

# The Constitutionality of Election Postponement in Ethiopia amidst COVID-19 Pandemic

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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 was because the state of emergency measure in Ethiopia, to contain the spread of COVID-19, was in conflict with constitutional deadlines for elections. The constitutional lacuna was due to the absence of a provision regulating election postponement. In response to this constitutional dilemma, the four possible 'options': dissolving the parliament, declaring state of emergency, constitutional interpretation and amendment of the Constitution were suggested. This paper investigates the constitutionality of each of the four alternatives. Given the risks of unconstitutionality in the first three options mentioned above, the constitutionally correct approach, although not ideal during a state of emergency, was to amend the Constitution. But the House of Federation, the Ethiopian Upper House entrusted to interpret the Federal Republic of Ethiopia Constitution, decided and postponed the election indefinitely. Accordingly, the constitutional interpretation option to postpone elections was an unconstitutional alternative. The research employed qualitative research methods and the documents included, among others, the Constitution, the regional and international legal frameworks and the decisions of the House of Federation were considered.*

*Key Words: Constitutional Interpretation, Covid-19, Election deferral, Ethiopia, Second Chamber*

## **Introduction**

The Coronavirus (COVID-19) pandemic, which broke out in China in late 2019, forced most states to impose either partial or complete lockdown. Some others have declared a state of

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emergency to curb the spread of the pandemic.<sup>1</sup> To certain states, the declaration of state of emergency during the coronavirus times<sup>2</sup> is in contemporaneous with the election period. Such state of emergency has placed unprecedented pressure on states as to whether to hold or postpone scheduled elections, resulting in controversies in either case<sup>3</sup>. Only 36 states and territories have decided to hold national or subnational elections as originally planned despite concerns related to COVID-19. At least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.<sup>4</sup>

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, some others have neither constitutional provisions nor any legal frameworks to do so<sup>5</sup>.

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

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<sup>1</sup>Emergency Measures and Covid-19: Guidance Organization for Higher Commission for Human Rights (2020), [https://www.Ohchr.Org/Documents/Events/Emergencymeasure\\_COVID19.Pdf](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."

<sup>2</sup>At Least 70 countries and territories across the globe have decided to postpone national and subnational elections due to COVID-19.

<sup>3</sup> Antonio S, *Managing Elections Under The COVID-19 Pandemic: The Republic Of Korea's Crucial Test*, International Institute For Democracy And Electoral Assistance(IDEA), Technical Paper, 1-8.(2020), Accessed at date DOI: <https://Doi.Org/10.31752/Idea.15>.

<sup>4</sup>Global Overview Of COVID-19 Impacts on Elections (2020), <https://Www.Idea.Int/News-Media/Multimedia-Reports/Global-Overview-Covid-19-Impact-Elections>. Accessed on August 2020. 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).

<sup>5</sup>Sead, A. 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>.

<sup>6</sup> Zemelak, A, *Federalism and the COVID-19 Crisis: Perspective from Ethiopia*, Forum of Federation, (2020). [https://Www.Researchgate.Net/Publication/341205760\\_Federalism\\_And\\_The\\_COVID-19\\_Crisis\\_the\\_Perspective\\_From\\_Ethiopia/Link/5eb3f35745851523bd49b6c1/Download](https://Www.Researchgate.Net/Publication/341205760_Federalism_And_The_COVID-19_Crisis_the_Perspective_From_Ethiopia/Link/5eb3f35745851523bd49b6c1/Download)

election, which was scheduled to be held in August 2020, for an unspecified time.<sup>7</sup> A week after the *de facto* lockdown, a formal state of emergency was declared all over the country for five months on 8 April 2020<sup>8</sup> and had 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 not only in the country's constitutional law jurisprudence but also it had not been discussed in academic publications either.

This was because the state of emergency measure in Ethiopia, due to COVID-19, was in conflict with constitutional deadlines for elections. The constitutional lacuna was due to the absence of a provision regulating election postponement. Although any legal measures to postpone election schedule and pass constitutional deadlock was far from simple, the parliament, on 29 April 2020, 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)<sup>9</sup>, constitutional interpretation was endorsed and the issue was referred to the Council of Constitutional Inquiry (CCI).<sup>10</sup> The CCI has a legal advisory role to the House of Federation (HoF).

On 11 June 2020, the HoF fully adopted the recommendations made by the CCI over the constitutional matters referred to it for interpretation by the parliament. Finally, the CCI recommended the deferred general elections to be postponed indefinitely until COVID-19

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<sup>7</sup>International Foundations For Electoral Systems: Elections Postponed Due To COVID-19 - As Of August 20, 2020, 1–8.

[Http://OhfgljdgelakfkefopgkIcohadegdpjf/Https://Www.Ifes.Org/Sites/Default/Files/Elections\\_Postponed\\_Due\\_To\\_Covid-19.Pdf](http://OhfgljdgelakfkefopgkIcohadegdpjf/Https://Www.Ifes.Org/Sites/Default/Files/Elections_Postponed_Due_To_Covid-19.Pdf).

<sup>8</sup> 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.

<sup>9</sup> Later TPLF, a party that administers one of the 10 th regions of Ethiopia, has attacked the northern command and entered the full scale war with the federal government over the disagreement of the election postponement as an immediate factor and the former had held its own regional elections.

<sup>10</sup>The Council of Constitutional Inquiry Is Established by Virtue of Art.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.

pandemic no longer poses a risk to public health confirmed by the very parliament which has direct vested interest in the outcome.<sup>11</sup>

The verdict of the HoF to postpone the election indefinitely, however, raised concerns whether the decision regards the premise of the FDRE Constitution. This research evaluates whether constitutional interpretation did adhere to the premises of the FDRE Constitution. The research also investigates the constitutionality of each of the four alternatives.

The research employed qualitative research methods and the documents included, among others, the Constitution, the regional and international legal frameworks and the decisions of the House of Federation were considered.

The research has four parts. The first part discussed how some states' constitutional provisions or/and legal rules entertain election postponements during emergency situations. The second part examined the constitutionality of election postponement in Ethiopia. The third part examined whether the four options—dissolving the parliament, declaring state of emergency, amendment of the FDRE Constitution and constitutional interpretation—adhere to the Constitution or are they (un)constitutional. The conclusion and the way forward are presented at the end of the work.

### **1. Elections during Emergencies: Experiences of Constitutional Provisions of Some States**

Although deadlines for holding elections are often entrenched in 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.<sup>12</sup> Some countries have either constitutional provisions or/and legal rules to entertain election postponements due to emergency situations. During a 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

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

<sup>12</sup> Katherine, E, *Legal Considerations When Delaying or Adapting Elections*, International Foundation for Electoral Systems. (2020) [https://www.ifes.org/sites/default/files/ifes\\_covid19\\_briefing\\_series\\_legal\\_considerations\\_whe\\_delaying\\_or\\_adapting\\_elections\\_june\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_legal_considerations_whe_delaying_or_adapting_elections_june_2020.pdf), Accessed 14 January 2021.

after the Proclamation has ceased to operate.<sup>13</sup> 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 for not more than one year but it shall not be extended beyond six months after the termination of the war.<sup>14</sup> 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 than one hundred and twenty days following the expiry of the extension or abridgement period.<sup>15</sup> The Constitution of Estonia also prohibits the election of members' of the new parliament during a 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.<sup>16</sup> 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.<sup>17</sup> According to the legislation of Armenia, no referendum can take place during the period of the state of emergency as a result a constitutional referendum scheduled for April 5/2020 had been postponed in Armenia as the country declared a state of emergency to deal with the Coronavirus pandemic.<sup>18</sup> Thus, states having constitutional provisions or legal frameworks to entertain election postponement, can easily pass emergency situations which would otherwise have paved the way for constitutional lacuna and conflicts among competing groups.

Any election is by nature a rules-based exercise, and changing the rules too close to the game, or without regard to flow-on effects, can be damaging and illegitimate.<sup>19</sup> It is inescapable in some

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<sup>13</sup> IDEA, *Voting From Abroad: The International IDEA Handbook*,(2020), <<https://www.Idea.Int/Publications/Catalogue/Votingabroad-International-Idea-Handbook>>, Accessed 17 July2020.

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

<sup>15</sup>Malah, A, *Constitutional Protection in Cameron: Critique of the Amendment Mechanism*, MA Thesis, Central European University, 21(2009).

<sup>16</sup> The 1992 Estonia Constitution, Art.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](http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-e.htm)

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

<sup>18</sup>Constitutional Referendum Postponed as Armenia Declares State of Emergency, Asbarez Staff, 2020. <http://asbarez.com/193019/constitutional-referendum-postponed-as-armenia-declares-state-of-emergency/>

<sup>19</sup> Supra note 12.

contexts that decisions to postpone or modify election periods and modalities will become politicized and heavily contested. This is even true in democratic states let alone in a country like Ethiopia which suffers from a democratic deficit and has many polarized interests.

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 year prior to an election.<sup>20</sup> The International Foundation for Electoral Systems (IFES), in its Guidelines and Recommendations for Electoral Activities during the COVID-19 Pandemic, has noted the following legal elements to be considered in relation to election postponements and modifications<sup>21</sup>:

- 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

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<sup>20</sup> 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.

<sup>21</sup> Supra note 12

[https://www.ifes.org/sites/default/files/ifes\\_covid19\\_briefing\\_series\\_legal\\_considerations\\_when\\_delaying\\_or\\_adapting\\_elections\\_june\\_2020.pdf](https://www.ifes.org/sites/default/files/ifes_covid19_briefing_series_legal_considerations_when_delaying_or_adapting_elections_june_2020.pdf).

- Provisions in the legal or regulatory framework requiring certain forms of accessibility, inclusion or consultation

When states, in the interest of public health, are unable to hold elections which touch upon citizens' fundamental rights 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.<sup>22</sup>

## 2. The Constitutionality of Election Postponement in Ethiopia

Coming to Ethiopia, the FDRE Constitution stipulates that the members of the HPR, the Lower House, 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> The Constitution also prohibits assuming state power in any manner other than that provided under the Constitution.<sup>27</sup>

If there is a *force majeure* to extend the election in an 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.<sup>28</sup> The government, when it comes to elections, is one of the actors, not the sole decision maker. One can also argue that the absence of

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<sup>22</sup> Kotanidis et al, *States of emergency in response to the coronavirus crisis: Situation in certain Member States*, EPRS, (2020).

<sup>23</sup> The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1st, No. 1, Art.54.

<sup>24</sup> FDRE Constitution , Art. 58.

<sup>25</sup> FDRE Constitution, Art. 54.

<sup>26</sup> 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.

<sup>27</sup> FDRE Constitution, Art. 9.

<sup>28</sup> Supra note 3

constitutional provisions to postpone the election schedule was made intentionally by the architects of the Constitution. This is because the Constitution was drafted after long years of civil wars and it aimed to prohibit any incumbent government from extending its term limit under the guise of an election postponement provision. The state of emergency, due to the pandemic, came at a precarious time for Ethiopia's short-lived (democratic) transition in which the country was already struggling to meet the expectations of its population. The postponement of the election in Ethiopia created a constitutional crisis and unfolded in a legal vacuum. Thus, the decision of the HoF to postpone the election was not 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.

### **3. Attempting to Validate Election Postponement in Ethiopia: the Four 'Options' and their (un)constitutionality**

This section evaluates whether the four options—dissolving the parliament, declaring state of emergency, amendment of the FDRE Constitution and constitutional interpretation—adhere to the Constitution or are they unconstitutional. It also investigates the constitutionality of opting for a constitutional interpretation to solve the constitutional controversy.

#### **3.1. Dissolving of the Parliament**

Dissolution is the power to dismiss a parliament or other legislative assembly such that the members of the assembly cease to hold office and new elections are required.<sup>29</sup> Dissolution may be required due to one or more of the following factors: as a means of enforcing party discipline and strengthening the executive, as a catalyst for government formation processes, as a way of breaking inter-institutional deadlock, as a way of reinforcing a government's popular mandate, to win a mandate following a change of government, as a way of testing public opinion on major issues and /or as a way of choosing the timing of elections.<sup>30</sup>

Dissolution of the parliament was one of the four suggested options by the government to get out of the legal conundrum. The FDRE Constitution under Article 60 allows the dissolution of the House. The specific constitutionally anticipated grounds to dissolve the House is in order [to hold new elections] if the Council of Ministers lose its majority in the House or if the political

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<sup>29</sup> International Institute for Democracy and Electoral Assistance (IDEA), 2016. <https://www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf>, Accessed 25 July 2021.

<sup>30</sup> Ibid



parties cannot agree to the continuation of the previous coalition or to form a new majority coalition.

The FDRE Constitution pursuant to Article 60 (1) and (2) allows the dissolution of the House under the following stringent condition.<sup>31</sup>

First, ‘the dissolution of the House is to be made before the expiry of its term.’ The assumption of the dissolution of parliament shall be concluded before the five-year term limit expires. Given five months were left for the term of the parliament’s legal termination, the dissolution of the House could not be legally substantiated. Had the attempt to dissolve the parliament been made earlier before the date of the expiry, it would have been constitutional. Otherwise, the term of the parliament should have not been close to its termination.

Second, ‘elections shall be organized within six months after the dissolution of the House.’ But the debate—since early April 2020—was how to legally postpone the National Elections which were scheduled for August 2020; not to hold an interim election within the House’s term of office. Hence, Article 60 cannot be invoked to ascertain term extension, and dissolution of the parliament cannot be justified to extend the term limit of the ruling government beyond the constitution’s allotment period. Unless understood as such, it means that an incumbent can always extend its term by at least six additional months by deliberately dissolving parliament just before its term expires.

Third, ‘the dissolution of the House by the Prime Minister requires the consent of the members of the parliament (MPs)’. Getting majority support from the MPs could not be difficult as the House was held only by the same political party, the then Ethiopian People’s Revolutionary Democratic Front (EPRDF), rebranded as Prosperity Party.<sup>32</sup>

Fourth, ‘the loss of the Council of Ministers to have a majority in the House and cannot agree to the continuation of the previous coalition.’ This point doesn’t need further explanation as the concern was not to sustain or form a coalition government but looking for any possible legal options to justify election postponement in the absence of clear constitutional provisions. Thus,

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<sup>31</sup> FDRE Constitution, Art. 60

<sup>32</sup>Analysis: Deferred Election, State Of Emergency and Covid19 – How Can Ethiopia avoid an Impending Constitutional Crisis?(2020) Addis standard /April 10, 2020 /

there are not sufficient constitutional grounds to dissolve the parliament and form a new government thereafter.

Even if a new government were to be established, following the dissolution of the House, it shall continue as a caretaker government that does nothing beyond conducting the day to day affairs of government and organizing new elections.<sup>33</sup> Ethiopia, due to COVID-19, was under a state of emergency and the logic of a caretaker government with limited powers was inconsistent with the logic of emergencies, which necessitated the government with full, even exceptional powers during and in the immediate aftermath of the emergency.<sup>34</sup>

Establishing a caretaker government was not only unconstitutional to Ethiopia but also practically was not the right decision while the country has faced internal political cleavage and external challenges, too.<sup>35</sup> Of course, when proposing ‘dissolution of the House’ as one of the alternatives to pass the deadlock, the government expressed its concern not to have a weak government that cannot enact new proclamations, regulations or decrees, nor may it repeal or amend any existing law.<sup>36</sup> Generally, the FDRE Constitution under Article 60 (1) and (2) allows dissolution of parliament to handle the power vacuum created in the ruling government only within its five years term of office; not to extend the next regular elections. Had dissolution of the parliament been opted as the legal solution to postpone national elections it would have been unconstitutional.

### **3.2. State of Emergency used as a Ground to Postpone Election in Ethiopia**

The Council of Ministers of the Federal Government has the power to declare a state of emergency, should an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur.<sup>37</sup> This part examines whether the above-

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<sup>33</sup> FDRE Constitution, Art. 60(5).

<sup>34</sup> Yonata Tesfaye and etal, Commentary: Making Sense of Ethiopia’s Constitutional Moment,2020, <https://addisstandard.com/commentary-making-sense-of-ethiopia-constitutional-moment/>, Addis Standard, Accessed on 05 July2021.

<sup>35</sup> Ibid

<sup>36</sup> Bantayehu Demlie, Analysis: Deferred Election, State of Emergency and #Covid19 – How Can Ethiopia Avoid An Impending Constitutional Crisis?, Addis Standard, <https://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/>, Accessed On 05 July2021.

<sup>37</sup> FDRE Constitution, Art. 93

mentioned grounds–conditions used to declare a state of emergency in Ethiopia–can also be used to justify postponing elections as the government sought it.

From these circumstances, the occurrence of a pandemic can be used as the justification to impose a state of emergency which was already declared on 8<sup>th</sup> of April 2020 due to COVID-19 until the end of August 2020. The parliament can extend by a two-thirds majority vote to renew every four months successively.<sup>38</sup> If the state of emergency had been renewed for another four months i.e., until the end of December 2020, still the time would not have been sufficient to handle the election. Of course, the FDRE Constitution neither puts a maximum limit on the number of renewals of an emergency decree nor mentions circumstances to extend. And there is no constitutional provision that allows a declaration of state of emergency simply to freeze the term of the House from counting. Here the ‘state of emergency’ was also anticipated by the government to justify election postponement as well. But election postponement is not one of the grounds, under the FDRE Constitution or the electoral law, to declare a state of emergency and can’t be used to extend the term of the parliament beyond allotted time. There should be any legitimate and constitutionally accepted cause (other than election postponement) to the result (i.e., to declaring state of emergency).

The FDRE Constitution also allows declaring state of emergency due to ‘a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel’. The constitutional crisis that has loomed after September 2020 was not due to any other external forces i.e., riots and invasions that require a state of emergency but emanates either from the very Constitution itself– the constitutional failure to legitimize election postponement.

Partly, the absence of any single constitutional provision or any legal framework that addresses explicitly or even impliedly election postponement endangers the constitutional order. Therefore, the constitutional lacuna–due to the absence of provisions to handle election postponement–cannot be mitigated by declaring a state of emergency. If it is assumed that declaring a state of emergency is the possible way out, it is impossible to hold an election while the very right to

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<sup>38</sup>FDRE Constitution, Art. 93(3) A state of emergency decreed by the Council of Ministers, if approved by the House of Peoples’ Representatives, can remain in effect for up to six months. the House of Peoples’ Representatives may, by a two-thirds majority vote, allow the state of emergency proclamation to be renewed every four months successively.

movement and assembly, among others, are limited during such extraordinary times.<sup>39</sup> Letting the country to stay in a prolonged state of emergency has also its own far reaching consequences in limiting fundamental human rights and freedoms. Thus, declaring a state of emergency, even with sufficient reasons, cannot create a conducive environment to handle elections except extending the term of office of the incumbent government whose term limit is expired.

The last, but not least, ground to declaring a state of emergency under the FDRE Constitution is the ‘external invasion’ and is not worth mentioning here as there is not any such threat to the country. A state, even fighting at war, may hold elections and Ethiopia did not postpone the 2000 national elections while it was at full scale war with its neighboring Eritrea between 1998 and 2000.

The FDRE Constitution, while listing grounds to declare a state of emergency, does not say anything about election postponement if the election schedule occurs amidst such an extraordinary situation.<sup>40</sup> Some argue, citing Article 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 a state of emergency. If an election is not conducted, there will not be a government as per Article 54 cum 93. Ethiopia, given its 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 the non-derogable rights under the FDRE constitution<sup>41</sup> even during a state of emergency, holding elections, one of the basic manifestations of self-determination, cannot be postponed.

Had the Constitution anticipated emergency situations during election periods that could potentially prevent the holding elections as per the scheduled timeline the Constitution would

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<sup>39</sup> FDRE Constitution, Art. 93. The exclusive listing of non-derogable rights during state of emergency under the FDRE 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.

<sup>40</sup> FDRE Constitution, Art. 93.

<sup>41</sup> 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 Art.1, 18, 25, and sub- Art.1 and 2 of Art.39 of this Constitution. The exclusive listing of non-derogable rights during state of emergency under the FDRE Constitution are: art 1 which describes the nomenclature of the state ‘the Federal Democratic Republic of Ethiopia’; Art.18 which prohibits inhumane treatment; Art.25 which guarantees equality of everyone before the law and equal protection of the law and Art.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.

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 proclaimed legal frameworks that govern election delaying or rescheduling during an emergency situation.

Generally, unlike some countries' constitutions, that foresee impending circumstances during a state of emergency that delay from holding elections or put exclusive provision to entertain election postponement, the FDRE Constitution does not have any such single provision to justify election postponement. In the absence of any constitutional provisions and legal frameworks, declaring a state of emergency merely to justify election postponement and extend the term limit of the expired parliament is duly unconstitutional. Thus, declaring a state of emergency, to handle the constitutional crisis, is doubling the problem and half the solution and it is not looking for solutions for problems but problems for solutions.

### **3.3. Constitutional Amendment**

A constitution, a supreme law of a country, needs to be amended over time to adjust provisions that are inadequate. Motivations for changing the written text of a constitution differ. Some amendments are made for the public interest, for example: (i) to adjust the constitution to the environment within which the political system operates (including economics, technology, international relations, demographics, changes in the values of the population etc.); (ii) to correct provisions that have proved inadequate over time and (iii) to further improve constitutional rights or to strengthen democratic institutions.<sup>42</sup>

Constitutional amendment was one of the four possible 'options' suggested by the Ethiopian government to legalize election postponement following the broke out of COVID-19 in the country. The general procedure of constitutional amendment mechanism of the FDRE Constitution is clearly stipulated under Art 104 and 105 of the Constitution. While the former sets *initiative* procedures for any proposal for constitutional amendment, the latter puts forth a *ratification* process. As per Article 104, there are no unamendable provisions under the FDRE Constitution.

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<sup>42</sup> The International Institute for Democracy and Electoral Assistance (International IDEA), Constitutional Amendment Procedures (2014), 1-17.

As Ethiopia is a federal state, its constitutional amendment mechanism (initiation and approval) requires the participation of both the federal and the regional governments.<sup>43</sup> Regarding the initiation of constitutional amendment, it can be started by either the federal or regional governments. If the amendment proposal is initiated at the federal level, the proposal should be supported by a two thirds majority vote in the HPR, or by a two thirds majority vote in the HoF; or if the amendment is initiated at the regional level, it requires one-third of the State Councils (i.e. three out of the then<sup>44</sup> nine) of the member states of the Federation to approve the proposal by majority vote.

Compared with initiation of amendments, ratifications of proposed amendments require more rigid requirements and restrictions. Based on the rigidity of criteria to ratify, there are two kinds of provisions. The first kinds of provisions are the ones that are given special protection with relatively rigid ratification requirements. They include all rights and freedoms specified under chapter three of the FDRE Constitution, the provision that provides for the initiation of amendment<sup>45</sup> and the amending provision itself.<sup>46</sup> The ratification of these provisions requires the endorsement of all State Councils by a majority vote and by the two Houses' two-thirds majority vote at the federal level in a separate session.

The second category includes other provisions of the Constitution that require relatively less rigid procedure to approve and can be ratified with the approval of the two Houses' two-thirds majority vote in a joint session and by the majority vote of the two-thirds of the Councils of the member States of the Federation.<sup>47</sup> Although the FDRE Constitution stipulates the need for popular discussion during the initiation of amendments, it does not require popular approval for ratification.<sup>48</sup> It is furthermore not clearly stipulated whether "popular discussion" refers to referendum or any other form of participation and the amending clauses do not mention constitutional amendments to be published in the *Negarit Gazeta*.

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<sup>43</sup> FDRE Constitution, Art. 104 and 105.

<sup>44</sup> The Ethiopian Federation initially had nine regional governments until the Sidama regional state formally joined the Federation in July 2020 as the tenth member.

<sup>45</sup> FDRE Constitution, Art. 104.

<sup>46</sup> FDRE Constitution, Art.105.

<sup>47</sup> FDRE Constitution, Art. 105(2).

<sup>48</sup> FDRE Constitution, Art.104.

There have not been any formal experiences of constitutional amendment in Ethiopia. The ruling party, the architect of the Constitution and basically still in power although in a different form, has resisted any amendment proposal especially from opposition parties.<sup>49</sup> It was not only rejecting the amendment proposals but also blaming the opposition themselves and their initiatives altogether as if it was a move to undermine the constitutional order of the country. But, the government did amend two provisions<sup>50</sup>- the concurrency of taxation power and national census. The first amended constitutional provision is Article 98 in 1997. Accordingly, the concurrency of taxation power between the federal and regional governments amended into revenue sharing, which gives more power to the federal government to levy, collect and administer specific taxes while regional governments share the collected money based on the criteria set by the HoF.

In 2005 when the national census—supposed to be held every ten years as per Article 103 (5) of the Constitution without any exception—was in conflict with the national election, the parliament amended Article 103(5) of the Constitution. And later the parliament amended as ‘the ten years schedule can be extended due to *a force majeure* approved by the joint session of the two Houses.<sup>51</sup> The fact that the FDRE Constitution obliges laws approved by HPR to be proclaimed in the *Negarit Gazeta*, none of the amended constitutional provisions were published nor included into the Constitution.<sup>52</sup> The above constitutional provisions, thus, were amended without a formal constitutional amendment procedure but with the decision of the executive and/or the House.

Following the broke out of COVID-19 that hindered the conduct of elections, the Ethiopian government proposed, among other things, to amend the FDRE Constitution to postpone elections during emergency situations. Although amendment of the Constitution was alluded by many legal experts as a legally indisputable remedy<sup>53</sup>, there is still unanswered question to be addressed including:

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<sup>49</sup> Zelalem Eshetu, Unconstitutional Constitutional Amendments in Ethiopia, *Haramaya Law Review/ Vol 4(1)*, 2015, Acceded date, <https://www.ajol.info/index.php/hlr/article/view/148618>

FDRE Constitution Article 71(2).

<sup>50</sup> FDRE Constitution, Art. 98 And 103.

<sup>51</sup> Supra note 49.

<sup>52</sup> FDRE Constitution Article 71(2).

<sup>53</sup> Supra note 36.

1. Is it feasible and legitimate amending the Constitution during a state of emergency?
2. Which constitutional provisions have to be amended to fill the current legal vacuum concerning parliamentary term of office?

Concerning amending constitutional provisions *vis-a-vis* the state of emergency, some constitutions put constitutional amendment restrictions during state of emergency (e.g. Cambodia, and Estonia).<sup>54</sup> This is with the intention to avert any amendments from being taken place under emergency circumstances when those incumbent governments may abuse public fear to seize additional power. The African Charter on Democracy, Elections and Governance,<sup>55</sup> to which Ethiopia is a party, obliges States Parties to ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.<sup>56</sup>

The FDRE Constitution does not prohibit amending its provisions during emergency situations. Amidst COVID 19 pandemic, the Ethiopian parliament was prompted to amend the Constitution to fill the constitutional lacuna created by the absence of explicit constitutional provisions that indisputably govern election postponement. Since amending the Constitution in order to add or modify clauses needs to be conducted in a normal situation, its feasibility was far from attainable, given Ethiopia was under state of emergency to contain the spread of COVID 19. The FDRE Constitution requires, among other things, public discussion for constitutional amendments<sup>57</sup> and such participation is difficult during a state of emergency period that limits, among other things, public gathering and movements. Though the Tigray Regional State duly rejected all proposals suggested by the government including amending the Constitution, getting approval from the six regional governments out of the then nine members of the federation is a sufficient condition in addition to the two Houses to amend the FDRE Constitution. To protect the spirit of the Constitution from short-sighted or partisan amendments, legal scholars

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<sup>54</sup>The International Institute for Democracy and Electoral Assistance (International IDEA), Constitutional Amendment Procedures (2014), 1-17.

<sup>55</sup> African Union, African Charter on Democracy, Elections and Governance, 30 January 2007, available at: <https://www.refworld.org/docid/493fe2332.html> [accessed 24 August 2020].

<sup>56</sup> African Charter on Democracy, Elections and Governance, Article 10.

<sup>57</sup> FDRE Constitution, Art.104: Any proposal for constitutional amendment, if supported by two-thirds majority vote in the House of Peoples' Representatives, or by a two-thirds majority vote in the House of the Federation or when one-third of the State Councils of the member states of the federation, by a majority vote in each council have supported it, shall be submitted for [discussion and decision to the general public] and to those whom the amendment of the Constitution concerns.



recommended the Ethiopian government to refrain from amending the Constitution during the state of emergency while public engagement was limited.<sup>58</sup> The amendment decision would have been considered as a unilateral decision provided that the parliament is of a single party government elected in an undemocratic manner. Had the constitutional amendment happened last May 2020 in Ethiopia during a state of emergency it would have been considered as a move to extend the term limit of a single party that dominated the parliament. This is because under the guises of constitutional amendment, some governments and presidents extended or even abolished their term limit to stay in power indefinitely. Such extension of the term limit of presidents and parliaments under the guise of amendments was practiced in Tunisia 2002, Chad in 2006, Uganda in 2005, Azerbaijan in 2009, Venezuela in 2009, Hungary in 2010), Yemen in 2011 and Burundi (2015) and Russia in 2008 and 2020 and tried and succeeded in circumventing term restrictions by abolishing relevant provisions through constitutional amendments.<sup>59</sup> Otherwise, there would have been constitutional provision in Ethiopia (like South Korea) that had prohibited any constitutional amendments from being applied to incumbent governments.

One of the second questions would have been identifying the specific constitutional provisions to be amended had the government resorted to constitutional amendment. These provisions would have included ‘the duration of the Houses’, ‘the right to vote and to be elected’ and ‘state of emergency’. This part discusses these provisions that could have potentially been proposed for amendment.

Obviously, Article 54 cum 58 of the Constitution, which limits the term of the members of the HPR to five years without exception, would have been amended. The amended version would have considered conditions during a state of emergency that prevent the term of a parliament from expiring and that allow it to be extended until the exigencies end. Article 93 of the

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<sup>58</sup> Supra note 48.

<sup>59</sup> Davide, E., et al, From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons From Honduras, *Global Constitutionalism*, Cambridge University Press,8:1,(2019), P 40-70. See Also S Choudhry, ‘Transnational Constitutionalism and a Limited Doctrine Of Unconstitutional Constitutional Amendment: A Reply to Rosalind Dixon And David Landau’ (2017) 15(3) *International Journal Of Constitutional Law* 826, 828 (‘Proposals to relax or remove Presidential term limits are the most Visible and Common example of Constitutional Amendments in the Service of Democratic Backsliding, having generated Constitutional Conflict in recent years across Sub- Saharan Africa (Burkina Faso, Burundi, Cameroon, Chad, Congo Brazaville, Democratic Republic Of Congo, Gabon, Guinea, Malawi, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo, Uganda, And Zambia) And Latin America (Colombia, Ecuador, Honduras, Nicaragua, And Venezuela).’)

Constitution that empowers the government to declare the state of emergency should also prohibit the election of members' of the new parliament during state of emergency nor shall the authority of the existing one be terminated, and must state as elections to be held [within the possible shortest time frame] after the end of the emergency situations. Article 38 of the Constitution which guarantees every Ethiopian national to have the right to vote and to be elected at a periodic interval (every five years) would have also been one of the amended provisions and put certain sudden conditions that hamper from holding regular elections.

### **3.4. Constitutional Interpretation**

The Ethiopian parliament claimed and proposed that the only possible solution, to the constitutional crisis concerning election postponement, should be exhausted within the perimeter of the Constitution as opposed to extra constitutional means. And the parliament had finally endorsed constitutional interpretation, among the four<sup>60</sup> recommended 'options', as the least complex decision to exit the constitutional quandary. The FDRE Constitution affirms that the fundamental rights and freedoms (including voting and being 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.<sup>61</sup> In our case the task of doing interpretation of the Constitution mandates any organ not to intrude on the constitutional right to vote and be elected. The FDRE Constitution—concerning the 'application and interpretation' of the constitution—obliges the interpreter to have the responsibility and duty to respect and enforce constitutional provisions and premises while giving interpretation.<sup>62</sup>

The incumbent's decision of requiring constitutional interpretation concerning election postponement, given the constitutional provisions that fixes the term of the office of any elected parliament to be five years<sup>63</sup>, heated up legal debates on, among others, the following issues:

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<sup>60</sup> These four options were put forward by the administration dissolving the parliament, declaring a state of emergency, amendment of the FDRE Constitution and constitutional interpretation.

<sup>61</sup> FDRE Constitution, Art.13.

<sup>62</sup> FDRE Constitution, Art. 13; Under the scope of application and interpretation, the 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.

<sup>63</sup> FDRE Constitution, Art.58 and 54.

1. Do the constitutional provisions, governing the period of conducting election and the term of the two Houses as well as the Executive branch, merit constitutional interpretation?
2. Were the specific constitutional provisions tabled for interpretation sufficient and duly selected?

The first question regarding constitutional interpretation, in the specific case of election deferral, starts from questioning the necessity of the very act of interpreting the FDRE Constitution. This is due to the Constitution having explicit provisions that govern election schedules– determining the term of office of the parliament for five years.<sup>64</sup>

The FDRE Constitution also, while prescribing the meetings of the House and the duration of its term, duly sets the term of the parliament at [five] years and reiterates that [elections] for a new House shall be concluded one month prior to the expiry of the House’s term.<sup>65</sup> The debate is about ‘what is not clear about *five years*’ that needs interpretation. Of course, the FDRE Constitution–while determining the term of office of the parliament–neither prohibits nor allows term extension. And some claimed that the FDRE Constitution is rather silent concerning term extension.

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 that violates it.<sup>66</sup> 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 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 second debate, regarding constitutional interpretation, was regarding the selected constitutional provisions tabled for interpretation. It is believed that a holistic understanding of a constitution and a robust interpretation by the responsible body is a necessary means of guaranteeing constitutionalism and making an indisputable and consistent reform [of a

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<sup>64</sup> FDRE Constitution, Art. 54.

<sup>65</sup> FDRE Constitution, Art. 58.

<sup>66</sup> FDRE Constitution, Art. 9.

constitution] in line with the ever changing conditions of life. However, the Ethiopian ruling Prosperity Party, the only party in the parliament, listed only three constitutional provisions (Article 54, 58 and 93 which, state about the election of members of the parliament, the duration of the term of the members of parliament and the declaration of the state of emergency respectively) to be interpreted and forwarded to the HoF.<sup>67</sup> Although identifying specific constitutional provisions to be interpreted requires careful selection by the interpreter, the parliament decided this in a hurry on 5 May 2020, 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 potentially relevant provisions raises concerns as to the holistic interpretation of the Constitution. The provisions the government wanted to be interpreted should not be read by excluding other pertinent provisions. This is because depending on a single or two or even three provisions may lead to a hasty generalization.

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.<sup>68</sup>

The crux of the debate following the global pandemic—whether periodic elections to be 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<sup>69</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>70</sup>, 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 it considers merely Article 54, 58 and 93 excludes Article 13

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<sup>67</sup> It does not mean that these are not the right provisions for interpretation.

<sup>68</sup> FDRE Constitution, Art. 9(3).

<sup>69</sup> African Charter on Democracy, Elections and Governance (ACDEG, Art. 2(3) And 3(4).

<sup>70</sup> International Covenant on Civil and Political Rights, Art. 25(B).

of the FDRE Constitution that requires the bill of rights to be interpreted in a manner conforming to the international instruments adopted by Ethiopia, which [require periodic] election.<sup>71</sup>

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 the election process. Of course, some members of parliament did not accept the very necessity of constitutional interpretation, citing Article 54 and 58 of the Constitution which have unequivocal provisions governing elections schedule without any exception. Still, Article 45 of the Constitution should not have been left from being referred during the interpretation, since it requires the establishment of only a ‘parliamentary’ 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 constitution prescribes. And any attempt to establish such a government would have been, of course, understood as contradicting the constitutional provisions.

Generally, a constitutional interpretation is not like an ordinary judicial exercise and hence, the constitutional interpreter need not to limit itself to what has been raised or asked by the petitioners only. Once the question is raised, the interpreter—unlike the ordinary courts—has the relative liberty to address related matters. The very purpose of constitutional interpretation is to maintain the supremacy of the constitution. And hence, a constitutional interpreter in the course of interpreting the constitution can see other related provisions, the preamble and other parts of the constitution.

#### **3.4.1. Prohibition of Abstract Review and Interpretation Ground under the FDRE Constitution**

Due to the fact that the perilous situation created by COVID-19 worsened the seemingly looming constitutional crisis 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 was, rather, unconstitutional in itself 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* (Randall,

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<sup>71</sup> FDRE Constitution, Art. 13(2).

1994). Hence, the main inquiry should be whether the provisions under question – Articles 54 (1), 58 (3) and 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 (Guyora, 2019). Article 54 (1) and 58 (3) explicitly state and limit the term of the HPR to five years without exception and Article 93 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 personnel, a natural disaster, or an epidemic”. 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 the fore is when two constitutional provisions are apparently contrary to each other at least textually.<sup>72</sup> 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 limits. Article 9(3) clearly rules out the assumption or continuation of power other than by means and procedures laid down under the constitution. And an election is the only constitutional avenue to assume power which the FDRE Constitution stipulates as there will be regular elections for every five years.<sup>73</sup> Declaring a state of emergency as per Article 93 (1)(a) also cannot be used to extend the tenure of the parliament beyond five years as specified under Article 54 (1). Therefore, there are no justifiable constitutional interpretation grounds in this case that merit constitutional interpretation. This sounds as there are no justifiable constitutional interpretation grounds in this case that would deem constitutional interpretation.

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<sup>72</sup> FDRE Constitution (Art.84 (2)).

<sup>73</sup> FDRE Constitution, Art.54.

### 3.4.2. The Prohibition of Abstract Review under the FDRE Constitution

In this regard, constitutional interpretation can be roughly bifurcated into two.<sup>74</sup> These are abstract review and concrete review procedures. 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.<sup>75</sup> 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 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).<sup>76</sup> The Proclamation No 798/2013 regulating the CCI has also no provision authorizing 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.<sup>77</sup> Hence, based on the preceding legal analysis one can soundly conclude that the constitutional interpretation option apparently preferred by the parliament is an unconstitutional alternative.

### Conclusion

From the suggested four possible solutions—dissolving the parliament, declaring state of emergency and constitutional interpretation—were unconstitutional options to postpone elections in Ethiopia as per its Constitution. Given the risks of unconstitutionality in the three options mentioned above, the constitutionally correct approach, although not ideal during a state of

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<sup>74</sup> Choudhry, S, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, International Journal of Constitutional Law, 15(3), pp. 23- 34(2017).

<sup>75</sup> FDRE Constitution, Art.37.

<sup>76</sup> Solomon Dersso, *Constitutional Based National Dialogue the best way to avert a Constitutional Crisis Triggered by Deferred Election*, Addis Standard, Op-Eds, 2020.

<sup>77</sup> FDRE Constitution, Art. 37(1), 62(1), 83(1), 84(1 and 2) and Proclamation No 798/2013.

emergency, was to amend the Constitution. Thus, the postponement of the scheduled election under the patronage of constitutional interpretation was unconstitutional and made the decision of the HoF as a constitutional interpretation by name and a political decision in practice. The constitutionality of election postponement in Ethiopia, in the absence of clear constitutional provision, was not duly legalised.

### **The Way Forwarding**

The CCI relied on fallacious reasoning on crucial issues. 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 the discussion between the government and opposition parties within the constitutional framework would have been vital. Thus, in the absence of a constitutional remedy, the political dialogue and consensus building remains the only real avenue for resolution of the crisis. Given the internal political polarizations and external challenges, a short period of government led transition, with its limitations, would have been one of the least evil options until the next election to be held after the pandemic over.

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