

In the
ETHIOPIAN CONSTITUTIONAL COUNCIL OF INQUIRY

BRIEF OF ALEMAYEHU GEBRE MARIAM
AS AMICUS CURIAE

(Per Proclamation No. 798/2013, Article 9 (1), (2), (3); FDRE Constitution, Article 84; FDRE Constitutional Council of Inquiry Announcement, 2(a), May 11, 2020.)

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IDENTITY AND INTEREST OF AMICUS CURIAE

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SOURCE OF AUTHORITY OF AMICUS CURIAE TO FILE

This Amicus Curiae is filed pursuant to Proclamation No. 798/2013², Article 9 (1), (2), (3) and Announcement of the FDRE Constitutional Council of Inquiry, 2(a), May 11, 2020.

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² <https://chilot.files.wordpress.com/2014/09/proclamation-no-798-20-13-council-of-constitutional-inquiry-proclamation.pdf>

QUESTION PRESENTED³

I. Whether the constitutional language in Articles 54(1), 58(3) and 93 of the Constitution of the Federal Democratic Republic of Ethiopia can be interpreted in harmony with the intent, aims and fundamental principles of the Constitution in light of assertions of linguistic gap or lack of clarity regarding postponement of a scheduled national election.

II. If compelling circumstances warranting a declaration of a state of emergency should arise during the period of prelection preparations and should these circumstances preclude the conduct of elections on a scheduled date, what is the constitutional status of a parliament and executive branch whose term ends?

III. What is the timeline to reschedule an election once the circumstances that occasioned a declaration of a state of emergency are no longer present.

³ The questions presented are the author's translation of the Amharic statement contained in FDRE Constitutional Council of Inquiry, 2(a), May 11, 2020. Amicus apologizes to the Constitutional Inquiry Council for his inability to prepare this brief in Amharic. Amicus notes the five-day window to submit an amicus brief on the questions raised by the Council are not sufficient to undertake a full-scale analysis. However, Amicus offers to respond to specific questions of the Council on any issues raised in the amicus brief.

I. WHETHER THE CONSTITUTIONAL LANGUAGE IN ARTICLES 54(1), 58(3) AND 93 OF THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (FDRE) CAN BE INTERPRETED IN HARMONY WITH THE INTENT, AIMS AND FUNDAMENTAL PRINCIPLES OF THE CONSTITUTION IN LIGHT OF ASSERTIONS OF LINGUISTIC GAP OR LACK OF CLARITY REGARDING POSTPONEMENT OF A SCHEDULED NATIONAL ELECTION

Interpreting Articles 54(1), 58(3) and 93 of the FDRE Constitution in harmony with the intent, aims and fundamental principles of the Constitution

The [FDRE Constitution](#) delegates the sole responsibility of authoritative and binding constitutional interpretation to the House of Federation (HoF).⁴ The Constitutional Council of Inquiry is granted the “powers to investigate constitutional disputes” and “submit its recommendations thereon to the House of the Federation.”⁵ Article 83 vests exclusive interpretive powers in the HoF and defers to it broad discretion. The Constitution expects the HoF to take its interpretive tasks objectively, fairly and professionally and impartially.⁶

It has been argued, “Ethiopia’s federal system is unusual in that the judiciary has no significant role in devising the system’s doctrines, principles, and rules” because “the Constitution and subsequent laws regarding constitutional interpretation have precluded the judiciary from undertaking constitutional review.”⁷ Various reasons have been given for divesting the judiciary of constitutional review powers.⁸ Others have argued the framers of

⁴ FDRE Constitution, Article 83 (1).

⁵ FDRE Constitution, Article 84 (1); The task of the Council of Constitutional Inquiry are spelled out in Article 84(1) of the Constitution (which empowers the Council to “investigate constitutional disputes”) and [Proclamation 798/2013](#). The Council is established as an independent body (Art. 15) consisting of the President and Vice President of the Federal Supreme Court as chair and vice chair respectively, six legal experts of high standing appointed by the President of the Republic on recommendation by the House of Peoples’ Representatives, and three persons designated by the House of the Federation from among its members.

Under Article 3 of Proclamation 798, the Council has the power to consider and review for constitutionality “any law or customary practice or decision of government organ or decision of government official” submit its recommendation to the House of the Federation.” Under Article 9, the Council has the power to compel “pertinent institutions or professionals, to appear before it and give opinions.”

⁶ Unlike the U.S. Constitution, the [Ethiopian Constitution](#) clearly delegates the ultimate power of constitutional interpretation to the House of Federation with investigative powers granted to Council of Constitutional Inquiry. To borrow from the landmark American constitutional case *Marbury v. Madison*, “*It is emphatically the province and duty of the House of Federation to say what the constitutional law is and is not.*” Indeed, the House of Federation over the past decades has been engaged in “[investigating questions](#)” of constitutional interpretation from various individuals and sections of the society.”

⁷ GEDION T. HESSEBON and ABDULETIF K. IDRIS, “The Supreme Court of Ethiopia: Federalism’s Bystander”, in *Courts in Federal Countries*, University of Toronto, 2017.

⁸ It is suggested the framers of the FDRE Constitution delegated the task of constitutional interpretation to the House of Federation arguably for three reasons: 1) They felt “the power to interpret a constitution is, in effect, the power to amend a constitution in the guise of giving meaning to a constitutional text.” 2) It would be undemocratic to invest

the Constitution sought to prevent judicial “usurpation of legislative power denying judicial review powers.”⁹

The FDRE Constitution is the supreme law of the land.¹⁰ It serves as the ultimate standard and benchmark for legality and all laws throughout the land must conform to its dictates. On a practical level, it is an instrument to manage and administer the national government and create a framework for the legitimate exercise of governmental power. But that Constitution is not a perfect document. It is not self-explanatory in all aspects and neither does it anticipate and answer all questions likely to arise under its authority. Like all constitutions, the FDRE Constitution needs expounding and interpretation to address new societal needs and challenges unanticipated or unimagined by its framers arise. Similarly, interpretation is needed when a manifest omission appears and creates uncertainty about constitutional intent or meaning.

The FDRE Constitution has been in effect for less than three decades. There is little documented history and precedent to guide constitutional interpretation. Though the House of Federation has addressed various constitutional issues over the years, this Amicus has found no body of constitutional interpretive opinion to use as a guide to address the questions raised herein.¹¹

The task of interpretation is at the core of all constitutional systems. Constitutional interpretation is the process of fixing the meaning of words and phrases in a constitution, understanding the intention of its authors and giving practical effect to the constitution. Constitutional interpretation is not an academic exercise of ascertaining semantic definition to words and phrases. It is a solemn and practical effort to fix the meaning of words and phrased and bridge gaps in constitutional language within the framework of the broader constitutional purpose. Interpretation must be done with objectivity, neutrality and impartiality. It cannot be influenced by ideology, political orientation or personal preferences.

such power in courts over “ a document that is an expression and embodiment of the sovereignty of the nations, nationalities, and peoples” 3) They considered the constitution “not just a legal document but also a pre-eminently political document, not a mere technical exercise to be left to professionals.” Ibid.

⁹ Yonatan Tesfaye Fisseha, “WHO INTERPRETS THE CONSTITUTION: A DESCRIPTIVE AND NORMATIVE DISCOURSE ON THE ETHIOPIAN APPROACH TO CONSTITUTIONAL REVIEW” 2004, Faculty of Law, University of Western Cape, Cape Town, South Africa, Ph.D. Dissertation.

¹⁰ Article 9, FEDR Constitution.

¹¹ The 1787 U.S. Constitution does not expressly grant the federal courts the power to review the constitution and render a definitive interpretation. In 1803, in [Marbury v. Madison](#), arguably the single most important case in American legal history, the U.S. Supreme Court case established the principle of judicial review. Justice John Marshall declared “It is emphatically the province and duty of the judicial department to say what the law is.” By the same token it is emphatically the province of the House of Federation to say what the Constitution means and means not.

Constitutional interpretation is not a search for the ultimate truth, only a search for a fair, soundly reasoned, unbiased and well-documented interpretation of the meaning of constitutional language. It is the universal aim of constitutional interpretation to create syntheses and harmony in the constitutional scheme in an objective and transparent way. But above all, constitutional interpretation is fundamentally a search for consistency and harmony within the constitutional scheme, not a mission to sabotage or destroy it for political ends. Interpreters of the constitution must seek out methods and alternatives that best advance constitutional integrity and harmony not to fabricate discontinuities and contradictions by pitting parts of the constitution against each other.

In interpreting constitutions, it is universal practice to probe into the implied meaning of expressly stated texts. Implied meanings are logically and objective inferences from the text and the structure of the constitution as a whole.¹² Constitutional interpretation must also take a broad view which incorporates the totality of the Constitution and avoid examining constitutional language in isolation.

The language used in constitutions is not specialized scientific or artistic language. In any constitution, there are likely to be constitutional texts that may not be clear and precise and are often framed in “majestic generalities”¹³.

When there appear to be gaps or lacunae in the language, it is imperative to use interpretive doctrines to bridge the gap and give a balanced and fair interpretation with due respect to the constitution itself. These ambiguities and gaps are a natural part of constitution framing. Constitutions reflect the general consensus of the people of a given nation within the broader parameters of its social, political and economic diversity. Though there may be words and phrases that require technical understanding, on the whole constitutions are written in ordinary language intended to be understood by members of the community with proper explanation. It aims to harmonize diverse and often competing interests, perspectives and values. Perhaps most importantly, a constitution is not solely a document for the present but also an aspirational guide for future generation.

In the absence of guiding judicial precedents, doctrines, standards and tests to interpret and fix the meaning of constitutional language, the HoF and Council Constitutional Inquiry

¹² In light of the questions raised herein, it is instructive to review two landmark American constitutional law cases, *McCulloch v. Maryland*, 17 U.S. 316 (1819) “There is nothing in the Constitution of the United States similar to the Articles of Confederation, which exclude incidental or implied powers.” ; *Baker v. Carr*, 369 U.S. 186, 242 (1987). “So far as voting rights are concerned, there are large gaps in the Constitution.” ; <https://supreme.justia.com/cases/federal/us/17/316/#tab-opinion-1918126> ; <https://supreme.justia.com/cases/federal/us/369/186/>

¹³ The late U.S. Supreme Court Associate Justice William Brennan observed, “Our amended Constitution is the lodestar for our aspirations. Like every text worth reading, it is not crystalline. The phrasing is broad, and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure.”; https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html

(CCI) should follow an approach/principle employed widely by American jurists called “Ockham’s rason”¹⁴, which prescribes the correct answer is often the simplest one.

Applying universal constitutional interpretive principles to issues that have arisen under FDRE 54(1), 58(3) and 93

Amicus submits Article 54(1), 58(3) do not exist on their own constitutional island or vacuum. They are part of the broader constitutional scheme of government powers and rights and liberties of citizens. Indeed, one of the major constitutional rights is the right of citizens to elect their representatives in a free and fair election.

Constitutional interpretation Article 54(1), 58(3) must necessarily begin with the written text. Article 54(1) provides:

“Members of the House of Peoples’ Representatives shall be elected by the People for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.”

Article 58(3) provides

“The House of Peoples' Representatives shall be elected for a term of five years. Elections for a new House shall be concluded one month prior to the expiry of the House's term.

Article 93 (1)(a) provides:

“The Council of Ministers of the Federal Government shall have the power to decree a state of emergency should an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur...”

The task of constitutional interpretation of Articles 54(1), 58(3) and 93 of the FDRE Constitution is to bring into harmony the plain texts of these articles with the intent and aims and fundamental principles of the Constitution. This interpretive inquiry must be guided by several questions:

- 1) What is the intent and purpose of the framers of the FDRE Constitution in creating the right to vote and an electoral process based on “universal suffrage and by direct, free and fair elections held by secret ballot”?
- 2) What did the framers of the FDRE Constitution understood the electoral process and the right to vote to be and what values did they intend to protect by them? Did they intend the electoral process and the right to vote to be the touchstone and

¹⁴ https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2476&context=journal_articles

cornerstone of all democratic rights? Did they understand electoral process and the right to vote as the ultimate expression of popular sovereignty?

3) Are Articles 54(1), 58(3) and 93 of the FDRE Constitution limited to the expressly stated language or could implied meaning be logically and reasonably inferred from them?

4) Could Articles 54(1), 58(3) and 93 of the FDRE Constitution be understood in isolation or within the totality of the Constitution, its purposes and aims?

5) How would the framers of the Constitution reasonably address the question raised under Articles 54(1), 58(3) and 93 if they had expressly considered it during the framing or ratification process?

6) Do Articles 54(1), 58(3) and 93 have a static meaning or meaning that is adaptable with the circumstances and principles stated in the Constitution to deal with current problems and needs?

Examining the texts of Articles 54(1), 58(3), it is clear the authors of the Constitution placed enormous importance on the citizens' right to vote. They solemnized it with a number of safeguards including the requirement of "secret ballot" and mandated that it be done on the basis of "universal suffrage and by direct, free and fair elections." The enormous importance the framers placed on the electoral process and the right to vote is self-evident in the dozen or more provisions they included dealing directly or indirectly with votes, elections and the electoral process.¹⁵

The authors of the Constitution intended to produce one paramount outcome in the electoral process and with the right to vote by including Articles 54 and 58: *Free and fair elections*. Amicus has found no external evidence in the form of documents, commentaries, public statements of leaders or other information in discussions and debates during the framing of the Constitution or in the ratification process which negates their paramount concern in ensuring a free and fair election.

The manifest intent and purpose of the framers manifest in the text of Articles 54(1) and 58(3) is the protection of the integrity of the electoral process by requiring that the ultimate test of any constitutionally election be "free and fair" and that it be done in an orderly and predictable process (secret ballot, universal suffrage) by mandating elections be concluded "one month prior to the expiry of the House's term."

A fair and reasonable reading of Article 58(3) shows that the language therein was intended to be an ironclad constitutional guarantee that elections will take place as prescribed, and

¹⁵ In at least a dozen articles, the Constitution directly or indirectly deals with the electoral process and the right to vote, see e.g. Article 38; Article 54; Article 55; Article 58; Article 60; Article 62; Article 77; Article 83; Article 84; Article 87; Article 93; Article 102.

not to preclude delay or postponement *unless under extraordinary circumstances*. Article 58 did not provide qualificatory language for postponement or delays because the framers had already anticipated and provided for such extraordinary circumstances under Article 93, which specifically include external invasion, a breakdown of law and order which endangers the constitutional order, a natural disaster, or an epidemic. Indeed, from the plain text of Article 93 (4)(b), if the country is facing an epidemic, indeed a pandemic of global proportions, “The Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.” The right to vote and to have elections is one such political and democratic right that could be suspended until the epidemic conditions are averted.

One of the principal purposes of constitutional interpretation is to harmonize the meaning of constitutional language and to illuminate obscure implications locked in words and reconcile linguistic omissions with intended constitutional purposes to produce fair and reasonable outcomes, and in extreme cases to sever language that is manifestly repugnant to the scheme of the constitution.

There is no text in the Constitution or external evidence that negates the assertion that the framers intended the ultimate test of the electoral process to be free and fair elections. The texts of Article 54(1), 58 (3) and 102(1) are clear on the constitutional mandate of ensuring free and fair elections of members of the House of Peoples’ Representatives for a term of five years by creating under Article 102 an independent National Election Board to be the sole organizer and arbiter of such an election. The texts of Article 38 (1)(c) and (3) are equally clear in underscoring the necessity of having elections that “guarantee the free expression of the will of the electors” and that such elections “be conducted in a free and democratic manner.”

The seminal question within the bundle of these provisions is why the drafters of the Constitution omitted express contingency language in the event an election could not be held as mandated in Article 58(3). Were the drafters simply unaware of a possibility that could lead to a postponement of an election? Did they intentionally omit such language? Did they intend to create chaos and anarchy by leaving out a contingency clause?

Interpretation of Articles 54(1), 58(3) in Conjunction with Article 93

Article 93 (a) provides, “The Council of Ministers of the Federal Government shall have the power to decree a state of emergency... [in the event of] ... an epidemic....”¹⁶ It is

¹⁶ State of emergency declarations often involve restrictions on the course of social, economic, civil and political activity and curtail civil liberties and rights. The overriding concern is always the abuse and misuse of a state of emergency by the ruling regime issuing the declaration to suppress the opposition, dissent and human rights. All

important to understand state of emergency declarations in Ethiopia in a historical perspective.¹⁷

The current Ethiopia government has already enacted [Proclamation No. 3/2020](#) (“State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact”) under Article 93 with minimal public criticism, opposition or condemnation. Indeed, an Article 93 emergency declaration to postpone elections under Articles 54(1), 58(3), will not be an entirely new action but a natural and logical extension of Proclamation No. 3/2020. The underlying set of facts that warranted enactment of Proclamation No. 3/2020, namely the COVID-19 crisis, are precisely the same set of facts and justifications for an invocation of Article 93 to postpone the election currently scheduled for August 29, 2020.

On March 31, 2020, the independent Ethiopian Election Board¹⁸ issued a statement that “because of issues related to the coronavirus, the board has decided it cannot conduct the election as planned... so it has decided to void that calendar and suspend all activities.”¹⁹ On April 30, Board Chair Birtukan Mideksa formally reported to the House of Peoples' Representatives that given COVID-19, it is “impossible” for her Board to do the vital preparatory work to conduct a free and fair election. Effectively, the Board has declared it cannot perform its duties mandated in Proclamation No. 1162/2019²⁰ which include among other things voter registration and education, ballot preparation and distribution of election

states should have an interest in ensuring that the declaration and implementation of states of emergency are subject to certain limitations and proceed in accordance with international norms. Ethiopia became a party by accession to the International Covenant on Civil and Political Rights (ICCPR), in June 1993. Article 4 of the ICCPR allows states “in a time of public emergency to take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation”, subject to notification of the Secretary-General of the United Nations. Under ICCPR, there are additional requirements that states must meet in justifying a declaration of a state of emergency. The UN High Commissioner for Human Rights has recently published detailed guidelines on the declaration of state of emergency necessitated by the COVID-19 crisis incorporating ICCPR treaty language.

¹⁷ In November 1974, the Provisional Military Government of Socialist Ethiopia (“Derg”) declared a state of emergency and imposed martial law in Ethiopia resulting in summary executions and arbitrary arrests and detention. In May 15, 2005, following parliamentary election that day, a state of emergency was declared to “counter havoc and fear created by opposition charges of abuses and a threat to reject the results.” Nearly 800 persons were killed or seriously wounded by gunfire and over 30 thousand incarcerated following that declaration of emergency. In October 9, 2016, a “State of Emergency Command Post” Decree was issued on the pretext that “the situation posed a threat against the people of the country.” In March 2017, it was announced three elements of that decree were lifted. In June 2018, the state of emergency decree was permanently lifted, and the political space opened for all contenders. In March 2020, Proclamation No. 3/2020 was enacted “to counter and control the spread of COVID-19 and mitigate its impact.

¹⁸ FDRE Constitution, Article 102.

¹⁹ <https://www.aljazeera.com/news/2020/03/ethiopia-postpones-august-elections-due-coronavirus-200331173402471.html>

²⁰ Proclamation No. 1162/2019 The Ethiopian Electoral, Political Parties Registration and Election’s Code of Conduct Proclamation ...

materials, organization and training of election observers and workers, supervision of nomination of candidates, monitor campaign activities, organize polling booths and other related essential functions. The Board has declared it will not be able to ensure free and fair elections on August 29, 2020 without performing in advance the myriad organizational, logistical and operational tasks.

The critical question arising under Article 93 in light of Articles 54(1), 58(3) is what the Council of Ministers must do in the event an “epidemic” (or more accurately a pandemic) which makes it impossible to conduct a free and fair election. More specifically, if an epidemic precludes the possibility of a scheduled election of the members of the House of Peoples' Representatives and make it “impossible” to hold “direct, free and fair elections” under the Constitution or internationally recognized standards²¹, could the Council of Ministers declare a state of emergency under Article 93 and postpone the election until such time as the epidemic is over or effectively under control?

The textual language of Article 93 is clear and unambiguous. Indeed, the plain text of the Article 93 mandates a declaration of a state of emergency to first deal with the epidemic before undertaking any tasks including elections which will manifestly be negatively impacted if they were held during an epidemic. The Council of Ministers is given plenary powers to prioritize societal values. If the choice is to have an election during an epidemic that could result in a significant loss of life or harm to citizens, it is entirely in the discretion of the Council under Article 93 to choose and protect life before any liberties, including the right to vote in a free and fair election.

²¹ Whether an election is free and fair is not a unique question for Ethiopia alone. It is a matter recognized by international bodies with standardized benchmarks. For instance, the [Inter-Parliamentary Union](#) which represents 179 parliaments, including Ethiopia's, has published standards for free and fair election which include establishment of 1) procedures and criteria for voter registration, initiation or facilitation of national programs of civic education on election procedures and issues; 2) neutral, impartial mechanism for the management of elections; recruitment and training of election officials and operatives; 3) procedures to ensure the integrity of the ballot and institution of measures to prevent voting fraud, establishment of mechanisms to ensure the integrity of the vote counting process, 4) mechanisms to ensure freedom of movement, assembly, association and expression for all contenders, particularly in the context of political rallies and meetings and creating conditions that will ensure parties and candidates are free to communicate their views to the electorate and 5) updating of electoral rolls and balloting procedures, and monitoring of performance under election Code of Conduct, among others.

The [African Union Declaration](#) on the Principles Governing Democratic Elections in Africa sets similar standards for free and fair election. Under Section III are listed numerous factors that must exist to ensure a free and fair election including: compilation of voters' registers, establishment of national electoral bodies staffed by qualified personnel, set up of safeguards ensuring freedom of movement, assembly, association, expression, and campaigning, promote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups, implementation of measures to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, ensure the availability of adequate logistics and resources for carrying out democratic elections and provision of adequate security to all parties participating in elections as well as accrediting national and/other observers/monitors.

It is manifest to all reasonable minds that the August elections cannot proceed with the COVID-19 crisis upending the country's social, economic and political system. The nation's energies and human and material resources must be redirected to the prevention, treatment and mitigation of COVID-19 and address the social and economic dislocations caused by the crisis. Indeed, the world's leading economists are predicting COVID-19 will exact "a heavy toll on the Ethiopian economy"²². Such is the dire nature of the current state of emergency in Ethiopia today.

The Council of Ministers has plenary powers the power declare a state of emergency under Article 93 in light of Articles 54(1), 58(3) and postpone the election until such time as the epidemic is brought under control or the initial period of state of emergency which can "remain in effect up to six months."

²² <https://www.focus-economics.com/countries/ethiopia>

II. IF COMPELLING CIRCUMSTANCES WARRANTING A DECLARATION OF A STATE OF EMERGENCY SHOULD ARISE DURING THE PERIOD OF PRELECTION PREPARATIONS AND SHOULD THESE CIRCUMSTANCES PRECLUDE THE CONDUCT OF CONSTITUTIONALLY PRESCRIBED ELECTIONS, WHAT IS THE STATUS OF A PARLIAMENT AND EXECUTIVE BRANCH WHOSE TERM ENDS?

The current term of House of Peoples' Representatives (HPP) expires by the end of September 2020, which under Article 58 (3), an election must be held no later than the end of August 2020. The question is what the status of the members of the HPP and the executive branch would be if an election cannot be held within the constitutionally prescribed time frame because of the COVID-19 crisis.

The constitutional question on the delay and postponement of the August 2020 election arises from an apparent lack of clarity in Article 58 (3) of the Constitution which mandates, "The House of Peoples' Representatives shall be elected for a term of five years. Elections for a new House shall be concluded one month prior to the expiry of the House's term." Unfortunately, Article 58 does not expressly anticipate postponement or delay of elections or provide for extraordinary circumstances that could prevent an election as prescribed in the timetable.

In parliamentary democracies, parliaments terminate in one of two forms of dissolution at the expiry of their formal term. First, when the current parliament completes its maximum term of office, it is *automatically dissolved* without the necessity of additional action by a head of state or a prime minister. The parliament whose term has expired retains no constitutional powers to engage in legislative activities. Every seat in parliament becomes vacant. All unfinished parliamentary business of the expired parliament is set aside and legislation from the expired parliament cannot be carried over into the next parliament. Until the new parliament convenes, all parliamentary business comes to a close. After the expiry of their term, the members of parliament cease to represent their constituents and lose all parliamentary rights and privileges. At best, they can refer to themselves as former members of parliament. During the interval between the dissolution of the previous parliament and the first meeting of the next parliament, there is no parliament in session.

However, government ministers remain in post and continue to execute their duties and run the government following the expiry of the parliamentary term to avoid a power vacuum, maintain law and order, carry on the day to day activities of governance, maintain stability and continuity until a general election is held and they are replaced by a new government. This means that the offices of president/prime minister will not become vacant while parliament is dissolved by operation of expiry of its formal term. The functioning of the

executive branch ensures at least one of the major organs of government will be available to administer the affairs of society and especially maintain law and order, ensure stability and prevent a potentially destabilizing power vacuum. Indeed, it is in the inherent nature of executive power to respond to an emergency and protect the public and state from harm. The executive branch has the resources to respond to an emergency by mobilizing the security, police, military and civil defense elements to maintain law and order. Without a functioning executive branch, the disruptions and dislocations could produce extremely negative consequences for society.

The second and more common dissolution of parliament comes as an obligatory constitutional act by a head of state or prime minister following constitutionally prescribed rules. It occurs ahead of a general election for a new parliament.

The FDRE Constitution grants the prime minister plenary powers to dissolve parliament before the expiry of its term to hold new elections within 6 months. The Prime Minister is required to consult and obtain the consent of the House but ultimately the power to dissolve parliament is delegated to the office of the prime minister.

Article 60 (1) provides, “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.”

Article 60 (3) provides, “If the House is dissolved pursuant to sub-Article 1 or 2 of this Article, new elections shall be held within six months of its dissolution.”

Article 60 (5) provides, “Following the dissolution of the House, the previous governing party or coalition of parties shall continue as a caretaker government. Beyond conducting the day to day affairs of government and organizing new elections, it may not enact new proclamations, regulations or decrees, nor may it repeal or amend any existing law.”

If the House is dissolved under Article 60, the post-dissolution government is mandated to play the role of “care taker” the Prime Minister and the Council of Ministers will be limited to “essential business”. They cannot undertake any new policy initiatives. They cannot make new appointments. They cannot enter into international agreements. A care taker government for Ethiopia when Ethiopians are facing existential threats in the form of COVID-19 pestilence, looming famine and starvation from an invasion of locusts²³ and myriad political uncertainties would be an invitation to an avoidable disaster.

²³ <https://www.bbc.com/news/world-africa-51501832>

III. WHAT IS THE TIMELINE TO RESCHEDULE AN ELECTION ONCE THE CIRCUMSTANCES THAT OCCASIONED THE DECLARATION OF A STATE OF EMERGENCY ARE NO LONGER PRESENT.

A state of emergency is generally regarded to be a temporary response to a particular extraordinary circumstance. The underlying intention in a state of emergency declaration that meets international standards²⁴ is use of the powers conferred by a state of emergency only to address that extraordinary circumstance at hand and restore constitutional normality as soon as possible.

Article 93(3) provides that a state of emergency decreed by the Council of Ministers and approved by the House of Peoples' Representatives "can remain in effect up to six months [and extended]... by a two-thirds majority vote...every four months successively." It is possible that within the timeline of the initial six months the extraordinary circumstances that led to a state of emergency declaration may no longer be present. The question is what timeline must be followed to reschedule the election postponed due to a declaration of a state of emergency.

Amicus has found no precedent, legislative history or other external evidence that sheds light on the question of when an election must take place following the end of a state of emergency declaration. It is unchartered constitutional territory.

Amicus proposes three practical approaches to addressing the issue. The first is to use the doctrine of tolling in re-setting the postponed election. Tolling suspends the fixed election date and allows for recalculation of the time needed by the Board to resume its normal preparatory activities and hold free and fair elections. For instance, that tolling period could be the number of days between the date the Board made public its statement that it cannot proceed with its preparatory activities and the date of the scheduled election.

Second, the time needed to reschedule the election post-termination of the state of emergency could be coterminous with the maximum period of state of emergency. Since the maximum time for a state of emergency is six months, the Board may be able to reset its pre-election calendar and organize a free and fair election within a period of six months after the official termination of the state of emergency.

The third and arguably the most practical and efficacious approach is to re-set the election guided by Article 102 which mandates the "National Election Board independent of any

²⁴ [Article 4](#) to the ICCPR allows states "in a time of public emergency to take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation", subject to notification of the Secretary-General of the United Nations. Ethiopia [became a party](#) by accession to the International Covenant on Civil and Political Rights (ICCPR), in June 1993.

influence, to conduct in an impartial manner free and fair election in Federal and State constituencies.” The Board, constitutionally declared independent and free of external influences, should be given a large say on when “to conduct in an impartial manner free and fair election in Federal and State constituencies”. The Board’s duties, responsibilities and mandates are set forth in detail in under Proclamation No. 1162/2019. The fact of the matter is that the Board has lost its momentum in organizing the elections because of the COVID-19 crisis. Much of the preparatory work may need to be done over again because of the lapse of time. Additional resources may have to be secured and logistical and organizational plans may need to be configured. Amicus submits that free and fair elections could be organized by the Board within a maximum of 12 months following the official termination of a COVID-19 state of emergency.

CONCLUSION

COVID-19 has been a global game changer. The pandemic has rocked the global social and economic system to the core. Even the most advanced industrialized countries are unable to withstand the chaos and dislocation created by COVID-19. The world has been reduced to a global village and the fate of the villagers intertwined. Countries have sought to deal with the COVID-19 crisis by taking extraordinary measures.

The fact of the matter is that constitutions and elections are of the people, for the people and by the people. People are not created for elections. The constitutional question is stark: Saving Ethiopian lives during a global pandemic or having an election on a particular date and risk untold numbers of deaths and unspeakable suffering. Elections make sense only when people are alive.

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Respectfully submitted,



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