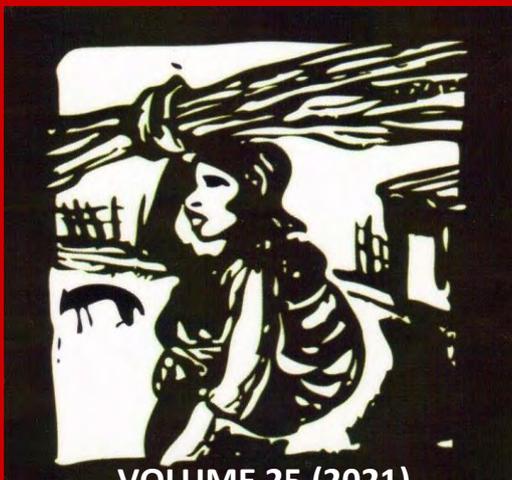


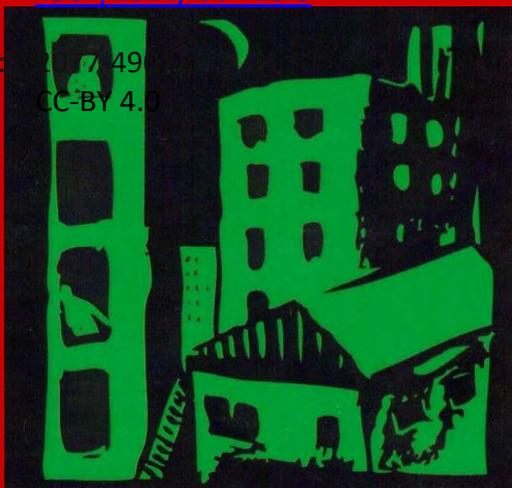
LAW  
DEMOCRACY  
& DEVELOPMENT



VOLUME 25 (2021)

DOI: <http://dx.doi.org/10.17159/2077-4967/2021/ddd.v25.3>

ISSN: 2077-4967  
CC-BY 4.0



**COVID-19 and  
elections in  
Ethiopia:  
exploring  
constitutional  
interpretation by  
the House of the  
Federation as an  
exit strategy**

LEGESSE TIGABU MENGIE\*

*Researcher, The University of Adelaide,  
South Australia*

ORCID ID <https://orcid.org/0000-0003-4288-2761>

**ABSTRACT**

*Over 60 countries have postponed their elections due to COVID-19. As an election is the primary means by which government power is assumed in constitutional democracies, the*

---

\* This article has benefited a lot from comments by Dr. Anna Olijnyk, Associate Professor Laura Grenfell and the two anonymous reviewers. I am grateful for their constructive comments. I would also like to thank the University of Adelaide for funding my work.

*postponement of elections has posed this question: what exit mechanisms do constitutional systems have to address a power vacuum caused by unforeseen circumstances like COVID-19? In other words, how can a legitimate government that adheres to the rule of law, a constitution more specifically, be ensured when elections cannot be held? While some countries held elections amid COVID-19 with precautions, others postponed them. Ethiopia is one of those countries which have postponed their elections. The postponement of Ethiopia's general elections sparked a debate about how the power vacuum caused by the pandemic should be addressed. After deliberating on the matter, Ethiopia's lower house approved constitutional interpretation by the upper house as the best solution. The upper house, through interpreting the Constitution, extended the term limits of the federal and regional governments. This article intends to address the question posed above by examining constitutional interpretation by the upper house as an exit strategy. It explores constitutional interpretation by this house and its implications for the rule of law and legitimacy of government. I conclude that comprehensive understanding of the Constitution offers an answer to the conundrum. The upper house has adopted a holistic interpretation approach and that is commendable. However, the ruling that allows the government to stay in power for an unknown time and the partiality inherent in the house compromise the merit of its interpretation.*

**Keywords:** COVID-19; election; constitution; the rule of law; legitimacy; Ethiopia.

## 1 INTRODUCTION

COVID-19 has impacted elections in over 60 countries and several territories.<sup>1</sup> General, presidential, local and municipal elections and referenda have been postponed in these countries and territories, most of them indefinitely.<sup>2</sup> The pandemic has posed an interesting constitutional question as it continues to impact elections: what exit mechanisms do democratic constitutional systems have to handle a constitutional crisis, in particular when a government's term expires before elections can be held due to unforeseen circumstances like COVID-19? Periodic elections have become sources of governmental legitimacy in modern democracy. Assuming power through other means would leave governmental legitimacy at risk. Overlooking elections in constitutional democracies would also mean ignoring one of the fundamental constitutional values in such systems and that violates the rule of law, supremacy of a constitution more specifically. But unforeseen circumstances, such as, COVID-19, outbreak of a civil war, natural disaster or breakdown of law and order, could result in an unelected government whose legitimacy depends on arrangements other than elections.

Modern democracy and popular sovereignty rely on elections. Berouk, in his work *Democracy, elections and political parties*, claims the inextricability of modern democracy from elections, stating that "the founding pillars of any democratic political

---

<sup>1</sup> See International Foundation for Electoral Systems "Elections postponed due to COVID-19" (2020) available at [https://www.ifes.org/sites/default/files/elections\\_postponed\\_due\\_to\\_covid-19.pdf](https://www.ifes.org/sites/default/files/elections_postponed_due_to_covid-19.pdf) (accessed 01 December 2020).

<sup>2</sup> See generally International Foundation for Electoral Systems (2020).

system, whether considered fragile or established, remain undoubtedly elections”<sup>3</sup>. Gardner has also set out the critical role elections play in the realisation of popular sovereignty and legitimate governance.<sup>4</sup> Democracy is also integral to the rule of law and this makes elections relevant for the promotion of the rule of law. As Murphy indicates, the broader conception of the rule of law requires democracy, hence elections, as the rule of law in this case will not be fulfilled just by following rules; the legitimacy of the authority behind the rules would also matter.<sup>5</sup> Tamana also argues that the “thick substantive rule of law, which includes formal legality, individual rights and democracy, likely approximates the common sense of the rule of law”<sup>6</sup>. But the question is: what if we end up with an unelected government due to unforeseen circumstances? Answering this question would require an investigation into the exit mechanisms constitutional systems have set in place to ensure the presence of a legitimate government that adheres to the rule of law until elections are held.

COVID-19 has presented a difficult dilemma for State authorities. “Both holding and postponing elections present a risk for politicians.”<sup>7</sup> If elections are postponed, “public concerns about perceived attempts at extending mandates of incumbents undemocratically” have to be carefully dealt with.<sup>8</sup> On the other hand, holding elections during the pandemic could undermine electoral legitimacy as campaigns, voter participation and other electoral processes may be seriously affected.<sup>9</sup> Countries, including Burundi, the US, South Korea, France and Singapore, have conducted elections during the pandemic. Many precautions have been taken by these countries “including requiring masks and staggering voting hours” to ensure “safe in-person voting”, and some have employed “voting by mail”.<sup>10</sup> While holding elections during the pandemic avoids a constitutional crisis, “challenges remain...including lack of funding, technical glitches, low turnout, and legitimacy concerns”<sup>11</sup>.

---

<sup>3</sup> Mesfin B "Democracy, elections & political parties: a conceptual overview with special emphasis on Africa' (2008) 166 *Institute for Security Studies Paper* 1 at 1.

<sup>4</sup> Gardner JA "Consent, legitimacy and elections: implementing popular sovereignty under the Lockean constitution" (1990) 52(1) *University of Pittsburgh Law Review* 189 at 192.

<sup>5</sup> See generally Murphy C "The rule of law, democracy, and obedience to law" (2017) 62 *Saint Louis University School of Law* 293 at 293–301.

<sup>6</sup> Tamana B *On the rule of law: history, politics, theory* Cambridge : Cambridge University Press (2004) at 111.

<sup>7</sup> Council of Europe “Elections and COVID-19” (2020) *Directorate General of Democracy* available at <https://rm.coe.int/election-and-covid-19/16809e20fe> (accessed 06 December 2020).

<sup>8</sup> See generally Council of Europe (2020).

<sup>9</sup> See generally Council of Europe (2020).

<sup>10</sup> Council on Foreign Relations “How countries are holding elections during the COVID-19 pandemic” *Backgrounder* (2020) available at <https://www.cfr.org/backgrounder/how-countries-are-holding-elections-during-covid-19-pandemic> (accessed 06 December 2020).

<sup>11</sup> See generally Council on Foreign Relations (2020).

Countries that have postponed their elections due to COVID-19 are in a more difficult situation for they have to carefully address a power vacuum problem while adhering to the rule of law. In constitutional democracies, emergency cases need to be guided by constitutional principles which are set in advance to prevent authoritarianism and ensure that the rule of law is adhered to. The way a given constitution is designed may result in a failure in serving these purposes. Koker, in his work, *Erdogan's presidency and the Constitution*, indicates that an unchecked emergency power is a serious impediment to constitutional democracy.<sup>12</sup> Bantayehu also argues that an emergency power would undermine legitimacy in governance by making elections controversial.<sup>13</sup> Unless it is managed in a legitimate way, a power vacuum problem caused by an emergency situation could thus inhibit democratic values. This article intends to contribute to and complement the scholarship addressing this issue by examining the case of Ethiopia. While several news articles and blog posts have discussed the different dimensions of the power vacuum caused by the pandemic in Ethiopia, a more focused and comprehensive analysis of the implications of the chosen exit strategy for the rule of law and legitimacy of government has still been awaiting a scholarly undertaking, and that is what this work is about.

Despite the useful contributions of several Ethiopian lawyers and politicians to some news outlets on the four possible constitutional exit mechanisms (caretaker government, declaration of state of emergency, constitutional amendment, and constitutional interpretation),<sup>14</sup> the subject needs further and focused consideration. The House of Peoples' Representatives (HoPR), the lower house, has picked and endorsed only one of the four possible exit mechanisms – constitutional interpretation by the House of the Federation (HoF), the upper house – and the HoF has extended the terms of the federal and regional governments. This article, therefore, discusses constitutional adjudication by the HoF and its implication for the rule of law and legitimacy of government by using this decision as a case study. The article also covers, if not in a comprehensive way, the relevant new developments that followed this decision. Section Two discusses COVID-19 and elections in Ethiopia. Section Three outlines the four exit mechanisms considered by the government with the aim to elaborate the possible constitutional ways out. Section Four examines constitutional interpretation by the HoF as an exit strategy.

---

<sup>12</sup> Köker L "Erdogan's presidency and the constitution" (2014) 4(5) *Turkish Review* 490 at 494.

<sup>13</sup> Bantayehu D "Deferred election, state of emergency and Covid19 – How can Ethiopia avoid an impending constitutional crisis?" (2020) *Addis Standard* available at <https://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/> (accessed 01 December 2020).

<sup>14</sup> *Addis Standard* and *Ethiopia Insight* have been publishing comments on the topic. The piece written by Bantayehu (2020) , the commentary penned by Fessha, Ayele, Dersso and Abebe, "Making sense of Ethiopia's constitutional moment", and Ayele's analysis of "Ethiopia's COVID-19 state of emergency" are among the notable contributions to the news outlets.

Section Five concludes the discussion by advocating the holistic constitutional interpretation approach employed by the HoF in handling the case and argues that this is best aligned with principles of the rule of law and legitimate governance. It also claims that though the HoF employed the right interpretation approach, the outcome of the interpretation process and partiality inherent in the HoF have compromised the legitimacy of the decision and posed an impediment to democracy and the rule of law.

## 2 COVID-19 AND ELECTIONS IN ETHIOPIA

In late March 2020, Ethiopia's National Electoral Board (NEBE) announced that it cannot conduct the 2020 general elections as planned based on its assessment of the challenges posed by COVID-19.<sup>15</sup> The elections were scheduled to be held by late August 2020. The HoPR, the lower house, endorsed the postponement of the general elections. It then asked the HoF, the upper house, to interpret the Constitution and determine the most appropriate mechanism to handle the problem of an unelected government. The HoF, referring to the constitutional principles on emergency, government terms, elections, and fundamental rights, extended the terms of the two federal houses, itself included, and regional councils.

The HoF represents the "Nations, Nationalities, and Peoples" of Ethiopia<sup>16</sup> and its 153 members are selected by regional legislative bodies.<sup>17</sup> Unlike the upper houses in other federations, the HoF does not have a legislative role. Ethiopia thus has a bicameral parliament but a unicameral legislative body, which is the lower house. The lower house is composed of 547 members elected by a first-past-the-post electoral system and exercises exclusive legislative power over federal matters.<sup>18</sup> The HoF's primary role is constitutional adjudication.<sup>19</sup> In this, the HoF is assisted by an 11 member advisory body, the Council of Constitutional Inquiry (CCI), which consists of lawyers and politicians, including the President and Vice-President of the Federal Supreme Court (Ethiopia's apex court), as well as six legal experts and three members of the HoF.<sup>20</sup>

---

<sup>15</sup> In its press statement, the NEBE brought to the public's attention a long list of tasks disrupted by COVID-19 including dispatching voter registration materials, training over 150 000 election staff, voter education and purchasing plans. {Citation}

<sup>16</sup> See Art 61 (1) of the Constitution of Ethiopia. These entities are the building blocks of Ethiopia's federation. See Fesha Y, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Routledge, 2011).

<sup>17</sup> Fiseha A "Constitutional adjudication through second chamber in Ethiopia" (2017) 16(3) *Ethnopolitics: The Ethnopolitics of Ethnofederalism in Ethiopia* 295 at 297. The HoF's size will keep increasing as each nation, nationality or people can claim one more seat for its additional one million population. See Art 61 (2) of the Constitution of Ethiopia.

<sup>18</sup> Regional states thus are not represented in law making at the federal level.

<sup>19</sup> The HoF also has additional powers including ordering federal intervention when regional states threaten the constitutional order, voting on constitutional amendment in a joint session with the lower house and resolving disputes between the regional states.

<sup>20</sup> Article 82 (2) of the Constitution of Ethiopia.

When invited by “any court or interested party”<sup>21</sup> to “investigate” a constitutional dispute,<sup>22</sup> the CCI has two options: submitting its recommendations to the HoF “for a final decision” or rejecting a case “if it finds there is no need for constitutional interpretation”.<sup>23</sup> However, the final decision in both cases rests with the HoF as a dissatisfied party can subsequently submit a rejected case directly to the HoF.<sup>24</sup> The CCI has received over 6000 cases since its inception and found a need for constitutional interpretation in only 79 of these, and it has thus sent 79 recommendations to the HoF.<sup>25</sup> Of these, 11 have been rejected.<sup>26</sup>

In early May 2020, the HoPR referred the constitutional issue posed by the pandemic to the CCI which proceeded to hear submissions on this issue, including 22 amicus curiae briefs.<sup>27</sup> The CCI investigated the issue and submitted its recommendation to the HoF which approved it on 10 June 2020.<sup>28</sup> This decision extended the terms of the federal and regional councils and executive bodies, including the HoF itself, as well as the next general elections, to 9 to 12 months after COVID-19 is found not to be a threat to public health.<sup>29</sup> It is surprising that the HoF extended the term of the regional councils and executive bodies as the HoPR’s submission had not sought advice on this, nor are these regional bodies’ terms set by the federal Constitution. It is to be noted that the regional constitutions in Ethiopia are interpreted by constitutional commissions established by the respective regional states. One regional state, Tigray, has rejected extension of the terms of both the federal and regional governments and held its own election in opposition to the HoF’s decision.

The power to conduct elections at federal and regional levels is exclusively vested in the NEBE<sup>30</sup> and the power to make electoral laws belongs to the federal parliament.<sup>31</sup> Contrary to such constitutional allocation of powers, the Tigray Regional State government established its own electoral commission and enacted electoral laws some weeks before it conducted the election. A week before Tigray held its election, the HoF

<sup>21</sup> Article 84 (2) of the Constitution of Ethiopia.

<sup>22</sup> Article 84 (2) of the Constitution of Ethiopia.

<sup>23</sup> Article 84 (3) of the Constitution of Ethiopia.

<sup>24</sup> Article 84 (3) of the Constitution of Ethiopia.

<sup>25</sup> The source available at <https://www.cci.gov.et/wp-content/uploads/2019/12/yewusane-hasabochII-converted.pdf> (accessed 02 June 2020).

<sup>26</sup> The source available at <https://www.cci.gov.et/wp-content/uploads/2019/12/yewusane-hasabochII-converted.pdf> (accessed 02 June 2020).

<sup>27</sup> Ethiopian News Agency “Upper house approved recommendation on postponement of general elections” available at <https://www.ena.et/?p=92560> (accessed 02 December 2020).

<sup>28</sup> See generally Ethiopian News Agency (2020).

<sup>29</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, para 70.

<sup>30</sup> Article 102 of the Constitution of Ethiopia.

<sup>31</sup> Article 55 of the Constitution of Ethiopia.

passed a decision that the electoral commission and laws established by the Tigray Regional State are unconstitutional and thus the election has no legal effect. This tension between the federal government and the regional state further escalated following the HoF's decision to suspend federal subsidy to Tigray indicating that the regional government was constituted through an unconstitutional election.<sup>32</sup> On 4 November 2020, Tigray forces attacked the northern military command of Ethiopia's national defence force and that led to a military operation which removed the regional ruling party, the Tigray Liberation Front (TPLF), from power, which in turn resulted in the establishment of a provisional administration through the HoF's decision.<sup>33</sup>

While the HoF's 10 June 2020 decision has some flaws, as will be explained later, the constitutional interpretation process was more participatory and transparent than ever. This was the first time in its history that the CCI invited Ethiopian lawyers to submit amicus curiae briefs.<sup>34</sup> As a problem comparable to the case at hand had not been experienced by the country before, a power vacuum of this type had never been part of the discourse in Ethiopian constitutional law. After the NEBE's announcement of the postponement of the general elections, constitutional lawyers and politicians started debating the legitimacy of the current government beyond its constitutionally stipulated term. The submissions received by the CCI revolve around the four exit mechanisms presented by the country's Deputy Attorney General in a meeting held between the Prime Minister and opposition parties in late April 2020. The four proposed exit solutions were: caretaker government, declaration of state of emergency, constitutional amendment, and constitutional interpretation by the HoF.<sup>35</sup>

### 3 THE EXIT MECHANISMS CONSIDERED BY THE GOVERNMENT

As Ethiopia follows a parliamentary form of government, the authority of the government depends on the parliament. Thus, the terms of both the Prime Minister and Parliament expire at the same time. Cognisant of the looming constitutional crisis, the federal government of Ethiopia sought advice from legal professionals, including practitioners and university professors, on the potential ways out by arranging consultative platforms under the aegis of the Attorney General. The legal professionals

---

<sup>32</sup> Ayele Z "Far-sighted Federal solidarity, not power politics and legalism, is needed to solve Tigray dispute" (2020) *Ethiopia Insight* available at <https://www.ethiopia-insight.com/2020/10/09/far-sighted-federal-solidarity-not-power-politics-and-legalism-is-needed-to-solve-tigray-dispute/> (accessed 06 December 2020).

<sup>33</sup> *Addis Standard* "House of Federation adopts resolution to establish a transitional government in Tigray" (2020) available at <https://addisstandard.com/news-alert-house-of-federation-adopts-resolution-to-establish-a-transitional-government-in-tigray/> (accessed 06 December 2020).

<sup>34</sup> The CCI establishment Proclamation No 798 gives discretionary power to the Council to gather professional opinions.

<sup>35</sup> *Addis Standard* "Parliament to convene for a special meeting tomorrow to approve differed election alternatives" (2020) available at <https://addisstandard.com/news-alert-parliament-to-convene-for-a-special-meeting-tomorrow-to-approve-differed-election-alternatives/> (accessed 03 December 2020).

proposed five exit mechanisms; four of them were picked by the government and presented to the opposition parties at the meeting held on 29 April 2020 where the Prime Minister categorically rejected the fifth proposed solution, formation of a transitional government. Extra-constitutional mechanisms including formation of a transitional government could be used to solve a power vacuum problem. While such mechanisms could work well in established democracies, they may have uncalled-for ramifications in countries with a poor democratic culture and polarised politics like Ethiopia.

The government insisted on drawing solutions from the Constitution whose legitimacy has remained controversial from its adoption. The constitution making process was exclusively controlled by the TPLF led Ethiopian Peoples Revolutionary Democratic Front (EPRDF).<sup>36</sup> Moreover, ethnic conflicts have become common since the Constitution introduced ethnic federalism and that has further aggravated the Constitution's legitimacy deficit. Thus, constitutional amendment or revision is inevitable, if not anytime soon. Yet, any attempt to address the power vacuum problem based on the Constitution is commendable for it builds the culture of constitutionalism. The Constitution has not clearly regulated the problem at hand. The government considered extra-constitutional solutions as unreliable due to the polarised political climate in the country. This Section presents a brief description of the four possible constitutional exit mechanisms to put them in perspective for the focused discussion on constitutional interpretation in Section Four.

### 3.1 First exit option: caretaker government

The first proposed exit mechanism is dissolving the HoPR and maintaining the executive wing as a caretaker government up until elections are held. Article 60 (1) of the Ethiopian Constitution reads : "With the consent of the house, the Prime Minister may cause the dissolution of the house before the expiry of its term in order to hold new elections."<sup>37</sup> If the Prime Minister dissolves the HoPR with its consent, the executive wing can remain in power as a caretaker government for an extra six months to organise new elections and carry out day-to-day affairs with, however, no legislative role.<sup>38</sup> Article 60 (1) has not set any grounds to dissolve the HoPR. The Prime Minister can thus dissolve the HoPR with its consent for whatsoever reason. What is not clear in this provision is whether the Prime Minister can dissolve the HoPR to postpone elections which are already due as per the Constitution. To be precise, the Constitution requires elections to be conducted every five years.<sup>39</sup> It also sets out the possibility of

---

<sup>36</sup> Kassahun Berhanu, 'Ethiopia Elects a Constituent Assembly' (1995) 22(63) *Review of African political economy* 129, 132-3.

<sup>37</sup> Article 60 (1) of the Constitution of Ethiopia.

<sup>38</sup> See Arts 60 (3) and 60 (5) of the Constitution of Ethiopia.

<sup>39</sup> Articles 54 and 58 of the Constitution of Ethiopia.

holding new elections within six months following dissolution.<sup>40</sup> It, however, lacks clarity on whether a late dissolution of the HoPR can result in a six-month caretaker government functioning beyond its five-year term.

One can argue that dissolution of the HoPR is one way of constitutionally addressing a power vacuum caused by the pandemic as there is no restriction on when the Prime Minister can request dissolution within the HoPR's term. This would mean that the Prime Minister may dissolve the HoPR on the last day of its term and buy an extra six months to organise elections. This argument does not, however, seem to be defensible. As Bantayehu puts it, Parliamentary dissolution under Article 60 "is intended to be used as a tool for organizing snap elections that are called earlier than their official schedule"<sup>41</sup>. Otherwise, the government would always be able to "extend its term by at least six additional months by deliberately dissolving parliament just before its term expires"<sup>42</sup>.

It should, nonetheless, be noted that Article 60 is designed to avoid a power vacuum. The caretaker government mentioned under Article 60 (5) comes into the picture not only when the Prime Minister dissolves the HoPR but also when a divorce among parties to a coalition government results in lack of a majority in the HoPR.<sup>43</sup> This could happen when the HoPR's term limit is about to end and before the general elections are held. The Constitution does not seem to allow a power vacuum. There will be either an elected government or a previous one as a caretaker. The ambiguity in Article 60 (1) could be resolved considering this overall constitutional design and the pandemic in mind.

However, there are some serious limitations with this exit strategy. First, the caretaker government does not have legislative roles. It can neither make new laws nor amend the existing ones. It cannot even issue executive decrees. As the caretaker government is allowed only to "conduct the day to day affairs of government"<sup>44</sup>, major policy decisions and international relations would be beyond its reach. The pandemic, political polarization in the country and security issues, no doubt, demand a strong government capable of making laws and decrees. Secondly, the caretaker government lasts only for six months. Given the social and economic conditions in the country, COVID-19 may survive the caretaker government and result in a second wave of constitutional crisis. Thirdly, dissolution by the Prime Minister of a House whose term is about to end to buy extra six months would set a poor precedent. This would encourage

---

<sup>40</sup> Article 60 (3) of the Constitution of Ethiopia.

<sup>41</sup> See generally Bantayehu (2020).

<sup>42</sup> Fessha Y, Ayele Z, Dersso S & Abebe A "Making sense of Ethiopia's constitutional moment" (2020) *Addis Standard* available at <https://addisstandard.com/commentary-making-sense-of-ethiopias-constitutional-moment/> (accessed 03 December 2020).

<sup>43</sup> See Art 60 (2) of the Constitution of Ethiopia.

<sup>44</sup> Article 60 (5) of the Constitution of Ethiopia.

senior government office holders to manipulate Article 60 (1) to stay in power without being elected.

It should be noted that it is not only the term of the HoPR that has expired in October 2020. The term of the HoF – the elected constitutional adjudication body in Ethiopia – and of the legislative councils at regional levels have also expired at the same time. The problem could not thus be addressed simply by ensuring continuity of the federal government which sits in the HoPR. Moreover, the term of regional councils is set in the respective regional state constitutions and such constitutions are interpreted by regional constitutional interpretation commissions and thus not by the HoF. The HoF should have let these commissions interpret regional constitutions to address the power vacuum problems in the respective regions. It does not, however, mean that the HoF has no say on the term of regional governments at all. It has the power to check the constitutionality of regional constitutions, laws and decisions.

### 3.2 Second exit option: state of emergency

The second proposed exit mechanism is declaration of a state of emergency. Article 93 of the Constitution grants power to the federal executive branch to declare a state of emergency and assume “all the necessary power” when “an external invasion, a breakdown of law and order which endangers the constitutional order..., a natural disaster, or an epidemic occur[s]”<sup>45</sup>. The Constitution has thus set only four grounds for declaration of a state of emergency. It is not controversial that the government can declare a state of emergency to fight COVID-19 as this evidently falls under Article 93. The government had, in fact, declared a state of emergency in response to the pandemic on 8 April 2020.<sup>46</sup> This declaration was approved by the HoPR and lasted for five months.<sup>47</sup>

What is rather controversial is whether the government can declare a state of emergency or extend a declared state of emergency if elections cannot be held when they are due. State of emergency power lasts only for six months irrespective of the facts on the ground unless an extension is approved by the HoPR. The HoPR would not be there to renew a state of emergency once its term expired unless the power vacuum problem is solved in a way that extends its term. The HoPR can “allow the state of emergency proclamation to be renewed every four months successively”<sup>48</sup>. Declaring a state of emergency or extending it to control the pandemic cannot, perhaps, address the question mentioned above as suspension of the constitutional provisions during an

<sup>45</sup> See Art 93 of the Constitution of Ethiopia.

<sup>46</sup> Source available at <https://addisfortune.news/news-alert/ethiopian-premier-declares-state-of-emergency/> (accessed 03 December 2020).

<sup>47</sup> Source available at <https://www.fanabc.com/english/ethiopian-parliament-approves-state-of-emergency/> (accessed 04 December 2020).

<sup>48</sup> See Art 93 (3) of the Constitution of Ethiopia.

emergency can be done only “to the extent necessary to avert the conditions that required the declaration of a state of emergency”<sup>49</sup> and thus not, perhaps, to solve an impending constitutional crisis. This could mean that if COVID-19 had been overcome, say, a month before the government’s term expired but after making it impossible for the electoral board to conduct elections as scheduled, that would have brought the state of emergency to an end without the conundrum being solved.

There is an important question that should be raised at this juncture. Can a constitutional crisis of this type be considered as a circumstance forming part of the four grounds mentioned under Article 93? In other words, leaving the pandemic aside, can the impending power vacuum itself be considered as a ground justifying declaration of a state of emergency? The answer could be positive if one takes a closer look at the very first section of the Amharic version of Article 93.

While the English version of section (1) of Article 93 requires occurrence of breakdown of law and order for a declared state of emergency to rely on maintaining the constitutional order, the Amharic version does not. The Amharic version uses a more generic phrase which reads “when a situation which endangers the constitutional order occurs”<sup>50</sup>. This phrase may be interpreted to include the constitutional crisis at hand. As mentioned, the general elections were not held as scheduled. Thus, a situation – the NEBE was not able to conduct the elections – endangering the constitutional order has occurred already. Unless addressed in advance, a power vacuum could lead to a political crisis that cannot be controlled by the regular law enforcement bodies. This is particularly true in emerging democracies with polarised politics like Ethiopia. Purposive interpretation of Article 93 may, therefore, allow declaration of state of emergency to handle such a crisis. It should, however, be noted that such broader reading of Article 93 could also be problematic. Being an exception to the constitutional principles, Article 93 may have to be interpreted narrowly.

### **3.3 Third exit option: constitutional amendment**

The third exit mechanism is amending the constitutional provisions which relate to the term of the government. There is no legal uncertainty with this option. All the constitutional provisions are subject to amendment. The constitutional provisions regulating government terms can be amended if a proposed amendment is approved by a two-thirds majority vote of the Parliament (a joint session of the HoPR and the HoF) and two-thirds of state legislatures.<sup>51</sup>

Ethiopia’s current Constitution is not the product of a participatory or inclusive constitution making process. As Stremlau has explained, the constitution making

---

<sup>49</sup> Article 93 (4(b)) of the Constitution of Ethiopia.

<sup>50</sup> The Amharic version of the first section of Art 93 of the Constitution of Ethiopia.

<sup>51</sup> Article 105 (2) of the Constitution of Ethiopia.

process suffered from a serious legitimacy problem as there was, among others, “a lack of participation by those who were not EPRDF [the then ruling party] supporters or members”<sup>52</sup>. The Constitution was adopted in 1995 by a constituent assembly. Of the 515 constituent assembly members, 460 were drawn from the EPRDF and the remainder from its ally parties and private candidates.<sup>53</sup> One of the political agendas tabled for discussion following a reshuffle in government in 2018 in response to the nationwide protests was constitutional amendment. Constitutional amendment is also at the centre of opposition parties’ election campaigns every five years. One can thus predict a fully-fledged constitutional amendment process in the future, if not before the elections. The constitutional amendment proposed in response to the power vacuum, however, relates only to the constitutional provisions regulating the government term as indicated above.

Though constitutional amendment can be used as an exit mechanism and is not legally controversial, it has practical limitations. The first limitation has to do with the initiation process. Article 104 requires a proposed amendment to be “submitted for discussion to the general public”<sup>54</sup>. Holding meaningful public discussions is difficult amid a COVID-19 pandemic. Yet, as it is the pandemic itself which necessitated amendment as one possible solution, engaging the public through mainstream media, social media, well-monitored meetings, and virtual meetings would contextually suffice.

The second limitation has to do with the fact that the approving bodies are dominated by the ruling party. Both the federal parliament and regional legislative bodies are dominated by this party. This could be a good opportunity to easily approve a proposed amendment. It could, however, impede the legitimacy of an amendment. The domination of the federal and regional legislative bodies by a single party through controversial elections has been common since the troubled birth of Ethiopia’s 1995 Constitution. Setting this legitimacy problem aside, constitutional amendment is undoubtedly a lawful and less controversial solution.

### **3.4 Fourth exit option: constitutional interpretation**

The last exit mechanism is constitutional interpretation. Given the limitations with the three exit mechanisms, the government refrained from adopting one or another mechanism and referred the matter to the constitutional adjudication body through a decision made by the HoPR. Before the HoF entertains a constitutional case, its own advisory body, the CCI, checks if the case requires constitutional interpretation.<sup>55</sup> If the

---

<sup>52</sup> Nicole Stremlau, ‘Media, Participation and Constitution-Making in Ethiopia’ (2014) 58 *J. Afr. L.* 231, 237.

<sup>53</sup> See Berhanu (1995) at 132.

<sup>54</sup> Article 104 of the Constitution of Ethiopia.

<sup>55</sup> See Art 84 of the Constitution of Ethiopia.

CCI decides that the case does not require constitutional interpretation, a concerned party can present it directly to the HoF.<sup>56</sup>

Constitutional interpretation in the case at hand involves explaining the vague and problematic yet possible exit mechanisms under the provisions discussed above and broader constitutional principles to allow the current government to stay in power beyond its term or forbid the same. Thus, the constitutional interpretation process has involved all the provisions that are relevant in addressing the power vacuum problem to ensure continuity in governance and holding of the elections within the specified time. The HoF has employed a purposive and holistic interpretation approach by considering the objectives, general principles, and directly relevant provisions of the Constitution.<sup>57</sup> An important indication of this holistic interpretation approach is the reference made to the preamble of the Constitution to emphasise the principles of the rule of law and popular sovereignty.<sup>58</sup>

Despite this commendable approach, the outcome of the interpretation process has failed to serve the basic values, including the rule of law and popular sovereignty, as it allows the government to stay in power for an undefined time. According to the HoF's decision, the current government stays in power until the general elections are held 9-12 months after the HoPR declares that COVID-19 is not a threat to public health.<sup>59</sup> This could be a full term or more if the pandemic persists. This ruling and the partiality inherent in the HoF have undermined its decision. Despite this ruling and the worsening pandemic, the Ministry of Health recommended to the HoPR that the general elections can be held with the necessary precautions, and the House approved the recommendation on 22 September 2020.<sup>60</sup> Following this, the NEBE resumed its preparation and announced that the elections will be held in June 2021.<sup>61</sup> The authorities have perhaps taken lessons from other countries that have held elections amid COVID-19 with many precautions.

In addition to the ruling it rendered, some have also questioned the HoF's jurisdiction over the case at hand. Can the HoF entertain an issue which does not

---

<sup>56</sup> See Art 84 of the Constitution of Ethiopia.

<sup>57</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, paras 30-53.

<sup>58</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, paras 30-53.

<sup>59</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, paras 30-53.

<sup>60</sup> Fana Broadcasting Corporation "Ethiopia decides to hold the 6th general election in adherence to Covid-19 precautions" (2020) available at <https://www.fanabc.com/english/ethiopia-decides-to-hold-the-6th-general-election-in-adherence-to-covid-19-precautions/> (accessed 07 December 2020).

<sup>61</sup> Ethiopian news agency "Ethiopia's general election to be held in June, 2021" available at <https://www.ena.et/en/?p=18076> (accessed 07 December 2020).

involve a disputed action? To be precise, does the HoF have the power of abstract review? The government did not take any action to solve the conundrum. Thus, there was no respondent or questioned act in the review process. The next Section provides a detailed discussion of constitutional interpretation by the HoF with a view to elaborate its jurisdiction and how it has interpreted the Constitution in addressing the issue.

#### **4 CONSTITUTIONAL INTERPRETATION BY THE HOF**

Ethiopia has a unique constitutional adjudication system. Though it introduced a federal system in 1995, it does not share some of the common features of the federal systems around the world. While most federations have empowered their courts to adjudicate constitutional cases or established other specialised impartial bodies like constitutional courts or tribunals for this purpose, Ethiopia has chosen a political body. It is the HoF that exercises jurisdiction over constitutional review in Ethiopia.

Though most federal countries with a written constitution have established an independent and impartial body to ensure effective constitutional review, they vary in their constitutional review models.<sup>62</sup> The USA, for example, follows the concrete constitutional review model which requires “case and controversy”<sup>63</sup>. However, the predominant model in other federal systems such as Germany is the combination of both abstract and concrete review enabling constitutional judges to review the constitutionality of draft legislation and entertain concrete constitutional cases referred by ordinary courts.<sup>64</sup>

##### **4.1 The HoF’s jurisdiction over the case**

The Ethiopian Constitution has clearly established the HoF’s jurisdiction over concrete constitutional cases. Articles 83 and 84 of the Constitution empower the HoF to adjudicate concrete constitutional cases. What is not clear under the Constitution is whether abstract constitutional review falls under the HoF’s jurisdiction. The constitutional silence over an abstract review invites a further inquiry into the overall design of the constitutional adjudication system, its practice and legislation that further clarify the HoF’s power.

The Constitution, under Article 9, declares its supremacy and “all citizens, organs of state, political organizations, other associations as well as their officials have the duty to

---

<sup>62</sup> See Shapiro M & Sweet AS “Abstract and concrete review in the united states” (2002) available at <https://oxford.universitypressscholarship.com/view/10.1093/0199256489.001.0001/acprof-9780199256488-chapter-11> (accessed 27 December 2020).

<sup>63</sup> M Rosenfeld, ‘Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts’ (2004) 2(4) *International journal of constitutional law* 633, 233–4.

<sup>64</sup> Rosenfeld (2004) at 633-634.

ensure observance of the Constitution and to obey it”<sup>65</sup>. This provision has also prohibited governments from assuming power in an unconstitutional way.<sup>66</sup> Being the State organ mandated to interpret the Constitution, the HoF takes special responsibility in ensuring adherence to the Constitution.

It should also be noted that the powers of the HoF are not provided in a single list. The HoF has a range of political and adjudicative powers stated in different parts of the Constitution. While Articles 83 and 84 of the Constitution set out the HoF’s power over concrete cases employing phrases like “constitutional disputes” and “contested as being unconstitutional”, Article 62 grants the power to interpret the Constitution to the HoF in a generic way. It reads “the House has the power to interpret the Constitution.”<sup>67</sup> This generally expressed power, if read along with other relevant constitutional provisions, could lead us to the conclusion that the HoF’s role is not limited to concrete cases. The HoF claimed its jurisdiction over the case based on the Amharic version of Article 84 which employs the generic phrase “constitutional issues”.<sup>68</sup> The Amharic version of this provision is consistent with the broad powers given to the HoF under Article 62 and other provisions of the Constitution.

As explained in the Introduction, following the submission of the abstract constitutional case by the HoPR, the CCI held a press conference to invite constitutional lawyers to submit amicus curiae briefs for the first time in its three- decade history. One of the questions asked by the journalists during this press conference was whether the CCI and HoF have jurisdiction to entertain abstract constitutional cases. The Chairwoman of the CCI, who is also the President of the Federal Supreme Court, asserted that the jurisdictional controversy could easily be addressed by having a closer look at the Amharic version of the relevant provisions. While the English version of Articles 83 and 84 employs the phrase “constitutional Disputes”, the Amharic version uses a broad phrase “constitutional issues”.<sup>69</sup> The latter expression allows the CCI and HoF to handle both concrete and abstract issues requiring constitutional interpretation.

Though not transparent, the previous actions of the HoF also complement the broader reading of the HoF’s jurisdiction over constitutional issues. The case at hand is the third abstract review in the HoF’s history. The previous abstract cases were handled through internal exchange of letters between the HoF and the government. There has not, therefore, been an opportunity to question the procedures in general and how the HoF established its jurisdiction in particular. The details of the HoF’s decisions over these cases are not yet public. These cases have to do with vertical division of legislative

---

<sup>65</sup> See Arts 9 (1) and 9 (2) of the Constitution of Ethiopia.

<sup>66</sup> Article 9 (3) of the Constitution of Ethiopia.

<sup>67</sup> Article 62 of the Constitution of Ethiopia.

<sup>68</sup> See Arts 84 (1) and 84 (2) of the Constitution of Ethiopia. Also see the Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, para 2.

<sup>69</sup> See the English and Amharic versions of Arts 83 and 84 of the Constitution of Ethiopia.

powers between the federal government and the regional states.<sup>70</sup> Both were submitted to the HoF to clear doubts over the constitutionality of draft federal legislation.<sup>71</sup> The HoF did not reject these cases despite the lack of a constitutional dispute in them.

As it is the HoF that has the final say on the meaning of the Constitution, its decisions on abstract cases could not simply be ignored. The Constitution declares itself the supreme law of the land. Article 9 of the Constitution reads : “any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect”<sup>72</sup>. Such supremacy is maintained through interpretation of the Constitution by the HoF. The decisions of the HoF thus form part of the constitutional system and acting contrary to its decisions would be a violation of the Constitution.

It is not, however, clear if the HoF can constitutionally order the government to do something when it is requested to give an advisory opinion. In the two previous abstract cases, the HoF decided on the scope of the federal legislature’s power over land and family matters but it was up to the legislature to pass the draft legislation with this determined scope in mind. That is to say, the legislature could not ignore and act contrary to the HoF’s decision but is not under an obligation to act.

In the case at hand, the HoF was requested to give its opinion on two constitutional issues posed by the pandemic. The first issue is: what happens to the term of the federal Parliament and government when it is not possible to hold elections due to an emergency? And the second one is: when should the elections be held?<sup>73</sup> Instead of providing an advisory opinion, the HoF ordered the Parliament and government to stay in power until the elections are held and power is transferred to a winning party.<sup>74</sup> The application of this ruling is also extended to the regional councils and executive bodies.<sup>75</sup> The HoF also ordered that the elections should be held 9-12 months after the

---

<sup>70</sup> The first case relates to draft federal legislation on family matters. Under the current Constitution of Ethiopia, it is not clear if the federal government can exercise legislative powers on family matters. The Constitution lists federal powers under Art 51 and regional ones under Art 52. It also provides for some shared powers. It then leaves residual powers to the regional states. Civil matters are residual. Family matters, therefore, fall under the jurisdiction of the regional states as per the power division scheme under the Constitution. There is, however, an exception to this. According to Art 60 (8) of the Constitution, the HoF has the power to “determine civil matters which require the enactment of laws by the House of Peoples' Representatives”. Hence, though civil matters are residual and belong to the regional states in principle, the HoF may, when it deems necessary, allow the federal legislature to enact laws on specific civil matters. The second case involves draft federal legislation on urban land administration and the central issue in this case, too, is vertical division of legislative powers.

<sup>71</sup> See generally Fessha, Ayele, Dersso & Abebe (2020).

<sup>72</sup> Article 9 (1) of the Constitution of Ethiopia.

<sup>73</sup> Source available at <https://www.cci.gov.et/press-release/> (accessed 04 December 2020).

<sup>74</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, para70.

<sup>75</sup> Council of Constitution Inquiry Recommendation (2020) para 70.

HoPR has declared COVID-19 not a threat to public health.<sup>76</sup> Though the Constitution lacks clarity on whether the HoF can issue such orders following submission of abstract cases to it, the decision has expanded the HoF's jurisdiction. That, if arguable, seems to be consistent with the broad adjudicative role of the HoF.

The legislation governing constitutional interpretation in Ethiopia also arguably allows the HoF to handle the abstract case at hand. The legislation that defines the powers of the HoF, Proclamation No 251, gives discretionary power to the HoF on abstract constitutional review. This Proclamation requires the HoF to render final decisions on constitutional disputes and leaves it free to give or refuse giving consultancy services. This Proclamation has not clearly set out who may possibly seek consultancy services from the HoF.

Proclamation No 798 also sets the possibility where politically sensitive abstract constitutional cases may be entertained by the HoF. Article 3 (2(c)) of this Proclamation allows political bodies to submit a request for constitutional interpretation to the CCI which in turn makes recommendations to the HoF. It reads : "constitutional interpretation on any unjusticiable matter may be submitted to the Council [CCI] by one-third or more members of the federal or state councils or by federal or state executive organs."<sup>77</sup> "Any unjusticiable matter" is broad enough to include abstract cases.

One can, therefore, safely conclude that the HoF has the power over the case at hand. The next question is what necessitates constitutional interpretation and how should the Constitution be interpreted.

### *4.1.1 Constitutional interpretation: why and how?*

There are two things that make interpreting the Ethiopian Constitution necessary in solving the power vacuum posed by the pandemic. First, there is constitutional silence over the issue. Article 60 of the Constitution is designed to address a power vacuum, but it does not talk about a power vacuum caused by unforeseen circumstances like COVID-19. This provision rather talks about the power vacuum scenarios which are caused by early dissolution of the HoPR. When the HoPR is dissolved by the Prime Minister or a coalition government loses its majority due to divorce among member parties, the incumbent is allowed to stay in power as a caretaker government until power is transferred through an election within six months.

The power vacuum problem posed by COVID-19 is a little bit complex and different. There is no early dissolution of the HoPR nor a disagreement among the ruling political groups. Yet, the government's term expires before the general elections are held.

---

<sup>76</sup> Council of Constitution Inquiry Recommendation (2020) para 71.

<sup>77</sup> Article 3 (2(c)) of Proclamation No 798, Federal Geqarit Gazette, 2013.

Allowing the government to stay in power as a caretaker may be controversial as it is not clear if Article 60 accommodates such a scenario, and COVID-19 requires strong government and not a caretaker government.

Secondly, there is constitutional ambiguity regarding the ways of assuming government power. One of the guiding principles of the Constitution, Article 9 (3), forbids assuming government power in any way other than the Constitution provides. The clear constitutional ways of assuming government power are election (Articles 54 and 58) and staying in power for six months as a caretaker government until elections are held as per Article 60. It is not, however, clear if these two are the only constitutionally permitted ways of assuming power if one looks at Article 93 of the Constitution. Though this provision does not talk about a power vacuum nor ways of assuming government power, it allows the government to use all power necessary to arrest an emergency including suspension of the relevant provisions discussed above.

How should the Constitution be interpreted then? Neither the HoF nor the CCI had developed detailed techniques of constitutional interpretation while resolving previous cases. The CCI recommendation approved by the HoF 10 June 2020 employed a holistic and purposive interpretation approach in resolving the power vacuum problem.<sup>78</sup> The CCI and HoF have considered some guiding principles under Chapter Two of the Constitution including popular sovereignty, supremacy of the Constitution, democratic rights, and accountability.<sup>79</sup>

Insofar as the case at hand is concerned, a comprehensive interpretation approach is apt. Interpreting one or other provision cannot solve the conundrum. All the relevant provisions need to be read together. Elections and being a caretaker for six months are sources of power in normal circumstances. Article 93 on the other hand addresses extra-ordinary situations. The requirement of exercising government power through a constitutional means alone under Article 9 (3) needs to be read with the Constitution's overall aim to avoid a power vacuum both in normal and emergency situations. In this regard, the HoF and CCI have employed the right constitutional interpretation approach by consulting the guiding principles of the Constitution starting from the preamble.

As a senior constitutional lawyer, Getachew Assefa, explained it in an amicus curiae hearing held by the CCI on 16 May 2020, Articles 54, 58 and 60 assume a normal situation while Article 93 is the governing principle during an emergency.<sup>80</sup> It is through the declaration of a state of emergency that the Constitution safeguards itself indeed. Almost all the constitutional provisions can be suspended when the government exercises an emergency power. The government can therefore, suspend, if necessary,

<sup>78</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, para30.

<sup>79</sup> See Arts 8-12 of the Constitution of Ethiopia.

<sup>80</sup> Council of Constitutional Inquiry Hearing, 16 May 2020. Video, 20:30 available at <https://www.youtube.com/watch?v=LxqK2qmFWqI> (accessed 04 December 2020).

the provisions related to the case at hand. As the HoF approved CCI recommendation explains, the provisions related to the government term should be interpreted in light of the fundamental rights of individuals under Chapter Three of the Constitution including the right to health and general principles of the Constitution.<sup>81</sup> The recommendation asserts that cumulative reading of the fundamental rights, Article 93 and general principles of the Constitution leads to the conclusion that the provisions talking about the government's term under Articles 54 and 58 may be suspended to protect the public from the pandemic.<sup>82</sup> It further explains that the government has to stay in power in this case as it is required to transfer its power only to an elected body and the elections will not be held in time as the electoral board is prevented from carrying out its tasks as planned.<sup>83</sup>

It should be noted that even when a constitution lacks an emergency clause, the *doctrine of necessity* may justify government action outside the law in extraordinary situations. The Cypriot Supreme Court's *Mustafa Ibrahim* landmark judgement is worth mentioning here. In rendering its judgement, the Court relied on the *doctrine of necessity* stating : "The legal doctrine of necessity is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people."<sup>84</sup> The Nigerian Parliament has also used the *doctrine of necessity* to address a power vacuum problem in 2010.<sup>85</sup> The Parliament allowed the Vice-President to act as president as the President, receiving medical treatment for over two months, was not able to officially empower the Vice-President.<sup>86</sup>

Article 93 of the Constitution of Ethiopia is an articulation of the *doctrine of necessity*. It allows the government to assume "all necessary power", except the suspension of the four provisions mentioned earlier, to restore normality. Ethiopian lawyers explained at the CCI hearing held on 16 May 2020 that Article 93 incorporates the *doctrine of necessity* as it allows the exercise of additional necessary powers the exercise of which is unconstitutional in normal circumstances.<sup>87</sup> This doctrine is mentioned at the CCI hearing for the first time as no emergency situation related case had been entertained by it before.

---

<sup>81</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, paras 30-39.

<sup>82</sup> See Council of Constitution Inquiry Recommendation (2020) at paras 30-39.

<sup>83</sup> See Council of Constitution Inquiry Recommendation (2020) at paras 30-39.

<sup>84</sup> See *The Attorney General of the Republic v. Mustafa Ibrahim* (1964) *Cyprus Law Review* at 195.

<sup>85</sup> Nossiter A "Nigerian parliament names acting president" available at <https://www.nytimes.com/2010/02/10/world/africa/10nigeria.html> (accessed 04 December 2020).

<sup>86</sup> See generally Nossiter (2020).

<sup>87</sup> Council of Constitutional Inquiry Hearing, 16 May 2020. Video, 1: 26:20 available at <https://www.youtube.com/watch?v=m3vsocbh6t4> (accessed 04 December 2020).

The CCI and HoF have thus interpreted Article 93 by considering the general constitutional principles, fundamental rights under Chapter Three, the overall design on assuming government power, and the preamble to derive a constitutional solution for the problem. As indicated earlier, a caretaker government under Article 60 is weak. That makes it unfit to fill the power vacuum problem and handle the pandemic. Constitutional amendment could not be the right solution either as the pandemic has made it difficult to follow the procedures required by the Constitution. Extending government power through constitutional amendment would also set an uncalled-for precedent with lasting consequences. Purposive understanding of Article 93 along with the general principles of the Constitution seems to be the most appropriate solution to the conundrum. The reading of the Constitution as a cohesive instrument aiming at realising a constitutional order and protecting itself through extraordinary measures when necessary seems to be a plausible approach.

This does not mean that the decision rendered by the HoF to solve the power vacuum problem is immune from limitations. While one could agree with the constitutional interpretation approach employed by the HoF and CCI, and the overall analysis, the ruling seems to have failed to serve the constitutional values and principles emphasised in the analysis. The analysis has referred to the preamble and general principles of the Constitution to capitalise on the fundamental values including popular sovereignty and the rule of law. As indicated earlier, elections are indispensable for the realisation of these values. Such a commendable reference should, therefore, have been backed by a ruling that strikes the right balance between the continuity of government and holding of the elections as soon as possible. The ruling allows the government to stay in power so long as the HoPR has not declared COVID-19 not a threat to public health. It also allows the government to stay in power for 9-12 months even after the HoPR has declared the pandemic not a threat to public health. The decision states that this is based on the inputs taken from the Ministry of Health and NEBE.<sup>88</sup> While taking the advices of these two bodies into account is appropriate, there should have been a well-defined election timeline based on the analysis of the constitutional framework.

Furthermore, there was a conflict of interest as the HoF had to decide whether Parliament's term, including its own, should be extended. While the HoF's advisory body, the CCI, is composed of lawyers and politicians, and relatively impartial, the HoF is fully controlled by political representatives. As it is the HoF that officially renders the final decision on constitutional cases rejecting, accepting, or modifying the recommendations of the CCI, the outcomes could become controversial. The HoF is controlled by the ruling party which submitted the request for constitutional interpretation through the HoPR. That is perhaps why some political parties expressed their objection to the HoF's decision, stating that it is the government itself that

---

<sup>88</sup> Council of Constitution Inquiry Recommendation, Re No 5216, approved by HoF 10 June 2020, para 58.

extended its power.<sup>89</sup> The HoF's decision has also interfered with the power of the regional constitutional interpretation bodies as indicated earlier. That has made the decision more controversial. As Sahlemariam explains, while "the decision to postpone elections...is a federal matter" and thus within the jurisdiction of the CCI and HoF, "the decision regarding the terms of the regional council and governments" falls under the jurisdiction of regional states.<sup>90</sup>

Yet, the decision of the HoF should be used as a pacific transition mechanism until power is transferred through the general elections. As indicated earlier, extra constitutional exit mechanisms do not seem to be feasible given the polarised political environment in the country. Pacific transition would also facilitate the realisation of the long-awaited major constitutional revision in the country which may include changing the constitutional adjudication system.

## 5 CONCLUSION

As elections are the primary source of the legitimacy of government in modern democracies, the constitutional mechanisms that allow unelected government to exercise power provisionally need to be subjected to strict scrutiny. Such mechanisms should be interpreted in a way that ensures elections are held as soon as possible and allow the government to exercise power only to the extent necessary. General constitutional principles are important here to guide the government and set fundamental limitations on it so that a power vacuum problem is not addressed in a manner that hampers democracy and the rule of law.

A comprehensive understanding of the Ethiopian Constitution leads to the conclusion that the power vacuum posed by the pandemic could be solved through interpretation. The HoF and CCI have employed the right approach in this regard. Picking one or other provision and interpreting it as having a constitutional exit mechanism could not be helpful in resolving the conundrum. As the decision made it clear, reading Articles 54, 58 and 93 with the objectives and general provisions of the Constitution was necessary to come up with a solution that serves the purpose of the Constitution. This holistic interpretation approach would help us understand the Constitution's contextual answer to the problem. Thus, the CCI and HoF's reading of the constitutional principles along with the provisions on a power vacuum, elections, the term of government, and an emergency with COVID-19 in mind, is acceptable.

---

<sup>89</sup> *Addis Standard* "OLF, OFC AND ONLF oppose HOF'S "unilateral decision" to extend incumbent's term limit, call for inclusive dialogue" (2020) available at <https://addisstandard.com/news-olf-ofc-and-onlf-oppose-hofs-unilateral-decision-to-extend-incumbents-term-limit-call-for-inclusive-dialogue/> (accessed 04 December 2020).

<sup>90</sup> Sahlemariam T 'Council of Constitutional Inquiry Verdict: "Because I said so"' (2020) available at <https://www.ethiopia-insight.com/2020/06/22/council-of-constitutional-inquiry-verdict-because-i-said-so/> (accessed 07 December 2020).

However, the decision has failed to do justice to the constitutional objectives and values to which it referred. Extending the government's term for an unknown time and letting the HoPR decide on when its term has to end, would mean failing to warrant the holding of the elections as soon as possible, and that in turn inhibits popular sovereignty and the rule of law. Though the reports from the Ministry of Health and NEBE are useful in determining for how long the government may use "all necessary power" or stay in power as an election facilitator, they should not have led to the extension of the government's term for an unknown time. There should have been the utmost care in this regard given that the HoF is a partial body susceptible to criticism whatever it decides. The HoF has also made its decision more controversial by extending its application to the regional states. The HoF is empowered to interpret the federal constitution. The terms of the regional government bodies are beyond its immediate reach as they are regulated by the regional states' constitutions.

Therefore, the extension of the government's term for an unknown time, interference with regional powers, and partiality inherent in the HoF compromise the merit of the comprehensive and purposive interpretation approach. The partiality problem will continue to undermine the legitimacy of the HoF's decisions, irrespective of their substance, and such a partial body is not pertinent to realise the rule of law through constitutional interpretation. It may be time to reconsider the most appropriate constitutional adjudication body for Ethiopia. The HoF's decision is yet the least problematic response to the crisis at hand given the multi-faceted limitations of the other possible exit mechanisms and the polarised politics in the country.

## **BIBLIOGRAPHY**

### **Books**

Fessha Y, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* Routledge:Oxfordshire ( 2011).

Tamanaha B *On the rule of law : history, politics, theory* Cambridge : Cambridge University Press (2004).

<https://doi.org/10.1017/CBO9780511812378>

### **Journal articles**

Berhanu K "Ethiopia Elects a Constituent Assembly" (1995) 22(63) *Review of African political economy* 129.

<https://doi.org/10.1080/03056249508704110>

Fiseha A 'Constitutional Adjudication through Second Chamber in Ethiopia' (2017) 16(3) *Ethnopolitics: The Ethnopolitics of Ethnofederalism in Ethiopia* 295, 297.

<https://doi.org/10.1080/17449057.2016.1254407>

Gardner JA "Consent, legitimacy and elections: implementing popular sovereignty under the Lockean constitution" (1990) 52(1) University of Pittsburgh Law Review 189 at 192.

Köker L "Erdogan's Presidency and the Constitution" (2014) 4(5) Turkish review 490.

Mesfin B 'Democracy, Elections & Political Parties: A Conceptual Overview with Special Emphasis on Africa' (2008) 2008(166) Institute for Security Studies Papers 12, 1.

Murphy C "The Rule of Law, Democracy, and Obedience to Law" (2017) 62 Louis ULJ 293.

Rosenfeld M "Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts" (2004) 2(4) International Journal of Constitutional Law 633.

<https://doi.org/10.1093/icon/2.4.633>

Stremlau N "Media, Participation and Constitution-Making in Ethiopia" (2014) 58 Journal of African Law 231.

<https://doi.org/10.1017/S0021855314000138>

### **Legislation**

Federal Democratic Republic of Ethiopia Constitution (1995). Proclamation No. 1/1995, A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1<sup>st</sup> Year 1, 21 August 1995.

Proclamation No. 251/2001, Proclamation to Consolidate the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define Its Powers and Responsibilities, Federal Negarit Gazeta, 7<sup>th</sup> Year 41, 6 July 2001.

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, Federal Negarit Gazeta, 19<sup>th</sup> Year 65, 30 August 2013.

### **Parliamentary documents**

Council of Constitution Inquiry Recommendation, Re No 5216, approved by the House of the Federation 10 June 2020.

House of the Federation Emergency Meeting decision on the constitutionality of Tigray Regional State 2020 election, 05 September 2020.

House of the Federation Resolution on the establishment of a transitional administration in Tigray, 07 November 2020.

### **Case law**

*The Attorney General of the Republic v Mustafa Ibrahim* 1964 CLR 195.

### **Internet sources**

Addis Standard 'OLF, OFC and ONLF oppose HoF's "unilateral decision" to extend incumbent's term limit, call for inclusive dialogue' available at <https://addisstandard.com/news-olf-ofc-and-onlf-oppose-hofs-unilateral-decision-to-extend-incumbents-term-limit-call-for-inclusive-dialogue/> (accessed 04 December 2020).

Addis Standard "House of Federation adopts resolution to establish a transitional government in Tigray" available at <https://addisstandard.com/news-alert-house-of-federation-adopts-resolution-to-establish-a-transitional-government-in-tigray/> (accessed 06 December 2020).

Addis Standard "Parliament to convene for a special meeting tomorrow to approve differed election alternatives" available at <https://addisstandard.com/news-alert-parliament-to-convene-for-a-special-meeting-tomorrow-to-approve-differed-election-alternatives/> (accessed 03 December 2020).

Ayele Z "Far-sighted federal solidarity, not power politics and legalism, is needed to solve Tigray dispute" Ethiopia Insight available at <https://www.ethiopia-insight.com/2020/10/09/far-sighted-federal-solidarity-not-power-politics-and-legalism-is-needed-to-solve-tigray-dispute/> (accessed 04 December 2020).

Bantayehu D "Deferred election, state of emergency and covid19 - how can Ethiopia avoid an impending constitutional crisis?" (2020) Addis Standard available at <https://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/> (accessed 01 December 2020).

Council of Constitutional Inquiry Hearing, 16 May 2020 Video 1: 26:20 available at <https://www.youtube.com/watch?v=m3vsocbh6t4> (accessed 04 December 2020).

## COVID-19 AND ELECTIONS IN ETHIOPIA

Council of Constitutional Inquiry Hearing, 16 May 2020 Video 20:30 available at <https://www.youtube.com/watch?v=LxqK2qmFWqI> (accessed 04 December 2020).

Council of Europe "Elections and COVID-19" available at <https://rm.coe.int/election-and-covid-19/16809e20fe> (accessed 04 December 2020).

Council on Foreign Relations "How countries are holding elections during the COVID-19 pandemic" available at <https://www.cfr.org/backgroundunder/how-countries-are-holding-elections-during-covid-19-pandemic> (accessed 04 December 2020).

Ethiopian News Agency "Ethiopia's General Election to be Held in June 2021" Ethiopia's General Election to be Held in June, 2021 | Ethiopian News Agency (ena.et) available at <https://www.ena.et/en/?p=18076> (accessed 04 December 2020).

Ethiopian News Agency "Upper house approved recommendation on postponement of general elections" available at <https://www.ena.et/?p=92560> (accessed 04 December 2020).

Fana Broadcasting Corporation, 'Ethiopia Decides to Hold the 6th General Election in Adherence to COVID-19 Precautions', available at <https://www.fanabc.com/english/ethiopia-decides-to-hold-the-6th-general-election-in-adherence-to-covid-19-precautions/> (accessed 04 December 2020).

Fessha Y, Ayele A, Dersso S & Abebe A "Making sense of Ethiopia's constitutional moment" Addis Standard, available at <https://addisstandard.com/commentary-making-sense-of-ethiopias-constitutional-moment/> (accessed 04 December 2020).

International Foundation for Electoral Systems, 'Elections postponed due to COVID-19', available at [https://www.ifes.org/sites/default/files/elections\\_postponed\\_due\\_to\\_covid-19.pdf](https://www.ifes.org/sites/default/files/elections_postponed_due_to_covid-19.pdf) (accessed 04 December 2020).

Nossiter A "Nigerian Parliament Names Acting President" available at <https://www.nytimes.com/2010/02/10/world/africa/10nigeria.html> (accessed 04 December 2020).

Shapiro M & Sweet AS "Abstract and Concrete Review in the United States" [2002] Printed from Oxford Scholarship online (www.oxfordscholarship.com) <https://oxford.universitypressscholarship.com/view/10.1093/0199256489.001.0001/acprof-9780199256488-chapter-11> (accessed 04 December 2020).

Teklemichael Sahlemariam, 'Council of Constitutional Inquiry Verdict: "Because I said so"', Ethiopia Insight, Council of Constitutional Inquiry verdict: "Because I said so!" -

Ethiopia Insight (ethiopia-insight.com) available at <https://www.ethiopia-insight.com/2020/06/22/council-of-constitutional-inquiry-verdict-because-i-said-so/>.