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**Constitutional Silence on Election Postponement in Ethiopia: A critique of
Constitutional Interpretation**

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ABSTRACT

Election postponement in Ethiopia, due to the COVID-19 pandemic, has raised critical constitutional questions that have never been really thought before in the country's constitutional law jurisprudence. This is because the state of emergency measure in Ethiopia, to contain the spread of COVID-19, is in conflict with constitutional deadlines for elections. The constitutional lacuna is complicated by the absence of explicit constitutional provisions that indisputably govern election postponement. Although any legal measures to postpone election schedule and pass constitutional deadlock is far from simple, the Ethiopian government has suggested four possible 'options' to the constitutional dilemma: dissolving the parliament, declaring state of emergency, amendment of the Constitution and constitutional interpretation. Later, constitutional interpretation was resorted and the planned elections were postponed indefinitely. This research investigates whether the constitutional interpretation option adheres to the premises of the Federal Democratic Republic of Ethiopian (FDRE) Constitution or is it extra constitutional and scrutinizes the pitfalls. Accordingly, the House of Federation (HoF), Ethiopian upper House, provided superficial analysis and fallacious reasoning and failed to meaningfully grapple with the serious constitutional issues. The constitutional interpretation is not constitutionally bound and is defective. The manner the House of Federation managed the constitutional vacuum concerning election postponement, indisputably, was 'constitutional interpretation' by name but indeed a political decision in practice. Thus, in the absence of a constitutional remedy to legalize election deferrals, the political dialogue and consensus building within the constitutional framework still remains the only real avenue in order to smooth the country's stuttering transition to multi-party democracy.

Key Words: COVID 19, Election deferral, Ethiopia, Constitutional Interpretation

INTRODUCTION

The Coronavirus (COVID-19) pandemic, which outbreak in China in late 2019, has forced most states to impose either partial or complete lockdown. Some others have declared a state of emergency to curb the spread of the pandemic.² The declaration of state of emergency, during the coronavirus times, is in coetaneous with the election period to certain states and has placed unprecedented pressure on states as to whether to hold or postpone scheduled elections, resulting in controversies in either case³. Only 36 states and territories have decided to hold national or subnational elections as originally planned despite concerns related to COVID-19 and at least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.⁴

While some states have constitutional provisions or legal frameworks to deal with election postponements in certain circumstances, such as political crises, the death of elected officials or natural disasters but some others have neither constitutional provisions nor any legal frameworks to do so.⁵

Following the report of the first case of COVID-19 in Ethiopia on 13 March 2020, the government has restricted public movements and closed offices and schools.⁶ On March 31, the National Electoral Board of Ethiopia submitted a proposal to the House of Peoples Representatives(HPR), approved on 30 April 2020, to postpone the sixth national election, which was scheduled to be

² Emergency Measures and Covid-19: Guidance Organization for Higher Commission for Human Rights(2020), https://www.Ohchr.Org/Documents/Events/Emergencymeasure_COVID19.Pdf.

[State of Emergency], In a general sense, involves "Governmental action taken during an extraordinary national crisis that usually entails broad restrictions on human rights in order to resolve the Crisis."

³Antonio Spinelli, Managing Elections under the COVID-19 Pandemic: The Republic of Korea's crucial test, International Institute for Democracy and Electoral Assistance (IDEA), Technical Paper 2(2020),1-8, Accessed At Date DOI: <https://Doi.Org/10.31752/Idea.2020.15>. At Least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.

⁴Global Overview Of COVID-19 Impacts On Elections (2020), <https://Www.Idea.Int/News-Media/Multimedia-Reports/Global-Overview-Covid-19-Impact-Elections>. International IDEA's *Global Overview Of COVID-19: Impact On Elections* lists the countries that conducted elections under COVID-19 as of March 2020, Among which: Australia (Local Elections In Queensland); Dominican Republic (Municipal Elections); France (Local Elections); Germany (Local Elections In Bavaria); Guyana (General Elections); Israel (General Elections); Mali (General Elections); Switzerland (Local Elections In Lucerne) And Vanuatu (General Elections).

⁵ Sead Alihodžić and Nicholas Matatu, Timing and Sequencing of Transitional Elections International Institute for Democracy and Electoral Assistance (IDEA), Policy Paper No. 18,(2018), 1-61. DOI: <<https://Doi.Org/10.31752/Idea.2019.13>>

⁶ Zemelak Ayitnew, Federalism and the COVID-19 Crisis: Perspective from Ethiopia, Forum of Federation, (2020), 1-2;

https://Www.Researchgate.Net/Publication/341205760_Federalism_And_The_COVID-19_Crisis_the_Perspective_From_Ethiopia/Link/5eb3f35745851523bd49b6c1/Download

held in August 2020, for an unspecified time.⁷ A week after the *de facto* lockdown, the formal state of emergency was declared for five months since 8 April 2020⁸ and has effectively postponed the election schedule. But the postponement of elections in Ethiopia due to the COVID-19 pandemic has raised a critical constitutional question that has never been really thought before in the country's constitutional law jurisprudence.

This is because the current state of emergency measure in Ethiopia, due to COVID-19, is in conflict with constitutional deadlines for elections. The constitutional lacuna is complicated by the absence of explicit constitutional provisions that indisputably govern election postponement.

After the end of September 2020, given only five months left which is insufficient to hold election, Ethiopia faces two scenarios: a state with no government (as the term of office of the incumbent government ends then) or having unconstitutional government (if the current government continues despite its term expires or if even any other interim civilian or military government established). And on 29 April 2020, the Ethiopian government, to respond to the constitutional crisis, has proposed four possible 'options', *fait accompli*, to get out of the constitutional crisis.⁹

Although any legal measures to postpone election schedule and pass constitutional deadlock is far from simple, the parliament, on 29 April 2020, has suggested the following options to the constitutional dilemma: dissolving the parliament, declaring state of emergency, amendment of the Constitution and constitutional interpretation. Despite objections from some 25 members of the very parliament mainly from Tigray people's Liberation Front (TPLF), constitutional interpretation was endorsed and referred to the Council of Constitutional Inquiry (CCI), "quasi-constitutional court".¹⁰

On 11 June 2020, the House of Federation (HoF) fully adopted the recommendations made by the CCI over the constitutional matters referred to it for interpretation by the Parliament. Finally,

⁷ International Foundations For Electoral Systems: Elections Postponed Due To COVID-19 - As Of August 20, 2020, 1-8

[Http://Ohfgljdgelakfkefopgkclcohadegdpjf/Https://Www.Ifes.Org/Sites/Default/Files/Elections_Postponed_Due_To_Covid-19.Pdf](http://Ohfgljdgelakfkefopgkclcohadegdpjf/Https://Www.Ifes.Org/Sites/Default/Files/Elections_Postponed_Due_To_Covid-19.Pdf)

⁸ Proclamation 3/2020 : A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate its Impact, (2020), 1-4

⁹ Solomon Ayele, Constitutional Based National Dialogue the best way to avert a Constitutional Crisis Triggered by Deferred Election, Addis Standard, Op-Eds, (30 April 2020).

[Http://Addisstandard.Com/Op-Ed-Constitutional-Based-National-Dialogue-The-Best-Way-To-Avert-A-Constitutional-Crisis-Triggered-By-Differed-Election/](http://Addisstandard.Com/Op-Ed-Constitutional-Based-National-Dialogue-The-Best-Way-To-Avert-A-Constitutional-Crisis-Triggered-By-Differed-Election/), Acced 23Aug2020.

¹⁰ The Council of Constitutional Inquiry, "Quasi-Constitutional Court", Is Established by Virtue of Article 82 of the Constitution of the Federal Democratic Republic of Ethiopia and by Proclamation No. 798/2013 to conduct constitutional inquiries and present its findings to the House of the Federation which is empowered to interpret the Constitution.

the CCI recommended the deferred general elections to be postponed indefinitely until COVID-19 pandemic no longer poses a risk to public health confirmed by the very parliament which has direct vested interest in the outcome.¹¹

The verdict of the HoF to postpone the election indefinitely, however, raises concerns whether the decision regards the premise of the FDRE Constitution. This research evaluates whether constitutional interpretation does adhere to the premises of the FDRE Constitution or is it extra constitutional and scrutinizes its pitfalls.

ELECTIONS DURING EMERGENCIES: EXPERIENCES OF CONSTITUTIONAL PROVISIONS OF OTHER STATES

Although meeting deadlines for holding elections are often baked into a country's legal or constitutional framework, international law allows for the derogation of some rights – including the right to vote and stand for election – in emergency situations with stringent rules to prevent abuse.¹² Some countries have either constitutional provisions or/and legal rules to entertain election postponements due to emergency situations. During state of emergency, the Indian Constitution for example, allows Parliament's term of office to be extended by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.¹³ The Bangladesh constitution, if the Republic is engaged in war, also allows the term of office of the parliament, without holding elections, to be extended not for more than one year but shall not be so extended beyond six months after the termination of the war.¹⁴ In case of serious crisis, the Cameroon constitution allows election postponement and asserts that the election of a new Assembly shall take place not less than forty days and not more

¹¹ The FDRE House of Federation convenes for the second year of its 5th parliamentary term on June 11, 2020.http://www.hofethiopia.gov.et/web/guest/decisions-documents/_/document/preview/29608/21536

The CCI's recommended the deferred general elections to be held within nine to 12 months after the Ethiopian Ministry of Health, the Ethiopian Public Health Institute and the science community assure that the pandemic no longer poses a risk to public health and the Parliament approves their suggestion.

¹² Katherine Ellena, The Legal Quagmire Of Postponing Or Modifying Election, International Foundation For Electoral Systems, (April 2020), <https://www.ifes.org/news/legal-quagmire-postponing-or-modifying-elections>, Accessed 23 Aug 2020.

¹³ *Voting From Abroad: The International IDEA Handbook*, (2020), PP. 12–13, 19–20, 23 And 26, <<https://www.idea.int/publications/catalogue/votingabroad-international-idea-handbook>>, Accessed 17 July 2020.

¹⁴ The Constitution of the People's Republic of Bangladesh, Art.72(3)
<https://www.refworld.org/pdfid/3ae6b5684.pdf>

than one hundred and twenty days following the expiry of the extension or abridgement period.¹⁵ The Constitution of Estonia also prohibits the election of members' of the new parliament during state of emergency nor shall authority of the existing one be terminated, and elections must be held within three months after the end of the war or emergency.¹⁶ Whereas the Constitution in Myanmar explicitly provides that after the expiry of the incumbent term, the President and the Vice-Presidents shall continue their duties until the time the new President is duly elected but no similar provision exists for members of Parliament.¹⁷ Thus, states having constitutional provisions or legal frameworks, to entertain election postponement, can easily pass emergency situations otherwise would have paved the way for constitutional lacuna and conflicts among competing groups.

Any election is by nature rules-based exercises, and changing the rules too close to the game, or without regard to flow-on effects, can be damaging and illegitimate.¹⁸ It is inescapable in some contexts that decisions to postpone or modify election periods and modalities will become politicized and heavily contested, let alone to a country like Ethiopia which has many polarized interests, but to democratic states too. The responsibility for making these difficult legal and operational decisions regarding the postponement or modification of elections varies between countries and can become fraught with problems, especially where the legal basis for postponement is not clear cut.

The Venice Commission's Code of Good Practice in Electoral Matters affirms that "stability of the law is crucial to credibility of the electoral process" and recommends no legal changes in the

¹⁵ Malah Anna, *Constitutional Protection in Cameroon: Critique of the Amendment Mechanism*, MA Thesis Central European University, (2009), 21

See also the 1996 Cameromia Constitution Art. 15(4): In case of serious crisis or where circumstances so warrant, the President the Republic may, after consultation with the President of the Constitutional Council and Bureaux of the National Assembly and the Senate, request the National Assembly to decide, by law, to extend or abridge its term of office. In this case, the election of a new Assembly shall take place not less than 40 (forty) days and not more than 120 (one hundred and twenty) days following the expiry of the extension or abridgement period.

¹⁶ The 1992 Estonia Constitution, Article 131 Article 131 [Authority During State of Emergency]: (1) During a state of emergency or a state of war there shall be no elections for the Parliament, the President of the Republic or representative bodies of local government, nor can their authority be terminated. (2) The authority of the Parliament, the President of the Republic, and representative bodies of local government shall be extended if they should end during a state of emergency or state of war, or within three months of the end of a state of emergency or state of war. In these cases, new elections shall be declared within three months of the end of a state of emergency or a state of war.

http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-e.htm

¹⁷ The 2008 Constitution of Myanmar, Art. 61(b) <http://extwprlegs1.fao.org/docs/pdf/mya132824.pdf>

¹⁸ Katherine Ellena, *Legal Considerations When Delaying or Adapting Elections*, 2020 International Foundation for Electoral Systems, (2020), 14
https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_legal_considerations_when_delaying_or_ada_pting_elections_june_2020.pdf

year prior to an election.¹⁹ The International Foundation for Electoral Systems (IFES) in its Guidelines and Recommendations for Electoral Activities during the COVID-19 Pandemic has also noted the following legal elements to consider in relation to election postponements and modifications:²⁰

- Legal elements to consider in relation to election postponements and modifications
- Source of authority for setting or moving election dates
- Legal or constitutionally mandated deadlines for transfers of power
- Provisions for continuity of power beyond the end of a term, or for caretaker governments
- Legal or constitutional authority for temporary derogation of rights or postponement of elections in emergency situations
- Laws or regulations enabling flexibility or modification of methods or modes of carrying out election processes
- Set timelines in the legal framework for key electoral processes such as voter registration, candidate registration and campaigning
- Statutory authority for Election Management Bodies(EMB) to develop regulations and procedures
- Provisions in the legal or regulatory framework requiring certain forms of accessibility, inclusion or consultation

When states, in the direst of public health environments, are unable to hold elections which are a fundamental right and are crucial to facilitating peaceful and democratic transfers of power, they are obliged to exhaust different legal means to postpone elections and/ or create platforms for inclusive participation of all political parties.²¹

¹⁹ Guidelines and Explanatory Report of the European Commission for Democracy Through Law (Venice Commission), No. 190/2002, *Code of Good Practice in Electoral Matters* (October 30, 2002).

Accordingly, one way of avoiding manipulation is to define in the Constitution or in a text higher in status than ordinary law the elements that are most exposed (the electoral system itself, the membership of electoral commissions, constituencies or rules on drawing constituency boundaries). Another, more flexible, solution would be to stipulate in the Constitution that, if the electoral law is amended, the old system will apply to the next election – at least if it takes place within the coming year – and the new one will take effect after that.

²⁰ Katherine Ellena, *Supra Note 12*

²¹S. Kotanidis et al., States of emergency in response to the coronavirus crisis: Situation in certain Member States, EPRS, May 2020.

THE CONSTITUTIONALITY OF ELECTION POSTPONEMENT IN ETHIOPIA

Coming to Ethiopian, the FDRE Constitution puts the term limit of the members of the HPR to be elected by the people for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.²² The FDRE Constitution also obliges elections for new members of the parliament to be concluded one month prior to the expiry of the House's term without any exception.²³ The current members of the Parliament were elected before five years in May 2015 and their term of office will be terminated at the end of August 2020, before another election is held which is needed to form a new government. As per the FDRE constitutional provisions, the next national election is supposed to be held before August 2020. Of course, it would have been scheduled for 29 August 2020 had it not been for COVID-19 pandemic. Now the declared state of emergency, due to COVID-19 pandemic, has altogether postponed indefinitely the planned election.

Except stating as there will be a regular national election to be held for every five years, the FDRE Constitution doesn't have any provision to entertain election postponement.²⁴ The Constitution, the supreme law of the land, imposes a duty to *inter alia* all organs of state, political organizations as well as their officials to ensure observance of the Constitution and to obey it.²⁵ Thus, the government's decision to postpone the election will not be constitutional as any law or a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect. The Constitution also prohibits assuming state power in any manner other than that provided under the Constitution.²⁶

If there is a *force majeure* to extend the election with extra constitutional manner, it should be decided by an independent organ that has the consent of all competing political forces or with inclusive participation of all political parties.²⁷ The government, when it comes to elections, is one

²² The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1st, No. 1, Articles 54.

²³ FDRE Constitution, Art. 58.

²⁴ FDRE Constitution, Art. 54.

²⁵ FDRE Constitution, Art. 9; The Constitution obliges any official, institutions and practices to observe the premises of its provisions as follows: the Constitution is the supreme law of the land, any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect. all citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the constitution and to obey it. it is prohibited to assume state power in any manner other than that provided under the Constitution.

²⁶ FDRE Constitution, Art. 9.

²⁷ Anthony Banbury, Elections and COVID-19: Legal Consideration as a way out, International Foundation For Electoral Systems President,(2020), 1-10.

of the actors not the sole decision maker. One can also argue that the absence of constitutional provisions to postpone the election schedule was made intentionally by the architects of the constitution. This is because the Constitution was drafted after longer years of civil wars and to prohibit any incoming government from extending its term limit under the guises of election postponement provision. The postponement of the election in Ethiopia creates a constitutional crisis and legal vacuum. The state of emergency, due to the pandemic, comes at a precarious time for Ethiopian short lived (democratic) transition in which the country is already struggling to meet the expectations of its populations. As far as elections are postponed beyond the scheduled plan, even if the constitutional interpretation was a legal remedy as maintained by the ruling government, questions arise as to the legitimacy of office holders. The postponement of the scheduled election under the patronage of constitutional interpretation, contended by legal experts and political parties, was unconstitutional and making the decision of the HoF as constitutional interpretation by name and political decision in practice. Thus, the constitutionality of election postponement in Ethiopia, in the absence of clear constitutional provision, is not duly legalized.

ATTEMPTING TO VALIDATE ELECTION POSTPONEMENT IN ETHIOPIA: CONSTITUTIONAL INTERPRETATION

The Ethiopian parliament claimed and proposed that the only possible solution, to the current constitutional crisis concerning election postponement, should be exhausted within the perimeter of the Constitution as opposed to extra constitutional means. And the parliament has finally endorsed constitutional interpretation, among the four recommended ‘options’, as the least complex decision to exit the current constitutional quandary. Because the ‘application and interpretation’ of the Constitution must be under the scope of the Constitution²⁸, it obliges the interpreter to have the responsibility and duty to respect and enforce constitutional provisions and premises while giving interpretation. Additionally, the FDRE Constitution affirms that the fundamental rights and freedoms (including voting and be elected) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.²⁹ In our case the

²⁸ FDRE Constitution, Art. 13; Under the scope of application and interpretation, the FDRE Constitution obliges all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce constitutional provisions.

²⁹ FDRE Constitution, Art.13

task of doing interpretation of the Constitution mandates any organ not to intrude the constitutional right to vote and be elected.

Still the incumbent government's decision of requiring constitutional interpretation concerning election postponement in Ethiopia, given the constitutional provisions that fixes the term of the office of any elected parliament to be five years³⁰, heats legal debates up including:

1. Are the constitutional provisions, governing the period of conducting election and the term of the two Houses as well as the Executive branch, merited constitutional interpretation?
2. Which specific constitutional provisions, if any, are going to be interpreted concerning election postponement?
3. Questioning on the neutrality of the constitutional interpreter as the HoF has direct vested interest on the outcome of the decision? This part investigates these mutually exclusive questions.

One of the questions regarding constitutional interpretation, to the current specific case of election deferral, starts from questioning about the necessity of the very act of interpreting the FDRE Constitution. This is due to the Constitution having explicit provisions that govern election schedules and determines the term of office of the parliament without any exception. The FDRE Constitution, for example, has stated as the members of the HPR to be elected for a term of [five] years on the basis of universal suffrage and by direct, free and fair elections.³¹ Accordingly, the term of the office of the incumbent parliament, that was elected in May 2015, will expire before (*Meskerem* 30) 10 October 2020.

The FDRE Constitution has also, while deciding the meetings of the House and duration of its term, duly determined the term of the parliament for only [five] years without any immunity and reiterates that [elections] for a new House shall be concluded one month prior to the expire of the House's term.³² The debate is about begging 'what is not clear about *five years*' that needs interpretation.

The FDRE Constitution asserts its supremacy and denies effect to any law, customary practice or a decision of any organ of the state or a public official.³³ As an expression of its supremacy, all citizens, organs of state, political organizations and other associations, as well as their officials, are required to ensure the observance of the Constitution and to obey it. Most importantly, the FDRE

³⁰ FDRE Constitution, Art.58 And 54

³¹FDRE Constitution, Art. 54.

³² FDRE Constitution, Art. 58.

³³ FDRE Constitution, Art. 9.

Constitution serves as the only source of government power. It is, therefore, prohibited to assume power through any means other than, or contradictory to, the manner prescribed in the Constitution itself.

The FDRE constitution, while listing grounds to declare state of emergency, still does not specify anything about election postponement if the election schedule occurs amidst such kind of extraordinary situations.³⁴ Some argue, citing Art 38 cum 93, that election can be postponed because the FDRE Constitution does not list the right to vote and be elected as non derogable rights during state of emergency situations. If there is not an election being conducted, there will not be a government as per Art.54 cum 93, get established. Ethiopia, given the internal political polarizations and external challenges, should not be left without a government unless the new elected government replaces the outgoing one. But some others still argue that because self-determination is one of those non derogable rights under the FDRE constitution³⁵ even during a state of emergency, holding elections, one of the basic manifestations of self-determination, cannot be postponed.

Had the Constitution foreseen emergency situations during election periods that could potentially prevent from holding regular elections as per the scheduled timeline the Constitution would not have such limitations responsible for the current legal crisis. Unfortunately, in Ethiopia, there are neither constitutional provision(s) that anticipate grounds to extend elections nor any legal frameworks proclaimed that govern election delaying or rescheduling during exigencies situations. Unlike, the FDRE Constitution's silent on election postponement, some states' constitutions unequivocally mention grounds to postpone elections.

It is believed that holistic understanding of a constitution and a robust interpretation by the legitimate body is a necessary means of guaranteeing constitutionalism and making an indisputable and consistent reform [of a constitution] in line with the ever changing conditions of life. However, Ethiopian ruling Prosperity Party, the only party at the parliament, listed only three constitutional provisions (Art. 54, 58 and 93 which stated about the election of Members of the Parliament, the duration of the Members of Parliament and the declaring of the state of emergency respectively)

³⁴ FDRE Constitution, Art. 93.

³⁵ FDRE Constitution, Art. 93 (4)(C): In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-articles 1 and 2 of article 39 of this Constitution. The exclusive listing of non-derogable rights during state of emergency under the Ethiopian Constitution are: art 1 which describes the nomenclature of the state 'the Federal Democratic Republic of Ethiopia'; article 18 which prohibits inhumane treatment; article 25 which guarantees equality of everyone before the law and equal protection of the law and articles 39(1 and 2) which guarantee every Nation, Nationality and People in Ethiopia to have an unconditional right to self-determination, including the right to secession.

to be interpreted and forwarded to the HoF, the Upper House mandated to interpret the FDRE constitution. Although such action on identifying specific constitutional provisions to be interpreted requires premeditated and inclusive discussion, the parliament made it in hurry on 5 May 2020, within less than five days after [the parliament] announced the four possible 'options'. Since the guidance as to the meaning of a particular word or phrase may be found in other words and phrases in the same provision or in other provisions of a constitution, constitutional interpretation requires provisions to be construed as a whole. Owing to this, the parliament's prejudgment of ordering only [three] constitutional provisions to be interpreted while there are other provisions, let alone the international and African regional laws, that will consolidate or even nullifying the act of interpretation, raises concerns as to its holistic interpretation of the constitution. The provisions, the government wanted, to be interpreted should not be read by excluding other pertinent provisions. This is due to depending on a single or two or even three provisions may lead to a hasty generalization.

Article 102 of the Constitution, that established the Electoral Board, would have been one of the provisions to be referred, as the Board has confirmed not to hold the planned elections as per its schedule due to the COVID-19 emergency situations. The interpretation did not even consider Article 9 of the FDRE Constitution that prohibits assuming state power 'in any manner' other than provided by the Constitution.³⁶

The crux of the debate following the global pandemic -whether periodic election is maintained or postponed- necessitates consideration of not only nation legal frameworks but also ratified international legal norms. The importance of periodicity of elections is enunciated under the African Charter on Democracy, Elections and Governance (ACDEG)³⁷ and the International Covenant on Civil and Political Rights (ICCPR)³⁸, to which Ethiopia is a party, and which by virtue of Article 13(2) of the Constitution form part of the human rights chapter of the Constitution. But, the interpretation decision-as far as considers merely Art. 54, 58 and 93- excludes Article 13 of the FDRE Constitution that requires the bill of rights to be interpreted in a manner conforming to the international instruments adopted by Ethiopia that [requires periodic] election.³⁹

It was also a unilateral decision by the parliament, being the judge on its own fate, without even consulting competing political parties, the primary actors in election politics. Of course, some Members of Parliament did not insist on accepting the very necessity of doing interpretation, citing

³⁶ FDRE Constitution, Art. 9(3).

³⁷ African Charter on Democracy, Elections and Governance (ACDEG, Art. 2(3) And 3(4).

³⁸ International Covenant on Civil and Political Rights, Art. 25(B).

³⁹ FDRE Constitution, Art. 13(2).

Art 54 and 58 of the Constitution which have unequivocal provisions governing election schedule without any exception.. Still, Art. 45 of the Constitution should not be left from being referred during the interpretation, which requires the establishment of only a ‘parliamentarian’ form of government in Ethiopia, in response to the opposition parties’ call for any form of government (Transition Government, Caretaker Government, Consultative Government, Elite Led Government...) different from what the constitutions designates. And any attempt to establish such government would have been, of course, understood as contradicting the constitutional provisions.

The third debate, regarding constitutional interpretation in general and concerning the 2020 election postponement in particular, is on the neutrality of the interpreter and has been remained contentions since the promulgation of the FDRE Constitution. This is due to the FDRE Constitution doesn’t establishing an effective and independent constitutional adjudication system. The Constitution rather empowers the HoF, a political organ, to interpret the Constitution.⁴⁰ Unlike many states’(including Germany, South Africa, USA) which establishes a neutral and competent constitutional interpreter either regular courts or constitutional courts, the FDRE Constitution confers the Upper House⁴¹, which is now overwhelmingly controlled by a single party, to interpret the constitution.⁴²

Following the current constitutional gaps/crisis, the opposition parties call for the termination of the incumbent parliament both the Lower and Upper Houses, but the parliament requests constitutional interpretation to decide on election postponement which would determine termination or extension of the parliament’s term of office. The funny thing is that such action – interpreting the Constitution to decide on the fate of the parliament’s termination or extension- is under the discretion of the Upper House which has direct vesting interest on the outcome of the decision. The HoF is not an impartial arbiter on a case involving the term limit of the HPR, since the decision to extend the latter’s term also extends its own.

⁴⁰ FDRE Constitution, Art. 62.

⁴¹ FDRE Constitution, Art. 61. Accordingly, the members of the House of the Federation are composed of representatives of Nations, Nationalities and Peoples; each Nation, Nationality and People shall be represented in the House of the Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population. members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of the Federation, or they may hold elections to have the representatives elected by the people directly. Thus, to be the members of the House of Federation, it doesn’t require legal scholarship as a criterion but representative role.

⁴² FDRE Constitution, Art. 83.

This raises another begging the question ‘can anybody be the judge of his or her own case? And the act also contradict the golden rule in legal scholarship-*nemo iudex in causa sua*, no-one is judge in his own cause. Such scenario erodes the credibility of the decision of the HoF, and constitutional interpretation has remained a political matter in Ethiopia. Then, after it received the case about election postponement, HoF has extended its own term of office and the HPR for unlimited time until election is held within nine to twelve months following the cessation of COVID-19 confirmed by the Parliament.⁴³ The decision didn’t oversee again what if the pandemic continues for another one year, three years, five or ten years. Still the final confirmation is not set to be determined by any independent body but by the parliament which has still direct vested interest with the outcome. The manner the HoF managed the constitutional vacuum concerning election postponement, undoubtedly, was ‘constitutional interpretation’ by name but indeed a political decision in practice.

Of course, the FDRE Constitution established a Council of Constitutional Inquiry that gives merely legal assistance to the HoF.⁴⁴ The Council of Constitutional Inquiry composed of eleven members. The nomination and approval of the nine legal experts of the Council are made by the parliament and are supposed to be loyal to the incumbent government. But what is astonishing is that the remaining three of the eleven members of the Council are from the very HoF. The three members may or may not be legal experts since their membership is not conditioned on their professional competence but their representative capacity (political). Still, the Council has a mere advisory role and its recommendation is not binding; but the veto lies on the HoF.

With this line of institutional structures, cynical legal merit of the members and more over the existence of interest conflict over the extension/termination of the election schedule, the neutrality of the constitutional interpretation at the HoF is inherently knotted. Therefore, as purely political organ under the influence of the legislature and the executive, given the fusion of power under the Ethiopian two Houses and executives, and the obvious interest of the HoF to extend its own term of office, the HoF cannot be expected to decide politically sensitive issues independently let alone the issue of election postponement that determine its own term of office all together. The constitutionality of the election postponement was resisted by some opposition parties⁴⁵ and even

⁴³ See *Supra note 11*

⁴⁴ FDRE Constitution, Art. 84.

⁴⁵ In order to find a legitimate solution for the impasse through national consensus. The following seven parties had announced and called for political discussion concerning election schedules. 1) The deliberation and negotiation should involve all political parties registered and qualified to participate in the 2020 election. 2) the deliberation and negotiation should be facilitated by entities who do not have direct involvement in election affairs and do not have vested interest in the outcome. 3) the final agreement reached among parties should be binding. Cosigning members

from the members of the HoF.⁴⁶ The very speaker of the HoF, Keria Ibrahim, had resigned after publicly denouncing the government's decision to seek for constitutional interpretation to handle deferred election. The speaker had accused, the ruling Propriety Party, of undermining the Constitution and wanting to establish an authoritarian regime.⁴⁷

PROHIBITION OF ABSTRACT REVIEW UNDER THE FDRE CONSTITUTION AND INTERPRETATION GROUND

The fact that the peril situation created by COVID-19 worsened the seemingly looming constitutional crises in Ethiopia, the incumbent government desperately looked for leeway to postpone the sixth national election under the guise of constitutional interpretation. However, the constitutional interpretation option is, rather, unconstitutional to resolve the issue at hand for two simple constitutional reasons: the absence of interpretation ground (disputed issue) and the prohibition of abstract review.

Interpretation Ground: In general, legal interpretation including the constitution takes place where there are justifiable grounds such as – *vagueness, silence* and *contradiction*.⁴⁸ Hence, the main inquiry should be whether the provisions under question – Art. 54 (1), Art. 58 (3) and Art. 93 – show any of these three grounds.

A. Vagueness – When a given word or phrase in the law/constitution is unclear or vague, it calls for interpretation by the institution formally bestowed with the power to do so.⁴⁹ Art. 54 (1), Art. 58 (3) explicitly states and limits the term of the HPR in to five years only without exception and Art.93 also unambiguously lists grounds, other than election postponement, for declaration of state of emergency-“...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

of the Coalition of Democratic Federalism: Oromo Liberation Front, Ogaden Liberation Front, Oromo Federalist Congress, Agaw National Congress, Mocha Democratic Party, Kaffa Green Party, Arena Tigray for Democracy and Sovereignty.

⁴⁶ Members of the House of Federation (HoF), Ethiopia's Upper Chamber, in its 5th year, second regular session of the chamber, on 10 June 2020, approved the Council of Constitutional Inquiry's (CCI) recommendations submitted to the constitutional interpretation and identity sub-committee on May 29. The House approved the recommendation with 114 Yeses, 4 Nos and one abstention. See Addis Fortune

⁴⁷ <http://Addisstandard.Com/News-Alert-Hof-Approves-Ccis-Recommendation-To-Extend-Both-Houses-State-Councils-Term-Limit-Constitutional-Expert-Raises-Concern/>

⁴⁸ R. Randall Kelso, Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History, 29 Val. U. L. Rev. 121 (1994), pp.121-233

Available at: <https://scholar.valpo.edu/vulr/vol29/iss1/2>

⁴⁹ Guyora Binder and Brenner M. Fissell, A Political Interpretation of Vagueness Doctrine, 2019 UNIV. OF ILL. L. REV. 1527 (2019), P. 1-63

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/1254

personnel, a natural disaster, or an epidemic occur”. In the current case, there is no vague constitutional provision which warrants constitutional interpretation by the HoF.

B. Contradiction – The second ground that brings constitutional interpretation to fore is when two constitutional provisions are apparently contrary to each other at least textually.⁵⁰ Again, in the case at hand, there are no seemingly contradictory provisions.

C. Silence – This ground calls for interpretation of the matter(s) on which the constitution kept silent or left it unregulated. Now the question is, whether the constitution is silent on the extension of term limits? The answer is emphatically no. Because, the constitution has spoken in loud and clear volume when it comes to prohibition of extension of term limit. Article 9(3) clearly rules out the assumption or continuation of power other than by means and procedures laid down under the constitution. And election is the only constitutional avenue to assume power which the FDRE Constitution stipulates as there will be regular elections for every five years.⁵¹ Declaring state of emergency as per Art. 93 (1)(a) also cannot be used to extend the tenure of the parliament beyond five years as specified under Art. 54 (1). Therefore, there are no justifiable constitutional interpretation grounds in this case that merit constitutional interpretation. To sum up, there are no justifiable constitutional interpretation grounds in this case that would deem constitutional interpretation.

THE PROHIBITION OF ABSTRACT REVIEW UNDER THE FDRE CONSTITUTION

In this regard, constitutional interpretation can be roughly bifurcated into two.⁵² These are abstract review and concrete review. While the former refers to seeking interpretation for the matter which has not been contested, the latter applies to case(s) where constitutional dispute arises between litigant parties. Broadly speaking, in Ethiopia, abstract review or advisory opinion mode of interpretation has not been permissible.⁵³ Evidence for this is: article 37 The FDRE Constitution states unequivocally that it is only justiciable (not abstract issues) matter that can be brought to adjudicatory institutions in Ethiopia. The relevant constitutional provisions (read Articles 62 cum 83) which define power of constitutional interpretation also make it abundantly clear that the

⁵⁰ FDRE Constitution (Art.84 (2)).

⁵¹ FDRE Constitution 54,

⁵² Wojciech Sadurski (ed.), *Constitutional Justice, East and West, Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*. Kluwer International, The Hague – London – New York, 2002. 189-211.

⁵³ FDRE Constitution, Article 37

interpretational power of HoF is limited only to constitutional disputes (that's concrete review). Besides, the existing president in Ethiopia makes no space or possibilities for abstract reviews (an example for this include: *Dr. Negaso's case* – his claim against the proclamation that prohibits benefits to retired or resigned president if s/he joins an opposition political party. And also, *the Oromia regional state's* request for interpretation of the 'special interest on Addis Ababa' under the constitution).⁵⁴ The Proclamation No 798/2013 regulating the CCI has also no provision authorising the CCI to issue a consultative or advisory opinion.

The fact that the HoF and CCI don't have consultancy or advisory service, the very request of the HPR for [constitutional guidance] on the postponement of the national election and subsequent matters is not supported by the Constitution or any relevant proclamations.⁵⁵ Hence, based on the preceding legal analysis one can safely and soundly concludes that both the procedure and the constitutional interpretation option apparently preferred by the Parliament is an unconstitutional alternative.

The major flaws are:

- The CCI stated the textual reading of Article 58(3) of the Constitution implies the contingency of the Parliament's five-year term on whether an election is held at least a month before the expiry of the term. This is an absurd inference as the meaning of the text is plain and drafted in compulsory terms.
- The CCI held that the purposive reading of Article 93 of the Constitution indirectly recognizes that the incumbent Government's term limit may exceed five years. The CCI provided no reasons why this is so. Rather, the CCI made the fallacy of circular reasoning by starting with the premise that it ended up repeating as a conclusion.
- The CCI gives the Federal Ministry of Health (FMOH) a central role in determining when the countdown to the upcoming elections date will begin. The National Electoral Board of Ethiopia (NEBE) is a constitutionally mandated organ to decide such important election-related matters. It contravenes the spirit of the Constitution to reassign this power to the

⁵⁴ Solomon Ayele and etal, Joint submission to the Constitutional Council of Inquiry of the Federal Democratic Republic of Ethiopia on the matter of the House of Peoples' Representative request for constitutional interpretation, (2020), p.6

https://www.cci.gov.et/wp-content/uploads/2020/06/Final-Submission-latest-to-CCI_15-May.pdf

see also T. R.Ararssa available at <https://addisstandard.com/wp-content/uploads/2018/02/Special-Edition-Full-version-.pdf> (February 2018)

⁵⁵ FDRE Constitution, Art. 37(1), 62(1), 83(1) , 84(1 and 2) and Proclamation No 798/2013

executive branch. The incumbent can stay in power as long as it says COVID-19 continues to be a public danger.

- The CCI held that the mandate of the regional councils and executive bodies shall also be extended as that of the federal parliament and government because elections matters are federal issues. The CCI enmeshed the decision to postpone elections with the decision regarding the terms of the regional council and governments. The former is a federal matter, while the latter is undoubtedly a matter left to the regional constitution. Hence, this aspect of the decision encroached upon jurisdiction of regional governments.

THE WAY FORWARDING

The CCI relied on fallacious reasoning on crucial issues. The shallowness and superficiality of the analysis is shocking. The reasoning is absurd, fallacious, self-serving and deeply flawed that it amounts to the CCI basically saying that “the Constitution must be interpreted this way because I said so!” The CCI has rewritten the Constitution under the guise of interpretation. The destabilizing effect of a failure to successfully tackle the current crisis can only contribute to further deterioration in an already fragile transition in Ethiopia. To amicably manage an impending constitutional and political crisis, as the term of the current parliament is coming to an end, the discussion between the government and opposition parties within the constitutional framework is vital.

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