

Towards Addressing the Challenges of Holding or Postponing Elections during Emergencies: A Proposal for ‘Election Emergency Laws’ in Ethiopia

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Abstract

This article explores the potential role of election emergency laws in effectively holding or postponing elections during emergencies within the electoral system of Ethiopia. Inspired by the legal and political challenges that arose due to the impacts of the COVID-19 pandemic on the eagerly anticipated 2020 election, the article essentially examines three key incidents: (1) how the federal government postponed the election through constitutional interpretation, despite opposition from politicians and scholars advocating for other alternatives within and outside the Constitution; (2) how the Tigray Regional Government, one of the federating units, held regional elections during emergencies in defiance of the federal government’s decision to postpone the election; and (3) how the federal government later conducted national and regional elections while the pandemic was still ongoing. Findings from doctrinal examinations reveal that the decisions to hold or postpone elections during emergencies were driven by political interests and operationalized under the regular election laws and institutional frameworks, rather than by clear and specific laws and authorities to determine who should decide on holding or postponing elections and how to conduct elections during emergencies. This has attracted several legal questions and political tensions. Thus, based on experiences from other countries, the article proposes an amendment to the Constitution

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to incorporate holdover clauses and Proclamation No. 1162/2019 to include a provision that could address election emergencies and empower electoral bodies to manage the holding or postponement of elections during emergencies.

Keywords: COVID-19, Election Emergencies, Elections Emergency Laws, Ethiopia, Holding Election, Postponing Election

Introduction

The holding of a free, fair, genuine, and regular election has been one of the defining characteristics of modern political communities.¹ Electoral rights are recognized under major international,² regional,³ and national⁴ human rights instruments as part of the right to democracy and democratic government.⁵ The foundational principles of these instruments, among others, require elections to be conducted periodically to ensure that power comes only from popular votes and no government remains in power indefinitely.⁶ However, the

¹ International Institute for Democracy and Electoral Assistance, *International Electoral Standards Guidelines for Reviewing the Legal Framework of Elections*, The International IDEA, (2002), p. 21.

² Universal Declaration of Human Rights, United Nations, Treaty Series, Vol. 999, (1948), Article 21; International Covenant on Civil and Political Rights, United Nations, Treaty Series, Vol. 999, (1966), Article 25; Declaration on Criteria for Free and Fair Elections, Inter-Parliamentary Union, 154th Session, (1994), Article 1.

³ African Charter on Human and Peoples' Rights (The Banjul Charter), Organization of African Unity, (1981), Article 13(1).

⁴ The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, *Federal Negarit Gazette*, (1995), Article 38 (Hereinafter The FDRE Constitution).

⁵ Ludvig Beckman, The Right to Democracy and the Human Right to Vote: The Instrumental Argument Rejected, *Journal of Human Rights*, Vol. 13, (2014), pp. 381–394.

⁶ Patrick Merloe, Human Rights: The Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections, In John Hardin Young (Ed.),

implementation of regular elections has faced obstacles in various communities affected by conflicts, warfare, terror attacks, natural disasters, and public health crises.⁷ Such situations, making election administration impossible or compromising periodicity are generally known as ‘election emergencies’.⁸

The outbreak of Coronavirus (COVID-19) has affected elections and referendums planned to take place worldwide since 2019.⁹ This is mainly due to the fact that election preparations and election events naturally bring people together and risk the spread of the deadly virus. The optimal recommendation from international organizations such as the Association of World Election Bodies and the World Health

International Election Principles: Democracy & the Rule of Law, American Bar Association, (2010), pp. 3-40.

⁷ Patrick Merloe, Authoritarianism Goes Global: Election Monitoring Vs. Disinformation, *Journal of Democracy*, Vol. 26, No. 3, (2015), pp. 79-93; Michael T. Morley, Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks, *Emory Law Journal*, Vol. 67, (2018), pp. 545.

⁸ The September 11 terrorist attacks and Hurricane natural disasters on USA’s elections, the Boko Haram attack on Nigeria’s election 2014 and the Ebola outbreak on Liberia’s election 2014 are some of the election emergencies that threatened elections. See Generally *Ibid*, Michael T. Morley; Martin Ewi, Was the Nigerian 2015 Presidential Election a Victory for Boko Haram or for Democracy? *African Security Review*, Vol. 24, No. 2, (2015), pp. 207–231; Erik Asplund and Toby James, Elections and Covid-19: Making Democracy Work In Uncertain Times, *Democratic Audit UK*, (30 March 2020), available at <https://www.democraticaudit.com/2020/03/30/elections-and-covid-19-making-democracy-work-in-uncertain-times/> last accessed on 06 June 2020.

⁹ Richard Baldwin and Beatrice Weder di Mauro, Introduction, in Richard Baldwin and Beatrice Weder di Mauro (eds.), *Economics in the Time of COVID-19*, Centre for Economic Policy Research Press, (2020), pp. 1-31; See also The second meeting of the Emergency Committee convened by the WHO Director-General under the International Health Regulations (IHR) (2005) regarding the outbreak of novel coronavirus 2019 in the People’s Republic of China, with exportations to other countries, World Health Organization, (30 January 2020), available at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) last accessed on 06 June 2020.

Organization (WHO) for such situations was to run elections while lessening the virus's transmission.¹⁰ Yet, it was unattainable for many countries, and they had to either postpone the election in the interest of public health or conduct the election for the sake of democracy, which has sparked several political and scholarly debates in the post-COVID-19 period.¹¹

Many scholars have held that emergency time elections should not be run through the regular election law, election management bodies, and election procedures.¹² Furthermore, the decision to postpone the election should be made according to clear legal stipulations, in a way that effectively defers and avoids the possible power vacuum in the interim periods.¹³ Hence, both the decision to hold and postpone require an election emergency law and authority that regulate who shall decide and how to manage consequential questions. Be that as it may, as of 26 April 2020, 68 countries and territories across the globe have decided to postpone national, subnational, or local (municipal) elections and referendums due to COVID-19, while 18 countries have decided to hold elections as originally planned and eight countries held national elections or referendums despite concerns related to COVID-19.¹⁴ In most of the instances, the decision to hold or postpone elections was made with the help of election emergency laws and powers and, as a result, did not attract political tensions. Moreover, research reports

¹⁰ The International IDEA, Global Overview of COVID-19: Impact on Elections, (01 December 2022) available at <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> last accessed on 30 April 2023.

¹¹ The International IDEA, Global Overview of COVID-19: Impact on Elections, (01 December 2022) available at <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections> last accessed on 30 April 2023.

¹² *Ibid*; Michael T. Morley, *Supra* at 7, pp. 547.

¹³ *Ibid*.

¹⁴ *Supra* Note 11.

confirmed that most of the elections were held or postponed after proper consideration of prevailing public health and legal issues.¹⁵

In Ethiopia, the FDRE Constitution underscores that state power can only be assumed through elections and allows only the political party or a coalition of political parties with the greatest number of seats in the House of Peoples' Representatives (HPRs) to form the executive and exercise political power.¹⁶ The term of the members of the HPRs, House of Federation (HoF), and the executive (the Prime Minister and cabinet) is the same five years.¹⁷ Consequently, elections shall be held one month before the expiry of the term to avoid a grave power vacuum, as the entire government will leave office except for the president.¹⁸ Accordingly, the country has held a series of elections since the Ethiopian People's Revolutionary Democratic Party (EPRDF) ousted the Derg regime in 1991. It has been largely established that, with the exception of the 2005 election, almost all the five rounds of elections are deemed to lack competitiveness, fairness, freedom, and representation.¹⁹ However, periodicity has not been a problem until the sixth round. With the rise in COVID-19 cases, the National Election Board of Ethiopia (NEBE) was indecisive and in conversation with stakeholders on whether to hold or postpone the election. Later, however, the NEBE reported to the HPRs that it was unable to handle Election 2020, and the federal government declared a five-month State of Emergency (SoE),

¹⁵ *Ibid.*

¹⁶ FDRE Constitution, Articles 9 (3) cum 8 (3).

¹⁷ *Ibid.*, Articles, 56, 73 (1), and 58 (3)

¹⁸ *Ibid.*, Articles 70 (6) and 71

¹⁹ Yonas Abiye, House Votes to Postpone City Council, Local Election, *The Reporter*, (3 Aug 2019) available at <https://www.thereporterethiopia.com/article/house-votes-postpone-city-council-local-election> last accessed on 30 April 2023. There were only a few adjournments of local elections, such as of Addis Ababa and Dire Dawa city councils in 2018 and 2019, because of the expanding ethnic clashes and political instability.

which forthwith suspends democratic and political rights.²⁰ Such actions were viewed as an indefinite postponement and sparked political tensions.

The FDRE Constitution, which impels elections every five years and defines emergencies as grounds for the declaration of SoE, failed to regulate the holding or postponement of the elections during emergencies. Similarly, the major election laws of the country, which are intended to govern elections during regular times, do not include provisions addressing elections in emergency situations.²¹ Neither the preparatory documents nor the substance of the SoE proclamations and regulations cover the fate of elections and the government after its term ends.²² It is also important to note that under the Ethiopian legal system, the legal frameworks for SoE and election administration exist independently, although the former immediately suspends the democratic and political rights to which the latter is grouped. This way, the absence of such an election emergency law had made Election 2020 a hub of grim legal and political questions and a looming constitutional

²⁰ The National Election Board of Ethiopia, Press Statement on the decision NEBE passed based on its analysis of the challenges posed by Coronavirus (COVID-19) on the 2020 elections operational plan and timetable (Amharic), March 31, 2020; Morris Kiruga, Ethiopia: Indefinite Postponement of Polls Raising Political Tempers, *The Africa Report*, (25 May 2020) available at <https://www.theafricareport.com/28418/ethiopia-indefinite-postponement-of-polls-raising-political-tempers/> last accessed on 30 April 2023. FDRE Constitution, Article 93 (4-a); A State of Emergency Proclamation Enacted to Counter and Control the Spread of COVID-19 and Mitigate Its Impact, No. 3/2020, *Federal Negarit Gazette*, (2020).

²¹ See generally The Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019, *Federal Negarit Gazette*, (2019) (Hereinafter Proclamation No. 1162/2019); A Proclamation to Establish the National Electoral Board, No. 1133/2019, *Federal Negarit Gazette*, (2019) (Hereinafter Proclamation No. 1133/2019).

²² See Proclamation No. 3/2020.

and legal crisis. Some political parties and scholars had strongly advocated the option of holding elections amid the pandemic as part of obeying the constitution and the rights of the people, while others appealed for postponement of the election due to the deadly nature of the virus and the heightening political animosity in contemporary Ethiopia.²³ The most critical and extra-politicized legal question was: who shall have power during the interim period as Election 2020 is postponed due to the COVID-19 pandemic? The government and some scholars in the field had suggested alternative options within the constitutional framework²⁴: Dissolution of the Houses,²⁵ Declaration of State of Emergency,²⁶ Constitutional Interpretation,²⁷ and Constitutional Amendment.²⁸ Others politicians and scholars, on the other hand, pitted against the qualification ‘within the constitutional framework’ and claimed no government upon the expiry of its term in September 2020. The incumbent would stand on equal footing with opposition parties, clamouring for political dialogue and the formation of the

²³ Mistir Sew, *Ethiopia Requires a Legal Solution to a Political Problem*, *Ethiopian Insight*, (12 May 2020) available at <https://www.ethiopianinsight.com/2020/05/12/ethiopia-requires-a-legal-solution-to-a-political-problem/> last accessed on 30 April 2023.

²⁴ See for example, Zemelak Ayitenew, *Analysis: Ethiopia’s Planned Elections and #Covid19: Constitutional And Political Implications*, *Addis Standard*, (31 March 2020) available at <http://addisstandard.com/analysis-ethiopias-planned-elections-and-covid19-constitutional-and-political-implications/> last accessed on 30 April 2023; See also Bantayehu Demlie, *Analysis: Deferred Election, State of Emergency and #Covid19 – How Can Ethiopia Avoid an Impending Constitutional Crisis?*, *Addis Standard*, (10 April 2020) available at <http://addisstandard.com/analysis-deferred-election-state-of-emergency-and-covid19-how-can-ethiopia-avoid-an-impending-constitutional-crisis/> last accessed on 30 April 2023.

²⁵ FDRE Constitution, Article 60(1).

²⁶ *Ibid*, Article 93.

²⁷ *Ibid*, Articles 62(1), 83, and 84(1).

²⁸ *Ibid*, Articles 104 and 105.

transitional government.²⁹ Finally, the government took the case to HoF for interpretation, which decided in favour of postponing the election and extending the terms of the government.³⁰

Despite the federal ruling, the TPLF-led Tigray Regional Government proceeded with regional elections by enacting election law and establishing its own election commission.³¹ This is thought to be the direct trigger for the war in northern Ethiopia- a violent clash between federal forces and Tigray regional forces that resulted in the deaths of hundreds of thousands, displacement of millions, and atrocities by both sides. Later, amid the lingering effects of the pandemic and widespread conflicts, the federal government held a nationwide election in accordance with the regular election laws and the election commission.³² Many scholars and politicians were concerned that these politically driven election decisions were made without clearly defined legal terms and, as a matter of fact, went against public health and democratic

²⁹ Neamin Ashenafi, ENM Calls For Creation of Transitional Government, *The Reporter*, (2 Nov 2019) available at <https://www.thereporterethiopia.com/article/enm-calls-creation-transitional-government> last accessed on 30 April 2023; ልደቱ ኢየሱሱ፣ ህዳሴ የእርቅና የአገድነት የሽግግር መንግሥት፣ ኢትዮጵያ ነገ፣ (መጋቢት 2012 ዓ.ም) available at <https://ethiopianege.com/wp-content/uploads/2020/03/%E1%8B%A8%E1%88%BD%E1%8C%8D%E1%8C8%20D%E1%88%AD-%E1%88%98%E1%8A%95%E1%8C%8D%E1%88%A5%E1%89%B5-%E1%88%98%E1%2089%8B%E1%89%8B%E1%88%9D-%E1%8A%A0%E1%88%B5%E1%8D%88%E1%88%8B%E1%8C%8A%20%E1%8A%90%E1%89%B5.pdf> last accessed on 30 April 2023.

³⁰ FDRE House of Federation, 5th Year Second Regular Session, 10 June 2020.

³¹ The relationship between TPLF and the Prosperity Party (PP) has already soured since TPLF withdrew from the defunct Ethiopian Peoples' Revolutionary Democratic Party (EPRDF) and the formation of the pp.

³² Zemelak Ayitenew, COVID-19 and Ethiopia's Sixth General Election, *The International IDEA Case Study*, (30 March 2022).

rights.³³ These decisions also resulted in intense political backlash, and the highly anticipated Election 2020 ended with polarized controversies.

The question that would naturally come to a sober mind is: why did Ethiopia fail to effectively postpone or hold elections unlike other countries that manage the same case with election emergency laws? While the Ethiopian electoral system and COVID-19 challenges have garnered interest from several politicians and academics, none of the inquiries have explored the idea and potential roles of emergency election laws amid crises like pandemics and conflicts.³⁴ This article aims to fill this void by exploring the potential use of election emergency laws to either postpone or hold elections during crises, based on the review of laws and practices in Ethiopia and other countries.

The contents in the body of the paper are organized in five sections. The first section briefly reviews the electoral laws and practices in Ethiopia. The second part explores at greater depth the election emergencies and the role of election emergency laws in ensuring elections are carried out effectively or postponed. The third section examines uncertainties and controversies with regards to holding and postponing elections in the

³³ Zemelak Ayitenew, *supra* at 24; Neamin Ashenafi, *supra* at 29.

³⁴ Marew Abebe Salemot and Mequanent Dube Getu, The Constitutionality of Election Postponement in Ethiopia Amidst COVID-19 Pandemic, *Jimma University Journal of Law*, Vol. 12, No. 1, (2020); Zelalem K. Bekele, The Quest for Election and State of Emergency in Ethiopia: An Appraisal on Related Constitutional Issues in Focus, *Beijing Law Review*, Vol.11, No. 4, (2020); Marew Abebe Salemot, Constitutional Silence on Election Postponement in Ethiopia Amidst A Pandemic: A Critique of Constitutional Interpretation, *Rudn Journal of Law*, Vol. 25, No.2, (2021); Sileshi Fentahun, Impact of COVID-19 on Democratic Election and Development of Ethiopia, *International Journal of Basic & Applied Research*, Vol. 4, No. 1, (2024), p.16 ; Zemelak Aytenew, Yonatan Fessha, Beza Dessalegn, and Berihun Adugna, Ethiopia: Legal Response to Covid-19, in Jeff King and Octavio LM Ferraz *et al.* (eds.), *The Oxford Compendium of National Legal Responses to Covid-19*, Oxford University Press Online, (2021).

Ethiopian political landscape focusing on the sixth election. Finally, section four presents concluding remarks.

1. Electoral Laws and Practices in Ethiopia: An Overview

Ethiopia's political discourse is at odds with party-based politics and electoral procedures throughout its three thousand years of statehood history.³⁵ This democratic deficit is primarily caused by prior institutional and policy failures as well as a lack of political will. Even though the right to political association is provided in the Constitutions of 1931, 1955, and 1987, at no point over these periods were political associations and political parties made practicable for electoral democracies.³⁶ The Transitional Government of Ethiopia (TGE) Charter and the 1995 FDRE Constitution introduced multiparty democracy and associated rights more openly, with a clear legal and institutional framework.³⁷ To this effect, the federal government had enacted three sets of laws on the election and political parties³⁸ that are recently

³⁵ Eyob Amedie, *The Impact of Electoral System on Political Representation in Diversified Society: An appraisal of National Elections of Ethiopia*, LL.B Thesis, St. Mary's University College (2013). Parliamentary elections were begun in the period of Emperor Haile Selassie, especially after the revision of the constitution and the enactment of the first Electoral law (Proclamation No.152/1956). However, the senators were fully appointed while members of the House of Deputies were partly elected by the emperor himself. Despite the fact that the right to association is provided under the Constitutions of 1931, 1955 and 1987, in none of these periods were political associations and political parties made practicable. The establishment of the Workers Party of Ethiopia (WPE) during the Derg Regime (1974-1991) can be taken as a departure, though it was a one-party system.

³⁶ *Ibid.*

³⁷ Transitional Period Charter of Ethiopia, Proclamation No. 1/1991,__(1991), Art. 1; FDRE Constitution, Articles 31 and 38.

³⁸ Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia Proclamation with the Constitution of the Federal Democratic Republic of Ethiopia No. 111/1995, *Federal Negarit Gazette*, (1995); Amended Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia with the Constitution of the

subsumed into a single legal document called the Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019 applicable to all elections conducted in Ethiopia and citizens.³⁹ The NEBE, formerly known as the Electoral Commission, was established as an autonomous entity responsible for overseeing the electoral activities and accountable to the HPRs.⁴⁰

The FDRE constitution recognizes different forms of elections in Ethiopia: general election, local election, by-election, re-election, and referendum in line with the administrative decentralization in the country.⁴¹ In all of these forms, the country follows the first-past-the-post system, where the candidate who receives more votes than other competitors within a constituency is declared the winner.⁴² This system is criticized for being generally weak in promoting representation, as most of the votes are discarded.⁴³ Others also argued that such a single-winner system of positional voting is not feasible in countries like Ethiopia, where more than 80 ethnic and linguistic groups have differing

Federal Democratic Republic of Ethiopia No. 187/2000, *Federal Negarit Gazette*, (2000); Amended Proclamation to Ensure the Conformity of the Electoral Law of Ethiopia with the Constitution of the Federal Democratic Republic of Ethiopia No. 438/2005, *Federal Negarit Gazette*, (2005); A Proclamation to Amend the Electoral Law of Ethiopia No. 532/2007, *Federal Negarit Gazette*, (2007); A Proclamation to Provide for the Electoral Code of Conduct for Political Parties No. 662/2009, *Federal Negarit Gazette*, (2009); Political Parties Registration Proclamation No. 46/1993, *Federal Negarit Gazette*, (1993); Political Party Registration (as amended) Proclamation No. 82/1993, *Federal Negarit Gazette*, (1993); The Revised Political Parties Registration Proclamation No. 573/2008, *Federal Negarit Gazette*, (2008).

³⁹ Proclamation No. 1162/2019, Article 3

⁴⁰ Proclamation No. 1133/2011; See also FDRE Constitution, Article 102

⁴¹ See for Example, Proclamation No. 1162/2019, Article 6.

⁴² FDRE Constitution, Article 56.

⁴³ Temesgen Sisay, Enhancing the Representativeness of the Ethiopian Electoral System: A Case for a Mixed Member Proportional (MMP) Electoral System, *Bahir Dar University Journal of Law*, Vol.6, No.2, (2016).

interests.⁴⁴ As such, the system favours single-party dominance against minority voices - pampering EPRDF for the first five rounds and the Prosperity Party (PP) for the 6th election.⁴⁵ The flaws of the Ethiopian electoral system in addressing the needs of the diaspora,⁴⁶ people with disabilities,⁴⁷ and prisoners⁴⁸ have been well articulated in different studies. To account for such deficits at least in the past three decades, the TGE hosted two notable elections: the 1992 election for the establishment of the Transitional Government at regional and district levels and the 1994 election for electing the members of the Constituent Assembly, which later ratified the 1995 Constitution.⁴⁹ These two elections were rejected and condemned by the opposition groups and international and local observers alike. They are fraught with partisan electoral institutions and processes unfairly favouring the incumbent EPRDF.⁵⁰ After the adoption of the FDRE Constitution, the first election was held in May 1995 for HPRs and Regional Councils. Other elections were conducted in 2000, 2005, 2010, and 2015, in which the

⁴⁴ Beza Dessalegn, The Right of Minorities to Political Participation under the Ethiopian Electoral System, *Mizan Law Review*, Vol. 7, No. 1, (2013) pp. 67-100.

⁴⁵ *Ibid.*

⁴⁶ Teguadda Alebachew, Extending Voting Rights to the Ethiopian Diaspora: Towards Institutionalizing Diaspora Political Participation in Ethiopia, in Wolfgang Benedek *et al.*, *Implementation of International Human Rights Commitments and Implications on On-going Legal Reforms in Ethiopia*, Brill Publisher, (2020).

⁴⁷ Shimels Sisay, Electoral Participation as a Fundamental Political Right of Persons with Disabilities in Ethiopia; Critical Examination of the Law and the Practice, LL.M Thesis, Addis Ababa University (2011).

⁴⁸ Zemenu Tareegn, Prisoners' Right to Vote in Ethiopia: Unconstitutionally stalled Human Right, *Elixir Law*, Vol. 99, (2016).

⁴⁹ Terrence Lyons, Ethiopian Elections: Past and Future, *International Journal of Ethiopian Studies*, Vol. 5, No. 1, (2010), pp. 107-121; Matthew J. McCracken, Abusing Self-Determination and Democracy: How the TPLF is Looting Ethiopia, *Case Western Reserve Journal of International Law*, Vol. 36, No. 1, (2004), pp. 183- 222.

⁵⁰ *Ibid.*

EPRDF, the single dominant party, claimed to have gained landslide victories, which, in turn, gave it a room to control the political power in the HPRs, HoF, and regional councils.⁵¹ The 2005 parliamentary election was the only, most competitive election in which an incumbent party historically allowed the opposition to have a space of optimal competition until the conduct of the election.

Yet, this glimpse of a democratic move was later marred by systematic intimidation and weakening of the opposition and democratic institutions by the ruling party apparatus.⁵² Such repressive moves of the ruling party drove the majority of the opposition out of the political sphere and resulted in the EPRDF's obsequious 99.6% and 100% wins in elections in 2010 and 2015 respectively.⁵³ At the end of every election, including the case in 2005, the oppositions continuously rejected the outcome, and the incumbent's combative reaction often led to mass arrest, unrest, bloodshed, hostility, etc. The entrenched authoritarian system that curtails the political space has moved to a level of claiming 100% win in the 2015 election. These developments cumulatively triggered recurrent anti-government mass protests and ethnic conflicts, resulting in the loss of thousands of lives, displacement of millions, and ransacking of properties and institutions.⁵⁴ This situation had continued despite two recurrent and even disastrous SoE declarations.⁵⁵

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Supra* at 43.

⁵⁴ *Ibid.*

⁵⁵ See State of Emergency Proclamation for the Maintenance of Public Peace and Security Proclamation No.1/2016, *Federal Negarit Gazette*, (2016); Constitution and Constitutional Order Defense from Threat State of Emergency Proclamation No.2/2018, *Federal Negarit Gazette*, (2018.)

In April 2018, Prime Minister Abiy Ahmed came to power and initiated notable political and legal reforms. This was started with the dissolution of the EPRDF and the formation of the Prosperity Party with the hope of shambing the TPLF-led dominant-party system and associated democratic deficits. The government also implemented reforms, among others, targeting laws that restricted political freedom, such as electoral laws, civil society laws, and anti-terrorism laws.⁵⁶ Two of the most important electoral legislations were also enacted ahead of the 2020 elections.⁵⁷ Though some criticized the reform for being hurried and particular concerns raised in the laws, it astonished many and made the election of 2020 truly much anticipated.⁵⁸

The NEBE announced that it undertook organizational reforms in consultation with political parties and civic associations and planned to hold the election in 2020 in the month of May as usual.⁵⁹ However, it was rescheduled for 16 August 2020 and later pushed to 29 August 2020.⁶⁰ The NEBE attributed the delay to the time needed to implement reforms and reregister political parties in accordance with the new law, despite facing criticisms.⁶¹ Some claim that the month of August is not appropriate due to the climax of the rainy season and fasting day for the Ethiopian Orthodox Church, impairing freeness and fairness. Others

⁵⁶ Jon Temin and Yoseph Badwaza, Aspirations and Realities in Africa: Ethiopia's Quiet Revolution, *Journal of Democracy*, Vol. 30 No.3, (2019), pp. 139–53

⁵⁷ See generally, Proclamation No. 1162/2019 and Proclamation No. 1133/2019.

⁵⁸ Hereward Holland, Ethiopia's Opposition Parties Criticize Election Law Changes, *Reuters*, (24 Aug 2019) available at <https://www.reuters.com/article/us-ethiopia-politics/ethiopias-opposition-parties-criticize-election-law-changes-idUSKCN1VE00V> last accessed on 30 April 2023.

⁵⁹ Morris Kiruga, Ethiopia Passes New Laws Ahead of 2020 Elections, *The Africa Report*, (29 Aug 2019) available at <https://www.theafricareport.com/16693/ethiopia-passes-new-laws-ahead-of-2020-elections/> last accessed on 30 April 2023.

⁶⁰ *Ibid.*

⁶¹ *Supra* at 58.

associate the consecutive reschedules and uncertainties with the board's reluctance to conduct the 2020 election. With the coming of COVID-19 and the declaration of SoE in the country, however, the NEBE declared that it could not administer the election and presented a proposal to postpone the election to the HPRs. The HPRs approved the proposal and postponed the election for an indefinite time. Though the board claimed that it tried to be participatory in all of the decisions, the much-anticipated election of 2020 has continued to receive fierce criticism from political parties and scholars. This has raised political temperatures as both the government and opposition parties started to accuse each other of attempting a power grab, leading to one of the deadliest civil wars in the post-2020 Ethiopia.

2. Emergencies and Election Emergency Laws

Throughout history, states experienced varieties of emergency situations ranging from natural disasters like earthquakes, floods, and epidemics, to social phenomena such as terrorism, war, and political turmoil. Scholars widely agree that such emergencies justify departure from norms expected during periods of normality, and, as such, governments enforce special emergency laws and assume extra powers.⁶² Yet, such measures could endanger the rights of citizens and entail establishing systems of emergency power regulation and the formation of an independent supervisory body. Elections are no exception, and several natural and manmade disasters have impeded elections and frustrated the continuity of governance in many countries. In one of such cases, the terrorist attacks of September 11, 2001 (in the US, New York City) occurred on the same day as the New York Democratic and Republican

⁶² Stefan Olsson, Defending the Rule of Law in Emergencies Through Checks and Balances Defending the Rule of Law in Emergencies, *Democracy and Security*, Vol. 5, (2009), pp. 103-126.

primary elections.⁶³ Similarly, natural disasters such as Hurricane Katrina (New Orleans, 2005), Hurricane Sandy (New Jersey and New York, 2012), and Hurricane Matthew (Florida and Georgia, 2016) occurred shortly before or during elections.⁶⁴ In Nigeria, the 2014 election was postponed due to the Boko Haram attack and terror.⁶⁵ In the same year, the public health crisis because of the Ebola outbreak critically threatened the election in Liberia, forcing the government to conduct it after two postponements.⁶⁶

The COVID-19 pandemic, emerging as a new manifestation, yet with more magnitude of threat to elections, massively threatened various types of elections worldwide, especially those scheduled for 2020.⁶⁷ Election management bodies of several countries had to make between two hard choices: to postpone the election in the interest of public health or to conduct elections as scheduled in the interest of democracy.⁶⁸ Studies indicate that only countries that adopted and effectively implemented election emergency laws made sound choices and effectively responded to unexpected crises.⁶⁹ However, there are states lacking such laws empowering electoral bodies or governments to

⁶³ Michael T. Morley, Election Emergencies: Voting in Times of Pandemic, *Washington and Lee Law Review*, Vol. 80, No. 1, (2023).

⁶⁴ *Ibid*; see also Michael T. Morley, See *supra* at 7, pp. 553-586.

⁶⁵ Martin Ewi, *supra* at 8.

⁶⁶ Anthony Banbury, Opinion: Elections and COVID-19 — what we learned from Ebola, (08 April 2020) available at <https://www.devex.com/news/opinion-elections-and-covid-19-what-we-learned-from-ebola-96903> last accessed on 30 April 2023.

⁶⁷ *Supra* at 63.

⁶⁸ Erik Asplund and Toby James, *supra* at 8.

⁶⁹ Michael T. Morley, *Supra* at 63; Michael T. Morley, *Supra* at 7; Ingrid Bicu and Peter Wolf, Elections during COVID-19: Considerations on How to Proceed with Caution, *The International IDEA*, (2020) available at <https://www.idea.int/news-media/news/elections-during-covid-19-considerations-how-proceed-caution> last accessed on 30 April 2023.

adequately respond to the crises.⁷⁰ In some countries, courts or other bodies are tasked with resolving the outcomes of election crises based on constitutional law, often using ambiguous, subjective, and politically charged proceedings.⁷¹ Where elections are postponed through such institutional setups and procedures, they would curtail standards that protect the safety of people involved as well as the success of the electoral system.⁷² This section assesses the role of laws and institutional arrangements in effectively postponing or holding elections during emergencies, using COVID-19 as a prime example.

2.1 Postponing Elections for Emergencies

Emergencies, while inherently posing challenges to elections, vary in their magnitude, and, postponing elections can be warranted depending on the nature of the emergency or the degree of disruption. Scholars such as Sloat and Morley ground such justifications on the need to ensure the safety of individuals, to uphold the integrity of elections, and to bolster public trust in the electoral process.⁷³ Emergencies like natural disasters, armed conflicts, civil unrest, epidemics, or other biosecurity threats can result in injury, loss of life, or other forms of calamities. Such situations require remedial actions and constitutions to provide authorities with special legal powers to declare SoE to safeguard citizens from peril. It is also important to note that the public stake associated with elections is so substantial in many ways that it deserves constitutional-level laws or emergency laws devised to protect such

⁷⁰ *Ibid.*

⁷¹ Ingrid Bicu and Peter Wolf, *Ibid.*

⁷² *Ibid.*

⁷³ Amanda Sloat, European Elections in a Time of Coronavirus, *Brookings Education*, (20 Mar 2020) available at <https://www.brookings.edu/blog/order-from-chaos/2020/03/20/europeanelections-in-a-time-ofcoronavirus/> last accessed on 30 April 2023.

stakes. For example, conducting an election in violation of the COVID-19 protocols would damage substantial public interests. First, it may put the public, election officials and other attendees at risk of contracting or transmitting the virus.⁷⁴ The election processes may also divert resources and focus from the prevention and control of emergencies.

Another downside of such a scenario is the democratic deficit likely resulting from it. Holding elections during emergencies would severely compromise the deliberation, participation, and election management quality. Emergency situations make electoral activities and processes such as voter registration, political campaigns, and poll worker trainings, distribution of ballots, ballot casting, and electoral dispute resolutions difficult, if not impossible. This may lead to mistakes, misunderstandings, or fraud, which ultimately erode the integrity of the election and public trust.

According to Morley, countries have the option to address emergencies by making modifications (introducing additional methods or time for voting), postponements (deciding to hold the election on a different date), and cancellations (nullifying the scheduled date without setting a new one).⁷⁵ Such decisions, however, should only be made after a careful assessment of circumstances and applicable laws, and rescheduling or annulling an election should only be decided as a last option. In this regard, election emergency laws are vital in empowering governments or election bodies to postpone elections as well as providing procedures that avoid arbitrary deferring of elections.⁷⁶

⁷⁴ Elliot Bulmer, Emergency Powers, *The International IDEA*, (2018), pp. 26-27.

⁷⁵ Michael T. Morley, *supra* at 7, pp. 545 ff.

⁷⁶ *Ibid*; *supra* at 63.

There is usually a fear that postponing elections might lead to a situation of what Toby James and Sead Alihodzic call the “postponement paradox,” where political actors might seek partisan advantages⁷⁷ and trigger democratic breakdown and institutional uncertainty.⁷⁸ While such unhealthy and discreet moves of incumbent political powers are expected, their impact depends on the design and clarity of constitutions or other statutes in dealing with the postponement of elections during emergencies.⁷⁹ For example, in France, as per the constitutional clause that deals with emergencies, the French Parliament, on 23 March 2020, adopted a law on urgent measures in response to the coronavirus pandemic.⁸⁰ This law stipulates that elections cannot be conducted during any SoE or within 90 days of its completion, and the term in office will be extended automatically.⁸¹ Similarly, the constitutions of India,⁸² Estonia,⁸³ and Afghanistan⁸⁴ provide generous stipulations

⁷⁷ For example, the incumbent might use the situation to reduce opportunities for rivals to campaign while continuing to political movements and using state resources.

⁷⁸ Toby James and Sead Alihodzic, When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations, *Election Law Journal*, Vol. 19, No. 3, (2020), pp. 344-362

⁷⁹ *Supra* at 66; see also Jacob Wallace and Darcy Palder, The Coronavirus Is Delaying Elections Worldwide, (22 May 2020), available at <https://foreignpolicy.com/2020/05/22/coronavirus-elections-postponed-rescheduled-covid-vote/> last accessed on 30 April 2023. The Global State of Democracy Indices also associates it with the prevailing democratic culture, taking the cases of Mali, South Korea, and Poland, which recorded 2, 9241, and 1080 COVID-19 cases, respectively, as of 26 March. This argument, however, seems to hold no water, as countries with better democracies, such as Germany and Canada, have postponed elections for the same reasons.

⁸⁰ The French Constitution, 4 October 1958, Articles 16 and 36.

⁸¹ The Emergency Law No. 2020-290, French Official Journal, 24 March 2020.

⁸² The Constitution of India, 1950. Article 83 stipulates that, while a Proclamation of Emergency is in operation, parliament’s term of office may be extended by Parliament by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate.

functional to the general emergencies, while the constitutions of Kenya,⁸⁵ Bangladesh,⁸⁶ and Malta⁸⁷ stipulate wartime emergency provisions.⁸⁸ In terms of design, the emergency provisions of different constitutions are designed differently.⁸⁹ For example, while some constitutions provide a defined list of emergency types (e.g., only war) to postpone elections, others provide general emergencies; some postpone elections in blanket, but others may set a time after which elections cannot be extended; in some constitutions, postponement of elections may follow automatically from the declaration of a SoE, yet in

⁸³ The Constitution of the Republic of Estonia, 2011. Art. 131 provides that during a state of emergency or a state of war, the parliament, the president of the republic, and the representative bodies of local governments shall not be elected, nor shall their authority be terminated.

⁸⁴ The Constitution of the Islamic Republic of Afghanistan, 2004, Art. 147, liberally provides that if the presidential term or the legislative term of the National Assembly expires during the SoE, the new general elections shall be postponed, and the presidential as well as parliamentary term shall extend up to amendable 4 months, and within two months after the termination of the SoE, elections shall be held.

⁸⁵ The Constitution of Kenya, 2010, Art. 102 provides that when Kenya is at war, Parliament may, by resolution supported in each House by at least two-thirds of all the members of the House, from time to time extend the term of Parliament by not more than six months at a time and the total period of postponement may not be more than 12 months.

⁸⁶ The Constitution of the People's Republic of Bangladesh, 1972. Art. 72 provides that the term of the parliament is five years, provided that at any time when the republic is engaged in war the period may be extended by Act of Parliament by not more than one year at a time, but shall not be so extended beyond six months after the termination of the war.

⁸⁷ The Constitution of Malta, 1964. According to Art. 76, when the country is at war, the five years of parliamentary terms of office can be extended for not more than twelve months at a time provided that the life of Parliament shall not be extended for more than five years.

⁸⁸ See Jacob Wallace and Darcy Palder, *Supra* at 79; *Supra* at 74; Krisztina Binder *et al.*, *States of Emergency in Response to the Coronavirus Crisis: Situation in Certain Member States*, European Union Briefing, (2020).

⁸⁹ *Ibid.*

other countries additional acts are required for the postponement of elections.⁹⁰

In general, in countries where constitutions have incorporated holdover clauses or emergency provisions, electoral bodies effectively postponed elections thereby responding to crises and legally safeguarding democracy.⁹¹ It is, however, important that such constitutional provisions must be buttressed by other enabling legislations (election emergency laws) that regulate not only election postponement but also the terms of office of the incumbent.⁹² These laws are designed to serve two main purposes: to prevent a potential power vacuum and to stop the incumbent from abusing emergency powers to prolong power, harass dissidents, rig elections, and restrict the press.⁹³ In this regard, Elliot Bulmer highlights how Paraguay under Stroessner and Egypt under Mubarak both extended emergency powers to suppress peaceful protests.⁹⁴ He associates problems in these countries with a lack of detailed election emergency laws and procedural safeguards, despite constitutional guarantees.

At this juncture, it is worth noting the US experience. The US Constitution grants the states (for state-wide elections) and Congress the authority to postpone elections to a set date, but not indefinitely.⁹⁵ The

⁹⁰ *Ibid.*

⁹¹ See Jacob Wallace and Darcy Palder, *Supra* at 79; *Supra* at 74, pp. 6-7; The ACE Electoral Knowledge Network, Planning for National Emergencies and Electoral Delays, (2014) available at <http://aceproject.org/electoral-advice/archive/questions/replies/267553153 #258871910> last accessed on 30 April 2023.

⁹² *Ibid.*

⁹³ *Supra* at 74, p.6-7; Krisztina Binder *et al.*, *supra* at 88.

⁹⁴ *Supra* at 74, pp. 12-15

⁹⁵ Scott Bomboy, Does the Constitution allow for a delayed presidential election?, *Constitutional Centre*, (10 April 2020) available at

Congress thus can change a statute through the regular legislative process as practiced, for example, in the delayed presidential election in the aftermath of the 9/11 terrorist attacks.⁹⁶

Issues arise when constitutions do not specify whether and how elections can be postponed for emergencies. Constitutional muteness can occur in two ways. For example, the constitutions of Sri Lanka, Norway, and Canada do not mention emergency provisions at all, while the constitutions of the Netherlands and Maldives mention general emergency powers and leave the details to ordinary laws.⁹⁷ According to Bulmer, when there is silence in constitutions, governments should not be inactive or act outside the law, as both actions pose great dangers to democracy.⁹⁸ Instead, they should invoke the “doctrine of necessity” and postpone elections until the emergency is resolved. However, opposition parties and other interested parties may not readily embrace such measures. In the year 2020, the delay of the presidential election in Sri Lanka and the local election in the Maldives, as a result of the COVID-19 pandemic, has created a constitutional and legal crisis like what happened in Ethiopia during the same year.⁹⁹ In these countries, the

<https://constitutioncenter.org/blog/does-the-constitution-allow-for-a-delayed-presidential-election>, last accessed on 30 April 2023.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ The ACE Electoral Knowledge Network, *Supra* at 91.

⁹⁹ Alan Keenan, *Sri Lanka's Other COVID-19 Crisis: Is Parliamentary Democracy at Risk?*, International Crisis Group, Commentary, (29 May 2020) Available at <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lankas-other-covid-19-crisis-parliamentary-democracy-risk> last accessed on 30 April 2023; Asian Network For Free Elections, Covid-19 and Elections: The Constitutional Crisis of the Delay in Local Council Elections in Maldives, Explained, (1 June 2020) available at <https://anfrel.org/covid-19-and-elections-the-constitutional-crisis-of-the-delay-in-local-council-elections-in-maldives-explained/> last accessed on 30 April 2023

presidents of the two states had to dissolve the parliament, which triggered stiff contention over the interpretations of pertinent constitutional clauses.¹⁰⁰ In Sri Lanka, while many believe the constitution clearly empowers the president to dissolve the parliament, others, particularly oppositions from political parties and civil societies dispute this and request the government to amend the constitution and to include a holdover clause.¹⁰¹

2.2 Holding Election During Emergencies

As mentioned earlier, it is indisputable that postponing an election should be a last resort. In other words, countries should stick to their election schedules and ensure democracy remains on track by thoroughly evaluating risks and employing emergency coping mechanisms. Experiences from different countries also show that holding elections during emergencies is often difficult, though not impossible in any way. Thus, what is always decisive is how countries can better carry out elections during times of emergency and what the role of election emergency laws would be in guaranteeing and facilitating electoral processes during emergencies.

At the outset, conducting elections during emergencies, like postponing, requires special emergency time laws distinct from those used during normal times.¹⁰² These laws are supposed to regulate election

¹⁰⁰ *Ibid.*

¹⁰¹ Krisztina Binder *et al.*, *Supra* at 88; *Supra* at 74. A 'holdover clause' is a generic inclusion of a provision in the constitution that states that anyone occupying an elected or an appointed position with statutory terms shall remain in that position and continue to discharge their duties even after the end of their term until their successor has qualified, and it allows continuity and precludes a vacuum.

¹⁰² Erik Asplund and Toby James (*supra* at 8) further cited the recent speech by Joe Biden '...We voted in the middle of a Civil War...We voted in the middle of World

administration by introducing alternative modes of voting and equipping polling stations.¹⁰³ In what Erik Asplund and Toby James call electoral innovation, election emergency laws introduced new options that mainly involve the use of electronic tools such as online campaigns and debates, mail-in, drop-off, or absentee ballot systems.¹⁰⁴ In countries or situations where internet facilities or online infrastructure are unaffordable, traditional media such as post offices are applied to run the election process remotely, and others apply health and safety routines (such as cleaning of polling stations, use of gloves and masks, hand hygiene, protective clothing, social distancing, temperature checks, and awareness education) to protect election staff, voters, and other participants.¹⁰⁵

Such electoral practices are highly recommended by the International Foundation for Electoral Systems (IFES) to conduct elections in times of the COVID-19 pandemic,¹⁰⁶ and such innovative electoral practices are enforced in several jurisdictions, including the USA, South Korea, Germany, and New Zealand, among others.¹⁰⁷ For example, the USA has implemented mechanisms that reduce contact, cleaning, and disinfection of voting equipment as well as social distancing measures

War I and II ... and so, the idea of postponing the electoral process just seems to me out of the question'.

¹⁰³ Robert M. Stein, Election Administration during Natural Disasters and Emergencies: Hurricane Sandy and the 2012 Election, *Election Law Journal*, Vol. 14, No. 1, (2015).

¹⁰⁴ *Supra* at 63; *supra* at 8.

¹⁰⁵ *Ibid.*

¹⁰⁶ The IFES Guidelines and Recommendations for Electoral Activities During the COVID-19 Pandemic, (March 2020) available at https://www.ifes.org/sites/default/files/guidelines_and_recommendations_for_electoral_activities_during_the_covid-19_pandemic_march_2020.pdf last accessed on 30 April 2023.

¹⁰⁷ *Supra* at 104

for in-person voting, and more importantly, its law permits absentee voting where the voter is under medical advice.

Similarly, South Korea has implemented special health and safety measures to ensure that COVID-19 patients exercise their right to vote. Citizens in this country could exercise their right to vote as far as they wore masks, used sanitizer, and hand gloves and got their temperatures checked upon arrival onsite for extra protection. Germany also employed postal voting mechanisms to exclude in-person voting and close contact. Some African countries, such as Benin, Cameroon, Guinea, and Mali, held elections amidst the pandemic with the same protective measures, though the WHO impugned it as inadequate and lacking technological and special voting arrangements.¹⁰⁸

The decision of these countries to hold the election with special health and safety measures is quite heuristic to maintain the health of the people and democracy balance. The clarity of election emergency laws in many countries has made elections simple and attainable by, for example, specifying roles during emergencies. Obviously, such laws require an extraordinary commitment from governments at all levels and other stakeholders such as the media, political parties, and voters.

Finally, it's worthy to note that there is no one-size-fits-all solution with respect to the design and content of these laws. The above-mentioned IFES recommendation indicates that standards applied in developed countries may not be enforced in developing countries due to limited fiscal, health, technological, and legal infrastructure.¹⁰⁹ Yet, an

¹⁰⁸ Erik Asplund and Olufunto Akinduro, *The COVID-19 Electoral Landscape in Africa*, *IDEA Commentary*, (19 July 2020) available at <https://www.idea.int/news-media/news/covid-19-electoral-landscape-africa> last accessed on 30 April 2023.

¹⁰⁹ *Supra* at 74.

appropriate, transparent, accountable, and trusted regulation of holding an election under such situations is required in all systems. Many of these requirements can be unaffordable, and it may not be sinful for election emergency laws in developing countries to provide instances of postponing elections until a time when the threat of emergencies has dissipated.

3. Constitutional Issues Arising from Postponing Election 2020 in Ethiopia

Postponing elections and the resultant constitutional issues had not been major worries in the last five Ethiopian election rounds. In 2020, the NEBE declared it could not carry out electoral activities because of the COVID-19 pandemic and restrictions, leading the HPRs to approve postponing the sixth-round election indefinitely.¹¹⁰ This decision, however, was not a simple deferral; rather, it had the effect of modifying the rigid constitutional provision on the election period and terms of the government. Under the FDRE Constitution, the two federal houses (HPRs and the HoF) and the executive are organized for the same five-year tenure,¹¹¹ and regional constitutions follow the same modality. Hence, the term of the parliament and government, which assumed power in September 2015, was going to end in September 2020. Apart from this, Art. 58(3) of the FDRE constitution boldly requires elections to be held every five years and, at the latest, a month before the expiry of the term of the incumbent Parliament. Yet, the FDRE Constitution, which requires periodic elections and defines the term of the parliament, falls short of dealing with emergencies. Further, while this same constitution foresees the possibility of pandemics and provides for the

¹¹⁰ *Supra* at 32.

¹¹¹ FDRE Constitution, Article 53.

declaration of SoE, it does not anticipate the simultaneous occurrence of such emergencies with the time when the five-year general election is to take place. This has sparked a constitutional and legal crisis as well as grim political questions.

The questions were whether the decision was made after proper consideration of public health and legal issues and whether the possibility of holding elections amidst COVID-19 was properly assessed. These questions require an empirical assessment of the procedure that the board and the HPRs went through to postpone election 2020 in Ethiopia. Some political parties and scholars contended the executive was already behind the reschedule and postponing the election had posed a danger to the federal system and worsened the political tension.¹¹² Moreover, the legality of the decisions is questionable, for the country has no election emergency law that regulates the fate of elections during emergencies or determines which organ of government has the power to decide on the fate of elections, under what conditions, when, and how.

An important legal question here is how the HPRs got the power to postpone the election given the silence of the constitution and the election proclamation. Some argue that what the Electoral Board and the Parliament did is mere consent to the cessation of administrative tasks and do not rule on the fate of the election in 2020.¹¹³ However, one cannot rule out the fact that the HPRs created power for themselves to postpone the election. This fact is clear from the statement ‘the parliament has postponed the election as per the proposal of the NEBE’

¹¹² *Supra* at 32.

¹¹³ *Ibid.*

that reverberated through the private and government media alike.¹¹⁴ Moreover, the decision has the effect of postponing election 2020 and expanding government powers. In this regard, the search for alternatives within or outside the constitution is spurious while the HPRs have already hammered the final nail in the coffin of election 2020.

Secondly, the NEBE's decision and the HPR's approval had put the country between two unbearable options: a state with no government (if it stepped down as its term ends) or an unconstitutional and illegitimate government (if the incumbent stayed in power). In addressing this dilemma, the government, politicians, and scholars in the field have suggested several alternative options within the constitutional framework: dissolution of the house, declaration of a state of emergency, constitutional interpretation, or constitutional amendment.¹¹⁵ Others seek extra-constitutional options such as prior political dialogue and establishment of a transitional government for different reasons.¹¹⁶ This section briefly assesses the feasibility, legality, and legitimacy of these options to postpone elections during emergencies and illuminates ways to alleviate problem of power vacuum under such situations.

¹¹⁴ For example, Capital on 3 May 2020, France24 on 31 March 2020, World Politics Review on 3 April 2020 and The Africa Report on 25 May 2020 are some of the major domestic and international media that published the issue of postponement. Scholars such as Adem Kassie and Zemelak Ayiteneu also used the same terms. See generally, Adem Kassie Abebe, Ethiopia's Postponed Elections: Governing in the Interregnum, *The IDEA Commentary*, 2020; Zemelak Ayiteneu, Federalism and the COVID-19 crisis: The Perspective from Ethiopia, *Forum of Federations*, 2020.

¹¹⁵ *Supra* at 24.

¹¹⁶ *Supra* at 29.

3.1 Dissolution of the Parliament

Dissolution of the Parliament is one of the options inferred from the constitution. The FDRE Constitution provides the possibility of dissolution of the house before the expiry of the five-year term by the Prime Minister (head of government) so that a new election can be held after the President (head of state) invites political parties. It's also common for other parliamentary democracies (such as the UK, Australia, the Czech Republic, India, and Canada) to provide for a premature dissolution of parliament for political need (for example, during times of crises or instabilities) or political opportunity (for example, when politicians find them opportune for partisan or personal reasons) in addition to the automatic (*per legem*) expiration of the term.¹¹⁷ This option is considered during emergencies because it allows the incumbent government to serve as a caretaker until a new election is held and, in effect, block a power vacuum.¹¹⁸

The question, however, is whether such an option is viable and lawful during emergencies, where the situation needs a strong government. In other words, emergencies would get problems at hand worse for the interim government is authorized only for acts of management.¹¹⁹ Moreover, the grounds to initiate dissolution are not statutorily stipulated, and emergencies such as COVID-19 can be considered insufficient. The other concern is that the intention of Article 60 is to end the term of office of a parliament before it ends *per legem*, not to extend the terms. It's also worth noting that it would set a bad precedent

¹¹⁷ Kaare Strøm and Stephen M. Swindle, Strategic Parliamentary Dissolution, *The American Political Science Review*, Vol. 96, No. 3, (2002), pp. 575-591.

¹¹⁸ FDRE Constitution, Articles 60 (3-5).

¹¹⁹ See for Example, Elliot Bulmer, *Dissolution of Parliament*, The International IDEA Constitution-Building Primer 16, (2ndedn.) (2017), p. 12.

for politically motivated dissolutions in the future. Therefore, given these challenges and concerns, the use of the “dissolution of house” to disentangle election emergencies might be illogical and unworkable.

3.2 Declaration of State of Emergency (SoE)

Declaration of a state of emergency is the other option that can be considered to manage problems associated with election emergencies. This is considered with the assumption that SoEs are declared to manage emergencies, including election emergencies, and, *ipso facto*, suspends the normal functioning of government including election and the rights of citizens including the right to elect and be elected.¹²⁰ Declaration of SoE is one of the common practices to postpone elections in other countries even without election emergency laws.¹²¹ Ethiopia declared a five-month SoE in response to the COVID-19 pandemic,¹²² and some suggest that the government can use it to postpone elections and manage a constitutional crisis. Its importance is clear as it allows the government to continue exercising legislative, executive, and judicial powers (though reduced) and avoids governance fissures.

Yet, the issue at hand is whether the declaration of SoE can act as a practical resolution to postpone an election and address the constitutional crisis and power vacuum following emergencies. To go into this assessment, let us see the legality dimension. There seems to be no legal problem with the declaration of SoE as the Constitution

¹²⁰ See for example, ICCPR, Article 4(1); FDRE Constitution, Article 93. In Ethiopia, rights under articles 1, 18, 25, and 39 (1 & 2) have a non-derogable status while other rights can be suspended to the extent necessary to avert the condition that required the declaration of a SoE.

¹²¹ *Supra* at 24.

¹²² See Proclamation No. 3/2020. However, the election postponement by the federal governments was not legally associated with the SoE.

explicitly provides for such declarations when emergencies such as external invasion, a breakdown of law and order, a natural disaster, and an epidemic occur.¹²³ However, the problem is that the issuance of SoE is not well intertwined with election emergencies. In other words, both Article 93 of the Constitution and the SoE declaring the Proclamation are silent about issues of election. Furthermore, postponement through SoE could be politicized as self-serving decisions, which, in turn, may threaten legitimacy and attract conflicts, as is the case in post-2020 times. In fact, the country has no good records with SoE declared, especially after 2015,¹²⁴ which, according to several studies, suffered from gaps in the design and enforcement.¹²⁵ Extending power through SoE may also set a bad precedent in the political and legal landscape. Therefore, one could not see healthy fruits out of the declaration of emergency to postpone the election.

3.3 Constitutional Amendment

Many scholars recommended constitutional adjustment through amendment to unravel the 2020 constitutional crisis and effectively postpone the election.¹²⁶ The FDRE Constitution provides for substantive and procedural requirements for a constitutional amendment (under Articles 104 and 105), and some scholars, such as Bantayehu consider it as simple (like inserting an exception clause in the pertinent provision) and the safest remedy that avoids the risk of illegality or

¹²³ FDRE Constitution, Article 93 (2 & 3).

¹²⁴ Proclamation No.1/2016 and Proclamation No.2/2018.

¹²⁵ See Human Rights Watch, Legal Analysis of Ethiopia's State of Emergency, 2016 Available at <http://www.hrw.org/report/2016> (last viewed on 12 May 2020) See also Amnesty International, Commentary on Ethiopian State of Emergency, (2018) available at https://www.amnesty.org/download/Documents/AFR_257982_2018ENGLISH.PDF last accessed on 30 April 2023.

¹²⁶ *Supra* at 24.

unconstitutionality. However, this cannot be a panacea when it comes to the implementation.

First of all, amending a constitution in contention *ab initio* is not an easy and timely job in times of emergencies. It's good to note that the FDRE Constitution suffers from polarized views and a serious lack of legitimacy attributed to a constitution-making process that was not inclusive and also to the subsequent lack of integrity and vitality in the constitutional system.¹²⁷ Secondly, the procedural and substantive requirements for valid constitutional amendment are difficult to get to while the country is under SoE and the looming menace of emergencies such as COVID-19. Public consultations required under Article 104 and parliamentary deliberations at regional and federal levels required under Article 105 would contravene precautionary measures for emergencies. For example, it violates the SoE law declared for the COVID-19 pandemic. Moreover, the process may lack public trust. One would find this claim convincing given the party pressures and poor record of constitutional amendment in the country.¹²⁸ Finally, the constitution has

¹²⁷ Gedion T Hessebon, The Precarious Future of the Ethiopian Constitution, *Journal of African Law*, Vol. 57, No. 2 (2013), p. 227; See also Zelalem Eshetu The Scope and Limitation of the Amending Power in Ethiopia: Thinking beyond Literalism, *Mekelle University Law Journal*, Vol. 4, (2016), p. 16. Some political parties and other actors associate the Constitution with the TPLF agenda of Ethnic Federalism and then struggle for its revolutionary change, and those who sense of having an exclusive ownership on it struggles for its preservation and consider the Constitution as a sacred and untouchable document for a democratic order to usher, rights respected and ethnic-based oppression stalled.

¹²⁸ *Ibid* Zelalem Eshetu; Mequanint Dubie, Amendment of State Constitutions in Ethiopia in Comparison With Other Federations, LL.M Thesis, Ethiopian Civil Service University, (2015); Nigussie Afesha, The Practice of Informal Changes to the Ethiopian Constitution in the Course of Application, *Mizan Law Review*, Vol. 10, No. 2, (2016). The poor record of constitutional amendment is well reflected from article 98 and 103 (2) of the FDRE Constitution as well as informal constitutional amendments.

to be protected from short-sighted and partisan amendments to extend the term limit of a single party, and such *ex post facto* amendments of laws may set a bad precedent. Hence, the quest for a constitutional amendment during emergencies seems not a feasible way out.

3.4 Constitutional Interpretation

Constitutional adjustment through interpretation is one of the alternatives to deal with election emergencies and subsequent constitutional crises.¹²⁹ The FDRE Constitution provides for constitutional interpretation by the HoF with the technical assistance of the Council of Constitutional Inquiry (CCI).¹³⁰ Scholars and politicians therefore argued that the constitution is ‘a living document that provides safety valves to sustain the polity and protect it from collapse caused by its silence on certain matters,’ and the involvement of experts in the CCI enhances the legitimacy, expediency, and nationwide applicability of the option in the face of the election emergencies.¹³¹ Accordingly, the government also opts for constitutional interpretation, and the HoF, upon the recommendation of CCI and *amicus curiae* from experts in the

¹²⁹ FDRE Constitution Articles 62 and 83.

¹³⁰ See A Proclamation to Define the Powers and Functions of the House of the Federation, No 1261/2021, *Federal Negarit Gazette*, (2021); 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 Proclamation No. 798/2013, *Federal Negarit Gazette*, (2013). In particular, Article 3(c) of Proclamation No. 798/2013 provides that constitutional disputes on non-justiciable matters may be submitted to the CCI by one-third of members of the federal parliament or a regional council, or by executive organs at either tier.

¹³¹ Mamo Mihretu, A Constitutional Path Towards Political Normalization, *Ethiopian Insight*, (2 May 2020) available at <https://www.ethiopia-insight.com/2020/05/02/a-constitutional-path-towards-political-normalization/> last accessed on 30 April 2023; Abebe Ababayehu Crisis Looms Large but We Must not Forfeit Constitutionality, Strong State, *Fortune*, (2 May 2020) available at <https://addisfortune.news/crisis-looms-large-but-we-mustnt-forfeit-constitutionality-strong-state/> last accessed on 30 April 2023.

field, provides an interpretation that extends the terms of the government up to 12 months.¹³²

However, critics argued that applying constitutional interpretation for the problem is conceptually defective and what the government pursues is an unconstitutional attempt to stay in power.¹³³ It was, particularly, argued that the constitution is clear and the interplay of Article 93 with Articles 54(1) and 58(3) does not necessarily call for interpretation. Others also mentioned that no dispute had called HoF for adjudication.¹³⁴ This emanates from the confusion on what constitutes

¹³² The main issue that was submitted to the HoF from the Parliament was: In light of the State of Emergency Proclamation Enacted to Counter and Control COVID-19 and Mitigate its Impact, Proclamation No. 3/2020, what do Articles 54(1), 58(3) and 93 of the Constitution indicate regarding the duration of the terms of office of the parliaments and executive organ? The HoF stated the textual reading of Article 58(3) of the Constitution implies the contingency of the Parliament's five-year term on whether an election is held at least a month before the expiry of the term, and the purposive reading of Article 93 of the Constitution indirectly recognizes that the incumbent government's term limit may exceed five years. It also held that the mandate of the regional councils and executive bodies shall also be extended as that of the federal parliament and government because election matters are federal issues. Finally, it gives the Federal Ministry of Health (FMOH) a central role in determining when the countdown to the upcoming elections date will begin.

¹³³ Jawar Mohammed, Opinion: Ethiopia's Impending Constitutional Crisis And Why We Need A Political Solution, *Addis Standard*, (3 May 2020) available at <http://addisstandard.com/opinion-ethiopias-impending-constitutional-crisis-and-why-we-need-a-political-solution/> last accessed on 30 April 2023; Wondwossen Demissie, House of Federation should consider rejecting request for constitutional interpretation, *Ethiopia Insight*, (14 May 2020) available at [https://www.ethiopia-insight.com/2020/05/14/house-of-federation-should-consider-rejecting-request-for-constitutional-interpretation/\(Last](https://www.ethiopia-insight.com/2020/05/14/house-of-federation-should-consider-rejecting-request-for-constitutional-interpretation/(Last) last accessed on 30 April 2023; Mulugeta Aregawi, There's Only One Winner When Legislation Clashes With The Constitution, *Ethiopia Insight*, (12 May 2020) available at <https://www.ethiopia-insight.com/2020/05/12/theres-only-one-winner-when-legislation-clashes-with-the-constitution/> last accessed on 30 April 2023.

¹³⁴ Some overemphasis on terms such as "...constitutional disputes ..." under Article 83 and "... contested as being unconstitutional ..." under Article 84(2), and the reading of Proclamation No. 250/2001 and Proclamation No. 798/2013, seems to

constitutional disputes and constitutional interpretation. The power of dealing with these two issues is vested in HoF as read from Article 62(1) and Article 84(1).¹³⁵ There is no room to fall in the ambit of any institution, for example, the courts or HPRs. Further, there can be issues with the independence of HoF because it's a political chamber controlled by a single party.¹³⁶ In effect, HoF sitting to decide the fate of government means that it judges its own case in emergency situations. Given such contentions, it is difficult to employ constitutional interpretation as a viable solution to postpone elections and deal with associated constitutional problems.

3.5 Inclusive Political Dialogue and Transitional Government

Undertaking inclusive political dialogue and establishing a transitional government could be seen as a way to address the issue of a constitutional crisis arising from postponing elections.¹³⁷ In the

refer to a real case controversy and adverse parties, and the latter does not recognize the concept of a 'constitutional gap' as a basis for constitutional interpretation. For example, Article 62(1) of the FDRE Constitution and Article 3(1) of Proclamation No. 798/2013 do not recognize or specify a constitutional gap as a ground for constitutional interpretation.

¹³⁵ Assefa Fiseha, *Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience*, *Netherlands International Law Review*, Vol. 52, No. 1 (2005) p. 13.

¹³⁶ Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (Hof)*, *Mizan Law Review*, Vol. 1 No. 1, (2007), pp. 1-32. Broadly speaking, one can see two patterns regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. The practice of constitutional interpretation in Ethiopia follows a different pattern. FDRE Constitution, the preamble, Article 8 and 39(3) cum. Art. 61(1) and Article 53.

¹³⁷ See also Yossi Shain and Juan J. Linz, *The Role of Interim Governments*, *Journal of Democracy*, Vol. 3, No. 1, (1992), pp. 73-79; Jennifer C. Seely, *The Legacies of Transition Governments: Post-Transition Dynamics in Benin and Togo*, *Democratization*, Vol.12, No.3, (2005), pp.357-377. Transitional or interim government is a type of government formed with the consent of political forces in a

literature, forms of national dialogues have been used as an instrument to resolve deep political crises and ensure genuine political transitions. Following the crisis that happened with the postponing of election in 2020, politicians and scholars, particularly those who consider all the above options as legally and politically defective, propose the need to rethink out of the box of the constitution. This group stresses the importance of forming an interim government and holding a nationwide political dialogue to effectively tackle not only electoral problems but also other national political hurdles. For them, the problem is more political than legal, and all legally registered political parties are equally responsible for the problem at hand, and with the existing legitimacy deficit and decline in a monopoly of violence, the government should not be the sole decision-maker.¹³⁸ Yohannes and Marew argued that ‘the constitution, which is the mother of all ills, cannot be relied upon as a supreme legal document, nor can it assist the country in times of crisis,’ and ‘as the legal roads closed, a transitional government should take the wheel.’¹³⁹

country (not by-election) with a defined transitional mandate. It is associated with the cases of new nations or the collapse of the existing regime, and the key role of the transitional government is not power sharing but guaranteeing true transition through peace talks, political participation, institution-building, and transitional justice.

¹³⁸ Jawar Mohammed, *supra* at 133.

¹³⁹ Yohannes Woldegebriel, Confronting the Nightmare Posed by the FDRE Constitution, *The Reporter*, (2 May 2020) <https://www.thereporterethiopia.com/article/confronting-nightmare-posed-fdre-constitution> last accessed on 30 April 2023; Marew Abebe, With Legal Roads Closed, A Transitional Government Should Take The Wheel, *Ethiopia Insight*, (26 May 2020) available at https://www.ethiopia-insight.com/2020/05/26/with-legal-roads-closed-a-transitional-government-should-take-the-wheel/?fbclid=IwAR1or2uTzqF0LnzWIMZX5BbaVxmx2ExWHREcxY_X2f-NA3logcoqP2WpC0fY last accessed on 30 April 2023.

However, one would see that this option is not viable as it seeks to attain a broad goal of healing all political ills of the country in times of narrow spaces for public participation and resources mobilization for the desired end.¹⁴⁰ Moreover, conducting inclusive dialogues and the formation of an interim government requires the consent of political forces and is difficult to achieve during emergencies, particularly in situations like Ethiopia with polarized views.¹⁴¹ Most importantly, given the constitutional emphasis on election as the sole source of power, the attempt to assume power through consensus may not have constitutional backing or, at least, set a bad precedent.¹⁴² All put together, political dialogue and the formation of a transitional government are not feasible way outs for dealing with election issues under those situations.

4. Legal and Administrative Issues in Holding Elections in Emergencies

As mentioned in the introduction section, there were significant voices that opposed the government's decision to postpone the election as a major setback for the democratization process and argued for holding the election in 2020 amidst COVID-19. Opposition political parties, in particular, accused the government of stalling elections through indefinite postponement and in defiance of its general duty to manage emergencies, protect citizens, and conduct the election as planned. Other interest groups had also exploited the absence of election emergency laws and subsequent constitutional crisis to advance their positions in

¹⁴⁰ Messay Kebede, On Transitional Government and Ethnic Federalism, *Ethiopia Observer*, (3 August 2018) available at <https://www.ethiopiaobserver.com/2018/08/03/on-transitional-government-and-ethnic-federalism/> last accessed on 30 April 2023.

¹⁴¹ Jennifer C. Seely, *supra* at 137.

¹⁴² FDRE Constitution, Article 9(3).

the name of holding the election, similar to what happened with the postponement.

The TPLF, a political party based in Tigray, which had dominated Ethiopian politics for decades prior to 2018, announced a plan to conduct a regional election. Shortly after, the regional government enacted new regional election laws and organized an electoral commission in preparation for the regional election.¹⁴³ Further, this party, which was disbanded from the EPRDF coalition, conducted this election on September 9, 2020, in defiance of the federal government's decision to postpone national and regional elections.¹⁴⁴ Those who support the regional election resorted to the rights of the electorate and the right to self-determination stipulated under the FDRE Constitution.¹⁴⁵ However, numerous political actors, including the federal government, view the regional government's election activities as an acute threat to the stability, if not sovereignty, of the country.¹⁴⁶

¹⁴³ Kjetil Tronvoll, Voting for War, to Secure Peace: Weaponising the Tigray 2020 Election in Ethiopia, *The Journal of Modern African Studies*, Vol. 62, No. 1, pp. 53-77; Mulugeta Gebrehiwot, Tigray's Elections: Test of Ethiopia's Federal Democracy, *African Arguments*, (15 October 2020) available at <https://africanarguments.org/2020/10/tigrays-elections-test-of-ethiopia-federal-democracy/> last accessed on 30 April 2023; Markos Debebe, Ethiopian Regions Cannot Hold Elections Without Federal Approval, *Ethiopia Insight*, (5 May 2020) available at <https://www.ethiopia-insight.com/2020/05/05/ethiopian-regions-cannot-hold-elections-without-federal-approval/> last accessed on 30 April 2023.

¹⁴⁴ *Supra* at 32.

¹⁴⁵ FDRE Constitution, Articles 38 and 39.

¹⁴⁶ Mehret Okubay, The newly legislated regional election law of Tigray Regional State has stipulated that the highest body of appeal for regional elections is the regional cassation bench, *Addis Fortune*, (13 July 2020) <https://addisfortune.news/council-mandates-regional-cassation-bench-preside-over-elections-appeal/> last accessed on 30 April 2023. The HoF declared the election as "null and void," and the Prime Minister publicized the election as an illegal 'shanty election'. Later, the HPRs decides that the federal government should cut off

The NEBE and scholars in the field also rejected this regional move as against the constitution, which mandates solely the federal government to enact laws on the election and political parties (Article 51(15) and (55) (2) (d)) and the NEBE to administer elections nationwide (Article 51(15) and 102). Moreover, these pragmatist views also remind the obligations of federating units to respect the powers of the federal government (Articles 50 (8) and (9)) and the constitutional interpretations by HoF upon the CCI's recommendations. As mentioned above, the constitutional interpretation already extended the mandate of the incumbent at the federal and regional level, nine to twelve months after COVID-19 -19 is declared no more a public health threat-based on sound reasoning.

Evidently, there are only federal laws on the election and issues of political parties (i.e., Proclamation No. 1162/2019 and a federal institution established through Proclamation No. 1133/2019. A cumulative reading of Article 4 (2), 7 (2), and 8 (4) of Proclamation No. 1162/2019) confirms that elections shall be conducted throughout the country simultaneously, and a regional election would have no legal effect if it contradicts the federal election law and practice. Therefore, those acts of enacting regional election laws and organizing electoral bodies by the Tigray Regional State were blatantly unconstitutional. This situation, coupled with the two years of tit-for-tat, had put the country on a different political trajectory, including the outbreak of armed conflict between the federal and the Tigray regional governments. The war had lasted for two years and taken the lives of hundreds of thousands, displaced millions, and seriously aggravated the country's already disastrous humanitarian situation. Some analysts

contact with the deemed illegal regional government and continue to work with local institutions in providing basic services to the people.

also recognize it as a *sine qua non* for instabilities and conflicts in other parts of the country, including on-going conflicts in the Oromia and Amhara regions.¹⁴⁷

Later, the federal parliament approved a proposal to hold the 6th general election after hearing the recommendation of the Ministry of Health (MoH) to conduct an election under special conditions in light of the previous HoF decision. This was highly criticized by those who believe that the previous decision to postpone the election is unconstitutional and there would be no legitimate federal government in Ethiopia thereafter. However, despite the concerns, the country conducted its 6th national election on 21 June 2021. The NEBE conducted the 6th national and regional elections while the transition and impacts of the COVID-19 pandemic were not over yet and where the country was still plagued by civil wars and conflicts, including the disastrous northern Ethiopian war.

Both the Tigray region and federal government claimed to have conducted the election by taking every necessary precautionary measure to mitigate the transition and impact of the pandemic. In particular, the NEBE issued a directive that regulates and reduces the spread of COVID-19 during elections.¹⁴⁸ The points outlined in the last paragraphs illuminate the different legal and political questions following the holding of election by the Tigray regional state and the federal government. In the Tigray region, there was no evidence

¹⁴⁷ Atrsaw Necho and Yared Debebe, Briefing Paper: Understanding the Fano Insurgency in Ethiopia's Amhara Region, *Rift Valle Institute*, (1 February 2024), <https://riftvalley.net/publication/understanding-the-fano-insurgency-in-ethiopias-amhara-region/> last accessed on 30 December 2024.

¹⁴⁸ የኢትዮጵያ ብሔራዊ ምርጫ ቦርድ፣ በምርጫ ወቅት የኮቪድ-19 ስርጭትን ለመቀነስ የወጣ መመሪያ ቁጥር 9/2013 (Directive No. 9/2020).

showing that the pandemic was checked as “no more a health threat”; rather, the virus was expanding. Similarly, the contentious recommendation by MoH did not say that the COVID-19 pandemic is no longer a public health, threat and, in fact, COVID-19 cases and deaths had shown an increasing trend. Moreover, the different parts of the country like Tigray, Amhara, Afar, and Oromia regional states, were either within an active war or with the grave impacts and threats of the war and conflicts. This is why the ballot was postponed in many areas of the country, including the Tigray and Oromia regions. Be that as it may, the NEBE conducted the sixth national and regional elections while the country was in SoEs due to COVID-19 and the Northern war.

The most important question of all this is whether these elections were conducted as per predefined election emergency laws that provide for necessary precautionary measures and standards to ensure the credibility of the election. Given that both elections were conducted amidst the COVID-19 pandemic, the election process is so risky to poll workers, voters, observers, and other partakers. Thus, election management bodies should have planned for a significant shift in the registration, balloting, and election disputes settlement systems unprecedented in the electoral history of Ethiopia.¹⁴⁹ It is obvious, for example, that election administration activates under Proclamation No. 1162/2019 such as establishing constituencies (Art. 13) and polling stations (Art. 15), voters registration (Arts. 18-21), distribution and handover of documents (Art. 23), closure of the electoral roll (Art. 25), displaying the electoral roll to the public (Art. 26), registration of complaints (Art. 27), cancellation of registration (Art. 28), registration and announcement

¹⁴⁹ Nathaniel Persily and Charles Stewart, III, Ten Recommendations to Ensure a Healthy and Trustworthy 2020 Election, *Law Fare*, (19 March 2020) available at <https://www.lawfareblog.com/ten-recommendations-ensure-healthy-and-trustworthy-2020-election> last accessed on 30 April 2023.

of candidates with symbols (Arts. 30-42), conducting an election campaign through media (arts. 43-46), managing voting process including security issues (Arts. 47-56) and vote counting and the announcement of results (Arts. 57-62) are designed to be applicable under the normal course of processes and no exception is provided for emergencies. The regional election law of Tigray Regional State is also similar in content.¹⁵⁰ Thus, the federal government and the Tigray Regional State should have enacted separate election emergency laws that set standards and requirements necessary to protect the safety of election participants and the trustworthiness of the election. For example, as the experience of other countries in Section Three depicts, election management bodies are supposed to implement online and postal balloting systems or strict observance to rules of social distancing and other precautionary rules when in-person voting is compulsory.¹⁵¹ These are most lacking in the two elections for capacity and funding reasons as well as the absence of regulatory frameworks.

In this regard, it is worth mentioning here that the NEBE had adopted a directive with the aim of reducing the spread of Covid-19 in conducting the election,¹⁵² and the same was announced by the Tigray regional election commission.¹⁵³ The directive and the press release, for example, required wearing of masks and gloves, the use of sanitizers, the maintenance of social distancing, the use of one's own pens, and caution in painting on thumbs and others to be adhered to during registration, campaigning, and polling.¹⁵⁴ These standards were not adequately

¹⁵⁰ See generally Kjetil Tronvoll, *supra* at 143.

¹⁵¹ *Ibid.*

¹⁵² The National Election Board of Ethiopia, Directive No. 9, 2020, Article 6.

¹⁵³ *Supra* at 32.

¹⁵⁴ *Ibid.*

implemented for, among others, enforcing the protocols resulted in significant additional costs of the election, and elections were highly politicized and hurried.¹⁵⁵ The most critical problem in this respect is the lack of a general election emergency law, and such attempts to enact a directive or a guideline have no adequate legal foundation. The issues of conducting elections were neither stipulated in the constitution or election laws of the country nor by a state law with this purpose. To this end, the following section proposes a framework for election emergency laws in Ethiopia.

5. A Proposal Framework for Election Emergency Laws in Ethiopia

The scenarios explored and multi-dimensional analysis made across earlier sections clearly suggest an imperative need for establishing a legal framework strong enough to address unforeseen emergencies threatening the electoral process and stability of public governance. Particularly, as stated in Section Three of this article, countries with a clear constitutional and legal framework are able to effectively handle election emergencies. Conversely, those without such structures struggle to determine whether to hold or postpone elections, as well as how to hold elections during emergencies. Such countries are also exposed to constitutional crises and a looming power vacuum due to election postponement or holding of elections. Countries such as the USA, France, Kenya, India, and the UK successfully manage election emergencies through a combination of clarity in constitutional provisions, electoral laws, and emergency regulations.

However, as outlined in the earlier sections, the FDRE Constitution and election laws of the country do not specify who determines or how to

¹⁵⁵ *Ibid.*

postpone or conduct an election during emergencies. This situation cost the country and its people a significant political, economic, and social crisis. Therefore, it is important to draw lessons from other systems to deal with such situations in the future. As the first move to this effect, it is recommended to amend the FDRE constitution to incorporate holdover clauses or election emergency provisions.¹⁵⁶ This should be accompanied by amendments to the election laws of the country regulating election emergencies and safeguarding democratic rights. In other words, “a proposed framework for election emergency laws in Ethiopia” does not suggest a standalone election emergency law; rather, it can be incorporated as part of the existing election law. The amendment, however, should outline the key components of election emergency laws designed to ensure that elections are either effectively postponed or held without compromising the safety and rights of voters and other participants and the integrity of the election. On the basis of such national election law, additional legislation like regulations or directives can be issued depending on specific situations and emergencies.

The amendments in the national election proclamation should address key components of election emergency laws.¹⁵⁷ The first key component is the definition of an electoral emergency. The law should clearly define what constitutes an “electoral emergency,” including natural disasters, public health emergencies, security threats, and significant

¹⁵⁶ The clause can be inserted in Article 93 in agreement with Articles 53 and 58 of the FDRE Constitution.

¹⁵⁷ The current electoral and political parties registration and election’s code of conduct proclamation (No. 1162/2019) is divided into nine parts and 164 articles. A part can be added to regulate election emergency situations or incorporate election emergency rules.

disruptions, and establish criteria for determining when an emergency is too severe to trigger the activation of emergency election laws.

The second key issue relates to the emergency election authority of the NEBE. Designating a specific body with the authority to seek the declaration of an electoral emergency is important to independently examine and propose circumstances for either holding or postponing elections during emergencies. The law should indicate who shall decide to hold or postpone and outline the process for declaring an electoral emergency, including consultation with relevant stakeholders, such as government officials, political parties, and civil society organizations. Thirdly, the law may specify guidelines or procedures to be followed in cases of postponing or holding elections for emergencies. For example, in cases of postponing, it may provide clear guidelines to ensure decisions are transparent, justified by the circumstances, made with input from key stakeholders, and clear timelines are established. In cases of holding elections, the law may provide procedures for alternative voting methods, protection of voter rights, public communication and transparency, security and fraud prevention, legal recourse and dispute resolution, and post-emergency evaluation.

Regarding the first issue, the law may authorize the use of alternative voting methods in the event of an emergency, such as mail-in ballots, early voting, extended voting periods, or online voting, depending on the nature of the emergency, along with protocols to ensure the security, accessibility, and integrity of the methods. The law may also set out the need to ensure that alternative voting methods are available to all eligible voters, including those in remote areas, with disabilities, or otherwise disadvantaged. Further, implementation rules to protect the rights of voters during an emergency need to be devised. These rules may include special provisions for vulnerable populations, such as the

elderly, disabled, or those in emergency shelters. Protection of voter rights also implies the need to ensure that voters are informed of any changes to voting procedures, locations, or times through comprehensive public communication campaigns, and the voter identification and registration processes are maintained, with adjustments made as necessary to accommodate the emergency situation.

These laws shall also introduce enhanced security measures to protect the electoral process from fraud, manipulation, or interference during an emergency, such as strict oversight and monitoring mechanisms or penalties for individuals or entities. The integrity of the election can be further protected by mandating transparent, regular, and timely communication from election authorities regarding any changes to the electoral process and decisions during an emergency. Yet, it is important to note that, despite all these efforts, election disputes can be inevitable, and the laws shall devise legal recourse and dispute resolution mechanisms. In other words, the law shall provide legal avenues and expedited procedures for challenging decisions made under emergency election laws, including the postponement of elections or the use of alternative voting methods. Finally, the law may provide for post-emergency evaluation, which requires a comprehensive evaluation of the electoral process following an emergency, including an assessment of the effectiveness of the emergency election laws. This may encourage public feedback on the emergency process and help make necessary adjustments to the laws, ensuring that future emergencies are better managed.

6. Concluding Remark

In Ethiopia, neither the constitution nor other legislation anticipates emergencies during election times or elections during emergencies. The laws in place do not address associated legal questions such as when and how to postpone or hold elections, who shall decide, and who shall govern the country if elections are postponed during the interim period. While the impact of such gaps in the pertinent laws had not materialized into major problems in the first five rounds of elections held in the country, they caused substantial crisis in the sixth election. The sixth election (Election 2020) which was surrounded by attendants of the COVID-19 pandemic left the country in a constitutional limbo and created a hub of serious legal and political questions. Politicians and scholars have been in constant indictment of one another for using the constitutional conundrum for a power grab, overlooking the imperatives of fighting the pandemic, consolidating democratic governance, and ensuring the continuity of a strong and effective state.

The article thus addresses why and how election emergency laws remain essential in Ethiopia by thoroughly analysing the notable gaps evident in three key incidents: the election postponed by the federal government, the election held by the Tigray Regional Government, and the election conducted by the federal government. It examines various proposals and their theoretical and practical defects, as well as how these have led to unnecessary politicization, uncertainties, and disagreements that further damage the already poor record of elections, democracy, and government legitimacy in Ethiopia. Finally, an attempt is made to review how other countries significantly mitigate the negative effects of holding or not holding scheduled elections through constitutional and legal mechanisms.

It is argued that governments' choice to hold or postpone elections amid emergencies requires an election emergency law and proposes an amendment to the constitution to incorporate holdover clauses and Proclamation No. 1162/2019 to include a separate part addressing election emergency rules. This would help the NEBE conduct credible and legitimate elections and, if not, effectively and promptly postpone elections and prevent a power vacuum. By establishing a clear legal framework that addresses the unique challenges posed by emergencies, this proposal aims to ensure that democratic processes are preserved, voter rights are protected, and public trust in the electoral system is maintained. The implementation of these laws will provide election authorities with the tools and flexibility necessary to navigate emergencies while upholding democratic principles