

Making Extraordinary Power Part of the Ordinary Discourse? The Case of Ethiopian State of Emergency Declared on February 16

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Introduction

In this piece, I will examine the legality of and intent induced the State of Emergency (SoE) declared on Feb. 16, 2018, in Ethiopia. Throughout, I will utilise legal and public choice analytical models. To do so, I will start by giving an overview of SoE as a general practice and under the 1995 FDRE constitution. I will then employ functional analysis to highlight the functions of SoE – mainly reassurance and existential rationales. Tied to the functional review, I will discuss the possibility of abuse of function and alternatives to control an abuse through *ex-ante* and *ex-post* monitoring mechanisms. In the fourth section, I will turn to the examination of a motive element that may induce declaration of SoE with a focus on benevolent intent and as a power-maximizing tool. Against these theoretical backdrops, under the fifth section I will diagnose the legality of and the rationale that induced the declaration of the current SoE. I would argue that SoE is an extraordinary power to be used in any but dire circumstances. The vaguer the condition for declaring an emergency and the weaker the check and balance of emergency process, the higher will be the risk of emergency power abuse. Further, its repeated reoccurrence sets a threat of normalization of SoE which is as much dangerous as the threat it is meant to mitigate.

1. The Overview

Nations live in a reality of inevitable threat ranging from a natural calamity of different magnitude, internal unrest to the ever reoccurring reality of terrorism. Danger was, is and will be inevitable. Some risks create a physical threat to the constituents, while others endanger the power of incumbent governments (Ackerman (2004), pp. 1039-40). Depending on the nature of their political setup, geographic location and other factors states design a way to deal with such inevitable threats (*Ibid*).

One way to control extraordinary situations of this nature is through State of Emergency (SoE). Often modern constitutions include a special provision that deals with emergency time (Ferejohn&Pasquino (2004), p.210). The constitutional provision on SoE exceptionally permits the delegation of additional power to a given state organ (often the executive) to issue a decree. The emergency period is mainly characterised by a temporary suspension of legal process and rights enjoyed in ordinary times; and bestow the executive body with extraordinary power that goes

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beyond the limits of separation of power (Dyzenhaus (2006), p.2). Put differently, SoE is a situation in which the state is forced to take refuge in the absolute power of a single state organ, the executive. This happens when the threat the nation faces is beyond the common legal and law enforcement rubric (Emilie Hafner-Burton et al. (2011, p.673-74)). It allows the suspension of rights and freedoms with an aim to restore the conditions of extraordinary nature to a state in which the ordinary constitutional system of rights and procedures can resume. (Emilie Hafner-Burton et al. (2011, p.675)).

Thus, the act of declaring a SoE is a delicate business that needs a balance between suspensions of individual rights by temporarily reducing separation of powers, while also providing monitoring mechanisms (Bjørnskov&Voigt (2016a), p.4). While the suspension of rights and erosion of the separation of powers is justified against the exigency of the threat, an equally important aspect of SoE is the existence of a proper monitoring mechanism to control the process. Monitoring is essential for two main reasons: first, because emergency power by its very essence is a procedure that gives enormous power to an already potent state organ, the executive. Second, because the exercise of SoE could be misused in the hand of power-maximizing politicians (Bjørnskov&Voigt (2016a), p. 4; Ferejohn&Pasquino (2004), p.212). Therefore, a balance must be kept between suspension of rights, limitation on separation of power and monitoring of the legality of measures taken under the SoE.

To this end, constitutional provision of SoE must specify conditions such as necessary conditions for declaring SoE; Who can declare and approve the SoE; who exercises emergency power; who monitors the legality of means used during SoE and what additional competence does the SoE decree confers to the organ that exercises emergency power.

The 1995 FDRE Constitution enumerates conditions for SoE. Art. 93 (1, a) stipulates external invasion, a breakdown of law and order that goes beyond the regular legal enforcement mechanism and natural disaster or epidemic as necessary conditions for declaring an emergency state in Ethiopia. About the mandate to declare, and approve SoE, the same provision empowers the Federal Council of Ministers (CoM) with the power to declare SoE. However, this must be passed by the House of Peoples Representatives (HoPR). The procedure follows: the CoM submits the decree that declares the SoE within 48 hours to the parliament if the parliament is in session. If not, within 15 days. Then, the SoE will be effective only if the HoPR approves with a two-thirds majority vote. Upon declaration of SoE, the power to exercise the emergency power is conferred on the CoM (the executive body) (Art. 93 (4, a-c)). The constitutional provision of SoE endows the CoM with “all necessary power” except for those rights specified under Art. 93(4, c) as non-derogable. The critical aspect of Ethiopia's emergency provision is concerned with the mandate to monitor the legality of measures taken during the emergency. Art. 93 (5, b) mandate the HoPR to establish a SoE Inquiry Board (EIB) simultaneously with the approval of the SoE. This board is supposed to be a composition of seven members chosen from the same house and legal experts. This is a necessary provision that serves as a holding block of check and balance under SoE. For instance, Ackerman mentions this feature of Ethiopian's emergency constitution as a unique feature worth making an exception for even under

such circumstance that Ethiopia's record of democracy is far from relying on (Ackerman (2004), p. 1055, *see* footnote 67).

That said, the following few notes are worth keeping in mind when discussing SoE in the contemporary context of Ethiopia: what implication does it have that the executive has the mandate both to declare and exercise the emergency state and power, respectively? Can the approval mandate of the HoPR play a significant role in maintaining the check and balance under a situation where the parliament's 100% seat is occupied by the ruling party? What constitutes an internal instability that endangers the constitutional order? With these basics in mind, I now turn to outline the purpose and functions of declaring a state of emergency.

2. Purposive and Functional Analysis of State of Emergency

Having set the general overview of SoE, I proceed with the functional analysis to address the question 'What function SoE is meant to serve?'

Based on Ackerman's discussion of the fundamental rationale for an emergency, I will rely on two grounds: Reassurance function and Existential rationale.

Reassurance function

In the instance of catastrophic natural disasters such as drought, flood, and epidemic that threatens the physical existence of citizens or external invasion that places the state's effective sovereignty in doubt, it is rational for the government to take a proportional measure (Emilie Hafner-Burton et al. (2011, p.675); Ackerman (2004), p.1037). The rationale is that such emergency situation shakes the citizen's confidence on the capacity of the government to discharge its sovereign function – protection of citizens against danger. This, then, justifies the government's choice to resort to the SoE. In doing so, the government acts visibly and decisively to calm down its terrified constituents and assure that the crisis is only temporary and that it is taking all necessary measures to restore to the normal state (Ackerman(2004), *ibid*). This is what is called the 'reassurance function' of SoE.

It is, however, crucial that emergency measure lasts temporarily and only to enable the government to discharge its reassurance function without causing long-term damage to individual rights (Ackerman (2004), *ibid*). To limit the emergency power of the executive within the ambit of this function, monitoring and control is essential. But then, if SoE is a means for the government to give an assurance that it will handle crises and restore the normal state, why bother monitoring the measures taken during SoE? After all, isn't the government the provider and protector of its people? Why not we trust our fate in the benevolent hand of this entity? (I will get back to this shortly).

Existential rationale

Threats that face states are not limited to those that physically endanger the citizen or the sovereignty of the country. It could also take a form of danger that threatens the existence and continuation of an incumbent regime on power. For instance, domestic riots aimed at replacing the regime (Bjørnskov&Voigt (2016), p. 4-5). Under this situation, it is the government's life that is at stake rather than that of the people. In

this situation too, the constitutional provision of SoE may enable the government to reach unto its rescue in its "life-and-death struggle for survival" (Ackerman (2004), pp. 1037-38). In doing so, the government will have a legitimate power to suspend some civil and political rights with the exception of the non-derogable rights.

However, the existential function of SoE as well requires a limitation on the scope of the emergency power. This is because limitation makes it possible to mitigate the risk of SoE from being hijacked by power-maximizing politicians or abuse of function. In other words, the government is not always a benevolent provider and protector of the constituents (Dennis Mueller (1997), p.575). Politicians like any other person are utility maximizers. Therefore, control and limitation on the power of the executive during the SoE is as much essential as restoring the constitutional order. The logical question to follow this is how to control the emergency power? With this query, I then proceed to examine a mechanism of check and balance under SoE.

3. Check and Balance under State of Emergency

To align measures taken during SoE within the functional scope of the emergency, it is essential to keep the emergency power under some control. To this end, check and balance over emergency power could take an *ex-ante* and/or *ex-post* form (Ferejohn&Pasquino (2004), pp. 227-30). Ferejohn and Pasquino advise that the choice between the two alternatives emanates from worries states are under and the political setup the state has. For example, *ex-ante* control through constitutional provision is often preferred when the state has a fragile constitutional order and prone to abuse of emergency power by the executive (Ferejohn&Pasquino (2004), p.229). To the contrary, *ex-post* control is preferred by states which have less worry about the stability of their constitutional order and potential abuse of emergency power (Ferejohn&Pasquino (2004), *ibid*). Nevertheless, it is also possible that states could use both *ex-ante* and *ex-post* control mechanisms jointly.

Ex-ante, the constitutional emergency provision may require the declaring organ and the one to exercise the emergency power to be different (Ferejohn&Pasquino (2004), p. 227). For instance, the legislator may declare the emergency that will be exercised by the executive. But this may face two challenges. The first challenge follows the argument that it is the executive that has a better knowledge of the condition on the ground and it could be efficient to leave the mandate to declare the SOE to the executive. This claim could to some extent be appealing. However, even in those circumstances where the power to declare SoE given to the executive, emergency power can be controlled by mandating the parliament as an approving organ. This is the typical case of Ethiopia. In doing so, it will be possible to *ex-ante* mitigate the risk that power-maximizing politicians exploit potential panic to gain a legislative order in their favour even when the real world condition does not qualify as an emergency. The second challenge is cumbersome than the first. That is, what about when the integrity of the legislative organ with a mandate to approve is compromised? Recall the Ethiopian example, even though the HOPR has the authority to approve the decree declared by the MoC, its integrity and independence is questionable given a 100% of its seat is occupied by the ruling party (the executive). Then, maybe resort to or supplement by *ex-post* control?

Ex post control of the emergency power exercised by the executive could be either through the judiciary or another entity (Ferejohn&Pasquino (2004), p. 229). Meant, after the emergency, the court will inquire the legality of measures taken during an emergency and bring the accountable body to justice. The other possibility is to use both mechanisms jointly. This could be possible by empowering the executive both to declare and exercise the emergency power but make it accountable to another organ. For example, in case of Ethiopia, the executive body (MoC) has both mandates to declare and exercise emergency power. However, the SoE Inquiry Board (EIB) has the power to monitor measures taken under the emergency state. Again, the integrity and independence of such board still matter in keeping the check and balance under the SoE.

In sum, these controlling mechanisms are crucial to keep the executive within the scope of the function meant to be served by the SoE. Using Ackerman's expression, command and control (SoE) is a serious option and a complement to, but not a substitute for check and balance (Ackerman, p. 29-30). So, we better be serious about it!

4. Motives Necessitate the Declaration of SoE

How well the function of SoE served and how efficient will the check and balance be is subject to the motive that necessitates the declaration of the SoE. Of course, motive is impossible to observe and even worse when it is that of a political organ such as a state (or government). However, it is possible to derive implications of the motive from an observable behaviour of the agent. Hence, I will examine the driving motivation for declaring SoE by looking at the clarity of conditions listed for declaring the emergency and the strength of monitoring mechanism stipulate under the emergency provision. I will do so by relying on an empirical study already conducted by Voigt & Bjørnskov to identify possible intent for adopting emergency constitution by states and its implication. While their research examined the motive for adopting emergency constitution, I will only adopt the parameters they used to explain the motive not for adopting but for declaring SoE.

I assume that the motive that induced the state to include an emergency provision in its constitution will likely be the reason for exercising the clause. For example, if the geographical location of a state is prone to a natural disaster such as flood or earthquake, it is likely that the state will have an emergency provision as part of its constitution. The motive behind such inclusion has a practical orientation. In other words, the actual (geographical) reality of the state requires it to have such provision. Upon the occurrence of the natural disaster, this same reason (natural disaster) becomes a cause (necessary condition) for declaring the SoE. Therefore, I would argue that the motive that induces the inclusion of emergency provision informs (feeds) the motive that necessitates the declaration of SoE.

Accordingly, for my discussion here, I will utilise two potential intents for declaring an emergency and their implications. Namely: benevolent or practical, and power-maximizing motive (Bjørnskov&Voigt (2016b)).

Benevolent: when SoE is declared out of benevolence of the government, it should be done for purely practical reasons (Bjørnskov&Voigt(2016b), p. 5). Bjørnskov and Voigt argue that when the motive behind emergency state is of practical nature, the check and balance will be stringent and the necessary conditions for declaring SoE will be limited to exogenous factors beyond the control of the government such as natural disaster and aggression (Bjørnskov&Voigt(2016b), *ibid*). Further, the preciseness and clarity of the condition also matter. In that sense, when SoE is declared out of benevolent motive, the rationale for doing so will be line with the reassurance function rather than existential (*see* section 2 above).

Power-maximizing motive: this motive assumes that politicians are utility maximizers (Dennis Mueller (1997), p.575; Bjørnskov&Voigt(2016b), p. 5). Their utility set includes maximizing, stabilizing and strengthening their power, among others. Hence, they see the extraordinary power the SoE endow them as an opportunity to stabilise, or even extend their actual authority (Bjørnskov&Voigt(2016b), *ibid*). For example, emergency power could be utilized to limit political competition and suppress oppositions both from the ordinary people and opposition parties (Bjørnskov&Voigt(2016b), *ibid*). One implication of such motive is when the declaration, approval, and monitoring of the emergency is subject to weak check and balance. An example could be when the assembly that approves the emergency declaration is dominated by would be emergency government. The other implication is the inclusion of vague and all types of endogenous factors such as civil unrests and riots as conditions for declaring SoE (Bjørnskov&Voigt(2016b), *ibid*).

Hence, when the inducing motive is to maximize political power, SoE will likely be in service of existential function by abusing its reassurance function. Note that I am not implying existentialist purpose of SoE is irrelevant. A state can face extraordinary civil unrest that needs a proportionally extraordinary power. However, it is often vulnerable to abuse by power-maximizing politicians. This is due to the risk that they could exploit the reassurance function of emergency by capitalizing on the vague emergency condition and the panic the nation is under to stabilise or even strengthen their political power.

5. Testing the February 16, 2018, Ethiopian State of Emergency

Leaning on the above theoretical backdrops, now I will turn to diagnose the recently declared SoE in Ethiopia, which is yet awaiting the approval by the HPR. In doing so, I will test the condition that necessitates the declaration of the emergency against the constitutional provision and Ethiopia's international obligations; and then examine the motive that induced the government to declare the emergency against the two motive parameters. I will end by presenting my argument that Ethiopia seems to be in the business of normalizing the extraordinary power meant to be reserved for an exceptional situation.

5.1. Factual Review

Since the legal ground and general procedure to declare SoE in Ethiopia has already discussed, I will directly start by examining the SoE declared on Feb. 16, 2018.

The content of the SoE declared:

The condition that necessitates the declaration of the SoE according to the Ethiopian Minister of Defence is "...to protect the constitution and constitutional order." (FBC, A.A., Feb. 17, 2018). The emergency will last for six months, a maximum duration under the constitution. It suspends basic rights which fall under categories of freedom of expression, assembly, protest, speech, movement and allow an arbitrary search, seizure, and detention, among other (FBC, A.A., Feb. 17, 2018; see also Ethiopian Reporter, Feb. 25, 2018). About the additional power given, the law enforcement body will have the mandate to take "...all necessary measures to safeguard the constitution and the constitutional order as well as ensure the wellbeing of the people..." (FBC, A.A., Feb. 17, 2018).

Occurrences before the declaration of emergency:

There were strikes and protests mainly in the Amhara and Oromia regions. Some of the questions put forward by participants of the strikes and protests were: the release of political prisoners, equitable distribution of wealth and power, freedom from unjust treatment and imprisonment (Aaron Maasho, Reuters, Feb. 15 &16, 2018). The other event that came at the same time with the strikes and protests was a release of political prisoners by the government. It is worth mentioning that this government decision has to some extent calmed the strikes (particularly in Oromia). The other occurrence that took place a day before the declaration of SoE is the resignation of the Prime Minister.

5.2. The Legality and Necessity of the SoE

The FDRE constitution empowers the executive organ (CoM) to declare SoE among other ground in the instance of the breakdown of law and order which endanger the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel (Art. 93 (1, a)). The International Covenant on Civil and Political Rights (ICCPR), which makes part of the FDRE constitution, also permits the possibility of declaring SoE under a condition that the declaration must be tailored to "exigencies of the situation" (ICCPR, Art. 4). While the constitution goes without saying what constitutes a breakdown of law and order and its magnitude, the Explanatory Note states an internal political problem that endangers the constitutional order as an example. The challenge is, however, that internal political problems range from minor protests to the grave military coup and civil wars. So, which one warrants the SoE? Which one falls beyond the control of the regular law enforcement mechanisms? To fill this gap, I rely on the United Nations Human Rights Committee, General Comment No. 29 which interprets the ICCPR, particularly the provision on SoE. According to the comment, whether the justification for SoE and measures allowed are consistent with the "exigencies of the situation" depends on the geographical coverage, material scope, and duration of the emergency period.

Now let me walk you through the analysis of the Feb. 16 SoE against the above constitutional and international bedrocks. The justification that is given for declaring the emergency is to protect the constitution and constitutional order. Then,

the question is, was there any civil unrest or internal political instability with a magnitude that threatens the constitutional order which is beyond the law enforcement mechanism? Yes, there were protests and strikes, but the exigency of these occurrences must be consistent with the geographical coverage, material scope and duration tests.

Geographical coverage: the Federal Democratic Republic of Ethiopia is made up of nine regional states forming the federation (FDRE Constitution, Art.47 (1)). From these states, the strikes and protests were mainly within the Amhara and Oromia regional states. Whereas, the SoE is declared across the whole country. Here, it is right to ask if this geographical scope justifies a nationwide SoE and if it is beyond the legal enforcement mechanism of both states and federal governments. **Duration of the emergency:** the SoE will last for six months. With the possibility of renewal, six months is the maximum period stipulated by the constitution for SoE to stay in effect (FDRE Constitution, Art.93 (3)). Then, the question is, can a protest that took place in two of nine states warrant an emergency decree with a maximum period? With regard to the **material scope:** the emergency suspends freedom of expression, assembly, protest, movement, and allow arbitrary search, seizure, and detention to restore the constitutional order. First of all, these limitations go well beyond what is permitted under the ICCPR. As highlighted by Walilegne, this might be because the list of non-derogable rights under Art. 93(4) of the FDRE Constitution leaves out some of the rights that are listed under Art. 4(2) of the ICCPR (*See Yeheneu Walilegne, p.107*). Second, even if it is the case that the suspension is in line with the constitution when the suspended rights countered against the questions raised during the protest, it still leaves a shadow of doubt as to its proportionality. For instance, is not it a constitutional right of any citizen to ask for equitable distribution of wealth and power or release of political prisoners? Why would a quest for a constitutional right license the government to exercise an extraordinary power that supposed to come as an exception rather than a rule?

Given the above result, I would argue that the recently declared SoE fails short of satisfying the legal threshold. With this I step to an inquiry: if the SoE, legally speaking, does not satisfy the requirements, then could there be any rationale that explains its necessity at this particular time? I will look at the motive element, its implication and utilize public choice theory as an analytical model.

5.3. The Motive Element

As the discussion under section 4 briefs, the declaration of SoE could spring from either benevolent (pragmatic reason) or as a handy tool for power-maximization. These motives are drawn from the justification the government gives for declaring the SoE and stringency of the check and balance. When it is out of benevolent motive, exogenous factors such as external invasion or natural disaster are reasons. Further, the check and balance will be stringent. Hence, the function of SoE under this situation is to give an assurance to the people that things will be alright.

When I test the recent Ethiopian SoE against these indicators, the intent appears to go beyond the benevolent rationale. This is because, first, the justification for declaring the emergency is not an exogenous factor. Besides being endogenous

factors (internal political instability), it does not give an adequate explanation how the situation faced by the government go beyond the ordinary legal rubric and enforcement mechanism in place. The geographical and material scope of the declared emergency does not seem to be proportional to the encountered strikes and protests and questions raised against the government during these demonstrations. In fact, the government's decision to release political prisoners (which can be an implication as to the legitimacy of the question asked) comes as a paradox with a decision to declare SoE. Second, as to check and balance, the constitutional requirement of approval by the HoPR and afterward monitoring power of the EIB over measures during an emergency would be robust controlling mechanisms. However, the dominance of the parliament seat by the ruling party (executive), the would-be organ to have the emergency power, weakens the reliability of this check and balance. Can we then conclude the motive that induced the declaration is a longing for power-maximization?

I believe the conclusion that the driving motive is power-maximization needs more factual and empirical analysis which is beyond the scope of this piece. However, I have a reasonable doubt that it could be one among other driving motives. My doubt follows the legal and behavioural analysis I did above. For clarification, my argument in this line goes as follows:

First, the condition that induced the declaration is a vaguely defined internal political instability. In that sense, it is an endogenous factor that threatens the life of the incumbent government rather than that of the nation or people. As I have tried to explain under the functional analysis, this resembles the existential function of SoE which is often vulnerable to abuse of emergency power. This is not to imply internal political instability cannot be a ground for an emergency declaration, but it is a mere reminder of its delicacy and vulnerability to exploitation.

Second, I would argue that conditions that induce emergency, whether exogenous or endogenous, must be a temporary extraordinary threat. Internal political instability of the type we have at home now, unlike an external invasion, natural disaster or domestic upheavals such as a military coup or civil war, is not a short-lived one. Perhaps, quests for civil, political and socio-economic rights by citizens are natural affairs of any nation. A claim for a right against the government is instead an episodic quest that will most likely be the fate of not only Ethiopia but any other state. Thus, using such grounds (a vague claim to internal political instability) besides paving the way for the abuse of emergency power would usher a greater danger – normalization of emergency conditions.

With this, it is my humble opinion and very optimistic hope that the HPR will give a careful attention to the legal requirements for declaring SoE and possible consequences before approval. Especially, given this is the second SoE, if approved, in just less than two years.