



Non-derogable Human Rights under the Federal and Regional States Constitution of Ethiopia: A Comparative Analysis

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Abstract

Human rights are commonly understood as universal, imprescriptible, indivisible, interdependent and inalienable fundamental rights to which a person is inherently entitled simply because she or he a human being. However, human rights are subject to derogation when certain circumstances are fulfilled in emergency situations. Both international and regional human right instruments as well as different domestic constitutions provide for the derogation of human rights and lay down certain limits on the power of the state not to derogate from some norms which are commonly recognized as non-derogable rights. In Ethiopia, both the federal and regional states constitution provide for the derogation of human rights and embrace certain norms as non-derogable rights, which are not suspended during emergency. The main objective of this study is to compare the Ethiopian federal constitution and regional states constitution and also among regional states constitution themselves with regard to non-derogable rights. Indeed, it tried to assess which of those constitutions protects human rights most during state of emergencies. To achieve the research objectives, the study employed a doctrinal research with statute, comparative, and conceptual approaches. Meanwhile, the data were analyzed and interpreted to draw conclusions. The results show that the state constitutions provide a wide list of non-derogable rights than the federal constitution during a state of emergency; and on the top of this, they protect the most fundamental rights, i.e. the right to life and some other rights which its derogation has no relevance for emergency. Thus, compared to the regional states constitution, FDRE constitution does not sufficiently protect human rights in a state of emergency.

Keywords: Human Rights, Non-derogable, State of Emergence, FDRE Constitution, Regional States Constitution

1. Introduction

The protection of human right is a concern of all world communities far back in the history. Human right is a right which every human person entitled without any grounds of discrimination. Different international and regional human right instruments as well as diverse domestic

constitutions provide for the protection of human rights both at the global and domestic standards. However, as everything has its own limitation. Similarly human right is not absolute. There is a condition under which human right is limited or suspended. Limitation of human right is a permanent measure which is only done through the provision of the laws; while derogation of human rights during the state of emergency is a temporary measure which is only valid for certain limited period of time when a threat to the safety of the nation occurred due to certain extraordinary circumstances.

The concept of emergency and its definition is a tricky task. The complexity it entails and the legality it requires make the concept more intricacy. If we see the concept critically it is a derogation of right; and one can say it's an extra-legal acts. But, there may come a time in the life of a nation when a situation arises that seriously threatens its security or stability. In response, a government may legitimately declare a state of emergence and make regulations designed to counter the danger for the safety of the community at large. Derogation clause is of paramount importance for the system of protection for human rights. On the one hand, it allows for a State Party unilaterally to derogate temporarily from part of its obligations. On the other hand, it subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. Hence, International Human Rights Law had come up with a balanced system to protect the rights of individuals on the one hand and to maintain state sovereignty on the other hand. Thus, the power of the state to derogate from its obligations under human rights is not limitless nor is it open-ended. Some rights are considered basic and fundamental that no crisis justifies their derogations.

The declaration of emergency and the derogation of human rights is one of the clauses found under Article 4 of International Covenant on Civil and Political Rights (ICCPR)¹, under Article 15 of the European Convention on Human Rights (ECHR)², and under Article 27(1) of the American Convention on Human Rights (ACHR)³. Furthermore, emergency clauses, which permit derogation of human rights in times of emergencies, are also found in most domestic legal instruments and standards. Most African states also encompass this clause in their constitutions including Ethiopia. All of the above legal instruments contain the list of non-derogable rights.

¹ The ICCPR, adopted in 1966, entered into force 1978.

² The ECHR of 1950, entered into force 1953.

³ The ACHR, November 22, 1969, entered into force: July 18, 1978.

The following table shows the list of non-derogable rights both under international and regional human rights treaties.

Table 1: Comparison of the Lists of Non-derogable Human Rights under International and Regional Treaties

ICCPR	ECHR	ACHR
1) Article 6: Right to Life	1) Article 2: The Right to Life, except in respect of deaths resulting from Lawful acts of War	1) Article 3: Right to Juridical Personality
2) Article 7: Freedom from Torture or to Cruel, Inhumane or Degrading Treatment or Punishment	2) Article 3: Freedom from Torture	2) Article 4: Right to Life
3) Article 8: Prohibition against Slavery or to be held in Servitude	3) Article 4(1): Freedom from Slavery and Servitude	3. Article 5: Right to Humane Treatment
4) Article 11: Imprisonment for the inability to Discharge Contractual Obligation	4. Article 7: No Punishment without Law	1. Article 6: Freedom from Slavery
5) Article 15: Prohibition against Ex-post facto Criminal Law		2. Article 9: Freedom from Ex post facto Laws
6) Article 16: The Right to be Recognized as a Person before the Law		3. Article 12: Freedom of Conscience and Religion
7) Article 18: Freedom of Thought, Conscience and Religion		4. Article 17: Rights of the Family
		5. Article 18: Right to a Name
		6. Article 19: Rights of the Child
		7. Article 20: Right to Nationality
		8. Article 23: Right to Participate in Government
		9. Article 27(2): The Judicial Guarantees Essential for the Protection of such Rights

From the above table, one can look that the ACHR provides a long list of non-derogable rights than other major human rights instruments like ICCPR and ECHR. In addition to the rights recognized as non-derogable in the ICCPR, the ACHR recognizes the right to marry and found a family, the right to a name, the right of children to special protection, the right to nationality, and the right to participate in government. Besides, it is only the ACHR, which explicitly notes that judicial guarantees indispensable for the protection of these absolute rights are non-derogable.⁴ Hence, one can argue that the ACHR is highly comprehensive and so generous that it includes broad lists of non-derogable than other human rights treaties.

Coming to the Ethiopian context, various researches were made on the compatibility of the Federal Democratic Republic of Ethiopia (FDRE) constitution and ICCPR with regard to the declaration of emergency and the derogations of human rights. Yet, there is a gap in assessing the compatibility of Ethiopian federal constitution and regional constitutions with regard to the declaration of emergency and the derogation of human rights looking from the perspective of international human right instruments.

The aim of this paper is to compare the Ethiopian federal constitution with the regional states constitution on the issue of declaration of emergency and the derogation of human rights in light of international human right instruments. The study make a modest attempt to compare and assess the adequacy of the Federal constitution and Regional states constitution in preserving human rights in a state of emergency, and evaluate which of the two constitutions resembles international human right instruments in providing broad lists of non-derogable rights, which are considered basic and fundamental that no crisis justifies their derogation.

2. Method of Research

This paper is a combination of comparative and doctrinal legal research type interested with the discovery of what Ethiopian constitution, both federal and regional, say on derogation and non-derogable human rights. To this end, the study is to be conducted due regard to qualitative research methodology. A qualitative analysis of relevant theoretical concepts, international human rights instruments and constitution of federal and regional governments of Ethiopia will be made.

⁴ ACHR, Op.Cit., Article 27(2); Compare it also with ICCPR, Op.Cit., Article 4(2) and ECHR, Op.Cit., Article 15(2).

3. Literature Review

3.1. The Concept of Derogation of Human Rights

Derogation of human rights is a temporary deviation in the way of detracting from many of the rights provided in the law.⁵ It enables governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties without fear of violating human rights norms.⁶ Tsegaye also noted that derogation gives the possibility of acting in a manner deviating from the accepted standards of behavior vis-a-vis rights or acting like there are no human rights at all.⁷

3.2. State of Emergency as a Ground for Derogation of Human Rights

The precondition for derogation of human right is the official declaration of state of emergency.⁸ So in order to understand about derogation of human rights, we have to know about what state of emergency mean and its grounds. Yet there is no agreement on what state of emergency mean. According to Siracusa Principles on the Limitation and Derogation Provisions a state of public emergency is a situation of exceptional and actual or imminent danger which threatens the life of the nation.⁹ The International Law Association (ILA) also define public emergency as “*an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.*”¹⁰ Similar to the definition given by ILA, the European Commission of Human Rights on the case of *Lawless v. Ireland*¹¹ reflected that the emergency must be actual or imminent which affects the whole nation.

⁵ Rosalyn Higgins.(1977).*Derogations under Human Rights Treaties*, BYBIL, p. 281.

⁶ Victor Conde.(1999).*A Handbook of International Human Rights Terminology*, University of Nebraska Press, 2nd edⁿ, Pp.34-35.

⁷ Tsegaye Regassa.(2009).Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia, *Mizan Law Review*, 3(2), p. 314.

⁸ Emilie M., Laurence R. and Christopher J.(2011). Emergency and Escape: Explaining Derogations from Human Rights Treaties, *International Organization*, 65, Pp. 673-676.

⁹ Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.(1985), *American Association for the International Commission of Jurists*.

¹⁰ Belay Frenesh Tessema.(2005). A Critical Analysis of Non-derogable Rights in a State of Emergency under the African System: The case of Ethiopia and Mozambique, LLM thesis in Human Rights and Democratization in Africa, *unpublished, University of Pretoria*, p. 7.

¹¹ *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Comm.'s of H. R. Dec. & Rep. 15 (1960).

In Ethiopia, there is no definition of the term state of emergency. But there are lists of the ground of the state of emergency which has a difference between states and federal constitution. As it is common to all regional constitutions, the state can declare a state of emergency when a natural disaster or an epidemic that jeopardizes the well-being or the health of the people in the region occurs.¹² But at the federal level, besides the reason expressed as a ground of declaration of state of emergency by states, an external invasion, and a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel are the grounds for the declaration of state of emergency.¹³ Here the difference is clear but the question is that what happens if certain situation happened in the regions which may affect or endanger the constitutional order? Similarly what if a breakdown of law for instance a gross violation of human rights happened in the region which cannot be controlled by the state authorities through ordinary laws? As to me these questions are systematically answered by the FDRE constitution. Because protecting the state from external invasion is the mandate of national defense¹⁴ which is organized under the federal government which is in no case becomes the issue of only one state. Again the issue of endangering constitutional order is about national issue which cannot be one state matter even though it happens in one region because constitutional order is base for the existence of the country. So as per Article 62(9) FDRE constitution the federal government can intervene when any situation happens which endangers the constitutional order. Additionally if there is a gross human rights violation which cannot be arrested by the state authorities, the federal government can interfere as per Article 55(16) of the FDRE constitution. The interference of the federal government may be through declaration of a state of emergency. Even though there is state of emergency which requires derogation of human rights, still there are non-derogable rights.

3.3. The Importance of Setting Non-derogable Human Rights

As viewed by scholars any form of derogation is inappropriate in conventions for the promotion of human rights.¹⁵ Because of this during the draft of major international and regional human

¹² The Constitution of FDRE, proclamation no.1/1995, *Negarit Gazetta*, year 1, No.1.Article 93(1B).

¹³ Ibid, Article 93(1A).

¹⁴ Ibid, Article 87(3).

¹⁵ Rosalyn Higgins, Op.Cit., p. 282; See also Belay Frenesh Tessema, Op.Cit., p.12.

right instruments the majority of experts agreed to include a derogation clause to grant absolute protection to a number of non-derogable rights in any emergency.¹⁶

Expressly stating non-derogable right has the following significance for human rights' protection. As expressed by Oraa, it is a minimum standard and an ultimate line of defense of protection of human rights in a state of emergency.¹⁷ It also sets up a restriction on the employment of the state's power to derogate and prevents the state from abuse of powers. Because in practice some states declare a state of emergency not to protect the nation or safeguard human rights but to maintain their power and to silence opposition.¹⁸

Moreover, it also prevents autocracy to some extent. During a state of emergency, it is vivid that the strongest power of the government is in the hands of executive. It is a fewer participant who decree a state of emergency. Thus the express list of non-derogable rights prevents the autocrats from acting as they likes.

4. Results and Discussion

4.1. The Non-derogable Human Rights under the Federal and Regional States Constitution of Ethiopia

The Ethiopian federation is composed of nine constituent units and last year the 10th Sidaama regional state joined the federation carved on the basis of "*settlement patterns, language, identity, and consent of the people concerned.*"¹⁹ The 11th regional state is soon coming. The Regional states have the power to issue its own constitutions and laws according to Article 52(2) (b) of the federal constitution. Immediately upon the coming into force of the federal constitution, states have come to adopt their own constitutions. It is observed that the constitutions provided about one-third of its content to human right issues just like that of FDRE constitution. On top of that each of the constitutions tried to manage the protection of human rights during state of emergency. One of the methods utilized to protect human right is through providing the express lists of non-derogable rights even during emergency situations. However,

¹⁶ Ibid.

¹⁷ Jaime Oraa.(1992). *Human Rights in State of Emergency in International Law*, Clarendon Press, Oxford, p.17.

¹⁸ FN Aolain. (1995). The Emergence of Diversity: Differences in Human Rights Jurisprudence, *19 FILJ*, p.101.

¹⁹ FDRE constitution, Op.Cit., Article 46(2); Further, according to Article 47(1) of this constitution: Member States of the FDRE are the following: 1) The State of Tigray 2) The State of Mar 3) The State of Amhara 4) The State of Oromia 5) The State of Somalia 6) The State of Benshangul Gumuz 7) The State of the Southern Nations, Nationalities and Peoples 8) The State of the Gambela Peoples 9) The State of the Harari People.

as we will see in the following table 2, the lists of non-derogable rights are different under the federal and Regional states constitution.

Table 2. Comparison of the lists of non-derogable Rights between FDRE Constitution and Regional States Constitution, and also the states themselves

Federal and Regional States Constitution		Catalogues of Non-derogable Rights
A. Proclamation No.1/1995,FDRE Constitution , Article 93(4)(c))		<ul style="list-style-type: none"> a. Article18:The Prohibition Against Inhuman Treatment b. Article 25: The Right to Equality c. Article 39(1)(2):The Right to Self Determination, including the Right to Secession, and Language, Culture, and History of the Nation, Nationality, and Peoples
1. The Revised Constitution of the Tigray National Regional State, Proclamation No. 45/2001, Article 103(4)		<ul style="list-style-type: none"> a. Article 15: The Right to Life b. Article 16: The Right to body Security c. Article 18(1)(2)): The Right to Prohibition against Inhuman Treatment d. Article 21(1)): The Right to Human Dignity of the Person Held under Custody and a Person Detained up on Conviction e. Article24(1): The Right to Recognition everywhere as a Person before the Law f. Article 25: The Right to Equality g. Article27(1): Freedom of Thought, Conscience and Religion h. Article 39:The Right to Self-determination up to Secession of Tigray Peoples
2. Revised Constitution of the Afar Regional State, Proclamation No. 14/2002, Afar Negarit Gazeta, 3 rd year No.1, Article 106(4)		<ul style="list-style-type: none"> a. Article 15: The Right to Life b. Article 16: The Right of Security of Person c. Article 18(1)(2): Prohibition against In human Treatment d. Article 21(1):The Right to Human dignity of Persons held in Custody and Person Imprisoned up on Conviction and Sentencing e. Article 24(1):The Right to Honor and Good Reputation f. Article 27(1):Freedom of Thought, Conscience and Religion g. Article 39:The Right to Economic, Social and Cultural Rights

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| 3. The Revised Constitution of the Amhara National Regional State approval Proclamation No. 59/2001, Zikren Hig, 7 th year No. 2, Article 114(4) | <ul style="list-style-type: none"> a. Article 15: The Right to Life b. Article 16: The Right to Security of Person c. Article 18(1)(2): Prohibition against Inhuman Treatment or Punishment d. Article 21(1): The Right of Person held in Custody and Convicted Prisoner e. Article 24(1): The Right to Honour and Reputation f. Article 25: The Right to Equality g. Article 27(1): Freedom of Religion, Conscience and Belief h. Article 39(1) (2): Right to Self-determination up to Secession including Language rights, Cultural rights, Right to autonomy and Right to effective Participation in Federal Government |
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| 4. Oromia Regional State Constitution, Proclamation No. 35/2001, Article 108(4) | <ul style="list-style-type: none"> a. Article 15: The Right to Life b. Article 16: The Right to Security of Person c. Article 18(1)(2): Right to human Treatment d. Article 21(1): The Rights of Detained or Imprisoned Person e. Article 24(1): The Right to Honour and Reputation f. Article 25: Equality before the Law g. Article 27(1): Freedom of Religion, Belief and opinion h. Article 39: National Rights of the Oromo Peoples |
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| 5. The Revised Constitution of the Somali Regional State, 2002, Article 105(4) | <ul style="list-style-type: none"> a. Article 15: The Right to Body Security b. Article 16: The Right to Life c. Article 18(1)(2): The Right to Liberty d. Article 21(1): The Right an accused Person e. Article 25: The Right to Honor and Reputation f. Article 27(1): The Right to Privacy g. Article 39: The National Right of the Somali Peoples |
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| 6. Revised Constitution of the Benishangul-Gumuz Regional State, Proclamation No. 31/2002, 8 th year No. 4, Article 115(4) | <ul style="list-style-type: none"> a. Article 16: The Right to Life b. Article 17: The Right to Security of Person c. Article 19(1)(2): The Right to Protection against Cruel, Inhuman and Degrading Treatment or Punishment and Freedom from Slavery d. Article 22(1): The Right to Human dignity of a Person held in Custody and Person Imprisoned up on Conviction e. Article 25(1): The Right to enjoy Recognition everywhere as a Person f. Article 28(1): Freedom of Religion, |
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- g. Article 39: Rights of the Indigenous Nations, and Nationalities of Benishangul Gumuz
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7. Revised Constitution of the SNNPRS, Proclamation No. 35/2001,(Article 121(4))
- a. Article 15: The Right to Life
 - b. Article 16: The Right of Security of Person
 - c. Article 18: Prohibition against Inhumane Treatment
 - d. Article 21(1): Respecting the Human dignity of Person held in Custody and Person Imprisoned up on Conviction
 - e. Article 24(1): The Rights to have Honor and good Reputation
 - f. Article 25: The Right of Equality
 - g. Article 27(1): Freedom of Thought, Conscience and Religion
 - h. Article 39: National Rights of the Southern Nations
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8. Revised Gambella Constitution, Proclamation No. 27/2002, Article 117(4)
- a. Article 16: The Right to Life
 - b. Article 17: The Right to Security of Persons
 - c. Article 19(1,2): Prohibition against Inhumane Treatment
 - d. Article 22(1): Respecting the Human dignity of Person held in Custody and Person Imprisoned up on Conviction
 - e. Article 25(1): The Right to Honor and Reputation
 - f. Article 26: The Right to Equality
 - g. Article 28(1): Freedom of Thought, Conscience and Religion
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9. The Harari Revised Constitution of 2004, Article 76(4)
- a. Article 14: The Security of Person and Liberty
 - b. Article 16: The Right of Security of Person
 - c. Article 18(1)(2): Prohibition against Inhumane Treatment
 - d. Article 21(1): Respecting the Human dignity of Person held in Custody and Person Imprisoned up on Conviction
 - e. Article 24: The Right to Honor and Reputation
 - f. Article 25: The Right to Equality
 - g. Article 27(1): Freedom of Thought, Conscience and Religion
 - h. Article 39: National right of the Harari Peoples
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10. The Constitution of the Sidaama National Regional State Proclamation No. 1/2020, 4th day of July, 2020, Article, 108(4).
- a. Article 15: The Right to Life
 - b. Article 16: The Right to the Security of Person

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- c. Article 18(1)(2): Prohibition against Inhumane Treatment
 - d. Article 21 (1): The Right of Person held in Custody and Convicted Prisoner
 - e. Article 24(1): The Rights to have Honor and Reputation
 - f. Article 25: The Right of Equality
 - g. Article 27(1): Freedom of Religion, Belief and Opinion
 - h. Article 39: National Rights of the Sidaama Peoples
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4.2. The Assessment on the Comparison of the FDRE Constitution and Regional States Constitution and the Regional States Constitution themselves

The above table 2 shows the lists of non-derogable rights under the regional states constitution, it is by far wider than the lists of non-derogable rights under the federal constitution. Looking side by side with FDRE constitution and among regional states constitution, the following issues can be appraised.

First of all, it is clear from this lists that unlike FDRE and Harari constitution, all of the regional constitutions provide the most essential right like the right to life, the right to security of persons, the right to have recognition everywhere as person and the right of person held in custody and convicted prisoner as non-derogable. Here, the states constitution provides more protection which the federal constitution gives no attention to it during emergency. Additionally all states except Somali constitution are listed freedom from torture, cruel, inhuman or degrading treatment or punishment as non-derogable rights. Importantly, the states by expressly stating the term torture, they clarified the controversies of the FDRE constitution. Failing to protect this right, the Somali regional constitution contradict with the supreme law of the land so that it is null and void.

Secondly, it is only the Amhara, Gambella and Sidaama regional states constitution that mention the nomenclature of the state as a non-derogable right. Except those states the nomenclature of the state, which does not apparently categorized as human right is not mentioned in the lists of non-derogable rights.

Thirdly, we can also observe that apart from FDRE and other states constitution, Afar and Somali regional states constitution also derogates the right to equality, which the federal

constitution and other regional constitutions states as non-derogable rights. Again as any law which contradicts with the federal constitution shall be of no effect, the same would apply to them.

Fourthly, unlike others the Somali regional state constitution ignored the freedom of thought, conscience and religion from the lists of non-derogable rights just like that of FDRE constitution.

Fifthly, Except Afar and Gambella regional states constitution, like FDRE constitution all other regional states mentioned the right to self-determination up to secession in the lists of non-derogable rights. Here what we have to know is that, though, this right is derogable under the major human right instruments like ICCPR²⁰, and the FDRE constitution protects this right as non-derogable. Thus, the Afar and Gambella regional states constitution contradicts with the Ethiopian federal constitution.

Sixthly, we can also assess that unlike the Ethiopian federal constitution and other regional states constitution, the Somali regional constitution included the right to be brought before an independent court of law, the right to liberty and the right to privacy in the lists of non-derogable rights. Similarly, only Afar regional state also listed the protection of Economic, Social and Cultural rights as non-derogable list which is a new start since this right is nowhere recognized as such. Unlike others, the Somali and Harari regional states constitution also listed the right to honor and reputation as non-derogable rights.

5. Conclusion and Recommendations

From the above discussion we can conclude that there is a limited list of non-derogable rights under the FDRE constitution than regional states constitution. At the regional level, though they are better in inserting the list of most fundamental rights as non-derogable rights than that of the FDRE constitution, thus; there is a problem in inserting non-derogable rights. Some regional states constitution leave out certain core human rights from the lists of non-derogable rights, which its exclusion is not justified under any circumstances.

Based on the findings and conclusions drawn above, I recommend the following points:

²⁰ Even though the right to self-determination is recognized under Article 1 of ICCPR, it is not listed as non-derogable rights under Article 4(2) of ICCPR.

- i. All regional states and FDRE constitution should include the Prohibition of imprisonment for inability of contractual obligation as non-derogable right lists because it is recognized as such under ICCPR.
- ii. At federal level, it is better if the catalogue of non-derogable rights should at least include the right to life, freedom of thought, conscience and religion, and Recognition everywhere as a person just like almost all regional states constitution.
- iii. Somali regional state constitution should incorporate freedom from torture, cruel, inhuman or degrading treatment or punishment and Prohibition of slavery and servitude and Freedom of thought, conscience and religion in the lists of non-derogable rights as the derogation of this right would not be justified under any circumstances.
- iv. In order to comply with FDRE constitution, Afar and Somali regional states should also list the right to equality as non-derogable.
- v. States should keep it up on extending the horizon of rights protection to frontiers that the federal constitution hasn't taken them yet by extending the list of non-derogable rights by using their law making power entrusted to them as per Article 52 (2B).

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