction of the 1931 Constitution.[527] As an instrument of centralisation, it constitutionalised the traditional absolute powers of the Emperor without their traditional limitations, for instance by watering down the powers of provinces and placing them under the authority of the Emperor.[528] As an instrument of modernisation, it is modelled on the Japanese Imperial Constitution of 1889 and introduced a bicameral legislature and various rights provisions in

519 Haile (n 516) 19; Paul and Clapham (n 496)
520 Ibid.
521 Ibid, 281–290
522 Ibid.
523 Haile (n 516).
524 Ethiopian Constitution of 1931, Preamble; Markakis and Beyene (n 81) 200; Beru and Junker (n 495) 10.
525 Markakis and Beyene (n 81) 199.
526 Ibid.
527 Paul and Clapham (496) 340–341.
528 Ibid.

Ethiopia.[529] The bicameral parliament comprised the Chamber of the Senate and Chamber of the Deputies.[530] The Emperor personally appointed members of the Senate from among princes and members of the nobility who had served the country well as judges, generals, ministers and patriots.[531] Members of the Chamber of Deputies were appointed by the nobilities and chiefs in their respective localities.[532] Neither of the chambers were elected houses that represented the people; as such, they could not be sources of political authority carrying out the usual functions of elected legislatures, namely law-making and oversight.

In terms of article 34 of the Constitution, no law could be put in force without being discussed by the chambers and confirmed by the Emperor. The newly introduced legislature had only the power to discuss matters referred to it by the Emperor; it lacked the power to make laws and decisions, and was unable to veto the Emperor's decisions.[533] Moreover, the chambers were not convened regularly but assembled annually to sit for a period determined by the Emperor.[534] The size of the chambers, the duration of their sessions, and the terms of the members were specified not in the Constitution but by the Emperor.[535] All of these factors made parliament symbolic at best, leaving with a highly limited role in times of normalcy as well as emergency.

The 1889 Constitution of Japan which served as a model for the 1931 Ethiopian Constitution contained several provisions that regulate emergency situations.[536] For instance, it contained provisions that clearly empower the Emperor to proclaim a state of siege.[537] The Emperor also had the power to issue imperial ordinances in times of urgency when parliament was not sitting.[538] Additionally, the emergency provisions of the Japanese Constitution allowed the Emperor to take financial measures by imperial ordinance in times of crisis.[539] The Constitution also banned its amendment during emergency situations.[540]

Ethiopian drafters borrowed selectively from the Japanese Constitution, however, leaving out most of the emergency provisions except for the imperial ordinance (article 8).[541] As a result, the 1931 Ethiopian Constitution did not have emergency provisions that explicitly regulate a state of emergency. The only ones with some relevance in this regard were article 9, licensing the Emperor to promulgate emergency decrees alone when the chambers were in recess, and article 12, reserving the power to declare war and conclude peace to the Emperor.[542] Under article 9, the Emperor's emergency decrees had to be presented before the chambers at their first subsequent meeting for approval, which was mandatory for the decrees to have force of law.[543] This provision was the only source of decision-making power

529 Zuzanna Augustyniak, 'The Genesis of the Contemporary Ethiopian Legal System' (2012) 46 Studies of the Department of African Languages and Cultures 100.

530 Ethiopian Constitution of 1931, art 30.

531 Ibid, art 31.

532 Ibid, art 32.

533 Ibid, art 34.

534 Ibid, art 8.

535 Markakis and Beyene (n 81) 199.

536 Japan's Constitution of 1989, arts 8, 14, 31, 70, 75.

537 Ibid, art 14.

538 Ibid, art 8.

539 Ibid, art 70.

540 Ibid, art 75.

541 Ethiopian Constitution of 1931, art 14, 70, 75.

542 Ibid, arts 9 and 12.

543 Ibid.

for the legislature, namely the power to reject emergency decrees which the Emperor had promulgated alone while the legislature was in recess. Nevertheless, the Emperor was the commander-in-chief of the army that could determine its organisation and mobilisation in times of war,[544] and so the provision could be regarded as source of emergency powers for the Emperor.

The 1931 Constitution provided for several human and democratic rights.[545] Ethiopian subjects had the right to pass freely from one place to another; no Ethiopian subject could be arrested, sentenced, or imprisoned except pursuant to law; no person could, against his will, be deprived of his right to be tried by a legally established court; no domicile searches could be made; no one had the right to violate the secrecy of the correspondence of Ethiopian subjects; except in cases of public necessity determined by law, no one had the right to deprive an Ethiopian subject of any moveable or landed property that he owned; and all Ethiopian subjects had the right to present to the government petitions in legal form.[546] However, these human rights provisions could be disregarded by the Emperor during times of public danger.[547]

The 1931 Ethiopian Constitution thus consolidated the legitimate exercise of power in the hands of the Emperor and went so far as to remove traditional limitations against an absolute exercise of powers. There was hence no clear and stated distinction between the power of the Emperor in times of crisis and normalcy: he had unlimited emergency powers by virtue of being the sovereign authority of the empire. Some constitutional provisions (articles 6, 9 and 29) show clearly that the Emperor's emergency power was without constraint, with the only intentional limitation being parliament's power to reject emergency decrees made by the Emperor alone during the recess. Even so, given that parliament did not control its agenda, schedule or membership, it could do little in practice to check the Emperor's power to issue emergency decrees and, indeed, did not make use of this power.[548] Technically, then, the 1931 Constitution did not contain a state-of-emergency provision, but simply reflected the necessity approach to dealing with emergency situations.

Key developments of the time – Eritrea's federation with Ethiopia in 1952, the changing political climate of the early 1950s, and awareness of its inadequacies – led to the revision of this constitution,[549] a process undertaken by a constitutional commission led by American scholars such as J.H. Spencer, Albert Garretson, and Edgar Turlinton.[550] In the resultant 1955 revised Constitution, the place of the Emperor remained unchanged. His person, as before, was declared to be sacred, his dignity inviolable and his power indisputable.[551] Sovereign power was vested with the Emperor, who had supreme authority over all the affairs of the empire,[552] was both head of state and chief executive, and had powers and functions that were legislative and judicial in nature.

544 Ibid, art 13 and 20.
545 Ibid, arts 18–28 (Chapter II).
546 Ibid, art 28.
547 Ibid, art 29.
548 Markakis and Beyene (n 81) 202; Paul and Clapham (n 496) 340.
549 Beru and Junker (n 495) 15; Zewde (79) 220–223.
550 Ibid.
551 1955 Revised Ethiopian Constitution, art 4; see also Zewde (79) 140–147.
552 Ibid, art 26.

Although the 1955 Constitution did not bring significant changes to Ethiopia's political life,[553] it did mark a major departure from the 1931 Constitution in the way it regulated emergency powers. This revised Constitution introduced an emergency provision that could be invoked in times of emergency.[554] Article 29 of the revised Constitution stated:

> *The Emperor reserves the right, with the advice and consent, of the Parliament to declare war. He, further reserves the right to decide what armed forces shall be maintained both in time of peace and in time of war. As Commander-in-Chief of the Armed Forces, He has the right to organize and commend the said Forces; to commission and to confer military rank upon the officers of the said Forces; to promote, transfer, or dismiss any of the said officers. He has, further, the right to declare a state of siege, martial law or a national emergency, and to take such measures as are necessary to meet a threat to the defense or integrity of the Empire and to assure its defense and integrity.*

As was clearly provided, the Emperor had the power to declare a state of emergency. The provision also made it clear that ordinary procedures of decision-making requiring the advice and consent of parliament were inapplicable in times of crisis. The emergency clause envisaged prompt action by the Emperor in times of peril threatening the security of the empire and hence enabled him to declare a state of emergency by imperial order.

This same clause employs different terms – a state of siege, martial law, and national emergency – to denote the exceptional situations that trigger the declaration of emergency.[555] Although these terms may be used interchangeably even today to signify exceptional situations that threaten the life of a nation and call for immediate government action,[556] 'a state of siege' and 'martial law' have different origins and entailments. Historically, 'martial law' is a notion that was developed in the United States and other common law countries, whereas 'a state of siege' originated in France and became common in civil law countries.[557] Martial law is based on the concept of necessity and entails little limitation on the use emergency powers when circumstances require its imposition; in a state of siege, the emergencies and counter-measures are regulated on the basis of legal rules ex ante.[558] Consequently, martial law gives broad and unlimited powers to the executive during an emergency, while the power of the executive is constrained in a state of siege by the involvement of the legislature and the constitutional council.[559]

In both cases, extraordinary and additional powers are transferred to the military for maintaining security, yet the role of military tribunals is not the same.[560] Under martial law, ordinary courts can be suspended and military tribunals established to try civilians when the civil courts in the territory under martial law are no longer able to function.[561] Military tribunals thus handle all cases regardless of the nature of the offence.[562] By contrast, the French state of siege allows military tribunals and civil courts to operate concurrently.[563]

553 Zewde (n 79) 140–147.
554 1955 Revised Constitution of Ethiopia, arts 29, 65, 92, 108.
555 Ibid, art 29.
556 Domin (n 12) 25–26.
557 Ibid; Gross and N´ı Aolain (n 9) 26–33.
558 Feldman (n 284); Gross and N´ı Aolain (n 9) 26–33.
559 Ibid.
560 Ibid.
561 Ibid.
562 Ibid.
563 Ibid.

Military tribunals exercise jurisdiction over civilians charged with serious crimes under the civilian penal code as well as crimes against the state, including treason, espionage and other crimes interfering with national defence; civilian courts retain jurisdiction over all other types of cases.[564]

In view of this, the emergency provision incorporated under the 1955 revised Constitution closely resembles the common law idea of martial law. Article 108 allows for the suspension of ordinary courts; according to the same provision, a military court could be functional during emergencies.[565] That military court could deal with cases involving civilians as well as active military personnel.[566] Hence, the emergency clause adopted features of martial law, which could be attributable to the influence of the America scholars who led the constitutional commission. The clause does not provide for detailed regulation of emergencies, nor does it mention all the conditions known in the 1950s to trigger the invocation of emergency powers;[567] instead, it enables the Emperor to use the power of emergency when national integrity and the defence of the empire are under threat. Moreover, it does not regulate the scope of emergency measures taken in times of emergency, but gives the Emperor a blank cheque to do whatever is necessary. Similarly, the provision does not stipulate the duration of the declaration and thus disregards the temporal nature of emergency powers.

The 1955 revised Constitution conferred decree-making power on the Emperor.[568] As in the 1931 Constitution, he could issue legislative decrees in order to be able to respond to urgent matters during parliamentary recess,[569] decrees which had to be approved by parliament in its subsequent meeting to have force of law.[570] However, the decrees were not the same as the emergency decrees noted under article 9 of the 1931 Constitution. Article 92 of the 1955 revised Constitution deals with decree-making powers that could be exercised in times of normalcy. This is clear from the Amharic version of the provision, which employs the term 'urgency' to signify matters that cannot wait until the next meeting of parliament. In other words, the 'urgency' did not necessarily stem purely from exceptional situations threatening the life of the empire. Furthermore, the Emperor, who could declare states of emergency by imperial orders, had no need to invoke article 92 to respond to emergency situations: since his power to declare emergencies was not affected by whether parliament was sitting or in recess, article 92 was irrelevant in times of crisis. Understanding article 92 as part of the emergency clauses of the 1955 Constitution thus makes no sense. In fact, as it happened, the Emperor invoked that provision to take tax-related and economic measures in times of normalcy in the first five years that followed the promulgation of the Constitution.[571]

Another difference was that the 1955 revised Constitution provided for more human right provisions than its predecessor and incorporated most of the human rights adopted in the advanced countries at the time.[572] As Paul and Clapham observe, each of the human rights provisions has a precedent either in Ethiopian tradition or in advanced systems overseas.[573]

564 Ibid.

565 1955 Revised Constitution of Ethiopia, art 108.

566 Ibid.

567 In the middle of the 1950s, six or seven conditions for emergency were reflected in the constitutions of the time. See Domrin (n 12) 38–45.

568 1955 Revised Constitution of Ethiopia, art 92.

569 Ibid.

570 Ibid.

571 Markakis and Beyene (n 81).

572 1955 Revised Constitution of Ethiopia, arts 37–65.

573 Paul and Clapham (n 496) 392.

The Constitution recognised the rights to equality and freedom from discrimination.[574] As such, no one was to be denied equal rights, and there would be no discrimination among Ethiopian subjects with respect to civil rights.[575] In addition, it included provisions on freedom of speech and association which had been deliberately left out of the 1931 Constitution.[576] The 1955 Constitution also empowered the Emperor to take all necessary measures to ensure that all inhabitants of the empire enjoyed human rights and fundamental liberties recognised therein.[577] This ambitious provision required that the Emperor take any action whatsoever for safeguarding the security and territorial integrity of the empire.[578] As noted earlier, the two wishes reflected in article 36 of the revised Constitution – for order and for freedom – are in tension, with the result that the provision exemplifies the dilemma raised by emergency powers: How could the Emperor protect the empire from danger in times of crisis, yet ensure that everyone had full enjoyment of the rights and freedoms recognised in the Constitution?

Given the inherent tension between order and freedom, many constitutions and international human rights instruments, among them the ICCPR, allow derogation, which is the temporary suspension of human rights during states of emergency.[579] This enables a government to adopt extraordinary and provisional measures for dealing with crises that imperil the nation.[580] However, the 1955 revised Constitution did not incorporate a provision listing the rights and freedoms that may or may not be suspended in a declared state of emergency,[581] but simply contained a general limitation clause restricting fundamental rights and freedoms on grounds of public order and general welfare in times of normalcy.[582] The absence of a derogation clause in the 1955 Constitution implies that the Emperor could not suspend rights and freedoms during emergencies, which was indeed unrealistic and near to impossible, especially at that time of absolute monarchy. The omission of a derogation clause may have been due to the influence of the American drafters, seeing as the United States Constitution has no clause formally allowing derogation from particular civil and political liberties.[583]

Moreover, judicial and legislative control over states of emergency had no place in the 1955 revised Constitution. The declaration of states of emergency could shift judicial power to military courts,[584] and though the Constitution made significant changes to the composition and powers of the legislature by establishing an elected chamber of deputies and granting it a law-making power,[585] the legislature did not have the power to approve, renew or end states of emergency. Similarly, it was vested with the power to summon ministers before it to

574 1955 Revised Constitution of Ethiopia, art 37-38.

575 Ibid.

576 Ibid, arts 41, 42, 45, 47.

577 Ibid, art 36.

578 Ibid.

579 Khakee (n 43).

580 Ibid.

581 Gross and N´ı Aolain (n 9) 58.

582 1955 Revised Constitution of Ethiopia, art 65.

583 On the place of derogation clauses in the United States, see Paige Tapp, 'To Derogate or Not to Derogate, that is the Question: A Comparison of Derogation Provisions, Alternative Mechanisms and Their Implications for Human Rights' (2019) University of Law School, Student Papers 1.

584 1955 Revised Constitution of Ethiopia, art 108.

585 Ibid, art 77.

answer questions, but had no power to control them in either their individual or institutional: ministers remained responsible to the Emperor alone.[586] In sum, the imperial constitutional framework did not enable parliament to exercise oversight of the Emperor during states of emergency.

As mentioned, the two imperial constitutions were not the result of upheaval or revolution, but were granted to the people by the Emperor on the basis of his goodwill. This was contrary to the constitution-making experiences of many other countries – almost all of the world's written constitutions are the product of momentous events,[587] and arise from political crises or revolutions accompanied by demands for change.[588] The trend in constitution-making in Ethiopia shifted, however, with the military coup in December 1960 when the legitimacy of the Emperor and Crown was questioned for the first time[589] and a committee was established to revise the 1955 Constitution.

Led by Abebe Reta and assisted by two foreign legal advisers, Charles Mathew and D.E. Paradis,[590] the committee completed the revision in October 1961, but Emperor Haile Selassie was reluctant to accept the outcome. Continued protests and uprisings throughout the country nevertheless forced him to re-order that the new cabinet, led by Endalkachew Mekonen, work on the revision of the 1955 Constitution in order to address popular demands.[591] Endalkachew presented the Emperor with a new draft constitution and, on 5 March 1974, the latter announced it to the public on radio and television.[592] However, this new draft constitution (Endalkachew's Constitution) did not come into force owing to the immediate military intervention that deposed the Emperor, suspended the revised 1955 Constitution, and put the new draft constitution under further scrutiny on the grounds of making necessary improvements.[593]

The result, the 1974 draft Constitution, was a breakthrough-attempt to introduce profound change in Ethiopia. For instance, it conferred sovereignty on the people by establishing a constitutional monarchy limiting the powers of the Emperor.[594] On the matter of emergency powers, the draft Constitution embodied a neo-Roman model that regulates a state of emergency on the basis of predetermined rules; it was also more detailed in this regard than the country's previous constitutions and made numerous departures from them.

To begin with, it provided for three distinct types of emergency, a state of emergency, state of siege and state of defence, each of which could be invoked on different grounds by taking into account the gravity of the danger.[595] The state of emergency could exist in case of internal violent acts that threaten public order and stability, or in case of natural disasters or economic crisis.[596] The state of siege could exist when the country is under foreign attack or threat of imminent foreign attack or internal civil war.[597] The state of defence could be invoked for even

586 Markakis and Beyene (n 81) 207.

587 Ibid.

588 Ibid.

589 Christophe R Clapham, 'The Ethiopian Coup d'état of December 1960' (1968) 6:4 Journal of Modern African Studies 495.

590 Beru and Junker (495) 20–23.

591 Ibid.

592 Ibid.

593 Proclamation No. 1 of 1974, art 5.

594 1974 Draft Constitution of Ethiopia, arts 5–6.

595 Ibid, arts 111–113.

596 Ibid, art 111.

597 Ibid, art 112.

more serious threats affecting the national integrity or defence of the state.[598] This system of differentiated emergency powers is common in contemporary Europe.[599] For example, the German Basic Law provides for a state of internal emergency, a state of tension, and a state of defence, depending on the nature of the emergency situation.[600]

The power to declare the first two types of emergencies – a state of emergency and a state of siege – is shared by the Council of Ministers and the Emperor: the former presents a request of declaration to the Emperor, who is able to promulgate it.[601] The national assembly can also renew or terminate the state of emergency and state of siege at any time.[602] As for the third type, the state of defence is declared through the involvement of the national assembly as well as the Council of Ministers and the Emperor: that is to say, it is declared by the Emperor at the request of the Council of Ministers and with the consent of the national assembly. All in all, the Emperor alone could not declare emergencies under the 1974 draft Constitution.

The careful reading of the provisions and the background against which the draft constitution was produced shows that the Council of Ministers and the national assembly were envisaged as having a greater role in political decision-making, including in declaration of emergencies, than what transpired. Under the 1974 draft Constitution, the Emperor's power to make decisions in regard to emergency situations was minimal and did not seem to go beyond merely endorsing decisions made by the Council of Ministers and national assembly. There was no time-limit concerning the state of defence; by contrast, the state of emergency and state of siege were time-bound[603] in that they could be introduced for a definite maximum of three months, albeit with the possibility of their being renewed or prolonged, as well as terminated, by the national assembly.[604]

The 1974 draft Constitution (in articles 111 and 112) requires the national assembly to make a proclamation that deals with the detailed measures taken during the state-of-emergency and state-of-siege declaration periods.[605] The state of emergency and state of siege are similar in regard to their declaration, prolongation, and termination; however, the conditions for the declaration of a state of siege are more serious than those triggering the declaration of a state of emergency.[606] Furthermore, although it is not indicated in the emergency clauses of the 1974 draft Constitution, a state of siege and state of emergency differ in their effects on power relations between civilian and military authorities.[607]

On the one hand, a state of siege transfers certain powers concerning the maintenance of order from civilian to military authorities; the civilian authorities retain all other functions and powers.[608] Military courts can assume jurisdiction over any offence against public peace and order whether committed by the military personnel or civilians. On the other hand, during a state of emergency, no powers are automatically transferred to the military authorities –

598 Ibid, art 113.
599 Khakee (n 43).
600 Ibid.
601 1974 Draft Constitution of Ethiopia, arts 111–112.
602 Ibid.
603 Ibid.
604 Ibid.
605 Ibid.
606 Ibid.
607 Gross and N´ı Aolain (n 9) 26–27; Khakee (n 43) 22–24; Feldman (n 284).
608 Ibid.

the emergency measures are enforced primarily by civilian authorities.[609] The content of the proclamation required to be made at the time of declaration of a state of siege and a state of emergency under articles 111 and 112 could reflect these variations. The third type of emergency, a state of defence, grants sweeping powers to the Council of Ministers to take all necessary measures to face the peril.[610] This type of emergency can be declared when serious existential threats are present.

Thus, the 1974 draft Constitution contains two different approaches for dealing with emergencies. The first is a well-regulated and -controlled approach pertaining to the states of emergency and siege. This approach envisages a bounded emergency power based on a neo-Roman model. As a result, the emergency clauses set certain ex ante legislative safeguards against the potential misuse of emergency powers. The second is a less-regulated approach that gives unlimited power to the executive once the state of defence is declared. This approach reflects a constitutionalised doctrine of necessity that gives the Council of Ministers broad powers to determine the emergency measures without checks by the national assembly once the state of defence is declared. In other words, during the state of defence, the Council of Ministers is not required to present the proclamation dealing with the emergency measures before the assembly. In addition, the 1974 draft Constitution contains three emergency clauses that can be invoked based on the level of threats facing the country. It hence introduced a differentiated or multilevel system of emergency powers as applied in most European democracies.[611]

2.1.1.3. The era of military rule

The armed forces, the police, and the Territorial Army Council known as the Derg – literally meaning 'committee' – took power in 1974 after deposing the long-established imperial regime of Emperor Haile Selassie I.[612] From there on, the military governed the state by decree for 13 years under the banner of 'Ethiopia Tikdem' ('Ethiopia First') until it approved a socialist constitution in 1987.[613] As part of this endeavour, the Derg suspended the 1955 Constitution and legislative chambers established under it, as well as rejecting the 1974 draft Constitution through a decree.[614] The latter provided that '[t]he Armed Forces, the Police and Territorial Army have hereby assumed full government power until a legally constituted people's assembly approves a new constitution and a government is duly established'.[615]

This decree thus conferred all legislative and executive powers on the military council for an indeterminate period. The council consolidated its power by issuing another decree in which it made itself the head of government with the power both to enact all types of laws and provide for their implementation and to take all necessary measures to ensure the defence and integrity of the nation.[616] In 1976, there were attempts to disperse functions within the Derg by establishing three institutions: a congress consisting of all military council members;

609 Ibid.

610 1974 Draft Constitution of Ethiopia, art 113.

611 Khakee (n 43) 29.

612 Paul Herman Brietzke, 'Law, Development and the Ethiopian Revolution' (Dissertation submitted to the School of Oriental and African Studies of the University of London, 1979) 218–228.

613 'Ethiopia Tikdem' was a slogan encapsulating the core tenets of the military regime.

614 Proclamation No. 1 of 1974, Provisional Military Government Establishment Proclamation, Negarit Gazeta, 34th Year, No. 1, Addis Ababa, 12 September 1974, arts 4–5.

615 Proclamation No. 1 of 1974, art 6.

616 Proclamation No. 2/1974, Definition of Powers of the Provisional Military Administration Council and its Chairman, Negarit Gazeta, 34th Year, No. 2, Addis Ababa, 15 September 1974, arts 5–6.

a central committee composed of military council members elected by the congress; and a standing committee comprising military council members elected by the congress and vested with legislative and executive powers.[617] The relevant decrees also established a Council of Ministers, consisting of ministers and senior officials appointed and designated by the military council, which had the power to execute the decisions of the congress, central committee and standing committee;[618] the congress retained the power to approve declarations of war, states of emergency and natural disaster upon the request of the Council of Ministers.[619] In sum, the military council (Derg) was vested with unlimited powers merging legislative and executive functions and unfettered by checks and balances.[620]

With this being the case, freedom of thought and the right to assembly, strike, demonstration and protest were suspended by decree for an unspecified period under the guise of protecting public peace and security.[621] The decree established a military court, whose decision was not subject to appeal, to enforce these prohibitions.[622] The military regime also enacted a special penal code aimed at punishing Haile Selassie's officials for maladministration and corruption, reducing administrative corruption, and safeguarding itself from anti-revolutionary activities.[623] This decree had retrospective effect on the former regime's officials. In addition, it criminalised challenges to the regime by equating threats to the Derg with threats to national security. This protective function was served by creating new crimes.[624] For instance, anyone failing to comply with the slogan 'Ethiopia Tikdem' or publicly criticising it was punishable with imprisonment of one to 10 years.[625] Intended to safeguard the ideology of the Derg from criticism and opposition, the new penal decree was cast in broad, vague terms, thereby providing an effective weapon by which the security services could punish all and any unwelcome political activity.[626]

The decrees were enforced by special three-member military tribunals that sat in Addis Ababa and each of the provinces. A special criminal procedural code was applied to suspend the Criminal Procedure Code provisions concerning the rights to bail, preliminary inquiries, and appeals.[627] During the years of the military regime (1974–1987) Ethiopia was hence under a permanent state of emergency that suspended civil and political rights, including the rights to life, and fortified the regime against opposition groupings such as the Ethiopian People's Revolutionary Party (EPRP).[628]

617 Proclamation No. 108/1976, Definition of Powers and Responsibilities of the Provisional Military Administration Council and the Council of Ministers, Negarit Gazeta, 36th Year, No. 10, Addis Ababa, 29 September 1976; Proclamation No. 110/1977, Redefinition of Powers and Responsibilities of the Provisional Military Administration Council and the Council of Ministers, Negarit Gazeta, 36th Year, No. 13, Addis Ababa, 11 February 1977.

618 Proclamation No. 108/1976, arts 14–17; Proclamation No. 110/1977, arts 12–20.

619 Proclamation No. 108/1976, art 5(5); Proclamation No. 110, art 5(5).

620 Brietzke (n 612) 281–283.

621 Proclamation No. 1 of 1974, art 8. This provision stated: 'It is hereby prohibited, for this duration of this proclamation, to conspire against the motto "Ethiopia Tikdem (Ethiopian First)", to engage in any strike, hold unauthorized demonstration or assembly or engage in any act that may disturb public peace and security.'

622 Ibid, art 9.

623 Brietzke (n 612) 286–297.

624 Ibid.

625 Ibid.

626 Ibid.

627 Ibid, 296–297.

628 Ibid.

After 13 years of permanent emergency under a centralised military rule, the Derg engaged in constitution-making and promulgated the Ethiopian Peoples' Democratic Republic (EPDR) Constitution in September 1987;[629] it also civilianised itself by forming the Ethiopian's Workers Party (EWP) under the leadership of Colonel Mengistu.[630] The 1987 Constitution established a one-party system and, given the regime's socialist tendency, focused on economic, social and cultural rights.[631] Ethiopia was by then, however, a country overwhelmed by fear, repression and civil war,[632] and, in the absence of fertile ground for enjoyment of human rights, a new constitution could do little to change the political equation.

2.1.2. States of emergency under the FDRE Constitution

The current FDRE Constitution, which entered into force on 21 August 1995, marks a major break with the past in terms of human rights and the structure of the state. It establishes a federal state mainly on the basis of ethnicity,[633] doing so in an attempt to address the volatile issues of ethnicity by recognising the right to self-determination up to secession.[634] As for human rights, the preamble reflects the pride of place given to them in its affirmation that the full respect of fundamental rights and freedoms is a precondition for the fulfilment of aspirations towards a peaceful, democratic and economically prosperous country.[635] One-third of the Constitution is devoted to human rights provisions, with these rights recognised as inviolable and inalienable.[636] The Constitution, in short, affirms that respect for human rights and fundamental freedoms – including the right to self-determination up to secession within an ethnic-based federal structure – is its founding principle.

It is against this backdrop that the drafters of the Constitution wrote its emergency clause. Khakee notes that countries that experienced atrocities and authoritarianism are inclined to especially detailed regulation of emergency powers.[637] Likewise, the FDRE Constitution, which came into force in the aftermath of military rule and bloody civil war, reflects a 'rule-bounded neo-Roman model' of emergency powers.[638] In accordance with this approach, the drafters anticipated the possibility of emergency circumstances and also made a distinction between normalcy and exceptional situations: the Constitution deals with the latter by way of rules set out under the emergency provision. Crucially, article 93 – the constitutional emergency provision – specifies the conditions and institutions responsible for the declaration, renewal and termination of a state of emergency. It also enumerates the additional powers conferred on the government during a state of emergency as well as the safeguards in place to ward against abuse of those powers.

629 For more on constitution-making see Andargachew Tiruneh, The Ethiopian Revolution I974–1987: A Transformation from an Aristocratic to a Totalitarian Autocracy (Cambridge University Press 1993) 265–294.

630 Ibid.

631 Menghistu Fisseha-Tsionn, 'Highlights of the Constitution of the Peoples' Democratic Republic of Ethiopia (PDRE): A Critical Review of the Main Issues' (1988) 14 Review of Socialist Law 129.

632 Tiruneh (n 629) 345–347.

633 FDRE Constitution, arts 1 and 46(2).

634 Alem Habtu, 'Multi-ethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) Publius 314; Christophe van der Beken, 'Improving the Constitutional Balance between Unity and Diversity for Societal Harmony and State Stability in Ethiopia' in Adem Kassie Abebe (ed), Remapping Ethiopian Federalism (Addis Ababa University 2019).

635 Abebe (n 510)

636 FDRE Constitution, Chapter Three.

637 Khakee (n 43) 13.

638 FDRE Constitution, art 93.

2.1.2.1. The conditions for declaring states of emergency

The FDRE Constitution lays out the circumstances that justify the declaration of a state of emergency. Article 93 (1) states:

> *The Council of Ministers of the Federal Government shall have the power to decree a state of emergency, should 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 occur.*

The first ground is an external act of war and invasion; the second is a constitutional disorder resulting in internal breakdown of law and order. This circumstance may include violence and public disturbance due to riots or rebellions.[639] The third reason, natural disaster, may include earthquakes, floods, locust swarms, and similar occurrences.[640] An epidemic, which is the outbreak of a disease such as COVID-19, Severe Acute Respiratory Syndrome (SARS), Ebola Virus Disease (EVD), cholera and flu in a large number of people at the same time, is mentioned separately as a ground for declaring a state of emergency.[641] However, as Elster notes, epidemics can also be placed under the category of natural disaster.[642] A state of emergency hence may be declared in the event of external invasions, constitutional disorders or natural disasters.

However, the generic nature of the conditions poses difficulties in determining when a state of emergency should be declared. For instance, a 'breakdown of law and order which endangers the Constitutional order' is a broad, vague and subjective condition – it could be interpreted in such a way that most common riots, protests or peaceful demonstrations are construed as threats to the constitutional system. The types of events included in the basket of 'external invasion' or 'natural disaster' are also open to the exercise of discretionary power. For instance, a recent desert locust invasion endangered food security but did not warrant a declaration of emergency. The nature of the events, and the magnitude of the danger, calling for a declaration are determined by the subjective assessment of politicians mandated to proclaim it.[643] Since emergency provisions contain broad terms like 'constitutional disorder', the door is opened for discretion, manipulation and abuse; consequently, the subjective judgment of politicians could make the dividing line between normalcy and exceptional circumstances a slippery one indeed.[644]

The problem is not solely an Ethiopian one but applies to emergency provisions the world over. As Charles Fombad argues, making the definition of emergency conditions precise is neither possible nor desirable.[645] To deal with this problem, the FDRE Constitution provides two objective-oriented criteria to guide decision-making. The first is that the emergency must be an actual event. In other words, eminent and anticipated emergency situations do not warrant a declaration of state of emergency. The emergency provision of the FDRE

639 Ali (n 508).
640 Ibid; see also Elster (n 389).
641 Ibid.
642 Ibid.
643 Fombad, 'Cameroon's Emergency Powers' (n 17) 70.
644 Ibid.
645 Ibid.

Constitution thus provides a stricter standard than the ICCPR, which allows a state of emergency to be declared for imminent dangers.[646] The second is that the danger should be beyond the capacity of the usual law enforcement mechanisms.[647] As a result, the mere existence of disorder and instability does not warrant the declaration of a state of emergency – however, it is a recourse available in, and only in, circumstances of constitutional disorder.

Furthermore, the FDRE Constitution makes the power to declare a state of emergency a shared responsibility that can be exercised by the federal as well as regional state governments.[648] The power of regional states to declare emergencies is, however, limited to circumstances of natural disaster and epidemics.[649] As such, regional states cannot declare states of emergency on grounds of war and subnational constitutional disorder. In these cases, the regional government may seek federal intervention, or the federal government may intervene in the regions based on the decision of the House of Federation.[650] The federal government can also declare a geographically limited state of emergency as soon as the subnational disorder poses a threat to the constitutional order of the entire federation, as contemplated in article 93 (1).

2.1.2.2. The power to declare, renew and terminate states of emergency

In Ethiopia, a state of emergency is declared by the Council of Ministers and approved by the legislature.[651] The framework follows a legislative-centred approach, albeit that the role of the Council of Ministers is crucial in times of crisis. It is this council that decides on the existence of a danger that merits a declaration and which proclaims a state of emergency by making a decree to that effect.[652] The Council of Ministers' decree may not have force of law for more than 48 hours or 15 days during a parliamentary recess; hence, the declaration by the executive must be submitted to the HoPR for post-declaration approval.[653]

The time limit for securing post-declaration approval is 48 hours in Ethiopia,[654] but the time limits for presenting the executive's decree to legislatures for approval vary across jurisdictions, ranging from 24 hours to 30 days.[655] For example, it is 21 days in South Africa and 14 days in Kenya. Thus, the 48-hour time limit set by the emergency clause of the FDRE Constitution is reasonable as it does not leave the executive uncontrolled for too long. If the Council of Ministers declares a state of emergency at a time when the HoPR is in recess, the decree has to be submitted to it within 15 days of its declaration.[656] This 15-day time frame is so lengthy that it eclipses legislative oversight over the executive for relatively long periods in times of emergency – in Brazil, for instance, parliamentary confirmation must be secured within 10 days.[657]

646 ICCPR, art 4.
647 FDRE Constitution, art 93(1).
648 Ibid, art 93.
649 Ibid, art 93(1)(b).
650 Ibid, arts 51(14), 55(16), 62(9).
651 Ibid, arts 93(2) and 55(8).
652 Ibid.
653 Ibid, art 93(2).
654 Ibid.
655 Domrin (n 12) 44–49; Bulmer (n 12) 13–14. It is 21 days in South Africa and 14 days in Kenya.
656 FDRE Constitution, art 93 (2)(b).
657 Domrin (n 12) 44–49.

Whether or not the HoPR has been in recess, a two-thirds majority vote by its members is required for approval.[658] The supermajority-vote requirement is helpful in increasing the power of opposition parties in times of emergency and so facilitating consensus on states of emergency. The post-declaration approval of the HoPR is, in summary, a necessary condition for using emergency powers in Ethiopia, which entails that the ultimate power to declare a state of emergency is under the province of the legislature: it is the say-so of the HoPR that gives a real force of law to emergency declarations.

As noted earlier, the neo-Roman model of emergency power is conservative in that a state of emergency grants additional powers to the executive only temporarily. Many constitutions thus impose a time limit on emergency rules – a comparative study shows it ranges from 14 days to one year;[659] these periods are usually also renewable.[660] Likewise, the emergency clause of the FDRE Constitution envisages time-bound states of emergency. A state-of-emergency declaration approved by the legislature may remain in force for a maximum of six months[661] and automatically lapses at the expiry of the indicated time limit unless it is renewed by the legislature. The same threshold of a two-thirds majority vote is needed in order to renew a state of emergency for an additional four months.[662] Moreover, the opinion of the Inquiry Board is required before decisions are made about prolongation. As the wording of the provision indicates, seeking the opinion of the Inquiry Board is mandatory. [663]

First, the FDRE Constitution checks the executive's desire to extend the duration of the state of emergency by making its renewal 'conditional' on the views of the Inquiry Board.[664] Thus, the legislature decides on the executive's request to extend the declaration based on the reports of the Inquiry Board rather than on the information given by the executive. Secondly, article 93 of the FDRE Constitution demands the same majority requirement for the approval and renewal of states of emergency.[665] Hence, Ackerman's 'super-majoritarian escalator', which demands a progressive increment of the required majority for extending the state of emergency, does not apply in Ethiopia.[666] Renewals can be obtained easily in Ethiopia; by contrast, the constitutions of South Africa and Kenya make prolonging states of emergency burdensome by requiring increasing supermajorities for each subsequent renewal. Thirdly, because the Ethiopian emergency clause does not limit the number of possible renewals of a declaration of emergency,[667] a government that controls more than two-thirds of the seats in the HoPR can renew a state of emergency for years. Thus, the absence of an upper limit on the possible number of renewals, along with the absence of a 'super-majoritarian escalator', could sow the seeds for a permanent state of emergency.

Sometimes confusion arises about the applicable denominator in counting the majority vote needed to approve or renew a state of emergency. In Latvia, the constitution clearly requires the absolute majority vote to be counted on the basis of the members present.[668] In Malta,

658 FDRE Constitution, art 93(2).

659 See Özbudun and Turhan (77); Domrin (12) 44–49; Bulmer (n 12). This period is 14 days in Malta, 15 days in Greece and Portugal, 30–60 days in Russia, two months in Cyprus, three months for the state of defence and one year for the state of readiness in Finland, and six months in Latvia, Lithuania and Turkey.

660 Constitution of South Africa (1996), art 37; Constitution of Kenya (2010), art 58.

661 FDRE Constitution, art 93(3)

662 Ibid.

663 Ibid, art 93(6)€.

664 Ibid.

665 Ibid, art 93 (2)(a) and (3).

666 Ackerman (n 75).

667 FDRE Constitution, art 93(3).

668 Özbudun and Turhan (n 77).

a two-thirds majority is determined on the basis of all the members of the legislature;[669] in Kyrgyzstan, the required majority is calculated on the basis of the total number of deputies.[670] By contrast, in Ethiopia it is unclear whether it is the total number of seats (total membership) or the number of members who are present and voted (votes cast) that forms the basis for calculating the two-thirds vote. Controversy of this kind occurred during the approval of a state of emergency in 2018.[671]

In this regard, there is a discrepancy between the English and Amharic versions of the provision that deals with the decision-making rules of the HoPR.[672] The English version of article 59 (1) takes members present for voting (votes cast) as the reference point for counting the required majority vote, whereas the Amharic version, which has final legal authority in terms of article 106 of the FDRE Constitution, takes the total number of seats as the baseline. The latter understanding is also endorsed in the Voting Procedure Directive No. 9/2008 of the legislature.[673] The Amharic version makes it more onerous for the executive to secure the approval and renewal of a state of emergency in that it increases the minimum number of votes required to support the resolution and thereby strengthens legislative control of the executive in times of crisis.

The FDRE Constitution does not clearly regulate the termination of a state of emergency. Some of the rules of termination are implied in the rules of approval and renewal, though. Accordingly, the declaration of emergency comes to end at the expiry of its time limit or when the HoPR declines to extend the declaration as per article 93 (3) of the Constitution. The declaration of emergency can be also terminated by the HoPR by following the same procedure that approves it, that is to say, upon the request of the Council of Ministers and with a two-thirds majority vote in the House. A further scenario – the question of whether the HoPR can terminate declared states of emergency before their time limits on its own initiation or without the request of the Council of Ministers – is problematical. Allowing this to happen may interrupt the executive in the middle of the crisis that necessitated the declaration of emergency. Some constitutions, however, clearly mandate their legislatures to terminate a state-of-emergency declaration by passing resolutions to that effect.[674] The silence of the emergency provision on this point would suggest that the legislature is denied that power in the Ethiopian context.

2.1.2.3. The power to exercise emergency powers

The declaration of states of emergency give additional and extraordinary powers to the executive. In the Ethiopian context, the Council of Ministers can assume those additional or special powers by making regulations to that effect. Article 93 (4) of the FDRE Constitution states that '[w]hen a state of emergency is declared, the Council of Ministers shall, in accordance with regulations it issues, have all necessary power to protect the country's peace and sovereignty, and to maintain public security, law, and order'.

669 Ibid.

670 Ibid.

671 Zelalem Eshetu Degifie 'Assessing the Decision Making Rules and Procedures of the HoPR' (Reporter Newspaper, Addis Ababa, 25 February 2018).

672 FDRE Constitution, art 59(1).

673 Directive No. 9/2008, FDRE HoPR Voting Procedures, Addis Ababa, Ethiopia.

674 Constitution of Namibia (1990 and amended 2010), art 26(4).

Hence, the declaration of emergency enables the Council of Ministers to assume all the necessary powers to deal with the crisis. In some jurisdictions, the extraordinary powers that follow the declaration of states of emergency are exercised by a special body established for that purpose. The constitutions of Albania and Hungary establish the Council of National Defense (CND) to exercise the necessary powers resulting from a state-of-emergency declaration. However, the CND has no power to suspend the constitutions.[675] In some countries, police powers are transferred to military authorities.[676]

As for Ethiopia, the emergency provision of the FDRE Constitution does not establish any special institution for exercising emergency powers; instead, the wide power granted to the Council of Ministers by virtue of article 93 (4) enables it to establish such institutions, and since 2016, a State of Emergency Command Post (SECP) has often been put in place to implement state-of-emergency proclamations.[677] The establishment of the SECP is ad hoc and functional only within the periods of the declaration, with it members selected by the Prime Minister, who leads the command post.[678] Usually, the Ministry of Defence serves as its secretary, and the chief of staff of the army, federal police commissioner and director of national intelligence and security services are also members.[679] A State of Emergency Task Force (SETF) led by the chief of staff was set up recently to enforce the state of emergency declared in Tigray National Regional State.[680] It is accountable to the Prime Minister, who also selects its members.[681] In addition, during the COVID-19 state of emergency, a ministerial committee was established with the mandate to determine the scope of emergency measures.[682] The SECP and SETF are granted a wide range of powers by the regulations of the Council of Ministers,[683] and are mandated to determine and enforce emergency measures necessary to restore normality.

As is evident, the executive exercises emergency powers by establishing military-oriented ad hoc institutions. The declaration of states of emergency has thus increased the powers of the security forces, with the result that the Ethiopian approach closely resembles the French state-of-siege model in which expanded powers are transferred to the military and other security authorities in times of emergency.

2.1.2.4. The effects of state-of-emergency declarations

The declaration of a state of emergency involves the transfer to the executive of additional powers that are not exercised in times of normalcy; these additional powers affect human rights protection and federalism. Accordingly, the Council of Ministers in Ethiopia has the power to suspend constitutionally protected fundamental rights and freedoms.[684] Article 93

675 Özbudun and Turhan (n 77); Domrin (n 12).

676 Ibid. For instance, Portugal, Greece, and Turkey.

677 Proclamation No. 1/2016, State of Emergency Proclamation for the Maintenance of Public Peace and Security, 25th October 2016, Addis Ababa, Ethiopia.

678 Ibid, art 6.

679 The State of Emergency Command Posts that were established in 2016 and 2017. See Ethiopian Human Rights Project (EHRP) (n 101).

680 Proclamation No. 4/2020, State of Emergency Proclamation for the Protection of the Constitution and Constitutional Order, Federal Negarit Gazeta, 27th Year, No. 1, Addis Ababa, 9 November 2020, art 7.

681 Ibid.

682 Proclamation No. 3/2020, art 5.

683 Regulation No. 391/2016, State of Emergency Proclamation for the Maintenance of Public Peace and Security Implementation Council of Ministers Regulation No. 391/2016, Federal Negarit Gazeta, 3rd Year, No. 2, Addis Ababa, 27 October 2016; Proclamation No. 4/2020.

684 FDRE Constitution, art 93(4)(b).

(4) (b) of the FDRE Constitution states that '[t]he Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency'.

While this provision empowers the executive to suspend rights and freedoms recognised under Chapter Three of the Constitution, this suspension does not happen automatically with the declaration of a state of emergency: further action is needed. That is to say, the executive has to issue regulations that list the suspended rights and freedoms.[685] Rights and freedoms cannot be suspended randomly either: the Constitution allows the suspension of rights and fundamental freedoms to the extent that is necessary to obviate the conditions that required the declaration.[686] Moreover, it is not the case that all rights and freedoms can be suspended – some are so sacred and fundamental that they are beyond the wrath of emergency powers. Article 93 (4) (c) of the Constitution enumerates those sacred provisions that the executive may not suspend during emergencies. These include the right to protection against cruel, inhuman and degrading treatment or punishment; the right to be protected against slavery, servitude and trafficking; the right to equality; the right to self-determination up to secession; and the right of nations, nationalities and peoples to speak, write and develop their own language as well as express, develop and promote their culture and preserve their history.

Nevertheless, the emergency clause of the FDRE Constitution that lists non-derogable rights is not in line with the standards set under the ICCPR.[687] For instance, it does not make the right to life – the mother of all rights – sacred and non-derogable in times of emergencies; nor is this is the case with the right to recognition everywhere as a person before the law; freedom against imprisonment for contractual debt; the prohibition against a non-retroactive application of criminal law; and the right to freedom of thought, conscience and religion.[688] This deficit, though, does not license the government to violate those fundamental rights recognised under the ICCPR but not in the derogation provision of the FDRE Constitution.

First, as a state party to the ICCPR, Ethiopia accepts those treaty obligations – they cannot be avoided by invoking a domestic legal framework that excludes such basic rights as the right to life from the list of non-derogable rights.[689] Secondly, courts in Ethiopia can directly apply the provisions of international treaties such as the ICCPR, given that they become part of the national legal system upon ratification.[690] Thirdly, article 13 (2) of the FDRE Constitution requires courts and other judicial organs to use the text of the ICCPR as a guide for interpreting the human rights provisions of the FDRE Constitution. The list of non-derogable rights in Ethiopia thus includes more rights than those listed under article 93 (4) (c) of the Constitution. As a result, during a state of emergency the Ethiopian government cannot violate unlisted sacred rights, such as the right to life, even though they are not included under article 93 (4) (c). A state of emergency allows the executive to suspend human rights but not ones that are non-derogable in a broader sense.

685 Ibid, art 93(4)(a).

686 Ibid, art 93(4)(b).

687 ICCPR, art 4; FDRE Constitution, art 93(4)(c).

688 Ibid.

689 Vienna Convention on the Law of Treaties (VCLT) 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, art 27.

690 FDRE Constitution, art 9(4).

The declaration of a state of emergency also changes the vertical distribution of powers and affects the autonomy of constituent units in federations.[691] It extends the legislative powers of the federal government into the jurisdictions of constituent units, and it can suspend the legislative and executive organs of subnational governments.[692] A state of emergency can hence temporarily eclipse the federal aspects of a constitution – the Indian and German federations are examples. To reiterate, in emergency situations the federal government suspends a state government and assumes to itself all legislative and executive powers of subnational governments; it can also suspend part of the constitution that deals with division of powers.[693] In effect, emergency powers can transform a federal system into a unitary one during crises. As Ronald Watts notes, these emergency powers are 'quasi-unitary powers' invoked to avert 'potential balkanization or disintegration' of federations.[694] Similar powers to suspend state government institutions during states of emergency were suggested by the Constitutional Commission during the making of the current Ethiopian Constitution.[695] However, these suggestions are not mirrored in the final constitutional text, a fact that points to the Constitution's protectionist attitude towards regional states.

In this regard, article 93 (4) (C) of the Constitution makes the designation of Ethiopia as a 'Federal Democratic Republic' non-derogable, albeit that this is not a human right. When viewed in the light of India's experience, it is evident that the provision intends to protect the federal structure from being suspended during a state of emergency. As a result, one cannot change this federal structure into a unitary one during a state of emergency – the Constitution reflects a federal will that may not be compromised even in times of crisis. It also sanctifies the right to secession – which is an external component of self-determination – as a right protected during states of emergency.[696] Paradoxically, the claim of secession in itself justifies the invocation and use of emergency powers, as the protection of territorial integrity is one of the conditions for the declaration of a state of emergency.[697] The claim of secession, something unlikely to be advanced peacefully, affects the territory of the country in whole or part, threatening its integrity and often igniting civil war – all of which can trigger the declaration of states of emergency.[698] It is clearly not a right to be fully exercised during a state of emergency, because making the right to secede non-derogable is at odds with the rationale for emergency powers, namely saving the life of a nation. Sanctifying 'secession' in times of emergency is, in short, unrealistic and itself a threat to territorial integrity.

691 Ronald Watts (n 16); Bulmer (n 12) 24–27.

692 Ibid; Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study (Revised edition, Forum of Federations 2007) 330–337; Venice Commission (73). Canada, Germany, India, Russia, India and South Africa can be mentioned in this regard.

693 Ronald Watts (n 16). See also Sudhir Krishnaswamy and Madhav Khosla, 'Regional Emergencies under Article 356: The Extent of Judicial Review' (2009) Indian J. Const. L. 168.

694 Ronald Watts (n 16) 90.

695 The Minutes of Constitutional Commission (78th Regular meeting, Vol. 2, 00148-00156, 14 March 1994, Addis Ababa, Ethiopia).

696 FDRE Constitution, arts 93(4)(c) and 39(1).

697 Principle 39 of the Siracusa Principles defines a 'threat to the life of the nation' as a threat that affects the whole of the population and either the whole or part of the territory of the state, and jeopardises the physical integrity of the population, the political independence or the territorial integrity of the state, or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant. Nigeria, Ethiopia, Spain and Iraq have experienced turmoil due to claims of secession. See Erin C Houlihan, 'Referendums on Secession and State Responses in 2017: Catalonia and Kurdistan (International IDEA Annual Review of Constitution Building Processes 2018) 22–54.

698 Ibid.

Another impact of state-of-emergency declarations is their effect on the functioning of democratic institutions. As noted, some constitutions prohibit holding elections, dissolving parliaments and amending constitutions during a state of emergency. However, the FDRE Constitution is silent on the effect of an emergency declaration on elections, the terms of legislatures, constitutional amendments, and the dissolution of parliaments.

During the COVID-19-related state of emergency, the Council of Constitutional Inquiry (CCI) interpreted the Constitution in the way that extends the effect of a state of emergency into the timeline of elections and terms of federal and regional state legislatures.[699] As to the legal consequences of the interpretation, article 11 of Proclamation No. 251/200 states that '[t]he final decision of the House on constitutional interpretation shall have general effect which therefore shall have applicability on similar constitutional matters that may arise in the future'.[700] By implication, in Ethiopia the declaration of a state of emergency has the effect of postponing national elections and extending the terms of the federal legislative assembly (HoPR) and regional sate councils.

The Constitution is also silent on constitutional amendment and parliamentary dissolution during a state of emergency. Although the constitutional commission recommended these prohibitions,[701] they are not reflected in the final text of the constitution. This silence amounts to permission to dissolve parliament as well as amend the Constitution in times of emergency.

2.2. Legislative emergency powers in Ethiopia

In Ethiopia, there is a likelihood of exercising legitimate special and extraordinary powers to deal with crisis without invoking the constitutional emergency provisions and declaring a state of emergency. Here, the government can respond quickly to emergency situations by using legislative emergency powers granted through ordinary legislation. For instance, the federal government has the power to intervene in regional states on grounds of constitutional disorder, human rights violations and security erosions.[702] It can also take restrictive public health measures during a health crisis that threaten the life of the people.[703] Ordinary legislation enacted by the HoPR gives special powers to the executive, including the power to suspend constitutionally protected rights for dealing with the specified crisis.

2.2.1 Federal intervention in regional states

In federal systems, relations between federal and subnational governments should be guided by the doctrine of comity. This requires that federalism be a relationship of trust and cooperation between the two levels of government.[704] Accordingly, each level of government

699 FDRE House of Federation Decision, House of Federation 5th Year 2nd Regular Session, 10 June 2020.

700 Proclamation No. 251/2000, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation, Federal Negarit Gazeta, 7th Year, No. 41, Addis Ababa, 6 July 2001.

701 Minutes of Constitutional Commission (n 695).

702 Proclamation No. 359/2003, System for the Intervention of the Federal Government in the Regions, Federal Negarit Gazeta, 9th Year, No. 80, Addis Ababa, 10 July 2003.

703 Proclamation No. 661/2009, Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009, Federal Negarit Gazeta, 16th Year, No. 9, Addis Ababa, 13 January 2010; Regulation No. 299/2013, Food Medicine and Health Care Administration and Control Council of Ministers Regulation, Federal Negarit Gazeta, 20th Year, No. 11, Addis Ababa, 24 January 2014; Proclamation No. 1112/2019, Food and Medicine Administration Proclamation, Federal Negarit Gazeta, 25th Year, No. 39, Addis Ababa, 28 February 2019.

704 Donald P Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (2nd ed, Duke University Press 1997) 68–70.

has a constitutional duty to respect the rightful prerogative of the other. The doctrine obligates federal and state governments to consider each other's interests in exercising their authority; broadly stated, the principle of federalism demands that both levels of government behave in a pro-federal manner.[705] The principle of federal comity has constitutional recognition under the Ethiopian federal system. As such, the federal government is required to respect the powers of regional states, while regional states are reciprocally obliged to respect the powers of the federal government.[706]

The principle of comity holds true in times of normalcy; however, during emergencies, federal governments can interfere in constituent units to the extent of suspending or dissolving subnational institutions and establishing provisional administrations.[707] As mentioned, if this kind of power is not clearly given to the federal government through the constitutional emergency power, then it cannot suspend regional state institutions by declaring a state of emergency. Although the FDRE Constitution hints at this power in various provisions, it was through a proclamation that a full-fledged scheme of federal intervention was secured.[708] The System for the Intervention of the Federal Government in the Regions Proclamation No. 359/2003 (the Federal Intervention Proclamation) allows the federal government to interfere in regional states on specified grounds.[709] The Proclamation does not create new grounds other than those set out in the constitution; rather, it operationalises the constitutional provisions by providing the scheme of federal intervention.[710] As the Proclamation declares, protecting and defending the Constitution is the main rationale for the federal government's intervention in regions;[711] in view of that, the Federal Intervention Proclamation sets up a system that enables the federal government to bear its responsibility in regional states.

The deterioration of security in regional states is the first condition for invoking the legislative emergency power that calls for federal intervention.[712] A deteriorated security situation is defined broadly as an 'activity that disturbs the peace and safety of the public' under the federal intervention proclamation.[713] The nature of activities that constitute a 'disturbance' warranting intervention and the required level of deterioration for invoking the emergency powers of intervention are determined by the subjective assessment of decision-makers; the only objective element of the condition is that the disturbance must be beyond the capacity of regional law enforcement agencies.[714] However, the Proclamation differentiates between the institution responsible for deciding on the existence of security deterioration and the one responsible for exercising the legislative emergency powers of intervention.[715] It is the regional state council or regional cabinet that decides on the need of intervention, which it does requesting that the Prime Minister intervene.[716] The intervention request sent to the Prime Minister by the state council or regional cabinet amounts to a declaration of 'state of security deterioration' justifying federal intervention in the region.[717] Once requested, the

705 Ibid.
706 FDRE Constitution, art 50(8).
707 Proclamation No. 359/2003, art 14(2)(b).
708 FDRE Constitution, arts 51(14), 55(16), 62(9).
709 Ibid.
710 Proclamation No. 359/2003, Preamble.
711 FDRE Constitution, art 51(1); Proclamation No. 359/2003, Preamble.
712 FDRE Constitution, art 54(1); Proclamation No. 359/2003, art 3.
713 Proclamation No. 359/2003, art 3.
714 Ibid.
715 Ibid,, arts 4–5.
716 Ibid.
717 Ibid.

federal executive (that is, the Prime Minister) deploys federal police or military forces to avert the deteriorating security situation in the region.[718] This in-built procedural rule intends to check the federal government's possible misuse of intervention powers.

What would happen if the regional government were the cause of the security deterioration in the region and the state council or cabinet consequently does not request federal intervention? At the moment, the federal government intervenes in the region on the ground of constitutional disorder.[719] In this regard, the Federal Intervention Proclamation defines the condition of constitutional disorder with some objective indication as to the type and nature of activities endangering the constitutional order.

First, the intervention is justified when there is an armed uprising, a violent means of resolving inter-regional disputes, a disturbance of peace and security of the federal government, and a violation of directives given by the joint session of the HoPR and House of Federation (HoF) regarding human rights protection.[720] All except the 'disturbance of peace and security of the federal government' are relatively objectively verifiable actions, and as such serve to curb the discretion of the decision-makers.

Secondly, the events must be the result of regional-state-led or -sponsored activities, that is, they happen with the direct participation or consent of the regional government.[721] Thirdly, prior to giving the order of intervention, the HoF must determine the existence of the activities endangering the constitutional order and the real magnitude of the danger posed by the regional state, doing so on the basis of evidence provided by the Council of Ministers.[722] In other words, the HoF decides on the state of constitutional disorder based on information received from a council led by the Prime Minister, noting that the executive branch of government has a full access to information, including intelligence sources. The ultimate decision of intervention is thus affected by the interests of the executive; stated differently, the executive has a decisive role in the decision regarding federal intervention on grounds of constitutional disorder.

The other ground for invoking the power of federal intervention is human rights violations that cannot be controlled by the regional state.[723] The HoPR decides on the existence of human rights violations based on reports submitted by a team consisting of its members.[724] The Proclamation allows the team to receive technical assistance from experts with the EHRC.[725] The intervention measures, including the federal intervention order, are issued through a joint decision of the HoPR and HoF convened at the request of the HoPR.[726]

The Federal Intervention Proclamation grants a wide range of legislative emergency powers to the executive. In Ethiopia, public security is a shared power, implying that maintaining law and order within regions is the competence of subnational governments.[727] Despite this, the decision on the state of security deterioration in regional states empowers the Prime Minister

718 Ibid, art 5.
719 FDRE Constitution, art 62(9); Proclamation No. 359/2003, art 12.
720 Proclamation No. 359/2003, art 12.
721 Ibid.
722 Ibid, art 13.
723 FDRE Constitution, art 55(16); Proclamation No. 359/2003, art 7.
724 Proclamation No. 359/2003, arts 8–9.
725 Ibid, art 8(2).
726 Ibid, arts 10–11.
727 FDRE Constitution, art 52(2)(g).

to deploy federal or military forces in the regions.[728] Under the command of the executive, the forces can take the necessary measures to maintain order and bring to justice to those who participated in creating instability.[729] In the case of human right violations, the federal executive is empowered to take measures necessary to stop the acts of violation and bring the perpetrators to justice.[730] The condition of constitutional disorder accords additional powers to the HoF for suspending regional state organs and establishing a provisional regional state administration.[731] The latter is accountable to the federal government, and the law allows the Prime Minister to assign federal government personnel temporarily in the provisional administration.[732] Given that all of these powers have the effect of suspending aspects of federalism and impairing the peoples' right to self-administration and the autonomy of regional states, the Federal Intervention Proclamation grants more expansive powers to the federal government than the constitutional emergency provision.

As actions borne of an emergency power, the special measures exercised in terms of emergency legislation should be limited by being time-bound; indeed, the inclusion of a sunset clause would minimise the risk of their becoming permanent.[733] The Federal Intervention Proclamation, however, does not set a time limit to the intervention upon which it automatically lapses unless it is prolonged.[734] The two years period of interim administration resulted in the decision of the HoF in times of constitutional disorder is so long that it might produce a quasi-permanent emergency situation.[735] Nevertheless, all intervention measures – including the provisional administration – can be terminated once the crisis of public security, human rights violations, or constitutional disorder in the region have been brought under control.[736] The purpose of the legislative emergency power is hence conservative in that it aims to restore normality; conversely, the situation may not be used to make permanent changes to the federal structure and limit the self-rule rights of the nations, nationalities and people of Ethiopia.

In addition, the invocation and exercise of legislative emergency powers – particularly on the ground of 'constitutional disorder' – is prone to misuse. First, the circumstances justifying intervention are relatively subjective when compared to the other two grounds. Secondly, the HoF, which is a political organ, assesses the situation in a regional state based on evidence provided by the executive, and hence the assessment is likely to be subjective and politically motivated. In India, for instance, the power has been used by the President of the Union many a time to suspend the autonomy of opposition-led states.[737] Even so, in India that power is justiciable, as a result of which the President's decision can be reviewed by the court on the ground that it is mala fide or based on 'wholly extraneous and irrelevant grounds'.[738] In the Ethiopian context, the HoF or ICC cannot preside as the judge in its own case; moreover, the FDRE constitution and 'political question doctrine' prevent courts from

728 Proclamation No. 359/2003, art 5.
729 Ibid.
730 Ibid, arts 10(2), 11, 12(4).
731 Ibid, art 14(2)(b).
732 Ibid, art 14(2)(b) and (4).
733 Ginsburg and Versteeg (n 77) 15–16; Ferejohn and Pasquino (n 5).
734 Proclamation No. 359/2003.
735 Ibid, art 15(3).
736 Ibid, arts 5(5) and 14(6).
737 Fiseha (n 698); Krishnaswamy and Khosla (n 693).
738 Ibid.

reviewing the decision of the HoF regarding federal intervention.[739] Reviewing the decision of the HoF regarding the intervention is hence unthinkable: neither the court nor the ICC may do such a thing.

2.2.2. Public health crises

Protecting public health from communicable diseases is one of the critical responsibilities of modern governments. To this end, governments need mandatory disease control measures in order to carry out their functions effectively.[740] The COVID-19 virus, which first emerged as a local health crisis in an outbreak in China, became a global health issue in 2020 and wrought multidimensional effects on civil, political and socio-economic rights.[741] Throughout the word, countries adopted a range of emergency measures in their responses to the crisis.

This included the shutdown of institutions, isolation and quarantine policies, national lockdowns and curfews, health screenings at airports and border crossings, international flight suspensions, domestic travel restrictions, restrictions or outright bans on public gatherings, the closure of public services, and the deployment of the military.[742] Most of the measures restricted constitutionally protected fundamental rights and freedoms; however, a significant number of countries (half of the world's countries) adopted response measures to COVID-19 measures without declaring states of emergency[743] and by using legislative emergency powers instead. For this purpose, they enacted new legislation or activated extant statutes to give governments special powers to address the pandemic.[744]

Although the Ethiopian government has legislative emergency powers that enabled it to deal with COVID-19, they were not brought into use until 10 October 2020,[745] at which point the government was empowered to take a wide range of measures to combat the pandemic, even to the extent of suspending certain constitutionally protected rights. The power was initially conferred on the Ministry of Health through Public Health Proclamation No. 200/2000, article 17 (3) of which states that

> *[t]he Ministry shall have the power to restrict movements to certain countries, or to the areas where there is epidemic, or to close schools or recreational areas, or to remove workers with communicable diseases from their working places, and to take other similar measures whenever an epidemic occurs.*

The Proclamation mandated the Ministry of Health to take quick action to address the public health crisis. It empowered the Ministry to issue orders that included mandatory quarantine or isolation, hygiene, sanitation and distancing rules, contact tracing and investigation procedures, disinfection and destruction of property, and other measures for controlling

739 See the next section for discussion of courts' review powers.

740 Ernest B Abbott, 'Law, Federalism, the Constitution, and Control of Pandemic Flu' (2008) 9:2 Asian-Pacific Law & Policy Journal 186, 195.

741 International IDEA, The Impact of the COVID-19 Crisis in Anglophone Countries (n 67) (International IDEA 2020); International IDEA, The Impact of the COVID-19 Crisis in Northern African Countries (n 67).

742 Ibid.

743 Lundgren, Klamberg and Dahlqvist (n 57).

744 Murphy (n 9).

745 Proclamation No. 200/2000, Public Health Proclamation, Federal Negarit Gazeta, 6th Year, No. 29, Addis Ababa, 9 March 2000. Proclamation No. 661/2009, Food, Medicine and Health Care Administration and Control Proclamation No. 661/2009, Federal Negarit Gazeta, 16th Year, No. 9, Addis Ababa, 13 January 2010; Regulation No. 299/2013, Food Medicine and Health Care Administration and Control Council of Ministers Regulation, Federal Negarit Gazeta, 20th Year, No. 11, Addis Ababa, 24 January 2014; Proclamation No. 1112/2019, Food and Medicine Administration Proclamation, Federal Negarit Gazeta, 25th Year, No. 39, Addis Ababa, 28 February 2019.

pandemics.[746] In addition, it allowed public health officials to require and enforce the vaccination and medical examination of persons suspected of infection with communicable disease.[747] The Proclamation also conferred powers on public health authorities to implement public health directives and orders.[748] For instance, they had the power to enter and inspect any premises they had sufficient grounds to believe posed a threat to public health.[749]

The power to exercise these legislative emergency powers was relocated from the Ministry of Health to the Ethiopian Food, Medicine and Health care Administration and Control Authority (EFMHACA) in 2009.[750] After a decade, the power was transferred again to another institution, the Ethiopian Public Health Institute (EPHI),[751] which is mandated, inter alia, to regulate quarantine, hygiene, environmental health, and the control of communicable diseases control; it also has the power to issue directives.[752]

Accordingly, the EPHI undertook numerous activities, among them testing and research, to enforce COVID-19 measures. EPHI has issued a directive after the end of five months COVID-19 -related state of emergency, thereby reintroducing most of the counter COVID19 measures employed during the April 2020 state of emergency.[753] The EPHI prohibited a number of activities, such as physical contact, handshakes and unmasked faces in public spaces.[754] It also limited public gatherings, in-house social ceremonies, religious and funeral ceremonies, public holidays and sports activities, albeit relaxing the level of restrictions.[755] For instance, the number of attendees permitted in a meeting was increased from four to 50 in the directive. It was also prohibited to provide service to individuals not maintaining social distance of two adult strides and not wearing masks in public and private institutions. It imposed precautionary measures enforcing hygiene and social-distancing rules in schools, higher education institutions, day-care centres, transport services, prison administrations, and private and public organisations and recreational centres.[756] It also prescribed mandatory self-quarantine and isolation of persons infected with, or suspected of being infected with, COVID-19.[757] These response measures were backed up with criminal sanctions for any violations of them.[758]

Thus, despite the absence of a state of emergency, legislative emergency powers permitted the EPHI to issue extraordinary measures to protect public health, measures that could include restricting constitutionally protected rights and freedoms such as freedom of movement, freedom of assembly, the right to privacy, freedom of religion, the right to education, and the right to work. As the United Nations Human Rights Higher Commissioner

746 Bonavero Institute of Human Rights (n 311).

747 Proclamation 200/2000, art 17(2).

748 Ibid, art 7.

749 Ibid.

750 Proclamation No. 661/2009, arts 54 (b), 3(2)(g), 4(14), 4(15); Regulation No. 299/2013, arts 43–48.

751 Proclamation No. 1112/2019, Food and Medicine Administration Proclamation, Federal Negarit Gazeta, 25th Year, No. 39, Addis Ababa, 28 February 2019.

752 Proclamation No. 1112/2019, art 72(2); Proclamation No. 661/2009, arts 3(2)(g), 4(14), 4(15); Regulation No. 299/2013, arts 43–48.

753 Directive No. 30/2020, A Directive Issued for the Prevention and Control of Covid-19 Pandemic, Ethiopian Public Health Institute, 5 October 2020.

754 Directive No. 30/2020, arts 4(2), 4(3), 4(5).

755 Ibid, arts 13, 17–23.

756 Ibid, arts 5, 24–27.

757 Ibid, art 6.

758 Ibid, art 30.

indicated, restrictions had to meet the requirements of legality, necessity and proportionality and be non-discriminatory.[759] However, the public health proclamations did not incorporate these principles. Judicial and legislative oversight was lacking, in addition to which the EPHI directive did not set a time limit on the emergency measures or include a sunset clause – all of which increased the likelihood of the measures being abused to the detriment of individual rights. Moreover, the public health proclamations did not set clear rules and standards in regard to the declaration of a public health emergency and the conditions for the declaration.

2.3. Scope and limitations of emergency powers in Ethiopia

As discussed above, the emergency power is regulated by the Constitution, by international human right instruments ratified or adopted by Ethiopia, and by proclamations made by the legislature. These laws form the Ethiopian legal framework on emergency powers. In turn, this framework sets out formal and substantive rules that must be observed in the invocation and use of emergency powers. Both the constitutional as well as the legislative model of regulating emergency powers give extraordinary powers to the executive to enable it to deal with crises effectively, yet even so the scope of these powers is not unlimited but constrained by procedural and substantive rules.

2.3.1. Procedural limitations

Emergency powers are governed by rules imposing procedural requirements on the proposal, approval, renewal, and termination of states of emergency. These procedural requirements have a formal character, identify the institutions involved, and specify the threshold required for making the necessary decisions, the aim thereof being to safeguard human rights and the rule of law from the intrusive hands of the executive.[760]

The executive and legislator are the primary institutions involved during the declaration of a state of emergency. The Council of Ministers is specifically responsible for declaring an emergency. The Prime Minister, Deputy Prime Minister, respective ministers and other officials designated by the Prime Minister are members of this council. The Prime Minister chairs the meetings and coordinates its functions[761] and, as a chief executive, has the power to determine its agenda.[762] In addition, he or she has full access to intelligence information and national security threats assessed by the Ethiopian National Security Council (ENSC).[763]

All of these factors would make the Prime Minister the proper institution to propose a state of emergency. However, the declaration of a state of emergency is an aggregate power vested with the Council of Ministers.[764] As a result, in the Ethiopian context the Prime Minister alone cannot declare a state of emergency without consulting with the cabinet. Post-declaration

759 Human Rights at the Heart of Response, Topics in Focus, Emergency Measures and COVID-19 (United Nations Human Rights, Office of the High Commissioner, 27 April 2020) <https://bit.ly/3suZIU0> accessed 22 November 2020.

760 Fombad, 'Cameroon's Emergency Powers' (n 17).

761 FDRE Constitution, art 74(1) and (4).

762 Proclamation No. 1097/2018, art 7(2).

763 Proclamation No. 257/2001, Ethiopian National Security Council Establishment Proclamation, 8th Year, No. 3, Addis Ababa, 12 October 2001.

764 FDRE Constitution, art 72(2).

legislative approval is another procedural requirement in the process of declaring the state of emergency: the Council of Ministers must submit the declaration bill to the HoPR within the required time limit, which is 48 hours when parliament is in session and within 15 days when it in recess. The legislative confirmation must be secured by a two-thirds supermajority vote of the total membership of the legislature.

The invocation and use of emergency powers is also limited by additional procedural requirements contained in the ICCPR. According to article 4 (1) of the ICCPR, state parties are required to officially proclaim states of emergency. Although the FDRE Constitution does not clearly require it, publicising a state-of-emergency declaration is another formal requirement that must be observed by the government – indeed, it is crucial to inform citizens about the nature and extent of the emergency measures and restrictions. It is also helpful in reducing the possibility of a de facto state of emergency, that is, a situation whereby the state restricts human rights without officially proclaiming a state of emergency.[765] This requirement is implied in the emergency clauses of the FDRE Constitution. Article 93 (2) hints at the official proclamation of states of emergency, while article 93 (4) (a) further requires the Council of Ministers to issue a regulation as to the scope of the emergency measures. Therefore, the principle of proclamation/publicity, which is clearly provided for in the ICCPR and implied in the FDRE Constitution, is one of the formal requirements for a state of emergency in Ethiopia.

However, the appropriate means of publicity is not clearly defined under the emergency framework. Owing to this, the executive sometimes publicises a state-of-emergency declaration through a media briefing and without making the text of the declaration available in writing.[766] Nonetheless, the structural understanding of the Constitution hints at the proper way of announcing a state of emergency. Article 71 (2) provides that 'the President shall proclaim in the Negarit Gazeta laws approved by the House of Peoples' Representatives'. In addition, the Federal Negarit Gazeta Establishment Proclamation (FNGE) requires all laws of the federal government to be published in the Federal Negarit Gazeta, the official newsletter for publicising federal laws in Ethiopia.[767] The Federal Negarit Gazeta Establishment Proclamation further states that all courts and all other organs of the federal and regional government, as well as other natural and physical persons, are required to take judicial notice of the existence of those laws that are published in the Negarit Gazeta.[768]

These provisions all show that proclamations and regulations made by the HoPR and the Council of Ministers, respectively, should be published in the Federal Negarit Gazeta. Indeed, the official publication of laws is one of the components of the rule of law.[769] It may be argued that, considering its significance in ensuring legality, a state-of-emergency declaration and the measures as well as restrictions it imposes must be publicised and accessible to the public in the form of publications. As long as these are federal laws, albeit made in times of crisis, they must be published in the Federal Negarit Gazeta.

765 Leandro Despouy, On the Question of Human Rights and States of Emergency (Report by the UN Special Rapporteur, 23 June 1997) <https://bit.ly/3rwpCVO> accessed on 5 November 2020; Yohanes Tsegaye Walilegne, 'State of Emergency and Human Rights under the FDRE Constitution' (2007) 21:2 Journal of Ethiopian Law 78, 97–99.

766 The 2005 state of emergency was announced by the Prime Minister and published the next day in the government-owned newspaper. The 2016 state of emergency declared on 8 October was not published until the end of the year. The nature of the measures were communicated to the public by state media, mostly via interviews. For more, see Ali (n 508); Amnesty International (101).

767 Proclamation No. 3/1995, Proclamation of the Establishment of the Federal Negarit Gazeta, Federal Negarit Gazeta, Year 1, No. 3, Addis Ababa, 1995, art 2.

768 Ibid, art 3.

769 Edwin W Tucker, 'The Morality of Law, by Lon L. Fuller' (1965) 40:2 Indiana Law Journal 271.

Additionally, the ICCPR under article 4 (3) requires state parties to observe the principle of notification during a state of emergency. Ethiopia is as such obliged to notify other state parties of the state of emergency through the intermediary of the Secretary-General of the United Nations.[770] The notification must be immediate and contain facts as to the derogation measures taken by the state, the reasons for them, and the list of derogated provisions of the ICCPR.[771] The notification requirement is intended to inform the global community of the way governments are treating their people in times of crisis, thereby making human rights protection an international concern and deterring arbitrary use of emergency powers.[772] As Fombad observes, the notification requirement contributes transnational accountability.[773]

In summary, constitutional emergency powers in Ethiopia are subject to the procedural limitations above that need to be fulfilled in states of emergency. Thus, a state of emergency can be declared only by qualified institutions with the power to do so and in the way provided for under the legal framework of emergency powers. In turn, this helps prevent the arbitrary uses of constitutional emergency powers.

2.3.2. Substantive limitations

The FDRE Constitution together with the ICCPR contains substantive limitations to control the abuse of emergency powers. These limitations establish subject-matter restrictions regarding the use of emergency powers through principles affecting the content, scope and application of emergency measures. These principles must be respected during states of emergency.

The principle of strict necessity is one such substantive limitation.[774] It requires states of emergency to be declared in situations that threaten the life of the nation and its peoples: in the Ethiopian context, external invasions, constitutional disorder, and natural disaster are grounds justifying the declaration of emergencies.[775] The principle further demands that the constitutional disorder must be one that cannot be controlled by regular law enforcement agencies and that an actual danger be present.[776] The power to invoke the constitutional emergency clause is thus constrained by the listed grounds and the degree of danger they pose to the nation. Consequently, a state of emergency cannot be declared in every abnormal situation and in respect of a threat which is remote and unlikely to occur.

Furthermore, a declaration of emergency does not give a blank cheque to the executive to do whatever it likes. The next substantive limitation – the principle of proportionality – requires that emergency measures be proportional to the danger posed by the conditions triggering the state of emergency. Article 93 (4) (b) of the FDRE Constitution provides that '[t]he Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency'. As the provision clearly indicates, emergency measures must be proportionate to the gravity of the emergency situation. Proportionality is assessed by taking into account the geographical coverage, material content and duration of the

770 ICCPR, art 4 (2); Fombad, 'Cameroon's Emergency Power' (n 17) 66-69; Walilegne (n 765).

771 Despouy (n 765).

772 Ibid.

773 Fombad, 'Cameroon's Emergency Powers' (n 17) 72.

774 FDRE Constitution, art 93(1).

775 Ibid.

776 Ibid.

measures.[777] The principles of strict necessity and proportionality thus require governments to provide proper explanations not only of their decision to declare a state of emergency but of specific measures resulting from such a declaration.

Another substantive limitation concerns discrimination. Although the emergency clause of the FDRE Constitution does not contain a specific prohibition against discrimination in times of emergency, emergency measures issued by the executive have to be applied without discrimination on the basis of race, colour, sex, language, religion or social origin or any other status.[778] First, the Constitution makes the principle of equality a non-derogable right and thereby sanctifies the principle of non-discrimination in the conduct of emergency actions.[779] Secondly, the principle of non-discrimination or equality attains the status of jus cogens and is, in effect, accepted by the international community as a norm from which no derogation is permitted.[780] Thirdly, because the principle is recognised under the ICCPR, it becomes part of Ethiopia's legal system by virtue of article 9 (4) of the FDRE Constitution. Hence, the principle of non-discrimination can constrain the use of emergency powers in the Ethiopian context.

The scope of the emergency measures taken as a response to exigencies is also limited by the principle of non-derogability, which prohibits the suspension of core rights.[781] Both the FDRE Constitution and ICCPR recognise two rights as non-derogable, namely the right to be free from torture and other inhuman or degrading treatment or punishment, and the right to be free from slavery or servitude.[782] The government cannot suspend these rights in times of emergencies.

The principle of compatibility, recognised under article 4 of the ICCPR, requires emergency measures to be congruent with the state's other obligations under international law as enshrined in human right treaties and norms of international law.[783] For instance, the right to life and the prohibition against retrospective criminal law have the status of jus cogens norms in international law.[784] This principle, together with articles 9 (4) and/or 13 (2) of the FDRE Constitution, in effect expands the list of non-derogable rights and thereby restricts the scope of the government's emergency powers.[785] As such, the right to life, freedom from imprisonment for the inability to discharge contractual obligations, the prohibition against retroactive criminal law, the right to be recognised as a person before the law, freedom of thought, conscience and religion, and the right to self-determination cannot be suspended during states of emergency in Ethiopia.

None of these substantive limitations, except the principle of necessity and proportionality, affect the use of legislative emergency powers in the case of federal intervention. As noted earlier, the federal government invokes the Federal Intervention Proclamation to intervene in national regional states on the grounds of security deterioration, human right violations and constitutional disorder. Therefore, the federal intervention within regional states is justified only if these conditions are present; if they are not, the federal government cannot cross the federal-state border established in the Constitution. The Proclamation also requires

777 Despouy (n 771); Fombad, 'Cameroon's Emergency Powers' (n 17) 74; Walilegne (n 765) 89–92.
778 ICCPR, art 4(1).
779 FDRE Constitution, art 25.
780 Walelgne (n 765) 92.
781 Ibid, 81–87.
782 FDRE Constitution, art 93(4)(c); ICCPR, art 4(2).
783 Ibid.
784 Ibid
785 Ibid.

that measures by the federal government be proportional to the danger posed by the conditions necessitating the intervention.[786] Similarly, the Public Health Proclamation makes no provision either for the limitations outlined above. The legislative emergency power, at least in cases of federal intervention and public health emergency, is thus less constrained by substantive issues than the constitutional emergency power.

To sum up, once a state of emergency is declared, the principles of strict necessity, proportionality, non-derogability, compatibility and non-discrimination constrain the scope and content of emergency measures taken by the executive. Legislative emergency powers during federal intervention and public health emergencies know little substantive limitation, with the principles of necessity and proportionality the only such limitations in the Federal Intervention Proclamation; as for the Public Health Proclamation, it does not reflect any substantive limitation to constrain the use of public health measures during crises such as the COVID-19 pandemic. This does not mean, though, that public officials can violate the equality principle embedded in the Constitution and international norms on human rights.

2.4. Institutional safeguards to control emergency powers in Ethiopia

Emergency power is prone to abuse whether in established or emerging democracies. It might happen that a state of emergency is declared, renewed or terminated by disregarding the relevant procedures, or that the emergency measures are issued and exercised by ignoring substantive principles designed to dictate the proper use of emergency powers. While these abuses can occur anywhere, it is the lack of institutional safeguards and accountability that makes them a particular concern in emerging and fragile democracies like Ethiopia.[787] As the global experience shows, the power to control the executive during states of emergency can be conferred on the legislature, the courts or both.[788]

2.4.1. Legislative oversight

The FDRE Constitution provides for a mechanism of legislative control of emergency powers. As explained, a state-of-emergency declaration must be confirmed by the HoPR, which is also authorised to renew or extend a state of emergency[789] on the basis of the information and opinions of the Inquiry Board. The legislature thus has full power to decline confirmation and renewal of a state-of-emergency declaration, though it has no power to lift such a declaration on its own initiative.

The FDRE Constitution establishes an inquiry body, the SIEB, to supervise the implementation of a state of emergency. Introduced by the HoPR at the time that it approves the declaration of a state of emergency, the SIEB comprises seven members chosen by the HoPR from among its members and legal experts[790] and has a general power to monitor the implementation of emergency measures.[791] It is mandated in particular to publicise the names of all arrested individuals together with the reasons for their arrest, check the humane implementation

786 Proclamation No. 359/2003, arts 5, 14(1)(5), 15(1).
787 Toggia (n 98) 118–119.
788 Ginsburg and Versteeg (n 76).
789 FDRE Constitution, art 93(3).
790 Ibid, art 93(5).
791 Article 93(6).

of emergency measures during the state of emergency, recommend corrective measures if it finds cases of inhumane treatment, ensure that perpetrators are held accountable, and opine on the renewal of states of emergency.[792]

Apart from its monitoring role, the SIEB hence serves as a source of information enabling the HoPR to make informed decisions – a significant function, given that access to accurate and sufficient information is a condition for effective legislative control[793] in circumstances where the executive's monopoly on information and propensity for spreading disinformation during states of emergency can undermine such control.[794] As Ackerman points out, Ethiopia's use of an SIEB is an innovative method of controlling executive abuse of information.[795]

While these safeguards strengthen legislative oversight, what they presuppose is that the HoPR continues to function during a state of emergency,[796] whereas it might not be in session because the crisis at hand prevents it from performing its regular work – the crisis could make it make it impossible for the HoPR to convene and then approve or not a declaration of a state of emergency and exercise oversight of emergency powers.[797] This is precisely the challenge that arose worldwide during the COVID-19 pandemic. In some cases, emergency frameworks contain force majeure rules that enabled legislatures to continue their regular functions amid the pandemic.[798] For instance, countries have special rules to facilitate legislative operations through other means such as immediate assembly,[799] meetings outside the capital,[800] bans on the dissolution of parliament, extensions of legislative time limits,[801] simplification or expedition of legislative procedures,[802] or authorising internet-based remote sessions and deliberations.[803] Certain countries also provide for an emergency parliament by giving a subgroup of legislators devolved powers to respond to the emergency situation.[804]

These alternative rules can be introduced through parliamentary working procedures or constitutional provisions,[805] with their intention being to strengthen legislative oversight during circumstances such as war or pandemic outbreaks that make the normal plenary sessions of legislatures impossible or onerous.[806] As Jonathan Murphy emphasises, effective legislative involvement in decision-making in times of crisis is essential for preserving democratic practices.[807] A shortcoming of the Ethiopian legal framework in this regard is that, except for rules of immediate assembly, it lacks alternative means of ensuring continued legislative oversight in times of emergency.

792 FDRE Constitution, art 93(6).

793 Hatchard, Ndulo and Slinn (n 49) 138.

794 Ackerman (n 75) 1050–1056.

795 Ibid.

796 Bulmer (n 12) 29–30; Özbudun and Turhan (n 77).

797 Murphy (n 9) 53–54.

798 Elizabeth Boomer, 'Continuity of Legislative Activities during Emergency Situations in Selected Countries' (Report for Congress, March 2020).

799 Murphy (n 9); Boomer (n 798). It exists in most constitutions, with the time limit varying among them.

800 Ibid. For instance, Norway.

801 Ibid. For instance, Jamaica, Kenya, Mexico and Turkey.

802 Ibid. For instance, Germany, Guatemala, Israel, Malta, Philippines, South Africa and Switzerland.

803 Ibid. For instance, Romania and Brazil.

804 Ibid. For instance, Germany and Sweden.

805 Murphy (n 9) 53–54.

806 Bulmer (n 12) 29–30.

807 Ibid; see also Murphy (n 9) 53–54.

Article 93 (2) (a) of the FDRE Constitution requires the HoPR to assemble within 48 hours of the declaration of a state of emergency; article 93 (2) (b) requires the legislature in recess to be called for a meeting within 15 days after the adoption of an emergency decree by the Council of Ministers. However, the relative lengthiness of these timeframes poses a problem for legislative control. For a start, the executive can exercise emergency powers without legislative oversight for 15 days. As is illustrated by the story of Lucius Quinctius Cincinnatus during the Roman Republic, a condition that necessitates a declaration of emergency can be reversed within 16 days.[808] The problem gets more complicated if the legislature in recess declines to approve the executive's emergency decree after 15 days. Here, the decree ceases forthwith to have force of law, but a lot could have happened in those 15 days to the cost of fundamental rights and freedoms.[809] Ethiopia's emergency provisions overlook this scenario and leave the victims of human rights violations without clear remedy.

On this score, Yibeltal Assefa has suggested ex post judicial or legislative oversight as a means of remedy for victims of human rights violations.[810] This is dubious, though, as it renders all of the executive's actions illegal by applying the general rule of article 2 (3) of the ICCPR retrospectively to cases arising during the 15 days of decree-based state of emergency rule. Constitutionally speaking, the executive is allowed to exercise emergency powers and, pursuant to this, suspend certain human rights, the non-derogable ones excepted, within those 15 days. Thus, the emergency measures taken within that period are lawful as long as they respected substantive limitations, in particular the principle of non-derogability. The mere rejection of the decree by the HoPR does not make the entire emergency response up until then null and void.

Ex post oversight can bring remedy only when the rejected emergency measures victimised individuals by violating their non-derogable rights. The emergency measures taken during the period of an unconfirmed state of emergency are justifiable unless they have violated non-derogable rights; as a result, it remains the case that the lengthy post-declaration approval period would leave many victims of human rights infringements without remedy. Therefore, shortening the 15-day post-declaration confirmation period during parliamentary recess is important for strengthening legislative control during parliamentary recess – a time limit of five to 10 days may be reasonable.

Unlike the other systems discussed above, Ethiopia, as noted, has no alternative or special rules for ensuring the continued functioning of the HoPR amid a crisis. There is no prohibition against the dissolution of the legislature during an emergency,[811] nor is there an arrangement in the HoPR for a designated subgroup of members to constitute an emergency parliament with devolved powers from the House for addressing crisis situations.[812] Likewise, technology-based procedures for remote sessions, deliberation and voting are not in place. The Ethiopian legal framework thus does not guarantee the continuity of legislative oversight during all foreseeable emergency situations, making force majeure rules to that effect imperative.

808 Lucius Quinctius Cincinnatus was a famous Roman statesman whom the Senate called from his plough to become dictator and save the country from invasion. Sixteen days later, after saving the Republic, he promptly resigned his dictatorship and returned to his plough. See De Wilde, 'Just Trust' (n 114) 6–8.

809 FDRE Constitution, art 93(2)(a).

810 Yibeltal Assefa, 'Upholding International Human Rights Obligations during A State of Emergency: An Appraisal of the Ethiopian Experience' (LLM Thesis, Addis Ababa University 2019) 35–36.

811 FDRE Constitution, art 60.

812 Neither the old nor new parliamentary working procedures and organisational directives refer to any such arrangement functioning in the manner of an emergency parliament. No working procedures were revised in the light of COVID-19. Interview with Seifu G/Mariam, Senior Advisor of the HoPR (Addis Ababa, Ethiopia, 12 October 2020).

During states of emergency, the legislature can also employ ordinary oversight tools, such as reporting, questioning, and standing and ad hoc committees, to hold the government accountable. These general oversight tools are more pronounced, however, in the case of legislative rather than constitutional emergency powers. In addition, the proclamation that enables the executive to use special emergency powers may introduce some safeguards to check the misuse of powers.

First, in such proclamations the legislature defines the extent of legislative emergency powers to be exercised by the executive – that is, the HoPR controls the scope of legislative emergency powers by virtue of its general law-making function.[813] Secondly, the legislature may incorporate follow-up mechanisms in the enabling proclamations. For instance, the Federal Intervention Proclamation requires periodic reporting and publication to control the intervention powers of the federal government;[814] accordingly, the Prime Minister has to present periodic reports to the HoPR about the activities of security forces deployed in the event of security deterioration.[815] The HoPR also has the power to investigate human rights violations in regional states, and plays a key role in deciding on the intervention in the state in question.[816] A federal intervention justified on the ground of constitutional disorder is controlled by the HoF, which is a non-legislative house.[817]

2.4.2. Judicial oversight

Globally, the judiciary plays several roles in preventing the abuse of emergency powers. First, it reviews the executive decree declaring a state of emergency or the legislative proclamation approving it, thereby controlling the procedural integrity of the emergency rules.[818] Secondly, the judiciary reviews the substance of emergency measures issued by the executive, in so doing controlling intrusions upon non-derogable rights and enforcing the principle of proportionality.[819] Thirdly, it continues its normal functions and so ensures fair trial and access to justice in times of emergency.[820] Finally, the judiciary may insist that the government take proper measures for addressing the crisis at hand.[821] In short, it controls abuse of emergency powers by enforcing procedural and substantive limitations through its powers of judicial review, powers which could originate in constitutional provisions, ordinary legislation and/or judicial activism.[822]

In Ethiopia, the judicial review of emergency powers is not available due to the unique role played by the HoF. The FDRE Constitution establishes a bicameral house that comprises the HoPR and HoF.[823] The latter is a second chamber consisting of representatives of nations,

813 FDRE Constitution, art 55.
814 Proclamation No. 359/2003, arts 6, 16–17.
815 Ibid, art 6.
816 Ibid, arts 8–11.
817 Ibid, arts 16–17.
818 Ginsburg and Versteeg (n 76) 31–37.
819 Ibid.
820 Ibid.
821 Ibid.
822 Ibid.
823 FDRE Constitution, art 53.

nationalities and peoples designated by regional state councils,[824] a mode of composition that makes the HoF a purely political organ. It is vested, however, with unusual powers. First, unlike the second chambers of other federations, it is not involved in the law-making process and serves as a non-legislative assembly. Secondly, the HoF – assisted technically by the CCI – has the power to rule on all constitutional disputes and hence the power to review the constitutionality of laws and government actions.[825] It is, as such, a quasi-judicial body, as intended by the constitutional framers, who deliberately made the HoF the guardian of the Constitution. In Ethiopia, the Constitution is considered as a political contract between the country's nations, nationalities and peoples – the framers thus conferred the power to guard the Constitution on the HoF, which is composed of their representatives. By design, the HoF becomes the ultimate guardian of the FDRE Constitution.[826]

2.4.2.1. The House of Federation as an oversight institution

The HoF, as noted, has the power to decide on constitutional issues, including the interpretation of the Constitution, pursuant to which it has the power to review the constitutionality of laws. While there is debate as to whether the scope of its review power extends to 'executive acts and decisions', the HoF is not specifically mandated to review states of emergency either on formal or substantive grounds,[827] given that subsequent legislation defining the powers and responsibilities of the HoF and CCI do not explicitly empower it to do so.[828] Unlike the South African Constitutional Court and Kenyan Supreme Court, the HoF has no clear power to review the validity of a state-of-emergency declaration and subsequent measures – the legal framework is silent on the matter.

As is apparent, the Ethiopian system of constitutional review is similar to the centralised European model of judicial review. In this model, constitutional courts need explicit authorisation by the constitution or ordinary legislation to exercise jurisdiction on a specific matter;[829] moreover, constitutional courts are not constrained by the 'political question doctrine' that impedes them from entertaining politically sensitive cases: the constitutional court reviews the constitutionality of a matter regardless of its political sensitivity. The constitutional silence in Ethiopia could hence be understood as a denial of the power to review a state-of-emergency declaration. However, this way of interpreting the 'silence' seems unsound and will not lead to a constitutionalism-friendly conclusion.

Both the American as well as European models of judicial review reinforce the principle of constitutional supremacy enshrined in almost all modern codified constitutions.[830] As a result, any law that contravenes the constitution, the supreme law of the land, is null and void. In view of this, the inclusion of the supremacy clause in a constitution leads, naturally and logically, to the authorisation of a certain institution (often the regular courts or constitutional courts) to enforce it by making laws null and void when they contradict

824 Ibid, arts 53 and 62.

825 Ibid, arts 83–84.

826 Ibid.

827 FDRE Constitution, arts 62 and 84. For the debate, see Abebe (n 510) 65–69.

828 Proclamation 798/2013, Council of Constitutional Inquiry Proclamation, Federal Negarit Gazeta, 19th Year, No. 65, Addis Ababa, 30 August 2013; Proclamation No. 251/200, Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation, Federal Negarit Gazeta, 7th Year, No. 41, Addis Ababa, 6 July 2001.

829 Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study (Ekin Press 2008) 12–13

830 FDRE Constitution, art 9.

the constitution.[831] Constitutional courts or regular courts enforce the supremacy clause of the constitution, thereby protecting the constitution from being undermined by acts of the legislature or executive.[832] This also holds true in times of emergency, during which the executive can suspend some constitutionally protected rights and freedoms while the constitution as a whole, including its supremacy clause, remains operative.[833]

The FDRE Constitution recognises the supremacy of the constitution;[834] since the emergency power is a constituted power derived from the constitution, it must be exercised in accordance with the constitution. A state-of-emergency declaration is an act made by the HoPR based on the proposal of the Council of Ministers, and so must be made in accordance with constitutional rules and procedures. As such, the HoF, which is the guardian of the Constitution, can assume jurisdiction to review the constitutionality of a state-of-emergency declaration, thereby enforcing those procedural limitations to ensure the integrity of emergency powers. In this regard, the political nature of a state-of-emergency declaration or the political question doctrine may not affect the jurisdiction of the HoF to review the validity of a declaration of emergency as it is essentially a political organ.

Therefore, the HoF has a mandate to ensure that a state of emergency proclamation is made by following the procedures provided under the Constitution. A declaration made by disregarding the formal steps enshrined under the constitutional framework would be null and void. As a guardian, it must protect the Constitution from unlawful declarations of emergency that undermine the Constitution. The experiences of the Weimar Republic and, more recently, Botswana serve as reminders that emergency powers can be used to undermine the constitution itself.[835] The HoF as a guardian must protect the FDRE Constitution not only in times of normalcy but of emergency; as such, it must ensure that the supremacy of the Constitution is maintained in all times, be they periods of normalcy or crisis. The HoF can thus review the constitutionality of a declaration of emergency on formal reasons. In so doing, it controls the procedural integrity of the invocation of the constitutional emergency powers.

As legislative emergency powers are the result of ordinary legislation enacted by the HoPR, the review of their constitutionality is under the jurisdiction of the HoF.[836] As a result, the HoF can control the validity of legislative emergency powers by reviewing the constitutionality of proclamations that grant special powers to the executive. In other words, the HoF can review the constitutionality of ordinary legislation, such as Federal Intervention Proclamation, that grants legislative emergency powers to the executive.

2.4.2.2. Regular courts as oversight institutions

In Ethiopia, judicial powers are vested with regular courts. However, the FDRE Constitution clearly prohibits them from reviewing the acts of parliament: they have no power to review legislative statutes.[837] The political question doctrine, on the one hand, and the fear of judicial

831 Vicki Jackson and Mark Tushnet, Comparative Constitutional Law (2nd ed, Cambridge University Press 2006) 456–487.

832 Ibid.

833 Ginsburg and Versteeg (n 76).

834 FDRE Constitution, art 9.

835 De Wilde, 'The State of Emergency in the Weimar Republic' (n 53).

836 FDRE Constitution, arts 83, 84, 62.

837 Ibid.

activism, on the other, persuaded the framers to deny courts the power to review legislation enacted by the HoPR and regional state councils.[838] For this reason, courts in Ethiopia cannot review the validity of a state-of-emergency declaration.

The exclusion of courts from judicial review is not absolute in Ethiopia. Their power to make review is limited when it comes to legislation by the HoPR or regional state councils,[839] but they are not precluded from reviewing the constitutionality of regulations and directives made by the executive. This, in fact, is in line with the concept of parliamentary sovereignty, which insulates only the acts of the legislature from review by the judiciary.[840] Accordingly, regular courts can review emergency measures issued by the Council of Ministers and the SECP. Constitutionally speaking, Ethiopian courts have the jurisdiction to entertain the constitutionality of the emergency measures taken by the executive, and can thus enforce substantive limitations such as the principles of proportionality, non-derogability and non-discrimination.

The second scenario in which courts can exercise control over emergency powers is the result of article 13 (1) of the FDRE Constitution.[841] In terms of this provision, courts are obliged to enforce Chapter Three of the Constitution, which is the bill of rights. They can enforce the Chapter Three provisions of the Constitution during a state of emergency by reviewing executive actions and emergency measures to ensure there are no encroachments on non-derogable rights. In addition, courts have a duty to enforce those rights and freedoms that are not suspended during the state emergency and thereby give remedies to complaints of human rights violations.

Courts also have the power to control the use of legislative emergency powers. They can review executive actions in the light of the enabling proclamation, doing so by checking whether there is legal authorisation, typically by legislation, for the basis of the executive action on a certain matter.[842] In addition, courts can check whether the executive has acted within the scope of its legislative emergency authority as allowed by the proclamation. Hence, in regard to the exercise of legislative emergency powers, regular courts can rule against executive actions when the executive takes the measures without legal authority or when the executive goes beyond the limits of the legal authority secured by the proclamations. In other words, courts can review legislative emergency measures on the grounds of ultra vires.

In conclusion, the power to review the validity of a state-of-emergency declaration and legislative emergency proclamation is conferred on the HoF by virtue of its power to check the constitutionality of legislation. Constitutionally speaking, regular courts can also review the emergency measures taken by the executive, this by virtue of their power to review the legality of executive actions and their responsibility to enforce the constitutional bill of rights. On that basis, courts can check executive measures for their adherence to substantive limitations engendered by the principles of proportionality, non-derogability and non-discrimination. In the case of legislative emergency measures, they can review the actions of the executive on the grounds of ultra vires.

838 Anchinesh Shiferaw Mulu, 'The Jurisprudence and Approaches of Constitutional Interpretation by the House of Federation in Ethiopia' (2019) 13:3 Mizan Law Review 419.

839 FDRE Constitution, art 84(2).

840 Dyzenhaus, 'The State of Emergency in Legal Theory' (n 218).

841 Article 13(1) of the FDRE Constitution provides that '[a]ll Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this Chapter [Chapter Three]'.

842 Ginsburg and Versteeg (n 76) 28.

2.4.3. Oversight by the Ethiopian Human Rights Commission

The EHRC, as an NHRI, was established in 2000 with a mandate to promote and protect human rights. The establishment of the EHRC is rooted in the FDRE Constitution, which requires the HoPR to create a human rights commission by law that determines its powers and functions.[843] After five years, the HoPR enacted the enabling legislation that established and defined the mandate of the EHRC.[844]

With regard to its legislative framework, the EHRC fulfils the minimum standard of the Paris Principles. The enabling proclamation also sets out a number of provisions securing its independence regarding financing, appointment and working procedures. The EHRC has the power to prepare its own budget and raise funds from other sources.[845] A formal appointment process is specified in the enabling legislation. Accordingly, the appointees are recruited and approved by a nomination committee and parliament, respectively.[846] Members of the EHRC governing body are appointed for a five-year term and cannot be removed before the term expires without following the specified procedures; by implication, the legislative framework provides security of tenure to the commissioners.[847] The institution is entitled to hire its staff and formulate its operational rules and procedures,[848] in addition to which commissioners and investigators may not be held liable for their actions or opinions expressed in the exercise of their functions. This immunity protects the independence of the institution by enabling it to carry out its functions without fear of prosecution.[849]

The EHRC has a broad mandate to promote and protect human rights.[850] It is mandated to educate the public about human rights with a view to raising awareness and enhancing the tradition of respect for human rights; to provide consultancy services on human rights; and to provide opinions on government reports submitted to international human rights bodies.[851] It also is authorised, on its own initiative or on receiving a complaint, to investigate human rights violations and propose policies and law reforms relating to human rights.[852] The EHRC is empowered too to ensure that laws, decisions and practices of the government are in harmony with human rights enshrined in the Constitution and to ensure that human rights are respected by the government as well as other entities.[853] More importantly, its mandate extends to protecting the people against the military, security and police forces, which are often associated with human rights abuses in Ethiopia.[854]

843 FDRE Constitution, art 55(14).

844 Proclamation No. 210/2000, Ethiopian Human Rights Commission Establishment Proclamation, Federal Negarit Gazeta, 6th Year, No. 40, Addis Ababa, 4 July 2020. The delay was attributed to the Ethio-Eritrea war (1998–2000) which diverted the government's focus to defence against Eritrean aggression. See Mohammed Abdo, 'The Human Rights Commission of Ethiopia and Issues of Forced Evictions: A Case-Oriented Study of its Practice' <https://bit.ly/3deKv2S> accessed on 10 November 2020.

845 Proclamation No. 210/2000, arts 19(2) and 36. In 2015 the annual budget was approximately USD 3.5 million, with 60 per cent of the EHRC's funding coming from the national government.

846 Ibid, arts 10–15.

847 Ibid.

848 Ibid, arts 19(2) and 31.

849 Ibid, arts 35 and 40.

850 Ibid, art 6.

851 Ibid, art 6(3), (6) and (7).

852 Ibid, art 6(4) and (5).

853 Ibid, art 6(1) and (2).

854 Ibid, art 6(1) and 39.

Apart from these general mandates, a recent amendment of the enabling legislation confers far-reaching and specific powers on the EHRC.[855] It is mandated to monitor the human rights situation during states of emergency, to visit and monitor, without prior notice, correction centres, prisons, police detention centres and any temporary detention centres where people are held in custody.[856] Therefore, the legislative framework goes beyond the minimum and explicitly mandates the EHRC to exercise oversight of the executive and its observance of human rights standards during states of emergency.

855 Proclamation No. 1224/2020, Ethiopian Human Rights Commission Establishment (Amendment) Proclamation, Federal Negarit Gazeta, 26th Year, No. 75, Addis Ababa, 18 August 2020.

856 Ibid, art 2.

4

The Practice of Emergency Powers in Ethiopia*

1. Introduction

The use of emergency power is not a new phenomenon in Ethiopia's modern history. All past and present regimes have exercised it at least once. The imperial regime of Haile Selassie declared states of emergency in the 1960s and in February 1974. The Derg did the same in September 1975 and the late 1970s.[857] Since the adoption of the current Constitution in 1995, its emergency clause has been invoked five times to declare a state of emergency. The first was declared in 2005 and the most recent on 24 November 2020; the remaining three were declared within four years from 2016 to 2020. All states of emergency, except for the one in response to COVID-19, have been declared for the same generic reason, that of protecting the constitutional order. The federal government has also exercised the legislative emergency powers contained in the Federal Intervention Proclamation. In 2001 and 2002, for instance, it intervened more than once in the regional states.[858] At the time of writing, another federal intervention is under way, this time in Tigray National Regional State. Ethiopia, as is apparent, is a prominent case study in the use of emergency powers.

This chapter intends to assess the country's application of emergency power in relation to the relevant national and international frameworks and standards. With this in mind, it examines the implications that the use of emergency powers hold for human rights and the rule of law in Ethiopia. The enquiry is carried out over four sections. The first describes the states of emergency that have been declared since 1995, beginning with the political background of each emergency declaration and proceeding to look at the emergency measures introduced under its auspices. The second section deals with the trends in emergency measures that have to come to light in Ethiopia since the first declaration in 2005. The third section focuses on the way oversight of the executive is practised and explores the experiences of the legislature, judiciary, HoF and EHRC. On the basis of these discussions, the final section identifies the implications that emergency powers have for human rights and the rule of law in Ethiopia.

* *This chapter looks into the five states of emergency declared under the FDRE Constitution, with the exception of the sixth state of emergency declared in November 2021.*

857 Toggia (n 98) 131.

858 Abraha (n 97) 21.

2. A chronology of states of emergency (1995–2020)

'Breakdown of law and order' is the most frequently invoked ground for declaring states of emergency in Ethiopia; the other is the spread of epidemics, as in the case of the emergency declared in response to COVID-19. Although Ethiopia is prone to natural disasters – for example, in 2016 and 2020, floods and locust swarms led to significant loss of life, destruction of property, and displacement of people[859] – they have not triggered declarations of states of emergency by any of the affected regional governments.

2.1. The first state of emergency (2005)

The first state of emergency was declared in May 2005 following contested national election results. On 15 May 2005, Ethiopia held its third parliamentary elections for seats in the national legislature and regional state councils, elections which were the most competitive and disputed in the country's history.[860] Although the ruling EPRDF claimed victory, opposition parties won 172 seats in the 547-member assembly, the highest achievement by the opposition in Ethiopian electoral history.[861] Tensions erupted quickly when the latter alleged vote-rigging, fraud and irregularities. Opposition parties contested the results of 235 seats, covering hundreds of polling stations around the country,[862] and vowed to boycott the national assembly in protest at election results that gave the incumbent EPRDF, led by then Prime Minister Meles Zenawi, a third term.[863] In this fractious atmosphere, Zenawi declared a state of emergency by way of a decree broadcast on state-controlled television:

> *As of tomorrow (16 May 2005), for the next one month no demonstrations of any sort will be allowed within the city of Addis Ababa and its surroundings … the government has decided to bring all the security forces, the police and the local militias, under one command accountable to the prime minister.*[864]

On the next day, the Prime Minister's declaration was published in Addis Zemen, a government-owned newspaper published in Amharic.[865] The decree was not submitted to parliament for approval, nor was it published in the official Federal Negarit Gazeta. Protests over the election broke out despite the executive order banning public demonstrations.

859 Sora Halake, 'New Swarms of Locusts Threaten Crops, Food Security in Ethiopia' (VOA News, 21 January 2020) <https://bit.ly/3rzFl6N > accessed on 10 November 2020.

860 Merera Gudina, 'The May 2005 Elections and the Future of Democracy in Ethiopia' in Aspen H et al. (eds), Research in Ethiopian Studies: Selected Papers of the 16th International Conference of Ethiopian Studies (Wiesbaden 2010).

861 Ibid.

862 J Abbink, 'Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and Its Aftermath' (2006) 105 African Affairs 173, 175–17; Yemane Negashe, 'Ethiopia between Election Events: The Impact of The 2005 and 2010 Pre-Election Politics on Competitive Elections' (Master's thesis, Addis Ababa University 2010) 26–28.

863 Ibid.

864 Ali (n 508). The declaration was published in Addis Zemen Newspaper, 64th Year, No. 248 (Addis Ababa, 16 May 2005).

865 Ibid.

Security forces, including the military, were deployed to suppress the protests, as a result of which several people were killed, many more were injured, and tens of thousands of opposition supporters and leaders were jailed.[866] Prime Minister Zenawi justified the crackdown by accusing protesters of seeking to overthrow the duly constituted government of Ethiopia.[867]

2.2. The second state of emergency (2016–2017)

A decade later, a second state of emergency was declared on 8 October 2016 by Prime Minister Hailemariam Desalegn following months of public protests in parts of the country. The main reasons for the declaration can be traced back to October 2015, when mass protests broke out in Oromia National Regional State (Oromia).[868] The newly proposed Addis Ababa Integrated Development Master Plan, which called for the expansion of the capital city into neighbouring Oromo towns and villages, was the immediate cause of the protests.[869] However, the issue of the master plan simply reactivated the deep-seated grievances of the Oromos – the largest ethnic group in the country – against the Ethiopian regime.[870]

Protests in Oromia were followed in July 2016 by protests in Amhara Regional State, the home of the second largest ethnic group. The Amhara as an ethnic group also have grievances in regard to marginalisation in post-1991 national politics. The arrest of various members of the Welqayit-Amhara Identity Self-determination Committee ignited these grievances and led to popular protests, especially so in Gondar.[871] The protests in Oromia and Amhara spread to other cities and towns in the two states, giving voice to deep-rooted political questions, among them the equitable distribution of political powers, proper self-rule and federalism, economic justice, democratic reform, and respect for human rights, including the release of prisoners, many of whom were ethnic Oromos and Amharas.[872] In the Southern Nations, Nationalities and Peoples' Region (SNNPR), the Konso community protested in August and September 2016 for the right to self-administration at zonal level, which was one step higher than what they were exercising.[873]

In all cases, security forces responded to the protests with the use of force despite the latter's largely peaceful nature. Large loss of life and damage to property ensued throughout the protests.[874] A horrific incident on 2 October 2016 during the Irreecha festival saw the death of several hundred people and was a turning-point both for the protesters and government. Protests intensified in Oromia,[875] with the government invoking the Constitution's emergency

866 Ibid.

867 Toggia (n 98) 12; Abbink (n 862).

868 Allo (n 91) 134-140; Amnesty International (n 101) 1-2; Ethiopian Human Rights Project (EHRP) (n 101).

869 Ibid.

870 Ibid.

871 Ibid

872 Ibid.

873 Ibid.

874 Ibid.

875 Ibid; see also Stephanie Busari, 'Ethiopia Declares State of Emergency after Months of Protests' (CNN 8 October 2026) <https://cnn.it/39tEazv> accessed on 23 October 2020.

provisions after a decade-long hiatus.[876] On 8 October 2016, the Council of Ministers declared a nationwide state of emergency for six months.[877] In a statement broadcast on the media, the Prime Minister said that 'the state of emergency is declared to reverse the danger posed by destabilizing forces undermining the safety of the people and security and stability of the country'. The same limited purpose was also reflected in the preamble of the decree, which pledged to maintain constitutional order by ensuring peace and security in the country.[878]

The decree of the Council of Ministers established an SECP to enforce the declaration and place all law enforcement organs under its command.[879] The Prime Minister headed the Command Post, while the Minister of Defence served as its secretary; the federal police commissioner and regional special force police commanders were additional members.[880] The decree conferred broad powers to the Command Post to determine the measures, restrictions and geographical areas for implementing the state of emergency.[881] This decree was submitted to the HoPR on 20 October 2016 through Proclamation No. 984/2016.[882] An Inquiry Board was established, as required by the Constitution, with a power to supervise the enforcement of the state of emergency.[883]

Following the approval of the legislature, the Council of Ministers issued a regulation to set emergency measures and give directions to be followed by the SECP during the enforcement of the emergency proclamation.[884] Regulation No. 391/2016 further empowered the Command Post to make implementation directives. Accordingly, it issued a directive that banned a wide range of activities.[885]

Using social media platforms such as Facebook and Twitter to communicate with political groups designated by the government as terrorist and anti-peace was prohibited. Banned too was sharing social media posts by these groups.[886] Watching broadcasts by the Ethiopian Satellite Television (ESAT) and Oromo Media Network (OMN) – both of which are based abroad – was banned by dint of labelling them as affiliated with terrorist organisations.[887] Similarly, political parties and journalists were prohibited from sharing information with,

876 Some regard this as the first state of emergency by arguing that the 2005 decree of the Prime Minister was not made in accordance with article 93 of the Constitution. However, the argument does not hold water since the failure of the government to observe the rules of the Constitution does not deprive the decree the status of an emergency measure; rather, it renders the government's actions unlawful and points to misuse of emergency powers.

877 Proclamation No. 1/2016, A State of Emergency Proclamation for the Maintenance of Public Peace and Security (25 October 2016). However, the official Negarit Gazeta has not been accessible yet.

878 Proclamation No. 1/2016, Preamble

879 Proclamation No. 1/2016, art 13.

880 Ethiopian Human Rights Project (EHRP) (101).

881 Proclamation 1/2016, art 4.

882 Proclamation No. 984/2016, State of Emergency for the Maintenance of Public Peace and Security Council of Ministers Proclamation No. 1/2016 Ratification Proclamation. Federal Negarit Gazeta, 23rd Year, No. 1, Addis Ababa, 1 November 2016.

883 Proclamation 984/2016, arts 10–11.

884 Regulation No. 391/2016, State of Emergency Proclamation for the Maintenance of Public Peace and Security Implementation Council of Ministers Regulation, Federal Negarit Gazeta, 23rd Year, No. 2, Addis Ababa, 7 October 2016.

885 The Command Post Directive for the Implementation of the State of Emergency (2016 Directive). The directive was not officially published; instead, its details were communicated by state media.

886 2016 Directive, arts 1–2.

887 Ibid.

and issuing press releases on current affairs to, local and foreign media.[888] The directive also prohibited communicating political messages to the public without the permission of the SECP.[889] It extended to religious matters, too, regulating the content of religious sermons by requiring that they not instigate protest and incite hatred among people.[890]

The directive also imposed a curfew and 'no-movement' zones,[891] along with orders that the populace cooperate with the security forces – people had to supply any information requested by the security forces and keep detailed information as to the owners of vehicles and tenants of houses and other buildings.[892] The security forces were empowered to take all necessary measures to enforce the prohibitions, including censorship, arrest and search without warrant, detaining suspects for six months without court orders, confiscating property and taking self-defence measures by using all necessary force.[893]

The state of emergency was renewed by a unanimous vote in the HoPR on 10 March 2017.[894] As a result, the previous regulation, directive and emergency measures were allowed to stay in force for an additional four months,[895] the extension being justified on the ground of the need to attain an irreversible level of stability as well as to respect the people's demand for a continuation of the state of emergency.[896] During the extension of the state of emergency, the situation in the country was relatively calm; the renewal proclamation also confirmed the moderate stability that had resulted from the previous emergency measures.[897]

The Inquiry Board had suggested that the state of emergency be prolonged but limited in its geographical coverage; however, the HoPR rejected these views and decided on a nationwide renewal.[898] The legislature, in other words, decided that all the emergency measures should be applied uniformly across the country albeit that the situation did not warrant it. As a result, the same restrictive emergency measures as before were enforced for an additional four months, even though the unrest that triggered the previous declaration had abated. During the overall ten-month period of the state of emergency, numerous human rights violations occurred, including deprivation of life, infliction of torture and other inhuman treatment, arbitrary arrests and detentions, forced political indoctrination, and denial of access to justice.[899]

888 Ibid, art 16.

889 Ibid, arts 3–6

890 Ibid, art 10.

891 Ibid, arts 17–18.

892 Ibid, arts 25–26.

893 Ibid, art 28.

894 Proclamation No. 1004/2017, State of Emergency Proclamation for the Maintenance of Public Peace and Security Renewal Proclamation No. 1004/2017, Federal Negarit Gazeta, 23th Year, No. 32, Addis Ababa, 19 April 2017.

895 Proclamation 1004/2017, arts 3–4.

896 Ibid, Preamble

897 Ibid.

898 Assefa (n 692) 38.

899 Ethiopian Human Rights Project (EHRP) (n 101); Zelalem Eshetu Degifie and Jemal Kasaw, 'The State of Emergency and the Right to Freedom from Torture in Ethiopia: The Case of Amhara Region (unpublished, 2017).

2.3. The third state of emergency (2018)

Further protests erupted in many parts of Oromia within two weeks after the end of the second state of emergency, with university students making various public demands.[900] By January 2018, the protests had spread to other regions. Protests flared up again in the Amhara region after security forces in the town of Woldiya killed innocent people observing the annual Epiphany holiday.[901] In February, mass protests demanding good governance also took place in Wolkite, the capital city of Gurage Zone in the SNNPR.[902] Prime Minister Hailemariam Desalegn resigned from office on 15 February amidst the deteriorating security situation and uncertain political environment.[903] Overall, Ethiopia's political stability was in doubt.

Against this background, the Council of Ministers acted swiftly and declared a nationwide six-months-long state of emergency on 16 February 2018 – barely six months after the previous state of emergency. Its main purpose, as set out in the declaration, was to prevent the breakdown of law and order from threatening the constitutional order.[904] The Council of Ministers' decree was approved by the HoPR on 2 March.[905]

As before, an SECP was established to enforce the emergency measures issued by the Council of Ministers. It was also empowered to issue directives for implementing the measures, and endorsed the former members of the Command Post.[906] The proclamation contained a broad and arbitrary prohibition of protests that rendered it illegal even to make a political gesture by crossing one's arms above one's head;[907] it outlawed, too, the right of assembly, peaceful demonstrations, and any kind of political communication.[908] The Command Post was granted, inter alia, the power to block means of communications including the internet, the power to make arrests without warrant, as well as the power to impose curfews and use any necessary force.[909] Security forces were mandated to take preventative detention measures against those suspected of conspiring against the constitutional order.[910]

During the emergency period, the ruling EPRDF elected Abiy Ahmed Ali as it new chairman and in April 2018 the HoPR endorsed him as the new Prime Minister. The Council of Ministers was reorganised under Abiy's leadership, following which it proposed to life the state of

900 International Crisis Group, Managing Ethiopia's Unsettled Transition (Africa Report No. 269, 21 February 2019); Danish Immigration Service (DIS), Ethiopia: Political Situation and Treatment of the Opposition (Country Report September 2018).

901 Ibid.

902 Ibid.

903 BBC News, 'Ethiopia PM Hailemariam Desalegn in Surprise Resignation' (BBC, 15 February 2018) <https://www.bbc.com/news/world-africa-43073285> accessed on 16 November 2020.

904 Proclamation No. 2/2018, Constitution and Constitutional Order Defense from Threat State of Emergency Proclamation, Federal Negarit Gazeta, 24th Year, No. 35, Addis Ababa, 23 March 2018.

905 Proclamation No. 1083/2018, Constitution and Constitutional Order Defense from Threat State of Emergency Proclamation No. 2/2018 Approval Proclamation, Federal Negarit Gazeta, 24th Year, No. 6, Addis Ababa, 23 March 2018.

906 Proclamation No. 2/2018, arts 2 and 6.

907 Ibid, art 4(1)(3).

908 Ibid, art 4(2).

909 Ibid, art 4(3)–(7).

910 Ibid, art 4(4).

emergency once it had reviewed the country's security situation.[911] The HoPR approved the executive's proposal to terminate the state of emergency on 5 June 2018, two months earlier than scheduled, as part of wider political reforms promised by the new premier.[912]

2.4. The fourth state of emergency (April 2020)

Ethiopia's first case of COVID-19 was confirmed on 13 March 2020 and its first set of response measures taken by the federal government on 16 March. After a meeting of the COVID-19 ministerial committee, the Prime Minister issued a press release announcing a raft of measures including a two-week ban on mass gatherings, school closures and border controls; these measures were extended on 30 March for another two weeks.[913] Regional states followed the same pattern in their measures to combat the pandemic, duly restricting inter- and intra-regional travel and banning all social activities including mass gatherings.[914] Some regions imposed total lockdowns on cities and towns with confirmed cases of infection.[915] Similar measures were taken by the local governments of cities, towns and districts, which restricted all public transport services within and beyond their administrative boundaries.[916]

Significantly, the measure were all adopted without the declaration of a state of emergency. All levels of governments (federal, regional and local) started taking serious measures that restricted constitutionally protected fundamental rights and freedoms in order to prevent the spread of the COVID-19 pandemic in their jurisdictions – but these executive actions and measures had a dubious legal basis. Legally speaking, they should have been taken on the basis of a state-of-emergency declaration or under the framework of legislative emergency powers permitted by public health proclamations.

The Tigray region was, however, the first and the only government to impose region-wide state of emergency, which it declared on 26 March 2020 for 15 days; its state council later extended the declaration for three months.[917] As for emergency measures, the Tigray regional government banned all travel and public activities, which extended to the closure of all cafés and restaurants, and prohibited evictions from rented houses and increases in rent. It also banned social activities such as weddings and other festivals, as well as market gatherings, while travellers entering the region were required to report to the nearest health offices.[918]

911 Paul Schemm, 'Ethiopia Moves to Lift State of Emergency Two Months Early as Tensions Ease' (The Washington Post, 2 June 2018) <https://wapo.st/3crlTol> accessed on 2 December 2020.

912 Ibid.

913 Addis Getachew, 'COVID-19: Ethiopia Closes Schools, Bans Public Events' (ACC 16 March 2020) <https://www.aa.com.tr/en/africa/covid-19-ethiopia-closes-schools-bans-public-events/1767683> accessed on 19 September 2020.

914 Zemelak Ayele, 'Federalism and the COVID-19 Crisis: The Perspective from Ethiopia' (Forum of Federations 2020).

915 Ibid. For instance, Amhara National Regional State imposed a lockdown in Bahirdar for a week after one was case confirmed.

916 Ibid.

917 Etenesh Abera, 'News: Tigray Region Relaxes #Covid19 State of Emergency' (Addis Standard, 24 April 2020, Addis Ababa) <https://addisstandard.com/news-tigray-region-relaxes-covid19-state-of-emergency-2/> accessed on 2 December 2020.

918 Ibid.

By contrast, the other regional governments, along with the federal government, adopted their COVID-19 measures without declaring a state of emergency. As discussed earlier, federal and regional governments have to invoke their emergency powers before they are allowed to take measures that restrict rights and freedoms. Municipalities and districts likewise imposed travel restrictions and lockdowns without a constitutional mandate to do so. In addition, the measures taken by the federal government and regional states were announced through press releases – they were, in other words, not introduced via regulations and directives. As a result, until 8 April 2020, there was considerable uncertainty about the legality, scope and content of COVID-19 response measures, the bodies responsible for their implementation, and the role of municipal and district level administrations.

On that date, 8 April, the Council of Ministers declared a nationwide state of emergency for five months in order to curb the spread of COVID-19,[919] with its decree to this effect approved by the HoPR in Proclamation No. 1189/2020 of 10 April 2020.[920] As usual, a seven-member Inquiry Board was established to monitor the implementation of the state of emergency in accordance with the Constitution.[921] This emergency was the first in Ethiopia to be declared on the ground of epidemic; it was also the first to be enforced without the establishment of a security-flavoured Command Post. As the Attorney-General said, a Command Post was deliberately avoided since the name is associated with bad memories from previous abuses of states of emergency.[922] The emergency measures were consequently determined instead by the Council of Ministers or Ministerial Committee established for this purpose.[923]

This state of emergency also provided the first opportunity for development of constitutional jurisprudence on the issue of whether the declaration of an emergency postpones periodic national elections and parliamentary terms. On the basis of constitutional interpretation by the HoF, the declaration led in effect to the postponement of national elections scheduled for 2020 and hence prolonged the HoPR's term of office as well as that of the regional state councils.[924] The HoF's decision planted some of the seeds for the 'causes and conditions' that triggered the declaration of another state of emergency in 2020, this one geographically limited to the Tigray region, which had rejected the decision and, amid controversy, gone ahead in holding its local election.[925]

Following the approval of the COVID-19 emergency declaration by the HoPR, the Council of Ministers issued a regulation containing detail restrictions and emergency measures to counter the spread of the pandemic and mitigate its socio-economic impacts on the life of the people.[926] The regulation prohibited gatherings for religious, government, social or

919 Proclamation No. 3/2020, State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, Federal Negarit Gazeta, 26th Year, No. 34, Addis Ababa, April 2020.

920 Proclamation 1189/2012, A Proclamation to Approve the State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact Proclamation No. 3/2020, Federal Negarit Gazeta, 26th Year, No. 33 Addis Ababa, 16 April 2020.

921 Proclamation No. 1189/2020, arts 3–4.

922 The Attorney-General mentioned this in a press release via state media.

923 Proclamation No. 1189/2020, art 5.

924 FDRE House of Federation's Decision, House of Federation 5th Year, 2nd Regular Session, 10 June 2020.

925 In Ethiopia, regional states have no power to administer local elections. The power to make election laws is vested with the federal government. The power to administer elections for the federal HoPR and regional state councils is vested with the National Electoral Board of Ethiopia. However, Tigray National Regional State held the local election by making its own electoral law and establishing an ad hoc electoral management body – which is completely unconstitutional.

926 Implementation Regulation No. 466/2020, State of Emergency Proclamation No. 3/2020 Implementation Regulation No. 466/2020, Federal Negarit Gazeta, 26th Year, No. 35 Addis Ababa, 20 April 2020.

political purposes in places of worship, public institutions, hotels, meeting halls, or any other locale.[927] It also prohibited handshaking and physical contact,[928] as well as requiring transport services such as buses, trains and private automobiles to use only half of their seating capacity.[929] The regulation shut down clubs, bars, theatres, cinemas and other places of entertainment; cafeterias, restaurants, hotels and the like were allowed to provide limited services adhering to safety protocols.[930]

Furthermore, the regulation imposed centralised communication regarding the pandemic by forbidding anyone other than the established committee from issuing media statements or briefings about COVID-19.[931] In this regard, it prohibited disseminating information that might cause 'terror and undue distress among the people'.[932] Employers were also forbidden from dismissing staff or terminating employment contracts during the period of the emergency. Similarly, the owners of houses and other buildings were barred from evicting tenants and increasing rental fees.[933] Banned, too, were sports activities, face-to-face classes, game zones and related activities that call for gatherings of more than two people.[934]

The regulations also required that social distancing and health measures be observed by all individuals and institutions. For instance, detainees in police stations and prisons were not allowed visitors except under conditions of social distancing.[935] There were no visitors to the country at large either: Ethiopia's international borders were to be closed.[936] The regulation also required some service providers to continue providing their services during the state of emergency. It obliged individuals to remain in quarantine when travelling into the country from abroad or if suspected of being COVID-positive.[937] The regulation required suspects to observe the rules of isolation, screening and testing for COVID-19, and obliged everyone to wear a mask in public spaces.[938] The regulation empowered the government to use individual properties and to order manufacturers to produce products for the government if these were needed to fight the pandemic.[939] The regulation suspended the criminal procedure provisions and rules during the state of emergency.[940]

Although the regulations contained most of the measures recommended by the World Health Organization and adopted by established democracies, their enforcement by the police and regional state militias raised human right concerns given that there were abuses of powers by security forces, including deprivation of life for not wearing masks in public places.[941]

927 Ibid, art 3(1).
928 Ibid, arts 3(4).
929 Ibid, arts 3(3), 4(5) and (6).
930 Ibid, arts 3(12) and (13).
931 Ibid, arts 3 (16).
932 Ibid, art 3(27).
933 Ibid, arts 3(18) and (19).
934 Ibid, arts 20–24.
935 Ibid, art 4.
936 Ibid, art 4.
937 Ibid, art 4.
938 Ibid, arts 5–7.
939 Ibid, arts 4(15) and (16).
940 Ibid, art 6(1).
941 Tsegaye (n 105).

2.5. The fifth state of emergency (November 2020)

On 4 November 2020, Ethiopia's fifth – and, at the time of writing, most recent – state of emergency was declared on the ground of constitutional disorder. Unlike previous states of emergency declared on this ground, the reason for the constitutional disorder stemmed not from public protests but a conflict between the federal government and Tigray national regional state.[942] The stand-off can be traced to the formation of the incumbent ruling party, the Prosperity Party (PP), through a merger of former members of the EPRDF coalition, which had been led by the TPLF.[943] For decades the dominant party in Ethiopia, the TPLF resisted the merger by alleging it would centralise power to the extent of affecting the self-rule rights of the nations, nationalities and peoples of Ethiopia,[944] as a result of which it refused to join the newly formed PP.[945] This has reduced the TPLF to the status of an opposition party administering the Tigray regional state, its long-established political constituency, while the PP controls the federal government and other eight regional states. Since then, the TPLF and the incumbent PP have been in vociferous confrontation with each other.

The rift between the federal government and Tigray region widened when, in the context of the COVID-19 pandemic, the HoF made a ruling that postponed the 2020 national elections for an indefinite period of time.[946] Led by the TPLF, the Tigray regional state refused to accept the decision of the HoF, which is constitutionally mandated to adjudicate constitutional disputes.[947] The TPLF's parliamentary members, including the Speaker of the HoF, walked out of the HoPR in protest, following which the Tigray regional government held elections for the regional state council in defiance of the HoF's decision. As an enabling measure, it enacted an electoral law and established a regional electoral commission, even though, legally speaking, making election-related laws is the competence of the federal government.[948] Furthermore, elections are administered by a centralised electoral management body, the National Electoral Board of Ethiopia.[949]

942 Proclamation No. 4/2020, State of Emergency Proclamation for the Protection of the Constitution and Constitutional Order No. 4/2020, 27th Year, No. 1, Addis Ababa, 9 November 2020. The conflict wore on for two years before eventually reaching the point of military confrontation. The Prime Minister informed the public via state media that the TPLF government of the Tigray regional state had attacked the northern command centre based in Tigray to seize military facilities and heavy weaponry. However, this reason is not stated directly on the official declaration of state of emergency published in the Federal Negarit Gazeta.

943 Tigray People Liberation Front (TPLF), 'Why the Question of Merger in Ethiopia Now?' (Weyen the Official Magazine of TPLF, 21 March 2019).

944 Ephream Sileshi, 'As the Formation of Prosperity Party Gains Momentum Here is Its Program' (Addis Standard, 28 November 2019) < https://bit.ly/3u5q4MD> accessed on 1 December 2020. For more on the TPLF, see Tefera Negash Gebregziabher, 'Ideology and Power in TPLF's Ethiopia: A Historic Reversal in the Making?' (2019) 118/472 African Affairs 463.

945 Ibid.

946 Oxford Analytica, 'Ethiopia Election Controversy Deepens Political Crisis, Expert Briefings' (11 May 2020) <https://www.emerald.com/insight/content/doi/10.1108/OXAN-DB252517/full/html> accessed on 30 December 2020. On the constitutional issues of postponement, see Adem Kassie Abebe, 'Ethiopia: Beating around the Bush on the Constitutional Conundrum' (Ethiopian Insight, 14 May 2020) <https://eritreahub.org/ethiopia-beating-around-the-bush-on-the-constitutional-conundrum> accessed on 10 November 2020; Marew Abebe Salemot, 'Constitutional Silence on Election Postponement in Ethiopia: A Critique of Constitutional Interpretation' (LEXFORTI, 9 September 2020) <https://lexforti.com/legal-news/election-postponement-in-ethiopia/> accessed on 2 December 2020.

947 FDRE Constitution, arts 62 and 83.

948 FDRE Constitution, art 55(2)(d).

949 FDRE Constitution, art 102; Proclamation No. 1162/2019, The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation, Federal Negarit Gazeta, 25th Year, No. 97, Addis Ababa, 16 October 2019.

On 5 September 2020, the HoF, in an emergency session, passed a resolution denouncing the region's preparations for holding a separate election and declared that the result would be null and void.[950] However, on 9 September, the Tigray region held the election in disregard of the resolution, with the TPLF claiming victory by winning 98 per cent of the seats of the state council.[951] The Tigray government, led by the TPLF, and the federal government, led by the PP, called each other 'illegitimate and unconstitutional'.[952] The TPLF accused the federal government of being an unelected body exercising power beyond the term of its constitutional mandate, while the federal government rebuked it for holding an illegal election.[953]

In October 2020, the HoF decided that the federal government should cut ties with the new regional government that had assumed power on the basis of that illegal election.[954] It also decided that budgetary aid to the Tigray region should be suspended and ordered the Council of Ministers to plan ways of maintaining links with lower levels of regional government such as districts, kebeles and city administrations.[955] The Tigray regional government, for its part, said the budget cut amounted to a declaration of war.[956]

What precipitated the declaration of a state of emergency was a 'surprise attack' on the Tigray region by special forces of the northern command of the Ethiopian National Defence Forces (ENDF) on the night of 3 November 2020.[957] On 4 November, the Council of Ministers declared a six-month geographically limited state of emergency, and on 5 November this was approved by the HoPR.[958] A general reason for the action was given under the proclamation that publicises the declaration of emergency: the Council of Ministers cited 'illegal activities' in the Tigray regional state that endangered the constitutional system as well as the peace and security of the people, threatened Ethiopia's sovereignty, obstructed the federal government

950 Topia News, 'House of Federation of Ethiopia on Tigray Election' (Topia News, 5 September 2020) <https://www.youtube.com/watch?v=obkhTeC6imo> accessed on 2 December 2020; see also ETV News, 'Ethiopia House of Federation leader Adam Farah Warns the Northern Separatists' (ETV News, 6 August 2020), <https://www.youtube.com/watch?v=Fu6fp51j6CI> accessed on 2 December 2020.

951 It secured 189 of 190 seats in the country's mixed system of election. Medihane Ekubamichael, 'TPLF Wins Regional Election by Landslide' (Addis Standard, 11 September 2020) <https://addisstandard.com/news-tplf-wins-regional-election-by-landslide/> accessed on 3 December 2020; see also Tigray Online News, 'Tigray Election Concludes Successfully' (10 September 2020) <https://www.youtube.com/watch?v=l6w3DtlJl1k> accessed on 2 December 2020.

952 Brook Abdu, 'Future of Escalating Federal-Tigray Tension' (The Reporter, 10 October 2020) <https://bit.ly/3wfmCkC> accessed on 2 December 2020.

953 Ibid.

954 Abdu (n 952); Ezega News, 'Ethiopian Upper House Orders Government to Cut Relationship with TPLF' (7 October 2020) <https://bit.ly/2PnpKKi> accessed on 2 December 2020.

955 Ibid; see Zemelak Ayele, 'Ethiopia: Federal Solidarity is needed to Solve Tigray Dispute' (The Africa Report, 4 November 2020) < https://bit.ly/3df1phQ> accessed on 12 November 2020.

956 Agence France Press, 'Ethiopian Lawmakers Vote to Slash Funds for Tigray' (7 October 2020) <https://bit.ly/2QISDRy> accessed on 2 December 2020.

957 FDRE Prime Minister Office, Responses by Prime Minister Abiy Ahmed to Questions Raised by the House of People's Representatives on Law Enforcement Operations in Tigray Region (30 November 2020, Addis Ababa, Ethiopia). The allegation by the federal government was confirmed by a high-ranking TPLF official, Seko Ture, who said on regional-state TV that 'our forces accomplished the mission within 45 minutes by making surprise attacks on the military'. See also Mesfin Hagos, 'Eritrea's Role in Ethiopia's Conflict and the Fate of Eritrean Refugees in Ethiopia' (African Argument, 4 December 2020) < https://bit.ly/31uwSHd> accessed on 2 December 2020.

958 Proclamation No. 4/2020, State of Emergency Proclamation for the Protection of the Constitution and Constitutional Order No. 4/2020, 27th Year, No. 1, Addis Ababa, 9 November 2020; Ratification Proclamation No. 1128/2020, State of Emergency Proclamation for the Prevention of Constitution and Constitutional Order No. 4/2020 Ratification Proclamation No. 1228/2020, 27th Year, No. 4, Addis Ababa, 14 November 2020.

from bearing its constitutional responsibilities, and breached the decisions of the HoF.[959] However, the official proclamation published in the Federal Negarit Gazeta refers to them sweepingly but does not specify what exactly the illegal activities are.[960]

A State of Emergency Task Force (Task Force) and an Inquiry Board were established to enforce and monitor the state-of-emergency declaration,[961] which was in force at the time of writing. The Task Force is accountable to the Prime Minister and chaired by the chief of staff of the National Defence Forces and accountable to the Prime Minister.[962] The Task Force is mandated to enforce the emergency measures by commanding law enforcement organs including the Ministry of Defence, National Intelligence and Security Service, Federal Police Commission, and regional state police.[963] Additionally, the Task Force is mandated to issue directives for the implementation of regulations made by the Council of Ministers.[964]

Because the directive issued by the Task Force is not accessible, it is impossible to know the exact contents of the emergency measures taken by the government during the ongoing state of emergency in the Tigray region. Self-evidently, the emergency declaration gives additional and special powers to the executive, which hence can take emergency measures that restrict rights and freedoms.[965] In this regard, the Task Force can deploy federal military and police forces in the region and disarm regional forces.[966] It has also the power to limit the right to movement by restricting transportation from and to the region and mobility with weapons within the region.[967] The Task Force can impose curfews; it can order people to stay in or evacuate a certain area,[968] as well as order the termination or closure of any means of communication.[969]

In addition, statements that foment war or criticise the government as weak and illegal can be banned – a prohibition open to abuse as it employs vague terms inviting subjective judgments.[970] The Task Force has the power to arrest and search without court order, and can detain arrested persons for six months without presenting them before the court.[971] Finally, the proclamation gives to the Task Force the power to take any measures it deems necessary for discharging its responsibility.[972] This provision is not only broad but defeats the purpose of having predefined rules that regulate the exercise of emergency powers.

959 Proclamation No. 2/2020, Preamble .

960 According to the premier's office, the TPLF ordered its soldiers to storm a northern command base to steal artillery and other equipment. The federal government also accused the TPLF of conspiring to foment unrest and ethnic-based conflict in various regions. These reasons were mentioned daily in state media as well by high-level public officials, among them the Prime Minister. However, they are not specifically cited as reasons in the official proclamations. The government there prefers the general expression 'illegal activities' – specifying only one such activity, namely breaching the decisions of the HoF – and focuses rather on the effect of the illegal activities, which is constitutional disorder.

961 Proclamation No. 4/2020, art 7; Proclamation No. 1128/2020, art 4.

962 Proclamation No. 4/2020, art 7.

963 Ibid, arts 2(1) and 793.

964 Ibid, art 11.

965 Ibid, art 4.

966 Ibid, art 4(1).

967 Ibid, art 4(2)(3).

968 Ibid, art 4(3) and (9).

969 Ibid, art 4(5).

970 Article 4(6) of Proclamation No. 4/2000 provides as follows: 'When the State of Emergency Task Force believes that it is necessary to maintain the Constitution and Constitutional Order, it may: prohibit any statement urging for war, making believe the Federal Government is weakened or illegal and so unacceptable to anyone and concerning other related matters to protect the Constitution and the Constitutional Order …'

971 Ibid, art 4(7) and (8).

972 Ibid, art 4(10).

The November 2020 state of emergency was declared in regard to the Tigray regional state and thus has geographical limits.[973] In effect, the emergency measures have applicability only in that particular regional state and may not affect the rights and liberties of individuals or ethnic Tigrayans living in other parts of the country. However, the Task Force is mandated to extend the geographical limits of the emergency by directive.[974] This is a risky mandate that could be abused at any time by the executive. It indirectly empowers the Task Force to assume the power to declare a state of emergency in other regions in the guise of extending the geographic limits of the declared state of emergency. The power delegated to the Task Force amounts, strictly speaking, to a relocation of the power to declare a state of emergency from the legislature to the executive, thus weakening legislative oversight of the invocation of emergency powers.

3. Trends in emergency measures in Ethiopia

As mentioned earlier, since 2016 a centralised, security-dominated and ad hoc institution, the SECP, has been established to enforce emergency proclamations; the recently established State of Emergency Task Force (see above) is similar in composition and powers to these Commands Posts set up in previous states of emergency. An exception was the COVID-19 related state of emergency, which was enforced by a ministerial committee. In other words, the same executive, led by Prime Minister Abiy, adopted different institutional set-ups to implement the April 2020 COVID-related state of emergency and the November 2020 emergency declared on the ground of constitutional disorder.

The similarities and differences in the institutions implementing states of emergency are not accidental: a national security crisis and a natural disaster crisis cannot be controlled in the same way.[975] Consequently, the former Command Posts and the current Task Force converge in terms of their composition and mandate in view of the nature of the crisis they address, that is, one affecting national security. As Ginsburg notes, national security crises require a centralised, secretive and security-oriented approach; crises relating to natural disasters or pandemics call for a more decentralised, open-information and technocratic approach.[976] In view of this, the formation of ministerial committees during the pandemic emergency was linked to the nature of the crisis rather than (as the Attorney-General said) the bad memories associated with the Command Posts of past states of emergency.[977] The same logic dictated the establishment of the Task Force, which is enforcing the current state of emergency.

973 Proclamation No. 4/2020, art 3.

974 Ibid, art 3(2).

975 Ginsburg and Versteeg (n 76) 17–21.

976 Ibid.

977 The Attorney-General said, 'Ethiopia's COVID-19 state of emergency will not be overseen by [a] command post, but by [a] Council of Ministers and ministerial sub-committees, because the name "command post" is associated with bad memories from past states of emergencies.'

Given that the composition and structure of state-of-emergency enforcement institutions are shaped by the nature of the crisis, these institutions have been mandated with broad powers to determine and enforce emergency measures during states of emergency. Censorship, information and communication blockage, arrest and search without warrant, preventative and rehabilitative detention, confiscation of property, and self-defence using all necessary force have been used as emergency measures in Ethiopia.[978] This is because the states of emergency have conferred exorbitant powers on the executive and, through it, to the security forces, including the military.

States of emergency have enabled the executive to exercise preventative and rehabilitative detention measures in Ethiopia.[979] Under the applicable regulations, the security forces can arrest an individual without a warrant when he or she has violated a prohibition or is suspected of doing so. They can also detain persons to prevent an individual or group from committing acts causing damage to public security and infrastructure or threatening the provision of basic public services, or committing, or supporting the commission of, specified actions banned by the Command Post or Task Force.[980] Preventative detention can be exercised for the period of the emergency, which is six months in most cases, and extended upon the renewal of a state-of-emergency declaration.[981] The Command Post has the power as well to determine the place of detention; as such, emergency detainee centres can be established. Consequently, the normal rules of prison administration might not protect the safety of detainees in times of emergency, as the possibility exists for secret detention as well as torture and other ill-treatment.

The measure of preventative mass detention was used extensively in the 2005, 2016 and 2018 states of emergency.[982] During the 2016 state of emergency, 26,130 individuals were arrested in the Oromia, Amhara and SNNP regions. Brietzke notes that the practice of mass detention originates in Ethiopia's past traditions. The Public Security Proclamation of 1942, drafted by British advisors at the end of the country's Italian occupation (1935–1941), was a quasi-emergency law intended to detain those who collaborated with the Italians.[983] In the same vein, the Public Safety and Welfare Order of 1969 and Public Order and Safety Proclamation of 1974 – issued under the Selassie and Derg regimes, respectively – justified detention as a temporary measure against persons attempting to disrupt Ethiopia's 'progress, public peace and security'.[984] The long-term detention of collaborators, pretenders to the throne, students, political opponents, and conspirators of coups or peasant rebellions was thus common in these regimes and, generally, during emergency periods throughout Ethiopia's modern history.[985]

The 2016 Command Post also applied reformative or rehabilitative detention measures. The regulation defines rehabilitation or reformation as 'training and education' given in times of emergency to arrested individuals for integrating them into society.[986] This reformation was not well-regulated by rules; rather, it was left to the discretion of the Command Post to decide

978 Command Post Directive No. 1/2016, art. 28; Command Post Directive No. 1/2018, art 28.
979 Regulation 391/2016, arts 5–6; Proclamation No. 2/2018, art 4(4); Proclamation 4/2020, art 4(7).
980 Command Post Directive 1/2016, art 28(1) and (2); Command Post Directive 1/2018, art 28 (1) and (2).
981 Ibid.
982 Ethiopian Human Rights Project (EHRP) (n 101); Amnesty International (n 101).
983 Brietzke (n 612) 292–294.
984 Ibid.
985 Ibid.
986 Regulation No. 391/2016, art 2(3).

who warranted such reformation – it was also the case that the detainee could be brought to justice or released after receiving rehabilitation based on the discretion of the Command Post.[987] For instance, in the 2016 state of emergency, 20,659 detainees were released after receiving training, 457 were freed after counselling, and 4,599 were charged.[988]

The power of reformative detention was exercised frequently during the 2016 emergency, with reformative detention centres having been set up in Tolay, Bersheleko, Awash 7 Kilo and Alage military training camps. Detainees underwent six modules of training,[989] which were prepared both in Amharic and Affan Oromo in view of the ethnic background of the detainees, who were mostly from the Oromo and Amhara regions.[990]

The first module, entitled 'Never Again', asserts that Ethiopia, a country recording double-digit economic growth, is not worthy of violence and protests.[991] The second maintains that protests and violence are orchestrated by neoliberal forces and Ethiopia's enemies to destabilise the country.[992] The third covers Ethiopia's history, praising EPRDF rule in comparison with the earlier monarchical and military regimes.[993] Module 4 extols the importance of constitutional democracy,[994] while Module 5 – 'The Coming Period is Ethiopia's Renaissance' – explains that poverty is Ethiopia's only true enemy and that all should join forces against it under the banner of the developmental state.[995] The final module is on the role of the youth in nation-building and urges them to pursue the development agenda.[996]

Reformation centres were places of inhuman and degrading treatment,[997] and the training they provided ended with a graduation ceremony in which detainees were forced to wear T-shirts proclaiming, 'Never Again'.[998]

The content of the reformation training reflects the 'security and development narratives' that, according to Awol Allo, are authoritarian governing styles.[999] The development narrative presents an image of a country with inordinate economic growth thanks to efforts of a ruling party devoted to alleviating the lives of Ethiopia's poor; the security narrative presents Ethiopia as 'an island of stability in a troubled region', with its peace and security threatened by belligerents from within and abroad.[1000] Both are narratives the government has advanced to justify the exercise of expansive powers with an authoritarian flavour. That is to say, the narratives enable the government to mute its opponents by legalising the use of force against political groups labelled as anti-peace elements.[1001]

987 Regulation No. 391, art 3(4); Command Post Directive 2/2016, art 28(3).

988 Ethiopian Human Rights Project (EHRP) (n 101).

989 Ibid.

990 Ibid.

991 Ibid.

992 Ibid.

993 Ibid.

994 Ibid.

995 Ibid.

996 Ibid.

997 Ibid. National and international human rights institutions reported that detainees arriving at the training centres had their hair shaven off and were forced to throw away their shoes and walk barefoot. Sanitation facilities were poor – there was no water for showering, nor toilets. Detainees had to dig ditches in the fields behind the centres and use these as toilets.

998 Ibid.

999 Allo (n 91).

1000 Ibid.

1001 Ibid.

A further measure common in the repertoire of Ethiopia's states of emergency is that security forces are given the power to search and seize property without court orders.[1002] The belief of the security forces that the property was or will be used for committing crimes is sufficient for it to be seized. In addition, the executive is usually given powers in regard to censorship, blockage of information, and shutdown of media outlets,[1003] with these powers subject to the requirement under the principle of proportionality that rights – here, the right to freedom of expression – be limited only to the extent necessitated by the emergency situation.[1004]

During the 2018 state of emergency, for instance, the Command Post prohibited criticism of the emergency measures in force at the time.[1005] In the COVID-19-related state of emergency, the ministerial committee which discharged aspects of the mandate of the Command Post restricted the free flow of news about the pandemic by requiring public communication professionals and media outlets to ensure that information, analysis or programmes about COVID-19 be 'without exaggeration, appropriate and not prone to caus[ing] panic and terror among the public'.[1006] Security forces enforced these restrictions by arresting journalists and blocking media outlets for allegedly spreading false information.[1007] In the case of emergency declared in the Tigray region, measures in use include internet shutdowns and information blockages.[1008] Any criticism of the federal government as 'weak and illegal' is also prohibited and punishable with imprisonment of three to five years.[1009] As is evident, emergency measures since 2005 have consistently attacked freedom of expression and the right to access information, thereby silencing political opponents and protecting incumbents.

States of emergency in Ethiopia have conferred wide-ranging powers on national security forces and law enforcement agencies. In addition, these powers are crafted in broad terms that give even further discretionary power to the executive. For instance, emergency regulations empower the security forces to take the necessary measures when they deem them fit.[1010] As a result, the security forces can exercise additional unspecified powers by invoking the clauses of the regulation. These kinds of provisions defeat the purpose of having predefined rules. In effect, they change the legal basis for exercising emergency powers from predetermined rules to the principle of necessity. Thus, the exorbitant powers and the broad terms used to define emergency measures give leverage to the executive to abuse emergency powers and consequently threaten human rights and the rule of law.

1002 Command Post Directive 1/2016, art 28(4) and (6).

1003 Command Post Directive 1/2016, art 28(5); Proclamation No. 2/2018, art 4(2); Proclamation 4/2020, art 4(5).

1004 ICCPR, art 4.

1005 Amnesty International, Ethiopia: Commentary on the Ethiopian State of Emergency Proclamation (Amnesty International, 1 March 2018, AFR 25/7982/2018) 5.

1006 Regulation No. 466/2020, arts 16–27.

1007 CPJ (Committee to Protect Journalists), 'Ethiopian Police Hold Journalist Yayesew Shimelis Pending Terrorism Investigation' (16 April 2020) <https://cpj.org/2020/04/ethiopian-police-hold-journalist-yayesew-shimelis/> accessed on 3 December 2020.

1008 Proclamation No. 4/2020, art 4(5).

1009 Ibid, art 4(6).

1010 Command Post Directive 1/2016, art 28(9); Proclamation No. 2/2018, art 4(16); Proclamation 4/2020, art 4(10).

4. Controlling emergency powers in Ethiopia

As happens elsewhere, the executive in Ethiopia is accustomed to abuse the powers resulting from the declaration of a state of emergency. These powers are used to silence opposition and thus have pernicious consequences for constitutional democracy and human rights protection. For that reason, checks and balances are imperative for inhibiting the misuse and abuse of emergency powers

4.1. Practices of legislative oversight

In Ethiopia, legislative safeguards are provided for in article 93 (2) of the FDRE Constitution, which subjects the executive's decision to declare or extend a state of emergency to parliamentary approval and thereby attempts to place a check on the ill-motivated invocation of emergency powers. However, the legislature's ex ante power of approval is limited to checking the validity of emergency declarations and do not go beyond (dis)allowing the state- of-emergency declaration. As a result, the Ethiopian legislature (the HoPR) does not debate on or approve the list of rights and freedoms that might be suspended, the scope of the restrictions on these rights, or the emergency measures that would be taken.

The nature and scope of emergency measures are determined within regulations issued by the Council of Ministers.[1011] These regulations do not have to be approved by the HoPR before they take effect. Hence, the Council of Ministers is vested with broad powers to determine emergency measures. In fact, the HoPR does not set some guiding principles and standards during the post-declaration approval session to limit the discretion of the executive. It has no power either to make a resolution on its own initiative that terminates a declaration before its expiry date. The HoPR thus has only a limited ex ante power to control the executive in times of crisis, one which anyway is not even applied in practice.

In the case of the 2005 state of emergency, it was not presented to parliament for approval while the HoPR was in session but implemented on the basis of the decree-making powers of the Prime Minister, which could not be a valid source of emergency powers for any longer than 48 hours.[1012] The HoPR exercised its ex ante power of confirming a state of emergency for the first time in 2016. Since then, it has endorsed states of emergency declarations. In all cases, the emergency provision has been invoked on the ground of constitutional disorder caused either by public protests or, recently, by the illegal actions of a defiant regional state government. The protests leading to the declaration of a state of emergency had their origins

1011 FDRE Constitution, art 93(4).

1012 FDRE Constitution, art 93(2)(a).

in the country's deep-rooted political problems,[1013] but the rhetoric of the declarations and the nature of the emergency measures employed by the government demonstrated a desire to conceal these problems by muting dissent through repression.[1014] As such, most of the state-of-emergency declarations are reflective of the regime's undemocratic practices.

Nevertheless, the initial decision of the Council of Ministers to declare a state of emergency has never been challenged by the HoPR since 2016,[1015] nor has the HoPR ever refused the executive's request for renewal – in most instances, the HoPR has approved and extended states of emergency with a unanimous vote. The only exception was the 2018 state of emergency, the approval vote for which saw 88 objections and seven abstentions thanks to a power struggle among members of the TPLF-led ruling coalition EPRDF that resulted in certain members of the Oromo People's Democratic Organization (OPDO) voting against the emergency declaration in the post-declaration approval session.[1016]

Apart from that single instance, the HoPR has acted as a rubber stamp to executive decisions declaring a state of emergency. The dominant-party system, which enabled the then EPRDF and now the PP to control all the seats of the legislature, and parliamentary members' excessive party loyalty have made emergency powers easily accessible to the executive. In practice, therefore, the HoPR has rarely used its ex ante power to control the invocation of emergency provisions.

4.1.1. The State of Emergency Inquiry Board

In Ethiopia, the legislature can also exercise ex post control over the implementation of emergency powers through the Inquiry Board. For this purpose, the legislature must establish the Inquiry Board at the time that it approves a state-of-emergency declaration.[1017] The latter was established successively during the confirmation of the 2016, 2018 and 2020 states of emergency, but experience shows that in practice this institution is ineffective in deterring abuses of emergency powers. It lacks sufficient authority, ability and political will to provide capable oversight of the executive during states of emergency.

As regards the Inquiry Board's limited powers, it has the power to publicise the names of detainees within a month and thereby check the use of secret detentions.[1018] It also has the power to monitor violations of the right to freedom from torture and inhuman treatment.[1019] Accordingly, it can review emergency measures determined by the Council of Ministers and its delegate (the Command Post or Task Force) as well as the practical exercise of these

1013 'Land to the tiller' (the issue of land reform), the self-determination rights of nations, nationalities and peoples (the issue of nationalities), and the establishment of a democratic republic (the issue of democracy) have been the country's three main questions ever since the 1960 Ethiopian Student Movement. See Bahru Zewde, The Quest for Socialist Utopia: The Ethiopian Student 1960–1974 (Addis Ababa University Press 2014) 118–126, 198–202; Adem Kassie Abebe, 'Introduction' in Adem Kassie Abebe (ed), Remapping Ethiopian Federalism (Addis Ababa University 2019).

1014 During the 2005, 2016 and 2018 states of emergency, the TPLF-led EPRDF dubbed the targets of the emergency measures as hooligans, destructive forces, anti-peace elements, terrorists and anarchists. The current government has now labelled the TPLF, against whom the latest state of emergency is directed, as bandits and a junta.

1015 The 2016 and 2018 states of emergency were approved by the current members of the HoPR.

1016 O Pride Staff, 'Here is How and Why the Ethiopian Parliament Rigged the State of Emergency Vote' (O Pride, 4 March 2018) <https://www.opride.com/2018/03/04/ethiopian-parliament-rigged-state-emergency-vote/> acessed on 5 October 2020.

1017 FDRE Constitution, art 93(5) and (6).

1018 Ibid.

1019 Ibid.

measures during the emergency period and make corrective recommendations to the executive. The Inquiry Board is mandated too to ensure that emergency measures respect the right to freedom from torture and inhuman treatment and to cause the prosecution of those violating this right.[1020]

At the same time, the Inquiry Board has no mandate to investigate other human rights violations, including that of non-derogable rights, and thus it cannot question the Council of Ministers or the Command Post, Task Force or ministerial committee about the suspension or violation of a particular constitutionally protected right or freedom. Legally speaking, protecting all other rights and freedoms apart from the right to freedom from torture is not within the mandate of the Inquiry Board. Nor is it mandated to ensure that all measures adopted during a state of emergency are in line with constitutional and international requirements.

The Inquiry Board, furthermore, has a merely advisory role when it comes to the question of prolonging a state-of-emergency declaration.[1021] It submits its opinion to the HoPR in this regard, but its opinion is not binding on the latter and can be disregarded. For instance, the Inquiry Board suggested that the 2016 state of emergency be extended with limited geographical coverage; however, the HoPR set aside the views of the Board and prolonged the state of emergency nationwide.[1022]

The ability of the Inquiry Board to hold the executive accountable for violations of the right to freedom from torture is crucial for effective oversight.[1023] However, this ability is a function of its available human, financial and technical resources.[1024] The efficacy of its oversight is, in other words, dependent on its institutional capacity to scrutinise emergency measures in the light of the right to freedom from torture and inhuman treatments – and its capacity is limited. Field visits and individual complaints are its primary sources of information,[1025] but the Board is impeded by the paucity of its financial and human resources and so cannot visit all the regions to detect human rights violations; for the same reasons, it is almost impossible for it to investigate all the complaints it receives from individuals telephonically and via other means of communication.[1026]

During the 2016 and 2018 states of emergency, parliament attempted to set some safeguards against secret detentions under the approval proclamation and decree proclamation, respectively. Article 7 of Proclamation No. 1/2016 and Proclamation No. 2/2018 provided that '[the] state of emergency Command Post shall notify the Inquiry Board of the names of arrested persons and the place where they are detained'. In this fashion, the legislature imposed a specific duty on the Command Post to report arrests and places of detention to the Inquiry Board. This specific duty could support the Board in fulfilling its responsibility to publicise the names of detainees and the reasons for their detention. More fundamentally, though, the provision implies that unreported and secret detentions are intolerable even in times of emergency and that the Command Post would be accountable for such deeds.

1020 Ibid.

1021 Ibid.

1022 Assefa (n 692) 37–38.

1023 Hanns Philip Fluri and Simon Lull (eds), Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector (Geneva Center for the Democratic Control of the Armed Force, 2010) 1–11.

1024 Ibid.

1025 Degifie and Kasaw (n 899); see also Abdurezak Mohammed, 'Observe and Report: Inspecting State of Emergency Implementation' (The Ethiopian Herald, 5 June 2020).

1026 Interview with Tadesse Hordoffa, Chair of the 2016 State of Emergency Inquiry Board (Addis Ababa, Ethiopia, 21 June 2016).

In practice, however, both the Command Post and Inquiry Board have usually ignored their reporting obligations and the implications these have for accountability. Moreover, provisions with similar requirements have not appeared in subsequent emergency proclamations, which contain only a general 'duty of cooperation' clause that requires everyone to cooperate with the Inquiry Board in its work.[1027] This approach relieves the Command Post of accountability for secret detentions by shifting the burden of revealing the name of arrested and detained individuals to the Inquiry Board's investigation. As a result, the mere existence of unreported and secret detentions during states of emergency need not cause the Command Post to be accountable as long as it does not bar the investigative work of the Inquiry Board. In the previous approach, it is the law or the rules that prevent secret detentions, whereas in the general-cooperation-clause approach, it is the ability and efforts of the Inquiry Board that prevent them. The cooperation-clause approach has also been adopted in the recent state of emergency in the Tigray region.

At a more basic level, the neutrality of the Inquiry Board and the political will of its members to hold the executive accountable are also questionable. The Constitution does not set out criteria ensuring neutrality in the selection of members of the Board;[1028] the only requirement is that some of them should be members of the legislature and others, legal experts. However, it is not clear whether the legal experts on the Inquiry Board are selected from outside the ranks of parliament or are supposed to be parliamentary members with a background in law;[1029] in practice, at any rate, they are selected from outside and serve on the Board as non-parliamentary members.[1030] The proportion of parliamentary members and legal experts is not indicated either in the Constitution. The only inference to be drawn is that the number of legal experts should be more than one and less than five.[1031]

Given these considerations, the party that dominates the legislature is very likely to dominate the Inquiry Board too. Indeed, the HoPR has established Inquiry Boards in its own image during times of emergency. Like the HoPR, the composition of the seven-person Inquiry Boards has been dominated by members of the ruling party, formerly the EPRDF and now the PP. For instance, the Boards of the 2016 and 2018 states of emergency were composed of four members of the HoPR and three legal experts from outside; the four parliamentary members selected for the Boards were also chairpersons of standing committees, and served as the chairs and vice chairs of the Inquiry Boards.[1032] The Boards established during the COVID-19 emergency had six members from the HoPR and one legal expert from outside.

1027 Proclamation No. 1189/2020; Proclamation No. 1228/2020.

1028 FDRE Constitution, art 93(5).

1029 Ibid.

1030 G/Mariam (n 812).

1031 FDRE Constitution, art 93(5). This is implied by the plural, 'legal experts'.

1032 The four parliamentary members on the Inquiry Board during the 2016 and 2018 states of emergency were Tadesse Hordoffa, chair of the educational affairs standing committee, serving as chair of the Board; Genet Tadesse, chair of the budget and finance affairs standing committee, serving as vice chair; Muna Ahmed, chair of the business & urban development standing committee; and Nuria Abdurahman, member of the HoPR's Advisory Committee. The three legal experts on the Board were Kifletsion Mamo, Federal Supreme Court Justice and member of the CCI; Habte Fichala, Federal Supreme Court Vice President; and Seid Hassen, Head Judge of the Supreme Court of Somali Region and Dire Dawa Town Appeals Court. The four members of parliament (MPs) in the 2020 COVID-19 related Inquiry Board were Petros Woldesenbet (chair) of the legal and justice affairs standing committee; Tesfaye Daba Wakjira, a long-serving MP (deputy chair) of the foreign relations and peace affairs standing committee; Momina Mohammed of the women, youth and social affairs standing committee; and Fantaye Wondim of the legal, justice and democracy affairs standing committee.

The same composition formula is reflected in the current Inquiry Board supervising the emergency declared in the Tigray region,[1033] with more than half of its members consequently drawn from the ranks of a party that has controlled the legislature since 1995. In terms of the ratification proclamations, the decisions of the Board are made by a majority vote, with the chairperson of the Board having a casting vote in case of deadlocks.[1034] The Inquiry Board's mode of composition can thus scarcely ensure impartiality and independence from partisan politics – a fact that does little to enhance its oversight roles.

As mentioned, then, the Inquiry Boards established since 2016 lack sufficient independence, authority, ability and political to exercise effective oversight during states of emergency. Cases in point are the 2016 and 2018 Inquiry Boards, which did not report incidences of torture and inhuman treatment, attempt to take any corrective measures, or cause the prosecution of the perpetrators.[1035] Similar oversight deficits were observed during the COVID-19 state of emergency. The Inquiry Board failed to publicise the names of arrested persons within a month,[1036] and was also blind to human rights violations and abuses of emergency measures by security forces.[1037] In fact, instead of seeking to control these abuses, the Board defended them when they were challenged by the EHRC.[1038]

Although the Inquiry Board supervising the state of emergency in the Tigray region has, at the time of writing, been in operation for more than a month, the names of detainees have not been publicised yet, while some of its functions seem to have been taken over by a State of Emergency Fact Check (SEFC) established under the Prime Minister's Office in the guise of combating disinformation.[1039] In short, the institution of the Inquiry Board has a poor record indeed of standing up to human rights violations and holding the executive and security forces to account for abuses of their powers.

4.1.2. The Special Inquiry Commission

One of the further ways in which the legislature can exert control over the executive is by using ordinary oversight tools such as questioning, periodic hearing, standing and ad hoc committee systems, and votes of no-confidence.[1040] For instance, the Ministry of Health presented its performance report to the HoPR regarding the implementation of COVID-19 prevention measures.[1041] These are indeed complementary ways of exercising oversight over the executive in times of emergency.

1033 G/Mariam (n 812).

1034 Proclamation 984/2016, art 8; Proclamation No. 1189/2020, art 8.

1035 Ethiopian Human Rights Project (EHRP) (n 101).

1036 Tsegaye (n 105).

1037 Ibid.

1038 Yohaness Anberbr, 'Confrontation Erupts between the Ethiopian Human Rights Commission and State of Emergency Inquiry Board' (Ethiopian Reporter Amharic, 24 May 2020).

1039 Samuel Gebre and Claire Wilmot, 'A Glimpse into the Future of Government Propaganda' (Mail and Guardian, 8 December 2020) <https://bit.ly/3u6SUfl> accessed on 10 December 2020.

1040 Gross and N´ı Aolain (n 9) 64.

1041 Ministry of Health and Institute of Public Health, The COVID-19 Responses and Future Concerns (Reports Presented to the HoPR, September 2020).

As noted, the 2005 state of emergency was not presented to the HoPR and consequently the legislature could not establish an Inquiry Board to inspect its implementation: that state of emergency was exercised from the outset without the involvement of the HoPR. However, in the course of the emergency, the HoPR did later establish a Special Inquiry Commission (Inquiry Commission) to investigate the post-election crisis that had triggered the declaration of emergency.[1042] The Inquiry Commission was intended to investigate the disorder and its effects in Addis Ababa and other parts of the country, as well as submit a report of its findings to the HoPR.[1043]

To that end, it was mandated to investigate the appropriateness of the measures taken by security forces to control the disorder in the light of the FDRE Constitution, human rights standards, the rule of law and the principle of proportionality.[1044] The Inquiry Commission's 11 members were appointed by the HoPR on the basis of nominations made by the legal and administration affairs standing committee of the legislature.[1045] At the time, various opposition members questioned the Commission's independence and voted against the nominees, albeit without changing the final appointments approved by the HoPR.[1046]

After seven months of intensive work, the Inquiry Commission completed its investigation and, eventually, presented its full report on 3 June 2006.[1047] It found that 193 civilians and a few policemen had been killed, and 763 civilians wounded, by bullets. It also established that property to the value of some ETB 4.5 million had been destroyed.[1048] Members of the Commission voted to present the report to the HoPR. At that juncture, of the 10 members present during the vote, eight voted to confirm that the government had used excessive force to control the crisis.[1049] This decision did not please the EPRDF-led government, which sought to pressure members of the Inquiry Commission into changing their conclusions before submitting the report to the HoPR.[1050] The chairperson of the Commission, Frehiwot Samuel, submitted a letter of resignation to the HoPR via the Office of the Speaker that cited personal health matters as his reason for stepping down – and thereafter he, together with other members of the Commission, fled from Ethiopia.[1051] Subsequently, the government exploited the situation by manipulating other members of the Commission into revising the June report that had made the executive accountable for using excessive force.[1052]

1042 Proclamation No. 478/2005, An Inquiry Commission to Investigate the Disorder Occurred in Addis Ababa and in Some Parts of the Country Proclamation No. 478/1998, Federal Negarit Gazeta, 12th Year, No. 8, Addis Ababa, 21 December 2005.

1043 Proclamation 478/2005, art 4.

1044 Proclamation 478/2005, art 5.

1045 Proclamation 478/2005, art 6. The nominees approved by the HoPR were Frehiwot Samuel, Shiferaw Jammo, Bishop Elsae, Sheik Elias Redman, Abel Mussie, Rev. Dereje Jemberu, Hikmat Abdela, Dr. Gemechu Megersa, Tamirat Kebede, Woldemichael Meshesha and Abdudiuad Ibrahim. Later, after four of them (Bishop Elsae, Hikmet Abdella Mefek, Tamirat Kebede and Abel Muse) resigned on 'health grounds', five other members were added (Beluy Haddis, Mitiku Teshome, Dr Meknoen Dissasa, Haregewoyn Tassew, and Bishop Ewostatewos). Of the new members, Beluy Haddis resigned, while the rest continued their assigned activity. See Wondweson Teshome, 'Electoral Violence in Africa: Experience from Ethiopia' (2009) 3:7 International Journal of Humanities and Social Sciences 1

1046 Sudan Tribune, 'Impartiality of Ethiopia Riots Inquiry Questioned' (Sudan Tribune, 8 December 2005) < https://bit.ly/3ftfgnA> accessed on 2 December 2020.

1047 Teshome (n 1045).

1048 Ibid.

1049 Ibid.

1050 Ibid.

1051 Ibid. Letter written to the Office of the speaker and signed by Frehiwot Samuel on 31 June 2006 (Archive of HoPR, Addis Ababa). The other members were Woldemicael Meshesha (vice chair of the Commission) and Mitiku Teshome.

1052 Ibid.

In October 2006, the Inquiry Commission – now led by a provisional chairperson – presented the revised version of the June report to the HoPR.[1053] It reflected almost the same statistics in terms of injury, loss of life and damage to property; it is also pointed out that respect for human rights was not strictly consistent with the provisions of the Constitution.[1054] But the revised report concluded that

> *the actions taken by security forces to control the violence were a legal and necessary step to protect the nascent system of government and to stop the country from descending into a worse crisis and possibly never-ending violence upheaval. The issue of proportionality cannot be seen outside these realities.*[1055]

The EPRDF-dominated HoPR led discussion of the revised report on 29 November 2006 and on 18 March 2007 passed a resolution endorsing it.[1056]

The Inquiry Commission had attempted – unsuccessfully, though instructively – to ensure executive accountability for excesses committed in times of emergency, but was hindered, inter alia, by its membership composition and the doubtful personal integrity of some of its commissioners. Chiefly, the ruling party had manipulated the Inquiry Commission in order to evade accountability for the disproportionate measures taken to suppress dissent under the pretext of protecting constitutional order. Party politics overrode institutions and the rule of law to shield the executive and security forces from censure for violations of constitutionally protected human rights.

4.2. Practices of judicial oversight

In Ethiopia, courts have played little role in checking abuses of emergency powers owing to constitutional limitations on their powers – Ethiopian courts have no constitutional mandate to review the constitutionality of legislation.[1057] The fear of judicial activism and the existence of the political question doctrine persuaded the framers of the FDRE Constitution to grant the power of judicial review to the HoF instead.[1058] Since courts have no power to review legislative statutes even in times of normalcy, they cannot review the validity of state-of-emergency declarations.

As for the HoF, it is a political organ with exclusive powers over constitutional adjudication in Ethiopia. Due to its nature, the political question doctrine cannot impede its jurisdiction[1059] and consequently it indeed can review the validity of highly political matters such as declarations of states of emergency: the HoF, in short, has the competence to check the validity of a state of emergency. Structurally, however, it is in a difficult position to do so.

1053 Special Inquiry Commission, The Independent Inquiry Commission's Report on the Violence in Addis Ababa and Some Other Parts of Our Country to the HoPR of the FDRE (September 2006, available at the Archives of HoPR, HoPR, Addis Ababa, Ethiopia).

1054 Ibid.

1055 Ibid.

1056 Ibid.

1057 FDRE Constitution, arts 62(1), 83 and 84.

1058 Mulu (n 838).

1059 FDRE Constitution, arts 61–62; see also Mulu (n 820).

As the nature of its composition and members suggests, it is unlikely to be impartial in regard to, or independent of, the ruling party and executive branch of government.[1060] Thus, in practice, it is not an effective body for reviewing the invocation and use of emergency powers.

As noted earlier, there is some constitutional room for courts to review the decisions and actions of the executive and to interpret the Constitution's human rights provisions, but in practice courts tend to avoid constitutional matters and instead refer cases to the CCI when these involve constitutional human rights provisions.[1061] The courts use the same referral mechanism when the constitutionality of secondary legislation made by the executive or of any executive decision is contested.[1062] They also avoid politically sensitive matters such as states of emergency by referring them to the CCI.[1063] Since 2016, emergency measures issued during states of emergency have not been challenged in court. If they were challenged, the trend suggests that the court would refer the cases to the CCI. In sum, constitutional and self-imposed limitations prevent courts from controlling the executive in times of emergency.

Two seminal cases highlight many of the deficits of judicial oversight of emergency powers in Ethiopia. The first case, Coalition for Unity and Democracy (CUD) V Prime Minister Meles Zenawi Asres, was filed following a decree by then Prime Minister Meles Zenawi that banned public demonstration and assembly in Addis Ababa and its surroundings for a month.[1064] The CUD, one of the EPRDF's competitors in the 2005 national elections, brought the case before the Federal First Instance Court. It requested that the court quash the decree on the grounds, first, that the Prime Minister has no power to issue such decree, and secondly, that there were no circumstances requiring the issuance of the decree.[1065]

The court believed that the case involved constitutional interpretation and directed it to the CCI, which decided that it did not involve a constitutional matter.[1066] The CCI considered two issues. The first was whether the decree by the Prime Minister violated the Constitution, and the second was whether there were sufficient conditions to issue the decree.[1067] The CCI ruled that the Prime Minister's decree prohibiting demonstration in Addis Ababa for a month did not violate the Constitution.[1068] In its decision, it argued that the Prime Minister is the highest executive organ and vested with wide power by virtues of articles 72 (1) and 74 (13) of the Constitution. It also held that Addis Ababa City is accountable to the federal government under article 49 of the Constitution and article 61 of Addis Ababa City Charter.[1069]

As regards the second issue, the Council held that whether there were sufficient conditions to trigger the decree prohibiting demonstration was a question that should be decided by an organ vested with such a power under the Constitution; in turn, anyone alleging the absence of triggering conditions would have a burden of proving it.[1070] The CCI thus did not

1060 Ibid.

1061 Mulu (n 838) 420–429.

1062 Ibid.

1063 Ibid.

1064 Coalition for Unity and Democracy (CUD) v. Prime Minister Meles Zenawi Asres, Fed. First Instance Ct., Lideta Div., File No. 54024 (Decision of 3 June 2005).

1065 Ibid. See also Ali (n 513); Temesgen Sisay Beyene, 'The Question of an Independent and Impartial Constitutional Adjudicator in Ethiopia: A Comparative Study with Germany and South Africa' (2012) 3:1 Bahir Dar University Journal of Law 67, 96.

1066 Ibid.

1067 Ibid.

1068 Ibid.

1069 Ibid.

1070 Ibid.

decide on whether the plaintiff had provided sufficient evidence to prove the absence of conditions necessitating the decree because the issue is an issue of fact rather than an issue of constitutional interpretation.[1071] Finally, the CCI remanded the case to the court, holding that the Prime Minister did not exceed the constitutional limit and that there was no need to require constitutional interpretation.

The case was a good opportunity to set a jurisprudential base for controlling the powers of the executive during states of emergency. However, it was presented, as well as decided, without taking the emergency clauses of the Constitution into consideration. As the case showed, the CUD challenged the decree, and the CCI decided the case, on reasons related to limitation clauses, which can be invoked and used to restrict rights in times of normalcy. None of the parties to the case – neither the plaintiff, the court, nor the CCI – entertained the matter with reference to the emergency clauses of the Constitution, as a result of which they could not address the real concern of this matter.

The main concern of the case is whether the Prime Minister has a power to declare a state of emergency on perceived threats without the involvement of the legislature – and hence the real issue was about the validity of the emergency declaration. The case could be presented and decided in the light of procedural and substantive requirements for the declaration of a state of emergency. As such, whether the Prime Minister alone can declare a state of emergency, and whether the circumstances are dangerous enough to trigger the invocation of emergency power in terms of article 93 of the Constitution, could be the crux of the case. In effect, instead of practising judicial activism to control the executive, the court imposed limitations on its power by restraining itself from constitutional matters and then directing the case to the CCI. The CCI also overlooked the main issue of the matter and then failed to set a precedent in the development of judicial oversight of the executive in times of emergency. Instead of controlling the executive, the CCI decided in favour of the executive and thereby legitimised the misuse of emergency powers by the Prime Minister.

The second state-of-emergency-related case was an abstract review made by the Council of Constitutional Inquiry regarding the postponement of the sixth Ethiopian national elections, scheduled for 29 August 2020, due to the COVID-19 pandemic. The FDRE Constitution under article 54 (1) requires members of the HoPR to be elected for five years on the basis of periodic elections. Article 58 (3) of the same specifies the term of the HoPR, which must be five years. The annual session of the House begins on Monday of the final week of September and ends on 7 July of the year. The Constitution also requires an election for a new House to be held one month before the expiry of the House's five-year term.[1072] The Prime Minister, who is accountable to the HoPR, can stay on in office only for the duration of the mandate of the House.[1073] Therefore, constitutionally speaking, the HoPR could not survive after 10 October 2020.

However, the National Electoral Board of Ethiopia confirmed that the national elections could not be held on the prescribed date of 29 August 2020 even though the five-year terms of the HoPR and Prime Minister expired on 11 October 2020. At the time, the fact that the national elections could not be held before the expiry of constitutional tenure of the incumbent federal and state governments meant that neither the House nor the executive could remain

1071 Ibid.

1072 FDRE Constitution, art 58(2) and (3).

1073 Ibid, art 72(3).

in power after 10 October 2020, at which point their mandates would exceed the five-year limit set by the Constitution. This was the essence of the impasse, and so the government sought constitutional interpretation regarding the postponement of the elections, doing so through parliament, which referred the matter to the CCI for abstract review.[1074]

The CCI framed the issue thus: in view of the COVID-19-related state of emergency and the threat posed by the pandemic, what do articles 54 (1), 58 (3) and 93 of the Constitution imply about the timeline for holding elections and the terms of the legislature and the executive organ?[1075] The CCI held unprecedented public hearings of prominent constitutional scholars from Ethiopia and abroad on the question of constitutional interpretation in general and the framed issues in particular.[1076] Based on this, it was anticipated that the CCI would make a precedent-setting decision that moved Ethiopian constitutional jurisprudence a step forward.

However, it made unpopular recommendations that give a blank cheque to the executive regarding the timeline for the next elections.[1077] It recommended prolonging the terms of members of the HoPR, HoF and regional councils as well as of federal and regional executives until the state of emergency was lifted and the elections held.[1078] It also suggested, provided this were approved by parliament, that the general elections be held within nine to 12 months after the Ministry of Health, Ethiopian Public Health Institute and health science professionals, based on evidence and direction from international and regional health organisations, were satisfied that the pandemic no longer posed a risk to public health.[1079] On 11 June 2020, the HoF adopted the CCI's recommendations in their entirety and the scheduled elections were postponed indefinitely.[1080]

In this decision, the CCI conferred a broad power on the Ministry of Health and Institute of Public Health in determining when the countdown to the next elections date would begin, thereby disregarding the National Electoral Board of Ethiopia, which is constitutionally mandated to decide on such key election-related matters.[1081] The decision in effect relocates the power to decide on the election day to the executive that has a vested interest in the matter: the incumbent, that is to say, could stay in power for as long as the Ministry of Health deems that COVID-19 poses a public threat.[1082] As such, instead of controlling the executive, the CCI conferred extensive powers on it regarding the electoral timeline – indeed,

1074 The government proposed four options: dissolving parliament; declaring a state of emergency; amending the Constitution; and constitutional review. It opted for the latter. See Zelalem Girma, 'Perspectives on Constitutional Options for Conducting the Next National Election' (The Ethiopian Herald, 2 May 2020); Jalale Getachew Birru, 'Constitutional Impasse in Ethiopia: Finding a Solution for the Current Postponement of the 2020 General Election in Ethiopia' (On Matters Constitutional, 18 May 2020) <https://verfassungsblog.de/constitutional-impasse-in-ethiopia/> accessed on 7 November 2020.

1075 FDRE House of Federation's Decision, House of Federation 5th Year, 2nd Regular Session, 10 June 2020.

1076 High-profile legal experts and professors of law presented their views on the interpretation of the Constitution in times of crisis. They included Solomon Ayele (PhD), a human rights expert; Yonatan Tesfaye Fiseha (PhD), a constitutional law professor in South Africa; Adem Kassie (PhD), a constitutional law expert in the Netherlands; Zemelak Ayele (PhD), a constitutional law professor at Addis Ababa University; Getachew Assefa (PhD), a constitutional law professor at Addis Ababa University; and Tadesse Lencho, a known legal expert. See Neamin Ashenafi, 'Quest for Clarity' (The Reporter, 23 May 2020).

1077 FDRE House of Federation Decision, House of Federation 5th Year, 2nd Regular Session, 10 June 2020.

1078 Ibid.

1079 Ibid.

1080 Ibid.

1081 Ibid. See also Teklemichael Abebe Sahlemariam and Endalkachew Geremew, 'Council of Constitutional Inquiry Verdict: "Because I said So"' (Ethiopian Insight, 22 June 2020) <https://bit.ly/2QD4qRk> accessed on 7 November 2020.

1082 Ibid.

the executive is granted unlimited powers to determine the date of the next elections. It is a decision which demonstrates that the CCI as an institution is less than interested in checking the executive.

All in all, judicial oversight of abusive exercise of emergency powers is a rare device in Ethiopia. The self-restraint of the courts, the partiality of the CCI, and the country's unique system of judicial review are the main factors that make judicial control over the executive during states of emergency ineffective.

4.3. Practices of oversight by NHRIs

As noted earlier, the EHRC has a general mandate to promote and protect human rights and was recently mandated in particular to oversee the observance of human rights standards in times of emergency. Although the Ethiopian legislative framework satisfies most of the requirements of the Paris Principles regarding the independence and 'broad mandate' of NHRIs, it was not until 2020 that the EHRC showed itself to be effective in practice in dealing with human rights abuses committed during states of emergency.[1083]

The EHRC, by virtue of its general mandate as a NHRI, may protect human rights during a state of emergency.[1084] Accordingly, it conducted investigations, on its own initiative, into the human rights situation during the second state of emergency (2016–2017).[1085] It did not, however, publicise its findings of human rights violations, violations which would include torture and other forms of ill-treatment.[1086] Rather, the EHRC's report blamed social media, foreign-based Ethiopian media outlets, and opposition parties for catalysing the protests, concluding that the use of force by security forces in response to the protests was largely proportional.[1087] As international human rights institutions maintain, the EHRC has failed to investigate complaints of torture impartially and publicise such practices in its reports.[1088] In addition, it has arbitrarily dismissed allegations of rights violations and made controversial statements that defend the executive.[1089] The EHRC, in short, has not exercised its mandates in ways that prevent human rights violations and ensure accountability.

However, after Abiy Ahmed came to power in 2018, it undertook reforms to make itself fit for the purpose for which it was established, which is 'to raise public awareness on human rights, to promote, protect and enforce human rights as well as take necessary measures when violations occur'.[1090] As part of this, the enabling legislation was amended to secure

1083 See the discussion in Chapter 4, section 4(3), of this book.

1084 The International Coordinating Committee's Sub-Committee on Accreditation (ICC SCA) suggests NHRIs to exercise the power to protect human rights in times of crisis. See ICCSCA (n 492).

1085 EHRC, Report on the Findings of the Ethiopian Human Rights Commission's Investigations into the Human Rights Situation during the Disturbances in Parts of Oromia Regional State and Dispute Related to Issues of Identity and Self-Administration Raised by the Qemant Nationality in Amhara Regional State and the Resolution Passed by the Federal Democratic Republic of Ethiopia House of Peoples' Representatives (Investigation Report, June 2016, Addis Ababa).

1086 Ibid.

1087 Ibid.

1088 Amnesty International, Skirting Human Rights Violations: Recommendations for Reform of the Ethiopian Human Rights Commission (Amnesty International 2019, AFR 25/0123/2019).

1089 Ibid.

1090 Ruth Brook, 'Ethiopian Human Rights Commission Embarks on Reform' (Capital) <https://capitalethiopia.com/capital/ethiopian-human-rights-commission-embarks-on-a-reform/> accessed on 2 January 2021; Proclamation No. 210/2000, Preamble.

the independence of the Commission and broaden its mandate to monitor human right situation during states of emergency.[1091] In addition, a respected human rights advocate formerly of Amnesty International and Human Rights Watch was appointed to chair it.[1092]

The result is that the EHRC has undertaken promising activities during recently declared states of emergency. For instance, it reviewed the emergency measures issued during the COVID-19 state of emergency and called for them to respect international human right standards and the principles of proportionality and legality.[1093] It also made a public statement reminding law enforcement agencies to be guided by constitutional principles, to respect and protect non-derogable rights, and to carry out their functions in an accountable and professional manner.[1094] The EHRC has voiced concerns, too, about the state of emergency in the Tigray regional state by issuing a statement calling for security forces to respect the geographical limitation of the declaration and take due care to avoid ethnic-profiling and discrimination.[1095] The EHRC, as is evident, is emerging as a promising institution for ensuring that the use of emergency powers complies with human rights standards.

5. Human rights and the rule of law during states of emergency

The Ethiopian legal framework on emergencies has adopted the neo-Roman model since the imperial regime and accordingly governs states of emergency on the basis of predetermined rules. These rules, as discussed earlier, provide both formal and substantive requirements for the invocation and use of emergency powers, requirements which together set the minimum standards for the protection of human rights and rule of law in times of crisis.[1096] As a result, the Council of Ministers and law enforcement organs have to operate within the limits of the legal framework during states of emergency. As James Madison observed, '[I] f angels were to govern men, neither external nor internal controls on government would be necessary.'[1097] That is to say, oversight of the executive to prevent abuse of emergency powers must be functional if the rule of law is to be maintained and human rights protected during states of emergency.

1091 Proclamation No. 1224/2020, Preamble; Yonas Abiye, 'Activist Returns to Lead Human Rights Commission' (The Reporter, 6 July 2019) <https://bit.ly/2Plp0p1> accessed on 26 December 2020.

1092 Ibid.

1093 Bernabas Shiferaw, 'Ethiopian Human Rights Commission Sees Inconsistent Practices with SOE Declaration' (Borkena, 28 May 2020) <https://bit.ly/3m4KKRY> accessed on 25 December 2020.

1094 EHRC, Statement and Recommendations on the Implementation of the State of Emergency Proclamation and Regulation (14 April 2020, Addis Ababa).

1095 EHRC, 'The War in Tigray Region and the Worrying State of Human Rights Protection' (Public Statement, 14 November 2020).

1096 Fombad, 'Cameroon's Emergency Powers' (n 17).

1097 James Madison, 'Federalist No. 51' in Clinton Rossiter (eds), The Federalist Paper (New 1961).

Against this backdrop, state-of-emergency rule in Ethiopia has posed significant threats to human rights and the rule of law. The first state of emergency declared in 2005 was not approved by parliament. The Prime Minister banned constitutionally protected rights to peaceful demonstration and assembly without observing the formal requirements for declaring states of emergency. The latest state of emergency, declared on 4 November 2020, is the fifth in 25 years, the fourth in the last five years, and the second since the reforms of 2018. As Luhrmann and Rooney note, frequent invocations of emergency powers signal an ill-fated process of democratisation and a decline in democratic attributes.[1098]

All of the states of emergency except the COVID-19-related one have been declared on the grounds of constitutional disorder by labelling various political groups as terrorists, anti-peace elements, traitors or forces of destruction. Such labelling shows the extent to which political judgments are brought to bear in the declaration of emergency and reflects the practice of Schmitt's friend-enemy distinction within the Ethiopian political culture.[1099] Emergency measures are often employed to attack opposing parties and ideologies categorised as enemies.[1100] The conditions and reasons provided under the constitutional framework do not constrain the executive in practice and are regularly used instead merely to justify the executive's political decisions. In most cases, the decision to declare an emergency has been based ultimately on political considerations. In keeping with this, in times of emergency declarations there have been always arrests of opposition party leaders and members, human rights activists and journalists.[1101] Declarations of states of emergency have thus had the effect of muting political opponents and distorting the political playing-field. This in turn negatively affects the quality of political competition and so hinders the process of democratisation.

The official announcement of an emergency declaration is required for exercising a lawful emergency power. However, unofficial and de facto states of emergency have been practised in Ethiopia. The executive has used extraordinary and repressive measures provided for in anti-terrorism legislation.[1102] Recently, some areas have been under the administration of the Command Post without an official declaration of emergency in the regions. For instance, the SNNP regional state had been administered by the military command post in 2019. [1103] The Welayta Special Zone in the SNNP Region, the Metekel Zone in the Benishangul-Gumuz regional state, the Ataye- Kemise corridor in the Amhara regional state and south and west Oromia have been under the administration of a Command Post led by military and federal police forces.[1104] Although the unrest in these areas justifies the formal declaration of emergency, the federal executive has exercised additional and special powers in those areas without an official declaration of emergency.

1098 Lührmann and Rooney (n 50).

1099 Greene (n 53) 72-77.

1100 In 2005, members of the CUD were attacked. In the 2016 and 2018 states of emergency, the OLF and Patriots Ginbot 7 members were the primary targets. In the second of the two 2020 states of emergency, the TPLF is the focus of the emergency measures. See Toggi (n 98); Allo (n 91); FDRE Prime Minister's Office (n 957).

1101 Ibid.

1102 Ibid.

1103 Addis Standard News: 'Security in the SNNP Regional State Placed under the Federal Army Command Post' (Addis Standard, 23 July 2019) <https://bit.ly/3rwGM5K> accessed on 25 July 2020; Addis Standard News, 'Security Forces Suspend Community Radio Stations in Sodo, Shut Down Local Civil Society Organization Office' (Addis Standard, 14 August 2020).

1104 Ibid.

The notification requirement under the ICCPR has not been observed consistently in the declaration of states of emergency. Ethiopia did not notify the United Nations of the 2016, 2018 and November 2020 declarations of emergency, nor were the renewal and termination of the 2016 and 2018 states of emergency communicated as required by the ICCPR.[1105] In addition, the executive has violated the principles of non-derogability during states of emergency. The right to freedom from torture and inhuman treatment and the right to life were violated during the 2005, 2016, 2018 and even the April 2020 states of emergency.[1106] Moreover, reformative detention centres were sites of torture and inhuman treatment in the 2005, 2016 and 2018 states of emergency.[1107]

Arbitrary arrest and police brutality have been common too. Sometimes the emergency measures violate the right of individuals to be free from non-retroactive application of criminal laws. For instance, during the 2016 state of emergency, the directive authorised security forces to arrest and detain people for their involvement and role in coordinating protests against the Ethiopian government since the end of 2015.[1108] The same non-derogable principle is violated in the latest state of emergency, which allow the Task Force to arrest and detain individuals without warrant for their actions prior to the declaration of emergency.[1109]

The proportionality principle has also been ignored. For example, the 2016 and 2018 states of emergency were nationwide declarations even though unrest was limited to the Oromia and Amhara regions. Emergency measures in every state of emergency have placed heavy restrictions on the right to freedom of expression and the right to access information. Criminal procedural laws have been suspended unnecessarily and in a non-proportionate way.[1110] The EHRC reminds us as well of the risk to the principle of non-discrimination in the current state of emergency.[1111] The 2016 state of emergency was renewed on the ground that 'the people demanded its continuation',[1112] which could not be a reason to prolong a state of emergency. In addition, emergency proclamations published in the Federal Negarit Gazeta have not been accessible within reasonable time, a practice which threatens the principle of publicity.

States of emergency, furthermore, have given security forces broad powers that enabled them to exercise arbitrary arrest, detention, search and seizure of property. Security forces also have an open-ended power to take the necessary measures they think proper.[1113] The mere subjective views of the Command Post or Task Force have warranted the exercise of emergency measures against individuals or groups, without these bodies being required to adduce some degree of evidence for their actions. By implication, the executive and its agents can exercise emergency measures against individuals based on their perceptions or opinions, as when the Command Post or Task Force acts against individuals it believes are involved in prohibited activities.[1114] Additionally, the power of reformative detention falls completely outside the scope of emergency powers, notwithstanding that introducing measures that go beyond tackling the problem of the emergency is unlawful.

1105 Assefa (n 692) 31.
1106 Ethiopian Human Rights Project (EHRP) (n 101); Amnesty International (n 101).
1107 Tesegaye (n 105).
1108 Command Post Directive1/2016, art 31.
1109 Proclamation No. 4/2020, art 4(7).
1110 Regulation No. 466/2020, art 6.
1111 EHRC(n 1095)
1112 Proclamation No. 1004/2017, Preamble
1113 Command Post Directive 1/2016), art 28(9); Proclamation 2/2018, art 4(16); Proclamation 4/2020, art 4(10).
1114 Proclamation No. 2/2018, art 4; Proclamation No. 4/2020, art 4.

There is no recourse for individuals who wish to contest the exercise of emergency measures over them. Apart from visiting detention centres, the Inquiry Board could ask the Command Post to produce evidentiary materials justifying its actions, including detentions. Judicial oversight has not been available or effective due to institutional and constitutional defects. As such, the unchecked powers of the executive in times of emergency undermine human rights and the rule of law. In addition, the broad terms used to prescribe emergency measures, the inaccessibility of emergency-related laws defining the scope of emergency measures, and the 'necessary measures clause' included in the proclamation or regulation to mandate the security forces to exercise unspecified powers, are violations of the principle of legality and therefore defeat the essence of the rule of law.

Although the procedural and substantive rules in the FDRE Constitution and ICCPR intend to secure minimal protections for human rights and the rule of law, the Ethiopian government has failed to observe these constitutional and international standards during states of emergency. As a result, the notion of the rule of law and constitutionally protected human rights, including non-derogable rights such as the right to life, the right to freedom from torture and inhuman treatment, and the right to freedom from the retrospective operation of criminal law, have been under attack since the declaration of the first state of emergency.

5 Conclusions and Recommendations

This study set out to explore the design and practice of emergency powers and their impact on human rights and the rule of law in Ethiopia. It addressed two key issues. The first relates to the manner in which emergency powers are designed and exercised in the country; the second concerns the oversight mechanisms available to control abuses of emergency powers.

The major arguments with respect to these issues were discussed in chapters 2–4. The second chapter, in examining the historical and philosophical development of emergency powers, the strategies employed to regulate emergency powers, and the content of emergency clauses, argued that the constitutional approach of regulating emergency powers rooted in the neo-Roman model is safer than the extra-constitutional and legislative models for human rights protection and rule of law. It was argued that the extra-constitutional approach reflecting elements of the Schmittian and Lockean perspectives is potentially a threat to the protections of human rights and the rule of law, particularly in emerging democracies such as Ethiopia. Since emergency powers are prone to abuse, the chapter shows that legislative and judicial oversight mechanisms supplemented by NHRIs are crucial to controlling abusive emergency measures endangering constitutionally protected rights and freedoms.

Chapter 3 explored the emergency legal regime of Ethiopia by taking into account historical developments. It led to four important conclusions. First, it concluded that during the pre-1931 period, traditional sources granted emergency powers to the Emperor that were restricted by the church, provincial powers and moral virtues of a just Emperor. The written imperial constitutions of 1931, 1955 and 1974 regulated emergency powers in different ways. The 1931 Constitution technically did not contain a state of emergency provision and reflected the necessity approach to dealing with emergency situations. The 1955 revised Constitution gave the Emperor a blank cheque to take all necessary measures to address any danger that threatened the national integrity and defence of the empire without providing for detailed regulation of emergencies or mentioning all the conditions that were known in the 1950s to trigger the invocation of emergency powers. These imperial constitutions were little interested in introducing limitations to the emergency powers of the Emperor, but the 1974 draft Constitution, which reflected a neo-Roman model, was a breakthrough in the regulation of emergency powers, one that envisaged a well-regulated, well-controlled and multilevel structure of emergency powers.

Secondly, that chapter concluded that the military regime that overthrew the Emperor in 1974 and imposed a permanent state of emergency for 13 years caused gross human rights violations.

Thirdly, the 1995 FDRE Constitution, drafted against this historical background, regulates emergency powers via a neo-Roman model and makes international human rights instruments such as the ICCPR integral to the emergency legal regime. This constitutional approach is supplemented by a legislative approach to regulating emergency powers, particularly in relation to federal intervention and public health crises. All in all, Chapter 3 found that the executive's emergency power is restricted by procedural and substantive limitations in the Constitution, ICCPR and Federal Intervention Proclamation. As a result, the declaration and exercise of emergency powers is subjected to the minimum formal and substantive standards set out in the emergency legal regime.

Fourth, the chapter concluded that legal mechanisms for oversight of emergency powers are also recognised under the Ethiopian emergency legal regime in that the legislature, Inquiry Board, HoF and EHRC are mandated to supervise certain aspects of the invocation and use of emergency powers. However, the judiciary has only a limited mandate to deter abuses of emergency powers in times of crisis.

Chapter 4 assessed practices in regard to emergency powers and concluded that Ethiopia has been under successive states of emergency since 2005; between 2016 and 2020 alone, states of emergency were declared four times. In most instances, emergency powers were invoked and exercised in a 'Schmittian political setting' that distinguishes friends from enemy. Frequent recourse to emergency power raises the question of whether the emergency provision has been invoked in accordance with its objective or not; irrespective of the answer, though, the frequency in itself points to deficits in democratisation and democratic values. Indeed, Ethiopia's experience of emergency powers calls into question the relevance of emergency powers for ensuring sustainable political stability. This chapter argued that emergency measures taken by the government have served only to conceal political crisis temporarily through repression, thereby reinforcing the undemocratic culture of the regimes. In other words, the use of emergency powers sustains the cycle of political repression and political instability witnessed in the Ethiopian political landscape.

The chapter revealed, in particular, that the executive has declared states of emergency and taken emergency measures by ignoring procedural and substantive requirements enshrined under the FDRE constitutional framework. State-of-emergency rule has thus posed significant threats to the protection of human rights and maintenance of the rule of law. States of emergency have conferred broadly framed, expansive and unchecked powers on the national security forces and law enforcement agencies. These powers have been misused and abused, in the process violating constitutionally protected fundamental rights, muting political opposition, and engendering public terror and a culture of rule by force. In effect, the abusive exercise of emergency power consolidates authoritarianism, which in turn makes checking the invocation and use of emergency powers imperative for Ethiopia.

This study also argued that the Ethiopian legal system lacks functional oversight institutions to act as safeguards against expansive emergency powers and thus protect human rights and the rule of law. In practice, judicial and legislative oversight mechanisms have been ineffective. In the case of the judiciary, this is due to structural and constitutional problems that result in self-restraint in the courts and partiality in the CCI and HoF. As for legislative oversight, the mechanisms are promising in their design but in practice they have not curbed abuses

of emergency powers. The political environment in which the legislature, Inquiry Boards and Inquiry Commissions operate is crucial for the effectiveness of legislative oversight of the executive during states of emergency. Accordingly, unless elected representatives have the commitment and political will to hold the executive accountable, no amount of ex ante or ex post power and institutional rearrangement will make them effective. If parliamentary members lack the willingness to employ their powers for scrutinising the invocation and use of emergency powers, then constitutional or legislative powers will have little significance in ensuring accountability.

In this regard, there are a variety of reasons why parliamentary members are reluctant to critically review the use of emergency powers. The most important reason is party politics. Due to excessive party loyalty, parliamentary members have little desire to oversee their party counterparts in a critical manner. This is a tendency especially apparent in systems under a single dominant party, as in Ethiopia where the ruling party, whether the EPRDF of the recent past or the PP of today, has controlled more than 90 per cent of seats since 1995. Similarly, party politics dominates all parliamentary standing committees and Inquiry Boards. The political reality of a dominant-party system working in tandem with a strictly disciplined ruling party renders effective legislative control of emergency powers impossible.

Most of the members of the legislature show a united front to defend the positions of the government led by their party even in times of emergency. They believe holding the executive accountable through critical oversight will backfire against the interests of the party, with most of them preferring to challenge abusive emergency actions through party channels. Thus, the chapter draws the conclusion that the use of broad, expansive and unchecked emergency powers by incumbents has led to many deaths, disappearances, acts of torture and other gross human rights violations. It also perpetuates an environment of terror and disrespect for the rule of law. The use of these powers has developed a culture of repression in which security or military considerations are prioritised in the resolution of political questions, something which would not only current but future attempts at genuine democratisation.

In addition to these specific conclusions, the overall conclusion this study draws is that while the Ethiopian legal regime envisages that emergency powers are limited on formal and substantive grounds, in practice the invocation and use of emergency powers disregard these limitations and thereby undermine the protection of human rights and the rule of law. Constitutional oversight mechanisms meant to ward against abusive emergency powers have not been functional due to the unique system of judicial review and the predominance of de facto one-party politics in the legislature and attendant lack of political will to hold the executive accountable. The emergency power is thus a threat to human rights and the rule of law in Ethiopia.

To make emergency powers safer for human rights protection and the rule of law, legal and political reforms are necessary to strengthen legislative and judicial oversights during states of emergency. Accordingly, the emergency clauses of the FDRE Constitution must be revisited to confer on the legislature the power to approve the nature and scope of emergency measures issued by the executive after the confirmation of the declaration. In addition to the legislature, the judiciary can play an active and positive role in the protection of rights in times of crisis. For this to happen, the Constitution must be amended to create

a constitutional court with clear mandate to review the constitutionality of emergency measures issued during states of emergency. The recent promising oversight activities of the EHRC in times of emergency must be institutionalised and consolidated to supplement legislative and judicial oversight and thereby ensure accountability in times of crisis.

These legal and institutional reforms can be effective only when accompanied by political changes aimed at reinforcing a pluralist democratic political system. As part of this, the political environment must be changed to give individual political space for parliamentary members to cross the border of party lines in the task of reviewing the exercise of emergency powers. Although party discipline is important in a parliamentary system, excessive party loyalty must be avoided – it should at the very least not be a barrier to undertaking the constitutional task of ensuring accountability during states of emergency. The Schmittian political setting that makes a friend-enemy distinction in times of emergency through political tagging and labelling must be avoided.

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