

## **DETERMINING THE PERIOD OF ELECTION AFTER POSTPONEMENT CAUSED BY COVID-19: THE CASE OF ETHIOPIA**

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### **Abstract**

Like the case in many States, Covid-19 has disrupted the election process of Ethiopia. It forced the government to postpone the national election which was scheduled for August 29/2020 and bypass the legal requirement of holding the national election every five years. The Constitution of the Federal Democratic Republic of Ethiopia (the FDRE Constitution, hereafter) does not explicitly set out when the election should take place in the event postponing it is necessitated by an emergent situation such as an outbreak of a pandemic. Notwithstanding this Constitutional lacuna, the House of the Federation (HOF), one of the Houses of the Federal Parliament, handled the matter and decided by interpreting the Constitution that the election should be held within 9 months but not later than one year after the control of the pandemic. In this article, I have assessed whether the HOF had the authority to determine the election period.

Keywords: *Constitutional interpretation, Election, House of Federation, postponement of the election, transition*

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## 1. Introduction

The Covid-19 pandemic was first reported in Ethiopia on the 13<sup>th</sup> of March/2020.<sup>1</sup> As with the cases in most states of the world, the pandemic has spread in Ethiopia at an alarming rate and large numbers of confirmed cases have been observed. From 3 January 2020 to 3 December 2021, as the WHO reported, there have been 371,803 confirmed cases with 6,784 deaths.<sup>2</sup>

The Pandemic has caused severe socio-economic consequences. A study conducted by members of the UN country team in Ethiopia has revealed that though Ethiopia was, in several aspects, better positioned developmentally to withstand and address the crisis posed by COVID-19 than many Southern Saharan African States, its macro-economic situation encountered some level of vulnerabilities caused by the pandemic. Evidence indicated that the country risked debt distress, low levels of domestic resource mobilization, high inflation, high unemployment, and significant pressure on the exchange rate of the Birr (Ethiopian currency).<sup>3</sup>

Besides, the outbreak of Covid-19 affected the election process in Ethiopia. On March 28/2020, the National Electoral Board of Ethiopia (NEBE) announced that it cannot conduct the sixth general election which was scheduled for August 29/2020, due to the Covid-19 related restrictions brought by the emergency laws and proposed its postponement.<sup>4</sup> The emergency laws were adopted by the Federal government to contain the spread of the pandemic.<sup>5</sup> The House of Peoples'

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<sup>1</sup> First Case of Ethiopia Covid-19 Confirmed in Ethiopia, (May 11/2020), <http://www.afro.who.int/news/first>

<sup>2</sup> World Health Organization, Ethiopia Situation, <https://covid19.who.int/region/afro/country/et>

<sup>3</sup> UN Ethiopia, Socio-Economic Impact of COVID-19 in Ethiopia(2020),(November 21/2021), <file:///C:/Users/user/Downloads/UN-Socio-Economic-Impact-Assessment-FINAL.pdf>

<sup>4</sup> Reuters, Ethiopia postpones August election due to corona virus, (June 15/2020), <https://www.reuters.com/article/us-ethiopia-election-idUSKBN21I2QU>,

<sup>5</sup> Embassy of the Federal Democratic Republic of Ethiopia, London, UK, Ethiopia Declares a State of Emergency to Curb Transmission of Corona Virus, (September 21/2021), <https://www.ethioembassy.org.uk/ethiopia-declares-state-of-emergency-to-curb-transmission-of-coronavirus/>

Representatives (the HPR), one of the Houses of the Federal bicameral Parliament<sup>6</sup>, approved the proposals of the NEBE.<sup>7</sup> The HPR decided that the election should take place after the return of normalcy. It remarked that determining the exact election period can only be made through Constitutional interpretation. Consequently, it referred the case to the HOF--the other House of the Federal Parliament empowered to interpret the Constitution.<sup>8</sup> On June 10/2020, the HOF in its second regular session decided that the election should be organized after 9 months but earlier than one year since the control of the pandemic.<sup>9</sup> The election was finally held on June 21/2021.<sup>10</sup>

The national (general) election involves the election of the members of the HPR.<sup>11</sup> The FDRE Constitution has provided that the members of the HPR shall be elected for a term of five years.<sup>12</sup> Accordingly, national elections are expected to be held every five years. Due to an emergency, however, it may be impossible to conduct the election within this period. The FDRE Constitution has not included an explicit provision when the election should, in such cases, be held. The HOF has filled this gap through Constitutional interpretation.

In this Article, I have assessed whether the HOF has the power to determine the election period through Constitutional interpretation. The discussions are presented as follows: I will first look at the wisdom of analyzing the issue of competence over the determination of the election period.

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<sup>6</sup> The FDRE Constitution established a federal Parliament comprising two Houses: The House of Peoples' Representatives and the House of the Federation (Article 53 ). As the upcoming discussions will elucidate, only the HPR has the power of legislation.

<sup>7</sup> Ethiopian Parliament Approves Resolution to Postpone General Elections, (May 11/2020), <http://www.ezega.com/Newsdetails/7921/Ethiopian-Parliament-Approves-Resolution-to-postpone-General-Elections>

<sup>8</sup> Parliament Endorses Constitutional Interpretation Option for National Election, (May 11, /2020), <http://www.hopr.gov.et/web/guest/-/parliament-endorses-constitutional-interpretation-option-for-national-election>.

The constitutions of some States have regulated the issue. The Constitution of Afghanistan under Article 147 provides that an election postponed due to emergency should take place within two months after the termination of the emergency. The Constitution of India (Art.83) requires that the term of office of Parliament after the termination of an emergency decree which prolonged the election shall not exceed six months.

<sup>9</sup> Fanabc, House Extends Federal, Regional State Councils' Term, (June 10/2020), <https://www.fanabc.com/english/house-of-federation-begins-2nd-regular-session/>

<sup>10</sup> BBC News, Ethiopia elections 2021: Abiy Ahmed faces first vote amid conflict (December 5, 2021),

<sup>11</sup> As defined under Art.2 (6) of Proclamation No. 1162/2019 (The Ethiopian Electoral Political Parties Registration and Election's Code of Conduct Regulation Proclamation) General election means the election of members of the HPR and the Regional States Councils conducted following relevant laws.

<sup>12</sup> FDRE Constitution, Art 54(1)

Next, I will present an overview of the HOF as it will help readers to easily understand the arguments related to the competence of the HOF to handle election matters. Then, I will argue that the HOF is not competent and lacks the legal authority to determine the election period. The discussions will end up by summarizing the key issues.

## **2. Identifying an organ competent to determine the election period: why it matters?**

The competence to set the election period should be analyzed in light of the profound significance that free and fair elections will have in transforming the country into a democracy. Unlike the cases in the preceding national elections of the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) regime, the sixth national election was able to instill hope in the majority of the public that it will enable them to freely elect their representatives.<sup>13</sup> The underlying reason seems to be the milestone steps the newly constituted political party which came out of the EPRDF following a political reform in 2018—the Prosperity Party took to transition the country into a democracy.<sup>14</sup> The reformed government ruled by the Prosperity Party, for example, released several political prisoners, allowed some groups that went into exile to participate in the election process, and repealed laws that the EPRDF used to stifle dissent such as the Anti-terrorism law.<sup>15</sup> The Prime Minister, Dr. Abiy Ahmed, winner of the 2019 Noble peace prize, appointed in the course of the reform, has publicly announced that among the top priorities of his government will be holding a credible election.<sup>16</sup>

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<sup>13</sup> The Guardian, 'These Changes are unprecedented': How Abiy is upending Ethiopian Politics, (Jun 13/2020), <https://www.bbc.com/news/world-africa-57513115e>

<https://www.theguardian.com/world/2018/jul/08/abiy-ahmed-upending-ethiopian-politics>

<sup>14</sup> The EPRDF which ruled the country for over 27 years did not assume power through a genuine democratic election. All the general elections organized after the downfall of the Derg regime in 1991 were replete with controversies. In the aftermath of all of the elections, there were clashes between protesters and the Police. The brutal excessive measures that the government deployed to quell the dissent have caused egregious human rights violations including dozens of deaths, abuses, and violence. The government used the draconian laws it passed such as the Anti-terrorism Proclamation to silence the protests and diminish the political space.

<sup>15</sup> Eega News, Ethiopia Approves New Anti-Terrorism Law Consisting of Death Penalty, (June 13/2020), <https://www.ezega.com/News/NewsDetails/7623/Ethiopia-Approves-New-Anti-Terrorism-Law-Consisting-of-Death-Penalty>

<sup>16</sup> Reuters, Ethiopia PM meets opposition parties, promises fair elections, (December 05/2021), <https://www.reuters.com/article/us-ethiopia-politics-idUSKCN1NWOY1>

Though the reformed government was able to garner huge support from the public, it could not adequately sustain stability and curb the proliferating human rights violations that commenced before the reform. Tragic incidences in the form of internal displacement and violence have occurred in various parts of the country. According to the 2019 report of IOM, Ethiopia recorded the third-highest number of new displacements worldwide in 2018 with 3,191,000 internally displaced persons. It clarified that a significant portion of these displacements was induced by conflict largely related to ethnic and border-based disputes. Concerns have been expressed by civil society organizations such as Amnesty International and the Human Rights Watch that much remains to be done by the incumbent government to halt the severe human rights violations perpetrated by security forces in the various parts of the country, in particular in Oromia and Amhara regions.<sup>17</sup>

A fair and free election is of paramount significance to States like Ethiopia that are facing multi-dimensional problems resulting from a political transition. As the IDEA stressed, the significance of elections becomes high when they take place in countries experiencing democratic transition. Conducting a genuine and democratic election will help to establish a system of government that can ensure observance of human rights and rule of law. In this regard, paramount care should be placed in determining the organ which should handle the task of fixing the election period. Assigning this power to an organ that lacks competence and legal authority will bring adverse consequences on the outcome of the election in two ways: First, it may lead the public to lose confidence in the entire election process. This will, in turn, have bearing on the legitimacy of the new government. Trends have revealed that diminished trust in the institutions involved in an election process undermines the legitimacy of the elected representatives.<sup>18</sup> Second, an organ that

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<sup>17</sup> Read, for example, Amnesty International, Ethiopia: Rape, extrajudicial executions, homes set alight in security operations in Amhara and Oromia, (December 06, 2021), <https://www.amnesty.org/en/latest/news/2020/05/ethiopia-rape-extrajudicial-executions-homes-set-alight-in-security-operations-in-amhara-and-oromia/>, Human Rights Watch, Ethiopia, Events of 2019, (December 06, 2021), <https://www.hrw.org/world-report/2020/country-chapters/ethiopia>

<sup>18</sup> Read, for example, Nicholas Kerr and Anna Lührmann, Public trust in elections: The role of Media Freedom and Election Management Autonomy, Working Paper No. 170, (June 12/2020), [http://afrobarometer.org/sites/default/files/publications/Working%20papers/afropaperno170\\_public\\_trust\\_in\\_electio](http://afrobarometer.org/sites/default/files/publications/Working%20papers/afropaperno170_public_trust_in_electio)

lacks technical competence to deal with the election period will not be able to suggest an election period that ensures sufficient time for candidates, political parties, and NEBE to prepare for the election.

As indicated in the backdrop of this discussion, the sixth national election has taken place on June 21/2021 based on the Constitutional interpretation by the HOF. As I will discuss in detail in the following section, the HOF is an organ that has the power to interpret the FDRE Constitution. An important question that needs an immediate response, hence, is: does the HOF have the authority to handle this matter? This will require us to look first at whether the election period can be determined through Constitutional interpretation. Before indulging in the details of this issue, let's first acquaint ourselves with the composition and powers of the HOF.

### **3. The House of the Federation: Composition and Powers**

A comparative study on bicameral parliaments has revealed that States establish second chambers mainly to ensure the representation of diversities in the Parliaments. Second Chambers, for example, may carry out representation through the constituent units (such as States, provinces, or regions).<sup>19</sup> They may also be structured to represent communities with specific religious, ethnic, language, or cultural identities.<sup>20</sup> The upper House of the Ethiopian Parliament, the HOF, is established to ensure the participation of the Nations, Nationalities and Peoples (ethnic groups) in the functions of the Parliament. The members of the HOF are elected to serve for a term of five years by the legislative branches of the constituent units (States).<sup>21</sup> The States councils may also hold elections to have the representatives elected by the people directly.<sup>22</sup> This option, nonetheless,

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ns.pdf, to analyze how the loss of trust of the public in the electoral Management Body of Nigeria seriously hampered the legitimacy of the constituted government following the 2007 election.

<sup>19</sup> Elliot Bulmer, *Bicameralism* (International IDEA Constitution-Building Premier 2, 2017), at 5

<sup>20</sup> See *id*

<sup>21</sup> FDRE Constitution, Art. 61(3) and Art. 67(2)

<sup>22</sup> See *id*

has never been used by the State Councils and no legislation has so far been adopted by States to regulate this matter.<sup>23</sup>

The HOF is unique as compared to the second chambers of other federal States in so far as its role in the legislative process is concerned. Though Second Chambers in several federal States portray disparities in their mode of participation in the initiation of legislation and veto power during the adoption of legislation, among others, they engage in the legislative process.<sup>24</sup> This legislative power is perceived as an important vehicle for the exercising of shared rule as the constituent units participate in the enactment of federal legislation that affects them.<sup>25</sup> As Ronald L. Watts wrote, the entrenched participation of the different regional groups in the Second Chambers is one manifestation of an effective operation of a federation.<sup>26</sup> This is not, however, the case in Ethiopia. The HOF does not participate in the law-making process. The legislative task is solely bestowed upon the lower House—the HPR.<sup>27</sup>

The HOF is also unique as compared to the Second Chambers of other States in that it shoulders the task of Constitutional interpretation.<sup>28</sup> The underlying reasons for assigning this task to the HOF, as the legislative history of the FDRE Constitution reveals, are as follows: First, it was believed during the drafting process that the Constitution should only be interpreted by its authors, i.e., the Nations, Nationalities, and Peoples. The HOF which comprises the representatives of the Nations, Nationalities, and Peoples, hence, is best suited to interpret the Constitution.<sup>29</sup> Second, the drafters felt that the judiciary, if assigned with the task of constitutional interpretation, may give meaning to the provisions of the Constitution in its way without giving due consideration to

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<sup>23</sup> ACE Electoral Knowledge Network, Elections in Ethiopia, Background and Electoral System (December 06/2021), [https://aceproject.org/ace-en/topics/vo/annex/voy/voy\\_et/mobile\\_browsing/onePag](https://aceproject.org/ace-en/topics/vo/annex/voy/voy_et/mobile_browsing/onePag)

<sup>24</sup> Anna Gamper, Legislative Functions of Second Chambers in federal Systems, *Perspectives on Federalism*, Vol.10, Issue 2, 2018, at 121

<sup>25</sup> See *id*

<sup>26</sup> Ronald L. Watts, Federal Second Chambers Compared, (November 23/2021), [http://pti.regione.sicilia.it/portal/page/portal/PIR\\_PORTALE/PIR\\_LaStrutturaRegionale/PIR\\_AssessoratoEconomia/PIR\\_Aretematiche/PIR\\_Federalismofiscale/PIR\\_SeminarioIlprocessofederaleinItalia/watts%20intervento.pdf](http://pti.regione.sicilia.it/portal/page/portal/PIR_PORTALE/PIR_LaStrutturaRegionale/PIR_AssessoratoEconomia/PIR_Aretematiche/PIR_Federalismofiscale/PIR_SeminarioIlprocessofederaleinItalia/watts%20intervento.pdf)

<sup>27</sup> FDRE Constitution, Art.55

<sup>28</sup> FDRE Constitution, Art.62(1)

<sup>29</sup> Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation, *Mizan Law Review*, Vol.1, No.1(2007), at 11

the intention of the authors of the Constitution.<sup>30</sup> There is, in fact, an ongoing debate regarding whether Courts are stripped of the power to interpret the Constitution.<sup>31</sup>

The HOF will not directly consider applications for Constitutional interpretations. The applications are first investigated by the Council of Constitutional Inquiry (CCI) established by the FDRE Constitution.<sup>32</sup> The CCI has eleven members comprising the President of the Federal Supreme Court, the Vice President of the Federal Supreme Court, Six legal experts, appointed by the President of the Republic on recommendation by the HPR, and three persons designated by the HOF among its members.<sup>33</sup> The powers and duties of the CCI are further elaborated by the Proclamation adopted by the federal government in 2013.<sup>34</sup> The CCI investigates Constitutional disputes submitted to it and forwards its recommendations to the HOF when it finds that the matter needs Constitutional interpretation.<sup>35</sup> The authority to pass a final decision on the recommendations of the CCI rests on the HOF.<sup>36</sup>

#### **4. Determining the Period of Election Postponed by an Emergent Situation: Can it be done by the House of the Federation?**

To consider whether the HOF could set the election period through Constitutional interpretation, it is essential first to understand what Constitutional interpretation is.

Although the Constitution categorically grants the HOF the power to interpret the Constitution, it has not included a straightforward provision explaining what Constitutional interpretation means.

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<sup>30</sup> See *id*

<sup>31</sup> See *id*, Read also Yonatan Tesfaye Fesseha, Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia, *Journal of Ethiopian Law*, vol.xxii, No.1(2008), Assefa Fiseha, Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience, *Netherlands International Law Review*(2005), Takele Soboka Bulto, Judicial Referral of Constitutional Disputes in Ethiopia; From Practice to Theory, *19 Afr. J. Int'l & Comp. L.* 99 2011

<sup>32</sup> FDRE Constitution, Art.82(1).

<sup>33</sup> See *id*, Art.82(2)

<sup>34</sup> Proclamation No 798/2013, A Proclamation to Re-enact for the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia

<sup>35</sup> FDRE Constitution, Art.84(1)

<sup>36</sup> See *id*, Art.83(2)



To get some insight on the notion underlying Constitutional interpretation, it will be of great help to cumulatively read Articles 83 and 84 of the Constitution. Article 83 provides:

- (1) All constitutional disputes shall be decided by the House of the Federation.
- (2) The House of the Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional Inquiry.

Article 84(2) reads:

Where any Federal or state law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

Looking at these provisions along with their Amharic versions, it is possible to draw that constitutional interpretation is pursued on cases that involve constitutional disputes or constitutional issues.<sup>37</sup> The dispute or issue can be submitted to the Council of Constitutional Inquiry (CCI), which the HOF organizes, either by the court or any interested party.<sup>38</sup> The CCI investigates the matter and forwards its recommendations to the HOF should it find that the case requires constitutional interpretation.<sup>39</sup> Since the matter has originated from courts, a constitutional dispute or issue necessarily involves litigants who are under controversy on a concrete case. The matter is referred to the CCI when, in the opinion of the courts, the issue presented demands constitutional interpretation. The phrase “...or interested party...” under Article 84(2) above appears to refer to any person whose interest may be affected by the case, including, in fact, the litigant parties.

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<sup>37</sup> The Amharic versions of the above Articles use the terms ‘constitutional dispute’ and constitutional issue; interchangeably. Under the Amharic version of Article 83(2), the word ‘*Constitutional dispute*’ is translated as ‘የሀገ-መንግስት ጉዳዮች’ (Constitutional issues). A similar mode of translation is adhered under Article 84(1). Under Article 83(1), however, it is translated as የሀገ-መንግስት ክርክር ጉዳይ (Constitutional dispute).

<sup>38</sup> The HOF is assisted by the CCI established under the Constitution and organized by it (Articles 62(2) and 82(1)). It has eleven members the composition of which is overwhelmingly dominated by individuals with legal background. The main task of the CCI is investigating constitutional disputes and issues on the cases submitted to it and forward its recommendations to the HOF should it find that the case requires constitutional interpretation.

<sup>39</sup>FDRE Constitution, Art.84(3)(b)

Referral to the CCI by the court or interested party is made “where any Federal or State law is contested as being unconstitutional”. As rightly argued by many constitutional law experts including Yonatan Fisseha, the reading of the above provisions does not warrant us to conclude that constitutional dispute is limited to claims that contest the constitutionality of Federal or State laws.<sup>40</sup> By way of illustration, the Constitution has explicitly mentioned these claims to qualify as constitutional disputes or issues. As such, it has not exhaustively mentioned claims which constitute constitutional dispute or issue. Hence, claims that challenge the constitutionality of customary practices, decisions, and practices of a government or other authority should be regarded as constitutional disputes or issues.<sup>41</sup>

The Proclamation adopted to specify the powers of the CCI mentioned above has buttressed the above approach through expanding the competence of the HOF. According to this law, the CCI may investigate cases alleging the unconstitutionality of any law or customary practice or decision of government organ or official and submit its recommendation to the HOF if it finds that the matter needs constitutional interpretation. Such cases can be submitted by applicants who pursued their case either through courts or administrative organs.<sup>42</sup>

The HOF, under this Proclamation, has also jurisdiction over non-justiciable matters. Article 3(2) (c) states: “constitutional interpretation on any nonjusticiable matter may be submitted to the Council by one-third or more members of the Federal or State councils or by Federal or State executive organs”. Taking into account the fact that this provision cross-refers to Article 3(1), we can realize that submitting non-justiciable matters wants the fulfillment of two conditions: i. the

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<sup>40</sup> Yonatan Tesfaye Fesseha, *Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia*, *Journal of Ethiopian Law*, Vol. XXII No. 1, at 134

<sup>41</sup> Some scholars have favored this stance basing their argument on the Amharic version of Article 84(1) which translated constitutional dispute into ‘የአገ-መንግሥት ጉዳዮች’ (Constitutional issues). The tenet of the argument is that as the Amharic version, which has final legal authority in case of contradiction or difference with the English version, helps to capture broader matters including those challenging the constitutionality of laws. In my view, nonetheless, this line of argument does not present a strong case for expanding the scope of matters that should be subject to Constitutional interpretation. As I pointed out above, this translation is not used consistently. The Amharic version of Article 83, which specifically deals with constitutional interpretation, has translated ‘Constitutional dispute’ as የአገ-መንግሥት ክርክር ጉዳይ (Constitutional dispute).

<sup>42</sup> See *id.*, Art.3(2)

application should allege unconstitutionality of any law, customary practice, or decision of an organ of government or official, and ii. It should secure the support of one-third or more of the members of the Federal or State councils or the Federal or State executive. To sum up, a constitutional dispute or issue, under the above Proclamation, involves the ascertainment of the constitutionality of a law, customary practice, and decision of a government organ or official.

But, on some occasions, some constitutional provisions may be found to be vague, contradictory, and ambiguous. For example, the provisions delineating the powers of the main branches of the government may appear to be contradictory. The content and scope of constitutional provisions may be far from clear. Applying these provisions may turn out to be challenging. Without the existence of the conditions noted above, however, the HOF cannot engage in constitutional interpretation and elaborate on the content and meaning of the provisions. It may address the ambiguity, contradiction, or vagueness of the provisions while determining the constitutionality or otherwise of a given law, customary practice, or decision of a government. In the absence of the issue of constitutionality, the HOF can do this only through the advisory opinion it may render per Article 4(2) of Proclamation No.251/2001.<sup>43</sup> This opinion, however, will not have a legally binding force.<sup>44</sup>

Coming back to our case, the first issue that we should investigate is: Is the determination of the election period a constitutional dispute or issue? Referring to the above provisions of the Proclamation specifying the powers of the CCI, one can without difficulty identify that this kind of matter does not qualify as a constitutional dispute or issue. It does not contest the constitutionality of law, customary practice, or decision of a government organ or official. It is, rather, a question that seeks to point out the period when an election should take place without making any link with the provisions of the Constitution. As the matter does not match

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<sup>43</sup> This provision reads: "...the House shall not be obliged to render a consultancy service on constitutional interpretation". Implicit in this provision is that the House can render constitutional interpretation upon request though it is not bound to do so.

<sup>44</sup> Advisory opinion, as it is widely agreed, is a non-binding interpretation of an adjudicatory organ over a legal question.

constitutional dispute or issue, the HOF cannot pass a decision through constitutional interpretation. Instead, the HPR could have requested the HOF advisory opinion on the matter. The HOF could decline to undergo interpretation as it is not obliged to do this as indicated above.

Besides, there exist other grounds that render the decision of this matter by the HOF worthless. Through fixing the voting period, the HOF cannot meet the purposes of constitutional interpretation envisaged under Proclamation No.251/2001.<sup>45</sup> Article 11(1) of same provides: “The final decision of the House [the House of the Federation] on constitutional interpretation shall have a general effect which therefore shall have applicability on similar constitutional matters that may arise in the future”. If we assume the matter to require constitutional interpretation, the decision of the HOF may not be relevant for future similar constitutional matters. It is reasonably expected that the HOF while setting the election period, had taken into account the nature and intensity of the crisis that Covid-19 caused in the election process.<sup>46</sup> It is very unlikely for a pandemic that may erupt in the future to pose a similar impact on the election process. The capacity of the government to cope with a crisis at such a time may also be different from the government of the day. It will be daunting for the HOF to come by a decision that fits all such future situations.

Besides, the HOF is not competent to grapple with technical issues associated with the election. The nature of its work and rules of procedure do not allow it to come up with an election period that comforts the contesting political parties and individuals. After all, what it finally produces is a decision that reflects its finding-but not an outcome of a negotiation. Article 10 of Proclamation No.251/2001 puts forward: “The House may, before it passes a final decision on constitutional interpretation, call upon pertinent institutions, professionals and contending parties to give their opinion”. The wording of the provision signifies that the concerned parties mentioned are only

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<sup>45</sup> Proclamation No.251/2001, Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation

<sup>46</sup> Read also Addis Standard, News Alert: HOF Approves CCI's Recommendation to Extend Both Houses, State Councils Term Limit; Constitutional Expert Raises Concern,(December 06/2021), <https://addisstandard.com/news-alert-hof-approves-ccis-recommendation-to-extend-both-houses-state-councils-term-limit-constitutional-expert-raises-concern/>

called upon to give their opinion to assist the HOF to get a better picture of the matter. As such, it will not pursue a consultative process to reach a decision that promotes the interest of contending parties. It should also be emphasized that as the text of the provision indicates, this is not a mandatory procedure that the HOF must in all cases implement.

Finally, pursuing the process through the HOF will not offer an opportunity for political parties and individuals who may be aggrieved by its decisions to appeal. With a procedure that does not adequately entertain the views of political parties and other stakeholders, it will be hardly possible for the HOF to hand down a decision that is agreeable to all. Unfortunately, the decision of the HOF is final and cannot be reversed through appeal. A lesson can be learned from some emerging democracies which opened such opportunities. In Sri Lanka, for example, opposition political parties have petitioned the Supreme Court to delay the parliamentary election which the country's Election Commission postponed until June 20.<sup>47</sup> In Liberia, the President's decision to postpone election during a state of emergency can be challenged before courts as the writ of habeas corpus cannot be suspended even during a state of emergency.<sup>48</sup>

In the light of the above justifications, it becomes more convincing that NEBE is more suited to the scheduling of the election period and related activities than any other organ of the government. In ordinary times, it has been considered that NEBE is entrusted to do this job under Proclamation No.1162/2019. The nature and purpose of its establishment reveal that NEBE can also execute this duty in the event regular election periods are disrupted due to an emergent situation. The Constitution has established it as an independent institution to conduct the general election impartially.<sup>49</sup> Its term of office is distinct from the HPR and the cabinet though it is accountable to the former.<sup>50</sup> Unlike these organs, its mandate will not expire on October 05/2020. The application of Proclamation No.1162.2019 and other subsidiary laws detailing its operation will not be

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<sup>47</sup> DW, Coronavirus keeps Sri Lanka without a Functioning Parliament, (June 5/2020), <https://www.dw.com/en/coronavirus-keeps-sri-lanka-without-a-functioning-parliament/a-53615108>

<sup>48</sup> Constitution of the Republic of Liberia, 1986, Art. 87

<sup>49</sup> FDRE Constitution, Art. 102

<sup>50</sup> Proclamation No.1133/2019, National Electoral Board of Ethiopia Establishment Proclamation, Art.3(2)

suspended when the term of office of the incumbent HPR and cabinet expires on October 05/2020. NEBE retains its power to set the schedule of voting dates and preceding activities including registration of voters, registration of candidates, and election campaign.<sup>51</sup>

An election period should enable the contestant political parties and citizens to adequately participate in the election process. Contestant political parties and citizens may find the fixed period insufficient to carry out essential activities such as election campaigns if the period is set without their involvement. This may pose a detrimental impact on the credibility of the election. The problem may exacerbate if the time fixed favors the incumbent ruling party.<sup>52</sup> In this regard, there is a high tendency for the HOF to cause this consequence as it passes decisions without accommodating the views of contestant political parties.

As a state in a transitional democratic process, critical issues like this one must be addressed following a participatory approach. The working rules of NEBE promote this approach. Key activities of the electoral process such as the setting of time table for voter registration are carried out by NEBE in consultation with political parties.<sup>53</sup> It has ample opportunities to determine the election period in a consultative and participatory approach. Its decision can also be further improved to promote the interest of contestant political parties during approval by the HPR.

This modality, in addition, presents another option for political parties and citizens to require reconsideration of the fixed election period. We have considered above that the constitutionality of the decision of any government organ can be challenged through the HOF. Political parties or citizens can nullify this decision through the HOF if they can sufficiently establish that the fixed period constrains the right to participation or other constitutionally protected rights of citizens.

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<sup>51</sup> Proclamation No. 1162/2019, The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct, Arts. 19, 30, and 47(1) respectively

<sup>52</sup> Kofi Annan Foundation, Confidence in Elections and the Acceptance of Results, A Policy Brief of the Electoral Integrity Initiative, Policy Brief No.1, at 20, (June 13/2020), <http://aceproject.org/ero-en/misc/confidence-in-elections-and-the-acceptance-of>

<sup>53</sup> Proclamation No.1162/2019, *supra* note 51, Arts.19(1)

## CONCLUSION

Unlike the Constitutions of States such as India, the FDRE Constitution has failed to expressly point out the approaches to be followed in the event the national election is disrupted by an unforeseen emergent situation such as the outbreak of Covid-19. It does not mention when an election in such cases should take place. The impact of this lacuna has presented a challenge in Ethiopia when holding the sixth national election became daunting due to the Covid-19.

The government has decided that the Constitutional silence on the issue should be filled by Constitutional interpretation. The HOF passed a decision based on the recommendation it received from the CCI that the election should be held within nine months but not later than one year after the control of the Pandemic. Following this decision, the election was conducted on June 21/2021. In this piece, I have examined whether the HOF could fill the Constitutional silence on the election period through Constitutional interpretation.

I have generally argued that the matter could not be resolved through Constitutional interpretation. The HOF lacks both Constitutional authority and technical competence to determine the election period. The joint reading of the FDRE Constitution and the Proclamation elaborating the powers of the CCI shades light that the HOF is empowered to undergo Constitutional interpretation when the matter presented to it involves a justiciable or non-justiciable claim that challenges the Constitutionality of any law, customary practice, or decision of an organ of a government official. The issue of determination of the election period does not fit this condition as it does not involve the issue of constitutionality. I have also indicated that pursuing the process through the HOF will deny aggrieved stakeholders to challenge the decision through appeal given that the decision of the HOF is final. Finally, I have argued that the HOF may face difficulty in setting an election period that best advances the interests of the contestant political parties as it is not strictly required to consult the opinion of the contestant political parties while determining the election period. The NEBE, on the other hand, is best suited to seize this task. It has the legal authority and technical

competence to deal with this issue. Its working rules also promote the engagement of contestant political parties while adopting decisions.