

# Constitutionality of the 2020 General Election Postponement in Ethiopia: What was there and what was not?

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## Abstract

The 2020 general election of Ethiopia was postponed as the pandemic (Covid-19) raged across the world. Due to the restrictive measures that were declared to contain the pandemic and the infeasibility of conducting the scheduled election, the National Electoral Board of Ethiopia proposed for postponement. To maintain the constitutional process, multiple solutions were proposed: amendment of the Constitution, dissolution of parliament, declaration of State of Emergency (SOE), and constitutional interpretation. After thorough scholarly debate and deliberation, constitutional interpretation was taken as the best remedy. The House of People's Representatives endorsed the chosen proposition and sent the claims to Council of Constitutional Inquiry having sought the fate of the term of incumbency, and the timeframe of the postponement. The House of Federation concluded that until the possible containment of the pandemic and the State of Emergency lifted, the scheduled election to be postponed, thereby recommending for continuity of the incumbent government until election is conducted. Nonetheless, the whole process of the deferment did not escape antimony. This short article examines mainly the process of the postponement *per se* and the means employed, separately by applying doctrinal research methodology, and investigates the validity of the stance taken by the Government.

**Key Terms:** Abstract Review, Advisory Opinion, Concrete Review, State of Emergency, COVID 19, Election postponement

## 1. Introduction

The contemporary global health crisis caused by COVID-19 triggered numerous uncertainties. Democracy was not the exception. Consequently, from February 21/2020 until February 21/2021, at least 75 countries across the globe decided to postpone their national or subnational elections due to COVID-19.<sup>1</sup> The perplexity was not only

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<sup>1</sup> Global Overview of Covid-19: IMPACT ON ELECTIONS (Last updated, Feb.21, 2021). At least 40 of these nations, including Ethiopia, had postponed national elections by conducting referendums. For further information, see <https://www.idea.int/news->

resolving the issue of deferment of periodic election and the continuity of the incumbency, but the absence of constitutional or statutory provision that can effectively address the impasse.

Initially, it was the National Electoral Board of Ethiopia (NEBE) that had proposed the controversial deferment of the scheduled 2020 general election justifying its inability of discharging the constitutional mandate on account of the pandemic and the resultant emergency declaration.<sup>2</sup> Upon endorsement of NEBE's proposal, the House of People's Representatives (HoPR) affirmed the postponement.<sup>3</sup> But this action generated multiple questions. The whole situation was surrounded by dilemma and issues that need to be unpacked further. It was uncertain whether and how the incumbent Government's legislative and executive power, in absence of constitutional backing, could extend, and if so, for how long — especially, due to the silence of the Federal Democratic Republic of Ethiopia (FDRE) Constitution. It was equally uncertain whether the Constitution never addressed such a dilemma or it could fall in any one of the rules through constitutional construction.<sup>4</sup> With a view to unsilence the apparent impasse, the following four solutions were proposed: amendment of the Constitution, dissolution of the parliament, declaration of State of Emergency (herein after SOE), and constitutional interpretation and a kind of brief discussion thereto had been tried to be envisaged.<sup>5</sup> Later, the government accepted the constitutional interpretation option, and the same was affirmed. The interpretation modality was endorsed by

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[media/multimedia-reports/global-overview-covid-19-impact-elections](https://www.un.org/News/Press-Releases/2020/06/media-multimedia-reports-global-overview-covid-19-impact-elections), (Accessed 2/24 2020).

<sup>2</sup> NEBE's Decision Ref.No.አ/64-1/ም/13/509/አ/6 & annexes, at 3 (22/07/2012 E.C).

<sup>3</sup> HoPR's Decision No.9/2012, Ref.No.ቃ/ጥ/ቃ/28/65, at 5 (28/08/2012 E.C). (It was decided, following the Decision No.7/2012).

<sup>4</sup> TPLF's position on the 2020 Elections — Official Facebook page (Nov.2019), <https://m.facebook.com/tplf.official/posts/3193195984065977> (last accessed 1/20/2021).

<sup>5</sup> Ethiopian Broadcasting Corporation, *Discussion with political parties on the postponement of 2020 general elections amid Covid-19*, YOUTUBE (Apr.30, 2020). <http://www.youtu.be/GFjyv-yTfDc> (last accessed 1/5/2021).

HoPR and the same was forwarded to the Council of Constitutional Inquiry (herein after CCI) for final determination of its legality in line with the dictates of the Constitution.

The CCI examined ancillary issues including its power to entertain the issue, and whether the HoPR could directly refer a case for the consideration of CCI. On both issues, the Council ruled affirmatively.<sup>6</sup> Regarding the issue of its competence, the CCI construed Article 84(1) of the FDRE Constitution that embodies the term ‘disputes’ which apparently encompasses the issue at hand. Concerning the legality of HoPR’s referral, it had ruled affirmatively by construing Article 3(2-c) of the CCI proclamation.<sup>7</sup> As to the tenure of the incumbency, it concluded that the validity of term of HoPR did depend on prior event of the election and could not stand by itself. The direct application of Articles 54(1) and 58(3) of the Constitution specifies measures to be taken in the normal course of action. But, in unprecedented situations, like COVID-19 pandemic, it could possibly take a different shape. Such a situation triggers declaration of SOE that permit derogation of some aspects of human and democratic rights, including strict adherence to the term of the government and the period of election. CCI thus concluded that until the possible containment of the pandemic and SOE lifted, the scheduled August 2020 general election to be postponed, and recommended the continuity of the incumbent government until the next election that could be conducted when the situation permits.<sup>8</sup> Upon receipt of the remarks, the House of Federation (HoF), and subsequently, the HoPR approved the recommendations of CCI.

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<sup>6</sup> CCI’s Recommendation, Ref.No.5216/2012, at iv (9/19/2012 E.C.)(A rough translation of Amharic version of CCI’s Recommendation).

<sup>7</sup> A Proclamation to Re-enact for the Strengthening and Specifying the Powers and Duties of the CCI of FDRE Proclamation No.798/2013, *Fed. Neg. Gaz.*, Year 19, No 65, A.A.(30 Aug. 2013) at Art.3(2-c).

<sup>8</sup> CCI’s Rec., *supra* note 6 at 10-14.

Nonetheless, the processes of postponement had faced multi-facet oppositions and contentions. Opponents of the postponement argued that failure to conduct the election on the ground of the pandemic could not only denigrate one of the symbols of the fundamental democratic right of election (periodicity) but also indirectly meant usurpation state power contrary to the rules of the Constitution.<sup>9</sup> Otherwise, if the deferral had to be made as a better extra-constitutional remedy, it could be done after thorough comprehensive national dialogue by the participation of all political parties and stakeholders.<sup>10</sup> Some others had even preferred the establishment of a caretaker or interim government administration.<sup>11</sup> Others had firmly opposed the postponement and suggested that the option for constitutional amendment should cover not only this narrow issue, but also many other provisions of the Constitution, which entail a radical revision than mere topical amendment.<sup>12</sup>

Regarding the constitutional interpretation, the first question raised was on the neutrality of CCI/HoF. The second issue was justification for constitutional interpretation to accommodate an unforeseen exigency. It was aggressively argued by some that situation did not call for construction, as there was no apparent contradiction or ambiguity in the constitutional wording. Thirdly, there was argument directed against the competency of both HoPR and CCI to bring the quest and to entertain it. Furthermore, there was the contention on the kind of the issue itself. Simply means whether the issue falls under review or advisory opinion.

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<sup>9</sup> TPLF, *supra* note 4.

<sup>10</sup> “Opposition parties statement on election postponement,” ETIOPIA INSIGHT, (May 4, 2020), [www.ethiopia-insight.com/2020](http://www.ethiopia-insight.com/2020) (accessed October 27, 2020).

<sup>11</sup> “EDP urges to postpone upcoming election”, REPORTER, 28 December 2019. Available at: <https://www.thereporterethiopia.com/article/edp-urges-postpone-upcoming-election> (last accessed 1/20/2021).

<sup>12</sup> Solomon A. Dersso, *Constitutional Based National Dialogue the Best way to avert a Constitutional Crisis triggered by deferred election*, ADDIS STANDARD, April 30, 2020 <https://addisstandard.com/op-ed-constitutional-based-national-dialogue-the-best-way-to-avert-a-constitutional-crisis-triggered-by-differred-election/>

This article is believed to enable one to genuinely scrutinize the variances concerning the postponement of the 2020 Ethiopian election underpinned by contentious constitutional interpretation. It is also helpful to explore plausible pathways that may help to skip the coincidence of exigencies and elections. It leads to assessing whether the constitutional provisions governing the period of conducting the election and the term of the two Houses and the Executive branch merited constitutional interpretation or not. To this effect, its framework seeks to explore possible pathways to skip the coincidence of exigencies and periodic election; this work tries to describe variances as to the deferral; it has open-ended questions and textual data format; and because of its flexibility, the piece employs qualitative methodology in doctrinal approach.

The article is organized into five parts. After illuminating background facts in first part, the second part discusses the regulation of the periodic election and possibility of postponement in light of national and international experiences. The third part embodies conceptual underpinnings that offer framework for constitutional interpretation. This part dwells the types, and implications constitutional construction in some purposely selected jurisdictions. Finally, the legality and justification of modus vivendi opted for examination of election postponement in Ethiopia and a critical scrutiny of the norms, actual conduct and processes involved in postponement of the election in light of the FDRE Constitution and international/regional law best practices.

## **2. Regulation of Periodic Election and the Possibility of Postponement in Light of Best Practices**

### *2.1. International and Regional Norms*

Regulation of free, fair, and periodic election is critical. Consequently, regulatory norms are embodied in major international documents. UDHR which was adopted unanimously by the United Nations

General Assembly in 1948 recognizes the integral role that periodic, transparent, and open elections play in the exercise of fundamental right crafting a participatory government. Sub-article 3 of Article 21 of Universal Declaration of Human Rights (UDHR) states: “The will of the people shall be the basis of the authority of government; this ‘will’ shall be expressed in periodic and genuine elections ...”<sup>13</sup> An equivalent rule is stipulated in Article 25 of ICCPR. It expresses: “Every citizen shall have the right and the opportunity [...]: to vote and to be elected at genuine periodic elections ... guaranteeing the free expression of the will of the electors [...]”<sup>14</sup>

Regionally, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) obligates member states to undertake free elections at reasonable interval by secret ballot, under conditions which will ensure the free expression of the will of people.<sup>15</sup> Similarly, Article 23 of the American Convention on Human Rights (ACHR) and Article 20 of the American Declaration of the Rights and Duties of Man guarantee the right of citizens to vote and to be elected in genuine periodic elections. But, the African Charter on Human and Peoples’ Rights (Banjul) is silent regarding periodicity of elections. However, the African Charter on Democracy, Elections and Governance (ACDEG) stresses member States to conduct ‘regular’ elections and dislodges unconstitutional change of governments.<sup>16</sup>

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<sup>13</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A, Art..21(3). Available at: <https://www.refworld.org/docid/3ae6b3712c.html> (Accessed 29 January 2021).

<sup>14</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, Art.25(b). Available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 29 January 2021]

<sup>15</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos.11 and 14*, 4 November 1950, ETS 5, Protocol I art. 3 Available at: <https://www.refworld.org/docid/3ae6b3b04.html> (accessed 2 March 2021).

<sup>16</sup> African Union (AU), *African Charter on Democracy, Elections and Governance (ACDEG)*, January 30, 2007. Para 7 & 8 of the preamble, Art..2(3-4) & 3(4). Available at

Moreover, the African Union Declaration on the Principles Governing Democratic Elections in Africa (AUD-PGDE) encompasses the issue of ‘regular’ election.<sup>17</sup>

Regarding postponement of election, however, there is no formal rule either in the regional or international regulatory frameworks that meant to regulate postponement. And also, there is no express escape clause for deferral of periodic elections. Does the silent amount to denial or authorization? This appears a matter of simple statutory interpretation. In absence of a restraining norm, can States safely postpone election for a legitimate cause? The only requirement on the part of States is to prove how an unforeseen event that was beyond control of the State concerned prevents the pursuance of election. The preventive event need not be defined in the level of strict meaning of force majeure that can absolutely render election impossible. It may be possible to run election paying a huge cost. This is not desirable. In such a scenario prudent States can weigh the costs of conducting election and its postponement. In computing cost, the *pros and cons* of conducting election in accordance with the regular schedule is weighed. The formula for computing *pros and cons* shall be strictly objective which is out of reach of politics and political players.

The occurrence of an event that makes election impossible or very expensive does not necessarily give assurance for continuance of an old government whose term is expired. There is no apparent legal framework that legalizes continuity of government beyond a mandated term. And, no clear body permeates to guide the concerned government bodies’ decision-making to support reasonable and fair remedies that protects both competing rights — democracy and public

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<https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (last accessed: 6/28/2021).

<sup>17</sup> African Union (AU), *African Union Declaration on the Principles Governing Democratic Elections in Africa*, AHG/Decl.1 (XXXVIII), 2002, Available at: <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/AHG.aspx> (last accessed 6/28/2021).

health. Despite the ramifications for the periodicity of election and the exercise of other fundamental civil and political rights, delayed or postponed election does not necessarily contravene international principles.<sup>18</sup>

In defining free, fair, and periodic election in term of right, in exceptional cases, as do other rights, election can be curtailed on legitimate grounds. Needless to say, both international and regional laws allow derogation of rights in exceptional situations — including the right to vote and stand for election — in exigencies. As per Article 4(1) of the ICCPR, a treaty party can invoke derogation when the two prerequisites of Article 4 ICCPR are met: “the situation must amount to a public emergency which threatens the life of the nation, and a SOE have officially proclaimed [...]”<sup>19</sup> However, as provided in General Comment 29, “not every disturbance or catastrophe qualifies as a public emergency [...]” and if a state wishes to invoke Article 4 to declare a SOE, it “[...] should carefully consider the justification and [...] a measure [which] is necessary and legitimate in the circumstances.”<sup>20</sup> The exceptional situations, which require strict construction, often involve special powers, for instance, the enactment of laws that may even be applied retroactively and limit the right to vote and stand for election.

The lack of an express legal instrument regulatory framework for deferral of elections amidst of exigencies, dictates states come up with contemporary measures, principles, and standards. For instance, International Foundation for Electoral Systems (IFES) identified four indicators that help understand whether state actions during the time of

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<sup>18</sup> Katherine Ellena, “Legal Considerations When Delaying or Adapting Elections,” International Foundation For Electoral Systems, (June, 2020) p.6  
Available at: <https://www.ifes.org/publications/ifes-covid-19-briefing-series-legal-considerations-when-delaying-or-adapting-elections> (last accessed 20 December 2020).

<sup>19</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, (31 Aug. 2001), CCPR/C/21/Rev.1/Add.11. Available at: <https://www.refworld.org/docid/453883fd1f.html>. (Last accessed 3/4/2021).

<sup>20</sup> *Id.*

crisis are within the guardrails provided by international principles. Accordingly, the emergency measures must be:

- **Proportional:** the measures taken must be commensurate with the problem.
- **Non-discriminatory:** the measures must not discriminate individuals or community, including, but not limited to, gender or gender identity, language, religion, social or ethnic origin, disability, or sexual orientation.
- **Temporary:** the measure must be specifically limited in duration and make provisions for an endpoint.
- **Limited in geographic and material scope:** the measures must be appropriately narrow and target resolution of the problem, in both geographic scope and significance.<sup>21</sup>

Besides, the European Council of Commission for Democracy through Law, Venice Commission, states: “The legitimate aim of maintaining the constitutional order may justify the postponement of elections in exceptional situations, such as a state of war or natural catastrophes.”<sup>22</sup> Given a severe crisis that could unbearably affects a country surfaces, elections might indeed exacerbate political conflicts, and hence calls for a curative solution that could mitigate or avert the crisis.<sup>23</sup> Hence, in very exceptional conditions, it can be the duty of the government to look for a best scenario that avoid or weaken tensions and give voters the possibility of expressing their will in a safe and well-ordered context.<sup>24</sup>

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<sup>21</sup> Katherine, *supra* note 18 p.7.

<sup>22</sup> Venice Commission, *Compilation of Venice Commission Opinions and Reports on States of Emergency*, at 29, (April 2020), Strasbourg: Venice Commission. Available at: <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e)>, (last accessed 14 June 2020).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

The African Commission on Human and Peoples' Rights (ACHPR) sets forth indispensable statements on election during the COVID-19 Pandemic, *inter alia*, it remarks:

- The public health measures that States adopt to safeguard the health and life of the public can result in, and justifiably necessitate limiting the exercise of various civil and political rights including freedom of movement, freedom of assembly, and freedom of association, which are keys to the implementation of free, fair and credible elections.
- [Any] updating the electoral calendar [should] be based on inclusive consultations and transparent processes.
- States should ensure clear procedures that are established based on consultations with and full participation of all stakeholders for determining the new electoral calendar in compliance with applicable constitutional standards.<sup>25</sup>

Hence, election postponement can only be justified under the limited circumstances that outlined above, with strict guardrails in place and in a time horizon.<sup>26</sup>

## 2.2. *Deferral of Election during Emergencies: Lessons from Selected Jurisdictions*

COVID – 19 was a global tragedy that had disrupted smooth working of laws and socio-economic and political processes. Among others, the disease prevented mass gathering and outdoor works. The Pandemic thus practically hindered election as it normally calls for collective action. In exploring the legality of Ethiopia's election deferral,

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<sup>25</sup> African Union (AU), *Statement of the African Commission on Human and Peoples' Rights (ACHPR) on Elections in Africa during the COVID-19 Pandemic*, July 22, 2020, <https://www.achpr.org/pressrelease/detail?id=522> (last accessed 6/28/2021).

<sup>26</sup>United Nations Human Rights Office of High Commissioner, *Human Rights and Election Standards A Plan of Action* (Dec.2017) Available at: <<https://www.ohchr.org/Documents/Issues/Elections/POA-EN.pdf>> (last accessed 20 January 2021).

experiences and measures taken by other jurisdictions appear instructive. The following discussion highlights the processes of deferral or holding of elections of four jurisdictions that had no express constitutional or statutory authorization for postponement or holding of elections as well as the in/continuity of the incumbent government in case of an unprecedented situations, like the COVID-19 pandemic.

#### A. France

In France local elections which were planned for March 2020 were partially postponed due to COVID-19. France was supposed to conduct two rounds of elections. The first round was held, but the second round was postponed due to lockdown. Before the final decision for postponement, President Emmanuel Macron asked a body of ‘COVID-19 Scientific Council’ (CPC) if it was possible to hold elections, and the response was affirmative (under specific conditions and with adaptations to voting procedures).<sup>27</sup>

Nevertheless, there was intense controversy over whether to hold or postpone the elections due to no legal provision in France authorizing the Government to decide by itself to postpone an election, hence the impasse had surfaced.<sup>28</sup> The question then was whether the Government could justifiably postpone the elections unilaterally, but this would have been extremely difficult both legally and politically.<sup>29</sup> The first round of the municipal elections was held but contention erupted when the government was ready to conduct the second round. Before holding the second round lockdown was announced. With the agreement of all political parties and in light of the restrictions, the Government decided to postpone the second round of the municipal

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<sup>27</sup> ROMAIN RAMBAUD, Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France, IDEA.int.pp.6 (June 23, 2020). Available at: <https://www.idea.int> (last accessed 2/24/2021).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

elections on justification of case law theory of exceptional circumstances.<sup>30</sup>

With a view to justify its actions and protect the public from the raging Pandemic, the French Parliament worked toward postponement of the planned election and justifiably declared the state of emergency.<sup>31</sup> By doing so, France adopted an electoral legal framework through a public and inclusive process, which allowed for a meaningful discussion and acquired the consensus of the key stakeholders.<sup>32</sup> This law provided the following two different possibilities: (a) if it were possible to organize the second round in June, it would be mandatory to do so; (b) if that were not possible, then the elections could be organized later.<sup>33</sup> After consulting the associations of mayors and the political parties, the government decided to follow the first scenario envisaged in the emergency law and to schedule the elections for 28 June, while the virus had started to plateau.<sup>34</sup>

## B. Myanmar

Myanmar's Constitution explicitly provides that "after the expiry of the incumbent term, the President and the Vice-Presidents," who were elected indirectly, "shall continue their duties until the time the new President is duly elected,"<sup>35</sup> but no similar provision exists for members of Parliament (MPs). Any decision to postpone would be significant, as Myanmar was facing a major general election scheduled for 8 November 2020<sup>36</sup> — the second since a civilian government

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<sup>30</sup> *Id.* P. 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id* p. 8.

<sup>34</sup> *Id*, p.19.

<sup>35</sup> Const. art. 61(b) (2008) (Myanmar).

<sup>36</sup> Union Election Commission, *The Republic of Union of Myanmar — Statement of the Myanmar National Human Right Commission/MNHRC/ on Multi-Party Democracy General Election Statement No. 9/2020(6 JUN.2020)* Available at: <https://www.mnhrc.mm> last accessed 3/7/2021.

came to power in the 2015 democratic transitional elections. As per the Constitution and election laws the timing of election requires that if there is to be no legislative interregnum, which would be constitutionally problematic — the election to be held no later than January 2021.<sup>37</sup> Under Sections 119 and 151 of the Constitution, the term is five years from the first day of their first session.<sup>38</sup> In 2016, the legislature was convened and MPs were sworn in on February 1, which means that the term was ended on January 31, 2021.<sup>39</sup> Under Section 123, the first regular session of a term of the lower house “shall be held within 90 days after the commencement of the general election.”<sup>40</sup> The schedule of the upper house is linked to that of the lower house (Section 154a), as are the schedules of the state and region legislatures (section 171a).<sup>41</sup>

Albeit such legal lacunae and the continuum government restrictions due to the pandemic, the campaign period was scheduled few weeks before the period of the election as the election was scheduled to be held as planned.<sup>42</sup> Nonetheless, in the areas, the lockdown was pending, the election campaigns with gatherings were paused, but online campaigns were conducted.<sup>43</sup> Additionally, the Ministry of Health and Sports/MoHS/ had issued the order to hold campaigns with a maximum of 50 people and in line with standards election operating procedures.<sup>44</sup>

However, this entailed that the opposition Political parties in Myanmar had urged the Union Election Commission (UEC) to postpone November's election, saying the "COVID-19 restrictions will hinder

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<sup>37</sup> Katherine, *supra* note 18 p.9.

<sup>38</sup> *Id* p.24.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Open Development Myanmar, “COVID-19 and the 2020 Myanmar Election” Available at: <https://opendevmentmyanmar.net> (last accessed 3/8/2021),

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

their election campaigns.<sup>45</sup> But the ruling National League for Democracy (NLD) party decided to go ahead with its election campaign on social media.<sup>46</sup> And, the UEC decided to continue the election as scheduled and it included MoHS's standard operating procedure and related health guidelines.<sup>47</sup> Finally, despite all these contentious issues, the general election of Myanmar was held on 8th November 2020 in which the incumbent NLD won a large majority seats (397 out of 476) of the parliament.<sup>48</sup> Consequently, as time went on the ruling government led by NLD was overturned by the coup d'état.

### C. The Republic of North Macedonia

The Constitution of Republic of North Macedonia was silent about the unprecedented exigencies, but the Parliament was dissolved to fill the unexpected lacunae.<sup>49</sup> The dissolution of Parliament coincided with the then electoral process that commenced in February, and hence a caretaker government was established as part of political agreement to raise trust on April 12, 2020, national election.<sup>50</sup> However, on March 18, the President declared a SOE, and the caretaker government subsequently issued a decree ceasing all election-related activities during the SOE.<sup>51</sup> This presents a complex scenario whereby a postponement was taking place during an electoral process and with a caretaker government in place — raising questions both of timing and

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<sup>45</sup> Cape Diamond & May Thingyan, “Coronavirus and security issues cast a pall over Myanmar polls” (30 Sept.2020) Available at: <https://www.dw.com/en/coronavirus-and-security-issues-cast-a-pall-over-myanmar-polls/a-55106894> (last accessed 3/8/2021).

<sup>46</sup> *Id.*

<sup>47</sup> Open Development Myanmar, *supra* note 42.

<sup>48</sup> Lucas Myers, “What Myanmar’s 2020 Election Tells Us About US.-China Competition”, (12 Jan. 2021). Available at: <https://www.wisoncenter.org> ( last accessed 3/8/2021),

<sup>49</sup> Katherine, *supra* note 18 p.9.

<sup>50</sup> Illcho Cvetanoski Skopje, North Macedonia, Coronavirus Stops Elections, Osservatorio Balcanie Casuoso Transeuropa (March 13, 2020), <https://www.balcanicaucaso.org/eng/Areas/North-Macedonia/North-Macedonia-coronavirus-stops-elections-200237.> ( Last accessed 3/8/2021).

<sup>51</sup> Katherine, *supra* note 18 p. 11.

decision-making authority.<sup>52</sup> The SOE was governed by the Constitution and the Law on the Government, but the Election Code is silent on what to do during exigencies.<sup>53</sup>

The parliamentary election was initially scheduled for 12 April 2020, but on account of COVID-19, on 18 March 2020, a 30-day SOE was declared, and on 21 March the scheduled election was suspended by a governmental decree, which provided that the electoral process would resume from the day the state of emergency was lifted.<sup>54</sup> The SOE, which granted the caretaker government extraordinary legislative powers, was extended four times.<sup>55</sup> Among challenges that the State confronted, the issue of legitimacy of presidential decisions that declared a state of emergency without parliamentary approval was a prominent one. Accordingly, the legislative decision was brought before the Constitutional Court.<sup>56</sup> The election date of 15 July 2020 was determined following a protracted negotiation between political parties, focused on the need to reconstitute a regular government and parliament and safety measures for conducting elections during the pandemic.<sup>57</sup> Thus, the election was conducted under a legal framework substantially amended on the eve of its announcement.<sup>58</sup> The amendment was sought by the majority of SEAM (Special Election Assessment Mission) interlocutors, state agencies, and political parties, which underlined the need for a comprehensive reform of electoral legislation.<sup>59</sup> The February 2020 changes to the Electoral Code were adopted under an expedited procedure, without general debate

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Office for Democratic Institutions and Human Rights, *Early Parliamentary Elections 15 July 2020: ODIHR Special Election Assessment Mission Final Report*, (2 Oct. 2020), p.6. <https://www.osce.org/files/f/documents/b/e/46568-0.pdf> (Last accessed 3/8/2021),

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id* p.7.

<sup>58</sup> *Id* p.8.

<sup>59</sup> *Id.*

parliamentary Rules of Procedure.<sup>60</sup> The proposals of an inter-agency working group tasked with amending the Electoral Code were not incorporated.<sup>61</sup>

Therefore, on 13 July, 67 special Election Boards (EBs) comprised of three healthcare workers and two political party representatives conducted voting in 57 municipalities by visiting COVID-19 voters and those in self-isolation at their locations.<sup>62</sup> Members of special EBs were trained to follow specific protocols COVID – 19 that meant to take care against infection and spread of COVID-19, which included the wearing of personal protective equipment, social distancing, and disinfection at multiple stages in the process.<sup>63</sup>

#### D. Zimbabwe

In matter of free, fair, and periodic election, the Zimbabwean Constitution aligns with the in line with the ICCPR rules.<sup>64</sup> Section 158(3) of the Constitutions states that polling to fill vacancies in the parliament and local authorities must take place within 90 days after the vacancies occurred, unless the vacancies occur within 9 months before a general election. The Section does not specify whether elections could be postponed beyond the 90-day limit, and there is no other provision in the Constitution that gives the power to postpone election.<sup>65</sup> Similarly, though Section 39 of the Election Act gives the President the power to fix a date for elections to fill vacancies among constituent members of the National Assembly, polling must not exceed 90 days after the vacancies occurred. Despite this fact, due to the pandemic on 25 March 2020, the Chairperson of Zimbabwe Electoral Commission/ZEC/ announced the suspension of electoral

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<sup>60</sup> *Id* p. 9.

<sup>61</sup> *Id.*

<sup>62</sup> *Id* p.30.

<sup>63</sup> *Id.*

<sup>64</sup> Const. sec 67 (2008) (Zimbabwe).

<sup>65</sup> Election Watch 1-2020 – Suspension of Election Activities, Veritas Zimbabwe (May 17, 2020), available at <http://www.veritaszim.net/node/4168>.

activities.<sup>66</sup> Rural district council by-election, ward 16 of Chiredzi (originally scheduled for 4 April 2020); Legislative and council by-elections (scheduled for 5 December 2020) suspended and then moved to 2021.<sup>67</sup> Emergency measures in Zimbabwe were introduced via amendments to the health laws, not as part of a formal declaration of a SOE.<sup>68</sup> Some commentators have criticized this approach, while noting that statutory instruments made under the Public Health Act that cannot override a mandatory provision of the Constitution, which requires by-elections to be held within 90 days.<sup>69</sup> Particularly, it criticized that the deferral announcement by-elections were not followed up with an official notice in the Gazette or newspaper, and did not consult all political parties likely to be affected.<sup>70</sup>

### *2.3. Constitutional Implications of Deferral of Election during Emergencies in Ethiopia*

In line with the other contemporary constitutions and international Bill of Rights, the FDRE Constitution recognizes the periodic election. Article 38(1-c) of the Constitution states: “Every Ethiopian national [...] has the right to vote and to be elected at periodic elections [...]” Furthermore, under Art. 9(4) of the FDRE Constitution the Constitution have domesticated international instruments like UDHR and ICCPR making them as an integral part of the law of land. Moreover, the Constitution under articles 54(1) and 58(3) fixes the term of the parliament to a maximum of 5 years and requires election to be held at least a month before the expiry of the constitutional term of the parliament.

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<sup>66</sup> *Id.*

<sup>67</sup> Global overview, *supra* note 1.

<sup>68</sup> Katherine, *supra* note 18 p.10.

<sup>69</sup> *Id.*

<sup>70</sup> Election Watch, *supra* note 65.

The NEBE has the power to determine the date of the election in tune with the Constitution. But it does not entrust with the power to postpone the scheduled date beyond a month before the end of the term of the parliament. The COVID -19 Pandemic distorted the enforcement of constitutional declaration thereby creating unforeseen uncertainties. The first case of COVID-19 Pandemic was reported on 13 March 2020 following WHO's declaration that confirmed the virus was an international exigency that required restraint of public gathering.<sup>71</sup> Consequently, the federal, state, and local governments introduced various measures and restrictions that were declared with the aim of containing the spread of the virus. Accordingly, decision was made to close all federal offices and all non-essential federal employees were told to work from home.<sup>72</sup> On 20 March 2020, the Council of Ministers (CMs) decided to close the borders of the country and took related measures.<sup>73</sup> Later, the CMs declared a nationwide SOE and introduced more restrictions.<sup>74</sup>

Consequently, on 1 April 2020 NEBE announced that it was unable to implement planned pre-election activities such as election officers training, voter registration and education, and dispatch of electoral materials.<sup>75</sup> On April 30, 2020, upon receipt of the NEBE's deferral proposal, the HoPR approved the postponement of the scheduled elections. Nonetheless, the dilemma that remained was how and when the election would be held instead. As per the aforesaid constitutional stipulation the 2020 general election should have been done only a month before the then HoPR term of office ends in the final week of the Ethiopian month of Meskerem 30, 2012 E.C. (October 10, 2020

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<sup>71</sup> Zemelak Ayitenew, *Federalism and the COVID-19 Crisis: The Perspective from Ethiopia*, Forum of Federation, (2020), 1-2. Available at: <https://www.researchgate.net/publication/341205760-federation-and-the-covid-19-crisis-the-perspective-from-ethiopia/link/5eb3f35745851523bd49b6c1/download> (last accessed 1/9/2021).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> NEBE, *supra* note 2.

G.C), which became a pressing issue. The question who should have had the mandate to govern after this date until Ethiopians were going to the polls was subject of political discourse.

Wrangling to cope with the unexpected exigency, the incumbent Government forwarded four alternative scenarios: (1) to dissolve the HoPR (as stated under Article 60 of the Federal Democratic Republic of Ethiopia (FDRE) Constitution); (2) to amend the constitution (based on Article 104 and Article 105 (2) of the constitution) to extend the term of office of the HoPR; (3) to govern the country under a state of emergency until the election is held (based on Article 93 of the Constitution); (4) to ask interpretation of the Constitution.<sup>76</sup> The Government further called certain number of opposition political parties and made a short brief of discussion on its four ‘constitutional’ solutions to fill the lacunae.<sup>77</sup>

However, some opposition political parties had primarily criticized the meeting itself complaining that it was a short brief of only the Government’s propositions. Particularly, some of the opposition parties argued that these four solutions were unconstitutional. In their opinion, a proposal to dissolve the HoPR, could only be accepted if the dissolution effected within the limit of the then government.<sup>78</sup> Hence, they argued that the then government could not dissolve the HoR and hold election within six months, as specified in Article 60(3) of the Constitution before end of the term in the final week of the Ethiopian month of Meskerem (October 3-10).<sup>79</sup> Some also disagreed with the solution (2), which suggests amending the Constitution, as they argued that it would give unlimited power to the then incumbent government,

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<sup>76</sup> JALALE GETACHEW, *Constitutional Impasse in Ethiopia: Finding a Solution for the Current Postponement of the 2020 General Election in Ethiopia*, <https://verfassungsblog.de/constitutional-impasse-in-ethiopia/>, DOI: 10.17176/20200519-013449-0.(last accessed 3/9/2021).

<sup>77</sup> EBC, *supra* note 2.

<sup>78</sup> JALALE, *supra* note 76.

<sup>79</sup> *Id.*

which controlled all seats in the HoPR.<sup>80</sup> But, one of the opposition political parties — ECSJ/EZEMA — favoured and even proposed the constitutional amendment as a viable solution. They had also rejected the third solution, declaring a SOE under Article 93, because the provision does not entrust the Government with the power to declare a SOE for holding an election after its term of office ends.<sup>81</sup>

Regarding solution (4), interpreting the constitution, most opposition parties argued that there was no need to ask for the interpretation of the Constitution. They contended that there was no ambiguity in the constitutional declaration since it was so vivid that does not call for interpretation. Therefore, the opponent of constitutional amendment through interpretation argued that the only way to resolve the constitutional impasse was an extra-constitutional solution — establishing a transitional government, stating that the current government would lose its legitimacy at the end of the first month of Ethiopia (Meskerem 30, 2013 E.C). More critically, some scholars had argued that Ethiopia may face two scenarios: a state with no government (as the term of office of the incumbent government ends then) or having an unconstitutional government (if the current government continues despite expiry of the constitutional term, or if even any other interim civilian or military government established).

Notwithstanding the contentions and oppositions forwarded, the HoPR approved the proposed deferral of the August 2020 general election of Ethiopia as it was reported by the NEBE. Subsequently, HoPR upheld constitutional interpretation. And, it endorsed and referred to the CCI, for the recommendation. The HoPR requested for constitutional interpretation on two issues. First, given the global outbreak of pandemic that entailed SOE and the eventual postponement of the general election, what would be the fate of the term of incumbency of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

both legislative and executive organs?<sup>82</sup> Second, once the Pandemic (COVID-19) no longer poses a risk to public health, how long the election would be postponed?<sup>83</sup> Upon the receipt of HoPR quests, before it had dealt with the reliefs sought by the HoPR, CCI had first framed issues (first, is CCI, after all, has entrusted with the power to entertain the issues brought to it; and second, can HoPR has the right to bring the issues before CCI or is there any ground for HoPR to seek relief on issues it had brought?).<sup>84</sup> On both issues the decision of the CCI was affirmative. CCI reasoned, regarding the first issue, that it had the power to entertain the issues, as per article 84 (1) “[it] shall have powers to investigate constitutional disputes”<sup>85</sup>

The English version of the FDRE Constitution deemed to confine CCI’s powers to investigate only issues on ‘constitutional disputes’ i.e., cases appearing in regular courts and that can raise a constitutional question.<sup>86</sup> But, the Amharic version says “CCI shall have the powers to investigate ‘constitutional matters’”—meaning, the power goes beyond ‘constitutional disputes’.<sup>87</sup> And, as per article 106 of the FDRE Constitution the constitutional stipulations shall have a final legal authority. Therefore, in accordance with the Amharic version of the Constitution, the CCI shall have the power to investigate matters dealing with the vacuum of legislative and executive bodies due to the postponement, and the longevity of the due date of the deferred election.<sup>88</sup> Regarding the second issue, CCI stated that per article 3(2-c) of CCI’s Proclamation No.798/2013 constitutional interpretation on any justiciable matter can be submitted to the CCI by with approval of

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<sup>82</sup> HoPR’s Decision, *supra* note 3. (A rough translation of the Amharic version of the recommendation forwarded by the HoPR’s Stranding Committee for the Law, Justice and Democracy Affairs which is annexed to the decision No.9/2012 of HoPR).

<sup>83</sup> *Id.*

<sup>84</sup> CCI’s Recommendation, *supra* note 6.

<sup>85</sup> *Id* p. 2.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id* p. 3.

one-third or more members of the federal or state councils or by federal or state executive organs.<sup>89</sup> Thus, since the HoPR had brought the matter upon the decision with the substantial majority of the parliament, it could be acceptable.<sup>90</sup>

Then, CCI resorted to the main issues. That was firstly, as far as the fate of the term of legislative and executive bodies is concerned, following the postponement of election because of COVID-19 pandemic that evinced SOE, how Articles 54(1), 58(3), and 93 of the Constitution could be interpreted? Secondly, how the same provisions could be interpreted to determine and recommend for how long the election would be postponed?<sup>91</sup>

As to the CCI, article 54(1) and Article 58(3) are complementary. Because, the latter clarifies what the former already stipulated regarding the term of HoPR. Article 58(3) states that HoPR shall be elected for a term of five years, and elections for a new House shall be concluded one month before the expiry of the House's term i.e., at least a month before the lapse of incumbency, election must be conducted.<sup>92</sup> From this, CCI inferred and concluded that the term of office HoPR does depend on prior events of the election but it could not stand by itself. According to CCI, one may anticipate the direct application of Article 54(1) and Article 58(3) of the Constitution in the normal course of things. But, in the case of unconventional situations like the COVID-19 pandemic surfaces, the provisions might apply differently. Because, such a situation was inevitably entails SOE, and results in the derogations of human and democratic rights, including the conventional term of the government and timely election. And, CCI finally concluded that until the possible containment of the Pandemic and the SOE lifted, the scheduled August 2020 general election to

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<sup>89</sup> *Id* p. 4.

<sup>90</sup> *Id.*

<sup>91</sup> *Id* p. 7.

<sup>92</sup> *Id* p.9.

postponed, and recommended the continuity of the incumbent government until the next election.<sup>93</sup>

Regarding the second main issue (for how long the election would be postponed), CCI's recommendation was based on the NEBE's assessment that forwarded two possibilities. First, election could be conducted within 10 months after the government lifted SOE and granted additional budget, and after containment of the Pandemic. Second, when the government granted sufficient additional budget, NEBE said it could conduct an election within 13 months by taking necessary measures to control the spread of the pandemic. Then CCI, having taken the assessed possibilities suggested by the NEBE into account, recommended the 6th general election to be held within 9-12 months. But, the activities of NEBE which could not be hindered by the pandemic are said to keep in touch. Finally, upon receipt, HoF and subsequently HoPR approved the said recommendations

### **3. The conceptual discussion on the needs of constitutional interpretation, the types, and its implication, as well as the experiences of some jurisdictions.**

#### *3.1. The Need for Constitutional Interpretation*

Under traditional constitutional jurisprudence, a constitution can be interpreted when one of the following conditions occurs: i) when the laws or decisions of government officials or administrative agencies are in contradiction with the constitution; ii) when the provision of the constitution is vague or difficult to understand; iii) when issues that are not covered by the constitution occur.

A petition for constitutional interpretation may be brought before an organ that is entrusted with the power of review in any or more of the following modalities: through process known as 'constitutional complaint', or in the caption of 'constitutional question', or through

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<sup>93</sup> *Id.* p.10-14.

‘constitutional challenge.’ ‘Constitutional complaint’ is a grievance lodged to a regular /constitutional court by individuals who feel their fundamental or constitutional rights are infringed by public authorities.<sup>94</sup> Some view that constitutional complaint has several characteristics determined by four factors: availability of legal remedies against violations of constitutional rights; the existence of a separate process that only examines constitutional issues of an act, not other legal issues; it can be submitted by individuals who are directly affected; the court that decides a constitutional complaint has the power to restore the rights of victims.<sup>95</sup>

‘Constitutional question’ is a mechanism that allows competent judges to review the constitutionality of laws or regulations being used to decide cases in ordinary courts if they are entrusted with the power to do so.<sup>96</sup> If not, judges putting the pending case up and refer to the organ entitled to do so. Or if the court is unsure or doubtful about the constitutionality of laws or regulations being used for examining their cases, they may delay the examination and question the organ in charge.<sup>97</sup> It may be a regular court like in the US or constitutional court like the one in Germany or the HoF in Ethiopia often is called on to rule on the constitutionality of statutes, legislations or regulations adopted by the legislature or administrative organs — ‘constitutional challenge’. A person who brings a ‘constitutional challenge’ faces and bears a difficult legal burden. Because, more often than not, laws enacted by government organs are presumed to be constitutional unless a clear violation of a specific provision of the constitution can be proven as a ‘constitutional challenge’.

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<sup>94</sup> Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82, 7, TEX.L. REV., pp. 710.( 2004)

<sup>95</sup> Pan Mohamad Faiz, *A Prospect and Challenges for Adopting Constitutional Complaint and Constitutional Question in the Indonesian Constitutional Court*, 2,1, CON.REV. pp.106 (2016) Available at: <https://media.neliti.com/media/publications/226550-a-prospect-and-challenges-for-adopting-c-7611e3b5.pdf>.

<sup>96</sup> *Id.* p.116.

<sup>97</sup> *Id.*

### *3.2. Types of Constitutional Review and Concomitant Implications*

The effect of constitutional review determines whether a certain law or legislation, government organ's actions or decisions are consistent with the constitution. Determining whether a certain constitutional challenge is tenable or not can be typified based on different scenarios. Due to different jurisdictions employed based on multiple scenarios. Different scholars classify the scenarios in varying dimensions. This Work addresses the issue in light of the classifications adopted by Tom Ginsburg's Memo. To Ginsburg constitutional review may be varied widely on some key questions of institutional design, including who can bring a claim, what the claim can be based on, when claims can be brought, and what the effect of such decisions is.<sup>98</sup> The following discussion only stresses what kind of claims can be brought — concrete review vis-à-vis abstract review. Accordingly, concrete review requires review in a particular case where the law has already been applied or is about to be applied, whereas abstract review determines the constitutionality of a statute or government practice without any reference to a specific case.<sup>99</sup> The U.S Supreme Court can only hear concrete cases, while the German Constitutional Court practices both abstract and concrete review.<sup>100</sup> In certain other systems, constitutional courts may only hear abstract claims and rely on the ordinary courts to apply their decisions in concrete cases. In these systems, certain political institutions can challenge a given legislation as an abstract matter, while citizens who allege infringement can approach for relief, either through a court or direct constitutional petition.<sup>101</sup>

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<sup>98</sup> Tom Ginsburg, *Comparative Constitutional Review*, UNITED STATES INSTITUTE OF PEACE, 1, 1-8 (2011). Available at: <https://www.usip.org/sites/default/file/ROL/TG-Memo-on-Constitutional-Review%20for%202011-v4.pdf>. (last accessed: 3/17/2021).

<sup>99</sup> *Id* p.3.

<sup>100</sup> *Id*.

<sup>101</sup> *Id*.

#### **4. Election Postponement in Ethiopia: A Critical Scrutiny**

##### *4.1. Examination postponement in light of constitutional dictates and International practices*

The decisions for postponement an election may be justified on three possibly amenable reasons: First, it can be justified on the basis of derogability or limitations as stipulated in the FDRE Constitution. There are possibilities of encroachments of most human and democratic rights including the periodic election in the event of SOE. The unfettered rights or constitutional provisions during the exercise of the emergency powers which cannot be suspended or limited by any means are those only stipulated under Articles 1, 18, 25 and sub-Articles 1 and 2 of Article 39 of the Constitution (Article 93(4-c) of the Constitution).<sup>102</sup> Similarly, ICCPR (Article 4) declares derogability of a right in a legitimate SOE, but only "to the extent strictly required by the exigencies of the situation." Therefore, it is an acceptable international norm to restrain effects of certain predetermined civil or political rights during SOE provided the minimum legal requirement like proportionality, non-discriminatory, temporary, and limited in geographic and material scope are met. Deferring an election therefore need not be considered as contravention. Postponement of election is simply deferral of the right to vote and stand for election in emergencies, albeit with very strict guardrails to prevent abuse. This is considered as a justifiable encroachment of human and democratic right for the sake of greater public interest.

Next, holding of periodic election is complementary to the exercise of democracy and related rights. In accordance with the General Human Rights and Election Standards, for the realization of democratic

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<sup>102</sup> Nomenclature of the State (art.1); the prohibition against inhuman treatment (art.18); the right to equality (art. 25); and the NNPE's unconditional right to self-determination, including the right to secession. as well as right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history(art.39(1-2)).

election, States should ensure proper exercise of key human rights, whether exercised online or offline, *inter alia*, freedom of peaceful assembly and association; freedom of opinion and expression, and access to information; security of the person; and the right to remedy and access to justice.<sup>103</sup> Unrestrained exercise of freedom of expression and the freedom of assembly and association for political purposes is vital especially during election campaign. As per both AU's ACDEG under Articles 3(1) and 6,<sup>104</sup> and PGDE under section III-d<sup>105</sup> require a proper safeguard of human and civil liberties of all citizens during democratic elections. Needless to say, the Government cannot effectively discharge its traditional function of safeguarding safety and security of citizens on the ground of ravaging Pandemic. Further, the proper exercise of rights could be inevitably in question as far as the measures and restrictions of SOE that meant to curtail spread of COVID - were intact. Deferral of election can be considered as a lesser evil that should be tolerated in line with the cost benefit analysis standards.

Lastly, consideration of factual situation that a nation has been experiencing is a determinative factor. For instance, one can safely argue that the adverse factual situations that Ethiopia has been enduring shall be considering in determining postponement. Often, elections require a peaceful political atmosphere and conducive environment in which basic human rights and freedoms are respected, and a formidable condition of full guarantee of public order and security. The pandemic coupled with a continuous security crisis would undoubtedly strain the process and undermine free exercise of democratic election.

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<sup>103</sup> United Nations Human Rights Office of High Commissioner, Human Rights and Election Standards A Plan of Action (Dec.2017), <<https://www.ohchr.org/Documents/Issues/Elections/POA-EN.pdf>. (last accessed 20 January 2021).

<sup>104</sup> AU's ACDEG, *supra* note 16, Art. 3(1) &6.

<sup>105</sup> AU's PGDE, *supra* note 17, sec. III-d.

Thus, in every exceptional scenario, it was the duty of authorities to postpone election to reduce tensions and give voters the possibility of expressing their will in a safe and well-orderly context. That is seemingly, for instance, the reason why the national population census of Ethiopia that scheduled after a long time was suspended on the ground of public safety and security. Then why not the general election that necessarily requires huge campaign and gathering not postponed for a safe time?

Given the deferment of the election due to one or cumulative causes mentioned of above, the question that remains intact is, who is entitled to declare a valid deferral? Though the Constitution is clear about the body to schedule the periodic election — NEBE, it does not vividly pinpoint an organ that can decide postponement. Most political parties and stakeholders did not oppose the deferment of the scheduled election (the end), but did not favour the processes [the means]. Despite the silence of the Constitution, the incumbent government came up with the decisions as *fait accompli*<sup>106</sup> i.e., things related to the postponement had been decided before those affected had heard about it, leaving them with no option but to accept it. It was an indisputable fact that the incumbent government did not call up political parties and concerned stakeholders before it reached on the resolution of deferment of the election and the four ‘constitutional’ propositions thereto. But it was seemingly a mere announcement of conclusive decisions. Such was also devoid of potential lessons that could have been taken from regional, international, or other jurisdictions’ standards, experiences, and practices.

In extraordinary situations, even the countries which have a constitutional way out often had required special measures like appeals for dialogue to the state actors and political parties.<sup>107</sup> The

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<sup>106</sup> Black’s Law Dictionary P. 825.

<http://thelawdictionary.org/page/825/?search=http%3A%2F%2Fthelawdictionary.org%2Fletter%2Fn%2F> (last accessed 3/28/2021).

<sup>107</sup> Venice Commission, *supra* note 22 p. 30-31.

international human rights and election standards of ensuring the right to participate in public affairs which is responsive, inclusive, participatory, and representative decision-making at all levels, should have been also applicable for the postponement of elections. More importantly, both Article 13 of ACDEG and ACHPR underlined consultations with and full participation of all stakeholders for determining the new electoral calendar in compliance with applicable constitutional standards.

For instance, given no legal provision in France that authorizing the Government to decide, the French Government had decided after consulting the associations of mayors and the political parties.<sup>108</sup> Hence, it has adopted an electoral legal framework through a public and inclusive process, which allows for a meaningful discussion and facilitates the consensus of the key stakeholders.<sup>109</sup> Similarly, save the dissolution of parliament and establishment of the caretaker government, the general election date of 15 July 2020 of North Macedonia was determined following protracted negotiations between political parties.<sup>110</sup>

On the other hand, Myanmar's and Zimbabwe's governments did not consult all political parties likely to be affected by it in the decisions of holding and deferment of elections or by-election, respectively. And, we have witnessed the unpleasant consequences happened especially in the former while in the latter continuous agitations toward the formation of the caretaker government. Coming to Ethiopia, one may argue, given the proliferation of opposition political parties and (often) extremely polarized political perceptions, it would be a nightmare to have (let alone unanimous consensus) a helpful decision. But, such should not be tantamount to rejecting the propositions of opposition political parties altogether and pulling off prior consultation. Because

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<sup>108</sup> ROMAIN, *supra* note 27 p.9.

<sup>109</sup> *Id* p.7.

<sup>110</sup> Office for Democratic Institutions and Human Rights, *supra* note 54 p. 7.

in the absence of responsive, inclusive, participatory, and representative decision-making at all levels as well as national dialogue and consultation (esp. in the period of political flux), whatever the endeavored decision of the incumbent government may lose legitimacy.

Opposition political parties are not the only and primary actors with vested interest about how this constitutional conundrum needs to be solved; are only first among many other equally important interested stakeholders.<sup>111</sup> Even one may argue that this crucial national issue should have been discussed not only with political parties but also with other sectors of society including representatives of women organizations, representatives of the ten regions and the two city councils, trade unions, businesses, daily labourers, farmers, persons with disabilities, pastoralists, professional associations, the intelligentsia, and the youth.<sup>112</sup> Nonetheless, we have witnessed that due to the perilous situation created by the pandemic worsened by the constitutional silence, the incumbent government was desperately looked for the leeway to postpone the sixth national election. Hence, sometimes the means determine the end — the process of postponement may determine the legitimacy of the incumbent government. However, it is important to note that albeit the critique of the lagging, NEBE on its part had priori consulted and discussed with the Parliament and other government bodies – Ministry of Health and high-level public health experts, international partners, and political parties.<sup>113</sup>

Regarding the quest (for how long the postponement should endure?), had the writer was not aware of the already rescheduled decision of the general election and stuck merely on the then indeterminate postponement decision of NEBE, would have firmly condemned the

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<sup>111</sup> Solomon, *supra* note 12.

<sup>112</sup> *Id.*

<sup>113</sup> NEBE, *supra* note 2.

indeterminate deferment. Such is because the more indeterminate and endurance of the postponement, the more possibility of abuse of power and undue continuity of the tenure of incumbency, and finally, get rid of legitimacy. The quest: ‘based on what?’ is attempted to assess indirectly in the above section.

#### *4.2. Examination of the Constitutional Interpretation of the Deferral of Election*

To the critique, the HoPR’s submission was a hypothetical issue that was not backed by the cumulative readings of Article 3(2-c) and article 3(1) of Proclamation No. 798/2013 — a proclamation setting ground for constitutional interpretation governing disputes on the constitutionality of laws, customary practice, or decision of government organs.<sup>114</sup> And also it was argued that Articles 83 and 84 of the Constitution limit the mandate of the CCI to deal with actual disputes of facts or laws – not imagination – hence, the Government’s submission apparently failed to meet the admissibility requirements set in Article 3(1) of Proclamation No. 798/2013 and Articles 83 and 84 of the Constitution.<sup>115</sup>

Therefore, it is pertinent to assess whether the constitutionality issue under discussion was an imaginary one or not. It is equally significant to explore whether the HoF is confined to determine only actual dispute or can resolve issues that can potentially ignite future confrontation. One, therefore, can fairly question whether there was a justifiable ground for constitutional interpretation that merit constitutional amendment through interpretation.

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<sup>114</sup> Abraha Messele, et-al, *Amicus Curiae on Election, COVID-19, and Constitutional Interpretation in Ethiopia*, (May 15, 2020) available at: <https://www.researchgate.net/publication/341643557> (accessed 2/23/2021); [submitted to the Ethiopian Council of Constitutional Inquiry (CCI) but was not raised during CCI’s hearing]

<sup>115</sup> *Id.*

Apparent clarity of a constitutional provision does not tantamount withering interpretation. A provision may be clear in its natural sense, but may be not able to suppress an actual or a perceived social evil. Further, a given constitutional provision may not necessarily be categorically empowered to tackle unimagined issues that may surface in real life. Therefore, a variety of constitutional constructions modalities may be employed to address issues that were not foreseen by constitutional makers. When literal interpretation fails to work, the next possible method of interpretation is contextual one. In this method, a provision need not be independently read, but with a view to find out the real thought of the crafter of the constitution, similar provisions or even the whole document might be read together. Moreover, there might be time where a constitutional provision contradicts with the other, situation like the case at hand that calls for application multiple scenarios side by side (for instance, the declaration of SOE and its frictions vis-à-vis the respect to democratic rights).

While a relevant constitutional provision may appear clear in isolation, a constitutionally defensible outcome may call for a reconciling logic through interpretation.<sup>116</sup> For instance, Article 58(3) of the Constitution states, “[t]he House of Representatives shall be elected for a term of five years [...],” But what would happen if it is not possible to run an election or if conducting an election is thought to stir huge costs to the nation or citizens? Should the dictates of the Constitution be respected no matter how enforcement of the constitutional provision generates absurd consequences? What if the literal application of a word or phrase bears a fruit that is more poisonous than its ignorance? Needless to say, it is imprudence to choose a grave evil while it is possible to choose a lesser one. Choice of lesser evil can be affected if an

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<sup>116</sup> Adem Kassie, *Beating Around the Bush on Constitutional Conundrum*, ETHIOPIA INSIGHT, Apr.14, 2020 : <https://www.ethiopia-insight.com/2020/05/14-beating-around-the-bush-on-constitutional-conundrum/?fbclid=iwar3ewfppeh9dsr5ezibd5tcubywa2wdnj5wrmxpeafjgpltj4nv3bvh7i> (Accessed 20 September 2020).

apparently vivid provision is construed in way a suppressing an unexpected mischief.

Article 58(3) of the FDRE Constitution was designed without foreseeing that situations restraining conducting periodic elections would surface. One may argue, taking it as an escape clause and in pursuit of a lesser evil, the HoF may rescind the democratic rights of citizens by applying Article 93(4) of the Constitution, which may authorize the Government to suspend political or democratic rights including free, periodic and election. As stipulated in this provision, the government can suspend constitutional rights “to the extent necessary to avert the conditions that required the declaration of a state of emergency.”

In the case of COVID -19 Pandemic suspension of certain constitutional rights appeared justifiable, but for how long? There was no scientific proof that could forecast the end of the Pandemic. Fortunately, now the world is not fearful of the Pandemic, but at the time of declaration of SoE no one could forecast the end of the Pandemic.

Does the FDRE Constitution cover constitutional interpretation in a situation where there is no constitutional dispute? It seems not clear whether the FDRE Constitution recognizes abstract review. As provided under Article 84(1) of the Constitution, CCI is empowered to investigate constitutional disputes, which appears equivalent but not necessarily includes abstract review. At the same time, Article 83(1) of the Constitution holds the same view. It expresses that all ‘constitutional disputes’ to be decided by the HoF. However, it is important to remind CCI’s argument forwarded to assume its competence. The English version of the FDRE Constitution seems to confine CCI’s powers to investigate only issues that arise from ‘constitutional disputes’ i.e., matters that involve a constitutional question.

But the Amharic version declares that CCI has the “[...] the powers to investigate “constitutional matters (ክት-ማንግስታዊ ክርክር),” which goes beyond the expression, ‘constitutional disputes.’ Specifically, the Amharic expression, ‘ክት-ማንግስታዊ ታደም’ connotes “issues”, “matters” or “affairs”, rather a mere dispute (ክርክር). In the case of ambiguity or contradiction, the authority of Amharic version is not doubtful. As per article 106 of the FDRE Constitution, the Amharic version of the Constitution shall have a final legal authority thereby implying that the CCI shall have the power to investigate abstract review – merely the power to deal with constitutional dispute. Moreover, under Article 62 of the Constitution, the HoF has a plenary power to “interpret” — but no reference is made to ‘dispute,’ which means the review is not limited to concrete dispute.<sup>117</sup>

Therefore, it appears safe to conclude that as per Article 84(1) of the Constitution the CCI is empowered to investigate constitutional issues which also include concrete constitutional disputes. Moreover, in line with the aforesaid argument, CCI’s Proclamation under Article 3(2-c) expressly recognizes abstract reviews in the case of constitutional crises. One can fairly infer from the Proclamation that un-justiciable matters can be challenged by one-third or more members of the federal or state councils or by federal or state executive organs.<sup>118</sup> Had Ethiopia’s constitutional system originally intended to exclude abstract review, it would have only confined to state the justiciable matters, and disregarded the ‘constitutional challenge.’ Thus, the mere fact that the abstract issue was contained in the HoPR’s requests did not mean the question was a hypothetical one. It was an actual claim that geared toward filling a possible power vacuum and the constitutional impasse. In this regard, generally speaking, some scholars jot the following down:

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<sup>117</sup> *Id.*

<sup>118</sup> CCI Proclamation, *supra* note 7.

The design of the Ethiopian Constitution is radically different. The power of constitutional review is given to one Branch of Parliament [HoF], which is not a part of the judicial branch. [The judiciary...] does not have the power of adjudicating “cases and controversies” of any kind as in the United States [...] To deny [...] judicial power and yet say that it could only resolve constitutional questions through the judicial function of adjudicating cases and controversies defies logic.<sup>119</sup>

The other indispensable issue that should be clearly dealt by the CCI was whether constitutionality issue was really concrete or simply an imagination that may or may not surface. As can be understood from the constitutional provisions and subsequent proclamations, a review to be brought on justiciable and non-justiciable matters have different grounds of interpretation. Furthermore, it can be understood from experiences of other jurisdictions as well as the international practices that concrete reviews only have to do with concrete cases through ‘constitutional complaint’ or ‘constitutional questions.’ The former presupposes the availability of legal remedies against violations of constitutional rights and the existence of a separate process that only examines constitutional violations, not other legal issues. A claim of constitutional violation can be submitted by individuals who are directly affected by that act, and the reviewing body that decides a constitutional complaint should have the power to restore the rights of victims.<sup>120</sup> The latter is all about that if regular courts are doubtful about the constitutionality of laws or regulations being used for examining their cases [the main claim], they may delay the examination and question the organ entitled to do so [the contingent

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<sup>119</sup> Zewdineh Beyene Haile & Won L. Kidane, BRIEF AMICUS CURIAE ON THE QUESTION OF A constitutional interpretive solution to the issue of the expiry of parliamentary term during a state of emergency that made timely elections impossible, pp.12(14 may 2020)

<sup>120</sup> Pan, *supra* note 95.

claim].<sup>121</sup> But the claim brought to the CCI/HoF was different and devoid of two aforesaid claims.

With the above issue, the opposition has also raised against the competency of HoPR to bring constitutional challenges. However, the HoPR has the right to submit a request for interpretation as the CCI had ascertained that the request for interpretation was submitted by the majority vote of the former. Nonetheless, the main deviation still left behind is concerning the content of the HoPR's requests and the consequent competency of CCI. This is because while the HoPR had accepted the postponement of the 2020 general elections, there was no specific government decision, law, or even proposal, and the request did not relate to the compatibility of a chosen course of action with the Constitution. Had the postponement decided in *de jure* (via law, endorsement, or even proposal) by the HoPR and consequently contended or challenged by substantial members of it or entrusted body, it would have been immediately capable of being entertained by HoF/CCI constitutional adjudicatory or review process. Technically and procedurally speaking, this dearth made the request resemble an Advisory Opinion which is not necessarily meant for constitutional review. However, the factual quest which was sought by HoPR is otherwise.

The advisory opinion procedure entails that the competent organ may present questions regarding the interpretation and application of the Constitution — may not be of an abstract or theoretical nature, but the question must involve concrete cases that call for review of a decision or law without a need to show that the decision inflicts rights of a specific person (i.e. without a victim).<sup>122</sup> The problem is not only got to do with the kind of review employed and non-binding of opinion but

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<sup>121</sup> *Id.*

<sup>122</sup> Janneke Gerards, *Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights: A Comparative and Critical Appraisal*, 21 MJ 4, RE.GATE pp.633(2014) Available at: <https://www.researchgate.net/publication/306290775> last accessed 3/22/2021

also the equivocality of the Constitution as well as the CCI proclamation regarding the competence of CCI to look at the ‘advisory opinion’ already brought. And, at the end of the day, the legality or constitutionality of the whole process of CCI’s review of rendition would be defeated. Seemingly, the mandate of giving an advisory opinion is entrusted on HoF which may be inferred from the otherwise expression of Article 4(2) of Proclamation No 251/2001, the laws regulating the role of the two in bodies — HoF and CCI, which states that HoF shall not be obliged to “... provide consultancy service on constitutional interpretation”. <sup>123</sup> The contrary reading of this provision could be interpreted to mean that the HoF has discretionary power to seek advisory opinion. The open-ended statement of Article 62(1) of the Constitution: “The House has the power to interpret the Constitution” may mean to encompass advisory opinion. Unlikely, Proclamation No. 798/2013 has no provision authorizing (either discretionary or else) the CCI to issue an advisory opinion.

Therefore, it is safe to conclude that the policy reason behind the CCI expelled from serving advisory opinion might be due to the decision to seek advisory opinions is an inherently political issue and needs political resolution, not adjudicatory. It is to be expected that the CCI as ‘quasi-judicial’ would not easily express more political grounds underlying a refusal or acceptance, such as a hesitation to become involved in a rather delicate national debate or a sensitive constitutional matter. Thus, the request of the HoPR should have been primarily brought to HoF, not of CCI, seeking an advisory opinion. Nonetheless, despite the appreciable, superb, and historical benchmark of the processes of televised hearings as to the constitutional interpretation, CCI did not only thoroughly examine whether it had the competence to entertain HoPR’s request, esp., on the constitutional

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<sup>123</sup> A Proclamation to Consolidate the HoF of FDRE and to Define Its Powers and Responsibilities Proclamation No.251/2001, *Federal Negarit Gazeta*, Year 7, No 41, Addis Ababa, 6 July 2001, Art. 4(2).

review vis-à-vis the advisory opinion. But priori had accepted the interpretation and thus gave much stress on the means or theories of interpretation. If the Council had thoroughly assessed this issue, it would have declined the request and opined the HoPR to submit the request to the HoF instead.

Thus, even though a glance of substantive looking of the process of HoF/CCI's constitutional interpretation seems constitutional; the lookover of the technical and procedural counterpart nullifies it.

## 5. Conclusion

To conclude, the decisions of the deferment *per se* are tolerable for plausible reason(s). But the incumbent government took it for granted i.e., was desperately looked for leeway to postpone the sixth general elections. On the other hand, the constitutional interpretation was a receptive remedy to rectify the constitutional impasse, if not the sole. The assumption of CCI to entertain and recommend the claim was tenable as per Article 84(1) of FDRE Constitution esp., the Amharic version, & Article 3(2-c) of CCI's Proclamation. However, the CCI was on the wrong track while concluding the HoPR's claims require a review. Because, technically and procedurally speaking, the HoPR's requests resemble advisory opinions that should have been declined and submitted to the HoF instead. This *ab initio* nullifies the CCI's recommendation as well as the HoF decision.